AMENDMENTS TO STATEMENTS OF CASE – POST CASE MANAGEMENT CONFERENCE

[Presentation by Mrs. Suzanne Risden-Foster to the Jamaican Bar Association's Continuing Legal Education Weekend Seminar on Saturday 26th November, 2005, Ocho Rios, St. Ann]

The Advent of the New Civil Procedure Rules, 2002 as Applicable to Amendments:-

1. Under Section 259 of the old *Judicature (Civil Procedure Code) Law*, the Court could allow amendments to pleadings at any stage of the proceedings provided that such amendments were necessary *"for the purpose of determining the real questions in controversy between the parties."* Given the liberal application of this Section it was not uncommon to have situations where amendments were sought and granted right up to and during the trial of actions in the Supreme Court and also in the Court of Appeal where that Court could allow amendments to pleadings.
2. The advent of the new *Civil Procedure Rules, 2002* (the "CPR") governing litigation of civil actions in the Supreme Court, introduced new rules applicable to amendments to statements of case during the course of litigation of matters in Court which have radically altered the prior regime governing amendments.
3. Part 20 of the CPR sets out the rules applicable to amendments to statements of case and the rules are divided between amendments to statements of case prior to the Case Management Conference ("CMC") and amendments post CMC. Rule 20.1 provides that a party may amend a statement of case at any time before the CMC without the Court's permission save where there is an issue of changing parties or amending after the limitation period.

4. Rule 20.4(1) provides that *"an application to amend a statement of case may be made at the case management conference."*
5. Rule 20.4 (2) deals with amendments to statements of case after the CMC and provides as follows:

> *"The Court may not give permission to amend a statement of case after the first case management conference unless the party wishing to make the amendment can satisfy the court that the amendment is necessary because of some change in the circumstances which became known after the date of the case management conference."*

6. Rule 20.4 (2) of the CPR in effect requires a litigant seeking an amendment post CMC to satisfy *two* tests, the first being that the amendment is necessary because of (a) some change of circumstances and (b) which became known after the CMC.

Recent Authorities which have Reviewed the Relevant Principles to be Considered in the Application of Rule 20.4(2) of the CPR:-

7. This paper is concerned with the principles which ought to be taken into account by the Court in the application of Rule 20.4(2) of the CPR to amendments sought after the CMC, and what is the nature of the change of circumstances occurring after the CMC which must be demonstrated to satisfy the Court that the amendment is necessary.
8. The English Civil Procedure Rules in relation to amendments are not in *pari materia* with our CPR Rule 20.4 (2) thus resort to the

English rules and authorities governing amendments under the CPR is of little assistance.

9. There are however, three recent Court of Appeal decisions, two from Jamaica and one from St. Vincent and the Grenadines which have reviewed the principles to be considered in the application of Rule 20.4(2) and which have considered the nature of the change of circumstances which must be demonstrated to satisfy the Court that an amendment sought by a litigant is necessary.

10. The issues considered in these cases are:

 (a) What is the nature of the change in circumstances which must become known after the CMC and which will satisfy a Court that the amendment sought is necessary;

 (b) Whether the words, "may not" in Rule 20.4(2) give the Court a residual discretion in its application of its powers under this rule; and

 (c) Whether the Court is obliged to give effect to the Overriding Objective in interpreting Rule 20.4 (2)

11. In ***Ormiston Ken Boyea & Hudson Williams v. East Caribbean Flour Mills Limited*** an unreported decision from the Court of Appeal of St. Vincent and the Grenadines handed down on 16th September, 2004, the Respondents in the Court below successfully obtained an order after a CMC and prior to the pre-trial review, permitting it to amend its statements of defence on the basis so as to *"clarify and/or narrow and/or reformulate the existing issues between the parties"* and that the amendments were *"relevant and central to the issues in the case"* and would not prejudice or disadvantage the Appellants but would instead, *"contribute to a just*

and fair determination of the matters in dispute." It was further argued by Counsel for the Respondent that the amendments fell within the Overriding Objective set by the Rules to deal with cases justly.

12. The order granting the amendments to the Respondent's statement of case was appealed before Her Ladyship, the Honourable Madame Suzie d'Auvergne J.A. (Ag.). Before the Learned Judge of Appeal, Counsel for the Appellants urged the argument to the effect that the word, "may not" in the rules, are not permissive. Her ladyship allowed the appeal and held, *inter alia*, that: -

a) the Court had a general discretion to permit amendments where it is just and appropriate and the overriding objective empowers the Court with responsibility of dealing with cases justly but amendments should be allowed as long as they do not affect the substance of the claim or the relief.

b) the overriding objective does not in of itself empower the Court to do any thing or grant to it any discretion residual or otherwise. Any discretion exercised by the Court must be found not in the overriding objective but in the specific provision that is being implemented or interpreted.

c) the overriding objective cannot be used to enlarge CPR 20.1(3) (equivalent to our 20.4(2)).

d) the Respondent failed to show any change in circumstances known after the date of the case management conference.

