[2015] JMCA Civ 23

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 120/2012

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE SINCLAIR-HAYNES (Ag)

BETWEEN GASOLINE RETAILERS OF JAMAICA LIMITED APPELLANT

AND JAMAICA GASOLINE RETAILERS ASSOCIATION RESPONDENT

John Graham and Miss Peta-Gaye Manderson instructed by John G Graham & Co for the appellant

Patrick Foster QC and Lancelot A Cowan instructed by Lancelot Cowan & Associates for the respondent

10, 11, 19 February and 27 March 2015

MORRISON JA

Introduction

[1] This appeal was heard on 10 and 11 February 2015. At the end of the hearing on the latter date, the court reserved its judgment until 19 February 2015, when it announced that the appeal would be dismissed for reasons to be given at a later date. These are my reasons for concurring in that decision.

[2] The appellant ('GRJL') is a limited liability company. It was incorporated on 29 June 1979. On 24 October 1979, GJRL became the registered owner of property known as Shop 5, King's Plaza, 38 Constant Spring Road, Kingston 10 in the parish of St Andrew ('the property'). The purchase price of the property was $260,000.00.

[3] The respondent ('the JGRA') is an unincorporated association registered under the Trade Union Act. The JGRA functions as an umbrella organisation representing the interests of members engaged in the business of gasoline retailers. Ever since the property was acquired in 1979, JGRA has had the Duplicate Certificate of Title (registered at Volume 1120 Folio 200) in its possession and has occupied the property as its head office.

[4] In or around the year 2001, a dispute arose between JGRA and GJRL regarding the beneficial ownership of the property. JGRA's claim was that GJRL holds the property in trust for the JGRA, while GJRL maintained that it holds the property in trust for certain individual members of the JGRA. On 10 July 2010, after a trial lasting over a period of six days, Mangatal J gave judgment for JGRA in the following terms:

> "(a) It is hereby declared that:
>
> (i) The Defendant Gasolene Retailers of Jamaica Limited, the registered owner, holds the property known as Shop No. 5, Kings Plaza, 38 Constant Spring Road, Kingston 10 in the Parish of Saint Andrew, being the land comprised in the Certificate of Title registered at Volume 1120 Folio 200 of the Register Book of Titles, in trust for the Claimant Jamaica Gasolene Retailers Association.
>
> (ii) The claimant Jamaica Gasolene Retailers Association is entitled to the entire beneficial interest

in the property known as Shop No. 5, Kings Plaza, 38 Constant Spring Road, Kingston 10 in the Parish of Saint Andrew, being the land comprised in the Certificate of Title registered at Volume 1120 Folio 200 of the Register Book of Titles.

(b) That, subject to the holding of Accounts and Enquiries, the Defendant is ordered to transfer the property known as Shop 5, Kings Plaza, registered at Volume 1120 Folio 200 of the Register Book of Titles to the Trustees of the Claimant at the date of judgment. The costs attendant on such transfer shall be borne by the Claimant.

(c) That should the Defendant fail, neglect and/or refuse to transfer the said property to the Trustees of the Claimant, the Registrar of the Supreme Court is empowered to execute all documents and do all things necessary to register the transfer of the property from the Defendant to the Claimant's said Trustees at the date of judgment.

(d) Accounts and Enquiries are to be held in Chambers on a Date to be fixed by the Registrar, with a view to perfecting the order for transfer of the legal interest in the property to Trustees of the Claimant at the date of judgment. In that regard, the Claimant is permitted to file and serve on the Defendant by the 31st of July 2012, evidence by way of an Affidavit attesting to, and attaching documentary proof, if any, as to whether there are currently Trustees of the Claimant, and if so, identifying these persons.

(e) Liberty to Apply.

(f) Costs of the trial to be the Claimant's to be taxed if not agreed.

(g) Costs of the hearing of the Accounts and Enquiries to be the Defendant's to be taxed if not agreed."

[5] This is GRJL's appeal from Mangatal J's judgment. In addition to disputing JGRA's capacity to bring the proceedings in the court below in its own name, GRJL also challenges a number of the learned judge's findings of fact.

Background

[6] The larger part of the background to the matter is not in dispute. In 1975, the Government of Jamaica granted a 5 cent per gallon increase in the price of gasoline. At that time it was agreed that, out of this 5 cent increase, 1 cent would be retained by the petroleum marketing companies and credited to the accounts of the individual members of the JGRA. The objective of this exercise was to create a fund for the repayment of a loan which had had to be taken out by the JGRA to enable its members to meet their obligations to make retroactive payments to service station attendants.

[7] In due course, the loan was paid off and surplus funds of the order of $230,000.00 ('the surplus') remained in the hands of JGRA. It is common ground that the surplus was an aggregation of funds belonging to members in their individual capacities and that the extent of each member's entitlement varied in accordance with the throughput of gasolene sales at their respective gas stations. The entire surplus was in due course applied by JGRA to the purchase price of the property. The balance of $30,000.00 due on the purchase price was supplied (as to approximately $21,000.00) by United Gasolene Retailers Ltd ('UGRL'), a connected company of JGRA, and by JGRA itself. It is also now common ground that, as the judge found (at para. [110] of her judgment), some members of JGRA "did receive a refund of their share of the surplus from the JGRA after the purchase of the property".

[8] The dispute between the parties surrounds the capacity in which the surplus was held by JGRA immediately before it was applied to the purchase price of the property.

JGRA's case was that its members had agreed that the surplus should inure to the benefit of JGRA for use in the purchase of property to function as its head office. GRJL on the other hand insisted that what was agreed was that the surplus would be retained by JGRA for the benefit of individual members.

The pleadings

[9] In its further amended statement of claim, JGRA, after stating the history described above, averred as follows (at paras 4-9):

> "4. At all times material the aforementioned loan was paid off, and a surplus of funds accrued to the Plaintiff. Thereafter, in 1976 and 1977, the Managing Committee of the Plaintiff proposed, and the Plaintiff's membership agreed, to use the surplus funds to purchase a property to meet the expanding needs of the Plaintiff.
>
> 5. At all times material, the Plaintiff through its managing committee was advised that a company was required to be formed as the Plaintiff lacked the legal capacity to purchase and/or hold real property in its own legal right.
>
> 6. That the Plaintiff will say that its membership of the day were [sic] never officially informed of the above referenced acquisition at any Annual General Meeting or any other forum of record.
>
> 7. Consequently, on or about June 29, 1979, the Defendant company was formed comprising of and drawing its directorship entirely from the then Managing Committee of the Plaintiff, namely:
>
> W.E. Clarke D. Hall A. Abrahams
>
> R. Chin A. Chuck A. McKenzie
>
> N. Bowen A. Hobbins D. Whittingham

> 8. That pursuant to the mandate of the Plaintiff through its Managing Committee of the day, and with the express intention of making a real estate acquisition on behalf of the Plaintiff, the defendant purchased and became owner of property at Kings Plaza registered at Volume 1120, Folio 200, on or about October 24, 1979.
>
> 9. That approximately $216,000.00 of the stated purchase price of $230,000.00 was provided by the Plaintiff from the aforesaid fund, to buy the said property.
>
> 10. That at all times material, from and since 1979, the Plaintiff, through its members, sought to have the Defendant company, through its members, give an account of and transfer to the assets of the Plaintiff, the said property at issue."

[10] In these circumstances, JGRA contended, GRJL held the surplus and the property "on trust for and on behalf of [JGRA] and its members". JGRA accordingly sought various reliefs, including a declaration to that effect.

[11] In its defence, GRJL maintained (at para. 3) that the surplus "accrued to and for the benefit of individual members of and not [JGRA]" and that "some and not all of the members agreed to purchase the said property". Further (at para. 7) "...that its purchase of [the property] was not made pursuant to the mandate of [JGRA] nor was the purchase made with the intention that the premises would have been acquired on behalf of [JGRA]".

The evidence

[12] The evidence at the trial was partly oral and partly documentary. Oral evidence was given on behalf of JGRA by Mr Hopeton Nembhard, who first became an active member of the association in 1979 and served as its president from 1988-1990; and Mr

Leonard Green, who became a member in 1996 and was the president in 2000-2001, during the period when the dispute first arose. On behalf of GRJL, oral evidence was given by Mr Aston Hobbins. Mr Hobbins had been a member of JGRA from 1959, a director since 1979 and served as president from 1986-1988.

[13] Neither Mr Nembhard nor Mr Green was a member of the JGRA during the critical period before the acquisition of the property and they both readily accepted that their understanding of the arrangements derived substantially from the minutes and other records of the JGRA (though Mr Green was able to say that UGRL was the "trading arm of the members of [JGRA]"). But, for what it was worth, they both strongly supported JGRA's case that, as Mr Nembhard put it in his witness statement (at para. 6), "[t]he membership of the [JGRA] agreed that the surplus funds would be and inure solely to the credit of the...association and not to each member in his individual capacity".

[14] Mr Hobbins gave a different account. Picking up the story from the point at which the JGRA loan was paid off, Mr Hobbins said this (at paras 7-10 of his witness statement):

> "7. The loan was paid off and there remained a surplus of funds which the Claimant held in trust for each individual member on the basis of his/her entitlement.
>
> 8. It was always agreed that the surplus was retained for the benefit of the individual members of the Claimant which members were beneficial owners of the surplus funds. The surplus was due to each member in his personal capacity.

9. The Claimant proposed to the members that the following options could be pursued by them in respect of their surplus from the cess:

(i) Those members who wished could contribute 50% of the surplus to a fund which monies were to be held by the Claimant to be used to purchase a building to be owned by those gasoline dealers who had opted to contribute to the purchase and the remaining 50% of the surplus would be paid over to them;

(ii) Those members who wished that their entitlement from the surplus funds should be paid over to them in full could request that it be paid in full and consequently, a number of dealers including Mr Vincent Chin exercised the option to take of all of his money and was paid in full. The majority of the members were paid half of the surplus and the other was kept by the Claimant to be contributed to the purchase of Shop No. 5, King's Plaza in the parish Saint Andrew.

10. Mr Vincent Chin did not lose his membership in the association because of his decision to take his contribution from the surplus funds. In fact, after Mr Vincent Chin received his full share of the surplus funds he subsequently became president of the association in 1982 and served in that capacity for two (2) years."

[15] The documentary evidence was primarily comprised in an agreed bundle of documents, consisting of (i) the Constitution of the JGRA; (ii) minutes of selected meetings of the executive and managing committees of the JGRA between 1975 and 1979; (iii) copies of the Duplicate Certificate of Title to the property; (iv) the Certificate of Incorporation of GRJL; (v) the record of the shareholding in GRJL as at 22 November 2004; (vi) a letter dated 25 July 2001 from GRJL to JGRA; (vii) a listing, certified by GRJL's auditors, of "proposed refunds to certain dealers"; and (viii) receipts evidencing

payments made by JGRA to 11 dealers, between 1987 and 1991, of sums described as having been received "in lieu of shares" in GRJL. For present purposes, it is not necessary to make any further mention of items (i) and (iii).

The minutes

[16] Given the conflict in the evidence given by Messrs Green and Nembhard on the one hand and Mr Hobbins on the other, it is hardly surprising that Mangatal J should have chosen to pay close attention to the minutes. The first set was the minutes of an emergency meeting of the executive committee of the JGRA held on 10 August 1975. Present were Messrs H.S. Morais, A.D. Hobbins, Basil Watson, Vincent Chin, Bunny Myers, Richard Chin, Winston Clarke and C.T. Lewis. It is clear that at this time the arrangements for the retention of an amount out of the 5 cent per gallon increase to meet retroactive wage payments had not yet been fully settled, since the minutes record the purpose of the meeting as being to decide "how details of the retroactive pay to gas station attendants should be administered...and what portion of the increased margin on petroleum products should be applied to retroactive pay". The relevant extract from the minutes reads as follows:

> "Mr Hobbins explained the back-ground of the negotiations and advised that Government was willing to allow J.G.R.A. to be the custodian of the funds for the retroactive pay and that those funds would be provided by a bank on the undertaking that the Oil Companies would pay regularly to the JGRA the returns resulting from a 1¢ per gallon on the price of bulk products.
>
> The JGRA would transmit those amounts, to the bank to defray the loan.

> This 1¢ per gallon would be made available not, only until the debt was completely met but until a new price structure was declared by Government.
>
> When the loan was repaid the extra margin would revert to the dealers through the JGRA. It was felt that perhaps dealers would allow this amount to remain at credit of the JGRA to help to provide a proper headquarters for the organization. The loan, he thought, would take about 13 months to be repaid.
>
> The meeting was advised that the anticipated increase in the price of gasoline and gas oil was 6¢ per gallon. Of this 1¢ would be a provision to meet increases to the tanker drivers; 1¢ per gallon as stated before would be to meet retroactive pay to gas station attendants. 4¢ would be increased margin to the dealer from which he would be expected to meet the new pay rates as soon as the increase in price became effective.
>
> ...
>
> When the loan is repaid and until there is a new price structure or arrangement with Unions, the cash flow from the 1¢ cess would be to the credit of the Association in trust for the dealers. It was felt that out of this a sizeable reserve could be built up and that dealers would allow the amount to remain as their investment in the anticipated new headquarters."

[17] Next were the minutes of the meeting of the managing committee held on 3 February 1977.At that meeting, there was an inconclusive discussion "over the resolution passed at the last Convention, authorising purchase of new premises to facilitate the expansion of UGR Ltd".

[18] Then there was the meeting of the managing committee held on 24 March 1977. With Mr Hobbins again in attendance, the following was recorded as having taken place:

"Purchase of Property:

A wide ranging discussion took place on whether or not the mandate through a unanimously passed resolution at the last Annual General Meeting, to purchase new premises to accommodate further development of our activities, should be pursued. The final decision was in the affirmative.

According to Messrs. Watson and Hobbins, even if there were cut-backs in imports, as good businessmen we should be able to devise alternatives to make up for losses in certain directions.

The purchase of new property should therefore be pursued. The premises on Beechwood Avenue offered by Daly & Campbell should be evaluated possibly by Mr. Finson and bargained for at a much lower price than that asked…

Donald Rigg – Bog Walk

This dealer complained that since he did not take any money for retroactive payment but met the bill of approximately $600 from his own funds, the full 50% of his credit should not be retained, nor should he pay any interest on the bank loan. It was agreed that the contention was reasonable and that the adjustment should be made in favour of Mr. Rigg.

Other applicants for full refund:

Letters were read from a number of members who wanted their full credit from the accumulation from the 1 c paid to them.

Decision:

They should be advised that the decision of the Annual General Meeting was binding on all members and that a marked copy of Rule 9 section 7 of our Constitution sent them."

[19] By the time of the meeting of the managing committee on 21 February 1979, the property had obviously been identified and, as the minutes show, the JGRA was already committed to its purchase:

> "Purchase of Property at King's Plaza:
>
> The Secretary reported that a deposit of $25,000.00 was made to Clinton Hart & Co. in connection with the purchase of premises at Kings Plaza. The present bank accumulation is $216,323.42.
>
> Mr. Abrahams suggested that the Association employ the services of another lawyer to conclude transaction. He recommended Messrs. Judah, Desnoes, Lake, Nunes, Scholefield & Co. This was agreed.
>
> A Holding Company is to be formed. Members will be duly informed of interest etc. and their equity in the property."

[20] Under the rubric, 'Purchase of premises at Kings Plaza', the minutes of the meeting of the managing committee of 8 August 1979 recorded the following:

> "(i) The causative factors which contributed to some dealers being in debt should be investigated and where necessary they should be relieved of the debt, e.g. Mr. Emile Josephs.
>
> (ii) A letter was received from Mr. Frankie Lewis requesting the payment of his accumulated credit as he had given up his gas station.
>
> DECISION:
>
> Transfer accumulated sum from Mr. Lewis' account to Mr. Reggie Chin's account. Mr. Chin would in turn pay over to Mr Lewis the full amount of his credit.
>
> (iii) In respect of the covenant of sale which was being asked for by Clinton Hart & Co. letters were exchanged resulting in assurance from Judah, Desnoes, Lake, Nunes & Scholefield to the effect the condition being required was innocuous and could not be enforced by law.
>
> Subject to change at the next Annual General Meeting, the following members were selected as Directors of the Gasolene Retailers of Jamaica Limited:

> Messrs; Winston Clarke, Dudley Hall, Andrew Abrahams; Norman Bowen; A. McKenzie; Reggie Chin; Astley Chuck; A.D. Hobbins; Desi Whittingham; and C.T. Lewis, Secretary."

[21] And lastly, in the minutes of the meeting of the managing committee held on 19 December 1979, under the heading "Kings Plaza: New Premises", the following was recorded:

> "...the title to the property was in our possession, the U.G.R. Limited had advanced the necessary amount to complete payment, there was an official handing over ceremony and that the formation of the holding company 'Gasolene Retailers of Jamaica' was accomplished. It was decided that a meeting of the sub-committee should be held early in the New Year to plan for the orderly transfer of operations to the new site."

