[2021] JMCA Civ 35

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE V HARRIS JA

SUPREME COURT CIVIL APPEAL NO COA2020CV00040

BETWEEN	**RICHARD BURGHER**	**APPELLANT**
AND	**EARL MARTIN**	**RESPONDENT**

Written submissions filed by Grant Stewart Phillips & Co for the appellant

Written submissions filed by Bernard & Co for the respondent

23 July 2021

PROCEDURAL APPEAL

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

MCDONALD-BISHOP JA

[1] I have read the draft judgment prepared by my sister V Harris JA. I agree with her reasoning and conclusion and there is nothing I could usefully add.

SIMMONS JA

[2] I, too, have read the draft judgment of my sister V Harris JA. I agree with her reasoning and conclusion and have nothing to add.

V HARRIS JA

Introduction

[3] On 21 May 2020, Wolfe-Reece J ('the learned judge') considered competing applications from the appellant, Mr Richard Burgher and the respondent, Mr Earl Martin, who were the defendant and claimant, respectively, in the court below. Briefly, the appellant applied to have his amended statement of case, certain witness statements and a notice of intention to rely on documents ('notice of intention to rely'), which were all filed out of time, to stand. The respondent's application was for the appellant's statement of case, or alternatively, any documents filed by him after the dates stipulated by the pre-trial review orders made on 5 May 2017, to be struck out.

[4] The learned judge granted the appellant's application except for the amendment at paragraph 22 of the amended defence and counterclaim. The appellant was also denied the right to rely on specific documents listed in the notice of intention to rely, as a sanction. The respondent's application was refused. The respondent was awarded costs on the appellant's application and each party was ordered to bear their own costs on the respondent's application. Both parties were given leave to appeal.

[5] On 4 June 2020, the appellant filed a notice of appeal challenging several of the orders made by the learned judge on both applications, as well as, certain findings of fact and law. The respondent filed a counter-notice of appeal on 18 June 2020, similarly seeking to set aside some of the orders made on both applications, and disputing several findings of fact and law made by the learned judge.

[6] The appeal and counter-notice of appeal are, therefore, primarily concerned with whether the learned judge correctly exercised her discretion when she made the orders mentioned at para. [4].

Background

[7] Before addressing the learned judge's reasons for her decision, it is necessary to provide a brief outline of the history of the litigation in the court below, which is relatively straightforward despite the enormous detail that the case has spawned.

[8] The appellant is the registered owner of residential property situated in the parish of Saint Andrew ('the property'). The respondent is a cabinet maker and was engaged by the appellant to carry out carpentry work at the property. This contract was partly oral and partly in writing. On 8 April 2009, the respondent filed a claim for monies owed by the appellant to him under the contract in the sum of $1,708,796.55 plus interest at the commercial rate of 22% per annum, court fees and attorney's fees totalling $2,096,731.79.

[9] In response, on 10 July 2009, the appellant filed a defence and counterclaim. He alleged that the respondent failed to complete the work satisfactorily, and due to the respondent's negligent carpentry work, he sustained loss, damage and incurred expense. The appellant counterclaimed for special damages amounting to $130,000.00 plus interest, damages for breach of contract and/or negligence or in the alternative, damages for the costs of rectifying all defects which were "conservatively estimated at $475,000.00".

[10] As is customary, the matter was referred to mediation on 17 January 2011, however, the mediation was postponed because the respondent's former attorney-at-law no longer represented him and was removed from the record. Mediation was then set for 29 April 2014, and again the respondent failed to attend. As a result, the appellant applied to have the respondent's claim struck out. That application was eventually withdrawn and the matter proceeded to case management hearing on 23 November 2015, before Bertram-Linton J, who made several orders.

[11] At the case management conference, standard disclosure was ordered by 31 July 2016. The respondent filed his list of documents on 3 August 2016 (three days late) but

complied with the other orders. The appellant's list of documents was filed on 27 July 2016 ('first list of documents') disclosing 10 documents. The appellant was permitted to amend his defence and counterclaim by or before 31 January 2016, which he failed to do. Witness statements were initially ordered to be filed and served by 30 November 2016. The appellant also failed to comply with that order.

[12] The pre-trial review came on for hearing before Palmer-Hamilton J on 20 February 2017 and, after hearing a joint application by both parties for an extension of time to fully comply with the case management orders, she granted the extension of time to 24 March 2017, and adjourned the pre-trial review to 28 April 2017. The pre-trial review came on for hearing before K Anderson J on 5 May 2017, and the following orders were made:

> "1. Trial of this Claim shall be held on July 8-11, 2019 and any trial dates earlier ordered by this Court shall stand as vacated.
>
> 2. The Claimant shall file a core bundle and shall file and serve an index to that core bundle by or before June 24, 2019.
>
> 3. The parties shall respectively file and serve a bundle of Skeleton Submissions and Authorities, and shall do so by or before July 1, 2019.
>
> 4. Upon the trial of this claim the parties shall be limited to examination in chief and cross examination of each witness as named in this order, during maximum time lengths as specified in this order, below the name of each witness:
>
> Claimant's witnesses:
>
> i. Earl Martin (Claimant)
> Examination in Chief- 90 Minutes
> Cross Examination- 2 hrs. 30 minutes
>
> ii. Junior Grant
> Examination in Chief- 30 Minutes
> Cross Examination- 45 Minutes

iii. Carlton Hollingsworth
Examination in Chief- 30 Minutes
Cross Examination- 60 Minutes

Defendant's Witnesses:

i. Richard Burgher (Defendant)
Examination in Chief- 45 Minutes
Cross Examination- 45 Minutes

ii. Robert Woodstock
Examination in Chief- 45 Minutes
Cross Examination- 45 Minutes

iii. Ruth Morrison
Examination in Chief- 45 Minutes
Cross Examination- 45 Minutes.

5. It shall be open to the trial judge to extend to whatever extent that the Judge considers necessary, the time periods required for examination in chief and cross examination in order number 4 above.

6. The last date scheduled for the trial of this claim shall be the date on which the respective parties shall present to the court, oral closing submissions, unless the trial judge thinks the presentation/making of same to be unnecessary.

7. By or before June 3, 2019 the Defendant shall notify the Claimant in writing by means of a document to be filed and served, of any document which the defendant wishes to rely on at trial.

8. The Claimant shall file and serve by or before June 24, 2019 and shall file and serve by or before same date, a bundle of agreed documents and a bundle of those documents that are not agreed and indices for those bundles. Those bundles need only to be filed but the indices for same shall be filed and served.

9. The parties shall respectively file and serve all witness statements for all witnesses whose evidence is intended to be relied upon at trial and no extension of time for this order shall be granted by this court without there having been a written application filed

for that purpose. Said witness statements shall be filed and served by or before July 31, 2017.

10. The costs of today shall be costs in the Claim.

11. The Claimant shall file and serve this order."

The applications

[13] The appellant was tardy and did not meet the timelines in the orders made at the 5 May 2017 pre-trial review. To rectify his non-compliance, he filed an application on 24 June 2019 requesting that the following documents be allowed to stand as properly filed:

1. amended defence and counterclaim filed on 9 May 2019 (to have been filed by 24 March 2017);

2. witness statement of Richard Burgher filed on 12 June 2019;

3. witness statement of Carlton Hollingsworth filed 12 June 2019; and

4. witness statement of Stacey-Ann Dennison-Heron filed on 24 June 2019.

The order of K Anderson J had stipulated that all witness statements were to be filed and exchanged on or before 31 July 2017.

[14] The respondent, in answer, filed an application on 25 June 2019 seeking to have the appellant's statement of case struck out for failure to comply with the pre-trial review orders and that judgment be entered in his favour, or in the alternative that the documents itemized at para. [13] be struck out.

