[2020] JMCA Civ 15

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2019CV00127

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE STRAW JA

BETWEEN	**CARICOM INVESTMENTS LIMITED**	**1ST APPELLANT**
AND	**CARICOM HOTELS LIMITED**	**2ND APPELLANT**
AND	**CARICOM PROPERTIES LIMITED**	**3RD APPELLANT**
AND	**NATIONAL COMMERCAL BANK JAMAICA LIMITED**	**1ST RESPONDENT**
AND	**RIO BLANCO DEVELOPMENT LIMITED (in receivership)**	**2ND RESPONDENT**
AND	**ESTATE of KARL AIRD (deceased) (Receiver of Rio Blanco Development Limited)**	**3RD RESPONDENT**

Written submissions filed by BrahamLegal for the appellants

Written submissions filed by Charles E Piper and Associates for the respondents

3 and 27 April 2020

PROCEDURAL APPEAL

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

BROOKS JA

[1] This procedural appeal concerns the right of a party to amend its statement of case in preparation for a retrial of a case, and the extent to which such amendments should be allowed.

[2] Having considered the appeal on paper, this court, on 3 April 2020, made the following orders:

> "(By majority, McDonald-Bishop JA dissenting in part)
>
> 1. The appeal is allowed in part.
>
> 2. Ground Q of the grounds of appeal is without merit and no order shall be made in that regard.
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> 3. Orders 3 (except in respect of the order in respect of the claim for interest) and 4 of the judgment of the Supreme Court handed down herein on 16 December 2019 are set aside.
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> 4. The appellants are granted permission to further amend their statement of case as proposed in the draft of the 4th amended claim form and the 4th amended particulars of claim which are appended to their application for court orders filed in the Supreme Court on 28 November 2019.
>
> 5. The 4th amended claim form and the 4th amended particulars of claim shall be filed on or before 9 April 2020 and served electronically on or before 10 April 2020.
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> 6. The respondents shall be at liberty, if so advised, to file a further amended statement of defence on or before 17 April 2020 and serve same electronically on or before 17 April 2020.
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> 7. The appellants shall be at liberty, if so advised, to file an amended reply on or before 21 April 2020 and serve same electronically on or before 21 April 2020.

8. The respondents' counter-notice of appeal is dismissed.

9. Costs of the application in the court below to the respondents in any event. Such costs are to be agreed or taxed.

10. Costs associated with the respondents' consideration of the 4th amended claim form and the 4th amended particulars of claim, the receiving of instructions in respect thereof, the preparation, filing and serving of any amendment to the defence and the consideration of and receiving of instructions in respect of any amended reply, shall be the respondents' in any event. Such costs are to be agreed or taxed.

11. No order as to costs of the appeal and of the counter-notice of appeal."

At that time the court promised that its reasons for this decision would follow in writing at a later date. This is the fulfilment of that promise.

[3] In their last appearance before this court, Caricom Investments Limited, Caricom Hotels Limited and Caricom Properties Limited (the appellants) secured an order which declared as a nullity a judgment that had earlier been handed down in the Supreme Court. It was R Anderson J, who had prepared that judgment, after conducting a trial of a claim by the appellants against National Commercial Bank Jamaica Limited (NCB), Rio Blanco Development Limited (in receivership) (Rio Blanco) and Mr Karl Aird. Mr Aird has since died and NCB, Rio Blanco and the Estate of Karl Aird (deceased) (former receiver of Rio Blanco Development Limited) are now the named respondents to this appeal. The reason for this court's declaration was that R Anderson J had delivered the judgment after he had retired, and was therefore not authorised so to do. The trial before him was also declared a nullity.

[4] This court's judgment (**Caricom Investments Limited and Others v National Commercial Bank and Others** [2018] JMCA Civ 23) also ordered, in part, that "the registrar of [the Supreme Court] fix the matter for retrial at the earliest convenient time".

[5] In preparation for the retrial, the case came on for case management conference (CMC) before another judge of the Supreme Court. During the CMC, the appellants applied for, among other things, permission to further amend their claim form and particulars of claim. The proposed amendments sought to add additional causes of action and to claim interest at commercial rates. On 16 December 2019, the learned judge refused to grant the amendments, except for that in respect of interest.

[6] The appellants, with the leave of the learned judge, have filed this appeal, mainly seeking to set aside the refusal and asking for orders that the applications be granted. The respondents have filed a counter-notice of appeal asking that the order in relation to the interest be set aside.

The essence of the case

[7] The litigation has its genesis in an agreement, signed in 1993, for the sale of registered lands at White River on the border of the parishes of Saint Ann and Saint Mary. By the agreement, the first appellant, Caricom Investments Limited was purchasing the lands from the second respondent, Rio Blanco. Rio Blanco was the registered proprietor of the lands at the time, but the first respondent, NCB, had placed Rio Blanco in receivership. NCB appointed Mr Aird, who was its employee, as the receiver. It was he who conducted the sale of the lands.

[8] The lands comprised several lots, which Rio Blanco had previously operated as a hotel. The appellants assert that the lands were advertised and sold as a package as a hotel property.

[9] Caricom Investments Limited nominated the second appellant, Caricom Hotels Limited, and the third appellant, Caricom Properties Limited, to respectively receive title for some of the properties. NCB financed the purchase by the appellants, by way of a loan. The loan was secured by a mortgage.

[10] The difficulty arose when, although they were, respectively, registered as the proprietors for the various parcels of lands and had, by then, paid off the loan, the appellants could not receive the certificates of title for five of those parcels (the disputed lands). The disputed lands housed, or were near to, a sewage plant that is configured to be used in connection with the rest of the hotel property. Rio Blanco claimed that it still owned the disputed lands and contested NCB's right to sell them. Rio Blanco sued NCB in respect of their dispute, and the dispute is, apparently, still in litigation. The appellants, being unable to secure all that they sought to purchase, are left dissatisfied with the deal.

[11] In 2005, the appellants sued the respondents for, among other things, specific performance of the agreement for sale.

The litigation between the appellants and the respondents

[12] In September 2010, the appellants secured permission from R Anderson J, to file a further amended claim form and a further amended particulars of claim. By those

pleadings, the appellants added claims for, as an alternative to specific performance, damages for breach of contract and a refund of the purchase price of the lands as well as compensation for the expenditure that the appellants had incurred in respect of the hotel property after purchasing it. The conclusion of the further amended claim form reads:

> "AND THE CLAIMANTS CLAIM AGAINST THE DEFENDANTS FOR:
>
> 1) In relation to the 1st Claimant, Specific performance of Agreements for Sale dated the 3rd day of May 1993 between the 1st Claimant and the 2nd Defendant, who acted through the 3rd Defendant, the 3rd Defendant having been appointed Receiver of the 2nd Defendant by the 1st Defendant pursuant to a Debenture of the 1st Defendant.
>
> 2) Further or in the alternative that in the event that specific performance is not possible, a declaration that the 2nd Defendant has wrongfully refused and/or neglected to hand over the Duplicate Certificates of Title and/or has wrongfully retained the Duplicate Certificates of Title in respect of the parcels of land registered at Volume 1220 Folio 921 and those registered at Volume 1230 Folios 801, 811, 812 in breach of its obligations contained in the said Agreements for Sale;
>
> 3) An order that the Claimants are therefore entitled to cancellation and/or rescission of the Agreement for Sale of Land dated 3rd May, 1993 in accordance with Clause 5 of the said Agreement together with damages in lieu of specific performance; and/or Damages for breach of Contract.
>
> 4) Damages for Breach of Warranty.
>
> 5) Special Damages in the amount of $8,690,173,177.00 and continuing.
>
> 6) A refund of all monies in the amount of $77,452,885.00 paid by the Claimants to the 1st Defendant up to the time of cancellation of the Agreement together with interest calculated 'at a rate equivalent to the best deposit rate of National Commercial Bank Jamaica Limited then prevailing

on deposits as to amount similar to the amount being refunded the Purchaser' equating to $8,993,967,420.00 and continuing.

7) The sum equivalent to the difference between the sums paid plus interest at the lending rates charged by the Claimants' Investors who the Claimants had to repay less the amount refunded in respect of the purchase price and costs attendant on the sale of the property together with interest calculated at the average Bank of Jamaica lending rate prevailing with amounts equating to $13,677,214,145.00 and continuing.

8) An Order that the Claimants be indemnified for all losses suffered as a result of the suit brought by Rio Blanco Development Limited against the 1st and 3rd Defendants; and the caveat lodged against the Certificate of Title comprised in Volume 1229 Folio 161 registered in the name of the 3rd Claimant an opportunity loss of $52,800,000 (being US$600,000.00 x JA$88.00.

9) Costs and Attorneys' costs.

10) Such further and other relief and orders as this Honourable Court shall think fit in the circumstance of the case." (Underlining removed)

The conclusion of the approved further amended particulars of claim was almost, but not exactly in the same terms as set out above. There were some differences between their respective paragraphs 7 and 8. The differences are not material for these purposes.

[13] The appellants failed in their claim in the trial before R Anderson J.

[14] They filed an appeal from the judgment. Mr Aird died thereafter, and his estate became the third respondent. NCB has conduct of the litigation on behalf of the estate.

The application that was before the learned judge

[15] The relevant portion of the appellants' application, made at the CMC, stated:

> "3. The [appellants] be permitted to amend their statement of case as proposed in the draft of the 4th Amended Claim Form and the 4th Amended Particulars of Claim…and that the amended documents be filed and served within 21 days of the date of this Order.
>
> 4. Consequent on an Order made in terms of Order 3 herein, the parties, if so advised, be permitted to make directly consequential amendments to their respective statements of case in the manner prescribed by Supreme Court Civil Procedure Rules 20.3."

The amendments included the addition of assertions of vicarious liability and claims for damages for negligent misstatement and misrepresentation. The incongruity between the respective paragraphs 7 and 8 of the conclusion of the proposed amended claim form and that of the proposed amended particulars of claim remained, but, again, that is not a material issue for this judgment. The proposed amendment, other than that relating to the interest, was set out at paragraphs 7(1) to 7(8) of the 4th amended particulars of claim. It is not to be confused with paragraph 7 of the conclusion that is mentioned earlier in this paragraph. Paragraphs 7(1) to 7(8) need not be set out in this judgment, but they are attached hereto, as an Appendix.

[16] The respondents opposed these aspects of the application on grounds which will be mentioned, in due course, below.

[17] At the CMC, the application also asked to be admitted into evidence at the retrial:

a. the witness statements made by;

b. the oral testimony of; and

c. the exhibits placed into evidence, through

Mr Aird, at the hearing before R Anderson J. This aspect of the application was not opposed and was granted.

The relevant orders made by the learned judge

[18] The learned judge, who heard the application for permission to amend, rendered his decision in a thorough, carefully written judgment. In his analysis of the application, the learned judge, after considering the overriding objective stipulated in the CPR, as well as various other parameters, found that:

a. the proposed amendments are not precluded by the operation of any limitation period since they are founded on the same facts, or substantially the same facts, as gave rise to the cause of action for breach of contract already pleaded (paragraph [16];

b. the application should be considered along the lines of a case, in which all the evidence had been led and "that there ought to be a…strong presumption against letting the applicant have the proverbial 'second bite of the cherry'" (paragraph [28]);

c. the appellants "have simply decided to take the opportunity of the retrial to seek to reinforce their case" (paragraph [31]);

d. in considering an application for permission to amend a statement of case, a judge is entitled to consider

the strain of litigation, which can affect the commercial realities that corporate entities have to face (paragraph [34];

e. "[i]t would not be unreasonable for the [respondents] to have the legitimate expectation that since they must face a new trial in these circumstances, then they would meet such an event without having to face new issues, or some issues which may have been somewhat bolstered by virtue of being reformulated, (albeit slightly)" (paragraph 35);

f. "…when a retrial is ordered in a case, especially in circumstances not arising from a successful appeal on the merits of the case, it is a retrial only in a limited sense in that the parties are still bound by their original statement of case unless the Court orders otherwise. It is not an opportunity to start afresh. Consequently, unless there are "good reasons" (admittedly a fluid concept depending on the facts of each case), supporting the granting of amendments, it is desirable that the parties proceed on the pleadings as they were at the time of the first trial." (Paragraph [36]);

g. in considering applications for permission to amend statements of case where there is a pending retrial, the court should take "a more restrictive approach" (paragraph [37]);

h. "…the Court should also be vigilant in order to prevent any litigant from unfairly benefitting from the first trial by using it as a dry run or practice run. The Court must prevent such a litigant from seeking to gain an advantage, however small, tactical or otherwise, based on the knowledge obtained from the first trial and the judgment delivered by the Court, especially where the claim or any issue in particular in respect of which the amendment is sought was not decided in that applicant's favour" (paragraph 37);

i. "[i]nterest is a thing on its own and it is for the trial judge to decide whether or not to grant interest and on what terms" (paragraph [41]); and

j. apart from the issues of negligent misstatement, misrepresentation and vicarious liability the other proposed amendments add nothing of substance and ought not to be allowed (paragraph [42]).

