[2021] JMCA Civ 50

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MS JUSTICE EDWARDS JA
THE HON MR JUSTICE BROWN JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2019CV00125

BETWEEN	**THE ATTORNEY GENERAL OF JAMAICA**	**APPELLANT**
AND	**ABIGAILE BROWN (By Next Friend Affia Scott)**	**RESPONDENT**

SUPREME COURT CIVIL APPEAL NO COA2020CV00019

BETWEEN	**THE ATTORNEY GENERAL OF JAMAICA**	**APPELLANT**
AND	**ABIGAILE BROWN (By Next Friend Affia Scott)**	**RESPONDENT**

Written submissions filed by the Director of State Proceedings for the appellant

Written submissions filed by Nunes, Scholefield, Deleon and Company for the respondent

26 November 2021

PROCEDURAL APPEAL

(Considered by the Court on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

F WILLIAMS JA

[1] I have read in draft the judgment of Brown JA (Ag). I agree with his reasoning and conclusion and have nothing to add.

EDWARDS JA

[2] I have read the draft judgment of Brown JA (Ag) and agree with his reasoning and conclusion.

BROWN JA (AG)

Introduction

[3] The Attorney General of Jamaica ('Attorney General') has filed two procedural appeals SCCA No 125/2019 and SCCA No 19/2020 against the decisions of Nembhard J ('the learned judge') in the Supreme Court on 16 October 2019 and 10 December 2019 respectively. These appeals will be considered and determined together.

[4] In a written judgment, the learned judge, in respect of the first of the appeals, SCCA No 125/2019, granted an application for amendments to be made to the respondent's statement of case. She also, on the date scheduled for trial, granted an oral application for the appointment of an expert witness. The learned judge, at para. [2] of her judgment, set out the issues which called for resolution as follows:

> "1. What is the proper interpretation to be applied to section 7 of the English [Statute of Limitation, Imperial Statute 21 James 1, Cap 16, of] 1623?
>
> 2. Whether the amendments indicated in the Further Amended Particulars of Claim, filed on 15 July 2019, are amendments that are being made after the expiration of a relevant limitation period?
>
> 3. Whether the purported amendments indicated in the Further Amended Particulars of Claim, filed on 15 July 2019, amount to a 'fresh claim' in that, new injuries are being pleaded for the first time?

4. Is the Court properly to certify or appoint Dr Kai A.D Morgan as an expert witness for the hearing of the Assessment of Damages?

5. Should permission properly be granted for the final report of Dr Kai A.D Morgan, dated 20 April 2019 and filed on 9 July 2019, to be tendered in evidence at the Assessment of Damages?"

[5] In the second appeal, SCCA No 19/2020, the appellant is challenging the decision of the learned judge to strike out its statement of case, namely its defence. This will be dealt with later in this judgment.

Background

[6] Abigaile Brown ('the respondent') is the claimant who initiated proceedings in the Supreme Court by her mother and next friend. She is 12 years old. She was born on 7 October 2009 at the Falmouth Hospital in the parish of Trelawny. The Board of Management of the Falmouth Public General Hospital is represented by the Attorney General in these proceedings, who was joined by virtue of the provisions of the Crown Proceedings Act. The Falmouth Public General Hospital provides medical services to include obstetric and gynaecological services to the public.

[7] On 7 October 2009, the respondent's mother who was nine months pregnant attended the Falmouth Public General Hospital for her delivery. During her delivery, the respondent experienced shoulder dystocia. This is a medical condition in which the respondent's shoulder becomes lodged to the mother's pubic bone, and the delivery of the head, shoulder and upper torso of the respondent becomes delayed during the delivery. The respondent's feet and lower body were delivered but the remainder of her body (head, neck, shoulder and upper torso) was stuck in the birth canal.

[8] As a result of this condition, the respondent suffered a brachial plexus injury at birth, which is an injury to the nerves from the neck region of the spinal column to the shoulder. As a consequence of this, she developed Erb's palsy, which is paralysis in her right shoulder and arm.

[9] The respondent instituted proceedings by way of a claim form and particulars of claim in the Supreme Court against the appellant for medical negligence of its servants/ agents, in this case, the Falmouth Hospital, on 11 October 2012. The claim form was subsequently amended on 7 August 2014 and 15 July 2019. It is the amendments that were filed on 15 July 2019 that are being challenged in this appeal, SCCA No 125/2019.

[10] In the amended claim form, the respondent seeks to recover damages for negligence and breach of contract of the appellant's servant/agents (medical staff) that negligently undertook and managed the prenatal care, delivery and birth of the respondent that resulted in the permanent physical injury, Erb's palsy.

[11] Damages were also sought for the negligence and/or breach of duty on the part of Radiology West Limited (not a party before this court) who conducted an ultrasound examination and interpreted the results in such a manner that, allegedly, created a risk to the respondent's health, affected the management and delivery of the respondent by the hospital staff and resulted in the respondent suffering personal injuries. The respondent also claimed costs and interest at the rate of 6% per annum or such other rate as deemed appropriate by the court.

[12] The appellant filed a defence to the claim on 20 February 2012. It denied liability on the following bases:

a) The condition of medical shoulder dystocia arose during delivery however it was denied that the agents and/or servants caused the respondent to sustain a brachial injury at birth and that all reasonable steps were taken to manage this condition during delivery.

b) The respondent suffered Erb's palsy of her right shoulder and arm which rendered it lifeless.

c) The respondent's mother was admitted and was carefully and continuously monitored from 1 to 6 October 2009, she did not appear to be under distress. There were no signs of labour.

d) On 6 October 2009, an ultrasound was conducted on the respondent's mother which revealed that the fetus was "cephalic" and no abnormalities were observed. There was no sign of labour. She was then discharged.

e) On 7 October 2009, when the respondent's mother returned to the ward she was in active labour and the respondent had been partially delivered up to the chest level but was not progressing.

f) It was observed that the lower part of the respondent's body was protruding up to the level of the chest outside the birth canal, the upper part of the body was still trapped inside the birth canal and a diagnosis of shoulder dystocia was made.

g) The respondent was carefully removed by the bending of her shoulder blades then one hand was extracted followed by the other to allow the remainder of her body to be delivered. The respondent was delivered without any undue force as there was no cephalo-pelvic disproportion.

h) The medical staff at the Falmouth Hospital exercised reasonable skill and care in both the treatment preceding the respondent's delivery and how she was delivered.

[13] The claim first came up for case management on 2 February 2017, before Rattray J. The trial date of 14 October 2019, for three days, was set. Rattray J also fixed 17 June 2019 for pre-trial review hearing. The case management conference was then adjourned to 26 October 2017, to facilitate the continuation of discussions between the parties.

[14] On 26 October 2017, when the matter came up for hearing for case management conference before Thompson-James J, standard orders were made for the disclosure of documents, filing and exchange of witness statements on or before 15 February 2019. Orders were also made for applications to be made concerning expert witnesses.

[15] On 17 June 2019, when the matter was next before Thompson-James J for pre-trial review, none of the case management orders made on 26 October 2017 had been complied with by the parties. Thompson-James J therefore extended the time for complying with the case management orders made on 26 October 2017 until 16 August 2019. The pre-trial review was adjourned until 26 September 2019. There was also an order for any further application touching and concerning expert witnesses to be dealt with at the adjourned pre-trial review date.

[16] When the matter came up for pre-trial review before the learned judge on 26 September 2019, the notice of application to appoint Dr Kai Morgan as an expert witness was withdrawn. The trial date, previously for fixed for 14 to 16 October 2019, was confirmed. When the matter came up for trial before the learned judge on 14 October 2019, the trial was aborted and the claim reverted to chambers. The attorneys-at-law representing the parties do not agree on the reason for the aborting of the trial. On the appellant's account, it was to facilitate the respondent making an application for the amendment of the respondent's statement of case and appoint an expert witness. On the version of the respondent, the trial was aborted in the wake of an exchange between the learned judge and the legal representative for the appellant, consequent on the respondent raising, as a preliminary matter, the appellant's extant application for relief from sanction. It was ordered that the trial date of 16 October 2019 be vacated and the matter adjourned to 15 October 2019 for oral applications to be heard in chambers. Nothing appears to have happened on 15 October 2019.

[17] On 16 October 2019, the respondent made oral applications in chambers. The oral applications in chambers were for the court to appoint Dr Kai A D Morgan as an expert in the proceedings; and to amend the further amended particulars of claim,

specifically, the particulars of injuries and loss of amenities. The learned judge heard the applications and gave the parties three weeks to file written submissions on the legal issues involved in relation to amending the particulars of claim and also made an order striking out the appellant's statement of case.

