JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

APPLICATION NO COA2020APP00063

BETWEEN	**BEEP BEEP TYRES, BATTERIES AND LUBES LIMITED**	**APPLICANT**
AND	**DTR AUTOMOTIVE CORPORATION**	**RESPONDENT**

Lemar Neale instructed by Neal/Lex for the applicant

Jason Jones and Adriel Williams instructed by Jason Jones Legal for the respondent

22, 26 June 2020 and 20 May 2022

MCDONALD-BISHOP JA

[1] I have read in draft the reasons for judgment of my sister Sinclair-Haynes JA and agree. I have nothing further to add.

SINCLAIR-HAYNES JA

[2] On 13 March 2020 Henry-McKenzie J (Ag), as she then was, refused Beep Beep Tyres, Batteries and Lubes Limited's ('Beep Beep') application for permission to amend its defence and entered summary judgment in favour of the respondent, DTR Automotive Corporation ('DTR'). Dissatisfied with the learned judge's refusal to grant its application, on 27 March 2020, Beep Beep, the applicant, sought the permission of this court to appeal the learned judge's decision. A stay of execution of the order of Henry-McKenzie J (Ag) pending the outcome of this application and the subsequent appeal, was also sought.

[3] It was Beep Beep's contention that it was entitled to the orders sought because, in compliance with rule 1.8 of the Court of Appeal Rules ('the CAR'), it first sought the permission of the learned judge to appeal, which was refused. It was further contended that there was a real chance of success on appeal. Regarding its application for a stay, Beep Beep contended that it faced ruin and the possibility that its appeal would be rendered nugatory, in the absence of a stay. Whereas, DTR on the other hand would not be prejudiced, if a stay were to be granted.

[4] On 26 June 2020, in refusing Beep Beep's request for leave to appeal, we made the following orders:

> "1. The application for permission to appeal against the order of Henry-McKenzie J (Ag), as she then was, made on 13 March, 2020 refusing the applicant permission to amend its defence and entering judgment in favour of the respondent is refused.
>
> 2. Costs of the application to the respondent to be agreed or taxed."

We promised to provide our written reasons. This is a fulfilment of that promise and we apologise for the late delivery.

Background

[5] On 13 March 2018, DTR, a company registered in Korea, instituted proceedings against Beep Beep for breach of contract and for payment of the sum of US$45,000.00, which it contended was owed to it.

[6] It was DTR's assertion that it is in the business of manufacturing and distributing batteries. By virtue of a contractual arrangement with Beep Beep, DTR manufactured and sold batteries to Beep Beep, over an unspecified period of time. This court was not provided with any information as to when this arrangement commenced. DTR, however, averred that in or around 2015, it supplied Beep Beep with batteries in the amount of US$49,741.07 and US$50,391.30, which sums Beep Beep failed to satisfy.

[7] In discussions between the parties, Beep Beep asserted that it was not liable to pay the sums which were alleged to be outstanding because the batteries that were supplied by DTR, were defective and not of merchantable quality. That resulted in contention between the parties.

[8] Consequent on that disagreement, discussions ensued between the parties' attorneys-at-law with a view to amicably resolving their dispute. These discussions fructified as an agreement was arrived at by the parties by which Beep Beep agreed to pay DTR a total of US$54,000.00, over a 12-month period, which was to commence 15 November 2017. The terms of the agreement were set out in a document entitled "Compromise Agreement", signed by both companies and dated 9 November 2017.

[9] In consideration of those payments, DTR agreed to "… abandon all present and future claims for loss, damage and expenses allegedly incurred and any interest thereon and Attorney's costs" in relation to approximately 2,600 batteries bearing certain specified serial numbers.

[10] Beep Beep partially honoured the Compromise Agreement by making two payments. The second payment was not made within the specified time. Thereafter, Beep Beep made no further payment. This claim is consequent of its failure.

Beep Beep's application for leave

[11] Beep Beep, by its application to this court, requested, so far as relevant:

> "1. Permission … to appeal against the order of the Honourable Mrs Justice Henry-McKenzie (Ag.) made on March 13, 2020 refusing [Beep Beep] permission to amend its defence and entering summary judgment in favour of [DTR].
>
> 2. A stay of execution of the order of the Honourable Mrs Justice Henry-McKenzie (Ag.) pending the outcome of this application and the subsequent appeal should permission be granted.
>
> …"

[12] The following were Beep Beep's proposed grounds of appeal:

"a. The learned judge erred as a matter of fact and/or law and/or wrongly exercised her discretion when she refused to grant [Beep Beep] permission to amend its defence to plead mistake.

b. The learned judge erred as a matter of fact and/or law in finding that the defence of mistake would require [DTR] to meet a new case which would be prejudicial to [DTR] at the late stage. In so finding the learned trial judge failed to appreciate that the proceedings were at an early stage and [Beep Beep's] additional defence was not statute-barred.

c. The learned judge erred as a matter of fact and/or law and/or wrongly exercised her discretion when she granted summary judgment against [Beep Beep] in circumstances where:

i. [Beep Beep's] original defence raised conflicting issues of fact and law which could only be resolved at trial.

ii. one of the issues raised by [Beep Beep] in its original defence which was joined by [DTR] concerned the enforceability of the Compromise Agreement, the subject matter of the litigation, by virtue of it not being stamped contrary to the Stamp Duty Act.

iii. [Beep Beep] had a real prospect of successfully defending the claim."

Submissions on behalf of Beep Beep

[13] Mr Neale commenced his submissions by acknowledging that the proposed grounds of appeal seek to impugn the learned judge in the exercise of her discretion, which exercise of discretion this court does not lightly interfere with. He referred to the case of **The Attorney General of Jamaica v John McKay** [2012] JMCA App 1.