[19] It was largely on those bases that the learned judge refused the appellants' application to amend their statement of case, as explained above. The appellants also assert that the learned judge refused to permit the filing of additional witness statements. There is, however, no order to that effect on the record. The learned judge ordered that all witness statements that had been previously filed, should stand.

The appeal

[20] The appellants filed 17 grounds of appeal, two of which had several sub-grounds. They are, for completeness, set out below.

> "The Grounds of Appeal are
>
> A. The exercise of discretion to partly refuse the Appellants' applications for amendments to their statement of case was inconsistent and palpably wrong in light of the learned Judge's finding that the proposed amendments created no new causes of actions, were based on no new facts, caused no prejudice to the Respondents to respond and would not delay the trial.
>
> B. The learned Judge placed no weight or insufficient weight on the overriding objective to deal with cases justly and to allow each litigant to present its best case at trial and undue weight on his finding that the parties were preparing for *retrial* when in fact, the effect of the judgment being a nullity means that there was in law, no trial.
>
> C. On the finding that there will be a 'retrial' and despite finding that there is no new fact or evidence being relied upon by the Appellants, the learned Judge unreasonably and/or incorrectly applied an incorrect test and/or took the wrong approach to the application to wit, applied a strong presumption against permitting late amendments where there is neither any new evidence nor new fact sought to be relied upon and/or where the trial of the claim and

judgment delivered therein on 20 September 2013 were each declared a nullity.

D. In refusing the Appellants' application to amend its statement of case the learned trial Judge gave undue weight to the concept of 'a second bite at the cherry' when for all intents and purposes what is to come is the trial.

E. The trial judge fell into error when he either purported to rely upon and apply or caused himself to be influenced by Eastern Caribbean Supreme Court Civil Procedure Rule 20.1(3) not only because this statutory regime differs from that of Jamaica but also because Eastern Caribbean Supreme Court Rules exclude factors for the consideration of the judge, which factors are usual in Jamaica including the parties right to place before the Court the issues in dispute or the real issues in dispute and the desirability that every point which a party reasonably wants to put forward is aired.

F. The learned judge gave no weight or failed to give any weight to the following factors:

i) the Appellants' right to place before the Court the issues in dispute or the real issues in dispute and the desirability that every point which a party reasonably wants to put forward is aired;

iii) the application for amendment was at case management conference;

iv) the learned trial judge's finding as follows: '*The proposed amendments (including the proposed amendment in respect of vicarious liability) do constitute a nuanced case for the claimants. I agree with Mrs. Hay's submissions that the defendant may not need to obtain additional instructions to face the referred case if the amendments re allowed*..' (para 33);

v) the absence of prejudice to the Respondents;

vi) the trial date was not put in jeopardy by the amendment;

vii) the learned judge's finding that the amendment only reformulated the issues 'albeit slightly';

viii) the learned judge's finding that the proposed amendments do not amount to new causes of action.

G. The learned judge wrongly concluded that the Appellants would suffer no prejudice if the amendments were disallowed particularly having regard to the learned judge's findings that the Appellants '*would not be in as advantageous a position as they would like to be'*. Further, the learned judge was wrong to conclude that the Appellants' continued ability to put forward their case as originally pleaded was evidence of the Appellants suffering no prejudice.

H. The learned judge failed to appreciate that whilst the absence of prejudice to a party may not be determinative of the matter, it is a factor that ought to be given weight or adequate weight. The learned judge failed to give this factor any weight whatsoever or adequate weight.

I. The learned judge wrongly took into account as an important basis for disallowing the amendments, the concept of strain of litigation in relation to the Respondents in circumstances where there is no evidence that the amendments if granted would cause any particular strain on the Respondents.

J. The learned judge was wrong to import the administrative law principle of legitimate expectation into the consideration as to whether amendment of pleadings should be allowed. Even if the principles related to legitimate expectation were admissible, the learned judge failed to appreciate that there was no evidence or legal basis for the application of legitimate expectation to the instant case.

K. The learned judge failed to:

a) appreciate that in the instant case the trial and the judgment of Anderson J were each declared to be a nullity;

b) the judgment being an integral part of the trial, in effect there was no trial;

c) a retrial is a new trial;

d) the Court of Appeal placed no limits or conditions on the retrial.

L. The learned trial judge was wrong to place conditions or limits on a retrial as set out at paragraphs 36, 37 of his judgment.

M. The learned judge was wrong in his conclusion that in '*considering the general principles relating to amendments, in my opinion, a more restrictive approach has to be taken to application for amendment where there is a pending retrial'*.

N. The learned judge was wrong in holding that the Appellant is unfairly benefitting from a retrial.

O. The learned judge failed to appreciate that even if the retrial ordered by the Court of Appeal should be treated as limited in effect, even so the Appellants are still entitled to the amendments in light of the other factors which favour the Appellants.

P. The learned judge failed to properly apply and/or distinguish the authorities set out in his judgment.

Q. The restriction placed on the Appellants to stand by the already filed witness statements was unreasonable and a palpably wrong." (Italics as in original)

[21] They will not be individually assessed, but will be grouped according to the issues that they raise. The approach used by the respondents, in their submissions in

this appeal, is a useful guide and will be adopted in this analysis. Accordingly the grounds will be considered as follows:

a. the retrial consideration – Grounds B, C, D, F (i) and (iii), K, L, M and O;

b. the prejudice consideration – Grounds A, E, F (iv) to (viii), G, H, I, J, N and P; and

c. the witness statement issue – Ground Q.

[22] It must be noted, however, before embarking on the analysis, that this court operates on the basis that, where the 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 or has made a decision that no judge, mindful of his or her judicial duty, would have made. The point was eloquently made by Morrison JA, as he then was, in **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, at paragraph [20] of his judgment. The principle is well established and the relevant text of that judgment need not be quoted here.

[23] A second point to be noted, on which both sides to this appeal agree, is that the order of a retrial, on the basis that the first trial is a nullity, means that the parties have been replaced in their respective positions before the trial before R Anderson J. The point on which the appellants and the respondents disagree, is whether they are bound to enter the new trial as they then were, or are allowed to adjust their stances in preparation for that trial.

The retrial consideration

[24] The learned judge accepted that, after the ordering of a new trial, or a retrial, it is possible for a party to be allowed to amend its statement of case. He was of the view that the power should be restrictively exercised. He so said at paragraph [37]:

> "…However, after reviewing the authorities to which I have been referred and considering the general principles relating to amendments, in my opinion, a more restrictive approach has to be taken to applications for amendments where there is a pending retrial. In expressing this view, I am not to be taken as saying that amendments should not be granted simply because there is a pending retrial. **Clearly, amendments can be allowed in appropriate cases before a retrial.**…" (Emphasis supplied)

[25] The power to allow a party to amend its statement of case is set out at rule 20.4 of the Civil Procedure Rules (CPR). The rule states:

> "(1) An application for permission to amend a statement of case may be made at the case management conference.
>
> (2) **Statements of case may only be amended after a case management conference with the permission of the court**.
>
> (3) Where the court gives permission to amend a statement of case it may give directions as to -
>
> (a) amendments to any other statement of case; and
>
> (b) the service of any amended statement of case." (Emphasis supplied)

In this case, the first CMC was in the distant past. In fact, as mentioned before, the appellants had, in 2010, sought and received permission from R Anderson J to amend their statement of case. Permission was, therefore, required if there was to have been an amendment in advance of the retrial.

[26] The learned judge's stance, in respect of the application to amend, was that a party should not seek to gain an advantage from the knowledge gained from the previous trial. The learned judge further said at paragraph [37]:

> "…What I am suggesting is that the Court should also be vigilant in order to prevent any litigant from unfairly benefitting from the first trial by using it as a dry run or practice run. The Court must prevent such a litigant from seeking to gain an advantage, however small, tactical or otherwise, based on the knowledge obtained from the first trial and the judgment delivered by the Court, especially where the claim or any issue in particular in respect of which the amendment is sought was not decided in that applicant's favour."

[27] He took the view that the appellants, having had the benefit of the reasoning of R Anderson J, were attempting to reformulate their case. He found that it was unreasonable for them to do so as it placed the respondents at a disadvantage.

[28] The respondents not only support the learned judge in this position, but their approach is even more stringent. They state, at paragraph 23 of their written submissions, that "the order for a retrial does not and ought not to be construed to permit a fresh opportunity to amend one's statement of case". They cited the cases of **Sugath Narayana v Sirisangabo Coraya** NWP/HCCA/KUR/05/2018 [LA] and **Atifa v Shairzad** 56 AD 3d 703 (NY App Div 2008), among others, in support of their submissions.

[29] The difficulty with the stance taken by the learned judge and the respondents is that there is nothing inherently wrong with a party seeking to reformulate its case in advance of a retrial. By way of example, it is noted that that was their Lordships'

position in the recent decision of the Privy Council in **The Queen v Vasyli** [2020] UKPC 8. The decision is in a criminal case, in which the liberty of the subject requires greater stringency in procedure. The Board found that there was nothing in principle that was unfair about the prosecution making use of the opportunity, afforded by an order for a retrial, to put forward further or different evidence at the new trial. The only requirement, their Lordships stipulated, was that the prosecution had proved a case to answer at the original trial. They said, at paragraph 31:

> "In reliance upon this passage [from the judgment of Lord Diplock in **Reid v R** [1980] AC 343], Ms Clare Montgomery QC for the appellant submitted that even if the Board was to conclude that there was a case to answer, the opportunity provided by a retrial in the present case for the prosecution to make good evidential deficiencies in its case means that to order a retrial would be wrong in principle and contrary to the interests of justice. In the Board's view the unfairness of the prosecution having a second chance arises where the evidence adduced at the first trial was insufficient to amount to a case to answer and this is what makes it wrong in principle for there to be a retrial. **If there was a case to answer and the conviction is set aside on the grounds of the trial judge's handling of the trial or mis-directions in the summing up, there is nothing inherently unprincipled or unfair about a retrial affording an opportunity for the prosecution to put forward further or different evidence, an opportunity also provided to the defence**." (Emphasis supplied)

[30] The learned judge erred in disregarding the learning to which he referred during the course of his judgment. The principle to which he referred is that a party should be at liberty to put forward its entire and best case. If it is entitled to succeed on that case then it would be an injustice to deny it that success. The fact that the other party loses the contest as a result of that amendment, is not, by itself, a wrong. It only means that

that party has got its just deserts. This guidance, among others, to which the learned judge referred is contained in the judgment of Neuberger J, as he then was, in **Charlesworth v Relay Roads Ltd (in liquidation) and others** [1999] 4 All ER 397, at pages 401-2:

> "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)

The other factor, to which Neuberger J referred, will be addressed in the discussion of the prejudice consideration.

[31] The cases cited by learned counsel for the respondents do not contradict that principle. In **Narayana**, the application that was made, after the order of a retrial, was to allow the defendant to amend his case to add other defendants. It was in that context that the High Court of the Democratic Socialist Republic of Sri Lanka of the North Western Province decided that the proposed amendment should not be granted. The court said at paragraph 12 of its judgment:

> "Thus it is clear, the definitions of re trial and de novo trial are same [sic] meaning and afresh [sic] trial should be

> started. But it should be stressed [that] trial only includes trial stage after closing pleadings and parties to raise fresh issues and evidence to be taken afresh. This [does] not mean to allow any rectification of pre trial stage short comings. The new trial should be based on previous pleadings."

[32] The court, however, went on to explain that adding defendants at that stage, after 22 years, "would lead to a maze". It approved the principle that the discretion of the court to allow a party to amend its pleadings should be exercised after taking all the relevant circumstances into account. Despite what is said in the extract quoted above, the court did not rule out an amendment of pleadings at the stage of preparing for a retrial. At paragraph 14 of the judgment it cited the principle that "the discretion of the court must be judicially exercised, **after consideration of all relevant circumstances, such as the conduct of the parties, and the belatedness of the application**" (emphasis as in original). The court imposed no restriction as to the stage at which the application may be made and considered.

[33] **Atifa v Shairzad** is also a case involving applications to amend pleadings after an order for a retrial. The appellate division of the Supreme Court of New York, Second Department, held that the order for retrial did not "expand the issues to be retried to include those that were never pleaded, were not addressed in discovery, and would prejudice" the other party to the litigation. On that basis, it refused the application. The court's ruling did not preclude the possibility of an application to amend in advance of a retrial. In fact, it agreed with the reasons given by the court at first instance for refusing the applications to amend. The appellate court said, in part:

> "Moreover, given the appellants' extended delay in moving for leave to amend their pleadings, the lack of a reasonable excuse for the delay, and the prejudice to ATIFA, the Supreme Court properly denied those branches of the appellants' respective motions which were for leave to serve supplemental and amended pleadings raising new issues, theories, and defences [sic], and for leave to renew…"

The rule to which the court referred in its judgment, CPLR 4401, concerned the basis on which the order for the retrial was made. That rule spoke to the equivalent in this jurisdiction of a "no case submission". The court did not refer to any other rule or legislation which could have precluded the applicant in that case from making the application that it did. The case does not support the respondents' submissions.