[18] The following orders were made by the learned judge:

> "1. The Defendant having failed to comply with paragraph 4 of the Case Management Conference Orders, made on October 26, 2017, and in relation to which the time for compliance was extended to June 17, 2019 to August 16, 2019, and no application for relief from sanctions having been advanced, the Defendant's Statement of Case shall stand struck out**;**
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> 2. Judgment is entered in favour of the Claimant against the Defendant on the issue of liability;
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> 3. The hearing of the Assessment of Damages is scheduled for the 12th and 13th days of April, 2021 at 10:00 am;
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> 4. The hearing of the Oral Application to appoint Dr Kai A.D. Morgan as an Expert Witness, to permit the Claimant to tender her report into evidence at the hearing of the Assessment of Damages, and to permit the Further Amended Particulars of Claim, filed on July 15, 2019 to stand filed, is further adjourned to **November 26, 2019** at 9:00 am before A. Nembhard, J.;
>
> 5. Each party is to file and serve Written Submissions and Authorities that treat with the following issues:
>
> > "(i) Whether the application to appoint Dr. Kai A.D Morgan as an Expert Witness, to permit the Claimant to tender her report in evidence at the hearing of the Assessment of Damages, and to permit the Further Amended Particulars of Claim, filed on July 15, 2019 to stand as filed, can properly be made orally;
> >
> > (ii) What is the proper interpretation to be applied to Section 7 of the Limitations of Actions Act of 1623;

(iii) Whether the amendments indicated in the Further Amended Particulars of Claim, filed on July 15, 2019 are amendments that are being made after the expiration of a relevant Limitation Period;

(iv) Whether the purported amendments indicated in the Further Amended Particulars of Claim, filed on July 15, 2019 amount to a 'fresh claim', in that, new injuries are being pleaded for the first time;

(v) (a) Is the Court properly to certify or appoint Dr. Kai A.D Morgan as an Expert Witness for the hearing of the Assessment of Damages;

(b) Should permission properly be granted for her Final Report dated July 9, 2019 to be tendered in evidence at the hearing of the Assessment of Damages;

The Written Submissions and Authorities are to be filed and served on or before **November 8, 2019**.

6. The Defendant is refused leave to appeal;

7. No Order as to Costs;

8. The Claimant's Attorney-at-Law are to prepare, file and serve the Orders made herein." (Emphasis as seen in the original)

The decision in the court below

[19] The learned judge found that the cause of action, as pleaded by the respondent was one of negligence (actions upon the case) and not an action for trespass, and as such, the respondent could not properly be permitted, to change her cause of action under section 7 of the English Statute of Limitation, Imperial Statute 21 James 1, Cap16, of 1623. The learned judge also found that the limitation period would have expired and it, therefore, meant that the amendments were being made after the expiration of the relevant limitation period. She, however held that the amendments did not constitute a "new case" or "fresh claim". Further, the proposed amendments would not prejudice the appellant but it was in the interest of justice to grant the amendments sought.

[20] It was also held by the learned judge that Dr Kai A D Morgan could properly be appointed as an expert witness for the hearing of the assessment of damages and permission was granted for her final report to be tendered into evidence without the need for her to attend the hearing.

Grounds of appeal

[21] The appellant filed 10 grounds of appeal in respect of SCCA No 125/2019 (the amendment of the claim and appointment of the expert witness) and seven grounds in respect of SCCA No 19/2020 (in respect of the striking out). The latter grounds will be set out in the latter part of this judgment. The grounds of appeal in respect of SCCA No 125/2019 are as follows:

> "1. The learned judge erred in hearing the Claimant/Respondent's oral application to further amend statement of case and to appoint Dr. Kai Morgan or in allowing the said applications to be made orally instead of in writing.
>
> 2. The learned judge erred in hearing the Claimant/Respondent's oral application to further amend statement of case and to appoint Dr. Kai Morgan or in allowing the said applications to be made orally instead of in writing.
>
> 3. The learned judge erred in hearing the Claimant/Respondent's oral application to further amend statement of case and to appoint Dr. Kai Morgan or in allowing the said applications to be made orally instead of in writing, in circumstances where the Claimant/Respondent withdrew her written applications to further amend statement of case and to appoint Dr. Kai Morgan as expert at the Pre-Trial Review Hearing on September 26, 2019.
>
> 4. The learned judge erred in stopping the trial of the matter to hear the Claimant/Respondent's oral application to further amend statement of case and to appoint Dr. Kai Morgan, in circumstances where the Claimant/Respondent withdrew her written applications to further amend statement of case and to

appoint Dr. Kai Morgan as expert at the Pre-Trial Review Hearing on September 26, 2019 and no notice was given to the Defendant/Appellant that the Claimant/Respondent would be pursuing the said applications at the trial of the matter.

5. The learned judge erred in finding that the rules of natural justice were satisfied in relation to the Defendant/Appellants in circumstances where the Claimant/Respondent withdrew her written applications to further amend statement of case and to appoint Dr. Kai Morgan as expert at the Pre-Trial Review Hearing on September 26, 2019 and no notice was given to the Defendant/Appellant that the Claimant/Respondent would be pursuing the said applications at the trial of the matter.

6. The learned judge erred in finding that the proposed amendments do not constitute a 'new case' or a 'fresh claim'.

7. The learned judge erred in finding that the Defendant/Appellant would not be prejudiced by the amendments at this late stage in circumstances where the learned judge struck out the Defendant/Appellant's Defence on October 16, 2019 whilst she was still hearing the Claimant/Respondent's oral application to further amend statement of case and to appoint expert.

8. The learned judge erred in finding that its [sic] in the interests of justice that the amendment be allowed.

9. The learned judge erred in allowing the amendments and appointing Dr. Kai Morgan as an expert in the proceedings on an oral application.

10. The learned judge erred in stopping the trial to hear the Claimant/Respondent's oral application to further amend statement of case and to appoint expert in circumstances where these applications were not in writing, no notice was given of the applications, they were not listed for hearing and the applications in writing were withdrawn on September 26, 2019 at the Pre-Trial Review."

[22] The respondent filed a counter-notice of appeal on 10 January 2020. No submissions were filed by either of the parties in this counter-appeal. The grounds on the counter-notice of appeal as filed are as follows:

> "(a) The decision of Lance Melbourne v Christina Wan (1985) 22 JLR 131, was wrongly decided.
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> (b) The decision of Lance Melbourne v Christina Wan (1985) 22 JLR 131 ought to be struck down.
>
> (c) The Court in Lance Melbourne v Christina Wan (1985) 22 JLR 131 erred when it decided that actions in negligence were akin to the actions "upon the case" mentioned and referred to in section 3 of the English Limitation Act of 1623, 21 James I, c16 which has accepted and received as one of the statues of Jamaica.
>
> (d) The findings in Lance Melbourne v Christina Wan (1985) 22 JLR 131 contravened the express and unambiguous language of the English Limitation Act of 1623, 21 James I, c16.
>
> (e) The findings in Lance Melbourne v Christina Wan (1985) 22 JLR 131 were inconsistent with the mischief and purpose of the exempting provisions of Section 7 of the English Limitation Act of 1623, 21 James I, c16.
>
> (f) The findings in Lance Melbourne v Christina Wan (1985) 22 JLR 131 arose from a misunderstanding and misconstruction of the law on "actions upon the case".
>
> (g) That there was a failure on the part of the Court to properly construe and apply section 7 of English Limitation Act of 1623, 21 James I, c16 which specifically provided that the exempting provision for disabilities applied to '**ANY** such action of trespass', and had no limiting or restricting feature.
>
> (h) The Court erred when it found that minors were bound by the six year limitation period in Section 3 of the 1623 Act in actions for negligence.
>
> (i) The Court erred when it found that section 3 of the Act of 1623 made a distinction between 'all actions of

trespass' and 'trespass upon the case', when no such distinction appears on the face of the statute.

(j) The Court failed to appreciate that there was no cause of action known as '*upon the case*', simpliciter, and that the term 'upon the case', can apply to any of the established causes of action.

(k) The Court erred when it found that the reference in section 3 of the Act to actions 'on the case' was a reference to special trespass, or modern day negligence.

(l) The Court failed to appreciate that the reference to [sic] upon the case', in Section 3 of the 1623 Act was in relation to 'actions of account'.

(m) The Court failed to appreciate that no reference was made to actions 'upon the case' in section 7 of the Act of 1623, as the reference to 'upon the case' in section 3, was descriptive of 'actions of account', and not actions of trespass. That this would explain why the words "upon the case" did not appear in Section 7.

(n) That the Respondent will, on its cross appeal, also be seeking to challenge the law which has developed which applies the statute of limitations or the issue of limitation to new facts and personal injuries. The Respondent will contend that Limitations of Actions applies to cause of actions, and not to new facts and or personal injuries." (Bold as seen in the original)

[23] Based on the appellant's grounds, three specific questions have been put before this court for deliberations:

(a) Whether the proposed amendments sought amount to a "new case" or a "fresh claim" (grounds 6 and 8).

(b) Whether the amendments were made at a late stage and it was not in the interest of justice to grant the

amendments and the appellant was prejudiced (ground 7).

(c) Whether the learned judge erred in hearing the oral application to amend and certify expert and the appellant was deprived of natural justice (grounds 1, 2, 3, 4, 5, 9 and 10).

Exercise of the court's discretion

[24] Before I proceed to discuss the issues that arise on this appeal, it must be known that the proposed appeal seeks to challenge the exercise of the learned judge's discretion. It has been stated that this court will not disturb a judge's exercise of discretion unless it is satisfied that the judge wrongly exercised that discretion by misapplication or non-application of the law or a principle.