The record of shareholders and directors of GRJL

[22] The two shareholders of GRJL shown in the records of the Registrar of Companies as of 22 November 2004 were Messrs Raymond Clough and Ian Don, each holding a single share. It is common ground that neither of these gentlemen, who were at the material time members of the firm of lawyers which had seen to the incorporation of GRJL, had any beneficial interest in the company. As at the same date, the directors were Messrs Winston E Clarke, Dudley Hall, Andrew Abrahams, Reginald Chin, Albert McKenzie, Norman Bowen, Aston D Hobbins and Desi Whittingham.

GRJL's letter of 25 July 2001

[23] Even if not the last straw (which Mr Green said it was not), this letter was obviously one of the things which crystallised the dispute between GRJL and JGRA:

> "**RE: NOTICE OF MEETING**
>
> We hereby advise you that Gasolene Retailers of Jamaica Limited ("**the Company**") will hold a meeting of present and former gasoline retailers who contributed to the purchase of property at Kings Plaza, Constant Spring Road, Kingston 10 on **Wednesday, August 22, 2001 at the Hotel Four Seasons, 18 Ruthven Road, Kingston 10, commencing at 2:00p.m**.
>
> At a meeting of the Contributors held on June 20, 2001, the decision was taken to ask the Company's Attorneys to prepare a Document giving details regarding a proposal made at the meeting to issue Debentures to the Contributors. We therefore enclose an Explanatory Memorandum, which we are sure you will find informative.
>
> We ask that you give consideration to this document and send **a duly appointed representative** to attend the meeting prepared to discuss it and take decisions on the proposals outlined therein.
>
> Yours truly
> GASOLENE RETAILERS OF JAMAICA LTD.
>
> Winston E. Clarke
> Chairman"
> (emphasis as in the original)

[24] Mr Green's evidence was that he was "outraged" by this letter and that he subsequently told its author, Mr Winston Clarke, that the meeting "should not be held based on content [sic] of letter". As it turned out, the proposed meeting was never held.

The auditors' list

[25] Under the heading, 'Gasolene Retailers of Jamaica one cent (1c) retroactive investment', this list showed the names of a total of 100 gasolene retailers, with varying amounts beside their names. Written and dated notations beside the names of 10 of them indicated that the balances shown had been paid.

The receipts

[26] As I have indicated, there were also 11 receipts, signed by various persons (not all of whose names appear to match the names on the auditors' list). The makers of these receipts, which bear dates between 1987 and 1991, acknowledged payment by JGRA in the following terms:

> "This sum is received in lieu of shares in Gasolene Retailers of Jamaica and I hereby transfer all my interest in the said Gasolene Retailers of Jamaica Limited to the Jamaica Gasolene Retailers Association."

[27] When shown these documents in cross-examination at the trial, Mr Green's response was that he had never seen them before.

[28] Finally, further documentary evidence in the form of the memorandum and articles of association of GRJL was also provided to the judge.

The judge's findings

[29] At the outset, in response to a late challenge to JGRA's capacity to maintain the action, Mangatal J held, in reliance on the well-known decision of the House of Lords in **The Taff Vale Railway Co. v Amalgamated Society of Railway Servants** [1901] AC 426, that a trade union registered under the Trade Union Act ('the Act') was fully empowered to sue and be sued in its own name. Then, turning to the substantive issues in the case, the learned judge, despite lamenting what she described (at para. [95]) as "a cluster of evidential gaps" in the case, felt able to find that –

> (1) GRJL was a "holding company", in the sense that the funds used to purchase the property were provided by a person other than itself, that is, JGRA (para. [100]).
>
> (2) All the directors of GRJL "were drawn from, and represented a large sub-set of the membership of JGRA's Managing Committee at the relevant time" (para. [105]).
>
> (3) The fact that there is no specific object in the memorandum of association of GRJL relating to the holding of property on behalf of JGRA, "does not water down or take away from the express unchallenged evidence as represented in the Minutes...wherein it is stated that this was the purpose" (para. [120]).

(4) The fact that article 28(a)(iii) of the articles of association of GRJL permits the free transfer of shares in the company to a person "who is a member of [UGRL]", does not mean that the articles were "so drafted on the specific instructions of the JGRA, as opposed to instructions simply to form a company where there would be allowance for free transfer amongst related parties" (para. [120]).

(5) UGRL was "a sort of trading arm of the JGRA", and therefore the sum paid by UGRL towards the purchase price of the property "would point more in the JGRA's favour than GRJ Ltd" (para. [103]).

(6) The majority of the purchase price came from the surplus which was held by JGRA (para. [118]).

(7) Although some dealers did receive refunds of their share of the surplus after the property was acquired, "there is no evidence as to any other dealers now claiming an interest [in the property] by way of resulting trust" (para. [118]).

(8) It was not contested that "there was a unanimous resolution passed by members that the surplus was to be used for the purchase the property, which was for the purpose of use for expansion of the activities of, and as headquarters for, the JGRA" (para. [118]).

[30] In the result, the learned judge concluded that GRJL holds the property on a resulting trust for JGRA and accordingly, as has been seen, made the declaration sought to this effect. However, the judge considered it necessary to grant JGRA's application to amend the statement of claim to add the trustees of JGRA as the persons to take a transfer of the property from GRJL.

The appeal

[31] The grounds of GRJL's appeal and the submissions in support of them may be summarised as follows:

(1) The judge erred in (a) holding that JGRA was competent to bring the claim in its own name; and (b) allowing the amendment of the statement of claim to allow a transfer of the property to trustees on behalf of JGRA.

(2) The judge erred in finding that (a) UGRL was the trading arm of JGRA; and (b) GRJL was a holding company. There was no documentary evidence to support the first finding, nor was either finding supported by the memorandum and articles of association of GRJL.

(3) The judge erred in preferring the evidence of Messrs Green and Nembhard, neither of whom was active in the JGRA at the material time, over that of Mr Hobbins, who had been an active member since 1959 and was also present when the decision to purchase the property was made.

(4) The judge erred in taking into account irrelevant matters, i.e., that JGRA had been in possession of both the certificate of title and the property since its acquisition.

(5) The judge erred in reversing the burden of proof and/or drawing an adverse inference from the fact that Mr Hobbins was the only witness called to give evidence for GRJL. In particular, the judge erred in attributing significance to the fact that no individual member had come forward to claim an interest in the surplus, given that it was JGRA's duty to prove its case.

(6) The judge's conclusion that GRJL holds the property in trust for JGRA was not open to her on the pleadings, neither was it supported by the evidence, given the fact that GRJL is the registered owner of the property and JGRA's allegation that it was gifted to it by the entire membership of association was not supported by the minutes which were in evidence.

[32] Mr Graham supplemented these contentions with a submission which had not been previously foreshadowed in either the grounds of appeal or the skeleton arguments. Basing himself on, among other things, a passage from The Declaratory Judgment (by The Rt Hon. The Lord Woolf and Jeremy Woolf, para. 6-01-6-02), Mr Graham submitted that, in considering whether or not to make a declaration of rights in a particular case, the court should have regard to the rights of all persons who appear to have an interest in objecting to the grant of a declaration. In this case, such persons would include all those whose earnings contributed to the surplus in the first place, as well as UGRL.

[33] Mr Foster QC's response to these submissions was to the following effect. Firstly, section 9 of the Act and subsequent judicial decisions make it clear that a registered trade union, such as the JGRA, is fully entitled to sue and be sued in its own name. Secondly, the judge's grant of permission to amend the statement of claim to enable a transfer of the property to trustees was a matter entirely within her discretion, given that rule 20.4(2) of the Civil Procedure Rules 2002 ('the CPR') empowers the court to grant amendments to the statement of case after the case management conference. In any event, it was submitted, there was no prejudice to either party in this case, since they were both given the opportunity to make further submissions as a result of the amendment. For this submission, reliance was placed on the decision at first instance of Neuberger J (as he then was) in **Charlesworth v Relay Roads Ltd and Others** [2000] 1 WLR 230. And thirdly, in respect of each of the matters complained of by Mr Graham, there was ample evidence before the judge to support the conclusions which she had reached. Therefore, in accordance with long established principle (as reflected in, for example, the decision of this court in **Cablemax Ltd and others v Logic One Ltd** [2012] JMCA Civ 14), an appellate court should be very reluctant to interfere with the trial judge's findings of fact. In addition to having had the opportunity of seeing and assessing the witnesses on both sides, the judge had had the benefit of the documentary evidence, in particular the minutes, which also provided an ample basis for her decision.

[34] These submissions give rise to three broad issues: (a) whether JGRA can sue and be sued in its own name; (b) whether the judge erred in permitting JGRA to amend the statement of claim; and (c) whether the judge's conclusions were justified by the pleadings and the evidence.

JGRA's capacity to sue

[35] Insofar as is material, section 9 of the Act provides as follows:

> "The trustees of any trade union registered under this Act, or any other officer of such trade union who may be authorized so to do by the rules thereof, are hereby empowered to bring or defend, or cause to be brought or defended, any action, suit, prosecution, or complaint in any court of law or equity, touching or concerning the property, right or claim to property of the trade union;..."

[36] By its terms, this section appears to authorise only the trustees or any other authorised officer of a trade union to bring and defend actions in matters touching or concerning the property, or any right or claim to the property, of the trade union. But as long ago as 1901, in the **Taff Vale Railway Co** case, the House of Lords had decided unanimously that, as a matter of clear implication from the terms of the equivalent section of the English Trade Union Act, a registered trade union was empowered to sue and be sued in its own name. Lord Brampton put it as follows (at page 442):

> "I think that a legal entity was created under the Trade Union Act, 1871, by the registration of the society in its present name in the manner prescribed, and that the legal

> entity so created, though not perhaps in the strict sense a corporation, is nevertheless a newly created corporate body created by statute, distinct from the unincorporated trade union, consisting of many thousands of separate individuals, which no longer exists under any other name. The very omission from the statute of any provision authorizing and directing that it shall sue and be sued in any other name than that given to it by its registration appears to me to lead to no other reasonable conclusion that that in so creating it, it was intended by the Legislature that by that name and by no other it should be known, and that for all purposes that name should be used and applied to it in all legal proceedings unless there was any other provision which militated against such a construction, as, for instance, in the case of trustees, by s. 9 of the same Act, who hold real and personal property of the society."

(To similar effect, see also **Bonsor v Musicians Union** [1955] 3 All ER 518, **Keys and others v Butler** [1971] 1 QB 300 and **Caesar v The British Guiana Mine Workers Union** (1959) 1 WIR 232)

[37] Mangatal J's conclusion that, as a registered trade union, JGRA had the capacity to sue and be sued in its own name is therefore fully supported by the authorities. In my view, no reason has been shown to disturb it.

The amendment

[38] As originally filed, the statement of claim sought orders that GRJL or, in default of it doing so, the Registrar of the Supreme Court on its behalf, should transfer the property to JGRL. However, section 8 of the Act provides that all real or personal estate belonging to a registered trade union "shall be vested in the trustees for the time being of the trade union appointed as provided by this Act, for the use and benefit of such

trade union and the members thereof". Mangatal J therefore considered (at para. [58]) that, "because the legal ownership cannot be vested in the JGRA, paragraphs 4 and 5 which seek a transfer of the legal ownership would have to be amended to have the property placed in the names of the only persons empowered under law to hold property on behalf of the union, and that is the trustees" (emphasis in the original). Accordingly, in order to achieve this, the learned judge granted JGRA'a application for permission to further amend the statement of claim, with liberty to apply. In addition, she also indicated (at para. [122]) that JGRA should bear the costs occasioned by any further hearing that the amendment might necessitate.

[39] Rule 20.4(2) of the CPR states that "[s]tatements of case may only be amended after a case management conference with the permission of the court". In **Charlesworth v Relay Roads Ltd and Others**, speaking to the two competing factors which can be said to arise where permission is sought to amend a pleading or to call further evidence, Neuberger J said this (at page 235):

> "The first factor is that it is desirable that every point which a party reasonably wants to put forward in the proceedings is aired; a party prevented from advancing evidence and/or argument on a point, other than a hopeless one, will understandably feel that an injustice has been perpetrated on him, at least if he loses and has reason to believe that he may have won if he had been allowed to plead, call evidence on, and/or argue the point. Particularly where the other party can be compensated in costs for any damage suffered as a result of a late application being granted, there is obviously a powerful case to be made out that justice indicates that the amendment should be permitted."

[40] Neuberger J also made called attention to the nineteenth century case of **Clarapede & Co. v Commercial Union Association** (1883) 32 WR 262, 263, in which Brett MR had observed that –

> "…however negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs..."

[41] When a party seeks permission to amend a pleading, therefore, the critical consideration for the court is the overall justice of the case. If it is possible to allow the amendment without prejudice to the other side, then the court will generally lean in favour of granting it, bearing in mind the obvious desirability of all matters in controversy between the parties being brought forward and adjudicated in the same proceedings. But, even where there is a possiblity of prejudice to the other side, the court will if at all possible seek to address this by way of an order for costs, or by some other means. Ultimately, these are matters for the court's discretion, the exercise of which will not lightly be interfered with by this court (**Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, especially paras [19]-[20]).

[42] In considering whether to grant the proposed amendment in this case, Mangatal J took the view (at para. [58]) that, by granting it, "the Court would simply be perfecting the legal form that would follow from a substantive resolution and determination as to the beneficial entitilement made in JGRA's favour". In my respectful view, the learned judge's decision to grant the amendment is unassailable, both in principle and on the facts of this case. Although this was obviously a matter which

ought to have attracted the attention of JGRA's legal advisors from the start of the litigation, the question of who should take a transfer of the property in the event that the claim succeeded was plainly a purely consequential one, having no bearing on the real substance of the case. It is difficult to imagine what possible prejudice could have been caused to GRJL by the grant of the amendment (and none was put forward on its behalf, even before this court). But, it seems to me, even if there was any such prejudice, the judge's grant to GRJL of liberty to apply, together with the costs of any further hearing that might arise from that order, was a perfectly reasonable exercise of her discretion. Accordingly, I do not think that this court should interfere with it.

Were the judge's conclusions justified by the pleadings/evidence?

[43] First, I will start with Mr Graham's pleading point (taken, as far as I can make out, for the first time in this court and unsupported by any ground of appeal). As I understood it, the basis of Mr Graham's complaint was that paragraph 4 of the further amended statement of claim (see para. [9] above) put JGRA's case on the footing that, (i) after the loan was paid off, "a surplus of funds accrued to [JGRA]"; and (ii) JGRA's membership then agreed "to use the surplus funds to acquire a property to meet [its] expanding needs". This pleading was misleading, it was submitted, given that it made no mention of the rights of the individual dealers, of whom JGRA was aware, whose funds had fed the surplus.

[44] It is true that as the case evolved JGRA's case in fact moved somewhat closer to the reservation expressed by GRJL (in paragraph 3 of the defence) as regards paragraph 4 of the statement of claim, which was that "the surplus accrued to and for the benefit of individual members... and not [JGRA]..." For, once witness statements were exchanged, it became clear that the true tension in the case was between Messrs Green and Nembhard, on one side, who stated that the members "agreed that the surplus funds would...inure solely to the credit of [JGRA] and not to each member in his individual capacity"; and Mr Hobbins, on the other, who insisted that "[i]t was always agreed that the surplus was retained for the benefit of the individual members of [JGRA] which members [sic] were the beneficial owners of the surplus...due to each member in his personal capacity".

[45] This is therefore a case in which the pleadings were supplemented and expanded by the witness statements and by the actual evidence given by the witnesses on both sides. Thereafter, the case proceeded on a basis obviously understood by both parties, the notes of evidence revealing very few objections from either side to the evidence being given by the witnesses. And, of course, there was also an agreed bundle of documents, which further served to delineate the precise area of dispute between the parties, so much so that the learned judge, despite her lament about gaps in the evidence, was able to arrive at a decision substantially based on the minutes.

[46] In **McPhilemy v Times Newspapers Ltd and others** [1999] 3 All ER 775, a case decided shortly after the Civil Procedure Rules came into effect in England in 1998, Lord Woolf MR, the acknowledged chief architect of the new rules, said this (at pages 792-3):

> "The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules."

[47] Those observations were cited with approval by the House of Lords in **Three Rivers District Council and others v Bank of England (No. 3)** [2001] 2 All ER 513 (per Lord Hope at para [50]); and, as the learned editors of Blackstone's Civil Practice 2012 observe (at para 8.21), "…it is clear from the comments of Lord Woolf MR in *McPhilemy v Times Newspapers Ltd*…that contests over the terms of statements of case are to be avoided".

[48] While pleadings therefore remain important to make clear the general nature of the case which the other side should expect to meet, the further documents in the case, such as witness statements and agreed documents, can supplement the pleadings in appropriate cases. In this case, it seems to me that the true issues in the case were at the end of the day clear and GRJL was in no way disadvantaged by any imprecision that there might have been in JGRA's statement of claim. I would therefore decline Mr Graham's invitation to decide this case on a pleading point taken for the first time on appeal. (See also **State Government Insurance Commission v Sharpe** (1996) 126 FCR 341, 344, a decision of the Supreme Court of South Australia (Full Court), in which Millhouse J observed that "[t]he day has well passed when decisions are based on the state of the pleadings, irrespective of the facts or justice".)

