[2018] JMCA App 24

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 21/2016

MOTION NO 15/2017

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MR JUSTICE PUSEY JA (AG)

BETWEEN	**SANDALS RESORTS INTERNATIONAL LIMITED**	**APPLICANT**
AND	**NEVILLE L DALEY & COMPANY LIMITED**	**RESPONDENT**

Jerome Spencer instructed by Patterson, Mair, Hamilton for the applicant

Canute Brown instructed by Brown, Godfrey & Morgan for the respondent

22, 21 May and 31 July 2018

PHILLIPS JA

[1] This is an application for conditional leave to appeal to Her Majesty in Council, from a decision in respect of a procedural appeal considered on paper by this court delivered on 7 November 2017. The court dismissed an appeal from Batts J's decision, wherein he refused an application for summary judgment and a stay of proceedings, and granted permission to the respondent to amend its particulars of claim to allege sums due on a *quantum meruit* basis.

Background facts, pleadings and amended pleadings in the court below

[2] Neville L Daley & Company Limited (NLDL) are general business contractors for upwards of 30 years. Sandals Resorts International Limited (Sandals) carries on business as hotel owners and operators of many properties including Sandals Royal Caribbean Hotel, Ironshore, in the parish of Saint James.

[3] Sandals had invited tenders to carry out building works on their hotel at the Ironshore property, and NLDL had been the successful bidder on the contract. They entered into a contract on 21 February 2008. The contract was for the construction of a new 18 suite room block known as the 'Clarence Block' and also for the upgrade of an adjacent 12 suite room block known as the 'Buckingham Block'. The contract incorporated the terms and conditions set out in the "Standard Form of Building Contract of the Construction Industry in Jamaica Private Edition 2007 Revised Edition". There were also other terms relied on for the due and faithful performance of the works in order to achieve practical completion of the work which was fixed for 13 June 2009 in the case of the Buckingham Block, and 13 September 2009 in the case of the Clarence Block.

[4] NLDL experienced delays in the supply of materials, and so, although work on Buckingham Block was to be completed on 13 June 2009, actual completion was effected on 19 December 2009. NLDL claimed that they were entitled to an extension of time for the completion of the works. They also pleaded that there had been several variations to the work which had been duly carried out, and these works ought to have been measured, assessed, and quantified by the quantity surveyor for the project. They

claimed that there was a duty on completion of the works for this assessment and measurement to be done, and the quantity surveyor had failed to act independently and to do so. As a consequence of the failure to assess the work, the final certificate had not been issued.

[5] NLDL claimed breach of contract made between itself and Sandals on 14 January 2008, and the sum of $22,390,966.76, being the balance on the price for work done and material supplied in accordance with the said contract. NLDL also claimed interest on the sum of $22,390,966.76 from 1 December 2009 to 17 March 2011, at the rate of 2% per month, which amounted to $7,239,613.99 and continuing at the daily rate of $16,707.83, until judgment or sooner paid.

[6] When the matter came for pre-trial review before Batts J on 8 February 2016, he made the following orders:

> "1. The claim to recover the sum of $22,390,966.76 struck out.
>
> 2. The application for summary judgment and stay of proceedings is refused.
>
> 3. Permission is granted to the [NLDL] to amend its particulars of claim to allege sum due on a *quantum meruit* basis.
>
> 4. [NLDL] is to file and serve amended particulars of claim on or before February 12, 2016.
>
> 5. Permission is granted to [Sandals] to file an amended Defence on or before February 26, 2016.
>
> 6. The time for the filing of [Sandals] List of Documents and Witness Statements is extended to March 25, 2016.

7. [NLDL] is permitted to file an additional witness statement on or before March 25, 2016.

8. Permission is granted to [NLDL] to put in an expert witness' report [sic] from Errol Spence, Quantity Surveyor, at the trial of this matter. The expert is to be available for cross examination if required.

9. [Sandals] is permitted to put in an expert report from a Quantity Surveyor at the trial of this matter. The expert is to be available for cross examination.

10. Expert reports are to be filed and exchanged on or before April 8, 2016.

11. Parties are to agree a bundle of documents if possible and file same on or before April 18, 2016.

12. In respect of the documents not agreed, notices of intention to rely on hearsay statements and or notices under the Evidence Act are to be filed and served on or before April 18, 2016.

13. Counter-notices are to be filed and served on or before April 21, 2016. Time is abridged accordingly.

14. No order as to costs.

15. [Sandals] Attorneys at Law are to prepare file and serve this order.

16. Permission to appeal is granted in respect of orders 1, 2 and 3 above."

[7] As can be seen from the above, Batts J, by virtue of his orders, intended that the matter was to proceed to trial. He ordered that the claim to recover the sum of $22,390,966.76 be struck out, but granted permission for NLDL to amend its particulars of claim to allege sums due on a *quantum meruit* basis. The summary judgment application and the application for stay of proceedings were refused. There were

several orders made for the filing of further pleadings, list of documents, witness statements, expert reports, agreement of documents, notices, objections, and counter-notices to those notices of objection.

