COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2001/CLE/gen/FP/296

BETWEEN

VLG NORTH AMERICA INC.

Plaintiff

AND

HILLSIDE INVESTMENTS CO. LTD.

Defendants

BEFORE: The Honourable Mrs Justice Estelle Gray-Evans

Counsel for the plaintiff: Miss Latisha Strachan along with Mr Adrian Hunt

Counsel for the defendant: Mrs A. Kenra Parris-Whittaker

RULING

Gray Evans, J

1. This is an application by the defendant for an order: (1) that the writ of summons be struck out as being an abuse of the process of the Court pursuant to Order 18 rule 19(1)(d) of the Rules of the Supreme Court ("RSC") and/or under the inherent jurisdiction of the Court on the ground that the plaintiff no longer exists; (2) that any orders made in the course of these proceedings after April 2002 be discharged; and (3) that the costs post that date, including the costs of this application, be paid by counsel for the plaintiffs.

2. The action was commenced on 26 September 2001 by a specially indorsed writ of summons in which the plaintiff claimed against the defendant moneys for goods sold and delivered to the defendant between February 1999 and October 2000. In the said writ the plaintiff, VLG North American Inc. ("VLG"), was said to be a company incorporated in the United States of America.

3. Approximately six months after the action commenced, on 29 March 2002, VLG purportedly merged with Richemont North America Inc and others into Cartier Incorporated and the name of the surviving company was changed to Richemont North America Inc. The purported merger was to take effect on 1 April 2002.

4. The action continued as though the purported merger had not occurred and the trial date was set for 24 October 2011.

5. However, the defendant, on 12 October 2011, filed a summons seeking security for its costs and a stay of the proceedings pending provision of such security, while the plaintiff, on 21 October 2011, filed a summons seeking an order for judgment on admissions and costs.

6. Both summonses were, on 24 October 2011, the date set for the commencement of the trial, adjourned for hearing to 3 November 2011.

7. In the meantime, on 1 November 2011, the defendant filed the present summons with 3 November 2011 as its return date.

8. That summons pre-empted the other summonses and although counsel for the plaintiff had initially objected to the application to strike out being heard on that date for the reason that the plaintiff had not been given two clear days' notice thereof, she subsequently withdrew the objection and the matter proceeded.

9. The defendant's application was supported by the affidavit of Sheila Taylor, a legal assistant in the firm of the defendant's counsel, also filed on 1 November 2011, in which she deposed, inter alia, that the plaintiff, VLG, ceased to be an active company on the New York Register of Companies on 1 April 2002. That the "current entity status" of VLG at that date was shown on the New York Register of Companies' website as: "Inactive – Merged Out (April 1, 2002)."

10. The defendant, therefore, contends that as VLG ceased to exist on 1 April 2002, it would be an abuse of the process of the Court to permit the action to continue as there was no one, after that date, who could authorize the continuation of these proceedings; and to allow the matter to continue in those circumstances would be an injustice to the defendant and a waste of the Court's time.

11. The defendant contends further that since there was no plaintiff to give instructions for the continuation of these proceedings post April 2002, all actions taken thereafter, including the third affidavit of Chinique Pratt-Kemp, filed herein on 3 November 2011, in opposition to the defendant's application, should be struck out and counsel for the plaintiff be ordered to pay all costs incurred by the defendant in this action, post April 2002.

12. In support of those contentions, the defendant relies on the cases of Lazard Bros. & Co v Midland Bank Ltd (1933) AC289, (1932) All ER Rep 571; Johnson v Gore Wood & Co. [2001] 1 All ER 481; and Freeport Licensees v The Grand Bahama Port Authority Limited et al SCCIV App. No. 10 of 2008.

13. The plaintiff opposes the defendant's application to strike out the claim because, according to its counsel, the plaintiff, having merged with Richemont North America, Inc.,

continues to exist, albeit under a different name. In support of that contention, the plaintiff relies, over the objection of counsel for the defendant, on the aforesaid third affidavit of Chinique Pratt-Kemp.

14. In that affidavit, Mrs Pratt-Kemp, a partner in the plaintiff's counsel's firm, averred that on 29 March 2002 the plaintiff merged with Richemont North America, Inc. et al into Cartier Incorporated; the surviving corporation's name was changed to Richemont North America Inc., "which filed and became a registered company in the State of New York" on 29 March 2002 and is currently listed on that State's Register of Companies.