[14] Regarding the proposed grounds of appeal a. and b., Mr Neale argued that the learned judge erred, in failing to grant Beep Beep permission to amend its defence to plead mistake. He referred to rule 20.4 of the Civil Procedure Rules, 2002 ('the CPR'), which allows amendments to statements of case, without the court's permission before case management conference. Learned counsel however submitted that, although the rule permits such amendments, it would not have been an appropriate course for Beep Beep to amend its defence, without the court's permission, in light of DTR's pending

application for summary judgment. He referred the court to the case of **Index Communication Network Limited v Capital Solutions Limited and others** [2012] JMSC Civ No 50 (‘**Index Communication’**) in which Mangatal J opined that:

> "… even if a matter has not reached the case management stage, where an application to strike out the existing Statement of Case is being heard, it is not correct that a party could simply, ‘pull the rug out’ from under the feet of the party applying to strike out on the basis of alleged weakness in the pleaded case, … by simply turning up with a newly amended statement of case that has been filed without the court’s leave. …"

[15] Mr Neale also relied on the **Index Communication** case in support of his submission that Beep Beep was required to demonstrate that the proposed amendments to its defence disclosed evidence that it had a real prospect of succeeding. It was Mr Neale’s submission that the proposed amendments satisfied this requirement. He referred to the amendments to plead mistake, which he submitted, could vitiate Beep Beep’s consent to an agreement. He relied on the cases of **Bell and another v Lever Bros Ltd** [1932] AC 161 and **Dwight Clacken and another v Michael Causwell and others** (unreported), Supreme Court, Jamaica, Claim No 2008 HCV 01834, judgment delivered 12 November 2010 in support of his submission that Beep Beep had an arguable case for both common and unilateral mistake.

[16] Mr Neale posited that the subject matter of the Compromise Agreement was payment for batteries supplied and that Beep Beep expected that all the batteries that were supplied by DTR were of merchantable quality and not defective. It was not until after entering into the Compromise Agreement that Beep Beep discovered that all the batteries in the particular batch that were supplied by DTR, were defective. Beep Beep was therefore mistaken as to the quality of the batteries for which it contracted to purchase and the fact that the batteries failed to meet the quality standard, meant that the contract was void. This issue, Mr Neale posited, ought to have been explored at a trial.

[17] In support of his argument regarding unilateral mistake, learned counsel relied on several authorities including the cases of **Alampi v Swartz et al** (1964) 43 DLR (2d) 11, and **McMaster University v Wilchar Construction Limited et al** [1971] 3 OR 801. He submitted that DTR should not be permitted to take advantage of Beep Beep's offer to pay, which it knew or ought to have known was made under a mistake. It was his submission that because a unilateral mistake is subjective, Beep Beep ought to have been given the opportunity to demonstrate by way of a trial, the effect that the mistake had on its mind.

[18] According to Mr Neale, the learned judge erred in finding that DTR would have been prejudiced if permission to amend was granted, because the claim was still in its early stages and the limitation period to plead mistake had not passed. In all the circumstances, the learned judge misunderstood the law and her decision was demonstrably wrong, he submitted.

[19] Regarding proposed ground of appeal c., Mr Neale argued that if the learned judge had granted permission for Beep Beep to amend its defence, it is highly unlikely that DTR would have succeeded on its application for summary judgment, because the defence of mistake would have raised triable issues which would have been unsuitable for determination at the interlocutory stage.

[20] Mr Neale submitted in the alternative that even without the amendment, Beep Beep's original defence raised triable issues, particularly the enforceability of the Compromise Agreement under the Stamp Duty Act ('the Act'). He relied on sections 3 and 36, and the Schedule to the Act, which according to Mr Neale, required the Compromise Agreement to be stamped for it to be enforceable in court proceedings. He relied on the case of **Garth Dyche v Juliet Richards and another** [2014] JMCA Civ 23 in support of his submission.

Submissions on behalf of DTR

[21] Mr Jones' response on behalf of DTR was *ad idem* with Mr Neale that Beep Beep was required to seek the court's permission to amend its defence, in light of DTR's pending application for summary judgment. He too relied on the **Index Communication** case. He focused on Mangatal J's examination of what constitutes 'lateness' of the stage in proceedings as follows:

> "As Mr. Robinson stated in his written submissions, the stage at which the case has reached is distinguishable from 'whether or not there has been a case management conference'. … [I]f the true position is that, but for the amendment, Index's claim is in danger of being struck out, then that is a stage at which there could be no more proceedings if the application for an amendment should fail. ... I am merely making the point that everything is relative. That the stage of striking out is a late stage since one is examining the question of whether or not a claim as pleaded will cease to exist. In other words, in my judgment, lateness of a stage is not limited to examining its closeness to trial or its timing in relation to case management conference. I am here examining the fact that it could without leave being granted, be struck out."

[22] Learned counsel also relied on the case of **Moo Young and another v Chong and others** ('the **Moo Young** case') (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 117/1999, judgment delivered 23 March 2000, in which Harrison JA (as he then was) highlighted the factors to be taken into account by a judge, when faced with an application to amend a statement of case in which an application to the court to strike out has been made. Mr Jones submitted that, in consideration of those factors, it will become evident that the learned judge did not err in refusing Beep Beep permission to amend.

[23] Mr Jones further submitted that the evidence that was before the court, particularly the emails, demonstrated that Beep Beep was not mistaken. Mr Jones pointed to the multiple statements by Dani Gonzalez, Beep Beep's managing director, which he said, demonstrated that, prior to signing the Compromise Agreement, Beep Beep knew that:

i. it had not yet determined the full extent of its losses;

ii. it had formed the view that its losses were enormous and in excess of US$10,000.00;

iii. it was unable to dispose of an entire container load of batteries due to their alleged "poor quality";

iv. it had several hundred batteries from DTR, warehoused, in which batteries it had no confidence and other batteries, the quality of which was doubtful; and

v. it suffered irreparable damage to its goodwill and reputation and irreparable financial harm, arising from defective batteries.