[8] It appears to me that the effect of this order was, that the basis of the claim for the sum of $22,390,966.76 could not succeed, as framed, and so the claimant would have to reformulate its claim. An examination of the amended pleadings confirms this understanding of Batt's J's order.

[9] The amendment to the claim form and particulars of claim, shows that the claim remained one for damages for breach of the same contract, but now claimed $32,469,918.80 as being the balance of the price for work done and material supplied on a *quantum meruit*. The amended particulars of claim after reciting the contract and the relevant terms referred to "the failure of [Sandals] to return the approved Variations promptly or within a reasonable time to [NLDL]". Paragraph 18 was amended as follows:

> "18. The measurement and valuation was not done and the final certificate has not been issued by the Quantity Surveyor and in the absence of a Final Certificate as to the amount payable to [NLDL] under the Contract, [NLDL] is entitled to the sum of $32,469,918.80 for work done on a quantum meruit."

[10] Paragraph 19 set out the details of the new sum claimed and at the conclusion of those details pleaded:

"19. The balance due, owing and payable by [Sandals] to [NDCL] for work done of $32,469,918.80 has not been paid by [Sandals], despite repeated demand for payment, detailed hereunder:

A. withheld retention sum	$4,250,000.00
B. wrongly deduced liquidated damages	$1,000,000.00
C. underpaid sum on Certificate #13 based on error in previous Certificate	$10,000,000.00
D. withheld additional Preliminaries	$550,000.00
E. approved Variations	$2,463,498.80
F. extension of time	$1,496,875.00
G. Buckingham Block-sum owing	$4,907,614.00
H. Clarence Block-sum owing	$3,172,100.00
I. additional extension of time	$4,490,625.00
J. external works and swimming pools	$39,206.00
K. testing and chlorination	$100,000.00
Total	$32,469,918.80

Alternatively [NLDL] is entitled to payment of a reasonable sum or such other sums as the Court considers reasonable in the circumstances of the case."

[11] The sum of $32,469,918.80 was thereafter substituted for the sum of $22,390,966.76 which had originally been pleaded.

[12] Sandals filed a procedural appeal challenging Batts J's decision on the following grounds:

"(1) The Learned Judge fell into error in granting permission to [NLDL] to amend its statement of case to pursue a claim for *quantum meruit* in circumstances where such a claim was statute barred.

(2) The Learned Judge wrongly exercised his discretion by permitting [NLDL] to amend its statement of case to allege sums due on a *quantum meruit* basis in the absence of:

a. a written application;

b. an order dispensing with the requirement that the application be made in writing;

c. grounds on which the application to amend to claim *quantum meruit* was being pursued; and

d. any evidence to support such a claim.

(3) In refusing the stay of the claim for breach of contract, the Learned Judge failed to take into account the written agreement of the parties to arbitrate all disputes and differences which arose in connection with the construction contract, particularly where no evidence was led by [NLDL] to explain its failure to resolve all disputes and differences by arbitration."

Summary of the decision of the court on the procedural appeal

[13] Brooks JA on behalf of the court identified the two main issues on the procedural appeal. Firstly, whether the learned judge ought not to have allowed NLDL to amend its claim because it had effectively allowed a new cause of action after the limitation period had passed, and also that no proper application had been made to the judge for the amendment. Secondly, whether the court ought to have ordered a stay of proceedings as there was a contractual term in the agreement to refer any difficulties to arbitration.

However, as that matter does not form the basis of any issue in the motion before us for conditional leave to appeal to Her Majesty in Council there is no need for anything further to be said on that issue.

[14] On the issue as to whether the proposed amendment on the claim form gave rise to a new cause of action, Brooks JA reviewed the Civil Procedure Rules 2002 (CPR), particularly rule 20.6, which permitted amendments after the limitation period had expired, but only to a limited extent. Brooks JA in reliance on **The Jamaica Railway Corporation v Mark Azan** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 115/2005, judgment delivered 16 February 2006, stated that such amendments can be validly made despite the expiry of the noted period. Brooks JA in making this finding, particularized paragraphs 27-29 of **Azan**, where K Harrison JA, in referring to rule 20.6, accepted that a change of name could be effected after the expiry of the limitation period, but indicated that there was no provision "in our [r]ules for the substitution or addition of a new cause of action after the expiration of the limitation period". K Harrison JA stated further that the "[r]ules do not presently state any specific matters that the court will take into consideration in assessing whether a proposed amendment in fact amounts to a new cause of action". He concluded by stating that in making the decision one ought to "apply the overriding objective and the general principles of case management".

