[2017] JMCA App 12

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 42/2016

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE F WILLIAMS JA

BETWEEN	**WESTMORELAND PARISH COUNCIL**	**1ST APPLICANT**
AND	**CHARLES BEHARIE**	**2ND APPLICANT**
AND	**OPAL BEHARIE**	**3RD APPLICANT**
AND	**ERROL BACCHAS**	**RESPONDENT**

Canute Brown instructed by Brown Godfrey and Morgan for the applicants

Charles Piper QC and Ms Petal Brown instructed by Charles E Piper and Associates for the respondent

16, 17 May 2016 and 5 May 2017

BROOKS JA

[1] In this application, the applicants are Westmoreland Parish Council, Mr Charles Beharie and Mrs Opal Beharie. They are, collectively, referred to hereafter as "the applicants". The respondent is Mr Errol Bacchas. The applicants seek an extension of time in which to apply for permission to appeal from an order made by Batts J in the Supreme Court on 21 April 2015. They also seek permission to appeal from that order.

The learned judge had refused to set aside certain amendments that Mr Bacchas had made to his statement of case. He also awarded costs to Mr Bacchas in respect of an application concerning those amendments.

[2] This was not the applicants' first attempt to apply for permission to appeal. On 29 September 2015, they filed a notice of application for court orders, in which they sought permission in the Supreme Court to extend the time in which to appeal the orders of the learned judge. The application was heard by Batts J, and on 12 February 2016, he refused that application. They have therefore filed the present application.

[3] The main issues to be determined concern whether the applicants have satisfied the requirements for their applications to be granted.

The background to the application

[4] The learned judge described the route of the litigation as "tortuous". He did not exaggerate. In his written judgment, he gave a detailed outline of the various steps taken by the parties thereto. In giving the background to these applications, only the major milestones need be set out.

[5] The litigation commenced in 2008, when Mr Bacchas filed a claim in the Supreme Court in which he sought damages for, among other things, negligence by the Parish Council and two other defendants. Those two defendants are not parties to this application. On 23 March 2009, Mr Bacchas discontinued the claim against them, leaving the Parish Council as the only defendant at that time.

[6] On 17 July 2014, Mr Bacchas amended his claim. He added Mr and Mrs Beharie as defendants. In his amended claim, he also sought damages from them. He alleged that the Beharies were guilty of certain torts, including nuisance. A case management conference was held on 27 October 2014, at which he and the applicants were represented. Dunbar-Green J (Ag) (as she then was), who conducted that case management conference, made a number of orders. Among those orders were the following:

> "2. [Mr Bacchas] is permitted to file and serve a further Amended Claim Form and Particulars of Claim by **November 21, 2014 at 3:00 p.m.**;
>
> 3. The [Beharies] are to file and serve Acknowledgement of Service in relation to the Amended Claim Form and Particulars of Claim (which were acknowledged as having been received in Chambers);
>
> 4. The [applicants] are to file and serve Defence by **12th December, 2014 at 3:00 p.m.**;
>
> 5. [Mr Bacchas] to file Reply, if necessary by the **9th January, 2015 at 3:00 p.m.**
>
> 6. All applications and Affidavits in support (where necessary) are to be filed and served by **March 13, 2015 at 3:00 p.m.**;
>
> 7. Written Submissions together with Bundles in relation to all Applications are to be filed and served by **March 31, 2015 at 4:00 p.m.**;" (Emphasis as in original)

There is no appeal from any of those orders.

[7] On 17 November 2014, pursuant to the permission that was granted on 27 October 2014, Mr Bacchas filed and served the further amended particulars of his claim. The applicants did not file a defence to the claim. They did, however, file an application on 13 March 2015. In that application, they asked the court to disallow the amendments that Mr Bacchas had made to his statement of case, and, in particular, those that added the Beharies as defendants to the claim. That application, along with an application for default judgment, filed by Mr Bacchas, came on for hearing before Batts J at a case management conference. On 21 April 2015, the learned judge made a number of case management orders, including the following:

> "1. Relief from sanction granted to [Mr Beharie] and [Mrs Beharie] [for failing to file their defence within the time stipulated by Dunbar-Green J];
>
> 2. [Mr Bacchas'] Notice of Application for Court Orders for Judgment [in default of defence] is withdrawn;
>
> 3. Costs of the [applicants'] Application filed on March 13, 2015 and [Mr Bacchas'] Application of February 26, 2015 to [Mr Bacchas] to be taxed or agreed and paid;
>
> 4. Time extended for the filing of the Acknowledgement of service on behalf of [the Beharies] to **April 24, 2015**;
>
> 5. Time extended for the filing of an Amended Defence for [the Parish Council] and Defence for [the Beharies] to **May 22, 2015**;
>
> 6. Unless a Defence is filed on behalf of [the Beharies] in accordance with Para 5 above Judgment shall be entered against [them];
>
> 7. – 19.: [Various case management conference orders for disclosure, production of witness statements,

production of expert report, the holding of a Pre-Trial Review and setting a trial date];

20. Half Costs of this case management conference to be costs in the claim." (Emphasis as in original)

The applicants assert that they are aggrieved by some of those orders and wish to appeal from them.