[24] These complaints and assertions, Mr Jones submitted, had been made as early as 2016, that is, before an agreement was reached, yet Beep Beep willingly entered into the agreement. It was learned counsel's submission that, in light of the foregoing, it was disingenuous for Beep Beep to seek to rely on mistake as the reason to amend its defence. He submitted that, on the evidence, it is palpable that there was no mistake.

[25] It was Mr Jones' submission that the proposed amendments would not assist in determining the real issue in controversy as the real issue in controversy was the amount that was due to DTR and not the question of whether there was a mistake.

[26] On the other hand, he submitted, the amendments would have been prejudicial to DTR who continued to suffer as a result of not being paid the balance owed to it under the Compromise Agreement. The proposed amendments would have been unfair to DTR, in light of an agreement between the parties for which there was part-performance and in circumstances where it is clear that Beep Beep was not labouring under a mistake. Mr Jones also pointed to the fact that Beep Beep had acted through an Attorney at the time of negotiating and entering into the agreement.

[27] According to Mr Jones, the proposed amendments served no useful purpose and amounted to Beep Beep seeking to present a new case. He held steadfastly to the view that when the case is considered in its proper context, it is palpable that the claim was at an advanced stage, in light of DTR's application for summary judgment, which, if

successful, could have brought the matter to an end. In those circumstances, there was no error by the learned judge in refusing permission to amend.

[28] Mr Jones argued that the learned judge was correct in granting summary judgment, because Beep Beep had no real prospect of defending the claim. There was overwhelming evidence, which was unchallenged, of an agreement between the parties, even in the absence of the Compromise Agreement.

[29] On the issue of the Compromise Agreement not being stamped, Mr Jones referred to section 36 of the Act which deals with the admissibility of an agreement into evidence. He submitted that the failure to have the agreement stamped does not invalidate or render the agreement void.

[30] Mr Jones stridently opposed Beep Beep's application for a stay of execution on the grounds that it had no real prospect of succeeding on appeal, and its failure to provide any evidence that it stood to suffer financial ruin in the absence of a stay. It was his submission that the grant of a stay would have been unjust to DTR which continued to be out of pocket. Mr Jones urged this court to dismiss Beep Beep's application in its entirety.

Discussion and analysis

[31] The issue that this court considered to be paramount, was whether the proposed appeal had a real chance of succeeding, as required to be demonstrated by the CAR. Rule 1.8(7) provides:

> "The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success."

[32] It is settled that the term "real chance of success" is a 'realistic' as opposed to a 'fanciful' prospect of success. This definition was enunciated by Lord Woolf MR in the case of **Swain v Hillman and another** [2001] 1 All ER 91 and has been accepted by this court in interpreting rule 1.8(7) of the CAR.

[33] The principles enunciated by Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042 ('**Hadmor**') regarding the function of an appellate court also provides guidance. At page 1046, Lord Diplock stated:

> "… the function of an appellate court, whether it be the Court of Appeal or your Lordship's House, is not to exercise an independent discretion of its own. It 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. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges … may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision … is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own."

This court has repeatedly referred to and relied on the view expressed by Lord Diplock in **Hadmor.**

[34] It was, therefore, incumbent on Beep Beep to demonstrate that it had a real prospect of successfully arguing on appeal that the learned judge erred in the exercise of her discretion by refusing its application for permission to amend its defence and/or that she erred in granting summary judgment in favour of DTR.

Issue 1: The learned judge's refusal of Beep Beep's application to amend its defence to plead mistake (proposed grounds of appeal a. and b.)

[35] In considering this issue, the rules governing amendments, particularly, part 20 of the CPR, must be given due consideration. Rules 20.1 and 20.2 are instructive. They provide:

> "Amendments to statements of case without permission
>
> 20.1 A party may amend a statement of case at any time before the case management conference without the court's permission unless the amendment is one to which either –
>
> (a) rule 19.4 (special provisions about changing parties after the end of a relevant limitation period); or
>
> (b) rule 20.6 (amendments to statements of case after the end of a relevant limitation period), applies.
>
> Power of court to disallow amendments made without permission
>
> 20.2 (1) Where a party has amended a statement of case **where permission is not required**, the court may disallow the amendment with or without an application.
>
> (2) A party may apply to the court for an order under paragraph (1) –
>
> (a) at the case management conference; or
>
> (b) within 14 days of service of the amended statement of case on that party." (Emphasis added)

[36] These rules, read together, demonstrate that parties are not at large to amend their statements of case, even where, *prima facie*, the court's permission is not required. However, the rules do not clearly outline the precise limits on a party's ability to amend, and neither do the rules set out any factors that may be relevant to a court in the exercise of its discretion to allow or disallow an amendment.

[37] A number of cases emanating from this court have, however, remedied that deficiency by enunciating the requisite principles applicable in determining whether permission to amend ought to be granted. In **Moo Young and another v Chong and others**, which was relied upon by Mr Jones, Harrison JA highlighted the important factors to be satisfied in determining whether permission ought to be granted. At pages 7 and 8, the learned judge of appeal stated:

> "In the instant case, the amendment granted may be permissible if:
>
> (1) 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 learned trial judge on the state of the evidence.
>
> However late may be the application for amendment, it should be allowed, in the above circumstances, if it will not injure or prejudice the applicant's opponent. Different considerations however, govern each case, and it is matter in the discretion of the learned trial judge."