[49] Turning now to the actual evidence, Mr Foster relied on, among other things,the decision of this court in **Cablemax Ltd et al v Logic One Ltd**, in which McIntosh JA, in explaining the court's reluctance to disturb a trial judge's findings of facts on appeal, referred to an extract from the judgment of Lord Thankerton in the oft-cited case of **Watt (or Thomas) v Thomas**[1947] 1 All ER 582, 587:

> "I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus:—
>
> I. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and

> heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.
>
> II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
>
> III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.
>
> It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question."

[50] More recently, the role of an appeal court when reviewing findings of fact by a trial judge was extensively reviewed by the Privy Council in **Beacon Insurance Company Ltd v Maharaj Bookstore Ltd** [2014] UKPC 21, paras 11-18, a decision on appeal from the Court of Appeal of Trinidad and Tobago. After referring to a number of the leading authorities on the point (including **Watt v Thomas**), Lord Hodge, speaking for the Board, said this (at para. 17):

> "Where a judge draws inferences from his findings of primary fact which have been dependent on his assessment of the credibility or reliability of witnesses, who have given oral evidence, and of the weight to be attached to their evidence, an appellate court may have to be similarly cautious in its approach to his findings of such secondary facts and his evaluation of the evidence as a whole. *In re B (a Child)* (above) Lord Neuberger at para 60 acknowledged that the advantages that a trial judge has over an appellate court in matters of evaluation will vary from case to case. The form, oral or written, of the evidence which formed the basis on which the trial judge made findings of primary fact

> and whether that evidence was disputed are important variables. As Lord Bridge of Harwich stated in *Whitehouse v Jordan* [1981] 1 WLR 246, 269-270:
>
> > '[T]he importance of the part played by those advantages in assisting the judge to any particular conclusion of fact varies through a wide spectrum from, at one end, a straight conflict of primary fact between witnesses, where credibility is crucial and the appellate court can hardly ever interfere, to, at the other end, an inference from undisputed primary facts, where the appellate court is in just as good a position as the trial judge to make the decision.'
>
> ...Where the honesty of a witness is a central issue in the case, one is close to the former end of the spectrum as the advantage which the trial judge has had in assessing the credibility and reliability of oral evidence is not available to the appellate court. Where a trial judge is able to make his findings of fact based entirely or almost entirely on undisputed documents, one will be close to the latter end of the spectrum."

[51] So cases in which the appellate court is asked to review a trial judge's findings of fact may fall into two distinct categories. In the first are those cases in which the trial judge's conclusions were based on her assessment of the credibility and reliability of oral evidence, while in the second are those cases in which her conclusions were based on inferences drawn by her from undisputed documentary or other evidence. In the first category of case, the appellate court will only interfere if it is satisfied that it is clear that the trial judge did not taken proper advantage of having seen or heard the witnesses and was plainly wrong. However, in the second category of case, the judge's advantage of having seen the witnesses will usually be significantly diminished, thus

leaving the appellate court in as good a position as the judge to review the undisputed material.

[52] In my view, the instant case more readily falls within the second, rather than the first, category. It is true that Messrs Green and Nembhard gave oral evidence which was, on the face of it, in direct contradiction to Mr Hobbins' evidence. But it is clear, as Messrs Green and Nembhard admitted, that their account of the facts on the critical issues in the case was almost entirely based on their reading of the minutes of meetings at which they were not in attendance. So, in relation to the greater part of their evidence, it seems to me, this court is as well placed as Mangatal J was to determine whether the inferences which she drew from the minutes were ones which she could reasonably draw in the circumstances. In relation to Mr Hobbins' evidence, however, I think that the situation must to some extent be different, since he was himself present at some of the relevant meetings. Accordingly, such assessment as the judge felt able to make of his credibility must naturally attract the usual deference due to a trial judge in such circumstances.

[53] Mr Graham first complained that the judge was wrong in concluding that UGRL was "a sort of trading arm of the JGRA". For this finding, the judge relied on Mr Green's evidence under cross-examination. The only other references to UGRL in the case came from Mr Hobbins. In his witness statement, he said that he had been involved with UGRL "since its formation in 1967 up until 1994"; and, under cross-examination, he described UGRL as "an associated company" of JGRA, "who were [sic] in the business of selling Automotive car care products, batteries and accessories". Far from

contradicting Mr Green's characterisation of UGRL as JGRA's trading arm, therefore, Mr Hobbins' evidence was entirely consistent with it. Accordingly, it seems to me that the judge was fully entitled to accept Mr Green's evidence as to UGRL's status.

[54] Next, Mr Graham complained that the judge erred in her finding that GRJL was a "holding company". For this finding, the judge relied on the minutes of the meetings of the managing committee of JGRA held on 21 February, 8 August and 19 December 1979 (see paras [16]-[21] above). These minutes show that, at the first of these meetings, the committee, having received a report on the progress of the purchase of the property, decided that "[a] holding company is to be formed". At the second of these meetings, GRJL having been incorporated in June 1979, the committee selected 10 persons (eight of whom were actually present at that meeting) to serve as directors of GRJL, but noted that this was "[s]ubject to change at the next annual General Meeting". As late as 2004, the directors on record of GRJL remained substantially unchanged. And, at the third of these meetings, the property having by this time already been transferred to GRJL, the committee received a report that "the formation of the holding company 'Gasoline Retailers of Jamaica' was accomplished".

[55] In its ordinary commercial usage, the phrase 'holding company' is usually apt to describe "a corporation that owns enough voting stock in another corporation to influence its board of directors and therefore control its policies and management" (Barron's Dictionary of Finance and Investment Terms, 4th edn, page 242). But in this case, it seems clear from the undisputed evidence that the managing committee,

having been advised that JGRA could not itself take a transfer of the property, used the phrase to denote the company, owned and controlled by it, which it had designated as the vehicle by which the property would be held on its behalf. I therefore consider that the judge's finding that GRJL was a holding company, in the sense in which the phrase was plainly used by the committee, was fully supported by the evidence.

[56] All of Mr Graham's other complaints can subsumed, in my view, under the general enquiry whether the judge's conclusion that GRJL holds the property in trust for JGRA was justified on the material that was placed before her. The largely uncontested evidence which the judge accepted establishes the following. As early as August 1975, that is, four years before GRJL was formed and the property was acquired, at a meeting in which Mr Hobbins clearly played a leading role, the executive of the JGRA had discussed the possibility that, after repayment of the loan, dealers might allow any extra margin reverting to them through the JGRA "to remain at credit of the JGRA to help to provide a proper headquarters for the organization". However, at this time, it was clearly stated that "the cash flow from the 1c cess would be to the credit of the Association in trust for the dealers", and it was felt "that dealers would allow the amount to remain as their investment in the anticipated new headquarters" (minutes of the meeting of 10 August 1975). Accordingly, the surplus, which represented the excess funds remaining after repayment of the loan, was an aggregation of funds belonging to individual dealers. At a meeting of the managing committee of 24 March 1977, it was decided to pursue the unanimous resolution passed by members at the last annual general meeting of the JGRA to purchase new premises to accommodate the

association's activities.The precise terms of the resolution were not stated, but, in response to letters from "a number of members who wanted their full credit from the accumulation of the 1c paid to them", it was decided that they should be advised "that the decision of the Annual General Meeting was binding on all members". But at the subsequent meeting of the managing committee at which the decision was taken to form a holding company in connection with the purchase of the property, it was noted that members "will be duly informed of interest etc. and their equity in the property".

[57] So up to the date of this meeting (21 February 1979), it is clear that the question of individual dealers' 'interest' in the surplus was not fully settled. This lack of clarity was to some extent compounded by the fact (which Mr Graham was understandably anxious to bring to our attention) that, between 1987 and 1991, a total of 11 dealers were refunded their share of the surplus, "in lieu of shares in Gasolene Retailers Limited". But, in my view, this evidence takes the matter no further, bearing in mind that the claim in the action was that GRJL held the property in trust for JGRA. In other words, even if any of the dealers who had contributed to the surplus had asserted and were able to establish an interest in GRJL, this could not defeat JGRA's claim, which was a claim against the company itself. At all events, after 1991, for a period of 20 years up to the date of the filing of proceedings on 21 August 2001, the rest was silence. In my view, the absence of any claim on behalf of any of the dealers against either JGRA or GRJL over all this time is a powerful indication that, save for those dealers who came forward, asked for and received their money in the late 1980s and early 1990s, the rest were content to, as had long been proposed, leave their share of

the surplus in the hands of JGRA to enable it to acquire the property and further advance the work of the association.

[58] I think that it is in this sense that Mangatal J's repeated comment that "[n]o individual dealers have asserted any claim to the court seeking a declaration as to a resulting trust in their favour" must be understood. It is not, as Mr Graham complained, that the judge had reversed the burden of proof. Rather, she was simply considering whether, as a matter of probability, individual dealers who had asserted no claim for over 20 years, during which JGRA remained in continuous possession of the property acquired by using the surplus, had in fact gifted their share of the surplus to JGRA for that very purpose. Thus, as the judge said (at para. [118]):

> "…even if some dealers did receive refunds subsequently, and the vouchers referred to above were signed, that would mean that they had, albeit subsequently, relinquished any interest in the surplus of property bought from it. Further, there is no evidence as to any other dealers now claiming an interest by way of resulting trust. The evidence is that the majority of the funds came from the surplus which was held by the JGRA. It is not contested that there was a unanimous resolution passed by members that the surplus was to be used for the purchase of the property, which was for the purpose of use for expansion of the activities of, and as headquarters for the JGRA. It is permissible in law for individual dealers to have given a gift to an association to which they belong and which association is set up to secure benefits on their behalf. Indeed, it can be seen from the Minutes that it was considered by some that the JGRA had been instrumental in obtaining a significant benefit to the members. This they arguably did by securing the loan to provide proceeds from which service attendants could be paid their retroactive pay, and by negotiating for a cess to be granted by the Government from which repayment of this loan could occur. It is not inconceivable that gifts may have been bestowed in those circumstances."

[59] Finally, in relation to Mr Graham's belated submission that, before granting a declaration of rights in this case, the court was required to have regard to the rights of all persons who appear to have an interest in objecting to the grant of a declaration, it suffices, in my view, to repeat the point which I have already made (at para. [57] above): even on the hypothesis that there remained persons who wished to claim an interest in GRJL, the viability or otherwise of such claims could have no effect on the question whether JGRA is entitled to a declaration that GRJL holds the property in trust for it.

Conclusion

[60] These are my reasons for agreeing with the result announced by the court on 19 February 2015. After the result was announced, the question of the costs of the appeal next arose and, at Mr Graham's request, the parties were given time to make written submissions on the point. However, by letters dated 11 and 12 March 2015 respectively, both GRJL and JGRA declined to make any further submissions on costs. In these circumstances, I consider that costs must naturally follow the event and I would accordingly order that the costs of the appeal are to be JGRA's, to be agreed or taxed.

DUKHARAN JA

[61] I have read in draft the reasons for judgment of my brother Morrison JA and agree with his reasoning and conclusion. I have nothing to add.

SINCLAIR-HAYNES JA (Ag)

[62] I too have read the draft judgment of my brother Morrison JA . I agree with his reasoning and conclusion and have nothing to add.

[2015] JMCA Civ 23

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 120/2012

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE SINCLAIR-HAYNES (Ag)

BETWEEN GASOLINE RETAILERS OF JAMAICA LIMITED APPELLANT

AND JAMAICA GASOLINE RETAILERS ASSOCIATION RESPONDENT

John Graham and Miss Peta-Gaye Manderson instructed by John G Graham & Co for the appellant

Patrick Foster QC and Lancelot A Cowan instructed by Lancelot Cowan & Associates for the respondent

10, 11, 19 February and 27 March 2015

MORRISON JA

Introduction

[1] This appeal was heard on 10 and 11 February 2015. At the end of the hearing on the latter date, the court reserved its judgment until 19 February 2015, when it announced that the appeal would be dismissed for reasons to be given at a later date. These are my reasons for concurring in that decision.

[2] The appellant ('GRJL') is a limited liability company. It was incorporated on 29 June 1979. On 24 October 1979, GJRL became the registered owner of property known as Shop 5, King's Plaza, 38 Constant Spring Road, Kingston 10 in the parish of St Andrew ('the property'). The purchase price of the property was $260,000.00.

[3] The respondent ('the JGRA') is an unincorporated association registered under the Trade Union Act. The JGRA functions as an umbrella organisation representing the interests of members engaged in the business of gasoline retailers. Ever since the property was acquired in 1979, JGRA has had the Duplicate Certificate of Title (registered at Volume 1120 Folio 200) in its possession and has occupied the property as its head office.

[4] In or around the year 2001, a dispute arose between JGRA and GJRL regarding the beneficial ownership of the property. JGRA's claim was that GJRL holds the property in trust for the JGRA, while GJRL maintained that it holds the property in trust for certain individual members of the JGRA. On 10 July 2010, after a trial lasting over a period of six days, Mangatal J gave judgment for JGRA in the following terms:

> "(a) It is hereby declared that:
>
> (i) The Defendant Gasolene Retailers of Jamaica Limited, the registered owner, holds the property known as Shop No. 5, Kings Plaza, 38 Constant Spring Road, Kingston 10 in the Parish of Saint Andrew, being the land comprised in the Certificate of Title registered at Volume 1120 Folio 200 of the Register Book of Titles, in trust for the Claimant Jamaica Gasolene Retailers Association.
>
> (ii) The claimant Jamaica Gasolene Retailers Association is entitled to the entire beneficial interest

in the property known as Shop No. 5, Kings Plaza, 38 Constant Spring Road, Kingston 10 in the Parish of Saint Andrew, being the land comprised in the Certificate of Title registered at Volume 1120 Folio 200 of the Register Book of Titles.

(b) That, subject to the holding of Accounts and Enquiries, the Defendant is ordered to transfer the property known as Shop 5, Kings Plaza, registered at Volume 1120 Folio 200 of the Register Book of Titles to the Trustees of the Claimant at the date of judgment. The costs attendant on such transfer shall be borne by the Claimant.

(c) That should the Defendant fail, neglect and/or refuse to transfer the said property to the Trustees of the Claimant, the Registrar of the Supreme Court is empowered to execute all documents and do all things necessary to register the transfer of the property from the Defendant to the Claimant's said Trustees at the date of judgment.

(d) Accounts and Enquiries are to be held in Chambers on a Date to be fixed by the Registrar, with a view to perfecting the order for transfer of the legal interest in the property to Trustees of the Claimant at the date of judgment. In that regard, the Claimant is permitted to file and serve on the Defendant by the 31st of July 2012, evidence by way of an Affidavit attesting to, and attaching documentary proof, if any, as to whether there are currently Trustees of the Claimant, and if so, identifying these persons.

(e) Liberty to Apply.

(f) Costs of the trial to be the Claimant's to be taxed if not agreed.

(g) Costs of the hearing of the Accounts and Enquiries to be the Defendant's to be taxed if not agreed."

[5] This is GRJL's appeal from Mangatal J's judgment. In addition to disputing JGRA's capacity to bring the proceedings in the court below in its own name, GRJL also challenges a number of the learned judge's findings of fact.

Background

[6] The larger part of the background to the matter is not in dispute. In 1975, the Government of Jamaica granted a 5 cent per gallon increase in the price of gasoline. At that time it was agreed that, out of this 5 cent increase, 1 cent would be retained by the petroleum marketing companies and credited to the accounts of the individual members of the JGRA. The objective of this exercise was to create a fund for the repayment of a loan which had had to be taken out by the JGRA to enable its members to meet their obligations to make retroactive payments to service station attendants.

[7] In due course, the loan was paid off and surplus funds of the order of $230,000.00 ('the surplus') remained in the hands of JGRA. It is common ground that the surplus was an aggregation of funds belonging to members in their individual capacities and that the extent of each member's entitlement varied in accordance with the throughput of gasolene sales at their respective gas stations. The entire surplus was in due course applied by JGRA to the purchase price of the property. The balance of $30,000.00 due on the purchase price was supplied (as to approximately $21,000.00) by United Gasolene Retailers Ltd ('UGRL'), a connected company of JGRA, and by JGRA itself. It is also now common ground that, as the judge found (at para. [110] of her judgment), some members of JGRA "did receive a refund of their share of the surplus from the JGRA after the purchase of the property".

[8] The dispute between the parties surrounds the capacity in which the surplus was held by JGRA immediately before it was applied to the purchase price of the property.

JGRA's case was that its members had agreed that the surplus should inure to the benefit of JGRA for use in the purchase of property to function as its head office. GRJL on the other hand insisted that what was agreed was that the surplus would be retained by JGRA for the benefit of individual members.