[34] The respondents also relied on **Castledowns Law Office Management Ltd v FastTrack Technologies Inc** 2012 ABCA 219 in support of their submission that amendments are not allowed in advance of a retrial. There are two bases for stating that this case does not support their argument that amendments are not allowed prior to a retrial. Firstly, in that case, the relevant order on the appeal was to remit the case to the first instance court "for the resolution of any outstanding issues". The circumstances are therefore quite different from an order for a retrial. Secondly, the Court of Appeal of Alberta held that the judge at first instance had a discretion in deciding to grant FastTrack's application to amend its statement of case and to add a party to its claim. It held that that judge had correctly exercised her discretion to refuse the application. It so found because:

a. FastTrack had waited too long to proceed and in the interim third parties had acquired interests in the property in dispute (paragraphs [25] and [26]); and

b. FastTrack did not have a real prospect of success in establishing a necessary element of the proposed amended claim, namely that the property had been transferred to the third party with the intent of defrauding FastTrack (paragraph [27]).

[35] The existence of the discretion, which the court identified, belied any principle automatically precluding an amendment of a statement of case, after an order for a retrial of a claim. It spoke to the "legal requirement for [FastTrack's] requested amendments" (paragraph [28]), rather than, if that were the case, stating that there was no authority to grant the request.

[36] Based on the above analysis, it must be stated that there is nothing inherently wrong with a court granting permission to parties to amend their statements of case in preparation for a retrial, provided that, in addition to the relevant considerations of the individual case, the prohibitions of the:

a. relevant limitation periods;

b. risk of injustice to the other parties in the case;

c. prejudice to litigants in other cases; and

d. general considerations of the administration of justice,

are observed and enforced.

[37] Those limitations will be discussed, in part, below.

The prejudice consideration

[38] Even before the advent of the CPR, courts had moved away from the strict principle that amendments may be allowed as long as the other party may be compensated by an award of costs. The learned judge recognised that shift and quoted from the judgment of Lord Griffiths in **Ketteman v Hansel Properties** [1987] 1 AC 189, [1988] 1 All ER 38, where Lord Griffiths, at page 220 A-G of the former report said:

> "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 upon 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...."

[39] Another important case in the modern approach to applications for permission to amend statements of case, and to which the learned judge also referred, is **Worldwide Corporation Ltd v GPT Ltd** [1998] EWCA Civ 1894. In that case, Waller LJ, in giving the judgment of the court said, in part, in dealing with applications for amendments:

> "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 approach in **Worldwide Corporation** was approved in **Savings and Investment Bank Ltd v Fincken** [2003] EWCA Civ 1630; [2004] 1 All ER 1125, as containing:

> "a full compendium of citation of authorities as at that date which emphasises that, even before the CPR, the older view that amendments should be allowed as of right if they could be compensated in costs without injustice had made way for a view which paid greater regard to all the circumstances which are now summed up in the overriding objective."

[40] A number of the previously decided cases in this area concern very late applications for permission to amend. In **Charlesworth v Relay Roads**, for example, the application was made after the judge had given his decision, but the formal order had not yet been drawn up. It is in that context that Neuberger J spoke of late applications. It is in that context also that Lord Griffiths in **Ketteman v Hansel Properties** at page 220 H said:

> "…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."

[41] The learned judge considered the application in this case as being similar to the ones being made at the end of a trial. He viewed the fact that there had been a previous trial as benefitting the appellants and allowing them an opportunity "to analyse that judgment, and determine how [their] case can be bolstered on the retrial by carefully worded amendments".

[42] The error in the right to amend in a suitable case, has already been addressed. The learned judge is also in error in equating the situation in this case with that in **Charlesworth v Relay Roads** and similar cases. The disadvantage of a late amendment is not the same in this case. There is an opportunity for the respondents to prepare their case for the trial and the trial date will not have to be vacated because of the amendment.

[43] The learned judge, in further considering the issue of prejudice, concentrated on the aspect of the effect that the amended pleadings would have on the respondents' case. He was, perhaps, lulled into not considering the issue of evidence, by assurances from counsel for the appellants, who addressed him. It is noted that the learned judge's record of those submissions foreshadow some of the assurances contained in some of the grounds filed in this appeal. The learned judge said, at paragraph [32]:

> "Mr Piper [for the respondents] has submitted that the proposed amendments seeking damages for negligent misstatement and misrepresentation as well as the introduction of a claim based on vicarious liability are new claims and are prejudicial. **He submitted that this is so particularly because Mr Aird, the sole witness of the Defendants and the person to whom Counsel turned for instructions is deceased. Mrs Hay** [for the appellants] **countered this suggestion in her reply by asserting that the Claimants did not intend to rely on any new evidence**. She maintained her position that the claims were not new claims as defined in [**The Jamaica Railway Corporation v Mark Azan**, (unreported), Court of Appeal, Jamaica, Supreme Court, Civil Appeal No 115/05 judgment delivered 16 February 2006] and were all foreshadowed. **Accordingly, there were no new propositions being advanced which would require additional instructions and therefore no risk of prejudice to the Defendants**." (Emphasis supplied)

[44] The learned judge not only expressed the view that the proposed amendments were not new and did not breach the rule against amendments after the expiry of relevant limitation periods, but in addition to finding that there was no doubting the sincerity of the applications, he also held that the proposed amendments amounted to a "nuanced" or "reformulated (albeit slightly)" case. He made these comments in considering the issue of prejudice to the respondents. He said at paragraph [33]:

> "I have held that the proposed amendments to include a claim for damages for negligent misstatement, misrepresentation and Vicarious Liability are not new claims as defined in **Azan** which could be excluded as being new claims for purposes of limitation. It would not be fair to suggest that the [appellants] are attempting to "renew the fight on an entirely different claim", however that is not the end of the matter. The proposed amendments (including the proposed amendment in respect of vicarious liability) do constitute a nuanced case for the Claimants. I agree with Mrs Hay that the Defendants may not need to obtain additional instructions to face the refined case if the amendments are allowed, **but I am of the view that the potential prejudice to the Defendants is not to be viewed through so narrow a lens and based on that sole criterion**. Furthermore, I agree with the observations of Sykes J in **Peter Salmon** [(unreported), Supreme Court Jamaica, Suit CL 1991/S163, judgment delivered 26 October 2007] to which I have already referred that the absence of prejudice to the Defendants is not, without more, determinative of the issue." (Emphasis supplied)

[45] In considering the prejudice to the respondents, the learned judge stressed in paragraph [34], the "strain the litigation imposes on the litigants", even commercial litigants, which face "commercial realities". He applied those concepts to the present case in paragraph [35]:

> "In this case, the parties have litigated the claim based on statements of case which have been formulated and refined, and which have stood for a considerable period of time since the last amendments. The [respondents], having had a successful judgment, now face a new trial through no fault of their own. The retrial is not as a result of the Court of Appeal having found that the grounds on which [R Anderson J] reached his conclusions were unsustainable…."

[46] The learned judge's reference to the strain of litigation is a reference to the second "competing factor" to which Neuberger J referred in **Charlesworth v Relay Roads**. Neuberger J made the point at page 402g of the report. He said, in part:

> "On the other hand, even where, in purely financial terms, the other party can be said to be compensated for a late amendment or late evidence by an appropriate award of costs, it can often be unfair in terms of the strain of litigation, legitimate expectation, the efficient conduct of the case in question, and the interests of other litigants whose cases are waiting to be heard, if such an application succeeds…."

[47] The term "legitimate expectation", as used by Neuberger J, and Lord Griffiths in the above extract from his judgment, was a reference to the public law principle of the right of a fair hearing, and result, within a reasonable time. That is a fundamental right that is promised by the Constitution of this country. The learned judge in this case also used the term "legitimate expectation" at paragraph [35], but he used it in a different context from the way Neuberger J and Lord Griffiths did. The learned judge said:

> "…It would not be unreasonable for the [respondents] to have the legitimate expectation that since they must face a new trial in these circumstances, **then they would meet such an event without having to face new issues, or some issues which may have been somewhat bolstered by virtue of being reformulated, (albeit slightly).**"

Although the learned judge used the term "legitimate expectation", the appellants are not correct in stating that the learned judge improperly imported public law principles into the case. The context of the statement does not support that assertion. Nonetheless, the learned judge erred in making the statement that has been highlighted in the above extract. Having accepted that it was possible, for "good reasons", that an opponent may be allowed to amend its statement of case in advance of a retrial, it cannot properly be said that the respondents could have a "legitimate expectation", albeit in a non-public law sense, that they would face the same case at a retrial, that they did at the original trial.

[48] There, however, are other difficulties with the learned judge's application of the legal principles. One flaw with the learned judge's reasoning, although not a major one, is that it is not correct to say that the respondents have lost a judgment in their favour. Nor is it correct, as the learned judge asserted in paragraph [36], that the upcoming trial is "a retrial only in a limited sense". The ruling of this court is that there had been no trial and therefore no judgment. It is true that the parties have had the benefit of the reasoning of R Anderson J on the case that was presented to him. It is not only the appellants who will benefit from that reasoning. The respondents will have the opportunity of shoring up such weaknesses as there were in their case and of identifying the chinks in the armour of the appellants' case. It is not a one-sided bestowal of a benefit.

[49] A second flaw in the learned judge's application is that he did not accord sufficient weight to the fact that the proposed amendments, albeit late in the day,

considering that the case was filed in 2005, will not cause any delay in the hearing of the new trial. The pre-trial review date, set for 27 March, had passed by the time the decision in this appeal was handed down, but the timetable set in the order made on the appeal will not affect the trial for 18 May 2020. There is sufficient time for the parties to meet stipulations which may be made to ensure that the trial date is not missed. The learned judge mentioned the trial date but held that "the issue of delay is not of any consequence for the purposes of [his] analysis". As mentioned above, the ability to meet the scheduled trial date is a significant distinction between this case and those of the ilk of **Charlesworth v Relay Roads**. The present comments, concerning the upcoming schedule, are made, assuming that the current national health crisis, caused by the corona virus COVID-19 pandemic, does not prevent the trial from starting as arranged.

[50] In **Castledowns v FastTrack**, the Court of Appeal of Alberta made another point which is relevant to this case. It asserted, at paragraph [17] of its judgment, that where an application has been made for an amendment of a statement of case, "[t]he burden is on the party resisting the amendment to show that it would suffer non-compensable prejudice were the amendment to be allowed". While that may not be a stated principle in this jurisdiction, the matter of prejudice is an important factor which a court would consider in these circumstances. It would be for the respondent to the application to bring that information to the court's attention.

[51] The appellants in this case supported their application before the learned judge, with affidavit evidence. The respondents filed no affidavit in response. They therefore

did not set out any prejudice that they would suffer if the amendment were granted. Mr Aird's death and the consequences for the retrial was raised in the appellants' application. The issue was raised for their purposes and not for the purpose of showing that the respondents would suffer any prejudice.

[52] Mr Aird's death, is, however, a live issue, as far as prejudice to the respondents is concerned. It affects the matter of the evidence to be led at the trial. It is, as counsel for the respondents have submitted, the death of Mr Aird that will provide the greatest prejudice to the respondents' case. Learned counsel's submissions, at paragraph 40, speak to that issue. They contend:

> "It cannot be denied that the Respondents are prejudiced by Mr. Aird's death should the amendments relating [to] misrepresentation and negligent misstatement be granted. There are allegations of fact in the proposed amendments which would have had to be addressed by Mr. Aird had they been pleaded during his lifetime. These are at paragraph 7(1)(d) and (e), 7(3), 7(4)(d) and (e), 7(7)(b), (c) and (d) of the further proposed amendments to the Amended Particulars of Claim. These all had to do with what it is alleged that the [respondents] did or failed to do in relation to certain of the titles to the property. If these allegations were not pleaded and as Mr. Aird handled the transaction, who will give the evidence in relation thereto?"

[53] Those are, undoubtedly, serious concerns. The appellants did not address this issue in their written submissions. It is noted, however, that the grounds of appeal, as mentioned before:

a. seem to accept that there would be no new facts at the retrial (grounds A and C);

b. specifically asserted that there would be neither any new evidence nor new fact sought to be relied upon" (ground C);

c. do not resile from the submission made to the learned judge that if the amendments were granted "the [respondents] may not need to obtain additional instructions to face the referred case" (ground F(iv)).