13. Accordingly, it is submitted that the import of the ***East Caribbean Flour Mills*** case, is that the grounds advanced by Counsel for the Respondent in the Court below to the effect that the amendments were necessary so as to *"clarify and/or narrow and/or reformulate the existing issues between the parties"* and that the amendments were *"relevant and central to the issues in the case"* and would not prejudice or disadvantage the Appellants but would instead, *"contribute to a just and fair determination of the matters in dispute"* are not to be considered as providing a valid basis for permitting amendments after a CMC given the limitations of that jurisdiction's equivalent to our Rule 20.4(2) and as the Respondent had not been able to satisfy the two tests articulated in rule equivalent to our Rule 20.4 (2) by establishing that there had been a change of circumstances which had become known after the CMC, the amendments were not permitted.
14. I will return to look at other aspects of the ***East Caribbean Flour Mills*** case during the course of this presentation when I look at the issue of the applicability of the Overriding Objective to Rule 20.4 (2).
15. The Jamaican Court of Appeal recently had to consider the application of Rule 20.4(2) in ***Paulette Bailey & Edward Bailey v. Incorporated Lay Body of the Church in Jamaica and the Cayman Islands in the Province of the West Indies*** (unreported judgment delivered on 25th May, 2005). In this case, the Appellants appealed an Order of Campbell J. which refused an application for variation of the Case Management timetable in order to, *inter alia,* file an amended defence. A CMC was held in October of 2003 and the Appellants applied subsequently to vary the Case Management timetable and for further orders including an order to change the name "Evadney" for the name "Ina." Anderson J. granted that amendment, however, the amended

any new circumstances arising" [per Harrison J.A. at page 7 of the written Judgment].

18. Counsel for the Appellant had conceded before the Court of Appeal that the pleadings could have alleged fraud from the very beginning as he had an opinion from one of the Bailey's that she knew Ina's handwriting and knew it was not her handwriting on the agreement referred to in the statement of claim. Panton J.A. in his judgment rejected the argument advanced by the Appellant that based on an English decision made prior to the introduction of the new CPR, that the *"panacea which heals every sore in litigation"* is costs and made it clear that whereas the award of costs occasioned by amendments may have been the order of the day in the old regime, this is not the case under the new CPR as *"the Courts cannot now, without very good reason, countenance disobedience of these Rules, and say simply that the panacea is "costs". Those days are gone"* [per Panton J.A., at page 19].

19. McCalla J.A. (Ag.) in her judgment (at pages 28-29) referred to the ***East Caribbean Flour Mills*** case which the Respondent sought to rely on. Her Ladyship cited the following passage from the dictum of D'Auvergne J.A. (Ag.) in the ***East Caribbean Flour Mills*** case as follows:

> *"The discretion of the court to permit changes to statement of a case [sic] has to be considered with reference to CPR 20.1 (3), changes to be made after the first case management conference. It is my view that the overriding objective cannot be used to widen or enlarge what the specific section forbids."*

20. McCalla J.A. (Ag.) did not expressly adopt the dictum of D'Auvergne J.A. (Ag.) in the ***East Caribbean Flour Mills*** case, however it is submitted that it is clear from the dicta of all three Court of Appeal judges in the ***Paulette Bailey*** case that principles enunciated by the older pre-CPR authorities such as ***Copper v. Smith*** [1884] 26 Ch.D. 700 and ***Rondell v. Worsley*** [1967] 3 All E.R. 993 which were cited by Counsel for the Appellant to the effect that amendments will be allowed up to the last minute in order to decide matters in controversy with the remedy to the opposing litigant being costs, no longer represent the law applicable to amendments governed by the CPR.
21. Importantly, McCalla J.A. (Ag.) concluded her judgment by holding that:

> *"even if section 20.4(2) confers a discretion, the learned judge was correct in refusing to exercise his discretion in favour of granting the amendments sought....It is my view that the having regard to the history of the matter, the learned judge correctly exercised his discretion in accordance with the overriding objective of the Civil Procedure Rules, 2002."*

22. It is submitted that the principle to be extrapolated from McCalla J.A.'s decision is that the Court in applying Rule 20.4(2) can exercise a discretion whether to amend a statement of case in accordance with the Overriding Objective provided that the litigant seeking to amend the statement of case can satisfy the restrictions imposed by the two (2) tests stipulated by Rule 20.4(2).
23. The third most recent Court of Appeal decision is ***Crown Packaging Jamaica v. Musson Jamaica Limited*** (unreported judgment handed down on June 8th 2005), which was a procedural

appeal in which Mr. Justice Paul Harrison J.A. (as he then was) considered written submissions submitted on behalf of the Appellant and the Respondent.