The pleadings

[9] In its further amended statement of claim, JGRA, after stating the history described above, averred as follows (at paras 4-9):

> "4. At all times material the aforementioned loan was paid off, and a surplus of funds accrued to the Plaintiff. Thereafter, in 1976 and 1977, the Managing Committee of the Plaintiff proposed, and the Plaintiff's membership agreed, to use the surplus funds to purchase a property to meet the expanding needs of the Plaintiff.
>
> 5. At all times material, the Plaintiff through its managing committee was advised that a company was required to be formed as the Plaintiff lacked the legal capacity to purchase and/or hold real property in its own legal right.
>
> 6. That the Plaintiff will say that its membership of the day were [sic] never officially informed of the above referenced acquisition at any Annual General Meeting or any other forum of record.
>
> 7. Consequently, on or about June 29, 1979, the Defendant company was formed comprising of and drawing its directorship entirely from the then Managing Committee of the Plaintiff, namely:
>
> W.E. Clarke D. Hall A. Abrahams
>
> R. Chin A. Chuck A. McKenzie
>
> N. Bowen A. Hobbins D. Whittingham

> 8. That pursuant to the mandate of the Plaintiff through its Managing Committee of the day, and with the express intention of making a real estate acquisition on behalf of the Plaintiff, the defendant purchased and became owner of property at Kings Plaza registered at Volume 1120, Folio 200, on or about October 24, 1979.
>
> 9. That approximately $216,000.00 of the stated purchase price of $230,000.00 was provided by the Plaintiff from the aforesaid fund, to buy the said property.
>
> 10. That at all times material, from and since 1979, the Plaintiff, through its members, sought to have the Defendant company, through its members, give an account of and transfer to the assets of the Plaintiff, the said property at issue."

[10] In these circumstances, JGRA contended, GRJL held the surplus and the property "on trust for and on behalf of [JGRA] and its members". JGRA accordingly sought various reliefs, including a declaration to that effect.

[11] In its defence, GRJL maintained (at para. 3) that the surplus "accrued to and for the benefit of individual members of and not [JGRA]" and that "some and not all of the members agreed to purchase the said property". Further (at para. 7) "...that its purchase of [the property] was not made pursuant to the mandate of [JGRA] nor was the purchase made with the intention that the premises would have been acquired on behalf of [JGRA]".

The evidence

[12] The evidence at the trial was partly oral and partly documentary. Oral evidence was given on behalf of JGRA by Mr Hopeton Nembhard, who first became an active member of the association in 1979 and served as its president from 1988-1990; and Mr

Leonard Green, who became a member in 1996 and was the president in 2000-2001, during the period when the dispute first arose. On behalf of GRJL, oral evidence was given by Mr Aston Hobbins. Mr Hobbins had been a member of JGRA from 1959, a director since 1979 and served as president from 1986-1988.

[13] Neither Mr Nembhard nor Mr Green was a member of the JGRA during the critical period before the acquisition of the property and they both readily accepted that their understanding of the arrangements derived substantially from the minutes and other records of the JGRA (though Mr Green was able to say that UGRL was the "trading arm of the members of [JGRA]"). But, for what it was worth, they both strongly supported JGRA's case that, as Mr Nembhard put it in his witness statement (at para. 6), "[t]he membership of the [JGRA] agreed that the surplus funds would be and inure solely to the credit of the...association and not to each member in his individual capacity".

[14] Mr Hobbins gave a different account. Picking up the story from the point at which the JGRA loan was paid off, Mr Hobbins said this (at paras 7-10 of his witness statement):

> "7. The loan was paid off and there remained a surplus of funds which the Claimant held in trust for each individual member on the basis of his/her entitlement.
>
> 8. It was always agreed that the surplus was retained for the benefit of the individual members of the Claimant which members were beneficial owners of the surplus funds. The surplus was due to each member in his personal capacity.

9. The Claimant proposed to the members that the following options could be pursued by them in respect of their surplus from the cess:

(i) Those members who wished could contribute 50% of the surplus to a fund which monies were to be held by the Claimant to be used to purchase a building to be owned by those gasoline dealers who had opted to contribute to the purchase and the remaining 50% of the surplus would be paid over to them;

(ii) Those members who wished that their entitlement from the surplus funds should be paid over to them in full could request that it be paid in full and consequently, a number of dealers including Mr Vincent Chin exercised the option to take of all of his money and was paid in full. The majority of the members were paid half of the surplus and the other was kept by the Claimant to be contributed to the purchase of Shop No. 5, King's Plaza in the parish Saint Andrew.

10. Mr Vincent Chin did not lose his membership in the association because of his decision to take his contribution from the surplus funds. In fact, after Mr Vincent Chin received his full share of the surplus funds he subsequently became president of the association in 1982 and served in that capacity for two (2) years."

[15] The documentary evidence was primarily comprised in an agreed bundle of documents, consisting of (i) the Constitution of the JGRA; (ii) minutes of selected meetings of the executive and managing committees of the JGRA between 1975 and 1979; (iii) copies of the Duplicate Certificate of Title to the property; (iv) the Certificate of Incorporation of GRJL; (v) the record of the shareholding in GRJL as at 22 November 2004; (vi) a letter dated 25 July 2001 from GRJL to JGRA; (vii) a listing, certified by GRJL's auditors, of "proposed refunds to certain dealers"; and (viii) receipts evidencing

payments made by JGRA to 11 dealers, between 1987 and 1991, of sums described as having been received "in lieu of shares" in GRJL. For present purposes, it is not necessary to make any further mention of items (i) and (iii).

The minutes

[16] Given the conflict in the evidence given by Messrs Green and Nembhard on the one hand and Mr Hobbins on the other, it is hardly surprising that Mangatal J should have chosen to pay close attention to the minutes. The first set was the minutes of an emergency meeting of the executive committee of the JGRA held on 10 August 1975. Present were Messrs H.S. Morais, A.D. Hobbins, Basil Watson, Vincent Chin, Bunny Myers, Richard Chin, Winston Clarke and C.T. Lewis. It is clear that at this time the arrangements for the retention of an amount out of the 5 cent per gallon increase to meet retroactive wage payments had not yet been fully settled, since the minutes record the purpose of the meeting as being to decide "how details of the retroactive pay to gas station attendants should be administered...and what portion of the increased margin on petroleum products should be applied to retroactive pay". The relevant extract from the minutes reads as follows:

> "Mr Hobbins explained the back-ground of the negotiations and advised that Government was willing to allow J.G.R.A. to be the custodian of the funds for the retroactive pay and that those funds would be provided by a bank on the undertaking that the Oil Companies would pay regularly to the JGRA the returns resulting from a 1¢ per gallon on the price of bulk products.
>
> The JGRA would transmit those amounts, to the bank to defray the loan.

> This 1¢ per gallon would be made available not, only until the debt was completely met but until a new price structure was declared by Government.
>
> When the loan was repaid the extra margin would revert to the dealers through the JGRA. It was felt that perhaps dealers would allow this amount to remain at credit of the JGRA to help to provide a proper headquarters for the organization. The loan, he thought, would take about 13 months to be repaid.
>
> The meeting was advised that the anticipated increase in the price of gasoline and gas oil was 6¢ per gallon. Of this 1¢ would be a provision to meet increases to the tanker drivers; 1¢ per gallon as stated before would be to meet retroactive pay to gas station attendants. 4¢ would be increased margin to the dealer from which he would be expected to meet the new pay rates as soon as the increase in price became effective.
>
> ...
>
> When the loan is repaid and until there is a new price structure or arrangement with Unions, the cash flow from the 1¢ cess would be to the credit of the Association in trust for the dealers. It was felt that out of this a sizeable reserve could be built up and that dealers would allow the amount to remain as their investment in the anticipated new headquarters."

[17] Next were the minutes of the meeting of the managing committee held on 3 February 1977.At that meeting, there was an inconclusive discussion "over the resolution passed at the last Convention, authorising purchase of new premises to facilitate the expansion of UGR Ltd".

[18] Then there was the meeting of the managing committee held on 24 March 1977. With Mr Hobbins again in attendance, the following was recorded as having taken place:

"Purchase of Property:

A wide ranging discussion took place on whether or not the mandate through a unanimously passed resolution at the last Annual General Meeting, to purchase new premises to accommodate further development of our activities, should be pursued. The final decision was in the affirmative.

According to Messrs. Watson and Hobbins, even if there were cut-backs in imports, as good businessmen we should be able to devise alternatives to make up for losses in certain directions.

The purchase of new property should therefore be pursued. The premises on Beechwood Avenue offered by Daly & Campbell should be evaluated possibly by Mr. Finson and bargained for at a much lower price than that asked…

Donald Rigg – Bog Walk

This dealer complained that since he did not take any money for retroactive payment but met the bill of approximately $600 from his own funds, the full 50% of his credit should not be retained, nor should he pay any interest on the bank loan. It was agreed that the contention was reasonable and that the adjustment should be made in favour of Mr. Rigg.

Other applicants for full refund:

Letters were read from a number of members who wanted their full credit from the accumulation from the 1 c paid to them.

Decision:

They should be advised that the decision of the Annual General Meeting was binding on all members and that a marked copy of Rule 9 section 7 of our Constitution sent them."

[19] By the time of the meeting of the managing committee on 21 February 1979, the property had obviously been identified and, as the minutes show, the JGRA was already committed to its purchase:

> "Purchase of Property at King's Plaza:
>
> The Secretary reported that a deposit of $25,000.00 was made to Clinton Hart & Co. in connection with the purchase of premises at Kings Plaza. The present bank accumulation is $216,323.42.
>
> Mr. Abrahams suggested that the Association employ the services of another lawyer to conclude transaction. He recommended Messrs. Judah, Desnoes, Lake, Nunes, Scholefield & Co. This was agreed.
>
> A Holding Company is to be formed. Members will be duly informed of interest etc. and their equity in the property."

[20] Under the rubric, 'Purchase of premises at Kings Plaza', the minutes of the meeting of the managing committee of 8 August 1979 recorded the following:

> "(i) The causative factors which contributed to some dealers being in debt should be investigated and where necessary they should be relieved of the debt, e.g. Mr. Emile Josephs.
>
> (ii) A letter was received from Mr. Frankie Lewis requesting the payment of his accumulated credit as he had given up his gas station.
>
> DECISION:
>
> Transfer accumulated sum from Mr. Lewis' account to Mr. Reggie Chin's account. Mr. Chin would in turn pay over to Mr Lewis the full amount of his credit.
>
> (iii) In respect of the covenant of sale which was being asked for by Clinton Hart & Co. letters were exchanged resulting in assurance from Judah, Desnoes, Lake, Nunes & Scholefield to the effect the condition being required was innocuous and could not be enforced by law.
>
> Subject to change at the next Annual General Meeting, the following members were selected as Directors of the Gasolene Retailers of Jamaica Limited:

> Messrs; Winston Clarke, Dudley Hall, Andrew Abrahams; Norman Bowen; A. McKenzie; Reggie Chin; Astley Chuck; A.D. Hobbins; Desi Whittingham; and C.T. Lewis, Secretary."

[21] And lastly, in the minutes of the meeting of the managing committee held on 19 December 1979, under the heading "Kings Plaza: New Premises", the following was recorded:

> "...the title to the property was in our possession, the U.G.R. Limited had advanced the necessary amount to complete payment, there was an official handing over ceremony and that the formation of the holding company 'Gasolene Retailers of Jamaica' was accomplished. It was decided that a meeting of the sub-committee should be held early in the New Year to plan for the orderly transfer of operations to the new site."

The record of shareholders and directors of GRJL

[22] The two shareholders of GRJL shown in the records of the Registrar of Companies as of 22 November 2004 were Messrs Raymond Clough and Ian Don, each holding a single share. It is common ground that neither of these gentlemen, who were at the material time members of the firm of lawyers which had seen to the incorporation of GRJL, had any beneficial interest in the company. As at the same date, the directors were Messrs Winston E Clarke, Dudley Hall, Andrew Abrahams, Reginald Chin, Albert McKenzie, Norman Bowen, Aston D Hobbins and Desi Whittingham.

GRJL's letter of 25 July 2001

[23] Even if not the last straw (which Mr Green said it was not), this letter was obviously one of the things which crystallised the dispute between GRJL and JGRA:

> "**RE: NOTICE OF MEETING**
>
> We hereby advise you that Gasolene Retailers of Jamaica Limited ("**the Company**") will hold a meeting of present and former gasoline retailers who contributed to the purchase of property at Kings Plaza, Constant Spring Road, Kingston 10 on **Wednesday, August 22, 2001 at the Hotel Four Seasons, 18 Ruthven Road, Kingston 10, commencing at 2:00p.m**.
>
> At a meeting of the Contributors held on June 20, 2001, the decision was taken to ask the Company's Attorneys to prepare a Document giving details regarding a proposal made at the meeting to issue Debentures to the Contributors. We therefore enclose an Explanatory Memorandum, which we are sure you will find informative.
>
> We ask that you give consideration to this document and send **a duly appointed representative** to attend the meeting prepared to discuss it and take decisions on the proposals outlined therein.
>
> Yours truly
> GASOLENE RETAILERS OF JAMAICA LTD.
>
> Winston E. Clarke
> Chairman"
> (emphasis as in the original)

[24] Mr Green's evidence was that he was "outraged" by this letter and that he subsequently told its author, Mr Winston Clarke, that the meeting "should not be held based on content [sic] of letter". As it turned out, the proposed meeting was never held.

The auditors' list

[25] Under the heading, 'Gasolene Retailers of Jamaica one cent (1c) retroactive investment', this list showed the names of a total of 100 gasolene retailers, with varying amounts beside their names. Written and dated notations beside the names of 10 of them indicated that the balances shown had been paid.

The receipts

[26] As I have indicated, there were also 11 receipts, signed by various persons (not all of whose names appear to match the names on the auditors' list). The makers of these receipts, which bear dates between 1987 and 1991, acknowledged payment by JGRA in the following terms:

> "This sum is received in lieu of shares in Gasolene Retailers of Jamaica and I hereby transfer all my interest in the said Gasolene Retailers of Jamaica Limited to the Jamaica Gasolene Retailers Association."

[27] When shown these documents in cross-examination at the trial, Mr Green's response was that he had never seen them before.

[28] Finally, further documentary evidence in the form of the memorandum and articles of association of GRJL was also provided to the judge.

The judge's findings

[29] At the outset, in response to a late challenge to JGRA's capacity to maintain the action, Mangatal J held, in reliance on the well-known decision of the House of Lords in **The Taff Vale Railway Co. v Amalgamated Society of Railway Servants** [1901] AC 426, that a trade union registered under the Trade Union Act ('the Act') was fully empowered to sue and be sued in its own name. Then, turning to the substantive issues in the case, the learned judge, despite lamenting what she described (at para. [95]) as "a cluster of evidential gaps" in the case, felt able to find that –

> (1) GRJL was a "holding company", in the sense that the funds used to purchase the property were provided by a person other than itself, that is, JGRA (para. [100]).
>
> (2) All the directors of GRJL "were drawn from, and represented a large sub-set of the membership of JGRA's Managing Committee at the relevant time" (para. [105]).
>
> (3) The fact that there is no specific object in the memorandum of association of GRJL relating to the holding of property on behalf of JGRA, "does not water down or take away from the express unchallenged evidence as represented in the Minutes...wherein it is stated that this was the purpose" (para. [120]).

(4) The fact that article 28(a)(iii) of the articles of association of GRJL permits the free transfer of shares in the company to a person "who is a member of [UGRL]", does not mean that the articles were "so drafted on the specific instructions of the JGRA, as opposed to instructions simply to form a company where there would be allowance for free transfer amongst related parties" (para. [120]).

(5) UGRL was "a sort of trading arm of the JGRA", and therefore the sum paid by UGRL towards the purchase price of the property "would point more in the JGRA's favour than GRJ Ltd" (para. [103]).

(6) The majority of the purchase price came from the surplus which was held by JGRA (para. [118]).

(7) Although some dealers did receive refunds of their share of the surplus after the property was acquired, "there is no evidence as to any other dealers now claiming an interest [in the property] by way of resulting trust" (para. [118]).

(8) It was not contested that "there was a unanimous resolution passed by members that the surplus was to be used for the purchase the property, which was for the purpose of use for expansion of the activities of, and as headquarters for, the JGRA" (para. [118]).

[30] In the result, the learned judge concluded that GRJL holds the property on a resulting trust for JGRA and accordingly, as has been seen, made the declaration sought to this effect. However, the judge considered it necessary to grant JGRA's application to amend the statement of claim to add the trustees of JGRA as the persons to take a transfer of the property from GRJL.

The appeal

[31] The grounds of GRJL's appeal and the submissions in support of them may be summarised as follows:

(1) The judge erred in (a) holding that JGRA was competent to bring the claim in its own name; and (b) allowing the amendment of the statement of claim to allow a transfer of the property to trustees on behalf of JGRA.

(2) The judge erred in finding that (a) UGRL was the trading arm of JGRA; and (b) GRJL was a holding company. There was no documentary evidence to support the first finding, nor was either finding supported by the memorandum and articles of association of GRJL.