[25] This was the position of Morrison JA (as he then was) in **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1. In applying the approach recommended by the House of Lords in **Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042. At paras. [19] and [20] Morrison JA stated:

> "[19] ...It follows from this that the proposed appeal will naturally attract Lord Diplock's well-known caution in **Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042, 1046 ..:
>
> > '[The appellate court] must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently.'
>
> [20] This court will therefore only set aside the exercise of discretion by a judge … on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed

> or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

Whether the proposed amendments sought amount to a "new case" or a "fresh claim" (grounds 6 and 8)

Submissions on behalf of the appellant

[26] Ms Dickens, on behalf of the appellant in her written submissions, has agreed that the court has the power to allow amendments to a party's statement of case. She relied on the learned author Stuart Sime in his text, A Practical Approach to Civil Procedure, 12th Edition, paragraph 15.08, "that the courts... have power… to allow the amendment of a statement of case. The rule simply says that amendments may be made with the permission of the court, without saying how the discretion will be exercised. A court asked to grant permission to amend will therefore base its decision on the overriding objective". Additionally, Ms Dickens relied on paragraph 15.10 where the learned author cited the case of **Clarapede and Co v Commercial Union Association** (1883) 32 WR 262, where Brett JA opined that "the amendment should be allowed if it can be made without injustice to the other side".

[27] She submitted that it is clear that the court has jurisdiction to amend a statement of case, but this must be determined in keeping with the overriding objective to deal with cases justly and fairly. Therefore, the court must balance what is just and fair to the parties involved.

[28] Further, Ms Dickens submitted that where the amendments are sought after the expiration of the relevant limitation period, there are principles that the court ought to be guided by and this was not done in the instant matter and as such this amounted to injustice to the appellant that cannot be cured by an award of costs. It was submitted that the amendments were being sought 10 years after the occurrence of the alleged tort to add 17 injuries in addition to the 21 injuries already pleaded. Therefore, the amendments allowed by the judge are all new injuries that were never before pleaded

and could not properly fall within those injuries that were previously pleaded. For this position, reliance was placed on the cases of **Peter Salmon v Master Blend Feeds Limited** (unreported), Supreme Court, Jamaica, Suit No CL 1991/S 163, judgment delivered 26 October 2007 and **Judith Godmar v Ciboney Group Limited** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 144/2001, judgment delivered 11 April 2003, for the principle that the court may not allow a party to amend its statement of case to introduce a fresh claim where the cause of action has become statute barred.

[29] It was also contended that the additional injuries as pleaded by the respondent are not fuller and better particulars of injuries previously pleaded but rather fresh claims that change the "complexion of the claim". Furthermore, these fresh claims cannot now be pleaded as the limitation period expired on 6 October 2015. Therefore, the learned judge was in error when she found that the amendments should be allowed.

[30] Ms Dickens argued that the appellant would be prejudiced by the proposed amendments as they are being made 10 years after the cause of action arose. The prejudice to the appellant was exacerbated by being barred from responding to the fresh claim as their statement of case was struck out, Ms Dickens concluded.

Submissions on behalf of the respondent

[31] Ms Minto, who appears for the respondent, submitted that the learned judge was correct in law when she allowed the respondent to amend its statement of case, being the further amended particulars of claim. Firstly, she submitted that the bar to allowing an amendment post limitation period relates to a new cause of action and not new injuries arising from the claim already pleaded. She posited that the addition of new injuries, is not a new cause of action, but rather, at most a "new remedy" or "further instance of the breach".

[32] She relied on the cases of **Brickfield Properties Ltd v Newton** [1971] 3 ALL ER 328 ('**Brickfield Properties**') and **Savings and Investment Bank v Fincken** [2001] EWCA Civ 1639 ('**Savings and Investment Bank**').

[33] Secondly, Ms Minto argued that the court can permit a party to amend its claim to add a new cause of action post the limitation period, where the cause of action arises from the same facts or substantially the same facts which are before the court for its determination. Ms Minto submitted that the same position would apply in relation to amendments regarding new injuries as this is akin to a further instance of breach, or the addition of a new remedy arising from the surrounding facts.

[34] Lastly, it was submitted that questions concerning the limitation period ought not to bar the amendment to plead injuries. Ms Minto urged the court to consider the intention behind the Limitations of Action Act which is to set a period for commencing proceedings and not particularizing injuries in a claim. She further contended that there was no question of limitation, delay or injustice when it came to pleading injuries when the cause of action is already pleaded before the court. **Letang v Cooper** [1964] 2 All ER 929 was cited for support.

[35] Ms Minto sought to distinguish the case of **Judith Godmar v Ciboney Group Limited** by stating that this case was decided before the Civil Procedure Rules ('CPR') and the provisions concerning the overriding objective and the case management powers of the court. She contended that this case is inconsistent with how this court has treated applications to add a cause of action and fresh claims after the limitation period has expired. This authority, she submitted, is "antiquated and ought to be shelved".

Discussion

[36] It is clear that the main contention before this court is whether the learned judge acted in error when she allowed the proposed amendments to the respondent's statement of case, in particular the further particulars of claim, after the expiration of the limitation period. There is no dispute that the application to amend the respondent's statement of

case was made outside the limitation period. The relevant rule for the consideration of this issue is, therefore, rule 20.6 of the CPR. The rule provides that the court may allow an amendment to correct a mistake as to the name of a party. The rule has made no provisions for the substitution or the addition of a cause of action after the expiration of a limitation period. Similarly, the rule is also silent on the addition of remedies and further breaches. Rule 20.6 states:

> "20.6 (1) This rule applies to an amendment in a statement of case after the end of a relevant limitation period.
>
> (2) The court may allow an amendment to correct a mistake as to the name of a party but only where the mistake was –
>
> (a) genuine; and
>
> (b) not one which would in all the circumstances cause reasonable doubt as to the identity of the party in question."

[37] From a detailed reading of this rule, it is clear that there is a restriction on amendments after the limitation period has run. Although the rule is only explicit in allowing amendments to the name of a party to correct a genuine mistake, there is a plethora of case law that has demonstrated that amendments may be made after the relevant limitation period.

[38] In **The Jamaica Railway Corporation v Mark Azan** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 115/2005 judgment delivered on 16 February 2006 ('**Azan**'), at paragraphs 25, 27 and 28, Harrison JA distilled the following principles:

> "25. 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.

> 27. There is provision in CPR, r. 20.6, for a party who wishes to amend a statement of case in respect of a change of name after a period of limitation has expired. There is no provision however, in our Rules for the substitution or addition of a new cause of action after the expiration of the limitation period.
>
> 28. Our Rules 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 (as opposed to a new party). In the final analysis, **the decision whether or not to grant such an application, one ought to apply the overriding objective and the general principles of case management**." (Emphasis mine)

[39] Harrison JA posited that there is no provision in the rules for the substitution or addition of a new cause of action after the expiration of the limitation period. He also accepted that the rules did not state any specific matters that the court should consider in assessing whether a proposed amendment amounts to a new cause of action. The guiding principles that emanated from the approach of Harrison JA, are that "an amendment should be allowed if it can be made without injustice to the other side". Secondly, consideration should be given to the overriding objective as contained in rule 1.1 of the CPR and the general principles of case management.

[40] The court thereafter summarized certain principles that ought to be utilised to assess what amounts to a new cause of action at paragraph 29 and stated that this list is by no means exhaustive.

> "29…
>
> > (i) If the new plea introduces an essentially distinct allegation, it will be a new cause of action. In ***Lloyds Bank plc v Rogers*** (1996) The Times, 24 March 1997, Hobhouse LJ said inter alia:
> >
> > > '…if factual issues are in any event going to be litigated between the parties, the parties should be able to rely upon any cause of action which substantially arises from those facts.'

> (ii) Where the only difference between the original case and the case set out in the proposed amendments is a further instance of breach, or the addition of a new remedy, there is no addition of a new cause of action. See ***Savings and Investment Bank Ltd v Fincken*** [2001] EWCA Civ 1639, The Times, 15 November 2001.
>
> (iii) A new cause of action may be added or substituted if it arises out of the same facts, or substantially the same facts, as give rise to a cause of action already pleaded.
>
> (iv) In the case of ***Brickfield Properties Ltd. v Newton*** (1971) 1 WLR 862 a general endorsement on the writ claimed damages against an architect for negligent supervision of certain building works. The particulars of claim were served after the expiry of the limitation period and contained claims both for negligent supervision and negligent design. It was held by the Court of Appeal that the negligent design claim arose substantially out of the same facts as the negligent supervision claim and in its discretion the court allowed the amendment." (Bold as seen in the original)

[41] The position adopted by the court in **Azan** was confirmed in the decision of **The Attorney General of Jamaica and Another v Cleveland Vassell** [2015] JMCA Civ 47 ('**Cleveland Vassell**'). In that case, this court upheld the decision of a judge of the Supreme Court to allow a claimant to make amendments to his claim to include new causes of action, being damages for assault and battery after the limitation period had expired. Dukharan JA, with whom the rest of court agreed, found that the amendments should be allowed to stand as the causes of action arose from the same factual situation. At paras. [22] and [23], he stated:

> "[22] … It seems clear in the present case that the facts that give rise to all three causes of action arise out of the single incident and are disclosed in the further statement of case of the respondent.
>
> [23] In our view, it could be said that new causes of action arise, that is, false imprisonment and malicious prosecution.