[15] Brooks JA also referred K Harrison JA's comments at paragraph 26 of **Azan** that it was well accepted that an amendment to include a new cause of action, if it would cause injustice, would not be allowed. In paragraph 29 of his judgment, K Harrison JA

referred to the principles utilised to establish what amounts to a new cause of action. It was in that paragraph that he referred to the two cases which have become the focus of this application: **Savings and Investment Bank Ltd v Fincken** [2001] EWCA Civ 1639 and **Brickfield Properties Ltd v Newton; Rosebell Holdings Ltd v Newton** [1971] 1 WLR 862. Harrison JA concluded from the dicta in those cases that a new cause of action would not arise if it was founded on the same facts as the original claim. This principle, Brooks JA said, was adopted in **The Attorney General of Jamaica and Another v Cleveland Vassell** [2015] JMCA Civ 47 where Dukharan JA, speaking on behalf of this court, permitted the addition of the claim of false imprisonment and malicious prosecution to a claim for damages for assault and battery, stating that it arose out of the same or substantially the same facts, that is, the same transaction.

[16] Brooks JA finally found that the claim had been filed within the limitation period and the amendments arose out of the same facts as the original claim. In fact, at paragraph [27] he said:

> "...The issue in respect of the original claim as well as in the proposed amendment is that NLDL has done work for Sandals for which it has not been paid. It is the same work, alleged in the original claim to have been done, which is used to support the amended claim."

[17] Brooks JA stated further that Sandals' defence was not that no works had been done, but that the submission for compensation for the work had been made late after the time specified in the contract. They would not therefore have been embarrassed,

and no injustice had been pleaded, and so the court, he stated, had properly exercised its discretion in allowing the claim to be amended. There was no difficulty in striking out the sum claimed on the basis of the contract. Additionally, Brooks JA stated that it could not be said that the proposed amendments in the instant case had no prospects of success since: (i) as was found by K Harrison JA, a "new" cause of action may be substituted if it arose out of the same facts; and (ii) based on the principle gleaned from the authors of Hudson's Building and Engineering Contracts, "*quantum meruit* is also available as an alternative remedy to damages to a party who has done work before accepting a fundamental breach by the other as discharging the contract".

[18] It seems therefore that this court ruled that based on the amendments:

(1) it could not be said that they had no real chance of success;

(2) as they related to a claim for *quantum meruit*, they were not based on separate facts than those in the original claim; and

(3) the claim for *quantum meruit* is available as an alternative remedy to damages in a contractual claim where one party has not accepted the fundamental breach by the other.

The application to Her Majesty in Council

[19] Leave is being sought for conditional leave to appeal the decision of this court to Her Majesty in Council pursuant to section 110(2) of the Constitution of Jamaica (the

Constitution). Essentially, the ground of the application stated that Sandals challenged Batts J's decision before the Court of Appeal, as he had erred *inter alia* by granting NLDL permission to amend its particulars of claim to allege sums due on a *quantum meruit* basis. The questions which Sandals claims arises from the judgment of this court and which are of "great general or public importance or otherwise" are:

> "(1) Does the law of Jamaica allow amendments to be made after the limitation period to pursue new causes of action?
>
> (2) Are authorities decided in the United Kingdom, Order 20, r.5 and the United Kingdom Limitation Act, 1980 applicable in Jamaica?"

This being a matter purely of law there was no affidavit in support of the motion filed.

[20] In his written submissions, counsel for Sandals, not so accurately in my view, posited what he described as the central issue being the question before this court as follows:

> "Whether the ability of the Supreme Court of Jamaica to permit an amendment to allow a new cause of action to be added or substituted, if it arises from the same facts or substantially the same facts as to give rise to a cause of action already pleaded, is a question of great general or public importance?"

[21] Counsel set out his understanding of the phrase "great general or public importance" from the Constitution by referring to several cases out of this court, for example, **Vick Chemical Company v Cecil DeCordova and Others** (1948) 5 JLR 106. Having framed the central issue as he did, counsel posited that the authorities

applied to the present application. He stated that the issue would affect the rights of all litigants and civil practitioners and not only the particular litigants before the court.

[22] Counsel for Sandals referred to and relied on the judgment of K Harrison JA in **Azan**, which he stated, permitted the amendment of a claim to include a cause of action provided the facts were the same or substantially the same as those substantially pleaded. However, he submitted that in coming to that conclusion, the court relied on two English authorities which were decided against the background of a different legislative framework, which explicitly permitted amendments in the circumstances. He contended that there was no such provision in the Limitation of Actions Act in Jamaica. Accordingly, he posited that **Azan** and **Vassell** were incorrectly decided, as the *ratio decidendi* of those cases were based on rules and legislation that do not exist in Jamaica.

[23] Mr Spencer referred to the specific deadlines relative to this matter, namely, that the dispute arose in 2008 when the practical certificates were issued. Submissions for the final certificates were made in on 9 October 2009. The claim was filed on 14 April 2011, Batts J's decision was made on 8 February 2016, and the amendment to the claim form and particulars of claim was filed 12 February 2016. He submitted that the procedural appeal had been pursued on the basis that the limitation period had expired. He set out the relevant corresponding items of legislation in the United Kingdom (UK) and Jamaica, and said that the order made by Batts J, and upheld by the Court of Appeal, was a matter desirous for serious debate before Her Majesty in Council.