(3) The judge erred in preferring the evidence of Messrs Green and Nembhard, neither of whom was active in the JGRA at the material time, over that of Mr Hobbins, who had been an active member since 1959 and was also present when the decision to purchase the property was made.

(4) The judge erred in taking into account irrelevant matters, i.e., that JGRA had been in possession of both the certificate of title and the property since its acquisition.

(5) The judge erred in reversing the burden of proof and/or drawing an adverse inference from the fact that Mr Hobbins was the only witness called to give evidence for GRJL. In particular, the judge erred in attributing significance to the fact that no individual member had come forward to claim an interest in the surplus, given that it was JGRA's duty to prove its case.

(6) The judge's conclusion that GRJL holds the property in trust for JGRA was not open to her on the pleadings, neither was it supported by the evidence, given the fact that GRJL is the registered owner of the property and JGRA's allegation that it was gifted to it by the entire membership of association was not supported by the minutes which were in evidence.

[32] Mr Graham supplemented these contentions with a submission which had not been previously foreshadowed in either the grounds of appeal or the skeleton arguments. Basing himself on, among other things, a passage from The Declaratory Judgment (by The Rt Hon. The Lord Woolf and Jeremy Woolf, para. 6-01-6-02), Mr Graham submitted that, in considering whether or not to make a declaration of rights in a particular case, the court should have regard to the rights of all persons who appear to have an interest in objecting to the grant of a declaration. In this case, such persons would include all those whose earnings contributed to the surplus in the first place, as well as UGRL.

[33] Mr Foster QC's response to these submissions was to the following effect. Firstly, section 9 of the Act and subsequent judicial decisions make it clear that a registered trade union, such as the JGRA, is fully entitled to sue and be sued in its own name. Secondly, the judge's grant of permission to amend the statement of claim to enable a transfer of the property to trustees was a matter entirely within her discretion, given that rule 20.4(2) of the Civil Procedure Rules 2002 ('the CPR') empowers the court to grant amendments to the statement of case after the case management conference. In any event, it was submitted, there was no prejudice to either party in this case, since they were both given the opportunity to make further submissions as a result of the amendment. For this submission, reliance was placed on the decision at first instance of Neuberger J (as he then was) in **Charlesworth v Relay Roads Ltd and Others** [2000] 1 WLR 230. And thirdly, in respect of each of the matters complained of by Mr Graham, there was ample evidence before the judge to support the conclusions which she had reached. Therefore, in accordance with long established principle (as reflected in, for example, the decision of this court in **Cablemax Ltd and others v Logic One Ltd** [2012] JMCA Civ 14), an appellate court should be very reluctant to interfere with the trial judge's findings of fact. In addition to having had the opportunity of seeing and assessing the witnesses on both sides, the judge had had the benefit of the documentary evidence, in particular the minutes, which also provided an ample basis for her decision.

[34] These submissions give rise to three broad issues: (a) whether JGRA can sue and be sued in its own name; (b) whether the judge erred in permitting JGRA to amend the statement of claim; and (c) whether the judge's conclusions were justified by the pleadings and the evidence.

JGRA's capacity to sue

[35] Insofar as is material, section 9 of the Act provides as follows:

> "The trustees of any trade union registered under this Act, or any other officer of such trade union who may be authorized so to do by the rules thereof, are hereby empowered to bring or defend, or cause to be brought or defended, any action, suit, prosecution, or complaint in any court of law or equity, touching or concerning the property, right or claim to property of the trade union;..."

[36] By its terms, this section appears to authorise only the trustees or any other authorised officer of a trade union to bring and defend actions in matters touching or concerning the property, or any right or claim to the property, of the trade union. But as long ago as 1901, in the **Taff Vale Railway Co** case, the House of Lords had decided unanimously that, as a matter of clear implication from the terms of the equivalent section of the English Trade Union Act, a registered trade union was empowered to sue and be sued in its own name. Lord Brampton put it as follows (at page 442):

> "I think that a legal entity was created under the Trade Union Act, 1871, by the registration of the society in its present name in the manner prescribed, and that the legal

> entity so created, though not perhaps in the strict sense a corporation, is nevertheless a newly created corporate body created by statute, distinct from the unincorporated trade union, consisting of many thousands of separate individuals, which no longer exists under any other name. The very omission from the statute of any provision authorizing and directing that it shall sue and be sued in any other name than that given to it by its registration appears to me to lead to no other reasonable conclusion that that in so creating it, it was intended by the Legislature that by that name and by no other it should be known, and that for all purposes that name should be used and applied to it in all legal proceedings unless there was any other provision which militated against such a construction, as, for instance, in the case of trustees, by s. 9 of the same Act, who hold real and personal property of the society."

(To similar effect, see also **Bonsor v Musicians Union** [1955] 3 All ER 518, **Keys and others v Butler** [1971] 1 QB 300 and **Caesar v The British Guiana Mine Workers Union** (1959) 1 WIR 232)

[37] Mangatal J's conclusion that, as a registered trade union, JGRA had the capacity to sue and be sued in its own name is therefore fully supported by the authorities. In my view, no reason has been shown to disturb it.

The amendment

[38] As originally filed, the statement of claim sought orders that GRJL or, in default of it doing so, the Registrar of the Supreme Court on its behalf, should transfer the property to JGRL. However, section 8 of the Act provides that all real or personal estate belonging to a registered trade union "shall be vested in the trustees for the time being of the trade union appointed as provided by this Act, for the use and benefit of such

trade union and the members thereof". Mangatal J therefore considered (at para. [58]) that, "because the legal ownership cannot be vested in the JGRA, paragraphs 4 and 5 which seek a transfer of the legal ownership would have to be amended to have the property placed in the names of the only persons empowered under law to hold property on behalf of the union, and that is the trustees" (emphasis in the original). Accordingly, in order to achieve this, the learned judge granted JGRA'a application for permission to further amend the statement of claim, with liberty to apply. In addition, she also indicated (at para. [122]) that JGRA should bear the costs occasioned by any further hearing that the amendment might necessitate.

[39] Rule 20.4(2) of the CPR states that "[s]tatements of case may only be amended after a case management conference with the permission of the court". In **Charlesworth v Relay Roads Ltd and Others**, speaking to the two competing factors which can be said to arise where permission is sought to amend a pleading or to call further evidence, Neuberger J said this (at page 235):

> "The first factor is that it is desirable that every point which a party reasonably wants to put forward in the proceedings is aired; a party prevented from advancing evidence and/or argument on a point, other than a hopeless one, will understandably feel that an injustice has been perpetrated on him, at least if he loses and has reason to believe that he may have won if he had been allowed to plead, call evidence on, and/or argue the point. Particularly where the other party can be compensated in costs for any damage suffered as a result of a late application being granted, there is obviously a powerful case to be made out that justice indicates that the amendment should be permitted."

[40] Neuberger J also made called attention to the nineteenth century case of **Clarapede & Co. v Commercial Union Association** (1883) 32 WR 262, 263, in which Brett MR had observed that –

> "…however negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs..."

[41] When a party seeks permission to amend a pleading, therefore, the critical consideration for the court is the overall justice of the case. If it is possible to allow the amendment without prejudice to the other side, then the court will generally lean in favour of granting it, bearing in mind the obvious desirability of all matters in controversy between the parties being brought forward and adjudicated in the same proceedings. But, even where there is a possiblity of prejudice to the other side, the court will if at all possible seek to address this by way of an order for costs, or by some other means. Ultimately, these are matters for the court's discretion, the exercise of which will not lightly be interfered with by this court (**Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, especially paras [19]-[20]).

[42] In considering whether to grant the proposed amendment in this case, Mangatal J took the view (at para. [58]) that, by granting it, "the Court would simply be perfecting the legal form that would follow from a substantive resolution and determination as to the beneficial entitilement made in JGRA's favour". In my respectful view, the learned judge's decision to grant the amendment is unassailable, both in principle and on the facts of this case. Although this was obviously a matter which

ought to have attracted the attention of JGRA's legal advisors from the start of the litigation, the question of who should take a transfer of the property in the event that the claim succeeded was plainly a purely consequential one, having no bearing on the real substance of the case. It is difficult to imagine what possible prejudice could have been caused to GRJL by the grant of the amendment (and none was put forward on its behalf, even before this court). But, it seems to me, even if there was any such prejudice, the judge's grant to GRJL of liberty to apply, together with the costs of any further hearing that might arise from that order, was a perfectly reasonable exercise of her discretion. Accordingly, I do not think that this court should interfere with it.

Were the judge's conclusions justified by the pleadings/evidence?

[43] First, I will start with Mr Graham's pleading point (taken, as far as I can make out, for the first time in this court and unsupported by any ground of appeal). As I understood it, the basis of Mr Graham's complaint was that paragraph 4 of the further amended statement of claim (see para. [9] above) put JGRA's case on the footing that, (i) after the loan was paid off, "a surplus of funds accrued to [JGRA]"; and (ii) JGRA's membership then agreed "to use the surplus funds to acquire a property to meet [its] expanding needs". This pleading was misleading, it was submitted, given that it made no mention of the rights of the individual dealers, of whom JGRA was aware, whose funds had fed the surplus.

[44] It is true that as the case evolved JGRA's case in fact moved somewhat closer to the reservation expressed by GRJL (in paragraph 3 of the defence) as regards paragraph 4 of the statement of claim, which was that "the surplus accrued to and for the benefit of individual members... and not [JGRA]..." For, once witness statements were exchanged, it became clear that the true tension in the case was between Messrs Green and Nembhard, on one side, who stated that the members "agreed that the surplus funds would...inure solely to the credit of [JGRA] and not to each member in his individual capacity"; and Mr Hobbins, on the other, who insisted that "[i]t was always agreed that the surplus was retained for the benefit of the individual members of [JGRA] which members [sic] were the beneficial owners of the surplus...due to each member in his personal capacity".

[45] This is therefore a case in which the pleadings were supplemented and expanded by the witness statements and by the actual evidence given by the witnesses on both sides. Thereafter, the case proceeded on a basis obviously understood by both parties, the notes of evidence revealing very few objections from either side to the evidence being given by the witnesses. And, of course, there was also an agreed bundle of documents, which further served to delineate the precise area of dispute between the parties, so much so that the learned judge, despite her lament about gaps in the evidence, was able to arrive at a decision substantially based on the minutes.

[46] In **McPhilemy v Times Newspapers Ltd and others** [1999] 3 All ER 775, a case decided shortly after the Civil Procedure Rules came into effect in England in 1998, Lord Woolf MR, the acknowledged chief architect of the new rules, said this (at pages 792-3):

> "The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules."

[47] Those observations were cited with approval by the House of Lords in **Three Rivers District Council and others v Bank of England (No. 3)** [2001] 2 All ER 513 (per Lord Hope at para [50]); and, as the learned editors of Blackstone's Civil Practice 2012 observe (at para 8.21), "…it is clear from the comments of Lord Woolf MR in *McPhilemy v Times Newspapers Ltd*…that contests over the terms of statements of case are to be avoided".

[48] While pleadings therefore remain important to make clear the general nature of the case which the other side should expect to meet, the further documents in the case, such as witness statements and agreed documents, can supplement the pleadings in appropriate cases. In this case, it seems to me that the true issues in the case were at the end of the day clear and GRJL was in no way disadvantaged by any imprecision that there might have been in JGRA's statement of claim. I would therefore decline Mr Graham's invitation to decide this case on a pleading point taken for the first time on appeal. (See also **State Government Insurance Commission v Sharpe** (1996) 126 FCR 341, 344, a decision of the Supreme Court of South Australia (Full Court), in which Millhouse J observed that "[t]he day has well passed when decisions are based on the state of the pleadings, irrespective of the facts or justice".)

[49] Turning now to the actual evidence, Mr Foster relied on, among other things,the decision of this court in **Cablemax Ltd et al v Logic One Ltd**, in which McIntosh JA, in explaining the court's reluctance to disturb a trial judge's findings of facts on appeal, referred to an extract from the judgment of Lord Thankerton in the oft-cited case of **Watt (or Thomas) v Thomas**[1947] 1 All ER 582, 587:

> "I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus:—
>
> I. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and

> heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.
>
> II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
>
> III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.
>
> It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question."

[50] More recently, the role of an appeal court when reviewing findings of fact by a trial judge was extensively reviewed by the Privy Council in **Beacon Insurance Company Ltd v Maharaj Bookstore Ltd** [2014] UKPC 21, paras 11-18, a decision on appeal from the Court of Appeal of Trinidad and Tobago. After referring to a number of the leading authorities on the point (including **Watt v Thomas**), Lord Hodge, speaking for the Board, said this (at para. 17):

> "Where a judge draws inferences from his findings of primary fact which have been dependent on his assessment of the credibility or reliability of witnesses, who have given oral evidence, and of the weight to be attached to their evidence, an appellate court may have to be similarly cautious in its approach to his findings of such secondary facts and his evaluation of the evidence as a whole. *In re B (a Child)* (above) Lord Neuberger at para 60 acknowledged that the advantages that a trial judge has over an appellate court in matters of evaluation will vary from case to case. The form, oral or written, of the evidence which formed the basis on which the trial judge made findings of primary fact

> and whether that evidence was disputed are important variables. As Lord Bridge of Harwich stated in *Whitehouse v Jordan* [1981] 1 WLR 246, 269-270:
>
> > '[T]he importance of the part played by those advantages in assisting the judge to any particular conclusion of fact varies through a wide spectrum from, at one end, a straight conflict of primary fact between witnesses, where credibility is crucial and the appellate court can hardly ever interfere, to, at the other end, an inference from undisputed primary facts, where the appellate court is in just as good a position as the trial judge to make the decision.'
>
> ...Where the honesty of a witness is a central issue in the case, one is close to the former end of the spectrum as the advantage which the trial judge has had in assessing the credibility and reliability of oral evidence is not available to the appellate court. Where a trial judge is able to make his findings of fact based entirely or almost entirely on undisputed documents, one will be close to the latter end of the spectrum."

[51] So cases in which the appellate court is asked to review a trial judge's findings of fact may fall into two distinct categories. In the first are those cases in which the trial judge's conclusions were based on her assessment of the credibility and reliability of oral evidence, while in the second are those cases in which her conclusions were based on inferences drawn by her from undisputed documentary or other evidence. In the first category of case, the appellate court will only interfere if it is satisfied that it is clear that the trial judge did not taken proper advantage of having seen or heard the witnesses and was plainly wrong. However, in the second category of case, the judge's advantage of having seen the witnesses will usually be significantly diminished, thus

leaving the appellate court in as good a position as the judge to review the undisputed material.

[52] In my view, the instant case more readily falls within the second, rather than the first, category. It is true that Messrs Green and Nembhard gave oral evidence which was, on the face of it, in direct contradiction to Mr Hobbins' evidence. But it is clear, as Messrs Green and Nembhard admitted, that their account of the facts on the critical issues in the case was almost entirely based on their reading of the minutes of meetings at which they were not in attendance. So, in relation to the greater part of their evidence, it seems to me, this court is as well placed as Mangatal J was to determine whether the inferences which she drew from the minutes were ones which she could reasonably draw in the circumstances. In relation to Mr Hobbins' evidence, however, I think that the situation must to some extent be different, since he was himself present at some of the relevant meetings. Accordingly, such assessment as the judge felt able to make of his credibility must naturally attract the usual deference due to a trial judge in such circumstances.

[53] Mr Graham first complained that the judge was wrong in concluding that UGRL was "a sort of trading arm of the JGRA". For this finding, the judge relied on Mr Green's evidence under cross-examination. The only other references to UGRL in the case came from Mr Hobbins. In his witness statement, he said that he had been involved with UGRL "since its formation in 1967 up until 1994"; and, under cross-examination, he described UGRL as "an associated company" of JGRA, "who were [sic] in the business of selling Automotive car care products, batteries and accessories". Far from

contradicting Mr Green's characterisation of UGRL as JGRA's trading arm, therefore, Mr Hobbins' evidence was entirely consistent with it. Accordingly, it seems to me that the judge was fully entitled to accept Mr Green's evidence as to UGRL's status.

[54] Next, Mr Graham complained that the judge erred in her finding that GRJL was a "holding company". For this finding, the judge relied on the minutes of the meetings of the managing committee of JGRA held on 21 February, 8 August and 19 December 1979 (see paras [16]-[21] above). These minutes show that, at the first of these meetings, the committee, having received a report on the progress of the purchase of the property, decided that "[a] holding company is to be formed". At the second of these meetings, GRJL having been incorporated in June 1979, the committee selected 10 persons (eight of whom were actually present at that meeting) to serve as directors of GRJL, but noted that this was "[s]ubject to change at the next annual General Meeting". As late as 2004, the directors on record of GRJL remained substantially unchanged. And, at the third of these meetings, the property having by this time already been transferred to GRJL, the committee received a report that "the formation of the holding company 'Gasoline Retailers of Jamaica' was accomplished".