> However, such causes of action may be added as they arise out of the same facts, or substantially the same facts, as has given rise to a cause of action, assault, which is already pleaded. In our view, no new facts are being introduced by the respondent. He merely wishes to add false imprisonment and malicious prosecution to his statement of case which was omitted by mistake and which was already introduced in the claim. In our view, the learned trial judge did not err in granting the amendment. In the totality of the circumstances, the appellants have already demonstrated by their statement of case that they are able to prepare an amended defence that properly addresses the amended claim form and amended particulars of claim."

[42] At para. [17], the learned judge of appeal also stated that in assessing whether a proposed amendment amounts to a cause of action it is necessary to consider the case as a whole. That is, it would be necessary for the court to assess the purpose of the Limitation of Actions Act, the duty alleged, the nature and the extent of the breach and the nature and extent of the damage claimed.

[43] Recently, in **Sandals Resorts International Limited v Neville L Daley and Company Limited** [2018] JMCA App 24 ('**Sandals Resorts**'), this court reiterated the position stated in **Azan** and **Cleveland Vassell**. The court, through Phillips JA who delivered the decision, opined that in the United Kingdom ('UK') cases of **Savings and Investment Bank** and **Brickfield Properties** although they place reliance on the UK rules and Limitation of Actions Act, they also distilled general principles of law. These general principles were, 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.

[44] In **Brickfield Properties**, the plaintiff, in 1962, contracted the defendant, who was a chartered architect, to prepare the requisite building plans for six buildings totalling 165 flats Work commenced in 1964 and completion of the work was done in 1969. In March 1966, the defendant ceased to act as an architect to the plaintiff. In April 1966,

the plaintiff contracted an independent firm of architects to report on the defects on the buildings. The plaintiff issued writs to the defendant in July 1969 claiming damages for negligence as the defendant was an architect employed to supervise the construction of the buildings that were rendered defective. In the statement of claim filed with the writ, it was pleaded that the defendant was negligent in its design of the buildings that in essence rendered them defective.

[45] In February 1970, the defendant filed a defence, in which reliance was placed on the Limitation Act, 1939 and the UK Rules of Supreme Court (RSC), 1970 that the cause of action arose more than six years before the issue of the writ. The plaintiff filed applications to amend the writs to include negligent designs but those applications were denied by the court. The statement of claim was ordered struck out on the application of the defendant.

[46] The primary issue, in that case, was, whether the plaintiff was entitled to extend the claim by the provisions of the RSC. The court found that the plaintiff was not entitled as of right to add a cause of action in regards to the allegation of negligent designs and as such it amounted to an irregularity. The court, however, accepted that the statement of claim could be amended even if the amendment did not fall within sub-paragraph (3), (4) or (5) of RSC, order 10, rule 5. The court then considered whether the defect in the writ could be cured by RSC, order 20, rule 5 and whether the court should make such an order. Sachs LJ stated at page 335 that:

> "In so far as the Rules of the Supreme Court deal with practice and procedure the rules 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 its 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."

[47] The court also held that RSC, order 20, rule 5 was designed to break down the rigid practice obtained due to the adherence to **Weldon v Neal** (1887) 19 QB 394 that no amendment would be allowed that deprives the defendant of a defence under the Statute of Limitations.

[48] The court found that the writ was defective as it failed to state in technically appropriate terms, the nature of the dispute between the parties. The reason for the defect was as a result of a genuine and excusable mistake by counsel for the plaintiff who followed a precedent from a textbook of repute. The court held that the defendant at all times was aware of the nature of the action which the writ was intended to initiate and the defect had caused him no difficulty.

[49] The court held that it had jurisdiction to permit the plaintiff to pursue its design claim although the writ was indeed defective, it advanced a new cause of action arising out of the same or substantially same facts. It was also the finding of the court that in considering the interest of justice and the history of the matter, absurdity would result if the claim was struck out and the amendment was not granted. As a result, the appeal was allowed against the order striking out certain allegations in the statement of claim, and against the refusal to grant leave to amend the writ.

[50] In **Savings and Investment Bank**, the plaintiff bank claimed that Mr Fincken owed £19,000,000.00 in 1982. In February 1988 the bank commenced proceedings against Mr Fincken for the recovery of that money. Mr Fincken and the bank agreed on deeds of settlement but Mr Fincken defaulted on two occasions.

[51] In May 1992, based on an affidavit deposed by Mr Fincken in a bankruptcy proceeding, a third deed of settlement was made between the parties. In 1997, the bank received information from informants that Mr Fincken had other properties that he did not disclose in his affidavit of means. Shortly before the limitation period expired the bank

issued a writ against Mr Fincken for an order for the transfer of assets retained by Mr Fincken in breach of the deed of settlement and for damages for breach of the deed.

[52] The writ was not served immediately; it was renewed twice. On 16 April 1999, the bank obtained permission to add a second defendant, who was an alter ego to Mr Fincken. Permission was also granted to amend the claim, to argue in the alternative, an order to transfer the undisclosed assets, payment of the value of the assets and damages for deceit in respect of misrepresentation which induced the bank to enter into the deed. Mr Fincken was served with the writ on 19 April 1999. The bank sought further amendments on 12 June 1999 to plead negligent misrepresentation in the alternative to fraudulent misrepresentation and alternatively to the other claims. Mr Fincken applied to strike out the bank's statement of case, except for one undisclosed asset. The application was refused. On appeal to the UK Court of Appeal, Mr Fincken sought to set aside the decision. The bank was content to say the amendments were not a new cause of action.

[53] Gibson LJ, handing down the decision of the court, ruled that a new claim is defined as a new cause of action. In determining whether the amendments amounted to a new cause of action the court should look at the essential facts, the proposed amendment and the pleadings, whether the duty or obligation pleaded in the amended claim differs from the duty or obligation pleaded in the original claim, if so, a new cause of action exists. The court having conducted that exercise 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 and therefore not a new cause of action.

[54] Concerning the claims for fraudulent, or negligent misrepresentation, the court found that the facts pleaded were the same as the statement of misrepresentation that was based on the non-disclosure. The court cited with approval the views expressed by Auld J in **Lloyds Bank plc v Rogers** [1999] All ER (D) 808 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 were not a new cause of action.

[55] 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, the court considered the issue of whether amendments which concern the addition of particulars of negligence amounted to a cause of action being brought after the expiration of the limitation period. Harris JA, in delivering the judgment of the court, found that rule 20.6 was restricted to amendments correcting a party's name after the limitation had passed. It was held that a new amendment would not be granted if it offended the statute of limitation. In arriving at this conclusion the court relied on the case of **Weldon v Neal**. However, as it related to the particulars of negligence, where they were imperfectly pleaded originally, they were deemed to be permissible.

[56] The appellant has sought to rely on the case of **Peter Salmon v Master Blend Feeds Limited** that adopted the position in **Judith Godmar v Ciboney Group Ltd**, where the Court of Appeal found that a court should not allow an amendment of a new cause of action after the expiration of the limitation period. In **Judith Godmar v Ciboney Group Ltd**, the appellant's claim was one for negligence as a result of injuries on 3 July 1995 while swimming in the sea on the north coast of the island as a guest at the Shaw Park Hotel. She was on vacation on the island at the time of the incident. As a result of her injuries, she had undergone an extended period of recuperation. As a result of this, during the period of incapacity, the sums chargeable for the medical and other incidental expenses increased over time. The appellant's statement of case pleaded several particulars of injuries in relation to fracture and wounds she sustained. She also pleaded special damages.

[57] Counsel for the appellant, in the Supreme Court, sought an amendment to the statement of case to increase the special damages and to add the category of post-traumatic stress disorder. Both applications in relation to the post-traumatic stress

disorder and special damages were refused by the judge. On appeal, the appellant sought to set aside the decision to the judge.

[58] Smith JA found that the limitation period does not apply to a claim for additional special damages as such damages are consistent with the ongoing treatment of the appellant in respect of the injuries pleaded. Also, the court held that these amendments need not be made within the six-year limitation period.

[59] As it relates to post-traumatic stress disorder, the court accepted the principle that the cause of action accrues when there has been wrongdoing by the defendant from which the loss or damage is suffered by the plaintiff. Thus, the loss or damage had to be pleaded within the relevant limitation period. The court held that this amendment if granted would allow the plaintiff to plead an injury long after the expiration of the limitation period. The court relied on the principle of **Weldon v Neal** that the court should not allow a plaintiff to amend its statement of case by setting up a fresh claim in respect of a cause of action that has been statute barred.

[60] Phillips JA cogently demonstrated in **Sandals Resorts** that this court has consistently applied the position laid down in **Weldon v Neal** that a new cause of action should not be allowed after the expiration of the limitation period as this would unjustly deny the defendant an accrued defence under the limitation of actions statute. Equally, the cases demonstrate that although an amendment may result in a new cause of action, it may be granted if it is founded upon the same or substantially the same facts upon which the claim was originally filed.