15. Mrs Pratt-Kemp deposed further that the merger became effective on 1 April 2002 at which date, Richemont North America Inc. acquired all the assets and liabilities of the plaintiff; that the merger did not abate these proceedings and that Richemont North America Inc. has the right to enforce, prosecute and/or settle this action against the defendant.

16. As evidence of the aforesaid merger and continued existence of the plaintiff as Richemont North America Inc., counsel for the plaintiff produced a copy of a document entitled a "Certificate of Merger", which states, inter alia, that:

> "Richemont North America, Inc, a corporation of the State of Delaware ("Richemont" or "Parent") owns all of the outstanding shares of each class of stock of (i) A. Sulka & Company Ltd., a corporation of the State of Delaware ("Sulka"), (ii) Lancel Corp., a corporation of the State of Hawaii ("Lancel"), (iii) VLG North America Inc., a Corporation of the State of New York ("VLG") and (iv) Cartier, Incorporated, a Corporation of the State of Delaware ("Cartier").
>
> Pursuant to a plan of merger (the "Plan of Merger') each of Richemont, Sulka Lancel and VLG are being merged (the "Merger") with and into Cartier, which will be the surviving corporation of the Merger (the "Surviving Corporation").
>
> The name of the Surviving Corporation is to be changed to Richemont North America, Inc. by amending and restating Article FIRST of the Restated Certificate of Incorporation of the Surviving Corporation to read as follows:
>
> FIRST The name of the corporation is "Richemont North America, Inc."
>
> The Merger shall become effective on April, 1 2002.

17. Also, exhibited to Mrs Pratt-Kemp's affidavit is a copy of a report, also downloaded from the New York Register of Companies' website on 1 November 2011, showing Richemont's "current entity status" at 31 October 2011 as "Active."

18. Additionally, Mrs Pratt-Kemp deposed that by affidavit filed herein on 27 January 2011 Mr Steven Speaks on behalf of the plaintiff deponed that since the commencement of this action the plaintiff company was renamed Richemont North America Inc.

19. Consequently, counsel for the plaintiff submitted that the plaintiff continues in existence as Richemont North America Inc., and in her said affidavit, Mrs Pratt-Kemp sought leave to have Richemont North America Inc. substituted as the plaintiff in these proceedings pursuant to the provisions of Order 20 rule 5(3) RSC.

20. No summons was filed therefor. However, counsel for the plaintiff also made an oral application for leave to amend the writ by substituting Richemont North America Inc. as plaintiff in place of VLG.

21. After hearing the parties on the aforesaid applications, and as a result of issues raised during the hearing, I invited counsel to consider two additional cases, namely: Industrie Chimiche Italia Centrale v Alexander G Tsavliris & Sons Maritime Co (The

Choko Star) [1996] 1 WLR 774 and Gaydamak and another v UBS (Bahamas) Ltd and another SCCivApp 13 of 2003; [2007] 1 BHS J No. 61, which had not been referred to by either counsel and which I thought may be relevant to the issues under consideration. I am grateful for their submissions in that regard.

22. It is accepted that the Court, under its inherent jurisdiction, as well as under Order 18 rule 19 (1) RSC, may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground, inter alia, that it is otherwise an abuse of the process of the Court (d), and the Court may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

23. The learned authors of Halsbury's Laws of England 4th edition volume 37 at paragraph 434 state that: *"...where subsequent events render what was originally a maintainable action, one which becomes inevitably doomed to failure, the action may be dismissed as an abuse of the process of the Court*".

24. Counsel for the defendant submits that this is such an action. In her submission, the fact that there is an application to have Richemont North America Inc. substituted as plaintiff in this action is evidence that VLG no longer exists and, she submits, a concession that the action should be struck out as an abuse of the process of the court.

25. Counsel for the defendant also relies on the case of Lazard Bros. & Co v Midland Bank Ltd (1933) AC 289, (1932) All ER Rep 571 in which Lord Wright, with whom the other Law Lords agreed, cited the dicta of Lord Parker in the case of Daimler Co v Continental Tyre & Co (1916) 2 AC 307 at 337 where he said:

> "But when the court in the course of an action becomes aware that the plaintiff is incapable of giving any retainer at all, it ought not to allow the action to proceed." In such a case the plaintiff cannot be before the court. In the present case if the defendant cannot be before the court, because there is in law no such person, I think by parity of reasoning the court must refuse to treat these proceedings as other than a nullity".