It is puzzling, in light of those observations, that in ground Q, the appellants criticise the learned judge for restricting them to the witness statements that had already been filed. That ground, however, will be separately considered.

[54] If, as the appellants seem to assert, they will not seek to adduce any new evidence to bolster the new issues of law, then the death of Mr Aird will not be as prejudicial to the respondents' case, as the respondents apprehend. Unfortunately, Mr Aird's evidence will, unlike that of the live witnesses at the retrial, be the same as it was at the hearing before R Anderson J, despite the fact that the appellants' evidence may have some variations. The judge conducting the retrial will, no doubt, be alert to the vicissitudes that a retrial brings. The inability to see and hear Mr Aird will also present its own challenges but it cannot be said that that only prejudices the respondents. On a balance, it cannot be said that Mr Aird's absence will irreparably prejudice them.

[55] Based on the above reasoning, it must be held that the learned judge erred in refusing to grant the application for the amendment.

[56] Before leaving these grounds, the appellants' complaint that the learned judge was wrong to have looked at rule 20.1(3) of the Civil Procedure Rules of the Eastern Caribbean Supreme Court (ECSC), must be addressed. Learned counsel complain that the learned judge's use of that rule was wrong because it excludes factors that a judge of this court should consider.

[57] The complaint cannot be supported. The error in learned counsel's submission is that the learned judge not only said that he was "not under any mis-apprehension that the ECSC governs [his] discretion", but he accepted that, in the absence of specific guidance from rule 20 of the CPR as to the approach to applications for amendments to statements of case, it was the overriding objective and case law that assist. He made the following statement at paragraph [9] of his judgment:

> "…although the CPR offers no guidance on how the Court is to exercise is discretion, save for CPR 1.1 the overriding objective, case law fills in the lacuna."

The learned judge's assessment of the case along the lines of the ECSC rule, was only a part of his assessment of the application. The appellants' complaint is not only an unfair one, but the provisions of the ECSC rule did not import any "alien" issues into the learned judge's consideration. The ECSC rule speaks to matters, which should be legitimately considered, among any other relevant matters, in applying the overriding objective. It states:

> "Changes to statement of case
>
> 20.1 – (1) A statement of case may be amended once, without the court's permission, at any time prior to the date fixed by the court for the first case management conference.

(2) The court may give permission to amend a statement of case at a case management conference or at any time on an application to the court.

(3) When considering an application to amend a statement of case pursuant to Rule 20.1(2), the factors to which the court must have regard are –

(a) how promptly the applicant has applied to the court after becoming aware that the change was one which he or she wished to make;

(b) the prejudice to the applicant if the application were refused;

(c) the prejudice to the other parties if the change were permitted;

(d) whether any prejudice to any other party can be compensated by the payment of costs and or interest;

(e) whether the trial date or any likely trial date can still be met if the application is granted; and

(f) the administration of justice."

The witness statement issue

[58] In advancing this ground, learned counsel for the appellants submitted that it was wrong "to prevent any party from putting forward evidence that it considers relevant and important to prove its case especially where the case is actively being prepared for trial". Learned counsel submitted that the learned judge fettered his discretion in restricting the parties to the witness statements that had already been filed.

[59] Allusions have already been made to the difficulties with learned counsel's submissions, in this regard. Firstly, the judgment did not discuss, nor was there an order refusing, an application for leave to file additional witness statements. Secondly, the appellants have expressly indicated, both to the learned judge and in their grounds of appeal, that they do not intend to adduce any fresh evidence to support the new issues of law, on which they intend to rely by their 4th amended statement of case.

[60] In light of Mr Aird's demise, any application for the filing of additional witness statements must be precisely made, indicating the nature of the proposed evidence, and preferably, exhibiting a draft of the proposed witness statement. Only then will the tribunal considering that application be confident that the proposed evidence will not be unduly prejudicial, since Mr Aird will not be available to respond.

[61] The appellants have not said that they made any such specific application to the learned judge. There is no written application on the record of appeal for permission to file additional witness statements. Their complaints in this ground cannot succeed.

[62] It perhaps should be said that any proposed new evidence as to what Mr Aird is supposed to have said or done, in respect of the transaction between these parties, should not be allowed, in light of his death. Any such new evidence would be unduly prejudicial to the respondents' case, in the absence of Mr Aird, especially as the appellants failed to adduce that evidence at the time when Mr Aird was available to respond.

The counter-notice of appeal

[63] In advancing the counter-notice of appeal, the respondents relied on their stringent stance "that amendment to pleadings for the purpose of a retrial to an action, [is] not allowed". That position has been rejected in this judgment. The question, therefore, is whether this amendment can be made without irreparable prejudice to the respondents.

[64] The proposed amendments, which the learned judge allowed, is in respect of interest rates. Those amendments were restricted to paragraph 10 of the respective sections of the claim form and of the particulars of claim, in which the appellants set out their claim. The paragraph states:

> "Such further and other relief as this Honourable Court shall think fit in the circumstances of the case to include but not limited to:
>
> a) Further or in the alternative, interest at the commercial rate in such amount and for such period as this Honourable Court may determine and to be compounded in such manner as this Honourable Court may determine.
>
> b) Reimbursement of all capital expenditure and interest at Commercial rates on that expenditure.
>
> c) Reimbursement of all operational losses for having to maintain the property and interest at Commercial rates on those losses." (Underlining as in original)

Earlier in each section, the appellants set out claims for a rate of interest that had been specified in the agreement for sale (paragraph 6 of the claim) and interest on the "average Bank of Jamaica's lending rate compounded monthly less the amount computed in item (6) above" (paragraph 7 of the claim). It appears, therefore, that the

proposed amendment is designed to seek interest on the judgment sum, if any, at commercial rates.

[65] The learned judge accepted that the amendment was required, based, in part, on the relevant provision in rule 8.7 of the CPR and the learning derived from the judgment in **Peter Salmon v Master Blend Feeds Limited** (unreported), Supreme Court Jamaica, Suit CL 1991/S163, judgment delivered 26 October 2007.

[66] Rule 8.7(3) of the CPR sets out how a claimant should go about setting out its claim for interest. The paragraph in the rule states:

> "3) A claimant who is seeking interest must -
>
> (a) say so in the claim form, and
>
> (b) include in the claim form or particulars of claim details of -
>
> (i) the basis of entitlement;
>
> (ii) the rate;
>
> (iii) the date from which it is claimed;
>
> (iv) the date to which it is claimed; and
>
> (v) where the claim is for a specified sum of money,
>
> - the total amount of interest claimed to the date of the claim; and
>
> - the daily rate at which interest will accrue after the date of the claim."

[67] The relevant principle that the learned judge derived from **Peter Salmon**, in this context, is that the application for the amendment should be granted, and the decision left to the trial judge to decide what is required to do justice between the parties on that issue.

[68] The learned judge cannot be faulted in his reasoning. **British Caribbean Ins Co Ltd v Perrier** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 14/1994, judgment delivered 26 May 1996 is authority for the principle that the Supreme Court has the jurisdiction to award interest at commercial rates in cases involving commercial transactions. The transaction in this case satisfies that requirement.

[69] The counter-notice of appeal must fail.

Costs

[70] In light of the difference of emphasis between this opinion and that rendered by McDonald-Bishop JA, it is necessary to make a few comments in respect of the award of costs.

[71] Rule 1.18 of the Court of Appeal Rules, stipulates that, with some exceptions, rules 64 and 65 of the CPR "apply to the award and quantification of costs on an appeal". Rule 64.6 and rule 65.8(2) of the CPR both state that the principle that, in making orders as to the costs of any proceedings "the general rule is that the unsuccessful party must pay the costs of the successful party" (65.8(2)).

[72] Whereas rule 64.6 provides guidance as to the application of variations and exceptions to the general rule, rule 65.8(3) creates a specific exception that is relevant to this case. The exception is that costs must not be awarded to the applicant who seeks to amend a statement of case. The rule states:

> "The court must however take account of all the circumstances including the factors set out in rule 64.6(4) **but where the application is** -
>
> (a) one that could reasonably have been made at a case management conference or pre-trial review;
>
> (b) to extend the time specified for doing any act under these Rules or an order or direction of the court;
>
> (c) **to amend a statement of case**; or
>
> (d) for relief under rule 26.8 (relief from sanctions),
>
> **the court must order the applicant to pay the costs of the respondent unless there are special circumstances**.
>
> (Rule 27.12(5)(b) makes special provision for the costs of a listing appointment.)" (Emphasis supplied)

[73] It will be noticed that the rule refers to the provisions of rule 64.6. That rule has many provisions but the overall guidance given is that the court, in considering costs, must have regard to all the circumstances in deciding who should pay costs. The more specific provisions are rules 64.6(4) and 64.6(5). These state:

> "(4) In particular it must have regard to -
>
> (a) **the conduct of the parties both before and during the proceedings**;
>
> (b) whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings;

(c) any payment into court or offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Parts 35 and 36);

(d) whether it was reasonable for a party –

(i) to pursue a particular allegation; and/or

(ii) to raise a particular issue;

(e) the manner in which a party has pursued –

(i) that party's case;

(ii) a particular allegation; or

(iii) a particular issue;

(f) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his or her claim; and

(g) whether the claimant gave reasonable notice of intention to issue a claim.

(Rule 65.8 sets out the way in which the court may deal with the costs of procedural hearings other than a case management conference or pre-trial review.)

(5) The orders which the court may make under this rule include orders that a party must pay –

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct part of the proceedings;

(g) costs limited to basic costs in accordance with rule 65.10; and

(h) interest on costs from or until a certain date, including a date before judgment." (Emphasis supplied)

[74] Two comments arise from those provisions. The first is that the learned judge ought to have applied rule 65.8(3) in arriving at his order for costs. That application should have resulted in the appellants paying all of the costs of the respondents, unless some other factor dictated otherwise. The learned judge only awarded two thirds of the costs of the application to the respondents. He did not give any reason for departing from the application of rule 65.8(3). In the absence of a reason, it must be said that he erred in not awarding full costs to the respondents.

[75] The second comment that arises is that although the learned judge was obliged to consider rule 65.8(3), that rule does not apply to this court. Rule 1.18(4) of the CAR exempts rule 65.8(3), among others, from the rules that apply to this court.

[76] The rationale for the exemption is undoubtedly that, at the appellate level, the decision that the court makes is that which the court below ought to have made. If an appellant unsuccessfully challenges the decision of the court below, that appellant must pay the respondent's costs of the appeal. If, however, that appellant is successful in the challenge, he has secured the order that he should have received below, and so he is ordinarily entitled to the costs of the appeal. The successful appellant should not, ordinarily, have to pay costs to the respondent to that appeal, for having secured the decision he ought to have received at first instance.

[77] In this case, on the reasoning set out above, the appellants were largely successful in their appeal and would be entitled to the costs of the appeal, since they are the successful party. That principle would also apply to the counter-notice of appeal, since the counter-notice was successfully resisted. It cannot be ignored, however, that it is the conduct of the appellants that have resulted in this appeal. Their late application to amend, 15 years after the commencement of the claim has caused the respondents to incur costs and inconvenience. It is true that, by the orders made by this court, they have been awarded costs according to rule 65.8(3). They should not have that award "extinguished" by having to pay the costs of this appeal or in respect of the counter-notice of appeal. It is for that reason that there was no order made as to the costs in respect of both.

Conclusion

[78] Based on the above reasoning, it was held that a party may be granted permission to amend its statement of case in advance of a retrial. The court tasked with that exercise, will assess that party's application according to rule 20.4 of the CPR. In light of the fact that that rule does not give any guidance as to the manner in which the court should carry out that assessment, the court should be guided by the overriding objective and such case law as exists. There is no harm in using learning from other jurisdictions if that learning does not conflict with the statutory provisions of this jurisdiction. The modern principle is that the court will give better effect to the overriding objective if it has regard to all the circumstances of the case, before deciding on the application to amend.

[79] In this case, the learned judge erred in failing to have regard to the fact that the appellants were ordinarily entitled to put forward their full case. Although the application for permission to amend was made late in the day, it was not so late as to irreparably prejudice the respondents, prejudice the start of the trial, or affect the interests of litigants in other cases. The application ought to have been granted.

[80] He also erred in not granting all of the costs of the application to the respondents as stipulated by rule 65.8(3) of the CPR.

[81] The learned judge was, however, correct in granting permission to amend the statement of case to allow the appellants to claim interest at commercial rates.

[82] It is based on all the above, that the appeal was allowed in part, and the portion of the learned judge's order, refusing permission to amend, set aside. Permission to amend was, therefore, granted. However, ground Q of the grounds of the appeal was found to be without merit, as was the counter-notice of appeal.

[83] The respondents are entitled to the costs of the application in the court below and all costs associated with, and resulting from, the amendment. No order was made as to costs of the appeal and the counter-notice of appeal, in the circumstances of this particular case.

