

BRITISH VIRGIN ISLANDS COURT OF APPEAL

Marinor Enterprises Limited & Others -v- First Caribbean Bank (Barbados) Limited DOMHCVAP2013/0003

APPLICATION TO VARY OR DISCHARGE ORDER OF A SINGLE JUDGE OF THE COURT OF APPEAL - APPLICATION TO FURTHER AMEND NOTICE OF APPEAL REFUSED BY SINGLE JUDGE - PRINCIPLES RELATING TO AMENDMENTS - APPROACH OF APPELLATE COURT TO EXERCISE OF CASE MANAGEMENT DISCRETION OF LOWER COURT JUDGE - POWERS OF THE COURT OF APPEAL - SECTION 32(3) OF THE EASTERN CARIBBEAN SUPREME COURT (DOMINICA) ACT

This is an Appeal against the Order of a single Judge of the Court of Appeal by which a late application to amend a Notice of Appeal was dismissed (without reasons).

In giving Judgment and dismissing the application to vary or set aside the order of a single judge, Baptiste JA held:

1. The grant or refusal of an application to amend involves the exercise of the Court's discretion. In exercising that discretion, the overriding objective, with its emphasis on enabling the court to deal with cases justly, is of the utmost importance, but the just disposal of a case is not reserved only for the party seeking amendment. The Court must consider all parties and has to perform a balancing act as it seeks to strike a fair balance. The factors relevant to doing so depend on the facts of the case and as such cannot be exhaustively listed. However, they are likely to include the history as regards to the amendment and an explanation as to why it is being made late; the prejudice which will be caused to the Applicant if the amendment is refused; the prejudice which will be caused to the opposing party if the amendment is allowed; and whether the text of the amendment is satisfactory in terms of clarity and particularity.
2. There is a heavy burden on a party making a very late application to amend. An explanation for the lateness is called for and the Court must consider the consequences for the opposing party. Where an amendment imperils a trial date which has been fixed, this is a significant factor to put into the scale. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to weigh heavily against the grant of permission. In the present case, the application to amend the amended notice of appeal was filed late – approximately five weeks before the date set for the hearing of the appeal – and the lateness of the application jeopardised the hearing date of the appeal. In the circumstances, it was incumbent on the Applicants to provide a good explanation for the delay and they failed to do so.
3. When considering the competing arguments of prejudice to parties to an application for amendment, the prejudice to the amending party, in not being able to advance its amended case, is a relevant factor, but is only one of the factors to be taken into account by the court in reaching a conclusion. Moreover, when, as in the case at bar, the prejudice is as a result of the amending party's own making, such a consideration is much less important in the Court's balancing exercise. In this case, the proposed amendments

would have resulted in a completely new defence compared to the pleaded defence on which the case was tried. The effect would be a new trial with the attendant costs and delay resulting in prejudice to the Respondent. These important factors, coupled with the unexplained lateness of the application, acted against the Court exercising its discretion in favour of granting the application to amend.

4. The law, in relation to compensation in costs to a prejudiced party, is clear. The Court will not discount prejudice to a party on the basis that the party could be compensated in costs. The Court is enjoined to consider the holistic effect of the disruption. This assessment includes the impact of the disruption on the parties, as well as on efficient case management and the administration of justice.
5. An Appeal Court should not interfere with a case management decision of a judge who has applied the correct principles and taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the Court is satisfied that that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the Judge.

Founded in 1928, Conyers Dill & Pearman is an international law firm advising on the laws of Bermuda, the British Virgin Islands, the Cayman Islands and Mauritius. With a global network that includes 130 lawyers spanning eight offices worldwide, Conyers provides responsive, sophisticated, solution-driven legal advice to clients seeking specialised expertise on corporate and commercial, litigation, restructuring and insolvency, and private client and trust matters. Conyers is affiliated with the Codan group of companies, which provide a range of trust, corporate secretarial, accounting and management services.

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.