[61] The instant case concerns the order made by the learned judge to grant the amendments in the further particulars of claim of the respondent. The respondent's claim was in negligence. The averments were that the appellant was negligent in its delivery and care of the respondent child resulting in paralysis of her right arm. The amendments sought were for particulars of injuries and loss of amenities. These injuries include

depression, anxiety and diminished self-confidence, negative views of herself and low self-image which arose out of the same facts that were already pleaded before the court.

[62] The instant case remained one in negligence. There was no new claim or new facts or any injustice or prejudice suffered by the appellant who at all times was aware of the nature of the matter against it and filed a defence in that regard. The court is of the view that there was no new cause of action added after the limitation period. The amendments proceeded by way of particulars of injuries on the same facts. Therefore, the learned judge correctly exercised her discretion in granting the amendments. Consequently, this ground must fail.

Whether granting the amendments at a late stage was in the interest of justice and was prejudicial to the appellant (ground 7)

Submissions on behalf of the appellant

[63] Ms Dickens submitted that the appellant was prejudiced by the amendments as the appellant's defence was struck out and judgment entered in the respondent's favour, whilst at the same time, the learned judge granted an application to the respondent to amend its further particulars of claim to include 16 particulars of injuries. Ms Dickens argued that, under rule 20.3 of the CPR, the appellant was to be served with the amended particulars of claim and be allowed an opportunity to file a defence in response to the amendments. In sum, counsel submitted that this amounted to a miscarriage of justice and was extremely prejudicial to the appellant.

Submissions on behalf of the respondent

[64] Ms Minto for the respondent has countered this submission, and submitted that the factors that the court ought to properly consider in granting an application for amendments are; (1) overriding objective; (2) general principles of case management; (3) interest of justice; and (4) history of the matter. Ms Minto relied on the cases of **Azan**, **Sandals Resorts** and **Brickfield Properties.** Further, she submitted that the amendments and the certification of expert witness arose from recent developments close to the time of trial. The appellant was notified from as early as 25 February 2019 that

the respondent needed to be evaluated. The amendments sought demonstrated that the respondent had a real issue and not a fanciful one, as the respondent has been removed from the mainstream public school and is now at a school for children with special needs and disabilities. Therefore, the amendments would impact the life of the respondent and as such the amendments should be granted as the interests of justice demands it.

[65] As it regards the issue of prejudice, Ms Minto posited that the appellant was very much aware that the respondent intended to make an application to certify an expert and to amend the particulars of claim as these applications came up at two previous pre-trial hearings.

[66] Ms Minto submitted that, in any event, amendments to pleadings may be made at any stage of the trial where it is bringing forward and/or determining the real question and issues in controversy between the parties. For this, she relied on the case of **Cropper v Smith** (1884) 26 Ch D 700 and **Moo Young and Another v Chong and Others** (2000) 59 WIR 369.

Discussion

[67] It has been established in **Azan** that in granting an amendment the court is to consider the overriding objective and the general principles of case management. In **Sandals**, the court extended these considerations to also include prejudice to the other party, interest of justice as well as the history of the matter before the court.

[68] **Moo Young v Chong** was decided under the old Civil Procedure Code. However, I agree with its reasoning and principle. Gloria Moo Young and Erle Moo Young appealed to the Court of Appeal against the order of Ellis J allowing an application by the respondents to amend their defence in the course of proceedings instituted by the appellants. In treating with the issue of when an amendment may be granted, the court found that however late the application was made it should be allowed if it will not injure or prejudice the appellant and the opposing party may be compensated by an award of costs. At page 374, P Harrison JA (as he then was) stated that:

> "An amendment granted before a trial commences, is usually viewed more liberally as permissible, than one at the end of the trial. In the latter case it should not be made, if the result would be: '… to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence' (per Lord Griffiths in Ketteman v Hansel Properties Ltd [1988] 1 All ER 38 at 62).
>
> …
>
> 'Quite obviously, there is more to be said for refusing an amendment when the action is in the course of trial or very nearly ready for trial.'
>
> In the instant case, the amendment granted may be permissible if: (1) it is necessary to decide the real issues in controversy, however late, (2) it will not create any prejudice to the appellants, and is not presenting a 'new case' to the appellants, (3) is fair in all the circumstances of the case, and (4) it was a proper exercise of the discretion of the trial judge on the state of the evidence."

[69] It was the court's conclusion therefore that however late the application may be, it should be allowed if it is necessary and will not injure or prejudice the applicant's opponent. "Different considerations, however, govern each case, and it is a matter in the discretion of the learned trial judge".

[70] I will now consider how the case at bar progressed to trial. The applications for amendments and the certification of expert arose from recent development in the respondent's condition as she grew older. The appellant was put on notice as early as 25 February 2019 that the minor was to be evaluated by a psychologist over several sessions. The appellant was aware of the respondent's applications to amend her statement of case and certify an expert on 17 June 2019, and objected to the applications. When the matter came up again on 26 September 2019 and 14 October 2019 the appellant also objected to the applications and the matter was adjourned.

[71] I find that the appellant was not ambushed when the applications were made at the time of trial. The appellant was aware that the respondent intended to make an

application to amend the further particulars of claim and to certify an expert by her previous attempts at the pre-trial review hearings. Further, even if that intention was not telegraphed by the previous failed attempts, the appellant had the opportunity to respond to the applications through written submissions filed in the court below as evidenced in the formal order made after the hearing of the application. Therefore, it is my view that the appellant was not taken by surprise by the granting of these applications. I do not agree that the principles of natural justice were breached as the appellant had the opportunity to advance written submissions before the learned judge delivered her decision on the applications.

[72] The learned judge had the discretion to allow the applications for the amendments and to certify the expert, at the time of trial; given the history of the matter and that the appellant was aware of the applications.

Whether the learned judge erred in hearing oral applications to amend and certify expert thus depriving the appellant of natural justice (grounds 1, 2, 3, 4, 5, 9 and 10)

Submissions on behalf of the appellant

[73] The appellant contended that the respondent had failed to comply with rule 11.6 of the CPR that requires applications to be made in writing with the requisite supporting affidavits. Ms Dickens also pointed out that whenever a judge is to exercise its discretion upon an application before the court, sufficient material must be placed before the court. For this position, Ms Dickens relied on the case of **Attorney General v Roshane Dixon and Attorney General v Sheldon Dockery** [2013] JMCA Civ 23 and **Sandals Resorts**. She further submitted that there is no rule in the CPR or any practice direction that permits an application to appoint an expert or for the amendment of the statement of the case to be made orally.

Submissions on behalf of the respondent

[74] Ms Minto conceded that the applications were made orally. She contended, however, that it was within the learned judge's discretion to dispense with the

requirement for applications to be made in writing under rule 11.6(2) of the CPR, therefore the applications did not need to be made in writing.

Discussion

[75] Rule 11.6 of the CPR stipulates that generally an application must be made in writing. The rule also provides that applications may be made orally in certain instances. Rule 11.6 states:

> "11.6 (1) The general rule is that an application must be in writing.
>
> (2) An application may be made orally if –
>
> (a) this is permitted by a rule or practice direction; or
>
> (b) **the court dispenses with the requirement for the application to be made in writing**" (Emphasis mine)

[76] Therefore, the court has the discretion to dispense with the general rule that an application should be made in writing.

[77] I will now consider rule 26.2(v) which gives the learned judge the power to manage the case, "take any other step, give any direction or make any order for the purpose of managing the case and furthering the overriding objective". In my view, the discretion under 26.2 (v) extends the power of the judge to dispense with an application in writing.

[78] Further, in **Sandals Resorts International Limited v Neville L Daley and Company Limited** [2016] JMCA Civ 35, which was cited by the attorneys-at-law on both sides, this court found that the court could exercise its discretion under rule 11.6 to dispense with the general rule that an application must be in writing. Also, the court can utilize its case management powers to hear an oral application in managing the case or furthering the overriding objective (see para. [38] of **Sandals Resorts International Limited v Neville L Daley and Company Limited**).

[79] It is for these reasons, that I find that the learned judge had the discretion to hear the applications orally. It cannot be ignored that the learned judge allowed the appellant to respond in writing to the applications that were before the court and as such, the appellant was not prejudiced. Based on the arguments of the appellant on this ground, there is insufficient basis to interfere with the exercise of the learned judge's discretion. This ground also fails.

The appeal in respect of the striking out order (Appeal SCCA No 19/2020)

[80] The leaned judge on 16 October 2019 heard and granted the respondent's oral application to strike out the appellant's statement of case. The learned judge indicated that the orders were being granted on the respondent's application.

[81] The order relevant to this appeal is:

> "The Defendant having failed to comply with paragraph 4 of the Case Management Conference Orders, made on October 26, 2017, and relation to which time for compliance was extended to June 17, 2019 to August 16, 2019, **and no application for relief from sanctions having been advanced, the Defendant's Statement of Case shall stand struck out**." (Emphasis mine)

[82] The appellant by way of its notice of application for permission to appeal filed on 25 October 2019 sought and was, on 27 February 2020, granted leave to appeal..