26. In the Lazard Brothers case, the Midland Bank in London, England, owed money to a Russian Bank, Banque Industrielle de Moscou, which owed money to Lazard Brothers Limited. In 1930, Lazard Brothers Limited started proceedings, obtained judgment against the Russian Bank and then garnished the Midland Bank. The court found that, in fact, the Russian Bank had ceased to exist before the action commenced in 1930 and, therefore, held that the writ and subsequent proceedings were null and void and must be set aside.

27. Likewise, counsel for the defendant submits, this Court should find that as VLG ceased to exist on 1 April 2002 all proceedings post that date should be set aside and declared a nullity.

28. As I understand the Lazard Brothers case, the principle enunciated therein is to the effect that if a party named in English proceedings does not exist at the date the proceedings are commenced, then the proceedings are a nullity and must be set aside. However, that is not the point in this case as there is no question that VLG was in existence at the date the writ was issued.

29. Furthermore, there was no suggestion in the Lazard Brothers' case that the Russian Bank had ceased to exist because it merged into another company, as is the contention in this case.

30. Consequently, I accept counsel for the plaintiff's submission that the Lazard Brothers case is distinguishable from this case on its facts.

31. The plaintiff's evidence, which I accept, is that VLG ceased to exist on 29 March 2002 when it, along with other corporate entities, merged into Cartier Incorporation, the surviving company, whose name was subsequently changed to Richemont North America Inc. I am also satisfied that, notwithstanding counsel for the defendant's attack on the certificate of merger, that the merger did occur and that it took effect from 1 April 2002.

32. The question then is what was the effect of the merger on the present action?

33. As I understand counsel for the defendant's argument, however VLG met its juristic demise, immediately it ceased to exist, so did this action; whereas, counsel for the plaintiff's position is that the merger merely resulted in a name change, therefore, there was no effect on the present action as Richemont North America Inc., as the surviving company has the authority and the right to continue the action.

34. It is not disputed that VLG was a company registered in the State of New York. Nor is it disputed that its merger with Richemont North America Inc. et al occurred in the State of New York. It is also not in contest that the surviving company, Richemont North America Inc., is a company also registered in the State of New York.

35. It is accepted that in those circumstances, the law of the State of New York would be the applicable law in determining the effect, if any, of the merger on the present action.

36. No evidence in that regard was provided by either side. Indeed, counsel for the plaintiff's request for a short adjournment to permit her to obtain such evidence was resisted by counsel for the defendant. Counsel for the plaintiff, therefore, submits that in the absence of such evidence, general principles of company law governed the merger.

37. Counsel for the plaintiff submits further that in the absence of evidence to the contrary, the relevant provisions of the Companies Act, chapter 308, Statute Laws of The Bahamas, applied and in that regard, she referred the Court to section 155 of that Act.

38. Counsel for the defendant objects and submits that to apply Bahamian law in these circumstances would set "a dangerous precedent that the Companies Act applies to a foreign company."

39. The burden of proving foreign law is on the party who bases his claim or defence on it and as a general rule, foreign law must be proved by an expert in that law. (Section 22 of the Evidence Act, chapter 65, Statute Laws of The Bahamas). As a question of fact, it must be proved on a balance of probabilities.

40. According to Cheshire's Private International Law, 8th Edition at page 123, the law in England is: where foreign law is not pleaded or sufficiently proven by the party relying thereon, the court must give a decision according to English law (See Warner Bros v Nelson [1937]1 K.B. 209). Put another way, where foreign law is not proved, the court applies English law and the onus of proving that it is different and of proving what it is lies upon the party who pleads the difference.

41. In that regard, it appears that the law in The Bahamas is the same as the law in England. See the case of Gaydamak and another v UBS (Bahamas) Ltd and another SCCivApp 13 of 2003; [2007] 1 BHS J No. 61, in which the appellants, French nationals, appealed the decision of Davis, J. refusing to discharge a confiscation order obtained

against them pursuant to section 26 (4) of the Proceeds of Crime Act 2000. One of the issues for the Court of Appeal's determination was whether the law in France permitted the confiscation of proceeds of crime, or the making of an external confiscation order against its citizens. No evidence of the relevant law in France was given.