The learned judge's decision

[15] The learned judge correctly decided that the seminal issue for her consideration on both applications was whether the appellant's statement of case should be struck out for failure to comply with the pre-trial review orders. She found that the explanations given by the appellant for failing to file the witness statements within the stipulated timeline were wholly unacceptable, and that he had not advanced any good reason for failing to disclose all the relevant documents in his possession by the date specified in the order of K Anderson J. She, however, proceeded to consider the merits of the case and also the prejudice which would be caused to the parties by the granting or refusal of the orders sought. She concluded that an order striking out the appellant's statement of case was not the most appropriate remedy, given the fact that the appellant had an arguable case. She opined that a more appropriate remedy in those circumstances would be to award costs in favour of the respondent. The learned judge also precluded the appellant from relying on certain documents listed in his notice of intention to rely, as a sanction.

[16] Another important element of the learned judge's analysis was her decision concerning paragraph 22 of the appellant's amended defence and counterclaim which sought to claim a further sum of $8,565,000.00 as damages for the costs of rectifying all defects, as opposed to the sum of $475,000.00 which was originally claimed. The learned judge ultimately found that to allow such an amendment almost 10 years after the original claim was commenced, and more than three years after the order permitting the amendment, would be manifestly unjust. This is particularly due to the fact that the appellant was now counterclaiming for a sum that was almost 18 times the amount he initially said would be the costs for repairs. Her reasons for this decision included the appellant's failure to explain how he had arrived at the inflated figure, and his failure to provide good reason for the delay in amending the defence and counterclaim.

[17] As a result of her findings, the learned judge made the following orders:

"Upon the [respondent's] Notice of Application for Court Orders filed 25th June 2019 it is hereby ordered:

1. Application to strike out the [appellants] statement of case is denied.

2. Each party to bear their own costs.

3. Leave to appeal granted.

Upon the [appellant's] Notice of Application for Court Orders filed 24th June 2019 it is hereby ordered:

1. The [appellant] is denied the right to rely on the documents listed in Notice of Intention to Rely filed on the 24th June, 2019 with the exception of items 34 & 35 and the 9 other documents [there were 10 documents] which were listed in the List of Documents filed on 27th July, 2016.

2. Permission is granted for the amendments to the [appellant's] statement of case and counterclaim allowed to stand as properly filed with the exception of the new estimated figure of $8,565,000.00 at paragraph 22 [of the amended defence and counterclaim].

3. The [appellant] is to amend the Defence and Counterclaim reflecting the particulars of Order # 2 made herein and file amended document within seven days of the date hereof.

4. The witness statements of Richard Burgher and Carlton Hollingsworth filed on 12th June 2019 and Stacey-Ann Dennison-Heron filed on 24th June 2019 stand as properly filed.

5. Costs of this Application are awarded to the [respondent] to be taxed if not agreed.

6. Leave to appeal granted."

Grounds of appeal and counter-notice of appeal

[18] On 4 June 2020, the appellant filed a notice of appeal relying on the following 10 grounds:

> "i. The learned trial judge erred in law and in fact in finding that the Appellant ought to be precluded from relying on the documents listed in its Notice of Intention to Rely on Documents for Trial filed 24th June 2019 *(with the exception of items 34 & 35 and the 9 other documents which were listed in the List of Documents filed on 27th July 2016)* as a sanction for its failure to file the same within the time limits set by the Honourable Mr. Justice Kirk Anderson upon the adjourned Pre-Trial Review on the 5th May 2017, given the circumstances of the particular case.
>
> ii. The learned trial judge erred in fact and in law in failing to take into account the fact that the Appellant had filed a Supplemental List of Documents on the 4th July 2019 listing all the documents listed in its Notice of Intention to Rely on Documents for Trial filed 24th June 2019 in accordance with its continued duty of disclosure as permitted under the Civil Procedure Rules (CPR), Part 28; and therefore had not only disclosed all the documents therein but was also entitled to rely on the same.
>
> iii. The learned trial judge erred in fact and in law when she found that the Appellant had given no reason for the purported non-disclose [sic] of the documents listed in its Notice of Intention to Rely on Documents for Trial filed 24th June 2019.
>
> iv. The learned trial judge erred in fact and in law when she found that the early date (namely dates spanning 2007-2009) of the documents listed in its Notice of Intention to Rely on Documents for Trial filed 24th June 2019 decisively demonstrated that the said documents were in the possession of the Appellant on or before the 27th July 2016.
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> v. The learned trial judge erred in fact and in law in strictly assessing the Appellant's application filed 24th

June 2019 pursuant to Civil Procedure Rule (CPR), Rule 28.6 [sic] in relation to relief from sanctions; and Rule 28.14 in relation to a party's failure to follow an order for disclosure.

vi. The learned trial judge erred in law and in fact in failing to take into account and/or adequately have [sic] regard to the Respondent's non-compliance with the rules and orders of the court throughout the history of the matter, particularly that the Respondent had not complied with paragraph 3 of the order made by the Honourable Mr. Justice Kirk Anderson upon the adjourned Pre-Trial Review on the 5th May 2017.

vii. The learned trial judge erred in law and in fact in finding that the Appellant could not rely on the Notice of Intention to Rely on Documents for Trial filed the 24th June 2019 *(with the exception of items 34 & 35 and the 9 other documents which were listed in the List of Documents filed on 27th July 2016)* and at the same time finding that the Appellant could rely on the witness statements of Richard Burgher and Carlton Hollingsworth filed on the 12th June 2019 and Stacey-Ann Dennison-Heron filed on the 24th June 2019, which all heavily rely on the said documents.

viii. The learned trial judge erred in law and fact in disallowing the Appellant's amendment to its Defence and Counterclaim at paragraph 22 of its Amended Defence and Counterclaim filed 9th May 2019, specifically the estimated figure for the costs of the remedial works necessary to remedy the Respondent's defective works under the contracts for carpentry works, [which is the subject of Claim No. HCV01956 of 2009], having regard to all the circumstances of the case and the fact that she has permitted the filing of the witness statement of Carlton Hollingsworth, the quantity surveyor who gives evidence in this regard. In particular, in determining the said issue the learned trial [judge] misapplied the case of George Hutchinson v Everett O'Sullivan [2017] JMSC Civ. 91.

ix. The learned trial judge erred in law and in fact when she failed to give due regard to the overriding

objective to deal with the matter of the [respondent]'s and [appellant's] Notice of Application for Court Orders filed 25th and 24th June 2019, respectively.

x. The learned trial judge erred in law and in fact in finding that each party should bear its own costs upon the Respondent's Notice of Application for Court Orders filed 25th June 2019 in circumstances where the Appellant was successful upon the said application and in light of the appropriate cost [sic] order upon the [Appellant's] Notice of Application for Court Orders filed 24th June 2019." (Italics as in the original)

[19] The respondent's counter-notice of appeal, filed on 18 June 2020, contained 17 grounds of appeal, three of which had several sub-grounds. For completeness, they are set out below:

"a. The learned trial judge erred on the facts and in law in finding that the [appellant] had no other form of redress available to him in circumstances where the Consumer Protection Act, 2005, provides protection to a consumer who is adversely affected in relation to the sale of goods or the provision of services.

b. The learned trial judge failed to adequately and completely consider whether, in the circumstance and as a result of the [appellant's] conduct, a fair trial was still possible; particularly:

i. The [appellant's] failure to disclose documents dating as far back as 2007 and 2008 raises issues of credibility and the extent to which the documents disclosed are a full and complete list of all documents which:

(a) are or were in the physical possession of the [appellant];

(b) the [appellant] has or has had the right to possession of;

(c) the [appellant] has or has had the right to inspect or take copies of.

ii. The prejudice that would result in permitting the [appellant] to rely on the Site Inspection Report / Snag List assessment prepared by HMRW Associated [sic] Limited dated the 1st of April 2019 some twelve (12) years after completion of the Works.