MCDONALD-BISHOP JA - Dissenting in part

[84] These proceedings serve to highlight a very important question that can arise following an order for a retrial in a civil matter in the Supreme Court, consequent on the

first trial having been declared a nullity by this court. The declaration of nullity was on account of the retirement of the trial judge before he had delivered judgment in the case. The central question for consideration in this appeal is under what circumstances should a party to those proceedings be permitted to amend its statement of case in preparation for the pending retrial.

[85] In the judgment of this court, delivered on 3 April 2020, the decision was made that the party that wished to amend its statement of case ("the appellants"), prior to the retrial, was permitted to do so. Consequential orders relative to the amendment of the parties' statements of case along with costs orders were also made. As was indicated then, I dissented in part.

[86] I have had the privilege of reading, in draft, the reasons for judgment of my learned brother, Brooks JA. His reasoning and conclusion on the critical matters, pertaining to the appeal and counter-appeal, substantially, accord with my own views. However, I have arrived at my conclusion that this appeal be allowed, in part, by a slightly different route from that taken by Brooks JA. It is also with some measure of regret, that I found myself in a position where I had to depart from his opinion as to how the appeal should be disposed of on the question of costs.

[87] Given the unusual circumstances of this case, coupled with my dissent on the narrow, but important issue of costs, I deemed it incumbent on me to say a few words of my own in relation to the appeal only. I entirely concurred in the decision concerning the counter-appeal with nothing useful to add. These are the reasons for my decision in

relation to the appeal in fulfilment of the promise made on the delivery of the decision of the court, that reasons for the decision would follow.

Standard of review

[88] I have accepted that the grant of permission to amend a statement of case, pursuant to rule 20.4 of the Civil Procedure Rules, 2002 ("the CPR"), falls within the exercise of the discretion of the judge to whom the application is made. Therefore, in examining the appeal, I, too, have applied the standard of review referenced by Brooks JA at paragraph [22] of the judgment.

Discussion and findings

[89] Laing J ("the learned judge") was faced with an application emanating from an unusual set of circumstances, with no known binding precedent to guide him. This is made clear from a reading of paragraph [37] of the judgment, where he states in part:

> "Neither learned Queen's Counsel for the [appellants], nor learned Queen's Counsel for the [respondents], have identified any case law authority which deals specifically with the approach to be taken where there is an application for amendment of statement of case where there is a pending retrial..."

[90] His reasoning reflects his valiant effort at grappling with the issues thrown up for his consideration. It is observed that in determining how best to exercise his discretion in the circumstances of the case, the learned judge focused almost entirely on the fact that the application was being made within the context of a retrial, which was following a trial that had culminated in a judgment that was adverse to the appellants. This court concluded that he erred in some critical respects in treating with the application to

amend the statement of case (other than with respect to the question of interest). These are my reasons for concluding, in agreement with my colleagues, that the learned judge erred as a matter of law on this issue.

The stage of the proceedings at the time of the application

[91] Rule 20.1 of the CPR makes it clear that amendments to a party's statement of case can be made at any time before the case management conference without the permission of the court, unless the amendment is one to which rule 19.4 or rule 20.6 applies. Reference in the rule to **"the"** case management conference and not **"a"** case management conference must be taken to mean the first case management conference in the matter. Thereafter, amendment is only to be done with the permission of the court.

[92] Brooks JA, in setting the framework for his analysis, identified an important point at paragraph [23] of his judgment, which I adopt, in part, in an effort to provide the factual context within which my analysis of the issue was conducted. Brooks JA noted:

> "A second point to be noted, on which both sides to this appeal agree, is that the order of a re-trial, on the basis that the first trial is a nullity, means that the parties have been replaced in their respective positions before the trial before R Anderson J."

[93] For reasons, which it is hoped will become evident by the end of my analysis, I think it important for this court to highlight what the history of the proceedings was up to the date the trial started before R Anderson J. This would be useful in providing an insight into what the respective positions of the parties would have been by the date the appellants made their application for permission to amend. It also serves to indicate

the stage at which the proceedings had reached when the application was made. This is a relevant consideration in treating with an application to amend a statement of case, as the authorities have demonstrated.

[94] The learned judge, at paragraph [17] of his judgment, noted the contribution of my brother, Brooks J (as he then was), to this area of the law in the case of **National Housing Development Corporation v Danwill Construction Limited and others** (unreported), Supreme Court, Jamaica, Suit Nos HCV000361/2004 and HCV 000362/2004, judgment delivered 4 May 2007. In that case Brooks J, after referring to several extracts from Stuart Sime's text, A Practical Approach to Civil Procedure, 7th edition, which in turn had referenced Blackstone's Civil Practice 2005, stated:

> "The UK rule 17.1(2) and our own rule 20.4 give the court flexibility, in exercising its discretion whether or not to grant permission to amend, **of examining, the stage at which the case has reached,** the effect on the opposing party and the extent to which costs will be an adequate remedy." (Emphasis added)

[95] Case law has shown that, among other things, different considerations do apply, depending on the stage of the proceedings at which the application is being made. There is sufficient authority that illustrates that the court should more vigilantly treat with late amendments than amendments made at an early stage in the proceedings. The learned author of Zuckerman on Civil Procedure Principles of Practice, Third Edition, 2013, at page 309, paragraph 7.49, noted that "a heavy onus lies on a party seeking to make a very late amendment to justify it, as regards his own position, that of the other parties to the litigation, and that of other litigants in other cases before the court" (see

Swain-Mason and others v Mills & Reeve LLP (a firm) [2011] EWCA Civ 14, per Lloyd LJ).

[96] In this case, it was the stage at which the amendment was being sought, and not the fact that the case was for retrial, without more, that would have dictated the appropriate legal framework within which the application should have been considered.

[97] To have a clear picture of the stage at which the permission to amend the statement of case was being sought by the appellants, I have had due regard to the history of the matter up to the date it was fixed for trial before R Anderson J. I have relied on the respondents' detailed chronology of procedural steps filed for the benefit of this court. The appellants did not raise a challenge to it; it is, therefore, taken as undisputed. A basic chronology of some of the relevant events in the course of the proceedings in the Supreme Court will now be broadly outlined.

[98] The first case management conference, at which case management orders were made, was in November 2007. That would have been two years after the initiation of the proceedings. At that case management conference, the matter was fixed for trial in June 2009 and a pre-trial review was scheduled for March 2009. In March 2009, orders were made, among other things, extending time for compliance with the case management orders made in 2007, and adjourning the pre-trial review to June 2009. The trial date, which was fixed for June 2009, was eventually vacated and the trial was fixed for four days in May 2010.

[99] It was in June 2009, that the appellants first made an application to the court to amend their statement of case. Permission was granted on that application in July 2009, with permission also granted to the respondents to file their consequential amended defence. This would have been approximately four years after the filing of the original statement of case and after the matter had already been fixed for trial. Following that first amendment to the statement of case, in February 2010, a pre-trial review was held and further orders were made for the parties to meet the trial date fixed for May 2010.

[100] In April 2010, one week before the date that had been fixed for trial, the appellants, without permission of the court, filed a further amended claim form, further amended particulars of claim and further amended reply. This would have been the second amendment of the appellants' statement of case.

[101] The trial commenced before R Anderson J on 3 May 2010. During the course of the trial, the appellants made two applications to amend their statements of case. R Anderson J refused one and granted permission for one to be made in September 2010. Although the trial was declared a nullity, it is evident that the appellants have, nevertheless, treated that amendment, which was done during the course of the trial, as the third amendment to the statement of case. This, therefore, explains the application before Laing J being for permission to make a fourth amendment.

[102] It is after these three amendments, case management conferences, pre-trial reviews, vacated trial dates, as well as after an appeal, that the appellants sought to make the fourth amendment to their statement of case. This would have been 14

years, or so, after the filing of the original statement of case and six months, or so, before the dates fixed for the pre-trial review and retrial, which are in May and June 2020, respectively. By this time, all relevant limitation periods would have expired. Given the expiration of the limitation period and the procedural history of the case, it cannot, with all good conscience, be denied that the fourth application to amend fell to be considered as an application for a late amendment.

[103] I have chronicled the chronology of the relevant procedural steps, partly, to make the point that the principles of law that are applicable to late amendments ought to have been brought to bear on this case, even though the retrial had not yet commenced and was six months away. It is also used to provide the background for my decision on the issue of costs in respect of the application for permission to amend, which was granted by this court.

[104] The learned judge recognised the relevance of the stage at which the application was being made. Between paragraphs [22] and [30] of his judgment, he considered this issue and had regard to several authorities dealing with the question of late amendments. At paragraph [26] of the judgment, he made the critical point:

> "Having evaluated the authorities it is clear that slightly different considerations ought to be brought to bear when applying the overriding objective depending on the stage of the proceedings at which the application for amendment is being made."

[105] Similarly, at paragraphs [28] and [29] of his judgment, he expressly recognised some late amendment principles that he said were "equally apt" in considering the issue of amendment pending a retrial. Those principles were distilled from such cases as

Worldwide Corporation Limited v GPT Limited and another [1998] EWCA Civ 1894; **Charlesworth v Relay Roads Ltd (in liquidation) and others** [1999] 4 All ER 397 and **Ketteman v Hansel Properties Limited** [1987] AC 189.

[106] The learned judge's reference to, and reliance on, cases treating with late amendment would not have been out of place in the circumstances of this case. The pertinent issue, however, is not so much concerned with his reliance on those cases but more with his application of the principles derived from them to the particular circumstances of the case he had to consider.

Whether the learned judge erred in law in refusing to grant permission

[107] The core complaints of the appellants (despite the many wide-ranging and overlapping grounds of appeal) are that the learned judge failed to properly apply and/or distinguish the authorities set out in his judgment and that he failed to apply any or adequate weight to factors that were more in favour of the grant of permission than in refusing it.

[108] The salient question that will now be discussed is whether the learned judge properly applied the relevant principles of law to the facts of the case before him and accorded to them the appropriate weight, having regard to all the circumstances of the case.

a. The use of the Eastern Caribbean Supreme Court Civil Procedure Rules, 2000

[109] In coming to his decision, the learned judge had regard to rule 20.1 of the Eastern Caribbean Supreme Court Civil Procedure Rules, 2000 (" the ECSC rule") which

is similar, albeit not identical, to our rule 20.4 of the CPR. The ECSC rule 20.1 provides, among other things, that the court may give permission to amend a statement of case at a case management conference or at any time on application to the court. ECSC rule 20.1(3), however, unlike our rule, sets out factors to which the court should have regard. These are:

i. how promptly the applicant has applied to the court after becoming aware that the change was one which he or she wished to make;

ii. the prejudice to the applicant if the application were refused;

iii. the prejudice to the other parties if the change were permitted;

iv. whether any prejudice to any party can be compensated in costs and or interest;

v. whether the trial date or any likely trial date can still be met if the application is granted; and

vi. the administration of justice.

[110] The ECSC rule does not provide an exhaustive list of the many factors that should be taken into account as established by case law. The learned judge stated, however, that he was of the view that the approach suggested by the ECSC rule, which, according to him, calls for flexibility and a multi-dimensional approach in the exercise of the discretion, "is sensible and in keeping with the applicable authorities" to which he

had referred. There is nothing objectionable about this, particularly, as he had also made it clear that he was "not under any mis-apprehension that the ECSC governs [his] discretion".