[55] In its ordinary commercial usage, the phrase 'holding company' is usually apt to describe "a corporation that owns enough voting stock in another corporation to influence its board of directors and therefore control its policies and management" (Barron's Dictionary of Finance and Investment Terms, 4th edn, page 242). But in this case, it seems clear from the undisputed evidence that the managing committee,

having been advised that JGRA could not itself take a transfer of the property, used the phrase to denote the company, owned and controlled by it, which it had designated as the vehicle by which the property would be held on its behalf. I therefore consider that the judge's finding that GRJL was a holding company, in the sense in which the phrase was plainly used by the committee, was fully supported by the evidence.

[56] All of Mr Graham's other complaints can subsumed, in my view, under the general enquiry whether the judge's conclusion that GRJL holds the property in trust for JGRA was justified on the material that was placed before her. The largely uncontested evidence which the judge accepted establishes the following. As early as August 1975, that is, four years before GRJL was formed and the property was acquired, at a meeting in which Mr Hobbins clearly played a leading role, the executive of the JGRA had discussed the possibility that, after repayment of the loan, dealers might allow any extra margin reverting to them through the JGRA "to remain at credit of the JGRA to help to provide a proper headquarters for the organization". However, at this time, it was clearly stated that "the cash flow from the 1c cess would be to the credit of the Association in trust for the dealers", and it was felt "that dealers would allow the amount to remain as their investment in the anticipated new headquarters" (minutes of the meeting of 10 August 1975). Accordingly, the surplus, which represented the excess funds remaining after repayment of the loan, was an aggregation of funds belonging to individual dealers. At a meeting of the managing committee of 24 March 1977, it was decided to pursue the unanimous resolution passed by members at the last annual general meeting of the JGRA to purchase new premises to accommodate the

association's activities.The precise terms of the resolution were not stated, but, in response to letters from "a number of members who wanted their full credit from the accumulation of the 1c paid to them", it was decided that they should be advised "that the decision of the Annual General Meeting was binding on all members". But at the subsequent meeting of the managing committee at which the decision was taken to form a holding company in connection with the purchase of the property, it was noted that members "will be duly informed of interest etc. and their equity in the property".

[57] So up to the date of this meeting (21 February 1979), it is clear that the question of individual dealers' 'interest' in the surplus was not fully settled. This lack of clarity was to some extent compounded by the fact (which Mr Graham was understandably anxious to bring to our attention) that, between 1987 and 1991, a total of 11 dealers were refunded their share of the surplus, "in lieu of shares in Gasolene Retailers Limited". But, in my view, this evidence takes the matter no further, bearing in mind that the claim in the action was that GRJL held the property in trust for JGRA. In other words, even if any of the dealers who had contributed to the surplus had asserted and were able to establish an interest in GRJL, this could not defeat JGRA's claim, which was a claim against the company itself. At all events, after 1991, for a period of 20 years up to the date of the filing of proceedings on 21 August 2001, the rest was silence. In my view, the absence of any claim on behalf of any of the dealers against either JGRA or GRJL over all this time is a powerful indication that, save for those dealers who came forward, asked for and received their money in the late 1980s and early 1990s, the rest were content to, as had long been proposed, leave their share of

the surplus in the hands of JGRA to enable it to acquire the property and further advance the work of the association.

[58] I think that it is in this sense that Mangatal J's repeated comment that "[n]o individual dealers have asserted any claim to the court seeking a declaration as to a resulting trust in their favour" must be understood. It is not, as Mr Graham complained, that the judge had reversed the burden of proof. Rather, she was simply considering whether, as a matter of probability, individual dealers who had asserted no claim for over 20 years, during which JGRA remained in continuous possession of the property acquired by using the surplus, had in fact gifted their share of the surplus to JGRA for that very purpose. Thus, as the judge said (at para. [118]):

> "…even if some dealers did receive refunds subsequently, and the vouchers referred to above were signed, that would mean that they had, albeit subsequently, relinquished any interest in the surplus of property bought from it. Further, there is no evidence as to any other dealers now claiming an interest by way of resulting trust. The evidence is that the majority of the funds came from the surplus which was held by the JGRA. It is not contested that there was a unanimous resolution passed by members that the surplus was to be used for the purchase of the property, which was for the purpose of use for expansion of the activities of, and as headquarters for the JGRA. It is permissible in law for individual dealers to have given a gift to an association to which they belong and which association is set up to secure benefits on their behalf. Indeed, it can be seen from the Minutes that it was considered by some that the JGRA had been instrumental in obtaining a significant benefit to the members. This they arguably did by securing the loan to provide proceeds from which service attendants could be paid their retroactive pay, and by negotiating for a cess to be granted by the Government from which repayment of this loan could occur. It is not inconceivable that gifts may have been bestowed in those circumstances."

[59] Finally, in relation to Mr Graham's belated submission that, before granting a declaration of rights in this case, the court was required to have regard to the rights of all persons who appear to have an interest in objecting to the grant of a declaration, it suffices, in my view, to repeat the point which I have already made (at para. [57] above): even on the hypothesis that there remained persons who wished to claim an interest in GRJL, the viability or otherwise of such claims could have no effect on the question whether JGRA is entitled to a declaration that GRJL holds the property in trust for it.

Conclusion

[60] These are my reasons for agreeing with the result announced by the court on 19 February 2015. After the result was announced, the question of the costs of the appeal next arose and, at Mr Graham's request, the parties were given time to make written submissions on the point. However, by letters dated 11 and 12 March 2015 respectively, both GRJL and JGRA declined to make any further submissions on costs. In these circumstances, I consider that costs must naturally follow the event and I would accordingly order that the costs of the appeal are to be JGRA's, to be agreed or taxed.

DUKHARAN JA

[61] I have read in draft the reasons for judgment of my brother Morrison JA and agree with his reasoning and conclusion. I have nothing to add.

SINCLAIR-HAYNES JA (Ag)

[62] I too have read the draft judgment of my brother Morrison JA . I agree with his reasoning and conclusion and have nothing to add.

[2015] JMCA Civ 23

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 120/2012

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE SINCLAIR-HAYNES (Ag)

BETWEEN GASOLINE RETAILERS OF JAMAICA LIMITED APPELLANT

AND JAMAICA GASOLINE RETAILERS ASSOCIATION RESPONDENT

John Graham and Miss Peta-Gaye Manderson instructed by John G Graham & Co for the appellant

Patrick Foster QC and Lancelot A Cowan instructed by Lancelot Cowan & Associates for the respondent

10, 11, 19 February and 27 March 2015

MORRISON JA

Introduction

[1] This appeal was heard on 10 and 11 February 2015. At the end of the hearing on the latter date, the court reserved its judgment until 19 February 2015, when it announced that the appeal would be dismissed for reasons to be given at a later date. These are my reasons for concurring in that decision.

[2] The appellant ('GRJL') is a limited liability company. It was incorporated on 29 June 1979. On 24 October 1979, GJRL became the registered owner of property known as Shop 5, King's Plaza, 38 Constant Spring Road, Kingston 10 in the parish of St Andrew ('the property'). The purchase price of the property was $260,000.00.

[3] The respondent ('the JGRA') is an unincorporated association registered under the Trade Union Act. The JGRA functions as an umbrella organisation representing the interests of members engaged in the business of gasoline retailers. Ever since the property was acquired in 1979, JGRA has had the Duplicate Certificate of Title (registered at Volume 1120 Folio 200) in its possession and has occupied the property as its head office.

[4] In or around the year 2001, a dispute arose between JGRA and GJRL regarding the beneficial ownership of the property. JGRA's claim was that GJRL holds the property in trust for the JGRA, while GJRL maintained that it holds the property in trust for certain individual members of the JGRA. On 10 July 2010, after a trial lasting over a period of six days, Mangatal J gave judgment for JGRA in the following terms:

> "(a) It is hereby declared that:
>
> (i) The Defendant Gasolene Retailers of Jamaica Limited, the registered owner, holds the property known as Shop No. 5, Kings Plaza, 38 Constant Spring Road, Kingston 10 in the Parish of Saint Andrew, being the land comprised in the Certificate of Title registered at Volume 1120 Folio 200 of the Register Book of Titles, in trust for the Claimant Jamaica Gasolene Retailers Association.
>
> (ii) The claimant Jamaica Gasolene Retailers Association is entitled to the entire beneficial interest

in the property known as Shop No. 5, Kings Plaza, 38 Constant Spring Road, Kingston 10 in the Parish of Saint Andrew, being the land comprised in the Certificate of Title registered at Volume 1120 Folio 200 of the Register Book of Titles.

(b) That, subject to the holding of Accounts and Enquiries, the Defendant is ordered to transfer the property known as Shop 5, Kings Plaza, registered at Volume 1120 Folio 200 of the Register Book of Titles to the Trustees of the Claimant at the date of judgment. The costs attendant on such transfer shall be borne by the Claimant.

(c) That should the Defendant fail, neglect and/or refuse to transfer the said property to the Trustees of the Claimant, the Registrar of the Supreme Court is empowered to execute all documents and do all things necessary to register the transfer of the property from the Defendant to the Claimant's said Trustees at the date of judgment.

(d) Accounts and Enquiries are to be held in Chambers on a Date to be fixed by the Registrar, with a view to perfecting the order for transfer of the legal interest in the property to Trustees of the Claimant at the date of judgment. In that regard, the Claimant is permitted to file and serve on the Defendant by the 31st of July 2012, evidence by way of an Affidavit attesting to, and attaching documentary proof, if any, as to whether there are currently Trustees of the Claimant, and if so, identifying these persons.

(e) Liberty to Apply.

(f) Costs of the trial to be the Claimant's to be taxed if not agreed.

(g) Costs of the hearing of the Accounts and Enquiries to be the Defendant's to be taxed if not agreed."

[5] This is GRJL's appeal from Mangatal J's judgment. In addition to disputing JGRA's capacity to bring the proceedings in the court below in its own name, GRJL also challenges a number of the learned judge's findings of fact.

Background

[6] The larger part of the background to the matter is not in dispute. In 1975, the Government of Jamaica granted a 5 cent per gallon increase in the price of gasoline. At that time it was agreed that, out of this 5 cent increase, 1 cent would be retained by the petroleum marketing companies and credited to the accounts of the individual members of the JGRA. The objective of this exercise was to create a fund for the repayment of a loan which had had to be taken out by the JGRA to enable its members to meet their obligations to make retroactive payments to service station attendants.

[7] In due course, the loan was paid off and surplus funds of the order of $230,000.00 ('the surplus') remained in the hands of JGRA. It is common ground that the surplus was an aggregation of funds belonging to members in their individual capacities and that the extent of each member's entitlement varied in accordance with the throughput of gasolene sales at their respective gas stations. The entire surplus was in due course applied by JGRA to the purchase price of the property. The balance of $30,000.00 due on the purchase price was supplied (as to approximately $21,000.00) by United Gasolene Retailers Ltd ('UGRL'), a connected company of JGRA, and by JGRA itself. It is also now common ground that, as the judge found (at para. [110] of her judgment), some members of JGRA "did receive a refund of their share of the surplus from the JGRA after the purchase of the property".

[8] The dispute between the parties surrounds the capacity in which the surplus was held by JGRA immediately before it was applied to the purchase price of the property.

JGRA's case was that its members had agreed that the surplus should inure to the benefit of JGRA for use in the purchase of property to function as its head office. GRJL on the other hand insisted that what was agreed was that the surplus would be retained by JGRA for the benefit of individual members.

The pleadings

[9] In its further amended statement of claim, JGRA, after stating the history described above, averred as follows (at paras 4-9):

> "4. At all times material the aforementioned loan was paid off, and a surplus of funds accrued to the Plaintiff. Thereafter, in 1976 and 1977, the Managing Committee of the Plaintiff proposed, and the Plaintiff's membership agreed, to use the surplus funds to purchase a property to meet the expanding needs of the Plaintiff.
>
> 5. At all times material, the Plaintiff through its managing committee was advised that a company was required to be formed as the Plaintiff lacked the legal capacity to purchase and/or hold real property in its own legal right.
>
> 6. That the Plaintiff will say that its membership of the day were [sic] never officially informed of the above referenced acquisition at any Annual General Meeting or any other forum of record.
>
> 7. Consequently, on or about June 29, 1979, the Defendant company was formed comprising of and drawing its directorship entirely from the then Managing Committee of the Plaintiff, namely:
>
> W.E. Clarke D. Hall A. Abrahams
>
> R. Chin A. Chuck A. McKenzie
>
> N. Bowen A. Hobbins D. Whittingham

> 8. That pursuant to the mandate of the Plaintiff through its Managing Committee of the day, and with the express intention of making a real estate acquisition on behalf of the Plaintiff, the defendant purchased and became owner of property at Kings Plaza registered at Volume 1120, Folio 200, on or about October 24, 1979.
>
> 9. That approximately $216,000.00 of the stated purchase price of $230,000.00 was provided by the Plaintiff from the aforesaid fund, to buy the said property.
>
> 10. That at all times material, from and since 1979, the Plaintiff, through its members, sought to have the Defendant company, through its members, give an account of and transfer to the assets of the Plaintiff, the said property at issue."

[10] In these circumstances, JGRA contended, GRJL held the surplus and the property "on trust for and on behalf of [JGRA] and its members". JGRA accordingly sought various reliefs, including a declaration to that effect.

[11] In its defence, GRJL maintained (at para. 3) that the surplus "accrued to and for the benefit of individual members of and not [JGRA]" and that "some and not all of the members agreed to purchase the said property". Further (at para. 7) "...that its purchase of [the property] was not made pursuant to the mandate of [JGRA] nor was the purchase made with the intention that the premises would have been acquired on behalf of [JGRA]".

The evidence

[12] The evidence at the trial was partly oral and partly documentary. Oral evidence was given on behalf of JGRA by Mr Hopeton Nembhard, who first became an active member of the association in 1979 and served as its president from 1988-1990; and Mr

Leonard Green, who became a member in 1996 and was the president in 2000-2001, during the period when the dispute first arose. On behalf of GRJL, oral evidence was given by Mr Aston Hobbins. Mr Hobbins had been a member of JGRA from 1959, a director since 1979 and served as president from 1986-1988.

[13] Neither Mr Nembhard nor Mr Green was a member of the JGRA during the critical period before the acquisition of the property and they both readily accepted that their understanding of the arrangements derived substantially from the minutes and other records of the JGRA (though Mr Green was able to say that UGRL was the "trading arm of the members of [JGRA]"). But, for what it was worth, they both strongly supported JGRA's case that, as Mr Nembhard put it in his witness statement (at para. 6), "[t]he membership of the [JGRA] agreed that the surplus funds would be and inure solely to the credit of the...association and not to each member in his individual capacity".

[14] Mr Hobbins gave a different account. Picking up the story from the point at which the JGRA loan was paid off, Mr Hobbins said this (at paras 7-10 of his witness statement):

> "7. The loan was paid off and there remained a surplus of funds which the Claimant held in trust for each individual member on the basis of his/her entitlement.
>
> 8. It was always agreed that the surplus was retained for the benefit of the individual members of the Claimant which members were beneficial owners of the surplus funds. The surplus was due to each member in his personal capacity.

9. The Claimant proposed to the members that the following options could be pursued by them in respect of their surplus from the cess:

(i) Those members who wished could contribute 50% of the surplus to a fund which monies were to be held by the Claimant to be used to purchase a building to be owned by those gasoline dealers who had opted to contribute to the purchase and the remaining 50% of the surplus would be paid over to them;

(ii) Those members who wished that their entitlement from the surplus funds should be paid over to them in full could request that it be paid in full and consequently, a number of dealers including Mr Vincent Chin exercised the option to take of all of his money and was paid in full. The majority of the members were paid half of the surplus and the other was kept by the Claimant to be contributed to the purchase of Shop No. 5, King's Plaza in the parish Saint Andrew.

10. Mr Vincent Chin did not lose his membership in the association because of his decision to take his contribution from the surplus funds. In fact, after Mr Vincent Chin received his full share of the surplus funds he subsequently became president of the association in 1982 and served in that capacity for two (2) years."

[15] The documentary evidence was primarily comprised in an agreed bundle of documents, consisting of (i) the Constitution of the JGRA; (ii) minutes of selected meetings of the executive and managing committees of the JGRA between 1975 and 1979; (iii) copies of the Duplicate Certificate of Title to the property; (iv) the Certificate of Incorporation of GRJL; (v) the record of the shareholding in GRJL as at 22 November 2004; (vi) a letter dated 25 July 2001 from GRJL to JGRA; (vii) a listing, certified by GRJL's auditors, of "proposed refunds to certain dealers"; and (viii) receipts evidencing

payments made by JGRA to 11 dealers, between 1987 and 1991, of sums described as having been received "in lieu of shares" in GRJL. For present purposes, it is not necessary to make any further mention of items (i) and (iii).