[38] It should be noted that the **Moo Young** case was determined prior to the enactment of the CPR, thus a markedly liberal approach was adopted.

[39] Prior to the advent of the CPR, the English courts adopted a more liberal approach in granting permission to amend. In the case of **Clarapede and Co v Commercial Union Association** (1883) 32 WR 262, Brett MR opined that:

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

[40] It must, however, be indicated that the CPR has ushered a new judicial culture. Disregard for the rules of the court is no longer being countenanced lightly. Notwithstanding the more liberal approach which obtained prior to the enactment of CPR, the factors expressed by Harrison JA, remain pertinent for a judge's consideration in the exercise of his or her discretion whether or not to allow or disallow an amendment.

[41] The courts have also developed some guiding principles that should govern applications for amendments under the CPR. In the cases of **Jamaica Redevelopment Foundation v Clive Banton and another** [2019] JMCA Civ 12 and **CARICOM Investments Limited and others v National Commercial Bank Jamaica Limited and others** [2020] JMCA Civ 15 ('**CARICOM v NCB**'), this court, after extensive review of some English authorities, reiterated the primary principles that ought to be applied in the consideration of an application for permission to amend a statement of case.

[42] The authorities have established that the paramount consideration for the court is to ensure that, having balanced the scales, justice is dispensed between the parties. In so doing, all the circumstances of the case must be taken into account. Stuart Sime, the author of the text, A Practical Approach to Civil Procedure, 14th Edition, captures adroitly, the legislator's intention. Paragraph 15.01 of the text, reads:

> "The underlying principle is that all amendments should be made which are necessary to ensure that the real question in controversy between the parties is determined, provided such amendments can be made without causing injustice to any other party."

[43] Neuberger J's following statement in **Charlesworth v Relay Roads Ltd (inliquidation) and others** [1999] 4 All ER 397 also provides guidance. At pages 401-2 the learned judge stated:

> "As is so often the case where a party applies to amend a pleading or to call evidence for which permission is needed, the justice of the case can be said to involve two competing factors. The first factor is that it is desirable that every point which a party reasonably wants to put forward in the proceedings is aired: a

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

[44] Lord Griffiths, on behalf of the House of Lords, in the case of **Ketteman and others v Hansel Properties Limited** [1988] 1 All ER 38 ('the **Ketteman** case'), however "sounded the death knell" to the liberal approach of the pre-CPR era, particularly as it related to late amendments. At page 62, he made it plain that:

> "Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear on the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. **But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other.** Furthermore, to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.
>
> Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by allowing an

amendment at a very late stage of the proceedings." (Emphasis added)

[45] Likewise, in the case of **Worldwide Corporation Ltd v GPT Ltd and another** [1998] Lexis Citation 3231 ('the **Worldwide Corporation** case') the English Court of Appeal's following statement erased any lingering doubt that the liberal approached will not be countenanced

> "… in previous eras it was more readily assumed that if the amending party paid his opponent the costs of an adjournment that was sufficient compensation to that opponent. In the modern era it is more readily recognised that in truth the payment of the costs of an adjournment may well not adequately compensate someone who is desirous of being rid of a piece of litigation which has been hanging over his head for some time, and may not adequately compensate him for being totally (and we are afraid there are no better words for it) 'mucked around' at the last moment. Furthermore, the courts are now much more conscious that in assessing the justice of a particular case the disruption caused to other litigants by last minute adjournments and last minute applications have also to be brought into the scales."

The court further expressed the view that:

> "Where a party has had many months to consider how he wants to put his case and where it is not by virtue of some new factor appearing from some disclosure only recently made, why, one asks rhetorically, should he be entitled to cause the trial to be delayed so far as his opponent is concerned and why should he be entitled to cause inconvenience to other litigants? The only answer which can be given and which, [counsel for Worldwide] has suggested, applies in the instant case is that without the amendment a serious injustice may be done because the new case is the only way the case can be argued, and it raises the true issue between the parties which justice requires should be decided.
>
> We accept that at the end of the day a balance has to be struck. The court is concerned with doing justice, but justice to all litigants, and thus where a last minute amendment is sought with the consequences indicated, **the onus will be a heavy one on the amending party to show the strength of the new case and why justice both to him, his**

> **opponent and other litigants requires him to be able to pursue it**." (Emphasis added)

That approach properly balances the scales of justice and is, in my view, just.

[46] Notwithstanding the aforementioned view expressed by the learned judges in the cases of **Ketteman** and **Worldwide Corporation**, Gibson LJ in **Cobbold v London Borough of Greenwich** [1999] EWCA Civ 2074 ('the **Cobbold** case'), although acknowledging the necessity to consider applications to amend within the context of court's overriding objective, seemed to have re-opened the 'gates' to the older, more liberal and more "costs" focused approach. He opined:

> "Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party or parties caused by the amendment can be compensated in costs, and the public interest in the efficient administration of justice is not significantly harmed … There is always prejudice when a party is not allowed to put forward his real case, provided it is properly arguable."

[47] With the advent of the CPR, it is now settled law that the paramount consideration is the court's "overriding objective of enabling the court to deal with cases justly". In the words of my learned sister, McDonald-Bishop JA in **CARICOM v NCB** at para. [120]:

> "[i]t is settled law that the jurisdiction to grant permission to amend is governed by the overriding objective, with **all** the considerations that concept embodies... [the application judge is] required to properly conduct a balancing exercise of **all** the relevant considerations **applicable to the case**." (Emphasis added)

[48] The court is, therefore, mandated to ensure that amendments to statements of case achieve that objective which is expressed in the CPR. Rule 1 states:

> "1.1 (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
>
> (2) Dealing justly with a case includes –

(a) ensuring, so far as is practicable, that the parties are on an equal footing and are not prejudiced by their financial position;

(b) saving expense;

(c) dealing with it in ways which take into consideration –

(i) the amount of money involved;

(ii) the importance of the case;

(iii) the complexity of the issues; and

(iv) the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

[49] Whilst it is the court's objective to ensure that issues between the parties are ventilated, the rules of the court must also be obeyed. It is inimical to the efficiency of the administration of justice to allow litigants to disregard its rules. The more liberal approach of the pre CPR era is now antithetical to the current judicial culture.