[24] In response counsel for NLDL submitted that this was not a case concerning a new cause of action. He submitted that in order to compute whether the limitation period had expired, one must first identify the date that represented the triggering date. It was counsel's contention that NLDL was only informed of the position taken by Sandals in respect of its refusal to assess the final certificate in March 2010. The original claim was filed well within the limitation period on 14 April 2011, and the amended claim form and particulars of claim were filed on 12 February 2016. Accordingly, counsel contended that the issue of limitation of action did not apply.

[25] Counsel submitted that UK statute and rules are not applicable to the instant case. The historical position of the *ratio decidendi* of **Weldon v Neal** (1887) 19 QBD 394 was also not applicable to the instant case, as the courts have long accepted and recognised that serious hardships have resulted in the application of the principles of that case, and in any event, that case had particular circumstances existing which did not exist in this case. In this case, counsel contended, there is no prejudice experienced by either party and there is no new cause of action, as the sum claimed by way of *quantum meruit* is not a new cause of action. Accordingly, counsel posited that whatever principle is applicable for the bringing of a claim in respect of a new cause of action after the limitation period had expired would not apply to the instant case.

[26] Although counsel accepted that rule 20.6 of the CPR would not be applicable to the instant case as it was not a change of parties, he reiterated that the judgment of Brooks JA, on behalf of the Court of Appeal in the instant case, did not rely on the addition or substitution of a new cause of action. Counsel also contended that he had

concerns as to whether **Vassell** had been correctly decided, as causes of action of false imprisonment and malicious prosecution, were entirely different from that for assault and battery. He submitted that each case must be decided on its own particular set of facts, and the issue of importance was whether on the basis of the amendment granted to NLDL, Sandals would have been deprived of a plea of a limitation defence. In the instant case, as there was no new cause of action, that defence could not arise, and there was no new question of great general or public importance arising out of this case that ought to be determined by the Judicial Committee of the Privy Council.

Analysis

[27] Section 110(2) of the Constitution reads as follows:

> "An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases-
>
> (a) where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings; and
>
> (b) such other cases as may be prescribed by Parliament."

[28] There is no issue in the application for conditional leave that was made under section 110(1) of the Constitution as of right. It is necessary therefore for the applicant to show that the matter raised important questions of great general or public importance pursuant to section 110(2).

[29] This court has reviewed that phrase over many years in several cases. Recently in **Norton Wordworth Hinds and Others v The Director of Public Prosecutions** [2018] JMCA App 10, the court summarised the principles arising out of the cases as follows at paragraph [32]:

> "...A question 'of great general or public importance' is one that is regarded as being subject to serious debate. It must be not just a difficult question of law but an important question of law that not only affects the rights of particular litigants but one whose decision will bind others in their commercial and domestic relations. It must not merely be a question that the parties wish to have considered by the Privy Council in an effort to see whether the Law Lords would agree with the decision of the Court of Appeal. It must be a case of gravity involving a matter of public interest, or one affecting property of a considerable amount or where the case is otherwise of some public importance or of a very substantial character (see **Georgette Scott v The General Legal Council (Ex-Parte Errol Cunningham)** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 118/2008, Motion No 15/2009, judgment delivered 18 December 2009; **Vick Chemical Company v Cecil DeCordova and Others** (1948) 5 JLR 106; **Dr Dudley Stokes and Gleaner Company Limited v Eric Anthony Abrahams** (1992) 29 JLR 79); and **Daily Telegraph Newspaper Company Limited v McLaughlin** [1904] AC 776)."

[30] As indicated, Sandals relies on dicta from two cases of this court, namely **Azan** and **Vassell**, and submitted that the decision from those cases are based on two cases out of the UK namely **Brickfield Properties** and **Savings and Investment Bank**. Sandals submits further that **Azan** and **Vassell** were incorrectly decided as the two UK cases were based on the UK statute and English Rules which were different from the statute and rules which apply in this jurisdiction. It is these alleged contradictions that

counsel submitted gave rise to the question of great general and public importance. Accordingly, I will deal summarily with **Azan** and **Vassell** in order to demonstrate that the submission made by counsel for Sandals is entirely misconceived, particularly in relation to how I propose to deal with the application before us.

[31] In **Azan**, the issue was whether amendments pleading monies had and received on the basis of a consideration that had wholly failed, as the claimant had not obtained title and ownership in respect of the property, were amendments constituting new causes of action. It was argued in that case that a claim for money had and received was inconsistent with a claim for specific performance or damages in lieu thereof, as the former did not treat the contract as subsisting, but invalidated, and there had been no claim for rescission of the contract. The overriding objective was brought into play as it was contended that not only would the amendment not add any new cause of action, but it would also not cause any injustice or prejudice. The amendments arose out of and were based on facts already pleaded in the statement of claim and so, the claim for money had and received was an inevitable consequence or inescapable inference from the facts pleaded, the claimant having not obtained title or ownership. K Harrison JA held that the amendment had not deprived the appellant of a defence under the Limitation of Actions Act and he also made this bold statement in paragraph 25 of the judgment:

> "It has been the practice over the years that there is a general discretion to permit amendments where this is just and proportionate. The principle has always been that an amendment should be allowed if it can be made without

injustice to the other side. See ***Clarapede and Co v Commercial Union Association*** (1883) 32 WR 262"

[32] The learned judge of appeal made the following points at paragraphs 26-28:

(1) An amendment to add or substitute a new cause of action is deemed to be a separate claim, and to have been commenced on the same date as the original claim.