iii. That no proper and fair assessment of defects can occur 12 years after completion in circumstances where the [appellant] has occupied and had the benefit and use of the works for the past 12 years.

iv. The blatant and irredeemable prejudice that would result in an assessment of defects some 12 years after completion of the works when in the absence of an express warranty section 21(6) of the Consumer Protection Act provides that an implied warranty of six months shall apply.

v. Disclosing and making an application to rely on documents four (4) days before the trial which was scheduled for the 8th to the 11th of July 2019 made a fair outcome impossible and resulted in depriving the [respondent] and other competing litigants of valuable judicial time.

vi. The [appellant's] conduct has solely caused the Court to vacate fixed trial dates on two separate occasions resulting in additional costs to the [respondent] and an inordinate sixteen (16) year delay between filing of the claim - 8th of April 2009 - and the new proposed trial date being 28th of October – 31st of October 2024.

vii. The risk of witnesses being unable to recall and give evidence some 16 years after completion of the Works.

viii. Relying on documents disclosed at this late stage in the proceedings deprives the [respondent] of the opportunity to properly investigate or challenge documents or get an independent expert witness as the locus would have substantially changed over 12 years.

c. The learned trial judge erred on the facts and in law in failing to give sufficient weight to the [appellant's] pattern of defiance and noncompliance over the 11

years the matter has been before the court particularly:

i. The [appellant] is the [sic] wholly responsible for the delay;

ii. The [appellant] has, by its blatant defiance, treated the court process with complete disrespect and disregard which precedent serves to undermine the administration of justice in our Courts;

iii. The [appellant] has sought to deliberately exploit the court's leniency towards him and prolong this matter for as long as he is able.

iv. The [appellant's] actions must lead to [sic] the court to the unavoidable inference that the [appellant] is not serious or has no real interest in advancing the matter before the court; his actions can only be viewed as deliberate [sic] contumelious.

v. The [appellant] has benefited from his own delay and disregard for court orders in that he has derailed two trial dates and thereby delayed the possibility of an adverse judgment.

d. The learned trial judge erred on the facts and in law in failing to adequately consider the prejudice suffered by the [respondent] as a result of the [appellant's] conduct, particularly the learnt [sic] trial judge has failed to take note of the following:

i. The parties are not on equal footing as the [appellant] is gainfully employed as the chairman of Marathon Insurance Brokers whilst the [respondent] is a humble Carpenter with limited resources.

ii. The disproportionality between the resources of the parties and the effect that legal costs and delay in recovery of amounts claimed will have on a carpenter viz-a-viz a successful businessman who has had the benefit of the goods and services provided by the [respondent] without objection since 2008.

iii. The [respondent] is faced with undue hardship in having to expend continuous financial resources and effort to fund litigation of this claim and on account of cost [sic] and the inordinate delay is unable to maintain litigation for sixteen (16) years.

iv. The [respondent] has endured emotional turmoil and stress due to the uncertainty surrounding the culmination of this matter.

v. The non-disclosure of witness statements and documents prevented proper preparation of the [respondent's] case and the fair disposal of the proceedings at the trial dates set for July 8-11, 2019.

vi. A fair trial is no longer possible for the reasons stated in ground b. i – viii.

e. The learned trial judge did not give due consideration to all the facts of the case before her in finding that the prejudice to the [appellant] far outweighed the prejudice to the [respondent] and that a fair trial was in fact possible in the circumstance.

f. The learned judge erred as a matter of fact and law in her application or in failing to properly apply the legal position in the case of ***Sandals Royal Management Ltd v Mahoe Bay Co Ltd***. [2019] JMCA App 12.

g. The learned trial judge failed to take into consideration that the [appellant] has had the benefit of the enjoyment of the cupboards, windows and cabinets for the past 12 years without conducting repairs; this demonstrates that any alleged defect did not prevent the usefulness of the goods and did not amount to a breach of a condition in the contract; at most, the alleged defect would amount to a breach of warranty in the contract, which does not repudiate the contract or empower the [appellant] to withhold payment. As such the [appellant] does not have an arguable case.

h. The learned trial judge failed to recognise and consider the Defendant's frivolous and vexatious attempt to increase the amount to repair the

cupboards, windows and kitchen cabinets 'conservatively estimated' at J$ 475,000.00 to an exorbitant sum of J$ 8,565,000.00 without any reference in the pleadings grounding or substantiating such a claim.

i. The learned trial judge did not direct her mind to consider the other limbs of Rule 26.3(1) which arose on the facts of this case, particularly, abuse of process.

j. The learned trial judge did not apply her mind to the accepted principle that strike out orders should be made either when it is necessary in order to achieve fairness ***or when it is necessary in order to maintain respect for the authority*** of the court as approved in **Branch Developments Limited t/a Iberostar Rose Hall Beach Hotel v The Bank of Nova Scotia Jamaica Limited [JMSC] Civ 003** [sic], thereby failing to give sufficient weight to the maintenance of the legitimacy of the court's authority.

k. The learned judge did not adequately consider or address her mind to the fact that failing to strike out the Defendant's statement of Case in the circumstances before the court has exposed the court and litigants to a dangerous and detrimental precedent that disrupts the overriding objective of the CPR and signals a return to the previous culture were [sic] timelines were not important and a lackadaisical and inefficient approach to court administration prevailed.

l. The learned trial judge failed to take account of the prejudice of the delay and the adjournment of two trial dates on the innocent litigant and *other litigants* who are competing for the court's finite resources.

m. The learned trial judge erred on the facts and in law in allowing the Defendant to rely on items 34 and 35 of the list of documents filed the 24th of June 2019, as both these documents were prepared in 2019 approximately 11 years after carpentry services were rendered to the Defendant and cannot fairly account or quantify damages flowing from any alleged defect.

n. The learned trial judge erred on the facts and in law in allowing the Defendant to rely on the witness statements of Richard Burgher & Carlton Hollingsworth filed on 12th June 2019 and Stacey-Ann Dennison-Heron filed on 24th June 2019, in circumstances where 11 years have passed since the alleged defects and it is questionable whether given the delay in the preparation of same, these witness [sic] can legitimately and accurately recall the circumstances that existed at the time these defects are purported to have existed.

o. The learned trial judge erred on the facts and in law by failing to order the any/appropriate sanction commensurate [sic] the gravity of the Defendant's breach of court orders, that being to strike out the Defendant's Statement of Case.

p. The learned trial judge erred on the facts and in law in ordering that each party is to bear their own costs on the Claimant's Application to strike out, in circumstances where Her Ladyship recognized the Defendant has shown '*blatant disregard for orders of the court'* which would have prompted the Claimant to make said application.

q. The learned trial judge erred on the facts and in law in finding that the Defendant had satisfied criteria under Rule 28.6 to warrant relief from sanction."

(Emphasis and italics as in the original)

Issues

[20] Each party filed written submissions in support of their respective appeal as well as replies. The submissions before this court were very detailed. Despite the many grounds of appeal and counter-notice of appeal, and the extremely lengthy submissions made by both parties, I find that many of them overlap and do not warrant individual assessment. However, I wish to thank counsel for the parties for their very helpful submissions. They have all been considered. Hopefully, without doing any injustice to the industry of counsel, I will endeavour to capture the submissions that are imperative to the disposition of the identified issues in the appeal.

[21] Also, it is certainly not my intention to resolve the many competing contentions of the parties but to simply determine whether the learned judge erred in exercising her discretion on the issues that emerged on the applications before her, which are not distinct, in my view, from those that have arisen for consideration on the appeal and counter-notice of appeal. These can be categorised as follows:

1. Whether the learned judge erred when she did not strike out the appellant's statement of case for failing to comply with the orders of the court (counter-notice of appeal grounds a to g, i to l, o and q) ('the strike out issue').