[50] In fact, Lloyd LJ in the case of **Swain-Mason and others v Mills & Reeve LLP** [2011] 1 WLR 2735 cautioned that the **Cobbold** case should be utilized within the context of the specific facts of that case. Further that the **Cobbold** case does not offer useful guidance in circumstances where the amendment, as he opined, "came out of the blue" or where permitting the amendment would require the trial to be adjourned. It is now settled that applications for such unanticipated amendments will no longer be lightly entertained.

[51] In its quest to achieve the overriding objection, another very important factor in determining the permissibility of a proposed amendment is the nature of the amendment, that is, whether the amendment introduces a new cause of action or an entirely new defence. The introduction of a new cause of action, may raise considerations as to the

expiration of the limitation period. In this regard, the case of **The Attorney General of Jamaica and Aaron Hutchinson v Cleveland Vassell** [2015] JMCA Civ 47 is instructive.

[52] On the issue of seeking an amendment to rely on an entirely new defence, Lord Griffiths had this to say at page 62 of the **Ketteman** case:

> "… whatever may have been the rule of conduct a hundred years ago, today it is not the practice invariably to allow a defence which is wholly different from that pleaded to be raised by amendment at the end of the trial even on terms that an adjournment is granted and that the defendant pays all the costs thrown away. There is a clear difference between allowing amendments to clarify the issues in dispute and those that permit a distinct defence to be raised for the first time."

[53] Although a judge is imbued with wide discretion to determine whether to grant or refuse a proposed amendment, in the exercise of that discretion a judge must seek to achieve fairness and justice between parties. That end is achieved by taking account of all relevant factors in the particular case and, in so doing, having regard to the court's overriding objective. The factors for the court's guidance in its quest to dispense justice and to further the overriding objective of the court can also be derived from the relevant authorities. Some relevant factors for the judge's consideration are listed below. This list is, however, by no means exhaustive and is merely intended as a guide.

(i) the importance of the proposed amendment in resolving the real issue(s) in dispute between the parties;

(ii) the nature of the proposed amendment, that is, whether it gives rise to entirely new and distinct issues or whether it is an expansion on issues that were already pleaded or otherwise foreshadowed;

(iii) the stage of the proceedings at the time the application to amend is made. If the application to amend is made at a late

stage, for example close to the trial date with the result that there may need to be an adjournment or if the application is made after trial has commenced, it should be considered with greater scrutiny;

(iv) whether there was delay in making the application to amend, the extent of the delay and the reason(s) for the delay;

(v) the prejudice to the respective parties to the claim, consequent on the decision to grant or refuse the proposed amendment;

(vi) whether any prejudice to the parties may be appropriately compensated by an order for costs;

(vii) the arguability of the proposed amendment;

(viii) the potential effect of the proposed amendment on the public interest in the efficient administration of justice;

(ix) the reason(s) advanced by the applicant for seeking an amendment; and

(x) the importance of having finality in litigation.

The proposed amendment

[54] Beep Beep sought to raise a wholly new defence, that is, the defence of mistake. Prior to this proposed defence, its stance was denial of the enforceability of the Compromise Agreement on the premise that the agreement failed to conform with the requirements of the Act.

[55] The proposed amendment was raised fewer than 10 months after Beep Beep had filed its original defence, and approximately nine months after DTR had made its

application for summary judgment or striking out. The court is, however, unaware of the date on which Beep Beep was served with that application.

[56] In light of the foregoing, it therefore cannot be reasonably asserted that the application for the proposed amendment was made at a late juncture in the proceedings. Although DTR had applied for summary judgment, the important considerations were whether the proposed amendment was important in resolving the real issue(s) in dispute between the parties and whether there was merit in the proposed amendment. If the answers were in the affirmative, refusing the application would have been antithetical to the interests of justice. Moreover, a trial date was not imperilled and DTR would have had ample opportunity to reply. Moreover, the imposition of costs to DTR could have adequately registered the court's displeasure.

[57] The draft amended defence reads as follows:

> "7. … [Beep Beep] will say further that the [Compromise Agreement] is void for common mistake as to the subject matter and quality.
>
> PARTICULARS OF MISTAKE
>
> i. [Beep Beep] entered into the [C]ompromise [A]greement without knowing the full value of the loss it suffered as a result of the defective batteries supplied by [DTR].
>
> ii. [Beep Beep] received additional information from the Jamaica Customs Agency of its sale by auction and as scraps of several other defective batteries that were stored in a bonded warehouse subsequent to the execution of the [Compromise Agreement].
>
> iii. [DTR] and [Beep Beep] operated under the assumption that the sum of USD$10,000.00 was the full extent of the value of the defective batteries and that assessment was based only on a fraction of the defective batteries supplied.
>
> iv. Upon receipt of the letter from the Jamaica Customs Agency dated January 29, 2019, [Beep Beep] made enquiries of its distributors and found that they had returned batteries, which were among those sold by the Jamaica Customs Agency as scraps, which were not among those assessed by [DTR].

v. [Beep Beep] would not have entered the [Compromise Agreement] had it known of its full loss which it only became aware upon receipt of correspondence from the Jamaica Customs Agency dated January 29, 2019." (Underline as in original)

[58] The crux of Beep Beep's proposed amended defence was that:

1. it was mistaken as to the full extent of its losses consequent on the non-merchantability of the batteries supplied by DTR;

2. it only became aware of the full extent of its losses, after receiving a letter from the Jamaica Customs Agency; and

3. the letter from the Jamaica Customs Agency was only received after the signing of the Compromise Agreement.