42. Longley L.J., delivering the majority decision, cited the above-mentioned passage from Cheshire, reviewed the relevant authorities and concluded on the basis of those authorities that, "in the absence of anything to the contrary, French law on the subject of the making of a confiscation order must be assumed to be the same as Bahamian law."

43. So, too, do I conclude that, in the absence of anything to the contrary, the law in New York as to the effect of a merger on a pending action must be assumed to be the same as the law in The Bahamas.

44. Section 155 of the Companies Act, chapter 308, Statute Laws of The Bahamas provides that where a merger occurs, no proceedings, whether civil or criminal pending at the time of a merger by or against a constituent company, or against any member, director, officer or agent thereof, are abated or discontinued by the merger, but the proceedings may be enforced, prosecuted, settled or compromised by or against the surviving company or the consolidated company or against the member, director, officer or agent, as the case may be, or the surviving company may be substituted in the proceedings for a constituent company. Further, as soon as a merger becomes effective, the surviving company becomes liable for all claims, debts, liabilities and obligations of each of the constituent companies.

45. It is clear from the foregoing that there is no automatic abatement or discontinuance of proceedings as contended by the defendant, when a plaintiff company merges with another company although it is necessary, in my view, for the surviving company, if it wishes to continue the proceedings, to be substituted as a party thereto in the place of one or more of its constituent companies. That, of course, means, in my view, that the surviving company would have to apply to be substituted as a party in order to continue the action.

46. The Rules of the Supreme Court provide for two kinds of substitution of parties: one where the party seeking to be substituted has succeeded to a claim or liability (Order 15 rule 8(2)) and the other where there has been a mistake in the identity of the party suing or being sued and a substitution is required to correct that mistake (Order 20 rule 5(3)).

47. The plaintiff's application was originally made pursuant to RSC Order 20 rule 5(3). However, in her subsequent written submissions that application was put in the alternative and instead she sought leave to substitute Richemont North America Inc., as the plaintiff in place of VLG pursuant to the provisions of RSC Order 15 rule 8(2).

48. Counsel for the defendant objects to the application for leave to amend pursuant to RSC Order 20 rule 5(3) and submits that contrary to the submission of counsel for the plaintiff, the amendment sought will result in more than simply a name change, but rather the substitution of a new party and should therefore not be allowed, as to do so would deprive the defendant of a defence under the Limitation Act, chapter 83 Statute Laws of The Bahamas. For that proposition counsel for the defendant relied on the cases of Davies v Elsby Brothers Ltd. [1961] 1 W.L.R. 170 and Mabro v Eagle Start and British Dominions Insurance Co. Ltd. [1932] 1 K.B. 485, C.A.

49. Further, counsel for the defendant points out that Richemont North America Inc. could only be substituted as the plaintiff in this action pursuant to RSC Order 20 rule 5(3) if there was a genuine mistake in VLG having been named as plaintiff instead of Richemont North America Inc. and that such mistake was not misleading. In that regard, counsel for the defendant submits that as neither of those reasons is applicable to the present case this Court has no jurisdiction to grant the relief sought by the plaintiff for substitution pursuant to RSC Order 20 rule 3(2). (See Davies v Elsby Brothers Limited).

50. The defendant also opposes the plaintiff's application for substitution under RSC Order 15 rule 8(2) and argues that, as in the case of RSC Order 20 rule 5(3), so too, under RSC Order 15 rule 8(2), this Court has no jurisdiction to make an order for substitution after the relevant period of limitation has expired. In her submission, RSC Order 15 rule 8(2) must be read in conjunction with RSC Order 20 rule 2, which she argues, makes no provision for substitution after the relevant limitation period.

51. Counsel for the defendant submits further that, even if this court has jurisdiction to allow the substitution sought by the plaintiff, it ought not to be exercised in the circumstances of this case.