(2) If the original claim was commenced in the limitation period and an amendment is allowed adding a cause of action after the expiry of the limitation period, the defendant would be deprived of the limitation defence, and an injustice would have occurred.

(3) Rule 20.6 of the CPR refers to an amendment of the statement of case in respect of a change of name.

(4) The rules do not provide for addition or substitution of a new cause of action after the expiration of a limitation period.

(5) The rules do not state any specific matters which the court should take into consideration in assessing whether a proposed amendment in fact amounts to a new cause of action.

[33] He thereafter set out certain principles to be utilised to assess what amounts to a new cause of action. The following are instances of those principles although they are not exhaustive:

> (1) A new plea introducing an essentially distinct allegation is a new cause of action (see **Lloyds Bank plc v Rogers and Another** [1999] 3 EGLR 83).
>
> (2) Where the only difference is a further instance of breach or the addition of a new remedy, there is no addition of any cause of action (see **Savings and Investment Bank**).
>
> (3) A new cause of action may be added or substituted if it arose out of the same facts, or substantially the same facts, which have given rise to a cause of action already pleaded (see **Brickfield Properties**).

K Harrison JA concluded that in **Azan**, it could not be said that a new cause of action had been added. No new facts were being introduced. It was merely a claim stating that if there was no valid contract between the parties, then the claimant should be able to recover what he had paid.

[34] So it is clear that in **Azan**, the issue that the court had to decide was whether the amendment related to a new cause of action. The court found that it did not. The court in **Azan** referred to **Savings and Investment Bank** and **Brickfield Properties**

to assist in arriving at a conclusion as to whether the facts relating to the proposed amendment could be considered a new claim.

[35] In **Savings and Investment Bank**, the bank claimed that Mr Kenneth Fincken owed it £19,000,000.00. Mr Fincken had deponed in an affidavit as to his means, assets and liabilities. In reliance on those statements, the bank entered into various deeds of settlement with Mr Fincken to settle the sums owed. After entering into two deeds of settlement upon which Mr Fincken defaulted, the bank entered into a third on 6 May 1992. After so doing, the bank discovered, through informants, that Mr Fincken had additional assets which were not disclosed, and that he had made additional purchases.

[36] As a consequence, the bank issued a writ against Mr Fincken on 1 May 1998, shortly before the expiration on the six year limitation period, for transfer of assets not disclosed by Mr Fincken and for damages for breach of the deed. On 16 April 1999, the bank obtained leave to add a second defendant, Bradenham Holdings Ltd, on the basis that it was Mr Fincken's alter ego and had received assets from Mr Fincken. The bank also sought leave to amend the writ to claim in the alternative, an order for the transfer of undisclosed assets; an order for the payment of the value of the undisclosed assets; and also damages for breach of contract and deceit in respect of Mr Fincken's misrepresentation claimed in his affidavit which induced the bank to enter into the deed. On 12 June 1999, the bank again applied to amend its statement of claim to plead negligent misrepresentation in the alternative to fraudulent misrepresentation and, alternatively to its other claims, rescission of the contract contained in the deed.

[37] Mr Fincken and Bradenham applied to strike out the bank's statement of claim save with reference to one undisclosed asset. This was however refused. On appeal to the UK Court of Appeal, they sought to set aside the dismissal of their application to strike out and the allowance of the amendments to the statement of claim with an exception to the claim of rescission.

[38] Gibson LJ on behalf of the court noted section 35 of the UK Limitation Act 1980 and accepted that it "prohibits the making of a new claim after the expiry of any time limit under the Act which would affect a new action to enforce the claim". The court indicated that a new claim is defined as a new cause of action. In determining whether there was a new cause of action filed, comparison must be made of the pleadings before and after the proposed amendment. The court must look at the essential or material facts and the pleadings, and if the duty or obligation pleaded in the amended claim differs from the duty or obligation pleaded in the original claim, then a new cause of action exists. Having conducted that exercise, the court found that the material facts were no more than the bank giving Mr Fincken a warranty and Mr Fincken breaching that warranty. Accordingly, the court held that the non-disclosure of additional assets was merely a further instance of how that warranty was breached.