2. Whether the learned judge erred in finding that the appellant ought to be precluded from relying on certain documents listed in its notice of intention to rely on documents for trial filed 24 June 2019 as a sanction (grounds of appeal i to v, vii and viii; counter-notice of appeal grounds m and n) ('the standard disclosure issue')

3. Whether the learned judge erred in allowing the amendments sought by the appellant after the limitation period had expired (grounds of appeal viii and ix; counter-notice of appeal ground h) ('the amendment issue').

4. Whether the learned judge erred in finding that each party should bear their own costs on the respondent's application (ground of appeal x; counter-notice of appeal ground p) ('the costs issue').

[22] The issues raised by the grounds of appeal and the counter-notice of appeal will now be considered.

Discussion

[23] As indicated earlier, these are appeals from an exercise of discretion by the learned judge. The parties agree, and it is well settled that, where a judge at first instance has made a decision, based on a discretion given to that judge, this court will only disturb that decision if it finds that the judge has erred on a point of law, misinterpreted or misapplied factual evidence, which is demonstrably wrong, or has made a decision that no judge mindful of his or her judicial duty, would have made (see **Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042 ('**Hadmor Productions**') and **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1 ('**AG v Mackay**')).

The strike out issue (counter-notice of appeal grounds a to g, i to l, o and q)

[24] Counsel for the respondent submitted that the exercise of the judge's discretion was flawed because she failed to give the appropriate weight to the appellant's conduct during the claim, and had this been done, the appellant's statement of case would have been struck out. Specifically, it was submitted that the learned judge did not give due regard to the fact that the appellant's pattern of non-compliance and scant regard for the rules and orders of the court, had caused inordinate delay which was prejudicial to the respondent and amounted to an abuse of the due process of the court. Rule 26.3(1) of the Civil Procedure Rules 2002 (as amended) ('CPR'), as well as the cases of **Sandals Royal Management Ltd v Mahoe Bay Co Ltd** [2019] JMCA App 12 ('**Sandals v Mahoe Bay**'), **McNaughty v Wright** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 20/2005, judgment delivered 25 May 2005 and **Biguzzi v Rank Leisure Plc** [1999] 1 WLR 1926 ('**Biguzzi**') were relied on in support of this submission.

[25] Learned counsel for the appellant, on the other hand, argued that the learned judge was correct when she refused to strike out the appellant's statement of case. It was contended that a strike out order, being the ultimate sanction, was draconian. It

was further contended that even in circumstances where the non-compliance was egregious, the courts, in keeping with the overriding objective to deal with cases justly, should not be quick to strike out a party's case where an unless order and/or a costs order might be sufficient to remedy the prejudice of the non-compliance. It was also posited that any prejudice that the respondent encountered, as a result of the delay, was not substantial or irredeemable, and could be counteracted by a costs order, which had been awarded by the learned judge, in any event. Rules 1.1 and 1.2 of the CPR, as well as the cases of **Charmaine Bowen v Island Victoria Bank Limited and others** [2017] JMCA Civ 23 ('**Charmaine Bowen**') and **Biguzzi**, were relied on in support of this proposition.

Analysis

[26] Central to the dispute between the parties is the question of whether the appellant's statement of case should have been struck out for failing to comply with the orders of the court. The learned judge, in my view, dedicated much attention to this issue.

[27] She considered firstly the oft-cited authority on striking out, **Biguzzi**, which established the well-known and accepted principle that the striking out of a party's statement of case should not be the first recourse when deciding on an appropriate sanction to impose for non-compliance. Instead, such a measure should be reserved for the most egregious breaches. The learned judge then referred to the case of **Charmaine Bowen** and applied the principle stated by Brooks JA (as he then was) that a fundamental role of the court is to settle disputes through the adjudication of matters based on the merits of the case. The learned judge in the present case also observed, based on that dictum, that courts ought to be slow to strike out a party's case on grounds of non-compliance (unless egregious) and technicalities.

[28] The learned judge took the view that the appellant had placed himself in the undesirable position where the court had the discretion under rules 26.3(1)(a) and

28.14(2) of the CPR, to strike out his entire statement of case or a part of it for failure to comply with the orders of the court. She went on to identify the relevant factors that were to be contemplated on an application for striking out by considering the authority of **Sandals v Mahoe Bay**. In that case Foster-Pusey JA at para. [47] of the judgment referred to those factors as being: (i) the length of the delay; (ii) the reasons for the delay; (iii) the merit of the case; and (iv) whether any prejudice would be suffered by the opposing side.

[29] In the present case, the learned judge considered each factor separately and concluded that:

> (1) the length of the delay was inordinate but this did not bar the court from granting the appellant's applications (applying **Branch Developments Limited t/a Iberostar Rose Hall Beach Hotel v The Bank of Nova Scotia Jamaica Limited** [2014] JMSC Civ 003);
>
> (2) the explanation given by the appellant for his failure to adhere to the rules and orders of the court was unacceptable and unreasonable, however, the court also had to consider the merits of the case and the issue of prejudice;
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> (3) in light of the defence and counterclaim, the appellant had an arguable case; and
>
> (4) there was a presumption that the respondent had been prejudiced by the undue delay, but that this could be adequately addressed by a costs order in favour of the respondent, as well as an order prohibiting the appellant from relying on certain documents that were not disclosed within the time ordered for standard disclosure, rather than striking out the appellant's statement of case (applying **Biguzzi**).

[30] It is well settled that while rule 26.3(1)(a) of the CPR gives the court power to strike out a party's statement of case, where there has been a failure to comply with a rule, practice direction or an order or direction given by the court in the proceedings, there is a plethora of authorities emanating from our jurisdiction that underscore the principle that striking out should be used only as a last resort and in the most exceptional cases. As such, the particular circumstances of each case must be considered. It is readily seen, in my view, that the learned judge correctly addressed her mind to the applicable legal principles and the circumstances of the matter before her.

[31] The substance of the application for striking out, in this matter, was grounded on the failure of the appellant to comply with the pre-trial review orders, in particular, to file his amended defence, disclose documents and file and serve witness statements within a specified time. Therefore, as correctly identified by the learned judge, rules 28.14(1) and 29.11(1) of the CPR were relevant.

[32] Rule 28.14(1) of the CPR provides that:

> "A party who fails to give disclosure by the date ordered or to permit inspection may not rely on or produce any document not so disclosed or made available for inspection at the trial."

[33] Rule 29.11(1) of the CPR states:

> "Where a witness statement or witness summary is not served in respect of an intended witness within the time specified by the court then the witness may not be called unless the court permits."

[34] Both rules provide alternative sanctions to striking out for failure to comply, in that the defaulting party may not rely on the documents not disclosed and prohibiting a party from calling a witness whose witness statement was not filed within the time stipulated. These provisions are ingrained mechanisms to ensure fairness within the

proceedings and as such, striking out in those circumstances would not, without more, be appropriate. Brooks JA (as he then was) in **Business Ventures & Solutions Inc v Anthony Dennis Tharpe et al** [2012] JMCA Civ 49, cited with approval the following dicta of Lord Woolf MR in **Biguzzi**:

> "[18] … Lord Woolf MR, in explaining the sanction of striking out of a statement of case in the regime of the CPR, said at page 940b:
>
> > 'Under r 3.4(2)(c) [the English CPR equivalent of rule 26.3(1)(a)] a judge has an unqualified discretion to strike out a case such as this where there has been a failure to comply with a rule. The fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of case. The advantage of the CPR over the previous rules is that the court's powers are much broader than they were. **In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out.**'" (Emphasis supplied)

[35] Having regard to the overall context of the present case, although not to be tolerated, the failure to file the witness statements and to disclose certain documents, in the absence of any other truly egregious failures, denoted that a less draconian sanction be imposed, if the learned judge thought it appropriate to do so. This was not an instance, for example, where the appellant had failed to comply with an unless order. In my view, the failure of the appellant to comply with the pre-trial review orders was less egregious.