[111] Another thing that is clear from the reasoning of the learned judge is that although he had indicated that he had considered the ECSC rule, he also, to his credit, had regard to relevant case law. From case law, he distilled other factors relevant to the consideration of permission to amend that are absent from the ECSC rule. The reasoning of the learned judge has demonstrated that he had not slavishly applied all the factors listed in that rule. There is, therefore, no merit in the appellants' complaint in ground E concerning the learned judge's consideration of the ECSC rule.

b. Key aspects of the learned judge's findings in favour of the application

[112] After conducting his analysis by application of the applicable principles of law, as he considered them to be, the learned judge arrived at several conclusions. The following aspects of his reasoning and findings would have been more in favour of the grant of permission than in refusing it.

i. The proposed pleadings in respect of negligent misstatement, misrepresentation and vicarious liability do not amount to new causes of action and would not be impermissible by reason of the fact that the limitation period in respect of these claims would have already expired.

ii. There is no assertion from the respondents that the amendments, which are being proposed, are not being made bona fide and so the issue of bona fides is of no relevance as far as the application is concerned.

iii. It is appreciated that the respondents could be afforded the opportunity to also amend their pleadings in response if that is deemed necessary.

iv. The potential prejudice to the respondents might not be as great as that which would be faced by a party responding in the middle of a trial.

v. The retrial should be considered in the context that the circumstances that arose in this case are not novel but are very unusual and constitute special circumstances.

vi. The consideration stated in the ECSC rule as to, "(a) how promptly the applicant has applied to the court after becoming aware that the change was one which he or she wished to make, is unhelpful". It would not be a proper exercise of the court's discretion to place much weight on promptness in that sense, without having regard to the fact that the application is being made 14 years after the claim was filed.

vii. It is not fair to suggest that the appellants are attempting to "renew the fight on an entirely different claim", albeit that the proposed amendments do constitute a nuanced case for the appellants.

viii. The trial date has been fixed for 15 May to 5 June 2020, and the issue of delay is not of any consequence for purposes of his analysis.

ix. There is no prejudice to the respondents in the sense that they would not need to obtain additional instructions to face the refined case if the amendments were allowed because the proposed amendments are not new claims.

c. Key aspects of the learned judge's findings that militate against the grant of permission

[113] The learned judge concluded that, "for the reasons herein before expressed, having considered the overriding objective of enabling the Court to deal with [the] case justly" he would refuse the amendment, except in respect of the claim for interest. These were the key considerations to which he had regard in arriving at that conclusion.

i. The application is coming after a trial in which the respondents had succeeded.

ii. There should be a strong presumption against letting the appellants have the proverbial "second bite of the cherry".

iii. The appellants have had a reasoned written judgment by a judge who heard the first trial. The fact the judgment had been declared a nullity did not render valueless the findings, opinions and conclusions expressed in it. This now impugned judgment provides the opportunity for counsel to analyse that judgment, and determine how the appellants' case can be bolstered on the retrial by carefully worded amendments.

iv. The appellants had made extensive amendments prior to the first trial.

v. There is no prejudice to the appellants in refusing the amendment. Admittedly, they would not be in as advantageous a position as they would like to be, but, that without more, does not amount to prejudice. They would still be able to advance their case as they had at the first trial.

vi. The appellants have simply decided to take the opportunity of the retrial to seek to reinforce their case.

vii. Although there is no prejudice to the respondents in the sense that they may not need to obtain new instructions to meet the amended case, and they would be able to respond to the

amendment, there is the strain of the litigation which a judge is entitled to take into account (following the lead of Lord Griffiths in **Ketteman v Hansel Properties**). Litigation and its results raise the possibility of serious consequences for corporate entities.

viii. The respondents are facing a new trial due to no fault of their own after a successful judgment. It would not be unreasonable for them to have a legitimate expectation that since they must face a new trial, in these circumstances, then they would meet such an event without having to face new issues, or some issues which may have been somewhat bolstered by virtue of being reformulated, albeit slightly.

ix. When a retrial is ordered in a case especially in circumstances not arising from a successful appeal on the merits of the case, it is a retrial only in a limited sense in that the parties are bound by their original statement of case unless the court orders otherwise. It is not an opportunity to start afresh.

x. Unless there are "good reasons" supporting the granting of amendments, it is desirable that the parties proceed on the pleadings as they were at the time of the first trial.

xi. The court should also be vigilant in order to prevent any litigant from unfairly benefitting from the first trial by using it as a dry run

> or practice run. The court must prevent such a litigant from seeking to gain an advantage, however, small, tactical or otherwise, based on the knowledge obtained from the first trial and the judgment delivered by the court, especially where the claim or any issue in particular in respect of which the amendment is sought was not decided in their favour.

d. Analysis of the findings of the learned trial judge

[114] It is evident that the reasons that the learned judge advanced for refusing the application are overwhelmingly connected to the fact that the application for amendment is following a trial in which the appellants were adjudged to be unsuccessful. His reasoning does not demonstrate that he had treated with the first trial and the judgment as nullities, therefore, placing the parties in a position as if no trial had taken place, which he ought to have done.

[115] The learned judge's misplaced focus on the fact that there had been a trial in which judgment had been entered against the appellants, led him to adopt what he described as a "more restrictive approach" in considering the application. In fact, he made it clear that he had to be vigilant in the circumstances of the case because it was a retrial and he had to "prevent any litigant from unfairly benefitting from the first trial by using it as a dry run or practice run". He maintained that there was "a strong presumption" against letting the appellants have a proverbial "second bite of the cherry".

[116] The flexible approach that the learned judge had asserted as having commended itself to him as a sensible one was, evidently, restricted or abandoned because of his view that he was considering a case that had already been tried and in which a decision had been made. There is no principle of law (or any universal one, at any rate) that a "more restrictive approach" is to be employed by the court in treating with the question of an amendment of a statement of case on the mere basis that the application is being made pending a retrial. The learned judge's assertion that there ought to be a strong presumption against letting the appellants have the proverbial "second bite of the cherry" because it was a retrial, has nothing in law to commend it in the context of this case.

[117] I do appreciate the appellants' complaint in ground D that the learned judge gave undue weight to the concept (or, in my words, what he perceived to be) a "second bite of the cherry". The decision to remit the case for retrial was one that was taken by the appellate court, without any determination on the merits, and without any restriction imposed on the parties' preparation for the retrial. The question of whether a retrial was presenting an opportunity for "a second bite of the cherry" would, ordinarily, have been one for the appellate court. That issue did not arise for the consideration of this court at the time of treating with the appeal because of the circumstances in which the retrial had to be ordered.

[118] Furthermore, the special focus directed by the learned judge at the fact that there was a retrial in this case was neither appropriate nor fair, given the circumstances that led to the retrial and the reasons for it. The fact that there was a retrial was not

the fault of the appellants and neither was it the fault of the respondents. That fact was made abundantly clear by this court in the judgment reported as, **Caricom Investments Limited and others v National Commercial Bank Jamaica Limited and others** [2018] JMCA Civ 23 at paragraph [23].

[119] The learned judge also apparently failed to recognise that the appellants were deprived of their opportunity to successfully challenge the first judgment on its merits because it was declared a nullity. Therefore, the judgment, which was declared a nullity, could not have been properly viewed as being indicative of the strength or weakness of any of the parties' case. The learned judge did not embark on an assessment of the prospect of success of either the original case, from which the appeal had emanated, or the proposed amended statement of case. He was, therefore, wrong to approach his consideration of the application as if there was an existing judgment that represented something of value to the respondents that should be safeguarded by him.

[120] It is settled law that the jurisdiction to grant permission to amend is governed by the overriding objective, with all the considerations that concept embodies. In focusing primarily and substantially on the issue of the retrial, the learned judge ignored some other important considerations that he ought to have weighed in the balance in determining where justice lay. He was required to properly conduct a balancing exercise of all the relevant considerations applicable to the case.

[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. Part of the appellants' complaint in this appeal is that the learned judge erred in according no weight to this consideration. This consideration was, seemingly, not accorded the primacy of place that it deserved in the learned judge's contemplation. The question is whether this is fatal to his decision.

[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."

[123] Stuart Sime explained the state of the law as it relates to this consideration at paragraphs 15.09 and 15.10 of his text. He pointed to the case of **Cobbold v London Borough of Greenwich** [1999] EWCA Civ 2074, which he said contained a modern reformulation of Brett MR's dictum in **Clarapede and Co v Commercial Union Association**. Gibson LJ in **Cobbold v London Borough of Greenwich** had said that 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. He further opined

that there is always prejudice when a party is not allowed to put forward his real case, provided it is properly arguable. This approach was subsequently declared to be wrong by the Court of Appeal of England and Wales in **Swain-Mason and others v Mills Reeve (a firm)**.

[124] Sime noted that while this approach set out in **Cobbold v London Borough of Greenwich**, "might continue to apply if an application to amend is made in the early stages of litigation, it almost certainly does not apply in the case of late amendments". In support of this proposition, the learned author directed attention to **Ketteman v Hansel Properties,**, in which Lord Griffiths commented on **Clarapede and Co v Commercial Union Association**, in this way:

> "...[W]hatever 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."

[125] Lord Griffiths went on to state that the court must consider where justice lies, and that there may be many factors that bear on the exercise of the learned judge's discretion. The learned judge, as will be shown below, relied heavily on other factors enunciated by Lord Griffiths in **Ketteman v Hansel Properties** in disposing of the application.

[126] It follows from the authorities that 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. In this case, it would have been one for prime consideration in light of the fact that the trial date was six months away and the learned judge's conclusion that the respondents would not have had to obtain fresh instructions to meet the amendment.

[127] I concluded that the learned judge had not demonstrated that he had accorded any weight or any adequate weight to this important consideration. I accepted the arguments of the appellants, and agree with Brooks JA, that the learned judge erred in this regard. That, however, is not, in and of itself, fatal to the decision. Other factors will have to be considered.

[128] A second related consideration that the appellants contended had not been accorded any or any adequate weight by the learned judge is that "it is desirable that every point which a party reasonably wants to put forward in the proceedings is aired". Neuberger J (as he then was) voiced this consideration in persuasive terms in **Charlesworth v Relay Roads Ltd** at page [401]. He stated, in part:

> "**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 added)

[129] The appellants contended that the learned judge ought to have given the "greatest weight" to the above principles stated by Neuberger J and wrongly gave greater weight to other factors in denying the application. It could not be said that this argument is without merit. This is particularly so in the light of the learned judge's own admission that, the amendment did not give rise to a new claim; the appellants' case was not a "new fight"; the application did not lack bona fides; and the appellants, "would not be in as advantageous a position as they would like to be ..." if the amendment was granted.

[130] A refusal of the permission would mean that the appellants would be shut out from airing their case and from placing all the issues in controversy for resolution by the court. This would have been in the absence of a definitive finding by the learned judge that their proposed amended case is without a prospect of success. Also, given the definitive findings that the appellants are not advancing a new case and that the respondents would not be prejudiced in the sense that they would not be able to meet the amended statement of case, with the trial date some way away, it would seem that, in those circumstances, to prevent the appellants from putting that case before the court "would impose an impediment on their access to the court which would require justification" (see **The Jamaica Railway Corporation v Mark Azan** (unreported),

Court of Appeal, Jamaica, Supreme Court Civil Appeal No 115/2005, judgment delivered 16 February 2006, per K Harrison JA).

[131] Against this background, the learned judge's finding that there was no prejudice to the appellants is difficult to accept. Any denial or curtailment of access to the machinery of justice is inherently prejudicial; the pivotal question is whether there is justification for such a restriction.

[132] The learned judge had not demonstrated that he had attached any or any adequate weight to this consideration of the desirability of the appellants to air their whole case or to put forward their best case. The question now arises as to whether there is any justification for his failure to do so. The resolution of this question would depend on whether there are more weighty considerations that would have overridden that consideration.

[133] It is observed that the learned judge was more content to adopt and apply the other competing factor enunciated by Neuberger J in the same case of **Charlesworth v Relay Roads Ltd** and which was earlier articulated by Lord Griffiths in **Ketteman v Hansel Properties**. Neuberger J expressed the competing principle in this way:

> "On the other hand, even where, in purely financial terms, the other party can be said to be compensated for a late amendment or late evidence by an appropriate award of costs, it can often be unfair in terms of the strain of litigation, legitimate expectation, the efficient conduct of the case in question, and the interests of other litigants whose cases are waiting to be heard, if such an application succeeds."

[134] In **Ketteman v Hansel Properties**, Lord Griffiths posited at page 220:

> "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 upon 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." (Emphasis added)

[135] The learned judge endorsed this view of Lord Griffiths and applied it with some modification, as he put it, to the facts before him. It was his attraction to this principle that led him to give effect to such considerations of the strain of litigation on, and the legitimate expectation of, the respondents, as explained by him in paragraphs [34] and [35] of his judgment.

[136] After applying those considerations, the learned judge refused the application thereby depriving the appellants of the benefit of the principle stated in **Charlesworth v Relay Roads Ltd**, that it is desirable that every point which a party reasonably wants to put forward in the proceedings is aired.

[137] The learned judge had declared the principles on which he relied but had not demonstrated the proper application of them, in several respects. In the first place, the dicta of Lord Griffiths in **Ketteman v Hansel Properties** established the need for there to be a balancing exercise of the relevant considerations that are applicable to the

circumstances of the case. The strain of litigation and legitimate expectation are but two of the factors that the court is entitled to *weigh in the balance* in determining where justice lies, if the circumstances of the case give rise to such a consideration. As Lord Griffiths, himself, correctly noted, many and diverse factors will bear on the exercise of this discretion.

[138] One would have expected to see the consideration given by the learned judge to the relevant competing principles and his reason for concluding that the strain of litigation and the respondents' legitimate expectation to face the original case at the trial would have overridden them all, when viewed collectively. This demonstration of the balancing exercise would have been required in this case for several reasons.

[139] The first reason would be the fact that the respondents are not personal litigants, who were the ones that were particularly within the contemplation of Lord Griffiths. It is the learned judge who modified the principle and extended it to corporate entities.