[39] With regard to the claims in tort based on fraudulent, or alternatively negligent misrepresentation, the court held that the essential facts pleaded both before and after the statement of claim was amended were the same, as the averment of falsity had not changed, and the averment to misrepresentation was based on the non-disclosure. The court cited with approval the views expressed by Auld J in **Lloyds Bank plc v Rogers**

that "the addition of a claim for a new remedy was not the addition of a new cause of action". As a result, it was held that the proposed amendments relating to non-disclosure was not a new cause of action.

[40] In **Brickfield Properties**, the plaintiffs contracted the defendant, who is a chartered architect, to prepare building plans for buildings comprising flats in 1962. Erection of those buildings began in 1964, and was completed in 1966. The defendant ceased to act as architect to the plaintiffs on 9 March 1966. However, in April 1966, disputes arose as to the buildings, and by June 1966, an independent firm of architects reported that there were a number of alleged defects in the buildings.

[41] On 11 July 1969, the plaintiffs issued writs against the defendant claiming damages for negligence and breach of duty, in that the defendant who was an architect employed by the plaintiffs, negligently supervised the construction of the buildings that ultimately rendered them defective. However, it was pleaded in the statement of claim that the defendant's negligent design of the buildings rendered them defective. On 11 February 1970, the defendant filed a defence in which it pleaded, in reliance on the Limitation Act 1939 and the UK Rules of the Supreme Court 1970 (RSC), that the pleading related to negligent design was a cause of action different from the ones already pleaded, and it arose more than six years before the issue of the writ. The plaintiffs filed applications to amend the writs to include the negligent design of the said buildings that rendered them defective, but those applications were denied. On the defendant's application, the allegations in relation to negligent design in the statement

of claim were struck out. The main issue on appeal was whether the plaintiff was entitled to extend the claim by virtue of various provisions of the RSC.

[42] Under RSC, Order 15, rule 15(2):

> "A statement of claim must not contain any allegation or claim in respect of a cause of action unless that cause of action is mentioned in the writ or arises from facts which are the same as, or include or form part of, facts giving rise to a cause of action so mentioned; but, subject to that, a plaintiff may in his statement of claim alter, modify or extend any claim made by him in the indorsement of the writ without amending the indorsement."

The court found that on the facts in that case, the plaintiffs were not entitled, as of right, to add an additional cause of action in the statement of claim in respect of 'design' and that that addition was accordingly, an irregularity. Although counsel for both parties accepted that under RSC, Order 2, rule 2 and Order 18, rule 19 such an irregularity could be waived, the court found that there was no waiver of that irregularity.

[43] The court then went on to consider whether the defect in the writ could be cured pursuant to RSC, Order 20, rule 5 and whether the court should so order. RSC, Order 20, rule 5 reads as follows:

> "(1) Subject to Order 15, rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

(2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.

(3) An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.

(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under paragraph (2) if the capacity in which, if the amendment is made, the party will sue is one in which at the date of issue of the writ or the making of the counterclaim, as the case may be, he might have sued.

(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment."

[44] The court acknowledged that statements of claim could be amended even if the amendment does not fall within sub-paragraphs (3), (4) or (5) of RSC, Order 20, rule 5, and at page 871, Sachs LJ stated that:

"In so far as the Rules of the Supreme Court deal with practice and procedure they can, for the purpose of this case, conveniently be described as falling within two

> categories. The first is mandatory, and lays down that something must be done in a particular way or prohibits it being done at all. The second is permissive and enables the court to develop its own practice. In cases falling within the second category it is undoubtedly open to the courts at any time to modify or alter their practice. The object of the rules and of practice alike is to achieve justice as between litigants -- a subject on which experience may teach the courts of one generation to take what they may regard as a wider or more liberal view than that of their predecessors."

The court also noted that RSC, Order 20, rule 5 was:

> "designed to break down the rigid practice which, through undue adherence to *Weldon v Neal* (1887) 19 QBD 394, had too often produced injustice."

Weldon v Neal held that amendments which include fresh causes of action would not be allowed once it is statute barred.

[45] The court in **Brickfield Properties** held that the writ was defective because it "failed to state in technically appropriate terms the nature of the dispute" between the parties. This defect was as a result of a genuine and excusable mistake by counsel who followed word for word a precedent in a textbook of repute. The court found that the nature of this dispute was well known to the defendant as in its defence it admitted that the architect made the designs. Accordingly, no prejudice was caused to the defendant by the inclusion in the design claim in the statement of case. Accordingly, the plaintiffs should not be barred from pursuing their design claim if the court has jurisdiction to permit them to pursue it.

[46] The court found that it had jurisdiction to permit the plaintiffs to pursue the design claim pursuant to RSC, Order 20, rule 5(1) and (5) as the writ was indeed

defective and it was a new cause of action arising out of the same or substantially the same facts. The court also found that in the interests of justice and from the history of the matter, an absurdity would result if the claim was struck out, and if the amendment was not permitted, and so, it allowed the appeals against the striking out of certain allegations in the statement of case, and against the refusal to grant leave to amend the writs.