24. In this action, the Appellant had filed a claim against the Respondent for the balance of the price of cans sold and delivered by the Appellant to the Respondent and the Respondent in answer to this claim filed a Defence and Counterclaim seeking damages under the Sales of Goods Act alleging that the cans delivered to it were not of merchantable quality as they had corroded and were unfit for resale to the general public. The Defence and Counterclaim did not expressly plead negligence but averred breaches of the Sale of Goods Act. The central issue on the pleadings was the question of causation of the corrosion evident on the subject cans. A CMC was held in December of 2003 at which time, both parties were permitted to file and serve expert reports as to the cause of the corrosion.

25. After the CMC, the Respondent's Attorneys subsequently requested an expert to do a second analysis of the cans and to visit Jamaica to inspect the Respondent's factory to establish conclusively the cause of the corrosion as the prior examination conducted by the expert did not identify the cause of the corrosion or address the Appellant's assertion that the cause of the corrosion was due to the negligence of the Respondent in its water treatment system, *inter alia*, employed at its factory.

26. The expert visited the factory and inspected the cans and prepared and submitted his expert report in March of 2005 which identified the cause of the corrosion as being a manufacturer's defect. Based on the conclusions contained in the expert report, the Respondent sought permission at the pre-trial review before the Honourable Mr. Justice Courtney Daye to amend its Defence and Counterclaim to plead the expert's findings as to causation and to include a

claim in negligence against the Appellant arising from the conclusions arrived at by the Respondent's expert. The application was opposed by the Appellant/Claimant on the basis that no new change of circumstances had emerged after the CMC to justify the amendment and that the Overriding Objective was not applicable to Rule 20.4(2) in that it did not grant the Court a discretion to allow the amendment. The Appellant relied on the ***East Caribbean Flour Mills*** case.

27. The Respondent/Defendant relied on two English decisions under the English Workmen Compensation legislation (***Radcliffe v. Pacific Stream Navigation Company*** [1910] 1 K.B. 685 and ***Sharma v. Holliday & Greenwood Ltd***. [1904] 1 K.B. 235] which provided assistance on the issue of what could amount to a change of circumstance, to the extent that, although the cases related to Workmen Compensation legislation, the principle that new medical evidence becoming available after an initial order constitutes a change of circumstances which entitles the Court to revisit the original order in light of the new change of circumstances. In ***Radcliffe***, Buckley L.J. stated that

> *"if circumstances subsequently occur to shew that the estimate or prophesy was erroneous, wither employer or workman is, I think, by virtue of the statute entitled to apply for a review...."*

And in ***Sharman*** Collins M.R. stated that,

> *"I think that there is a change of circumstances where subsequent experiment has shewn that the previous opinion based on expert evidence was wrong. It seems to me that the grounds for review*

> *formulated before the county court judge by the applicant's counsel, particularly with reference to the repeated failure of the applicant to obtain work through his incapacity to do it, point to the existence of evidence which would amount to such a change of circumstances as to let in the jurisdiction of the county court judge... and to justify a review of the weekly payment...."*

28. The Respondent also argued that the express provisions of the Overriding Objective required that *"the Court must seek to give effect to the overriding objective where it – exercises any discretion given to it by the rules; or interprets any rule."*
29. Daye J., held in favour of the Respondent/Defendant and allowed the amendments sought and in an oral judgment pronounced on 4th May, 2005, held that the expert report provided technical information after the CMC and that the Respondent/Defendant had satisfied him that the new information contained in the expert report constituted a change of circumstances which became known after the CMC. He went on to hold that he did not rely on the Overriding Objective to grant the amendment, but instead used it as a guide to coming to his decision that *"it is in the interests of justice and a fair trial that all relevant issues affecting the claim be determined ..."* and *"as a guide to look at in what manner the Claimant will be affected by this amendment."*
30. His Lordship, Mr. Justice Paul Harrison upheld Daye J.'s ruling and noted that Rule 20.4(2) is restricted in its application in that the litigant seeking to amend post CMC must satisfy the Court that there has been a change of circumstances which became known after the CMC. Harrison J.A. held that:

> *"The visit to Jamaica and the report of Romero dated March 11, 2005, addressing specifically only the cause of the corrosion to the cans qualifies as "some change in the circumstances .... known after...case management." The case of* ***Radcliffe v. Pacific Steam*** *[1910] 1 KB 685, relied on by Daye, J and which decided that new medical evidence qualified as changed circumstances is helpful, despite its apparent antiquity."*

31. On the issue of the order for the amendment fell outside the limitation period, His Lordship held that as the issue of negligence arose on the pleadings although not particularized in that a duty of care in the supplier/manufacturer of such goods is generally envisaged under the Sale of Goods Act, the Order was valid [citing ***Drane v. Evangelou*** [1978] 2 All ER 437].

32. In relation to the issue of the applicability of the Overriding Objective, His Lordship held that:

> ***"The overriding objective "to deal with cases justly" is a guiding principle, generally, (Rule 1.1) and should not be viewed in isolation****......In all the circumstances, Daye, J exercised his discretion on a correct basis."* (emphasis mine)

33. Thus Harrison J.A.'s decision in the ***Crown Packaging*** procedural appeal is authority for the principle that new technical information arising by way of an appointed expert's opinion post CMC qualifies

as a change of circumstances which has become known after the CMC.

34. However, I wish to play Devil's Advocate and point out that the cause of action in negligence which the expert identified after the CMC existed from the very beginning and could have been identified had the expert done his analysis prior to the CMC. The negligence which the expert identified was not a "change in circumstances" which became known after CMC as it was the genesis of the cause of the corrosion from the onset. It is the **discovery** of cause of the corrosion which occurred after the CMC. However, the Rule does not state that the litigant must establish that the amendment is necessary because of such change in the circumstances which could have been known prior to the CMC with due diligence.

35. Further, these decisions do not resolve the question of how to interpret Rule 20.4(2), in that, is the Rule to be interpreted as meaning that the litigant must establish that the change of circumstance occurred after the CMC and also became known post CMC, or is it that the change of circumstance could have occurred before the CMC but not become known until after the CMC. The Rule only says *"a change in the circumstances which became known after the date of the first case management conference."* It does not say whether such "change in the circumstances" must have occurred prior to the CMC or after the CMC and I am therefore of the view that the Rule is ambiguous to the extent that it allows for at least three different interpretations.

36. If it is that the change of circumstances must have occurred after the CMC, the effect is that there would almost be no situation where an amendment could be sought after the CMC to add a new claim or raise a new defence which may be subsequently

discovered, as the facts giving rise to the cause of action or defence would have been in existence from before.

37. Thus, if for example a litigant files a claim against a Hospital for negligence in causing her injury and after the CMC and medical examination and filing of expert reports it is discovered it was the doctor who had treated the litigant who was the cause of the injury, the question is would that be a change of circumstances? The only likely scenario where amendments would be permitted post CMC is in relation to damages.

38. Given the possible ambiguity, resort should be had to the Overriding Objective to resolve and identify the interpretation which meets the justice of the case.

39. The ruling in the ***Crown Packaging*** case on the face of it, did not consider the decision in the ***East Caribbean Flour Mills*** case to the effect that *"the overriding objective does not in or of itself empower the Court to do anything or grant to it any discretion residual or otherwise"* and that *"any discretion must be found not in the overriding objective but in the specific provision that is being implemented or interpreted."*

40. I venture to say therefore that Harrison J.A.'s statement was not *obiter dictum*, but that he was stating a principle of law in holding that *"the overriding objective "to deal with cases justly" is a guiding principle, generally, and should not be viewed in isolation....."* and by implication he chose not to follow the restricted application of the Overriding Objective posited by Her Ladyship Madame Suzie D'Auvergne in the ***East Caribbean Flour Mills*** case. Indeed, my interpretation of Harrison's J.A.'s ruling is that it is entirely consistent with the statements of McCalla J.A. (Ag.) in the ***Paulette Bailey*** case to the effect that Rule 20.4(2) is to be interpreted as conferring on the Court a discretion whether to grant an amendment subject to the restrictions imposed on the

Court by virtue of the two pre-conditions stated in Rule 20.4(2) and subject to the Overriding Objective which the Court is to seek to give effect to in interpreting any rule or exercising any discretion conferred by the Rules.