[140] Secondly, as observed by Brooks JA, there was no evidence from the respondents (and nothing obvious in the circumstances, I would add) that provided a proper basis for the learned judge to find that it would have been unfair to grant the amendment due to the strain of litigation. The learned judge had accepted counsel for the appellants' argument that the respondents would not be prejudiced in the sense that they would not need to obtain new instructions to meet the newly adjusted case. The respondents provided no evidence to the contrary but, by way of submissions, argued that they were prejudiced because there were new claims being brought. The

learned judge rejected those submissions. He found that the case was only nuanced or slightly reformulated. This would suggest that there was no great or significant change in the issues by the proposed amendments. In the end, the learned judge accepted that there is nothing to say that the respondents would be unable to meet, what he viewed, as the slightly nuanced case that would result from the amendment. He, therefore, found them not likely to be prejudiced on that account. There is no counter-notice of appeal relating to this finding.

[141] The third reason (which is closely connected to the second) is that there was no indication that the learned judge had given consideration as to whether the respondents could have been compensated in costs, even though this is no longer determinative of granting an amendment. It, nevertheless, remains, a relevant consideration as the modern approach enunciated in the cases have shown. Neuberger J, for instance, in stating the other competing principle, to which the appellants contended that the learned judge should have accorded the greatest weight, made the point that, "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".

[142] Lord Griffiths' opinion in **Ketteman v Hansel Properties** was that, "... justice cannot always be measured in terms of money" and, so, there will be cases in which it would be unfair to grant the amendment with compensation in costs. At the end of the day, the question must be what is just. Compensation in costs may not be in keeping

with the overriding objective to deal with the case justly or it may well be so. There is no indication that the learned judge, before deciding to refuse the application, had given thought to this alternative consideration in determining what was best in keeping with the overriding objective.

[143] Another relevant principle that would have had a bearing on the weight to be accorded to the strain of litigation and the legitimate expectation of the respondents, in the sense used by the learned judge, relates to the stage of the proceedings the amendment was being sought. The authorities as well as the ECSC rule illustrate that the question of whether the trial date could still be met, if the permission to amend was granted, was a material consideration for the learned judge. Also, the cases on which the learned judge relied, that raised the strain of litigation as a consideration, all involved applications for permission to amend that were made after the trial had commenced. The stage at which the amendments were to be made in those cases would have been at a much later stage than in this case. In **Ketteman v Hansel Properties,** for instance, the amendment was made during closing speeches.

[144] In this case, the trial had not begun, and there was no "apparently unsuccessful" party. Also, the learned judge found that the appellants were not advancing a new claim or putting forward a new fight as in the case of **Ketteman v Hansel Properties**. It was also clear to the learned judge that the trial date would not have been jeopardised as deduced from his reasoning at paragraph [39] of his judgment. He, however, failed to attach any, or any sufficient, weight to that factor. This was a factor of relatively significant importance that ought to have been weighed in the balance with

other factors. By failing to give the appropriate weight to that consideration, it cannot be said that the learned judge had regard to all relevant considerations that would be in keeping with the overriding objective.

[145] The authorities have also established that the court must also consider the interests of, or prejudice to other litigants, waiting for their cases to be heard as well as the interests of the administration of justice, generally. In arriving at his decision to refuse the application, the learned judge did not make a finding that the grant of the amendment would have been detrimental to these interests. He opined that it would not be a proper exercise of the court's discretion to place much weight on promptitude in the sense used in the ECSC rule, without having regard to the fact that the application was being made 14 years after the claim. Therefore, he attached no weight to the issue of delay. That disregard for the question of delay coupled with the absence of any finding concerning the effect the grant of the amendment would have had on other litigants and the administration of justice, would have tipped the scale in favour of the grant of permission.

[146] I concluded that the learned judge erred by not correctly applying the relevant law to the peculiar circumstances of the case before him. He failed to take into account some relevant considerations of significant import along with those that would have been in favour of the grant of permission on the basis of his findings. Those were (a) the necessity of the proposed amendments in the determination of the real issues in dispute between the parties; (b) the desirability that the appellants be given access to the machinery of the court to air their full case in the absence of prejudice to the

respondents and other litigants; (c) the prejudice to the appellants in denying this access in the absence of justification; (d) compensation in costs as an alternative to refusal of the amendment; and (e) the fact that the trial date could have been met if the amendment were granted.

[147] On the other hand, the learned judge wrongly took into account some irrelevant considerations in his approach to the application, especially matters pertaining to the invalidated trial and judgment. In so doing, he failed to properly weigh and/or to accord appropriate weight to relevant factors that were crucial to his determination of the matter and more in favour of the grant of permission than refusing it.

[148] When all other factors that the learned judge took into account are weighed in the balance and accorded the appropriate weight that each deserved, the overwhelming weight of the relevant factors that he ought to have taken into account, based on what was argued before him, would have been in favour of granting the amendment than refusing it. There was no evidence or anything in the circumstances that would justify the obviously significant weight that he had accorded to the factors of strain of litigation on the respondents and their legitimate expectation not to face new or reformulated issues at the retrial. I endorsed the views of Brooks JA, expressed at paragraph [29] above, that there is nothing inherently wrong for a party to use the opportunity presented by a retrial to re-align his case.

[149] Accordingly, the learned judge's conclusion that the overriding objective to deal with the case justly necessitated a refusal, cannot be accepted. This amounted to an error of law, which would justify interference by this court with his decision.

The witness statement issue - Ground Q

[150] In treating with the issues surrounding the application for permission to amend, I found that the assertions of the appellants in ground of appeal Q, and their submissions in support of that ground, had a bearing on the application for permission to amend. Ground Q evoked much disquiet on my part.

[151] The complaint of the appellants in ground Q was that the restriction placed on the appellants by the learned judge, to stand by the witness statements that were originally filed, "was unreasonable and palpably wrong". They submitted that having regard to the fact that there has been no trial or judgment in this case, the court is entitled to grant permission to file additional witness statements. To order otherwise, they said, "is an unreasonable fetter of the learned [j]udge's discretion". For three critical reasons, I agreed with Brooks JA that the contention of the appellants in this ground should be rejected.

[152] In the first place, the application before the learned judge did not include an application for an order permitting the filing of new or additional witness statements. There is also nothing on the record showing any order from the learned judge relative to that ground from which an appeal could lie.

[153] Secondly, the appellants, in stating that there had been no trial and, so, they are entitled to file witness statements, are not correct. They seemed to have failed to realise that the fact that the trial before R Anderson J had been declared a nullity does not affect other orders that had already been made or steps already taken in the case prior to the first trial. Those orders include orders for the filing and exchange of witness

statements. It was not the entire proceeding that was declared a nullity. They are, therefore, not at liberty to file additional witness statements as they should think fit.

[154] Finally, and even more importantly, the appellants ought not to have taken this point on appeal in the light of the case advanced by them below, and on this appeal, as it relates to likely prejudice to the respondents. The appellants, through their counsel, maintained that the respondents would not be prejudiced by the proposed amendments as they were not bringing any new case and were not seeking to rely on any new evidence. They had applied for the evidence of Mr Aird to be admitted at the retrial, which was granted.

[155] As Brooks JA noted in paragraph [43], the learned judge "was, perhaps, lulled into not considering the issue of evidence, by assurances from counsel for the appellants, who addressed him". He referred to paragraph [32] of the judgment of the learned judge, and noted that the learned judge's record of those submissions "foreshadowed some of the assurances contained in some of the grounds of the appeal". Again, at paragraph [59], he alluded to the potential prejudice to the respondents that an application to adduce further evidence could cause, given the death of Mr Aird.

[156] I share Brooks JA's concern for the potential prejudice to the respondents, if an application were to be pursued by the appellants to adduce additional or new evidence at the retrial. I have, however, taken my observations even further than my learned brother.

[157] To my mind, this complaint of the appellants on the appeal has managed to raise questions as to the sincerity and reliability of their assertions that the amendments would require no new evidence. There is no question that if new evidence is to be adduced, following the grant of the amendment, there is a real possibility that the respondents could be prejudiced in the light of the death of Mr Aird, their critical witness.

[158] It became apparent to me that although the appellants' counsel had asserted that no new evidence would be led, they had not arrived at a settled decision that they will not seek to change the evidential basis of their case in the court below. This would be after almost 15 years. I formed the view that the only reason, for the appellants' obvious desire to be able to adduce additional evidence, at this time, must be as a result of their proposed amended statement of case.

[159] The conduct of the appellants in raising this issue on appeal, having given the assurances to the court down below that no new evidence would be adduced that could prejudice the respondents in the presentation of their case, should not pass the close scrutiny of this court, in deciding how the application to amend should finally be disposed of. I have taken it into account in treating with the application for permission to amend.

This court's treatment of the application for permission to amend

[160] Having ruled that the learned judge erred in the exercise of his discretion this court was entitled to exercise its own independent discretion and substitute its own decision, bearing in mind, of course, the limitations imposed by rule 1.16(3)(b) of the

Court of Appeal Rules, 2002 ("the CAR"). This caveat had caused me not to have regard to other factors that, in my opinion, should have been considered in the court below but which were never raised, such as the prospect of success of the proposed amendment.

[161] An approach that should consistently be adopted by our courts in treating with applications of this nature is that indicated by the learned author of Zuckerman on Civil Procedure Principles of Practice, Third Edition, 2013 at page 308, paragraph 7.47, and endorsed by this court in **Jamaican Redevelopment Foundation, INC v Clive Banton and another** [2019] JMCA Civ 12, that:

> "...**judges must be astute to correct sloppy practice and to avoid at all costs 'slipping back to the bad old days when courts took a relaxed attitude to the need for compliance with rules and court orders'. The court's approach to late amendments cannot be radically different from the approach to enforcing compliance with any other process requirements and to case management generally**." (Emphasis added)

K Harrison JA made a similar point in **The Jamaica Railway Corporation v Mark Azan**, which I would endorse, that, in the final analysis, the court in determining whether or not to grant such an application, ought to apply the overriding objective and the general powers of case management.

[162] This approach is accepted as being applicable to applications for amendments because they do arise, from time to time, due to the failure of a party to comply with the rules of court with regards to pleadings in the initiation of its case. That is the situation in this case. In the case of claimants, which the appellants are down below, rule 8.9(1) of the CPR specifically provides that a claimant must include in his claim

form or particulars of claim a statement of all the facts on which he relies. In the light of the history of this case, it is clear that the appellants have been grossly non-compliant with this rule. This has resulted in them trying to fix their case, for over a decade, by seeking permission from the court to make adjustments to their pleadings. They have advanced no explanation for their failure to formulate their case at an earlier stage of the proceedings, given the previous extensive amendments that were made and the extensive amendments that were being sought in this appeal. This is a relevant consideration.

[163] Having taken into account all the circumstances of the case, including its colourful history, and the conduct of the appellants in the preparation of their case leading to this appeal as well as the case on the appeal, I formed the view that justice demands that the respondents be compensated in costs, if the permission to amend should be granted. These compensatory costs should have included, in my view, a portion of the costs of the appeal.

a. The issue of costs

[164] My position on the issue of costs as compensation for the grant of the permission to amend in this case is rooted in the duty of the court to persistently and vigilantly manage the cases brought before it, in keeping with the ethos of the new procedural regime encapsulated by the overriding objective. This is in the interest of preserving the authority and effectiveness of the administration of justice. As already established, applications for amendments fall within the realm of the exercise of the case

management powers of the court. Consequent on the error of the learned judge, the rehearing of the application for permission to amend by this court is no exception.

[165] The appellants' desire to amend their statement of case and, in all probability, their evidence, as revealed by ground of appeal Q, has led to this appeal. The appellate process is a continuation of the appellants' continued pursuit to straighten out their case, following their failure to comply with rule 8.9(1) of the CPR. The appellants have also failed in their duty to expeditiously prepare their case for trial. As a result, the respondents have not only been exposed to fresh proceedings in the court below for an amendment but have also been carried along with the application to the appellate process. The respondents had incurred expenses and costs to instruct counsel to respond and defend this appeal, it being all part and parcel of the direct consequences of the appellants' application to amend their statement of case for the fourth time. The fact that the respondents had incurred costs down below, and may incur costs to respond to the amendment, is no different from the fact that they had incurred costs to defend the appeal, brought by the appellants in order to secure this late amendment.

[166] They should not be disadvantaged for responding to this appeal, which emanated solely from the appellants' belated desire to fix their case after almost 15 years of litigation. The costs so incurred are occasioned by the late amendment.

[167] Rule 2.15 of the CAR provides that in relation to a civil appeal, the court has the powers set out in rule 1.7, and in addition, all the powers and duties of the Supreme Court including, in particular, the powers set out in Part 26 of the CPR. Rule 1.7(3) provides that when the court makes an order or gives directions, it may make it subject

to conditions and may also stipulate the consequences for failure to comply with those conditions. The conditions, which the court may impose, include requiring, "a party to pay all or part of the costs of the proceedings..." (see rule 1.7(4)(d) of the CAR). The court in this case, has not only made orders but has given directions for the future conduct of the proceedings. It was entitled to do so on condition, which could include the award of costs and could also have stipulated the sanctions for the failure of the appellants to abide by those conditions.