[47] The Full Court of Appeal dealt with this issue in **National Commercial Bank Jamaica Limited and Another v Scotiabank Jamaica Trust and Merchant Bank Ltd** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 22/2008, judgment delivered 19 December 2008 where Harris JA, on behalf of the court, was considering whether 11 of the 17 paragraphs which the learned judge ordered should be amended, could be objectionable, as they raised new causes of action, and were being brought after the expiration of the limitation period. Harris JA referred to rule 20.6 of the CPR and stated that that rule prohibited amendments outside of the limitation period save and except to correct a genuine mistake or in cases affecting the identity of the party, which were inapplicable in that case. She stated in paragraph 15 of the judgment that:

> "It is a well settled rule that an amendment will not be permitted, if to do so, would effectually divest a defendant of a right to a defence under the Statute of Limitation. That is, if the proposed amendment amounts to a new cause of action, or a new claim, a court will refuse to grant an amendment if to do so would deprive a defendant of a defence under the statute of Limitation."

[48] So the court made it clear that a new cause of action could not be introduced as an amendment if it offended the statute of limitations. That statement was very clear. Harris JA referred to the dictum of Lord Esher MR in **Weldon v Neal** with approval where fresh claims were struck out. The court focused on the question as to whether the rights of the opposite party would be prejudiced, namely, that the party would be deprived of a benefit under the Limitation of Actions Act. The court also endorsed the ratio in **Dornan v J W Ellis & Co Ltd** [1962] 1 QBD 583 making it clear that the particulars of negligence proposed to be added as amendments, although dissimilar in quality from the original claim, did not raise a new claim and or a different case of negligence. The court said that the authorities had made it abundantly clear that the court would refuse an amendment sought if it is one involving a new consideration of a new set of facts.

[49] In **NCB v Scotiabank**, there was a challenge to proposed amendments in respect of six paragraphs which had been refused by the learned trial judge. The court examined each paragraph against the original pleaded claim in order to ascertain if it was a new claim or merely an amplification of an existing claim. The court found that some were new claims relating to bank customs (as against a general plea of negligence), equitable assignment or estoppels, which were amendments which would deprive the defendant of a limitation defence and would not be allowed. Amendments related to particulars of negligence where they had been imperfectly pleaded originally were deemed to be permissible.

[50] In **Vassell**, the court once again reiterated the principles as stated by K Harrison JA in **Azan** and Harris JA in **NCB v Scotiabank**. The court said in order to assess whether a proposed amendment is a new claim, one must look at the case as a whole. The court endorsed the dictum of Hobhouse LJ in **Lloyds Bank plc v Rogers and Another** (1996) The Times, 24 March who stated that if the factual issues were in any event going to be litigated between the parties then they should be able to rely upon any cause of action which substantially arises on those facts. The court also referred to the statement made in **Savings and Investment Bank** confirming that the addition of a new remedy was not an addition of a new cause of action. The court also referred to **Azan** and **Brickfield Properties**. Dukharan JA ultimately concluded that although the causes of action of malicious prosecution, false imprisonment could be considered new causes of action as the original claim was for assault in battery, they had arisen out of the same facts or substantially the same facts that had given rise to the causes of action originally pleaded. No new facts were introduced. Indeed, false imprisonment and malicious prosecution had been omitted by mistake. The facts had already been introduced in the claim. As a consequence, the defendants had demonstrated that they had been able to prepare an amended defence and properly address the amended claim form and amended particulars of claim.

[51] In the instant case, Brooks JA made it clear in paragraph [27] that "there is no dispute that the original claim was filed within the limitation period and NLDL's proposed amendments arose out of the same facts as the original claim". It was a

situation in which work had been done by NLDL for Sandals for which NLDL had not been paid. The learned judge of appeal continued in paragraph [28] of the judgement:

> "On the issue of prejudice it should be noted that Sandals, in its application to strike out the claim, did not say that no work had been done. Its defence is that the submission for compensation was made after the time specified by the contract. It would not be embarrassed by an amendment which seeks payment for the work that has been done. The learned judge properly exercised his discretion in allowing the amendment. It is consistent with the overarching principle applied by Harrison JA in **The Jamaica Railway Corporation v Mark Azan**, namely, that the amendment would cause no injustice to either side."

[52] In the instant case Batts J ordered that the claim by NLDL for the sum of $22,390,966.76 be struck out and gave permission for the particulars to be amended for NLDL to allege the sum due of $32,469,918.80 on a *quantum meruit* basis.

[53] Halsbury's Laws of England, Volume 88, 2012, paragraph 408 states:

> "The term 'quantum meruit' is used in different senses at common law. For example, in some cases quantum meruit is used to express the measure of recovery in a contractual claim. In other cases it is used to denote a restitutionary claim. The claim is clearly contractual in nature where it is one to recover a reasonable price or remuneration in a contract where no price or remuneration has been fixed for goods sold or work done. Where, however, no contract is ever concluded between the parties or the contract is void or otherwise unenforceable, the claim cannot be contractual in nature and is likely to be restitutionary. In other cases it can be difficult to discern whether the claim is contractual in nature or restitutionary. Where the implication of an obligation to pay a reasonable sum is a genuine one on the facts, reflecting the intention of the parties, the claim is

> contractual, but where the obligation is imposed as a matter of law, the claim is more likely to be restitutionary."