[36] The learned judge, in the exercise of her discretion, having found that the appellant had an arguable case, concluded that while there was a presumption that the respondent had been prejudiced as a result of the undue delay, the prejudice to the appellant would be greater because of the merits of his claim. Additionally, the expiration of the relevant limitation period would impede his ability to seek redress if his

statement of case was struck out. She determined that, in keeping with the overriding objective to deal with the case justly, the imposition of a less severe sanction was just and appropriate in the circumstances.

[37] While this court remains adamant that judges must be vigilant in ensuring that parties comply with court orders and rules of court, on applications for striking out, they are tasked with balancing the right of the litigant to have his or her case heard on the merits against the need for the litigation to be conducted efficiently and proportionately by enforcing compliance with rules, practice directions and orders. This was the exercise which the learned judge, in the instant case, carefully undertook.

[38] Having considered the approach of the learned judge to this issue, I am not of the view that there is a basis for this court to interfere with her decision refusing to strike out the appellant's statement of case.

[39] Before addressing the next issue, I wish to state, for completeness, that note is taken of the respondent's complaints, on the counter-notice of appeal, that the learned judge erred in refusing to strike out the appellant's statement of case because she failed to consider whether a fair trial was still possible, as a result of the inordinate delay, and whether the conduct of the appellant amounted to an abuse of the process of the court. The learned judge, in her written reasons, did not address those complaints. However, in my view, the failure of the learned judge to consider them does not affect her core decision not to strike out the appellant's statement of case in light of her analysis. The respondent also has the opportunity to raise those issues before the trial judge who will be better positioned to resolve them, after a careful assessment of the quality of the evidence, and upon hearing more detailed submissions. I also acknowledge the respondent's position that the learned judge failed to accord sufficient weight to the alternative remedy available to the appellant under the Consumer Protection Act. However, I am of the view that this ground lacks the capability of advancing the counter-appeal in any meaningful way.

The standard disclosure issue (grounds of appeal i to v, vii and viii; counter-notice of appeal grounds m and n)

[40] The learned judge having determined that an order for striking out the appellant's statement of case was not the most appropriate remedy for his default, directed that the appellant would be prohibited from relying on the documents listed in his notice of intention to rely ('the disputed documents') except for the nine documents that had been disclosed in the first list of documents, and items 34 and 35 (which were dated in 2019). However, the record shows that there were 10 documents, not nine, that were disclosed in the first list of documents. I am, therefore, of the understanding that the appellant could rely on all 10 documents as they were disclosed in time and that the learned judge's reference to 'nine documents' was a simple error.

[41] It was submitted on behalf of the appellant that the learned judge erred when she prohibited him from relying on the disputed documents as a sanction because:

a) she did not take into consideration that having allowed the witness statements of Richard Burgher, Carlton Hollingsworth and Stacey-Ann Dennison-Heron to stand, those witnesses referred to and heavily relied on the disputed documents;

b) the order, as a result, would effectively prevent the appellant from relying on his witness statements, contrary to the overriding objective of enabling the court to deal with cases justly; and

c) most of the cases that spoke to an alternative order to the striking out of a party's case suggested that such an order should be in the form of an appropriate costs order and the learned judge, in error, had acted outside the ambit of the overriding objective by imposing both a costs order as well as a sanction.

[42] It was submitted that the learned judge did not give due regard to the legal principle that the appellant had a mandatory continuing duty of disclosure and was not prevented from disclosing relevant documents that came into his possession or were located after the time fixed by the court for standard disclosure. Additionally, the fact that a party had control of a document did not mean that the party had physical control or possession of it, and that in either circumstance it did not mean that the document could be located upon an initial search. It was further submitted that the appellant had provided good reason for his failure to disclose the disputed documents in time. It was also argued that since the first list of documents had already been filed, the appellant was entitled to rely on the disputed documents in his notice of intention because they had been disclosed in a supplemental list of documents filed on 4 July 2019 in accordance with his continuing duty of disclosure. Part 28 of the CPR, particularly rule 28.13, and the case of **McTear and Williams v Englehard and others** [2016] EWCA Civ 487 ('**McTear v Englehard**'), among others, were cited in support of this submission.

[43] Counsel for the respondent countered by submitting that the learned judge in her analysis of rule 26.8, placed reliance on the case of **Sandals v Mahoe Bay.** Having identified the relevant law, she correctly applied the principles to the facts before her and formed the view that the appellant's "blatant disregard for the orders of this court warrants the imposition of this lesser sanction" (as opposed to the ultimate sanction of striking out the appellant's statement of case). It was also submitted that much of the judgment of the learned judge was dedicated to the balancing act required in furthering the overriding objective.

Analysis

[44] It is evident that the learned judge considered the sanction within the context of rule 28.14(1) of the CPR. Implicit in the learned judge's reasons for her decision was that the disputed documents were all dated between the years 2007 and 2009. She took the view that those documents were either in the appellant's possession or under

his control on or before 27 July 2016, when the first list of documents was filed and ought to have been disclosed then. She also found that the appellant did not provide good reason for failing to do so.

[45] The rules governing disclosure of documents are contained in Part 28 of the CPR. Those rules allow the court to make orders for standard and specific disclosure. The issue, in this case, concerned an order for standard disclosure. Rule 28.4(1) of the CPR states: "[w]here a party is required by any direction of the court to give standard disclosure, that party must disclose all documents which are directly relevant to the matters in question in the proceedings".

[46] Rule 28.13 (2) of the CPR stipulates that "the duty of disclosure in accordance with any order for standard or specific disclosure continues until the proceedings are concluded". Therefore, if documents to which the duty extended came to a party's notice at any time during the proceedings, "he must immediately notify every other party and serve a supplemental list of documents" (rule 28.13(2)). That supplemental list is required to be served not more than 14 days after the documents had come to the notice of the party required to serve it (rule 28.13(3)).

[47] The purpose of disclosure was succinctly outlined by Lord Donaldson MR in **Davies v Eli Lilly and Co** [1987] 1 All ER 801 at page 804. The learned judge opined that discovery, as the process was then known, "is designed to do real justice between opposing parties and, if the court does not have all the relevant information, it cannot achieve this object".

[48] Although the rules provide that a party is under a duty to disclose documents that are or were under his or her control, they also make allowance for the fact that there might be circumstances that prevented their production. As a result, the rules permit a litigant to explain their non-disclosure (see rule 28.8(4)). The consequences for failing to disclose under an order for disclosure are stated in rule 28.14 and include prohibiting the offending party from relying on or producing at trial, any document not

disclosed or made available for inspection by the date ordered, as well as the striking out of the offending party's statement of case or a part of it.

[49] The appellant has submitted that the disputed documents were disclosed in a supplemental list of documents. The appellant has also submitted that he discovered the disputed documents after he secured a witness statement from the architect, Ms Stacey-Ann Dennison-Heron. However, in his affidavit of urgency, the appellant averred that he had secured that witness in April 2019 but that she finalised her witness statement on 24 June 2019, which was the same day that the notice of intention to rely was filed. The supplemental list was filed after.

[50] Accordingly, the appellant having secured the witness in April 2019, it would be reasonable to infer that the disputed documents would have come to his notice before that witness' statement was "finalised" on 24 June 2019. It would also be fair to surmise that when the disputed documents came to the appellant's notice, he did not immediately notify the respondent about them and that it was more probable than not that the supplemental list was not served on the respondent within the stipulated period.

[51] Having assessed the evidence given by the appellant, the learned judge concluded that no good reason had been provided for his failure to disclose the disputed documents within the time ordered for standard disclosure. The appellant also did not explain his failure to immediately notify the respondent of the disputed documents when they were purportedly discovered and file the supplemental list within the required time. Therefore, in the absence of any good reason before the learned judge why those documents were not disclosed promptly, it could not be said that she exercised her discretion erroneously by finding that the appellant should be sanctioned for his non-compliance.