DTR's response to the proposed amendment

[59] In response to Beep Beep's application to amend its defence, Mr Jones, on behalf of DTR, by way of his affidavit, exhibited several email correspondences from Dani Gonzalez which contradicted the assertions made in Beep Beep's draft amended defence. Note worthily also, is that no affidavit in response challenging those averments was provided on Beep Beep's behalf.

[60] On 15 August 2017, Dani Gonzales wrote, apparently in response to a demand from Mr Jones, stating *inter alia*:

"… We discussed with Mr Park that the entire invoice that these defective goods came from should be reimbursed … We also indicated that we had several hundred batteries in our warehouse that we had no confidence in and we are seeking compensation also. Further we indicated that other pending/shipped/on wharf orders at the time was [sic] in doubt due to quality.

…

Our understanding of the matter, looking back; is one where Mr Park knowing of the defective products visited us and later **convinced us to accept a compensation that was totally inadequate** given the magnitude of the problem. …

Our company has existed since 1997 and we worked very hard to build a reputable company that had excellent goodwill, reputation for quality products and good credit rating. All of this lost as a result of the thousands of defective batteries that [DTR] allowed to knowingly enter into the Jamaican market.

As a result … our company has suffered irreparable reputational, financial [sic] and almost [sic] all our battery market share, affecting also our tyre and lubricant business. We currently finally received earlier this year 1 shipment with over 1600 batteries that was sitting on the wharf due to lack of demand for Voltex brand batteries, almost 12 months and to date we are having difficulty to sell this shipment, not due to price but the 'BRAND' …" (Emphasis added)

[61] On 22 August 2017, Mr Gonzalez again wrote:

"Dear Mr Jones,

further [sic] to our discussion and several recent emails between Mr Park and myself we are making the following proposal which takes into consideration the poor decision our company made and insufficient initial mutual acceptance of $18,900 USD. The history and details of this is in our previous emails. **Beep Beep Tyres**, weekend [sic] financial status.

(a) We wish to firstly establish in no uncertain terms that we are willing to continue doing business with [DTR] provided it is a different brand battery.

(b) In light of the heavy losses as a result of the defective batteries our company has taken with respect to market share, loss of confidence in our company and other products we distribute, goodwill and financial losses.

(c) No compensation for Duties paid and other charges for hundreds of defective batteries.

(d) Left alone to battle the returns and brutal complaints due to defective batteries.

(e) Still struggling to rid ourselves of the last container which clearly will cause significant further losses. All due to a rejection of the brand due to the history of defective batteries.

…" (Emphasis added)

[62] Mr Gonzalez then proposed to pay DTR 50% of its claim over a certain period of time. It was this proposal which sparked negotiations between the parties and which eventually led to the Compromise Agreement.

[63] These emails demonstrated that although Beep Beep had not thoroughly quantified in dollar value, the extent of its losses, it anticipated that it would suffer further losses from other shipments which it had not disposed of. Notwithstanding that very serious concern, Beep Beep entered into the Compromise Agreement, thereby obviously intending to forgo even its likely future losses. In light of that evidence, the learned judge, cannot be faulted for refusing Beep Beep's application for permission to amend. It was palpable that the draft amended defence was disingenuous.

[64] In any event, assuming the facts as stated in the draft amended defence were not disingenuous, those facts were not supportive of a defence of mistake. The recital to the Compromise Agreement is instructive. It reads:

> "WHEREAS:
>
> (i) A claim has been made by **DTR AUTOMOTIVE/DONG AH** against **BEEP BEEP** alleging breach of contractual duty in relation to batteries (with serial #2015004 … and serial #2015005 … [sic] supplied to Beep Beep;
>
> (ii) **BEEP BEEP** maintains that it is not liable primarily because the batteries supplied by **DTR AUTOMOTIVE/DONG AH** were not of merchantable quality;
>
> (iii) Notwithstanding the respective positions of the parties, they are desirous of resolving this matter amicably without recourse to litigation."

[65] This agreement was not for the supply of batteries. The quality of the batteries supplied was, therefore, not an issue. This was an agreement to settle a dispute. The subject matter of the Compromise Agreement was the settlement of a dispute. Assuming

it was mistaken as to the extent of its losses, such a mistake would not absolve it of its responsibility under the Compromise Agreement.

[66] The Halsbury's Laws of England, Volume 77, at para. 17, is instructive:

> "Where parties enter into a contract under a common mistake as to the existence of the subject matter or of some fact or facts forming an integral element of the subject matter, it is a question of construction as to whether either or both of them is or are relieved of liability to perform. In most such cases, both parties are relieved of liability, because the consideration for which each party contracted has failed and, deprived of any effective content, the contract has the appearance of having been void *ab initio.*
>
> …
>
> In modern times the position has been stated thus: for common mistake to avoid a contract **there must be a common assumption as to the existence of a state of affairs** as to which there must be no warranty that that state exists, and nor must it be attributable to the fault of either party, **but it must render performance of the contract impossible. It has also been said that the mistake must render the subject matter of the contract radically different from the subject matter which the parties believed to exist.**" (Emphasis supplied)

[67] Beep Beep was aware that a dispute had arisen between itself and DTR. It was also aware of the cause of the dispute. That notwithstanding, it indicated its desire to settle the dispute in order to resolve the matter "amicably without recourse to litigation." Its subsequent knowledge that the Jamaica Customs Agency had disposed of its batteries, did not change those circumstances and neither did it render the contract impossible to perform. A defence of mistake in those circumstances would not have assisted Beep Beep.