[54] In Emden's Construction Law by Crown Office Chambers, at paragraph 6.18 it states:

> "Quantum meruit is the right to be paid reasonable remuneration. A quantum meruit claim may be based either on contract or on restitution. In principle, the conceptual distinction between contract and restitution is clear: contract is based on agreement between the parties; restitution is imposed by law, being the legal response to unjust enrichment of one party at the expense of another. In practice, the concepts are often blurred together in the cases, whether because of muddled analysis or because the distinction makes no practical difference in the particular circumstances."

[55] Finally, a very clear statement made in respect of payment under the contract by way of *quantum meruit* has been stated in the Stair Memorial Encyclopaedia, paragraph 64. It reads:

> "When the price cannot be fixed by reference to the building contract, the contractor is entitled to payment *quantum meruit* for work done under contract. Examples include preparatory work for which the employer has agreed to pay, and cases where no price has been fixed in the contract (even when an estimate has been given) or where the pricing arrangements of the contract are not applicable (for example, because they were stated to apply only to a particular date which has passed). Likewise, where 'extras' have been ordered, but the parties have not agreed on the amount to be paid for them, payment is *quantum meruit*. If the contract in which the price is stipulated fails for some reason, and a new contract is implied, which ex

> hypothesi contains no term regarding payment, payment is *quantum meruit*..."

[56] So in summary, the applicant in the motion for conditional leave to appeal to Her Majesty in Council appears to have muddied the waters. This arose based on counsel for the applicant's submission that the real issue in this case was whether there were two cases out of this court, which appeared to be following cases out of the UK, which were decided on the basis of provisions of the UK Limitation Act 1980 and the UK Rules, which do not exist in this jurisdiction. As I have endeavoured to demonstrate, this is not the case in the authorities arising out of this jurisdiction or specifically in the instant case at all.

[57] In the UK cases of **Savings and Investment Bank** and **Brickfield Properties**, the courts in deciding which amendments were permissible, did not only place reliance on UK rules and the Limitation of Actions Act, but also stated general principles of law. These principles related to whether the amendment being made was that of a new remedy or a new cause of action; whether it was based on the same or substantially the same facts; whether the amendments would prejudice the other party; and whether it should be granted in the interests of justice.

[58] In **Azan**, **NCB v Scotiabank** and **Vassell**, this court utilised the general principles of law emanating from these cases. The courts also examined the overriding objective pursuant to the CPR, and accepted the fact that amendments should not violate the Jamaican Limitation of Actions Act.

[59] The instant case was about the order made by Batts J, which was acted on promptly by NLDL, whereby NLDL amended their claim and particulars of claim, to claim sums on a *quantum meruit* basis. This claim is being made on sums originally claimed by way of a submission to the quantity surveyor for the project, for the production of the final certificate under the contract between the parties. This submission was not forthcoming due to the late delivery of the submissions, which NLDL said was late due to the fault of Sandals in the delivery of assessing variations claimed.

[60] The cause of action therefore remained one of breach of contract. There was no question of a new claim or new facts or any prejudice suffered by Sandals who had filed the defence thereto, nor can it be said that the case was one without any prospect of success, all of which fell to be considered against the framework of the overriding objective. On the totality of the information before us in respect of this case, it is my view that there was no new cause of action added after the expiry of a limitation period. The amendment to proceed by way of *quantum meruit* is an alternative remedy on the same facts as pleaded. Additionally, Batts J's order for NLDL to pursue this remedy, was made in accordance with his powers under section 48(g) of Judicature Supreme Court Act to:

> "...grant either absolutely or on such reasonable terms and conditions as to it seems just, **all such remedies as any of the parties thereto appear to be entitled to in respect of any legal or equitable claim properly brought forward by them respectively in such cause or matter**; so that as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and multiplicity of proceedings avoided." (Emphasis supplied)

[61] In the light of the above, it is my opinion that there is no genuinely disputable question of importance, let alone any question of great general or public importance that arises for determination before Her Majesty in Council in this matter, and so the motion ought to be refused with costs to the respondent to be taxed if not agreed. As a consequence, as the decision of this court affirmed the judgment of Batts J in the Supreme Court, the amended claim on the basis of *quantum meruit* ought therefore to proceed to case management for preparation of the trial of the claim at the earliest convenient date.

F WILLIAMS JA

[62] I have read in draft the judgment of Phillips JA. I agree with her reasoning and conclusion and have nothing further to add.

PUSEY JA (AG)

[63] I have read the draft judgment of Phillips JA and I entirely agree with her reasoning and conclusion.

PHILLIPS JA

ORDER

(1) Application for leave to appeal to Her Majesty in Council is refused.

(2) Costs to the respondent to be taxed if not agreed.