52. While I agree with counsel for the defendant that RSC Order 20 rule 5(3) does not assist the plaintiff in this case, as an amendment thereunder would be subject to the provisions of the Limitation Act (Davies v Elsby supra), as pointed out by several of the authorities, Order 15 rule 8(2) [rule 7(2) in the English Rules] contains no reference to limitation. Millett, L.J., in the English Court of Appeal case of Yorkshire Regional Health Authority v Fairclough Building Ltd and another [1996] 1 All ER 519 at page 523 made the following observation regarding the lack of reference to limitation in RSC Order 15 rule 7(2) [our rule 8(2)] of the English Rules:

> "This is as it should be, since the circumstances in which the rule may be invoked do not give rise to any question of limitation. Even though the rule permits a new party to be substituted for an original party, this does not involve a new cause of action; the new party is substituted because he has succeeded to a claim or liability already represented in the action and sues or is sued in respect of the existing cause of action. The substitution of the successor does not deprive the defendant of an accrued limitation defence. There is no good reason why the substitution should not be made at any stage of the proceedings and whether a relevant period of limitation has expired or not; the expiry of the limitation period is completely irrelevant."

53. It is not disputed that this action was commenced within the relevant limitation period and although Richemont North America Inc. is a new entity, it seems to me, based on the authorities and the law regarding mergers in The Bahamas, which I have found must be assumed to be the same as the law in the State of New York, that the cause of action which VLG had was transmitted to Richemont North America Inc. as the surviving company and since there is no new cause of action, no question of limitation arises.

54. I find further support for that view in the case of *Industrie Chimiche Italia Centrale v Alexander G Tsavliris & Sons Maritime Co (The Choko Star)* [1996] 1 WLR 774 which was approved and followed by the English Court of Appeal in Yorkshire Regional Health Authority [1996] 1 WLR 210 and cited with approval by the English Supreme Court in the case of Roberts v Gill & Co and another [2011] AC 240.

55. The Choko Star is a case concerned with universal succession after the merger of two companies under article 2504 of the Italian Civil Code. Under Italian law the

surviving company automatically succeeded to the rights and obligations of the dissolved company. On an application by the plaintiffs for the surviving company to take over and continue the action, the defendants applied to strike out the action on the ground that to allow the surviving company to be named as plaintiff would be to introduce a new party and a new claim after the expiry of the limitation period. The defendants relied on section 35 of the English Limitation Act. Mance J. held that RSC Order 15 rule 7 [our rule 8] allowed the substitution of a party to an action by a new party to whom his interest or liability had been transferred at any stage of the proceedings and nothing prevented the operation of that rule after the expiry of a limitation period provided that the action was originally commenced within that time.

56. At pages 782 and 783 Mance J., observed that RSC Order 15 rule 7(2) went back to the rules in force before 1962, and expressed the following view, with which I respectfully agree and which I adopt:

> "The problem addressed by Ord 15, r 7 is different: *during the course of the proceedings* there has been some change affecting the identity of the correct claimant, which could not have been dealt with (or normally even predicted) when proceedings were originally issued…
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> "In all such situations, of which death is only the most striking, it seems self-evident that any existing proceedings, properly constituted within the limitation period, should be allowed to continue for or against the party to whom the relevant right or obligation has been transferred in law; and that this should be permitted whether the transfer occurs before or after the expiry of the limitation period.
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> "Ord. 15 r. 7 provides that the power which it contains applies "at any stage of the proceedings." It appears to me that a likely reason why it does not expressly mention the limitation period is that it caters for situations of assignment, transmission or devolution "at any stage of the proceedings"...where it is self-evident, without need for express reference, that the power to join the person now entitled, so that he may carry on the proceedings in circumstances where the general law recognizes such an assignment, transferor devolution, must apply irrespective of the passing of the limitation period.
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> "If the expiry of the limitation period were relevant under Ord. 15 r. 7, then the misfortune of the death or bankruptcy of a plaintiff just after the expiry of the limitation period would deprive his successors of any benefit from the action. That is quite apart from the apparent suggestion in the present defendants' summonses that the costs of the litigation would then fall on his solicitors."