[68] On the facts of the instant case, it would not have been in the interests of justice for the learned judge to permit Beep Beep to amend its defence to advance a new defence. That would have been equally susceptible to summary disposal, as appeared to be the one that was already filed.

[69] In light of the foregoing, Beep Beep has failed to demonstrate that it had a real chance of succeeding on appeal with respect to grounds a. and b. of its proposed grounds of appeal.

Issue 2: The learned judge's decision to grant summary judgment in favour of the respondent (proposed ground of appeal c.)

[70] The issue is whether, in challenging the learned judge's decision to grant summary judgment, Beep Beep had an arguable case with a real chance of success. Rule 15.2 of the CPR is instructive. It states:

> "The court may give summary judgment on the claim or on a particular issue if it considers that –
>
> (a) the claimant has no real prospect of succeeding on the claim or the issue; or
>
> (b) the defendant has no real prospect of successfully defending the claim or the issue." (Emphasis supplied)

As stated at para. [32] above, a real prospect of success means a 'realistic' as opposed to a 'fanciful' prospect of success. (**Swain v Hillman**)

[71] In light of my finding that the learned judge properly exercised her discretion in refusing Beep Beep's application for permission to amend, the learned judge's decision to grant summary judgment must be considered with regard to the original defence which was filed on Beep Beep's behalf. In assessing the matter, it is necessary, to set out, portions of the parties' pleadings and to juxtapose them.

[72] The relevant portions of DTR's particulars of claim stated:

> "3. [DTR] and [Beep Beep] entered into a contract in which [DTR] would manufacture and sell to [Beep Beep] batteries over a period of time. In or about 2015 [DTR] provided [Beep Beep] with batteries amounting to US$49,741.07. [Beep Beep] has failed and/or refused to satisfy the outstanding sum despite the request of [DTR].

4. [DTR] further provided [Beep Beep] with batteries amounting to US$50,391.30.

5. [Beep Beep] failed and/or refused to satisfy the outstanding sums.

6. Between in or about September 2017 and October 2017 [DTR's] Attorney and [Beep Beep's] Attorney entered into settlement discussions with a view to resolving the matter. …

7. [DTR] and [Beep Beep] thereafter entered into a contract. The terms of the contract were that inter alia [sic] [Beep Beep] would pay [DTR] the sum of US$54,000 in settlement of the claim. It was further agreed that the said sum would be paid in twelve equal monthly instalments commencing on November 15, 2017 and on or before the 15th of each month thereafter until the sum was satisfied. …

8. [Beep Beep] has made two payments and has failed and/or refused to make any further payments despite [DTR's] demands."

[73] Beep Beep sought to defend the claim as follows:

"3. Paragraph 3 of the Particulars of Claim is admitted in so far as [DTR] says that [Beep Beep] entered into a contract in which [DTR] would manufacture and sell to [Beep Beep] batteries over a period of time.

4. In further response to paragraph 3 as well as paragraph 4 of the Particulars of Claim, it is denied that in or about 2015 [DTR] provided [Beep Beep] with batteries amounting to US$49,741.07 and [DTR] is put to prove this assertion. [Beep Beep] will say that it is aware that [DTR] also supplied goods to another company, Priceco Global Distributors Limited, whose registered address is the same as [Beep Beep] and that there appears to be some error in the allocation of goods and preparation of invoices by [DTR] in respect of [Beep Beep] and that other company.

5. In response to paragraph 5 of the Particulars of Claim [Beep Beep] says that it does not know the precise sums that are outstanding. Further, [Beep Beep] repeats paragraph 4 herein and puts [DTR] to prove the outstanding sums.

6. Paragraph 6 of the Particulars of Claim is admitted.

> 7. Paragraph 7 of the Particulars of Claim is denied. [Beep Beep] will say that the Agreement is void and unenforceable because it does not conform to the requirements of the Stamp Duty Act.
>
> 8. Paragraph 8 of the Particulars of Claim is denied and [DTR] is put to prove its assertions made therein. [Beep Beep] will say that it has over the years been making payments to [DTR] in respect of goods supplied to it."

[74] Beep Beep, by its defence, admitted the following:

> i. it had an arrangement whereby it agreed to purchase batteries from DTR over a period of time;
>
> ii. there were sums owed to DTR consequent on this arrangement but the precise sum that was owed was unknown; and
>
> iii. the parties had settlement discussions with a view to settling the outstanding sum.

The particulars of claim also annexed various email correspondence between the parties' attorneys, which Beep Beep admitted as being true and accurate.

[75] The issues on which the parties disagreed, were:

> (i) whether the Compromise Agreement was valid and enforceable; and
>
> (ii) whether the two payments made by Beep Beep were in furtherance of the Compromise Agreement or in furtherance of the longstanding arrangement for the supply of batteries.

Whether the compromise agreement was valid and enforceable

[76] Of significance, the defence did not challenge the issue of whether an agreement had been reached. Instead, it challenged the validity and enforceability of the unstamped

Compromise Agreement. In this context, the issue which remained for the learned judge's examination, was the enforceability of the Compromise Agreement *vis a vis* the Act. Section 36 of the Act provides:

> "No instrument, not duly stamped according to law, shall be admitted in evidence as valid or effectual in any court or proceeding for the enforcement thereof."