[83] The appellant filed the following grounds of appeal in respect of the decision of the learned judge:

> " 1. The learned judge erred in striking out the Defendant's Defence for non-compliance with Case Management Conference orders, particularly the filing and exchanging of witness statements/summaries in circumstances where she was then currently hearing and adjudicating on the Claimant's oral application to further amend Particulars of Claim and to appoint expert witness.
>
> 2. The learned judge erred in striking out the Defendant's Defence for non-compliance with the Case Management

Conference Orders, particularly the filing and exchanging of witness statements/summaries, in circumstances where counsel for the Defendant was not previously advised before attending Chambers before the learned judge that such a course was being contemplated by her thereby failing to afford the Defendant and her counsel with reasonable and sufficient notice of the intended action.

3. The learned judge erred in striking out the Defendant's defence for non-compliance with Case Management Conference Orders, particularly the filing and exchanging of witness statements, in circumstances where it was the Claimant's counsel who urged it upon the Court to take such action by oral application and there was no written application made by the Claimant to strike out the Defendant's Defence, thereby the Defendant was afforded no notice of this application to strike out.

4. The learned judge erred in striking out the Defendant's Defence for non-compliance with Case Management Conference Orders in circumstances where she ultimately made an order on December 10, 2019, permitting the further amendment of the Claimant's Particulars of Claim to include new and fresh claims and thereby barring the Defendant from responding to the amended pleadings of the Claimant.

5. The learned judge erred in striking out the Defendant's Defence for non-compliance with Case Management Conference Orders in circumstances where she aborted the trial of the matter, sent the matter to Chambers the following day for the hearing of the Claimant's oral application to further amend Particulars of Claim and to appoint expert witness and had vacated the trial date of October 16, 2019.

6. The learned judge erred in striking out the Defendant's Defence for non-compliance with Case Management Conference Orders, particularly the filing and exchanging of witness statements/summaries, in circumstances where she had aborted the trial to hear the Claimant's oral application to further amend the Particulars of Claim and to appoint expert and vacated the trial date of October 16, 2019 and had previously on October 14 and 15, 2019, requested that the parties and her clerk attend upon the Court Administrator to obtain new trial dates.

7. The learned judge erred in striking out the Defendant's Defence for non-compliance with Case Management Conference Orders, particularly the filing and exchanging of witness statements/summaries, in circumstances where rule 29.11 of the Civil Procedure Rules already provided a sanction for failure to serve witness statements thereby imposing a double sanction on the Defendant."

[84] The issues that are therefore relevant for the court's determination are as follows:

1. Whether the court erred when it struck out the defence and directed that the matter proceed to assessment of damages while an extant application to amend the respondent's claim as to damages was being amended;

2. Whether the order striking out the defence amounted to a double sanction as the appellant had already been sanctioned for failure to serve witness statement pursuant to rule 29.11 of the CPR; and

3. Whether the failure of the respondent to give sufficient notice of the application to the appellant resulted in prejudice to the appellant.

Whether the court erred when it struck out the defence and directed that the claim proceed to assessment of damages while an application to amend the respondent's claim was being considered.

Submissions on behalf of the appellant

[85] Ms Dickens contended that the decision of the learned judge to strike out the appellant's statement of case, namely its defence, at the same time the judge heard an oral application and granted an amendment of the respondent's further particulars of claim was unjust, extreme and draconian and cannot be regarded as a proper exercise of judicial discretion.

[86] Ms Dickens also argued that the appellant was entitled to respond to the new allegations/amendments that were added to the respondent's further particulars of claim

pursuant to rule 20.3(1) of the CPR. The fact that the appellant was deprived of the opportunity to respond to the amendments also demonstrated that the learned judge's decision was not in keeping with the provisions of the rules.

[87] Ms Dickens also submitted that the guiding principles regarding an order for striking out are that of justice and fairness. Further to this, an order for striking out must only be utilized as a last resort and the court is encouraged to use alternative powers to an order for striking out. For this submission, she relied on the case of **UCB Corporate Services Ltd (formerly UCB Bank Plc) v Halifax (SW)** [1999] Lexis Citation 1393, where Lord Lloyd cited the case of **Culbert v Stephen G Westwell** (1993) PIQR P54, **Garbage Disposal and Sanitation Systems Ltd v Noel Green and Others** [2017] JMCA App 2 ('**Garbage Disposal**') and **The Commissioner of Lands v Homeway Foods Limited and Stephanie Muir** [2016] JMCA Civ 21 ('**Homeway Foods'**). She relied specifically on para. [50] of **Homeway Foods** where McDonald-Bishop JA stated that:

> "The authorities have equally made it clear that striking out or dismissing a party's case is a draconian or extreme measure and so it should be regarded as a sanction of last resort. As Lord Woolf explained in **Biguzz**i, there may be alternatives to striking out, which may be more appropriate to make it clear that the court will not tolerate delay but which, at the same time, would enable the case to be dealt with justly, in accordance with the overriding objective. The court in considering what is just, he said, is not confined to considering the effects on the parties but is also required to consider the effect on the court's resources, other litigants and administration of justice."

[88] On this point, Ms Dickens urged the court to consider that the judge did not apply her discretion in keeping with the legal principles and as such her decision to strike out the appellant's defence was unjust and unfair and most of all extreme and draconian as a sanction was already imposed under rule 29.11(1).

<u>Submissions on behalf of the respondent</u>

[89] Ms Minto contended that an order striking out a statement of case is appropriate where a party has failed to comply with an order of the court in relation to the service of a witness statement where a sanction under rule 29.11 has been triggered, there has been no application for relief from sanctions and there is no evidence before the court. This, counsel stated would be an abuse of the process of the court to allow such a defence to proceed. The case of **Simone Magee v Joy Willmott** [2020] EWHC 1378 QB was relied on.

[90] Ms Minto further submitted that the appellate court will not lightly interfere with case management decisions of a first instance judge but it is rather "… vital for the Court of Appeal to uphold robust fair case management decisions made by first instance judges" (see **Mannion v Ginty** [2012] EWCA Civ 1667 at paragraph 18).

[91] In Ms Minto's submission, the test to be applied in a decision to strike out a party's statement of case is set out in **Clearway Drainage Systems Ltd v Miles Smith Ltd** [2016] EWCA Civ 1258 at paragraph 68. It states:

> "The fact that different judges might have given different weight to the various factors does not make the decision one which can be overturned. There must be something in the nature of an error of principle, or something wholly omitted, or wrongly taken into account, or a balancing of factors which is obviously untenable."

[92] She concluded that, the learned judge was correct to strike out the appellant's statement of claim as she made no error in law or principle in striking out the appellant's defence.

Discussion

[93] It is useful at this point to set out the rules that govern the striking out regime. Rule 26.3 is set out in its entirety below:

> "26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –

(a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;

(b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;

(c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or

(d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10.

(2) Where –

(a) the court has struck out a claimant's statement of case;

(b) the claimant is ordered to pay costs to the defendant; and

(c) before those costs are paid, the claimant starts a similar claim against the same defendant based on substantially the same facts, the court may on the application of the defendant stay the subsequent claim until the costs of the first claim have been paid."

[94] The dispute before this court is therefore whether the learned judge acted in error when she struck out the appellant's defence, the other issues are collateral to this issue. It is, therefore, pertinent to set out the relevant order made by Thompson-James J on the 26 October 2017 that affected the learned judge's discretion to strike out the appellant's defence. The order is as follows:

> "Witness statements to be filed and exchanged on or before 15 February 2019"

[95] This order was subsequently extended to 1 August 2019 by Thompson-James J on 17 June 2019. The appellant filed a lone witness summary, that of Dr Yumkella Kamara, on 16 August 2019 and served it on the respondent on 13 September 2019. It is an

inescapable fact that no witness statement was filed within the time that the court had ordered.

[96] There is no dispute that the appellant had filed an application seeking relief from sanctions some six days before the trial dates of 14 to 16 October 2019. The issue that is therefore hovering over this application is whether the application was withdrawn in chambers before the learned judge or was extant. Counsel for the appellant submitted that at no time did she withdraw the application for relief from sanctions and as such the application was extant at the time when the respondent was making her application to amend its further particulars of claim. Ms Minto for the respondent contended that the appellant had withdrawn the application for relief from sanctions before the learned judge in chambers and as a result, had no evidence to support its statement of case.