41. The applicability of the Overriding Objective must also be viewed in the context the recent English Court of Appeal's decision in ***Totty v. Snowden*** [2001] 4 All E.R. 577 at page 585 paragraph 34 per Kay L.J. where he stated that:

> *"Rule 1.2 requires the court to have regard to the overriding objective in interpreting the rules. Where there are clear express words, as pointed out by Peter Gibson LJ in Vinos' case, the court cannot use the overriding objective 'to give effect to what it may otherwise consider to be the just way of dealing with the case.' Where there are no express words, the court is bound to look at which interpretation would better reflect the overriding objective ....*
>
> *If the court does have a discretion, the circumstances of failure will fall to be considered by the court when it considers its discretion since discretion must be exercised having regard to the overriding objective."*

42. In ***Vinos v. Marks & Spencer plc*** (2001) 3 All E.R., May LJ stated at page 789 that:

> *"Interpretation to achieve the overriding objective does not enable the Court to say that provisions which are quite plain mean what they do not*

mean, nor that the plain meaning should be ignored."

43. The case of ***Vinos*** was cited with approval in the ***East Caribbean Flour Mills*** case, which in turn was referred to in Counsel for the Appellant's written submissions before Harrison J.A. in the ***Crown Packaging*** case. Yet His Lordship did not decline to apply the Overriding Objective in giving his decision and on the face of it, such an approach may be viewed as being at variance with the English Court of Appeal decisions in ***Vinos*** and ***Totty*** in so far as those decisions limit the applicability of the Overriding Objective.

44. It is my submission that to the extent that Rule 20.4(2) confers a discretion (by the use of the word "may"), and to the extent that there may be ambiguity in the proper interpretation to be applied to the Rule, it must be interpreted in accordance with the Overriding Objective, and as stated by Harrison J.A., the Overriding Objective is a guiding principle which ought not to be interpreted in isolation. This submission is consistent with Kay LJ's holding that:

> *If the court does have a discretion, the circumstances of failure will fall to be considered by the court when it considers its discretion since discretion must be exercised having regard to the overriding objective."*

45. In other words where the Rules confer a discretion then the Overriding Objective applies. This would reconcile the differences in approach arising from the two lines of cases.

Summary of the Relevant Principles & Considerations Applicable to Rule 20.4(2):-

46. In summary, I list below the relevant principles and considerations which are to be extrapolated from the cases discussed above. These are as follows:

(a) the litigant seeking an amendment to a statement of case post CMC must satisfy two tests – that there has been some change of circumstances and which became known after the date of the CMC;

(b) current English rules on amendments governed by the CPR are of little relevance as the English Rules differ from ours;

(c) the pre-CPR principles allowing amendments at any stage of the proceedings, on the basis that such amendments will clarify issues in controversy and can be remedied by an award of costs, are no longer applicable;

(d) a litigant seeking an amendment after the CMC based on facts known prior to the CMC will not succeed based on the limitations imposed on amendments to statements of case by Rule 20.4(2);

(e) Rule 20.4(2) confers a discretion on the Court whether to permit an amendment provided the litigant seeking the amendment can satisfy the restrictions imposed by the two (2) tests stipulated by the Rule;

(f) new technical information arising by way of expert opinion obtained post CMC which requires an amendment to a statement of case, will provide sufficient evidence as to a change of circumstances which has become known after the CMC; and

(g) to the extent that Rule 20.4(2) confers a discretion on the Court in respect of amendments sought post CMC, the Overriding Objective is a guiding principle and should not be

viewed in isolation, however it cannot be applied to interpret a Rule by ignoring the express language of the Rule.

41. I am of the view that Rule 20.4(2) is draconian in its effect and is crying out for an amendment to give the Court a wider discretion to allow amendments after CMC as the Rule's current formulation can result in serious injustice to litigants where for example Counsel has inadvertently not pleaded his client's case fully, or has accidentally omitted some crucial detail, or where in the process of disclosure or the preparing of witness statements (tasks done after CMC) it is discovered that new issues arise which ought to be pleaded and which the Court ought to be given the opportunity to deal with so that all matters in dispute can be fully ventilated at the trial.

42. As food for thought, I mention in passing that an argument could be made that a litigant is guaranteed a constitutional right to a fair trial, which I submit overrides any procedural rule and compels the grant of an amendment which is necessary to achieve a fair hearing. I say this because a fair trial contemplates that each party is able to put forward their entire case, and this may necessitate an amendment post CMC so as to put forward all issues in controversy. I invite comments from the audience on this issue.

43. I therefore urge the Rules Committee to heed the cry from the Bar to recommend an amendment to Rule 20.4.

Per:

Suzanne Risden-Foster

18th November, 2005