[77] By contrast, section 37 provides:

> "If with intent to evade this Act a consideration or sum of money shall be expressed to be paid in any instrument less than the amount actually paid, or agreed to be paid, **every such instrument shall be null and void**." (Emphasis supplied)

[78] Sections 36 and 37, support Mr Jones' contention that the failure to stamp the Compromise Agreement, does not render the agreement void or invalid. The effect of non-stamping is that it prevents the Compromise Agreement from being tendered and relied upon in court as evidence, unless and until it is stamped.

[79] Section 43 of the Act, however, affords relief to a litigant in default of the requirements of the Act. That section enables a litigant, to take the necessary steps to comply with their obligations under the Act and pay the required penalties. Section 43 provides:

> "43. Upon the tender in evidence of any instrument, other than inland and foreign bills of exchange and promissory notes, coastwise receipts, and bills of lading, it shall be the duty of the officer of the court, before reading such instrument, to call the attention of the Judge to any omission or insufficiency of the stamp; **and the instrument if unstamped, or insufficiently stamped, shall not be received in evidence until the whole, or (as the case may be) the deficiency of the stamp duty, to be determined by the Judge, and the penalty required by this Act, together with an additional penalty of five hundred dollars, shall have been paid**." (Emphasis added)

[80] Similarly, as it relates to bills of exchange and promissory notes, section 50 provides:

> "50. Every person who issues, endorses, transfers, negotiates, presents for payment, or pays any bill of exchange, or promissory note liable to duty, and not being duly stamped, shall incur a fine or penalty not exceeding one hundred dollars and the person who takes or receives from any other person such bill or note, either in payment, or as security, or by purchase, or otherwise, **shall not be entitled to recover thereon, or to make the same available for any purpose whatever, except that the same may be used for the purposes of evidence on payment of the stamp duty payable thereon, together with a penalty equal to the stamp duty payable thereon, which penalty shall be in lieu of the penalty imposed by section 32**". (Emphasis supplied)

[81] This court interpreted section 50 of the Act in the case of **Garth Dyche v Juliet Richards and another** [2014] JMCA Civ 23. In that case, Phillips JA stated at para. [54]:

> "… What, in my opinion, section 50 does, however, allow, is that on payment of the required stamp duty and a fine and/or penalty, the document may be used for the purposes of evidence. …"

That interpretation cannot be faulted. Instruments that initially were unstamped are also captured by section 43. Regarding the instant case, DTR would have been in a position to tender the Compromise Agreement into evidence upon payment of the requisite duties and penalties.

[82] DTR's particulars of claim also demonstrated that the Compromise Agreement was being relied upon to corroborate the existence of an agreement. DTR's claim could therefore have stood independently of the Compromise Agreement, as the claim expressly outlined that Beep Beep had:

> (i) agreed to pay a specified sum over a specified time period; and

(ii) in fact made two payments in furtherance of that agreement,

but failed to make the remaining payments.

Beep Beep failed to raise any real challenge to these averments. It has, therefore, failed to demonstrate that the agreement is unenforceable. Accordingly, there is no merit in this proposed ground of appeal.

The two payments made by Beep Beep

[83] The issue whether the two payments that were made by Beep Beep were made in furtherance of the Compromise Agreement, or the original agreement for the supply of batteries will be dealt with shortly. Short shrift can be made of the issue as it is palpable, on a reading of the email correspondences which were exhibited by Mr Jones to his affidavit filed on 6 July 2018, in support of DTR's application for summary judgment, and to which no challenge was mounted by Beep Beep, that the two payments were in fact made in furtherance of the Compromise Agreement. On 30 November, 2017, Ms Nelson, on behalf of Beep Beep, sent the following email to Mr Jones:

> "Kindly send confirmation of receipt of the sums paid by my client in satisfaction of its obligations **under the Compromise Agreement** entered into with your client." (Emphasis added)

On the same date, Mr Jones responded:

> "Dear Counsel:
>
> I am confirming receipt of JA$571,500.00."

Likewise, on 19 January, 2018, in relation to December's payment, which by then was late, Ms Nelson wrote:

> "Our client advised that the second payment of JMD $556,120.00 **towards the agreed sum** was made on January 17, 2018. Kindly confirm receipt of the monies." (Emphasis added)

Mr Jones responded on 22 January 2018 indicating:

> "Dear Counsel:
>
> Confirming receipt of the sum of $556,120.00. We look forward to receiving payment for the month of January 2018 which has been overdue since January 15, 2018."

[84] This correspondence contradict Beep Beep's denial in its defence that the two payments were made in furtherance of the Compromise Agreement. In this regard, I am guided by the statement of Potter LJ at para. 10 of his decision in **ED & F Man Liquid Products Ltd v Patel and another** [2003] All ER (D) 75 (Apr), in which he stated:

> "...where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini-trial: ... However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases, it may be clear that there is no real substance in factual assertions made, **particularly if contradicted by contemporary documents**. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable: ..." (Emphasis added)

[85] In the instant case, the email correspondence contradicted Beep Beep's assertion that the two payments were made in furtherance of the general agreement for the supply of batteries. The correspondence between the parties demonstrated that the two payments were made in accordance with the terms of the Compromise Agreement and was not part payment for the supply of batteries, for which payment was made over a two-year period. Beep Beep's case, therefore, had no real prospect of succeeding on this aspect of its defence.

[86] Beep Beep has also failed to demonstrate that it had a realistic prospect of succeeding in relation to proposed ground of appeal c. The issues in this case were not complex and investigation by way of a trial, was, therefore, unnecessary. Accordingly, the learned judge correctly exercised her discretion by granting summary judgment.

[87] It was for the above stated reasons I concurred with the orders that were made at para. [4] above. In light of the foregoing, it was unnecessary to consider Beep Beep's application for a stay.

FOSTER-PUSEY JA

[88] I too have read in draft the reasons for judgment of my sister Sinclair-Haynes JA and agree.