The minutes

[16] Given the conflict in the evidence given by Messrs Green and Nembhard on the one hand and Mr Hobbins on the other, it is hardly surprising that Mangatal J should have chosen to pay close attention to the minutes. The first set was the minutes of an emergency meeting of the executive committee of the JGRA held on 10 August 1975. Present were Messrs H.S. Morais, A.D. Hobbins, Basil Watson, Vincent Chin, Bunny Myers, Richard Chin, Winston Clarke and C.T. Lewis. It is clear that at this time the arrangements for the retention of an amount out of the 5 cent per gallon increase to meet retroactive wage payments had not yet been fully settled, since the minutes record the purpose of the meeting as being to decide "how details of the retroactive pay to gas station attendants should be administered...and what portion of the increased margin on petroleum products should be applied to retroactive pay". The relevant extract from the minutes reads as follows:

> "Mr Hobbins explained the back-ground of the negotiations and advised that Government was willing to allow J.G.R.A. to be the custodian of the funds for the retroactive pay and that those funds would be provided by a bank on the undertaking that the Oil Companies would pay regularly to the JGRA the returns resulting from a 1¢ per gallon on the price of bulk products.
>
> The JGRA would transmit those amounts, to the bank to defray the loan.

> This 1¢ per gallon would be made available not, only until the debt was completely met but until a new price structure was declared by Government.
>
> When the loan was repaid the extra margin would revert to the dealers through the JGRA. It was felt that perhaps dealers would allow this amount to remain at credit of the JGRA to help to provide a proper headquarters for the organization. The loan, he thought, would take about 13 months to be repaid.
>
> The meeting was advised that the anticipated increase in the price of gasoline and gas oil was 6¢ per gallon. Of this 1¢ would be a provision to meet increases to the tanker drivers; 1¢ per gallon as stated before would be to meet retroactive pay to gas station attendants. 4¢ would be increased margin to the dealer from which he would be expected to meet the new pay rates as soon as the increase in price became effective.
>
> ...
>
> When the loan is repaid and until there is a new price structure or arrangement with Unions, the cash flow from the 1¢ cess would be to the credit of the Association in trust for the dealers. It was felt that out of this a sizeable reserve could be built up and that dealers would allow the amount to remain as their investment in the anticipated new headquarters."

[17] Next were the minutes of the meeting of the managing committee held on 3 February 1977.At that meeting, there was an inconclusive discussion "over the resolution passed at the last Convention, authorising purchase of new premises to facilitate the expansion of UGR Ltd".

[18] Then there was the meeting of the managing committee held on 24 March 1977. With Mr Hobbins again in attendance, the following was recorded as having taken place:

"Purchase of Property:

A wide ranging discussion took place on whether or not the mandate through a unanimously passed resolution at the last Annual General Meeting, to purchase new premises to accommodate further development of our activities, should be pursued. The final decision was in the affirmative.

According to Messrs. Watson and Hobbins, even if there were cut-backs in imports, as good businessmen we should be able to devise alternatives to make up for losses in certain directions.

The purchase of new property should therefore be pursued. The premises on Beechwood Avenue offered by Daly & Campbell should be evaluated possibly by Mr. Finson and bargained for at a much lower price than that asked…

Donald Rigg – Bog Walk

This dealer complained that since he did not take any money for retroactive payment but met the bill of approximately $600 from his own funds, the full 50% of his credit should not be retained, nor should he pay any interest on the bank loan. It was agreed that the contention was reasonable and that the adjustment should be made in favour of Mr. Rigg.

Other applicants for full refund:

Letters were read from a number of members who wanted their full credit from the accumulation from the 1 c paid to them.

Decision:

They should be advised that the decision of the Annual General Meeting was binding on all members and that a marked copy of Rule 9 section 7 of our Constitution sent them."

[19] By the time of the meeting of the managing committee on 21 February 1979, the property had obviously been identified and, as the minutes show, the JGRA was already committed to its purchase:

> "Purchase of Property at King's Plaza:
>
> The Secretary reported that a deposit of $25,000.00 was made to Clinton Hart & Co. in connection with the purchase of premises at Kings Plaza. The present bank accumulation is $216,323.42.
>
> Mr. Abrahams suggested that the Association employ the services of another lawyer to conclude transaction. He recommended Messrs. Judah, Desnoes, Lake, Nunes, Scholefield & Co. This was agreed.
>
> A Holding Company is to be formed. Members will be duly informed of interest etc. and their equity in the property."

[20] Under the rubric, 'Purchase of premises at Kings Plaza', the minutes of the meeting of the managing committee of 8 August 1979 recorded the following:

> "(i) The causative factors which contributed to some dealers being in debt should be investigated and where necessary they should be relieved of the debt, e.g. Mr. Emile Josephs.
>
> (ii) A letter was received from Mr. Frankie Lewis requesting the payment of his accumulated credit as he had given up his gas station.
>
> DECISION:
>
> Transfer accumulated sum from Mr. Lewis' account to Mr. Reggie Chin's account. Mr. Chin would in turn pay over to Mr Lewis the full amount of his credit.
>
> (iii) In respect of the covenant of sale which was being asked for by Clinton Hart & Co. letters were exchanged resulting in assurance from Judah, Desnoes, Lake, Nunes & Scholefield to the effect the condition being required was innocuous and could not be enforced by law.
>
> Subject to change at the next Annual General Meeting, the following members were selected as Directors of the Gasolene Retailers of Jamaica Limited:

> Messrs; Winston Clarke, Dudley Hall, Andrew Abrahams; Norman Bowen; A. McKenzie; Reggie Chin; Astley Chuck; A.D. Hobbins; Desi Whittingham; and C.T. Lewis, Secretary."

[21] And lastly, in the minutes of the meeting of the managing committee held on 19 December 1979, under the heading "Kings Plaza: New Premises", the following was recorded:

> "...the title to the property was in our possession, the U.G.R. Limited had advanced the necessary amount to complete payment, there was an official handing over ceremony and that the formation of the holding company 'Gasolene Retailers of Jamaica' was accomplished. It was decided that a meeting of the sub-committee should be held early in the New Year to plan for the orderly transfer of operations to the new site."

The record of shareholders and directors of GRJL

[22] The two shareholders of GRJL shown in the records of the Registrar of Companies as of 22 November 2004 were Messrs Raymond Clough and Ian Don, each holding a single share. It is common ground that neither of these gentlemen, who were at the material time members of the firm of lawyers which had seen to the incorporation of GRJL, had any beneficial interest in the company. As at the same date, the directors were Messrs Winston E Clarke, Dudley Hall, Andrew Abrahams, Reginald Chin, Albert McKenzie, Norman Bowen, Aston D Hobbins and Desi Whittingham.

GRJL's letter of 25 July 2001

[23] Even if not the last straw (which Mr Green said it was not), this letter was obviously one of the things which crystallised the dispute between GRJL and JGRA:

> "**RE: NOTICE OF MEETING**
>
> We hereby advise you that Gasolene Retailers of Jamaica Limited ("**the Company**") will hold a meeting of present and former gasoline retailers who contributed to the purchase of property at Kings Plaza, Constant Spring Road, Kingston 10 on **Wednesday, August 22, 2001 at the Hotel Four Seasons, 18 Ruthven Road, Kingston 10, commencing at 2:00p.m**.
>
> At a meeting of the Contributors held on June 20, 2001, the decision was taken to ask the Company's Attorneys to prepare a Document giving details regarding a proposal made at the meeting to issue Debentures to the Contributors. We therefore enclose an Explanatory Memorandum, which we are sure you will find informative.
>
> We ask that you give consideration to this document and send **a duly appointed representative** to attend the meeting prepared to discuss it and take decisions on the proposals outlined therein.
>
> Yours truly
> GASOLENE RETAILERS OF JAMAICA LTD.
>
> Winston E. Clarke
> Chairman"
> (emphasis as in the original)

[24] Mr Green's evidence was that he was "outraged" by this letter and that he subsequently told its author, Mr Winston Clarke, that the meeting "should not be held based on content [sic] of letter". As it turned out, the proposed meeting was never held.

The auditors' list

[25] Under the heading, 'Gasolene Retailers of Jamaica one cent (1c) retroactive investment', this list showed the names of a total of 100 gasolene retailers, with varying amounts beside their names. Written and dated notations beside the names of 10 of them indicated that the balances shown had been paid.

The receipts

[26] As I have indicated, there were also 11 receipts, signed by various persons (not all of whose names appear to match the names on the auditors' list). The makers of these receipts, which bear dates between 1987 and 1991, acknowledged payment by JGRA in the following terms:

> "This sum is received in lieu of shares in Gasolene Retailers of Jamaica and I hereby transfer all my interest in the said Gasolene Retailers of Jamaica Limited to the Jamaica Gasolene Retailers Association."

[27] When shown these documents in cross-examination at the trial, Mr Green's response was that he had never seen them before.

[28] Finally, further documentary evidence in the form of the memorandum and articles of association of GRJL was also provided to the judge.

The judge's findings

[29] At the outset, in response to a late challenge to JGRA's capacity to maintain the action, Mangatal J held, in reliance on the well-known decision of the House of Lords in **The Taff Vale Railway Co. v Amalgamated Society of Railway Servants** [1901] AC 426, that a trade union registered under the Trade Union Act ('the Act') was fully empowered to sue and be sued in its own name. Then, turning to the substantive issues in the case, the learned judge, despite lamenting what she described (at para. [95]) as "a cluster of evidential gaps" in the case, felt able to find that –

> (1) GRJL was a "holding company", in the sense that the funds used to purchase the property were provided by a person other than itself, that is, JGRA (para. [100]).
>
> (2) All the directors of GRJL "were drawn from, and represented a large sub-set of the membership of JGRA's Managing Committee at the relevant time" (para. [105]).
>
> (3) The fact that there is no specific object in the memorandum of association of GRJL relating to the holding of property on behalf of JGRA, "does not water down or take away from the express unchallenged evidence as represented in the Minutes...wherein it is stated that this was the purpose" (para. [120]).

(4) The fact that article 28(a)(iii) of the articles of association of GRJL permits the free transfer of shares in the company to a person "who is a member of [UGRL]", does not mean that the articles were "so drafted on the specific instructions of the JGRA, as opposed to instructions simply to form a company where there would be allowance for free transfer amongst related parties" (para. [120]).

(5) UGRL was "a sort of trading arm of the JGRA", and therefore the sum paid by UGRL towards the purchase price of the property "would point more in the JGRA's favour than GRJ Ltd" (para. [103]).

(6) The majority of the purchase price came from the surplus which was held by JGRA (para. [118]).

(7) Although some dealers did receive refunds of their share of the surplus after the property was acquired, "there is no evidence as to any other dealers now claiming an interest [in the property] by way of resulting trust" (para. [118]).

(8) It was not contested that "there was a unanimous resolution passed by members that the surplus was to be used for the purchase the property, which was for the purpose of use for expansion of the activities of, and as headquarters for, the JGRA" (para. [118]).

[30] In the result, the learned judge concluded that GRJL holds the property on a resulting trust for JGRA and accordingly, as has been seen, made the declaration sought to this effect. However, the judge considered it necessary to grant JGRA's application to amend the statement of claim to add the trustees of JGRA as the persons to take a transfer of the property from GRJL.

The appeal

[31] The grounds of GRJL's appeal and the submissions in support of them may be summarised as follows:

(1) The judge erred in (a) holding that JGRA was competent to bring the claim in its own name; and (b) allowing the amendment of the statement of claim to allow a transfer of the property to trustees on behalf of JGRA.

(2) The judge erred in finding that (a) UGRL was the trading arm of JGRA; and (b) GRJL was a holding company. There was no documentary evidence to support the first finding, nor was either finding supported by the memorandum and articles of association of GRJL.

(3) The judge erred in preferring the evidence of Messrs Green and Nembhard, neither of whom was active in the JGRA at the material time, over that of Mr Hobbins, who had been an active member since 1959 and was also present when the decision to purchase the property was made.

(4) The judge erred in taking into account irrelevant matters, i.e., that JGRA had been in possession of both the certificate of title and the property since its acquisition.

(5) The judge erred in reversing the burden of proof and/or drawing an adverse inference from the fact that Mr Hobbins was the only witness called to give evidence for GRJL. In particular, the judge erred in attributing significance to the fact that no individual member had come forward to claim an interest in the surplus, given that it was JGRA's duty to prove its case.

(6) The judge's conclusion that GRJL holds the property in trust for JGRA was not open to her on the pleadings, neither was it supported by the evidence, given the fact that GRJL is the registered owner of the property and JGRA's allegation that it was gifted to it by the entire membership of association was not supported by the minutes which were in evidence.

[32] Mr Graham supplemented these contentions with a submission which had not been previously foreshadowed in either the grounds of appeal or the skeleton arguments. Basing himself on, among other things, a passage from The Declaratory Judgment (by The Rt Hon. The Lord Woolf and Jeremy Woolf, para. 6-01-6-02), Mr Graham submitted that, in considering whether or not to make a declaration of rights in a particular case, the court should have regard to the rights of all persons who appear to have an interest in objecting to the grant of a declaration. In this case, such persons would include all those whose earnings contributed to the surplus in the first place, as well as UGRL.

[33] Mr Foster QC's response to these submissions was to the following effect. Firstly, section 9 of the Act and subsequent judicial decisions make it clear that a registered trade union, such as the JGRA, is fully entitled to sue and be sued in its own name. Secondly, the judge's grant of permission to amend the statement of claim to enable a transfer of the property to trustees was a matter entirely within her discretion, given that rule 20.4(2) of the Civil Procedure Rules 2002 ('the CPR') empowers the court to grant amendments to the statement of case after the case management conference. In any event, it was submitted, there was no prejudice to either party in this case, since they were both given the opportunity to make further submissions as a result of the amendment. For this submission, reliance was placed on the decision at first instance of Neuberger J (as he then was) in **Charlesworth v Relay Roads Ltd and Others** [2000] 1 WLR 230. And thirdly, in respect of each of the matters complained of by Mr Graham, there was ample evidence before the judge to support the conclusions which she had reached. Therefore, in accordance with long established principle (as reflected in, for example, the decision of this court in **Cablemax Ltd and others v Logic One Ltd** [2012] JMCA Civ 14), an appellate court should be very reluctant to interfere with the trial judge's findings of fact. In addition to having had the opportunity of seeing and assessing the witnesses on both sides, the judge had had the benefit of the documentary evidence, in particular the minutes, which also provided an ample basis for her decision.

[34] These submissions give rise to three broad issues: (a) whether JGRA can sue and be sued in its own name; (b) whether the judge erred in permitting JGRA to amend the statement of claim; and (c) whether the judge's conclusions were justified by the pleadings and the evidence.

JGRA's capacity to sue

[35] Insofar as is material, section 9 of the Act provides as follows:

> "The trustees of any trade union registered under this Act, or any other officer of such trade union who may be authorized so to do by the rules thereof, are hereby empowered to bring or defend, or cause to be brought or defended, any action, suit, prosecution, or complaint in any court of law or equity, touching or concerning the property, right or claim to property of the trade union;..."

[36] By its terms, this section appears to authorise only the trustees or any other authorised officer of a trade union to bring and defend actions in matters touching or concerning the property, or any right or claim to the property, of the trade union. But as long ago as 1901, in the **Taff Vale Railway Co** case, the House of Lords had decided unanimously that, as a matter of clear implication from the terms of the equivalent section of the English Trade Union Act, a registered trade union was empowered to sue and be sued in its own name. Lord Brampton put it as follows (at page 442):

> "I think that a legal entity was created under the Trade Union Act, 1871, by the registration of the society in its present name in the manner prescribed, and that the legal

> entity so created, though not perhaps in the strict sense a corporation, is nevertheless a newly created corporate body created by statute, distinct from the unincorporated trade union, consisting of many thousands of separate individuals, which no longer exists under any other name. The very omission from the statute of any provision authorizing and directing that it shall sue and be sued in any other name than that given to it by its registration appears to me to lead to no other reasonable conclusion that that in so creating it, it was intended by the Legislature that by that name and by no other it should be known, and that for all purposes that name should be used and applied to it in all legal proceedings unless there was any other provision which militated against such a construction, as, for instance, in the case of trustees, by s. 9 of the same Act, who hold real and personal property of the society."

(To similar effect, see also **Bonsor v Musicians Union** [1955] 3 All ER 518, **Keys and others v Butler** [1971] 1 QB 300 and **Caesar v The British Guiana Mine Workers Union** (1959) 1 WIR 232)

[37] Mangatal J's conclusion that, as a registered trade union, JGRA had the capacity to sue and be sued in its own name is therefore fully supported by the authorities. In my view, no reason has been shown to disturb it.

The amendment

[38] As originally filed, the statement of claim sought orders that GRJL or, in default of it doing so, the Registrar of the Supreme Court on its behalf, should transfer the property to JGRL. However, section 8 of the Act provides that all real or personal estate belonging to a registered trade union "shall be vested in the trustees for the time being of the trade union appointed as provided by this Act, for the use and benefit of such

trade union and the members thereof". Mangatal J therefore considered (at para. [58]) that, "because the legal ownership cannot be vested in the JGRA, paragraphs 4 and 5 which seek a transfer of the legal ownership would have to be amended to have the property placed in the names of the only persons empowered under law to hold property on behalf of the union, and that is the trustees" (emphasis in the original). Accordingly, in order to achieve this, the learned judge granted JGRA'a application for permission to further amend the statement of claim, with liberty to apply. In addition, she also indicated (at para. [122]) that JGRA should bear the costs occasioned by any further hearing that the amendment might necessitate.