[168] This basis for the award of costs, as part of the court's case management powers, is separate and distinct from the regime established by Parts 64 and 65 of the CPR. This basis does not, in my view, depend on any issue of success on the appeal. So, the fact that rule 65.8(3) of the CPR is not applicable to this court, as correctly pointed out by Brooks JA, does not affect the power of the court to make an order for costs against a successful appellant on an application to amend his statement of case, if the circumstances so warrant.

[169] The discretion of the court to award costs, as compensation for prejudice that has resulted or is likely to result from an amendment, is not taken away because rule 65.8(3) is not applicable to this court. The inapplicability of rule 65.8(3) only means that it is not mandatory that the appellants pay the costs of the appeal to the respondents in the absence of special circumstances. The question in this court of who should pay the costs in those proceedings to which rule 65.8(3) applies, is one, at large, for the discretion of the court.

[170] By way of an alternative analysis, Brooks JA has referred to rules 64.6(4) and 64.6(5) at paragraph [73] of the judgment. There is no need for me to repeat those provisions here. In arriving at my decision, I was also particularly, attracted to rule 64.6(4)(a), which empowers the court to have regard to the conduct of the parties, both before and during the proceedings, in considering who should pay the costs of proceedings.

[171] Rule 64.6(4)(d) is also applicable to my observations concerning ground of appeal Q, which failed. In my view, it was not reasonable for the appellants to have raised that issue on appeal, particularly, in the light of the assurances given by them and reflected in their grounds of appeal that there is no new fact or evidence sought to be relied upon by them. This position taken by the appellants led Brooks JA to deal with the issue of new evidence, if it should arise after the appeal, in paragraphs [59]-[62] above. This, is in an effort to seek to deal with the recognised potential prejudice to the respondents, if the appellants were to pursue an application to adduce new or additional evidence in the court below. While there was no good reason for me to disagree with the approach of my brother, I was still left with a measure of unease, as to whether the respondents are sufficiently safeguarded from potential prejudice or risk of injustice that could result from the grant of the permission to amend.

[172] I formed the view, after considering all the circumstances of this case, that be it by virtue of (a) the common law principle that permits compensation for the late amendment by way of costs; (b) the exercise of the case management powers of the court under rule 1.7 of the CAR; (c) rule 64.6(4) of the CPR; or (d) all of those

considerations combined, the appellants should have been ordered to pay a portion of the costs of appeal to the respondents. In my opinion, anywhere between 1/3 and 1/2 of the costs of the appeal would have been fair and reasonable. The fact that the respondents are not the "successful" party on the appeal is irrelevant to this consideration. A costs order, including a portion for the appeal, would be more in keeping with the overriding objective to deal with the case justly.

Conclusion

[173] I agreed that there was sufficient basis to allow the appeal in relation to the application to amend, given the error of the learned judge. Based on the matters raised before him and the authorities he considered, the balance was more in favour of the grant of the permission. There was nothing to preclude him from granting it, even on terms as to costs, as the authorities reviewed by him have demonstrated. I would have granted permission with a costs order relating to the appeal in favour of the respondents. I also believed that, as a condition, the appellants should have paid a portion of the costs ordered to be paid before the date fixed for the retrial to commence before they should be permitted to advance the newly amended case at trial. The unprecedented conduct of the appellants in the presentation of their case, the need to minimize or eliminate the risk of prejudice to the respondents and the interests of the administration of justice, generally, demanded nothing less.

[174] It was for the foregoing reasons, and with much diffidence, that I found myself unable to accept the conclusion of my brother that there should be no order for costs of the appeal.

STRAW JA

[175] I have read in draft the judgments of both my learned brother and sister. Both have arrived at the same conclusions in relation to the appeal and counter-appeal, albeit by slightly different emphases on certain aspects of the relevant factors pertinent to applications for amendments. I do adopt in entirety the reasoning of my brother, Brooks JA, in relation to the disposition of this matter including his reasoning in relation to the award of costs. I found his reasoning to be sufficient in expressing my own views on the matter.

[176] However, in her usual scholarly approach, my sister McDonald-Bishop JA has made some additional detailed analysis in relation to the failure of the trial judge to properly consider and balance all the necessary factors relevant to the application that was before him. In particular, McDonald-Bishop JA found at paragraphs [128] to [132] and [141] of her judgment that Laing J failed to properly give weight to the principle as expounded by Neuberger J in **Charlesworth v Relay Roads Ltd (in liquidation) and others** [1999] EWCA Civ 1894, "that it is desirable that every point which a party reasonably wants to put forward in the proceedings is aired". I concur with her reasoning on this point.

[177] I also concur with her reasoning at paragraphs [141] and [142] on the issue that the learned judge failed to properly consider whether compensation in costs could be an alternative to the refusal of the amendment. While he does refer to this principle as set out by Neuberger J in **Charlesworth** and Lord Griffiths in **Ketteman v Hansel Properties** [1987] 1 AC 189 at paragraphs [24] and [34] of his judgment, I do agree

with her conclusion that there is no indication that he gave specific thought to its application in the circumstances that were before him. The pertinent passages from the above-mentioned judgements are quoted at paragraphs [38], [45] to [46] of the judgment of Brooks JA and paragraphs [133] and [134] of the judgment of McDonald-Bishop JA.

[178] Finally, I feel compelled to reiterate the comments of McDonald-Bishop JA, that the issues before the learned judge were novel (see paras [87], [89] and [90] of her judgment) as they involved unusual circumstances, bearing in mind the history of the proceedings. I do agree also, as acknowledged by my sister, that the learned judge made a valiant effort to grapple with the" issues thrown up for his consideration", albeit, he failed in the long run to properly balance all the relevant factors in coming to his decision.

Appendix

Proposed amended paragraphs 7(1) to 7(8)

"7. (1) During the negotiations, in order to induce the Claimants to enter into the Agreement for Sale, the Defendants (whether singular, together and/or through their servants and/or agents) made the following representation(s) (party oral and partly in writing) to the Claimants:

a) By advertisement published on or about February 1993 the Defendant(s) stated that the said lands were "suitable for resort development";

b) In the Agreement for Sale eventually signed by the parties on 3 May 1993, the Defendants described the said lands as "Hotel Property";

c) By the terms set out in the Agreement for Sale eventually signed by the parties on 3 May 1993, the Defendants represented that they were the beneficial owners of the said lands and had a right to sell the said lands to include lands which comprised the sewerage plan and entrance as follows:

i. Lot 41 registered at Volume 1230 Folio 801 of the Register Book of Titles;

ii. Lot 1 registered at Volume 1220 Folio 921 of the Register Book of Titles;

iii. lot 51 registered at Volume 1230 Folio 811 of the Register Book of Titles;

iv. Lot 52 registered at Volume 1230 Folio 812 of the Register Book of Titles;

d) That all the said lands were free from incumbrances other than the restrictive covenants and easements (if any) endorsed on the Certificates of Title and such easements as are obvious and apparent:

e) That the duplicate Certificate of Title for properties listed at 8(b)(i) to (iv) were lost; and/or

f) That immediately after registration of the ownership of the said lands to the Claimants, the Defendants would at their expense apply for new Certificates of Title to be issued for lands referred to in Special Conditions 4 and 5 as follows:

i. Lot 41 registered at Volume 1230 Folio 801 of the Register Book of Titles;

ii. Lot 1 registered at Volume 1220 Folio 921 of the Register Book of Titles;

iii. Lot 51 registered at Volume 1230 Folio 811 of the Register Book of Titles;

iv. Lot 52 registered at Volume 1230 Folio 812 of the Register Book of Titles.

7. (2) Induced by and acting in reliance on each of the representations and/or acting in good faith on the said representations, the Claimants entered into the Agreement for Sale dated 3 May 1993 with the Defendants and paid the full purchase price.

7. (3) Further, at all times material to the making of the representations, the Defendants intended and they knew or ought to have known that the Claimants would rely on their representations and would be induced into signing the Agreement for Sale dated 3 May 1993. In the premises, the Defendants were under a duty of care in making of the said representations to the Claimants and/or to act in good faith in their performance of the said Agreement for Sale.

7. (4) In fact, each of the representations was false and/or amounted to false and/or negligent misstatement in that:

a) The said lands as conveyed to the Claimants were not "suitable for resort development" as set out in advertisement published on or about February 1993 by the Defendant(s);

b) The said lands as conveyed to the Claimants were not in fact "Hotel Property" as described by Defendants in the Agreement of Sale.

c) The Defendants were not the beneficial owners of the said lands and had no right to sell and/or had no right to exercise power of sale over the said lands to include lands which comprised the sewerage plant and/or entrance as follows:

   i. Lot 41 registered at Volume 1230 Folio 801 of the Registered Book of Titles.

   ii. Lot 1 registered at Volume 1220 Folio 921 of the Register Book of Titles;

   iii. Lot 51 registered at Volume 1230 Folio 811 of the Register Book of Titles;

   iv. Lot 52 registered at Volume 1230 Folio 812 of the Register Book of Titles.

d) That not all the said lands were free from encumbrances other than the restrictive covenants and easements (if any) endorsed on the Certificates of Title and such easements as are obvious and apparent;

e) That the duplicate Certificates of Titles for lands listed at 7. (1) (c) (i) to (iv) were not lost;

f) The Defendants either were incapable of applying or did not all their expense apply for new Certificates of Titles to be issued for lands referred to in Special Conditions 4 and 5 of the Agreement for Sale as follows:

   i. Lot 41 registered at Volume 1230 Folio 801 of the Registered Book of Titles.

ii. Lot 1 registered at Volume 1220 Folio 921 of the Register Book of Titles;

iii. Lot 51 registered at Volume 1230 Folio 811 of the Register Book of Titles;

iv. Lot 52 registered at Volume 1230 Folio 812 of the Register Book of Titles

g) The Certificates of Titles registered at Volume 1230 Folios 801, 811, 812 and Volume 1220 Folio 921 and Volume 1229 Folio 161 of Registered Book Titles were the subject of a suit between Rio Blanco Development Company Limited and the 1st and 3rd Defendants herein (**C.L.1994/R.021**);

h) That Caveat No. 1060272 had been lodged against the Certificate of Titles registered at Volume 1229 Folio 161; and/or

i) By the Judgment of Mr. Justice James in Suit No. C.L.R. 021/1994, Rio Blanco Development Bank Company Ltd v National Commercial Bank (Jamaica) Ltd. and Karl Aird in which the Claimants were not parties, His Lordship found that the parcels of land registered at Volume 1220 Folio 921, Volume 1220 Folio 921, Volume 1230 Folios 801, 811, 812 and 860 did not form part of the security given to the 1st Defendant. It was also realized that the sewerage plant for the hotel is situate on premises which Court had determined that the Defendants did not have the right to sell.

7. (5) The Defendants made the representations knowing that they were false or were reckless, not caring whether the said representations were true or false and/or acted in bad faith with respect to the representations and/or in the performance of the Agreement for Sale. Further or in the alternative, the Defendants were guilty of negligence in making the said representations.

7. (6) The Claimants will aver that the 1st Defendant had duty [sic] to act in good faith in the performance of the Agreement for Sale in circumstances where the 1st

Defendant and/or the 3rd Defendant (as employee for the purposes of vicarious liability or otherwise and/or as agent) was exercising its power of sale (and/or purported power of sale) over the said lands and whilst at the same time acting as the banker for the Claimants to finance the purchase of the said lands subject to the Agreement for Sale.

7. (7) The Claimants will further aver that the 1st Defendant and/or the 3rd Defendant (as employee for the purposes of vicarious liability or otherwise and/or as agent) acted in bad faith by:

a) exercising or purporting to exercise power of sale for lands over which it was not the beneficial owner of the said lands and had no right to sell the said lands, namely lands comprised in Certificates of Title registered at Volume 1230 Folios 801, 811, 812 and Volume 1220 Folio 921 and Volume 1229 Folio 161 of Register Book of Titles (hereafter in this paragraph referred to as the "disputed titles" or the "disputed lands");

b) representing to and/or misleading the Claimants into believing that the disputed titles were unavailable because they were misplaced and/or lost;

c) failing to advise and/or disclose to the Claimants the fact that the disputed titles/lands were encumbered;

d) failing to advise and/or disclose to the Claimant that they, the 1st Defendant had not received the duplicate Certificate of Titles for the disputed land and/or

e) paying out the purchase price on the Agreement for Sale without first securing the duplicate Certificates of Title for the disputed lands and/or without procuring new Certificates of Title for the disputed lands.

7. (8) As a result of the Defendants' conduct particularized herein, the Claimants suffered loss and damage further particularized below.” (Underlining removed)