57. His Lordship continued at page 785:

> "I conclude that the type of situation covered by Ord. 15 r. 7 is one for which the rules would naturally be expected to cater, and that in this context it should be irrelevant whether or not the limitation period had expired prior to the assignment, transmission or devolution in question. All that should matter is that the original litigation was commenced in time. In my view, the wording of Ord. 15 r. 7 is in these respects expressed in precisely the way one would expect. It is apt to cover any change necessary as a result of any such assignment, transmission or devolution at any stage in the proceedings. Not only is there no restriction in this language, read literally. Any restriction by reference to the limitation makes absolutely no sense and would lead to major absurdities, as in the present and many other cases which can be envisaged. The role of this rule before the Act of 1980 was clear. Unless other rules lead to a contrary conclusion, I see no reason why it should not continue to fulfill the same role for the purpose of the Act of 1980...The absence of any reference to limitation in Ord. 15 r. 7 compared with both Ord. 20 r. 5 and Ord. 15 r. 6, is explained, as I have indicated, by the different subject matter on which each

> focuses. Ord. 15 r. 7 deals with a situation where the proceedings as originally constituted were in perfect order and subsequent changes require to be catered for: it is self-evident that limitation must be irrelevant. The other rules focus on situations where the proceedings as originally constituted were in some way defective or inadequate, and therefore it might be said that their correction or amendment worked an injustice in exposing a defect to some new claim which could and should have been put forward properly within the limitation period."

58. In light of the foregoing, the only question then is whether Richemont North America Inc.'s failure to apply to be substituted as a party to these proceedings more than nine years after the merger occurred precludes it from now being substituted or acts as a bar to my exercising my discretion in its favour.

59. Counsel for the defendant says it should. Indeed, in her submission, to allow Richemont North America Inc. to be substituted as plaintiff at this late stage would be prejudicial to the defendant. In support of that submission and apart from the limitation issue, she pointed to the following areas of prejudice:

> **(1)** The defendant is unable to determine whether the list of documents provided by counsel for the plaintiff is in fact a complete list of documents as the list was prepared subsequent to the merger and some years after this action was commenced;
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> **(2)** There is an issue as to whether Richemont North America Inc is able to provide complete discovery and not merely what the plaintiff may have provided to RNA after the merger. This is of significant concern in light of clause 9 of the merger contract which allowed Richemont North America Inc. only to deal with matters within the State of New York;
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> **(3)** Prejudice will be caused to the defendant if the defendant is unable to ensure that all of the documents in this matter to which the defendant is entitled have been provided by the plaintiff to Richemont North America Inc., and as such, this is severely prejudicial to the defendant in light of the claim being made by Richemont North America Inc., a claim which relies heavily on documentary evidence.

60. Admittedly, all applications before the court ought to be made promptly, and delay in doing so may result in them being refused. However, with respect, I do not see how the defendant would be prejudiced by this Court acceding to the present application for substitution. As indicated, there is no new cause of action. The case that the defendant has to meet has not changed. The parties were, apparently, ready for trial. Indeed, the trial date had been set and it was the defendant's application for security for costs that set in motion the series of applications that resulted in the trial being adjourned.

61. RSC Order 15 rule 8(2) is clear. The application for substitution may be made at any stage of the proceedings, even after judgment.

62. Therefore, in the exercise of my discretion, I order that Richemont North America Inc. be substituted as the plaintiff in these proceedings pursuant to RSC Order 15 rule 8(2) and that leave be granted to amend the writ of summons accordingly.

63. The defendant's application to strike out this action as an abuse of the process of the court is therefore dismissed.

64. In light of the decision to which I have arrived, it is not necessary to consider the issue of the costs of the action being paid by counsel for the plaintiff.

65. Nevertheless, for the sake of completeness, I refuse to grant that order.

66. In this case, VLG was a company in existence at the commencement of the action in 2001, and although I accept that when VLG "merged-out" in April 2002 it ceased to exist from that date, I also accept that VLG merged into Richemont North America Inc. on the same date and therefore there was no time since the action commenced in 2001 when there was no entity who could give instructions for the continuation of these proceedings. Indeed, in her third affidavit Mrs Pratt-Kemp avers that Richemont North America Inc. acquired all the assets and liabilities of VLG and that Richemont North America Inc. as the surviving company has the right to enforce, prosecute and/or settle this action against the defendant.

67. As a general rule "costs follow the event". However, although I have dismissed the defendant's application and acceded to the plaintiff's, I am mindful that the plaintiff or its surviving company had nine years within which to make the application for substitution, which I have found was necessary, and in fact, only did so because of the defendant's application to strike out.

68. I therefore order that the costs of the application to strike out as well as the application for leave to amend by substitution be paid by the plaintiff to the defendant, to be taxed if not agreed.

Delivered this 1st day of March A.D. 2012

Estelle G. Gray Evans
Justice