[52] Notwithstanding, I find that the learned judge's error was in her determination of the appropriate sanction in the circumstances. While a judge is given some latitude

when exercising a discretion, such discretion must always be exercised judicially (**Hadmor Productions** and **AG v Mackay**). Therefore, it is my view, that when exercising a discretion to impose a sanction, a judge is to ensure that the sanction not only suits the breach but also that its imposition, when looked at in the round, will not result in incongruity or injustice. Regrettably, in my judgment, the order of the learned judge, in the present case, did just that. My reasons for saying so are as follows.

[53] In the case of **McTear v Englehard**, the England and Wales Court of Appeal held that the trial judge was wrong to have refused permission for the appellant (who was the defendant in the court below) to rely on newly discovered documents and ordered a retrial of the matter. Vos LJ, writing for the court, at paragraphs 45 to 50 of his judgment, provided useful guidance on some of the relevant factors to be considered on an application for extension of time to comply with an order for disclosure, similar to the one that was before the learned judge in the present case. Those factors are:

> (1) whether the party making the application had filed a list of documents in response to the original order for disclosure but had failed to disclose the new documents;
>
> (2) whether at the hearing of the application for extension of time the new documents had been disclosed to the opposing party in a supplemental list;
>
> (3) whether the application had been supported by an affidavit explaining why the new documents had not been disclosed in the first place;
>
> (4) whether the opposing party could "properly deal with" with the new documents at the trial;

(5) whether the opposing party would wish to rely on the new documents; and

(6) the relevance of the new documents to the issue(s) in the case.

[54] I bear in mind that the distinguishing feature in the present case was that the learned judge concluded that the disputed documents were not "newly discovered", while in **McTear v Englehard** there was no dispute that they were. However, this contrast, to my mind, does not render the sound principles pronounced by Vos LJ inapplicable to the instant case.

[55] Applying those principles, the key factors, that were relevant for the learned judge's consideration on this issue were:

a) The appellant's continuing duty of disclosure as prescribed by rule 28.13(2) in the context of the principle that the obligations imposed under rule 28.13 "do not excuse the breach of an order for disclosure that is limited in time, but in considering the extent of any permitted usage of documents that are found after such an order has expired, the court does have to take these duties into account" (per Vos LJ in **McTear v Englehard** at para. 34 of the judgment).

b) On 23 February 2020, when the applications came before the learned judge, the appellant had complied with the original order for standard disclosure and filed the first list of documents on 27 July 2016. He had also, by that time, disclosed the disputed documents in a supplemental list that had been filed on 4 July 2019, in accordance with his continuing duty of disclosure. Therefore, at the time the application was heard, the appellant had not failed to disclose the disputed documents but had been tardy in doing so.

c) The appellant had provided an explanation for his failure to disclose the disputed documents. The excuse given was that he experienced difficulties securing the witness who provided most of the disputed documents (other than the appellant himself and the documents he provided). This accounted for the appellant's inability to disclose them in the first list of documents. Assuming without deciding that the explanation did not provide any good reason for the appellant's failure to disclose, that was not determinative of the matter, as "the overriding principle is that justice has to be done" (per Panton P in **Leymon Strachan v The Gleaner Company Limited and Dudley Stokes** (unreported), Court of Appeal, Jamaica Motion No 12/1999, judgment delivered 6 December 1999 at page 20 of the judgment).

d) The trial date had been set for October 2024, which is more than four years from the date that the applications were heard. The respondent, in those circumstances, would have ample time to examine the disputed documents and provide any relevant instructions to counsel. Therefore, it could not be fairly said that the respondent would not be able to "properly deal with" the disputed documents at the upcoming trial.

e) Several of the disputed documents concerned variations of the work that the respondent was contracted to do, carpentry estimates from the respondent and site inspections of the work that the respondent did. The respondent, if he wished, could also rely on those documents.

f) On examination, it would appear that the disputed documents were relevant to the issue(s) in the case.

[56] The learned judge, therefore, having concluded that the appellant's witness statements and notice of intention to rely should stand as properly filed, was required to demonstrate that she had given due regard to those considerations, to inform her decision whether it was just and proportionate, in all the circumstances, to impose the sanction she did. The reasoning of the learned judge did not show that she had treated with those critical tenets, which she ought to have done.

[57] Another difficulty that arose with the learned judge's decision was that the sanction she imposed, having permitted the appellant's witness statements to stand, would firstly, impede the appellant's ability to put forward his entire and best case at the trial; and secondly, diminish the quality of the witnesses' evidence, which could have serious implications for the appellant's case, given that credibility will be a major issue at the trial. Also, the court, as a result of the sanction, would be deprived of relevant information which could hinder its ability to "do real justice" between the parties, in keeping with the overriding objective.

[58] The learned judge, therefore, erred by not correctly applying the relevant law to the circumstances of the case before her and imposing a sanction that was neither just nor proportionate in all the circumstances. As a result, the interference of this court is warranted on this issue.

[59] Having concluded that the exercise of the learned judge's discretion must be set aside for the reasons stated, this court is now entitled "to exercise an original discretion of its own" (per Lord Diplock in **Hadmor Productions** at page 220 C – E of the judgment). The learned judge recognised that a costs order would have been an apt sanction instead of striking out the appellant's statement of case, although she failed to make that order. At para. [61] of her judgment she stated:

> "[61] …I have concluded that an order striking out the [appellant's] statement of case is not the most appropriate remedy given the fact that the [appellant] has a meritorious claim. I am also mindful that the limitation period for bringing a claim for damages for negligence or breach of

> contract has since expired, which would cause the [appellant] to lose the right to seek redress if his claim is struck out. I therefore find that the [appellant] would suffer greater prejudice if the relief is not granted. **The [appellant] has expressed a willingness to compensate the [respondent] if an order for costs is imposed and I agree that this is a case where such an order would be appropriate**." (Emphasis added)

[60] I entirely agree with this observation made by the learned judge. It would have been more apposite, in my view, to sanction the appellant by allowing the respondent to get costs on the application to strike out, rather than proscribing him from relying on almost all of the documents listed in the notice of intention to rely. My reasons for saying so are particularised below at paragraphs [76] to [82].

The amendment issue (grounds of appeal viii and ix; counter-notice of appeal ground h)

[61] The appellant has complained that the learned judge erred when she refused to allow the amendment to his defence and counterclaim for the estimated costs of $8,565,000.00 to repair the cupboards, windows and kitchen cabinets (para. 22 of the amended defence and counterclaim), having permitted the witness statement of Carlton Hollingsworth to stand as properly filed. In particular, it was submitted that there was no prejudice to the respondent because the initial sum of $475,000.00 which was pleaded for those repairs was stated to be "a conservative estimate" and, therefore, an amendment of that figure was foreshadowed. Furthermore, there was ample time before the trial in October 2024 for the respondent, if he wished, to investigate and challenge the claim. The case of **George Hutchinson v Everett O'Sullivan** [2017] JMSC Civ 91 ('**George Hutchinson**') was distinguished and **Albert Simpson v Island Resources Limited** (unreported) Supreme Court, Jamaica, Claim No HCV 01012 of 2005, judgment delivered 24 April 2007 ('**Simpson v Island Resources**') was cited in support of this submission.

[62] In response, counsel for the respondent submitted that the case of **Simpson v Island Resources** was distinguishable on the basis that in the case at bar, the

appellant placed his case before the court and was given permission to amend his statement of case on or before 31 January 2016, which he did not do. It was further submitted that the appellant was now seeking to introduce a claim for damages amounting to $8,565,000.00 on a contract for the provision of services valued in total at $5,074,396.55, in circumstances where the appellant had enjoyed the use and benefit of the items supplied, without complaint or demand, for over 10 years. It was posited that the learned judge was correct when she found that it was unjust and entirely prejudicial to allow such an amendment, at such a late stage in the proceedings, as the respondent had lost the opportunity to properly challenge, by way of assessment or otherwise, the unsubstantiated amount counterclaimed by the appellant for repairs.