[39] Rule 20.4(2) of the CPR states that "[s]tatements of case may only be amended after a case management conference with the permission of the court". In **Charlesworth v Relay Roads Ltd and Others**, speaking to the two competing factors which can be said to arise where permission is sought to amend a pleading or to call further evidence, Neuberger J said this (at page 235):

> "The first factor is that it is desirable that every point which a party reasonably wants to put forward in the proceedings is aired; a party prevented from advancing evidence and/or argument on a point, other than a hopeless one, will understandably feel that an injustice has been perpetrated on him, at least if he loses and has reason to believe that he may have won if he had been allowed to plead, call evidence on, and/or argue the point. Particularly where the other party can be compensated in costs for any damage suffered as a result of a late application being granted, there is obviously a powerful case to be made out that justice indicates that the amendment should be permitted."

[40] Neuberger J also made called attention to the nineteenth century case of **Clarapede & Co. v Commercial Union Association** (1883) 32 WR 262, 263, in which Brett MR had observed that –

> "…however negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs..."

[41] When a party seeks permission to amend a pleading, therefore, the critical consideration for the court is the overall justice of the case. If it is possible to allow the amendment without prejudice to the other side, then the court will generally lean in favour of granting it, bearing in mind the obvious desirability of all matters in controversy between the parties being brought forward and adjudicated in the same proceedings. But, even where there is a possiblity of prejudice to the other side, the court will if at all possible seek to address this by way of an order for costs, or by some other means. Ultimately, these are matters for the court's discretion, the exercise of which will not lightly be interfered with by this court (**Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, especially paras [19]-[20]).

[42] In considering whether to grant the proposed amendment in this case, Mangatal J took the view (at para. [58]) that, by granting it, "the Court would simply be perfecting the legal form that would follow from a substantive resolution and determination as to the beneficial entitilement made in JGRA's favour". In my respectful view, the learned judge's decision to grant the amendment is unassailable, both in principle and on the facts of this case. Although this was obviously a matter which

ought to have attracted the attention of JGRA's legal advisors from the start of the litigation, the question of who should take a transfer of the property in the event that the claim succeeded was plainly a purely consequential one, having no bearing on the real substance of the case. It is difficult to imagine what possible prejudice could have been caused to GRJL by the grant of the amendment (and none was put forward on its behalf, even before this court). But, it seems to me, even if there was any such prejudice, the judge's grant to GRJL of liberty to apply, together with the costs of any further hearing that might arise from that order, was a perfectly reasonable exercise of her discretion. Accordingly, I do not think that this court should interfere with it.

Were the judge's conclusions justified by the pleadings/evidence?

[43] First, I will start with Mr Graham's pleading point (taken, as far as I can make out, for the first time in this court and unsupported by any ground of appeal). As I understood it, the basis of Mr Graham's complaint was that paragraph 4 of the further amended statement of claim (see para. [9] above) put JGRA's case on the footing that, (i) after the loan was paid off, "a surplus of funds accrued to [JGRA]"; and (ii) JGRA's membership then agreed "to use the surplus funds to acquire a property to meet [its] expanding needs". This pleading was misleading, it was submitted, given that it made no mention of the rights of the individual dealers, of whom JGRA was aware, whose funds had fed the surplus.

[44] It is true that as the case evolved JGRA's case in fact moved somewhat closer to the reservation expressed by GRJL (in paragraph 3 of the defence) as regards paragraph 4 of the statement of claim, which was that "the surplus accrued to and for the benefit of individual members... and not [JGRA]..." For, once witness statements were exchanged, it became clear that the true tension in the case was between Messrs Green and Nembhard, on one side, who stated that the members "agreed that the surplus funds would...inure solely to the credit of [JGRA] and not to each member in his individual capacity"; and Mr Hobbins, on the other, who insisted that "[i]t was always agreed that the surplus was retained for the benefit of the individual members of [JGRA] which members [sic] were the beneficial owners of the surplus...due to each member in his personal capacity".

[45] This is therefore a case in which the pleadings were supplemented and expanded by the witness statements and by the actual evidence given by the witnesses on both sides. Thereafter, the case proceeded on a basis obviously understood by both parties, the notes of evidence revealing very few objections from either side to the evidence being given by the witnesses. And, of course, there was also an agreed bundle of documents, which further served to delineate the precise area of dispute between the parties, so much so that the learned judge, despite her lament about gaps in the evidence, was able to arrive at a decision substantially based on the minutes.

[46] In **McPhilemy v Times Newspapers Ltd and others** [1999] 3 All ER 775, a case decided shortly after the Civil Procedure Rules came into effect in England in 1998, Lord Woolf MR, the acknowledged chief architect of the new rules, said this (at pages 792-3):

> "The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules."

[47] Those observations were cited with approval by the House of Lords in **Three Rivers District Council and others v Bank of England (No. 3)** [2001] 2 All ER 513 (per Lord Hope at para [50]); and, as the learned editors of Blackstone's Civil Practice 2012 observe (at para 8.21), "…it is clear from the comments of Lord Woolf MR in *McPhilemy v Times Newspapers Ltd*…that contests over the terms of statements of case are to be avoided".

[48] While pleadings therefore remain important to make clear the general nature of the case which the other side should expect to meet, the further documents in the case, such as witness statements and agreed documents, can supplement the pleadings in appropriate cases. In this case, it seems to me that the true issues in the case were at the end of the day clear and GRJL was in no way disadvantaged by any imprecision that there might have been in JGRA's statement of claim. I would therefore decline Mr Graham's invitation to decide this case on a pleading point taken for the first time on appeal. (See also **State Government Insurance Commission v Sharpe** (1996) 126 FCR 341, 344, a decision of the Supreme Court of South Australia (Full Court), in which Millhouse J observed that "[t]he day has well passed when decisions are based on the state of the pleadings, irrespective of the facts or justice".)

[49] Turning now to the actual evidence, Mr Foster relied on, among other things,the decision of this court in **Cablemax Ltd et al v Logic One Ltd**, in which McIntosh JA, in explaining the court's reluctance to disturb a trial judge's findings of facts on appeal, referred to an extract from the judgment of Lord Thankerton in the oft-cited case of **Watt (or Thomas) v Thomas**[1947] 1 All ER 582, 587:

> "I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus:—
>
> I. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and

> heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.
>
> II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
>
> III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.
>
> It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question."

[50] More recently, the role of an appeal court when reviewing findings of fact by a trial judge was extensively reviewed by the Privy Council in **Beacon Insurance Company Ltd v Maharaj Bookstore Ltd** [2014] UKPC 21, paras 11-18, a decision on appeal from the Court of Appeal of Trinidad and Tobago. After referring to a number of the leading authorities on the point (including **Watt v Thomas**), Lord Hodge, speaking for the Board, said this (at para. 17):

> "Where a judge draws inferences from his findings of primary fact which have been dependent on his assessment of the credibility or reliability of witnesses, who have given oral evidence, and of the weight to be attached to their evidence, an appellate court may have to be similarly cautious in its approach to his findings of such secondary facts and his evaluation of the evidence as a whole. *In re B (a Child)* (above) Lord Neuberger at para 60 acknowledged that the advantages that a trial judge has over an appellate court in matters of evaluation will vary from case to case. The form, oral or written, of the evidence which formed the basis on which the trial judge made findings of primary fact

> and whether that evidence was disputed are important variables. As Lord Bridge of Harwich stated in *Whitehouse v Jordan* [1981] 1 WLR 246, 269-270:
>
> > '[T]he importance of the part played by those advantages in assisting the judge to any particular conclusion of fact varies through a wide spectrum from, at one end, a straight conflict of primary fact between witnesses, where credibility is crucial and the appellate court can hardly ever interfere, to, at the other end, an inference from undisputed primary facts, where the appellate court is in just as good a position as the trial judge to make the decision.'
>
> ...Where the honesty of a witness is a central issue in the case, one is close to the former end of the spectrum as the advantage which the trial judge has had in assessing the credibility and reliability of oral evidence is not available to the appellate court. Where a trial judge is able to make his findings of fact based entirely or almost entirely on undisputed documents, one will be close to the latter end of the spectrum."

[51] So cases in which the appellate court is asked to review a trial judge's findings of fact may fall into two distinct categories. In the first are those cases in which the trial judge's conclusions were based on her assessment of the credibility and reliability of oral evidence, while in the second are those cases in which her conclusions were based on inferences drawn by her from undisputed documentary or other evidence. In the first category of case, the appellate court will only interfere if it is satisfied that it is clear that the trial judge did not taken proper advantage of having seen or heard the witnesses and was plainly wrong. However, in the second category of case, the judge's advantage of having seen the witnesses will usually be significantly diminished, thus

leaving the appellate court in as good a position as the judge to review the undisputed material.

[52] In my view, the instant case more readily falls within the second, rather than the first, category. It is true that Messrs Green and Nembhard gave oral evidence which was, on the face of it, in direct contradiction to Mr Hobbins' evidence. But it is clear, as Messrs Green and Nembhard admitted, that their account of the facts on the critical issues in the case was almost entirely based on their reading of the minutes of meetings at which they were not in attendance. So, in relation to the greater part of their evidence, it seems to me, this court is as well placed as Mangatal J was to determine whether the inferences which she drew from the minutes were ones which she could reasonably draw in the circumstances. In relation to Mr Hobbins' evidence, however, I think that the situation must to some extent be different, since he was himself present at some of the relevant meetings. Accordingly, such assessment as the judge felt able to make of his credibility must naturally attract the usual deference due to a trial judge in such circumstances.

[53] Mr Graham first complained that the judge was wrong in concluding that UGRL was "a sort of trading arm of the JGRA". For this finding, the judge relied on Mr Green's evidence under cross-examination. The only other references to UGRL in the case came from Mr Hobbins. In his witness statement, he said that he had been involved with UGRL "since its formation in 1967 up until 1994"; and, under cross-examination, he described UGRL as "an associated company" of JGRA, "who were [sic] in the business of selling Automotive car care products, batteries and accessories". Far from

contradicting Mr Green's characterisation of UGRL as JGRA's trading arm, therefore, Mr Hobbins' evidence was entirely consistent with it. Accordingly, it seems to me that the judge was fully entitled to accept Mr Green's evidence as to UGRL's status.

[54] Next, Mr Graham complained that the judge erred in her finding that GRJL was a "holding company". For this finding, the judge relied on the minutes of the meetings of the managing committee of JGRA held on 21 February, 8 August and 19 December 1979 (see paras [16]-[21] above). These minutes show that, at the first of these meetings, the committee, having received a report on the progress of the purchase of the property, decided that "[a] holding company is to be formed". At the second of these meetings, GRJL having been incorporated in June 1979, the committee selected 10 persons (eight of whom were actually present at that meeting) to serve as directors of GRJL, but noted that this was "[s]ubject to change at the next annual General Meeting". As late as 2004, the directors on record of GRJL remained substantially unchanged. And, at the third of these meetings, the property having by this time already been transferred to GRJL, the committee received a report that "the formation of the holding company 'Gasoline Retailers of Jamaica' was accomplished".

[55] In its ordinary commercial usage, the phrase 'holding company' is usually apt to describe "a corporation that owns enough voting stock in another corporation to influence its board of directors and therefore control its policies and management" (Barron's Dictionary of Finance and Investment Terms, 4th edn, page 242). But in this case, it seems clear from the undisputed evidence that the managing committee,

having been advised that JGRA could not itself take a transfer of the property, used the phrase to denote the company, owned and controlled by it, which it had designated as the vehicle by which the property would be held on its behalf. I therefore consider that the judge's finding that GRJL was a holding company, in the sense in which the phrase was plainly used by the committee, was fully supported by the evidence.

[56] All of Mr Graham's other complaints can subsumed, in my view, under the general enquiry whether the judge's conclusion that GRJL holds the property in trust for JGRA was justified on the material that was placed before her. The largely uncontested evidence which the judge accepted establishes the following. As early as August 1975, that is, four years before GRJL was formed and the property was acquired, at a meeting in which Mr Hobbins clearly played a leading role, the executive of the JGRA had discussed the possibility that, after repayment of the loan, dealers might allow any extra margin reverting to them through the JGRA "to remain at credit of the JGRA to help to provide a proper headquarters for the organization". However, at this time, it was clearly stated that "the cash flow from the 1c cess would be to the credit of the Association in trust for the dealers", and it was felt "that dealers would allow the amount to remain as their investment in the anticipated new headquarters" (minutes of the meeting of 10 August 1975). Accordingly, the surplus, which represented the excess funds remaining after repayment of the loan, was an aggregation of funds belonging to individual dealers. At a meeting of the managing committee of 24 March 1977, it was decided to pursue the unanimous resolution passed by members at the last annual general meeting of the JGRA to purchase new premises to accommodate the

association's activities.The precise terms of the resolution were not stated, but, in response to letters from "a number of members who wanted their full credit from the accumulation of the 1c paid to them", it was decided that they should be advised "that the decision of the Annual General Meeting was binding on all members". But at the subsequent meeting of the managing committee at which the decision was taken to form a holding company in connection with the purchase of the property, it was noted that members "will be duly informed of interest etc. and their equity in the property".

[57] So up to the date of this meeting (21 February 1979), it is clear that the question of individual dealers' 'interest' in the surplus was not fully settled. This lack of clarity was to some extent compounded by the fact (which Mr Graham was understandably anxious to bring to our attention) that, between 1987 and 1991, a total of 11 dealers were refunded their share of the surplus, "in lieu of shares in Gasolene Retailers Limited". But, in my view, this evidence takes the matter no further, bearing in mind that the claim in the action was that GRJL held the property in trust for JGRA. In other words, even if any of the dealers who had contributed to the surplus had asserted and were able to establish an interest in GRJL, this could not defeat JGRA's claim, which was a claim against the company itself. At all events, after 1991, for a period of 20 years up to the date of the filing of proceedings on 21 August 2001, the rest was silence. In my view, the absence of any claim on behalf of any of the dealers against either JGRA or GRJL over all this time is a powerful indication that, save for those dealers who came forward, asked for and received their money in the late 1980s and early 1990s, the rest were content to, as had long been proposed, leave their share of

the surplus in the hands of JGRA to enable it to acquire the property and further advance the work of the association.

[58] I think that it is in this sense that Mangatal J's repeated comment that "[n]o individual dealers have asserted any claim to the court seeking a declaration as to a resulting trust in their favour" must be understood. It is not, as Mr Graham complained, that the judge had reversed the burden of proof. Rather, she was simply considering whether, as a matter of probability, individual dealers who had asserted no claim for over 20 years, during which JGRA remained in continuous possession of the property acquired by using the surplus, had in fact gifted their share of the surplus to JGRA for that very purpose. Thus, as the judge said (at para. [118]):

> "…even if some dealers did receive refunds subsequently, and the vouchers referred to above were signed, that would mean that they had, albeit subsequently, relinquished any interest in the surplus of property bought from it. Further, there is no evidence as to any other dealers now claiming an interest by way of resulting trust. The evidence is that the majority of the funds came from the surplus which was held by the JGRA. It is not contested that there was a unanimous resolution passed by members that the surplus was to be used for the purchase of the property, which was for the purpose of use for expansion of the activities of, and as headquarters for the JGRA. It is permissible in law for individual dealers to have given a gift to an association to which they belong and which association is set up to secure benefits on their behalf. Indeed, it can be seen from the Minutes that it was considered by some that the JGRA had been instrumental in obtaining a significant benefit to the members. This they arguably did by securing the loan to provide proceeds from which service attendants could be paid their retroactive pay, and by negotiating for a cess to be granted by the Government from which repayment of this loan could occur. It is not inconceivable that gifts may have been bestowed in those circumstances."

[59] Finally, in relation to Mr Graham's belated submission that, before granting a declaration of rights in this case, the court was required to have regard to the rights of all persons who appear to have an interest in objecting to the grant of a declaration, it suffices, in my view, to repeat the point which I have already made (at para. [57] above): even on the hypothesis that there remained persons who wished to claim an interest in GRJL, the viability or otherwise of such claims could have no effect on the question whether JGRA is entitled to a declaration that GRJL holds the property in trust for it.

Conclusion

[60] These are my reasons for agreeing with the result announced by the court on 19 February 2015. After the result was announced, the question of the costs of the appeal next arose and, at Mr Graham's request, the parties were given time to make written submissions on the point. However, by letters dated 11 and 12 March 2015 respectively, both GRJL and JGRA declined to make any further submissions on costs. In these circumstances, I consider that costs must naturally follow the event and I would accordingly order that the costs of the appeal are to be JGRA's, to be agreed or taxed.

DUKHARAN JA

[61] I have read in draft the reasons for judgment of my brother Morrison JA and agree with his reasoning and conclusion. I have nothing to add.

SINCLAIR-HAYNES JA (Ag)

[62] I too have read the draft judgment of my brother Morrison JA . I agree with his reasoning and conclusion and have nothing to add.