[97] In the affidavit of Catherine Minto filed on 24 January 2020, at paragraphs 11 and 12, she stated:

> " 11. That at the Pre-Trial Review, the Applicant made an oral application for extension of time to comply with the Case Management Conference Orders and the extension was granted to August 16, 2019, during the Court's vacation…
>
> 12. That the Defendant, once again failed to comply with the Orders granted at the Pre Trial Review… However, a "Witness Summary" was not served until September 13, 2019…"

[98] At paragraph 18, Ms Minto gave evidence of the circumstances in which the appellant informed the court that she would no longer be proceeding with the application for relief from sanctions. She detailed that:

> "That at the commencement of Trial, the Court was advised of the Defendant's Application for Relief from Sanctions… I then yielded for the Defendant to inform the Court of its position in relation to its application for relief from sanctions. My trial notes of the subsequent interchange between the Court and Counsel on the issue of the Defendant's application is as follows:

> T. Dickens: in all the circumstances, and considering that this matter is set for three days, I will ask that the application is not heard today...
>
> …
>
> T Dickens: I do not believe there will be any prejudice if the application is not heard until the trial begins.
>
> Judge: But it will have an impact in terms of putting your case.
>
> C. Minto: How would Counsel put the Defendant's case to the Claimant, we do not know what evidence the State will be relying on, to put such a case.
>
> T Dickens: I will forgo my application.
>
> Judge: Are you sure Ms Dickens.
>
> T. Dickens: Having reflected on the matter, I will forgo the application."

[99] Ms Dickens in her affidavit filed on 19 February 2020 objected to the accuracy of Ms Minto's record of the proceedings. At paragraph 9, she deposed that:

> "9. With regard to paragraph 18 of Ms Minto's Affidavit, it is my recollection that I had requested of the court that the application for relief from sanctions be heard on the following day in the proceedings. The judge was not minded to do so. After being asked by the Court what is my position with regard to the application for relief from sanction, **I advised the learned judge that I will not be advancing the application at that time. I did not advise the Court that I am withdrawing the application**." (Emphasis mine)

[100] In deciding on this issue, due regard has to be given to the evidence that is before this court, which, unhappily, is ambiguous. Since there is no agreement concerning Miss Minto's "trial notes", of what transpired, I am inclined to treat with the question concerning the status of the applicant's application for relief from sanctions as gleaned from the formal order. That is, at the time of making the striking out order, the application was not being advanced. To quote from the formal order, "no application for [relief from] sanction having been advanced". Literally, the phrase does not represent a definitive

position. Even applying the most restrictive interpretation, the phrase connotes that the application, although alive, was not being pursued at the making of the order striking out the appellant's statement of case. In short, the application was extant.

[101] In any event, having aborted the trial and remitted the claim to chambers, the circumstances had changed. Meaning, the trial was no longer imminent. Therefore, the appellant had the option of pursuing the application, if it wished, during the interval of the hearing in chambers and the next trial date. Nothing in the learned judge's order shows that the appellant had absolutely renounced its ability to pursue the application at a subsequent date. The analysis will therefore be conducted against this factual background.

[102] It is, therefore, appropriate to start by stating that it is well established that the courts consider it important to adhere to the time limits fixed by the rules of the court or by the court itself. This principle is more important under the new civil procedure rules than that of the old procedural regime. This was the position that was adopted by the court in **Biguzzi v Rank Leisure plc** [1999] 1 WLR 1926 ('**Biguzzi**') which I undoubtedly agree with. These principles were succinctly summarized by McDonald-Bishop JA in the case of **Homeway Foods**. At para. [49] she opined that:

> " In Biguzzi v Rank Leisure plc…, Lord Woolf MR made the important point that under the CPR, the keeping of time limits laid down by the rules or by the court, itself, is, in fact, more important than it was under the old procedural regime. The clearest reflection of this, he noted, is to be found in the overriding objective and in the power of the court to strike out a party's statement of case for, *inter alia*, failure to comply with a rule, practice direction or court order. Lord Woolf MR explained in that case that judges, in exercising their discretion within the scope of the CPR, should be trusted to exercise their discretion fairly and justly in the given case, while recognizing their responsibility to litigants in general not to allow the same defaults to occur as had occurred in the past. The overriding purpose of the rules, he said, is to impress upon litigants the importance of observing time limits in order to reduce the incidence of delay in proceedings."

[103] The rules and authorities have made it clear that a judge has the discretion to strike out a party's statement of case where the party has failed to comply with the rules or the orders of the court. However, although a judge at first instance is cloaked with the discretion to strike out, this does not mean that he or she will necessarily exercise that option as a first resort when he applies the overriding objective to the circumstances of the case. The decision to strike out a party's case is considered draconian and an extreme measure that should be regarded as a sanction of last resort, other appropriate alternatives to striking may be utilized to impress upon the parties that the court will not tolerate delays (see para. [50] of **Homeway Foods** and page 1933 of **Biguzzi**).

[104] A similar issue concerning the sanction of striking out in consequence of an unless order was discussed in detail in **Barbados Rediffusion Service Ltd v Asha Mirchandani and Others (No 2)** (2006) 69 WIR 52 ('**Barbados Rediffusion**') by the Caribbean Court of Justice ('the CCJ'). The court distilled nine guiding principles that have provided insightful guidance in this area. The approach of the court, in determining whether to strike out a party's statement of case, is that the application must be holistic, and as such, a balancing exercise is necessary to ensure that proportionality is maintained and that the punishment fits the crime. Also, the court's discretion is wide and flexible and is to be exercised as "justice requires" and so it is impossible to anticipate in advance, and it would be impractical to list, all the facts and circumstances which point the way to what justice requires in a particular case (para. [51] of **Homeway Foods** and paras. [40] and [44] of **Barbados Rediffusion**).

[105] At paras. [45] to [47] the CCJ distilled some salient considerations which have been set out below in point format by McDonald-Bishop in the judgment of **Homeway Foods** at para. [52]:

> "(i) Strike out orders should be made either when that is necessary in order to achieve fairness or when it is necessary in order to maintain respect for the authority of the court's orders. In this context, fairness means fairness not only to the non-offending party but also to other litigants who are competing for the finite resources of the court.

(ii) If there is a real risk that a fair trial may not be possible as a result of one party's failure to comply with an order of the court, that is a situation which calls for an order striking out that party's case and giving judgment against him.

(iii) The fact that a fair trial is still possible does not preclude a court from making a strike out order. Defiant and persistent refusal to comply with an order of the court can justify the making of a strike out order. While the general purpose of the order in such circumstances may be described as punitive, it is to be seen not as retribution for some offence given to the court but as a necessary and, to some extent, a symbolic response to a challenge to the court's authority, in circumstances in which failure to make such a response might encourage others to disobey court orders and tend to undermine the rule of law. This is any type of disobedience that may properly be categorized as contumelious or contumacious.

(iv) It must be recognised that even within the range of conduct that may be described as contumelious, there are different degrees of defiance, which cannot be assessed without examining the reason for the non-compliance.

(v) The previous conduct of the defaulting party will obviously be relevant, especially if it discloses a pattern of defiance.

(vi) It is also relevant whether the non-compliance with the order was partial or total.

(vii) Normally, it will not assist the party in default to show that non-compliance was due to the fault of the lawyer since the consequences of the lawyer's acts or omissions are, as a rule, visited on his client. There may be an exception made, however, when the other party has suffered no prejudice as a result of the non-compliance.

(viii) Other factors, which have been held to be relevant, include such matters as (a) whether the party at fault is suing or being sued in a representative capacity; and (b) whether having regard to the nature of the relief sought or to the issues raised on the pleadings, a default judgment can be regarded as a satisfactory and final resolution of the matters in dispute.

> (ix) Regard may be had to the impact of the judgment not only on the party in default, but on other persons who may be affected by it."

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[106] I will now consider the approach that the learned judge adopted in arriving at her decision to strike out the appellant's statement of case. The undisputed facts are that the learned judge allowed the respondent at a date scheduled for trial to make oral applications for amendments to its further particulars of claim to include additional particulars of injuries and loss of amenities and an oral application to appoint and certify an expert witness. In my view, the judge correctly granted those applications. At the end of those applications, the respondent made another oral application for the appellant's defence to be struck out on the basis that it would amount to an abuse of process and also that the appellant had no prospect of defending the claim. In response, Miss Dickens submitted that since the learned judge was in the process of hearing an application to amend the respondent's particulars of claim, the interests of justice and the overriding objective did not favour the making of a striking out order. The learned judge thereafter made an order for the defence to be struck out as the appellant had failed to comply with the order to file and serve its witness statements.

[107] A judge has wide discretion on how to deal with cases fairly and justly whilst he or she also has the power to strike the balance in not allowing the same non-compliance to occur in the future. When a detailed examination is made of the principles and the considerations laid down in **Barbados Rediffusion**, particularly, where it is highly recommended that the "the previous conduct of the defaulting party should be relevant especially if it discloses a pattern of defiance", it is clear that a holistic approach is counselled. It is also relevant whether the non-compliance with the order was total or partial.

[108] I am also guided by the warning of the CCJ in **Barbados Rediffusion** that generally, a party cannot rely on the fact that his attorney-at-law was the reason for the

non-compliance. However, there is an exception, in cases where the affected party was not prejudiced by the defaulting party.

[109] In these circumstances, it is my conclusion that in striking a balance in this matter the appellant should have been granted an opportunity to reply to the application to strike out its defence whether orally or in writing. Further, to strike out the appellant's case, under those circumstances, would be an extreme measure when there were alternative options available. For example, there was no unless order made in these proceedings, the court could have given an extension of time to the appellant to file its witness statement failing which its defence would stand struck out. This would be just in the circumstances since the respondent had already caused a delay in proceeding to trial when she amended her claim and appointed a certified expert; as this would have affected the pleadings in the matter going forward.