Analysis

[63] It is well established in this jurisdiction that actions grounded in tort and contract are time-barred after the expiry of six years. In the case of **Bartholomew Brown and Another v Jamaica National Building Society** [2010] JMCA Civ 7, Harrison JA, in delivering the judgment of the court, stated, in part, at para. [40] that:

> "…actions based on contract and tort (the latter falling within the category of 'actions on the case') are barred by section 111, subsections (1) and (2) respectively of the [English Limitation of Actions Act 1623 (21 Jac I Cap XVI), which has been received into Jamaican law] after six years (see **Muir v Morris** (1979) 16 JLR 398, 399, per Rowe JA)."

[64] Part 20 of the CPR makes provision for amendments to statements of case. A party is required by virtue of rule 20.1(b) to seek the permission of the court to amend his or her statement of case after the expiration of the relevant limitation period. Rule 20.6 sets out limited circumstances in which a party's statement of case may be amended after the end of the limitation period. Nonetheless, several authorities illustrate that the court is not bound by the constraints imposed by rule 20.6 when considering an application to amend a statement of case after the limitation period had expired.

[65] In the cases of **Savings and Investment Bank Ltd v Fincken** [2001] EWCA Civ 1639 and **Brickfield Properties Ltd v Newton** [1971] 1 WLR 862, the courts, in determining which amendments were permissible, considered the Limitation of Actions Act, as well as general principles of law. Certain broad principles emanate from those authorities. These are: (1) whether the amendment was that of a new remedy or a new cause of action; (2) whether the amendment was based on the same or substantially the same facts; (3) whether the amendment would cause prejudice to the other party; and (4) whether the amendment should be granted in the interests of justice.

[66] 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, Harrison JA writing for the court observed at para. [25] of the judgment:

> "[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…"

[67] The case of **Caricom Investments Ltd and others v National Commercial Bank and others** [2020] JMCA Civ 15, although concerned with amendments in preparation for a retrial, highlighted the general principle that the proposed amendments must be of importance to the determination of the issues in dispute. At paras. [121], [122] and [126] McDonald-Bishop JA, with her usual clarity, opined:

> "[121] The authorities have established that the foremost consideration is whether the proposed amendment is needed in order to determine the real issues in dispute between the parties, in the light of all the relevant circumstances…
>
> [122] Stuart Sime in his text, A Practical Approach to Civil Procedure, Fifteenth Edition at page 196, paragraph 15.08, noted that, 'one view is that disposing of a case justly will mean that amendments should be

> allowed to enable the real matters in controversy between the parties to be determined'. He referenced the case of **Clarapede and Co v Commercial Union Association** (1883) 32 WR 262, in which Brett MR stated:
>
> > '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.'
>
> …
>
> [126] …even though amendments should be allowed to enable the real matters in controversy between the parties to be determined, it is not, in and of itself, determinative of the matter since other factors have to be considered, including the stage of the proceedings. Nevertheless, it is an important consideration to be weighed in the balance with other relevant considerations in determining where justice lies."

[68] The authorities also show that different considerations apply depending on the stage of the proceedings at which the application to amend is being sought. The court "should more vigilantly treat with late amendments than amendments made at an early stage in the proceedings" (per McDonald-Bishop JA in **Caricom Investments Ltd and others v National Commercial Bank and others** at para. [95]). This position is perfectly logical, in my view, as the later the amendment, the more strident the court has to be to guard against injustice. The criterion of justice, therefore, is a crucial factor when considering an amendment at any stage of proceedings.

[69] The learned judge in the present case was required to evaluate the appellant's application in accordance with the overriding objective to deal with the case justly, rules 20.4 and 20.6 of the CPR, as well as the learning derived from the relevant case law and all the circumstances of the case. I am satisfied that her focus was not misplaced. She correctly found that the proposed amendments to the defence and counterclaim,

except for the estimated figure of $8,565,000.00 for repairs (which will be discussed separately below), served to expand on the previous pleadings that were put forward by the appellant, and that, as a result, there was sufficient basis to allow for them. In the absence of any evidence from the respondent that those amendments could not be made without causing irreparable prejudice to him, the learned judge could not be faulted for arriving at that conclusion.

[70] However, the learned judge also had to determine whether the appellant's further claim for repairs should be allowed. In his original defence and counterclaim, the appellant indicated at para. 17:

> "The Defendant further says that the Defendant has had to effect partial remedial work resulting from the poor quality of work negligently done by the Claimant to the doors at a cost of J$130,000.00. **Further the Defendant will be required to repair cupboards, windows and kitchen cabinets and additional windows which are conservatively estimated will cost an additional J$475,000.00**." (Emphasis added)

[71] Having considered the relevant principles in the cases of **George Hutchinson** and **Judith Godmar v Ciboney Group Limited** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 144/2001, judgment delivered 3 July 2002, the learned judge found that to allow the amendment for repairs in the amount of $8,565,000.00 would be manifestly unjust because:

(i) the appellant was counterclaiming for an amount that was almost 18 times the amount he originally claimed;

(ii) the amount that was being claimed was still an estimate and the appellant had failed to explain how he arrived at that figure;

(iii) it would be difficult for the respondent to challenge this claim given that the passage of time could cause

witnesses' memories to fade and other defects to emerge as a result of wear and tear; and

(iv) the appellant failed to provide good reason for the inordinate delay in amending his defence and counterclaim (10 years after the claim was initiated and over three years after being granted permission to do so at the case management conference).

[72] The learned judge cannot be faulted for her reasoning. While the amendment was being sought before the commencement of the trial, the learned judge had regard to the history of the matter up to the date that the application was heard. She considered that this was 10 years after the commencement of the claim, as well as over three years after the appellant had obtained permission to amend his statement of case, and that the relevant limitation period had expired. The learned judge would also have been aware that at the pre-trial review on 5 May 2017, the appellant, having failed to comply with the previous orders allowing for the amendment, did not seek a further extension of time to comply with that order, and that two trial dates had been vacated. I do not believe, in all the circumstances, even though the trial date was more than four years away, that the view could be taken that the amendment was being sought "early in the proceedings", and therefore, it was the duty of the learned judge to be "more vigilant in the treatment of the application" to guard against any potential injustice.

[73] In arriving at her decision, the learned judge correctly recognised that the main question for her consideration was whether the amendment could be made without causing irreparable prejudice to the respondent. In that regard, she took into account that the dispute concerned windows, doors and kitchen cabinets that had been completed by the respondent, and used by the appellant, since April 2008. She further considered the lack of an explanation for, as well as any precise calculation illustrating

how, the vastly different sum for repairs was arrived at. Those factors, in her view, would be prejudicial to the respondent.

[74] She found that the respondent would also be prejudiced because the condition of the items would also have been affected by normal wear and tear over the many years, and with the passage of time, he would have lost the opportunity to adequately investigate and challenge, whether by way of assessment, expert evidence or otherwise, the estimated costs for repairs on this basis. I agree. I also feel compelled to add that the costs to repair the items would also have been impacted by inflation in light of the time that had passed, and in the context where, it seemed to me, the respondent took little or no measure to mitigate his purported loss.

[75] In my judgment, even if the impugned amendment were foreshadowed (and I am not saying that it was), it remained a matter for the learned judge, taking into account all the relevant factors discussed above, to decide whether or not it was in the interests of justice to allow it. I am of the view that to have allowed the impugned amendment, as it stood, would have propelled that particular aspect of the case into the realm of guesswork and arbitrariness, and as the learned judge described it "added another layer of prejudice to the [respondent]", contrary to the overriding objective to deal with the case justly. The learned judge having considered all the material before her and the applicable legal principles, cannot be faulted for arriving at that decision.

The costs issue (ground of appeal x; counter-notice of appeal ground p)

[76] The appellant has complained that he was entitled to costs, having succeeded on the strike out application. The respondent is equally unhappy because the learned judge did not impose a costs order in his favour as the alternative sanction to striking out the appellant's statement of case.

Analysis

[77] Whilst the appellant's complaint cannot be supported, I am appreciative of the respondent's grievance that has been set out in ground p of their counter-notice of appeal (see para. [19]). I say so for the following reasons:

a) The appellant's position ignores the fact that it was due to his cumulative non-compliance with the rules and orders of the court during the proceedings that prompted the respondent's application to strike out.

b) Two trial dates have been vacated and the new trial date is in October 2024. The claim was initiated on 8 April 2009. This means that by the time this case is eventually tried, it would have enjoyed the unenviable prominence of traversing the courts for over 15 years. It would be fair to comment, taking into account the history of the litigation, that the chief cause of this inordinate delay is mainly attributable to the dilatory conduct of the appellant. The respondent, on the other hand, has been compliant, for the most part.

c) There is no basis on which the appellant could successfully argue that the respondent was unreasonable to have raised and pursued the application to strike out, in light of all the circumstances.

d) The appellant in the proceedings below advanced that a costs order was the appropriate alternative to an order striking out its statement case. It is, therefore, quite startling, that on appeal, it could now be seriously contended that "the appellant having succeeded on the respondent's application" ought to have been awarded costs.

It is for these reasons that the contention by the appellant that he should be awarded costs on the respondent's "failed" application, is viewed as one entirely devoid of merit and duly rejected.

[78] On the other hand, the respondent's argument that the learned judge, having decided not to strike out the appellant's statement of case, ought to have given due consideration to imposing a costs order in his favour, is not without merit. In addition to the factors identified and discussed at para. [77] above, the respondent as a result of the amendment to the appellant's defence and counterclaim, as well as the filing of new witness statements and other documents (in the notice of intention to rely and supplemental list), will now have to meet all those late documents, at what I regard to be, late in the proceedings. Taking all of these factors into consideration, I am compelled to the conclusion that the attitude and approach of the appellant to the litigation, which incited the respondent's strike out application, and has undoubtedly caused him much frustration, as well as expense, cannot be condoned and should be appropriately penalised.

[79] As discussed above, having found that the alternative penalty imposed by the learned judge, on the strike out application, was unsuitable, and that the exercise of her discretion, in this regard, was flawed (see paras. [44] to [58] above), this court is now "entitled to exercise its own independent discretion and substitute its own decision" on this issue (see **Caricom Investments Ltd and others v National Commercial Bank and others**, per McDonald-Bishop JA at para. [160]), and, therefore, has gained the right to make the required order that ought to have been made by the learned judge in the court below.

[80] While the respondent did not succeed in obtaining an order striking out the appellant's statement of case, he is not precluded, solely on that basis, from being awarded costs on his application. Taking into account the principles enunciated in **Biguzzi** (which was applied in **Business Ventures & Solutions Inc v Anthony Dennis Tharpe et al,** a decision of this court) that, "[i]n In many cases there will be

alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out", I am convinced that the justice of the case demands that the appellant ought to be sanctioned by a costs order in favour of the respondent. Such an order will have the intended effect of replacing the unsuitable alternative penalty imposed by the learned judge and ensuring that the appellant is held accountable for his tardiness and failure to comply with rules and orders of the court.

[81] For the reasons stated above, the appeal will have to be allowed on the issue of costs as an alternative sanction to striking out and the order of the learned judge that each party should bear their own costs on the respondent's application, be set aside.

[82] It is perhaps useful and timely, at this juncture, to remind attorneys-at-law and parties of their duty as prescribed by rule 1.3 of the CPR. That duty is unequivocally stated to be: "to help the court to further the overriding objective" by "saving expenses" and ensuring that matters are dealt with "expeditiously and fairly", among other things. Any conduct to the contrary, without good reason, should be appropriately sanctioned. Unfortunately, I have found that the overall conduct of the appellant in the court below and the inordinate delay that has resulted are "far removed from a party's duty in civil proceedings to assist the court to further the overriding objective" (per Lord Briggs in **Bergan v Evans** [2019] UKPC 33 at para. 46 of the judgment). The suggested penalty, is, therefore, adequately justified, in my own view.

Conclusion

[83] The learned judge was entitled to find as she did on the issues presented for her consideration. She erred only in relation to the particular sanction she imposed, which prevented the appellant from relying on specific documents listed in his notice of intention to rely (filed on 24 June 2014) and which had been disclosed in his supplemental list of documents (filed on 4 July 2014). Her error did not lie strictly in the actual sanctioning of the appellant (which was amply justified, in my view), but was limited to the choice of penalty she imposed as an alternative to a strike out order, the

effect of which would be incongruous and contrary to the overriding objective in all the circumstances.

[84] Accordingly, for all the reasons I have sought to explain, I would allow, in part, the appeal and counter-notice of appeal.

[85] On the appeal, I would set aside paragraph 1 of the order of the learned judge on the appellant's notice of application filed 24 June 2019, and would also make an order permitting the notice of intention to rely filed on 24 June 2019, to stand as properly filed. I would also order that the appellant be allowed to rely on the documents listed in the notice except for those that are concerned with the counterclaim of $8,565,000.00 for repairs. However, the respondent should be compensated for any costs incurred by him as a result of inspection of these documents and for the further preparation of his case in light of the late disclosure.

[86] On the counter-notice of appeal, I would set aside paragraph 2 of the order of the learned judge on the respondent's notice of application filed on 25 June 2019 (that each party should bear their own costs) and make an order, in its stead, that by way of sanction, the appellant should pay the respondent's costs of the application, such costs to be agreed or taxed. I would also allow the respondent to immediately proceed to taxation on those costs, if not agreed.

Costs of the appeal and counter-notice of appeal

[87] The appellant and respondent have both succeeded in part on the appeal and counter-notice of appeal (the appellant has succeeded on the standard disclosure issue and the respondent on the costs issue). Therefore, neither party can claim to be more successful than the other and as such, are on equal footing as it concerns the proposed outcome of these proceedings. Consequently, I would order that there should be no order as to costs on the appeal and counter-notice of appeal.

MCDONALD-BISHOP JA

ORDER

1. The appeal is allowed in part.

2. Paragraph 1 of the order of Wolfe-Reece J dated 21 May 2020 on the appellant's notice of application filed 24 June 2019 is set aside and the following orders are substituted therefor:

    a) The appellant's notice of intention to rely on documents filed on 24 June 2019 is permitted to stand as properly filed.

    b) The appellant is permitted to rely on all documents listed in the notice of intention to rely on documents filed on 24 June 2019, except for those that are concerned with the counterclaim of $8,565,000.00 for repairs.

3. Paragraphs 2, 3, and 4 of the said order of Wolfe-Reece J made on the appellant's notice of application filed on 24 June 2019 are affirmed.

4. The counter-notice of appeal is allowed in part.

5. Paragraph 1 of the order of Wolfe-Reece J dated 21 May 2020 on the respondent's notice of application filed 25 June 2019 is affirmed.

6. Paragraph 2 of the said order of Wolfe-Reece J is set aside and the following orders are substituted therefor:

    a) The appellant shall pay the respondent's costs of the application as an alternative to striking out; such costs to

be agreed or taxed. The respondent shall be permitted to proceed to taxation of these costs forthwith, if not agreed.

b) Costs (if any) associated with the respondent's inspection of the documents permitted to be disclosed in the notice of intention to rely on documents, the receiving of instructions in respect thereof, the preparation, filing and serving of any amendment and/or reply to statements of case, or supplemental witness statement pursuant to or as a consequence of this order, shall be the respondent's against the appellant, in any event. Such costs are to be agreed or taxed.

7. There shall be no order as to costs of the appeal and of the counter-notice of appeal.