Whether the order striking out the defence amounted to a double sanction.

Submissions on behalf of the appellant

[110] Ms Dickens argued that rule 29.11(1) imposes a sanction for failure to serve witness statements or witness summary. The decision of the learned judge to strike out the appellant's defence was made in addition to the sanction imposed on the appellant by virtue of rule 29.11(1) which resulted in a double sanction. Counsel relied on the case of **Garbage Disposal** for the principle that double sanctioning of a litigant has been regarded as an inappropriate exercise of judicial discretion.

[111] Further, Ms Dickens submitted that the respondent could only apply for an unless order and not an order for striking out pursuant to rule 26.4(1) of the CPR. In sum, Ms Dickens submitted that there was no need for the learned judge to have taken such an extreme course against the appellant which resulted in significant prejudice when combined with the decision of the learned judge to allow the amendments to the particulars of injuries and appointed an expert.

Submissions on behalf of the respondent

[112] Ms Minto countered that there was nothing novel or unique, perverse or offensive for a trial judge to strike out a statement of claim for a failure to comply with a court order where a sanction has already been imposed by the rules. Ms Minto asserted that it is the case management power of the court which is available to a first instance judge that allows the judge to make such an order. Reliance was placed on **Gladwin v Bogescu** [2017] ALL ER (D) 104 where the case of **Chartwell Estate Agents Ltd v Fergies Properties SA and another** [2014] EWCA Civ 506 was cited with approval.

[113] In responding to the decision of **Garbage Disposal**, Ms Minto submitted that this authority was not binding on the court as that case was concerned with an application for relief from sanctions where the appellant had failed to comply with a court order for serving a witness statement. In this case, the appellant did not seek relief from sanctions for the failure to comply with a court order. Counsel further posited that although the application in **Garbage Disposal** was determined based on the court's view that to strike out the claim would operate as a double sanction, no authority was cited or examined and as such the finding was based on the evidence before the court and the circumstances of that particular case.

Discussion

[114] The matter in contention is whether the court should have struck out the appellant's claim where a sanction was already provided by the CPR. The respondent submitted that the court had the discretion to do so. She placed reliance on a line of cases from the UK that had its genesis in applications for relief from sanctions where the court in those circumstances refused to grant these applications for one reason or another. However, the main thread was the applicants in those applications had a flagrant disregard for the UK Civil Procedure Rules. The courts in those matters after considering the applications for relief from sanctions then went on to consider the application for the statement of case to be struck out.

[115] It is necessary at this point, to consider the case of **Jamaica Public Service Company Limited v Charles Vernon Francis and Columbus Communications**

Jamaica Limited (trading as Flow) [2017] JMCA Civ 2. This decision is instructive as it guides the court on how it should approach the authorities from the UK governing applications for relief from sanctions. At para. [57] Edwards JA (Ag) (as she then was) stated:

> "**Reliance on English authorities to interpret the proper application of rule 26.8(2) should best be avoided or approached with caution because the English rule is not only laid out differently but has also been interpreted differently from ours by the English courts**. In this jurisdiction, a first instance judge faced with an application for relief from sanctions must begin from a point of principle that (a) the orders of the court must be obeyed; (b) all the requirements of rule 26.8 (1) and 26.8(2) must be met; (c) once those requirements have been met, it is the duty of the judge to have regard to the interest of the administration of justice and ensure that justice is done in accordance with the overriding objective, without resort to needless technicalities, in keeping with the factors set out in rule 26.8(3); (d) a litigant is entitled to have his case heard on the merits and should not lightly be denied that right; and (e) the court must balance the right of the litigant against the need for timely compliance…[T]**he approach to the application of the rule should be that taken in H.B. Ramsay and Associates Ltd and another v Jamaica Redevelopment Foundation Inc. and Another.**" (Emphasis mine)

[116] The case at bar can be distinguished from the line of cases submitted by Ms Minto as these authorities would have considered the UK Civil Procedure Rules and the principles as outlined in the decision of **Denton v TH White Ltd** [2014] EWCA Civ 906 which is not similar to the provisions in our CPR or the principles in our case law. I am cognizant of the fact that the authorities as submitted were in relation to the power of the court to strike out the appellant's case as opposed to an application for relief from sanctions. However, to consider this as persuasive authority when it stems from different rules and principles would be unsafe.

[117] In my view, based on my earlier finding that the learned judge should have contemplated alternative options to striking out the appellant's statement of case, the issue of a double sanction in this appeal would have fallen away.

[118] By way of commentary, I do not agree with Ms Minto that **Garbage Disposal** is not to be regarded as a binding authority. This case was decided in this courtand it made pronouncements on the issue of double sanction, the proposition that it is brief has no bearing on the guidance that it offers. F Williams JA, in delivering the judgment of the court, found that where there is a sanction provided by the rules in relation to rule 29.11 then an order striking out can be deemed to be a double sanction and I accept and agree with his reasoning. F Williams JA at para. [49] of **Garbage Disposal** opined that:

> "Rule 29.11(1) therefore imposes a sanction for the failure to serve the witness statement in the time limited to do so and this sanction takes effect unless relief from sanction is granted by the court. As such, striking out in those circumstances would not only be inappropriate; but, in my view, would operate as a second or double sanction."

Whether the failure of the respondent to give sufficient notice of the application to the appellant resulted in prejudice to the appellant

[119] It was submitted by Ms Dickens that the appellant was given no notice of the respondent's application to strike out its defence and, pursuant to rule 11.8(1) of the CPR, notice must be given to each respondent. Further, she submitted that rules 26.2(1) and (2) provide that the court can hear an application on its own initiative, however, it is obliged to give the appellant a reasonable opportunity to make representations. Ms Dickens contended that the learned judge did not abide by the provisions of the rules as she failed to give the appellant the relevant notice before embarking upon hearing the application. The result, counsel argued, was that the appellant was ambushed as it was not prepared to respond to an application to strike out its defence.

[120] The applicable rule is rule 11.8. Pursuant to rule 11.8(1) the general rule is that an applicant must give notice of the application to each respondent. Under rule 11.8(2)

it provides that an applicant may make an application without giving notice if this is permitted by a rule or practice direction.

[121] Rule 26.2 is of equal importance; rule 26.2(1) states, except where any rule or other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative. Rule 26.2(2) stipulates that where the court proposes to make an order of its own initiative it must give any party likely to be affected a reasonable opportunity to make representations. Under rule 26.2(3), the representation may be oral, in writing, telephonically or by any other means, the court considers reasonable.

[122] It is clear from the rules that the opposing party must be allowed to make representations. This is regardless of whether the application was made by a party or of the judge's own initiative.

[123] The learned judge at para. [56] of the judgment held that:

> "… The Defendant was afforded an ample opportunity to respond to the application by way of affidavit evidence, had she deemed that to be necessary and to be heard in relation to each of the issues that arise on the application, including the opportunity to reduce those submissions in writing. The Defendant also had an ample opportunity to reduce those submissions in writing. The Defendant also had an ample opportunity to provide the Court with authorities in support of the different submissions advanced on her behalf."

[124] The formal order filed on 8 November 2019, particularly order numbered 5, states that each party is to file and serve written submissions and authorities in relation to the oral application to amend the respondent's further amended particulars of claim and also its application to appoint an expert witness.

[125] Upon examination of the judgment and the formal order, there is nothing to indicate that the learned judge allowed the appellant time to make comprehensive representation as it relates to the application to strike out the appellant's defence. The learned judge was rather detailed when she specified in the formal order the various

areas that counsel should provide submissions in writing. There was no order made in relation to the application to strike out the appellant's defence. Therefore, I agree with Ms Dickens that the appellant was not allowed to make representations and this is an important aspect in any application before the court.

The counter-notice of appeal

[126] Counsel for the respondent Ms Minto has filed a counter-notice of appeal in relation to first of the appeals, SCCA No 125/2019. At the time when the matter was scheduled to be considered, no submissions were filed by either of the parties and as such the court has made no findings on that application.

Conclusion

[127] As regards to SCCA No 125/2019, the learned judge was correct in granting the amendments to the respondent's statement of case after the expiry of the limitation period. Upon examination and analysis of relevant law, the learned judge made no errors of law on this issue. Also, this court did not find any misapprehension or misapplication of any of the relevant facts in the case. For the foregoing reasons, the appeal should be dismissed with costs to the respondent to be taxed if not agreed.

[128] In relation to SCCA No 19/2020, in all the circumstances, the learned judge erred when she struck out the appellant statement of case, namely its defence without allowing the appellant to respond to the application made by the respondent. In this light, the appeal should be allowed with costs to the appellant to be taxed if not agreed.

F WILLIAMS JA

ORDER

SCCA No 125/2019

1. The appeal and counter-notice of appeal are dismissed.
2. Costs in the court below are awarded to the appellant.

3. Costs of the appeal to the respondent to be taxed if not agreed.

SCCA No 19/2020

1. The appeal is allowed.
2. The claim is remitted to the Supreme Court for a date to be fixed for case management conference.
3. Costs to the appellant to be taxed if not agreed.