[8] They first applied to the Supreme Court for permission to appeal against the orders of Batts J. That application was filed on 29 September 2015. It came before Batts J on 3 February 2016. After considering the application, he made an order on 12 February 2016, refusing it. He did, however, grant permission, if it were required, to appeal against his latter order. That permission was, strictly speaking, unnecessary, as the applicants were entitled to renew the application before this court. Rule 1.8(2) of the Court of Appeal Rules (CAR) implicitly recognises the right of the applicant to renew his application to this court once it has been refused by the court below.

This application

[9] On 26 February 2016, the applicants filed the present application. They seek:

a. an extension of time in which to apply for permission to appeal an order of Batts J made on 21 April 2015;

b. permission to appeal from that order; and

c. a stay of execution, pending the determination of the application, of the proceedings to recover the costs awarded to Mr Bacchas.

[10] In supporting their application, the applicants assert, through an affidavit filed by their attorney-at-law, that:

a. the delay in making the application was due to the attorney being unsure as to the appropriate method of dealing with the orders;

b. the uncertainty was the reason for the length of the delay; and

c. there is a real prospect of the proposed appeal being successful.

[11] In respect of the merits of their proposed appeal, the applicants asserted that Batts J was in error in disallowing their application to set aside Mr Bacchas' amendment to his claim and also in error in awarding costs to Mr Bacchas in respect of applications that were dealt with at a case management conference. Their main objection to Mr Bacchas' amendments is that his claim against Mr and Mrs Beharie was already statute barred when he filed the amended claim.

[12] Mr Brown, on behalf of the Beharies, contended that the alleged cause of action arose, according to Mr Bacchas' claim, in 2006. It is plain therefore, learned counsel argued, that an amendment in 2014, seeking to add Mr and Mrs Beharie as defendants to that claim, would be out of time. Mr Brown also asserted that it is not permissible to add to a claim, causes of action which arose subsequent to the filing of that claim.

[13] Learned counsel asserted that the applicants were not afforded an opportunity to object to the amendments before they were made because there was no formal application for those amendments to have been made. The application to amend had been made orally at a case management conference and approval had been given without any indication as to what the proposed amendments were.

[14] Mr Brown submitted that Batts J was in error when he ruled that he had no authority to set aside those amendments. The reason given by the learned judge, counsel stated, was that the amendments had been made pursuant to a grant of permission to amend, and that the permission to amend was given by a judge of equal jurisdiction. Learned counsel contended that Batts J was wrong to have refused their application to disallow the amendments.

[15] In respect of the issue of costs, Mr Brown submitted that Batts J was wrong in making an order for costs other than that which allotted all the costs to be costs in the claim. He argued that issues dealing with amendments to statements of case are properly dealt with at a case management conference. The general rule was that costs at the case management conference were to be costs in the claim. Since therefore, Mr Brown submitted, the hearing before Batts J was a case management conference, the proper order to have been made was that costs were to be costs in the claim. Mr Brown submitted that the departure from that principle meant that the order was in breach of the provisions of the Civil Procedure Rules (CPR). He cited rules 11.3(1), 20.2(1),

20.2(2), 20.3(1), 27.3(8), 27.3(9), 64.5(2) and 65.8(1) of the CPR in support of his submissions.

[16] On these bases, Mr Brown contended, the applicants ought to be granted an extension of time within which to apply for permission to appeal from Batts J's initial order and for permission to appeal that order. Learned counsel relied on, for support, the cases of **Eshelby v Federated European Bank, Limited** [1932] 1 KB 423, **Busch v Stevens** [1962] 1 All ER 412 and **National Commercial Bank Jamaica Limited and Another v Scotiabank Jamaica Trust and Merchant Bank Ltd** SCCA No 22/2008 (delivered 19 December 2008).

The objection

[17] Mr Piper QC, on behalf of Mr Bacchas, resisted the application. In respect of the procedural point, learned Queen's Counsel contended that the applicants' explanation for the delay was not genuine, or at least the delay was inexcusable, since it resulted from the failure of the applicants' attorneys-at-law to conduct a timely research of the relevant points of law.

[18] Mr Piper submitted that the applicants had waited far too long in which to file their application for permission to appeal against Batts J's initial order. He asserted that that delay is inconsistent with the spirit of the CAR. He relied on **The Commissioner of Lands v Homeway Foods Limited and Another** [2016] JMCA Civ 21 in support of those submissions.

[19] In respect of the merits of the proposed appeal, Mr Piper submitted that Batts J was correct in refusing to disallow the amendment to the claim. Learned Queen's Counsel argued that the cases that had been cited on behalf of the applicants were not relevant to the circumstances of this case. He argued that these circumstances required that Mr Bacchas put his whole case before the court and that the issues be adjudicated together.

[20] Learned Queen's Counsel submitted that it was permissible to add causes of action which arose after a claim had been filed. Any procedural defects in Mr Bacchas' case, Mr Piper submitted, were capable of being corrected by the amendments, and that the court would allow the correction. For these points, he relied on, for support, the cases of **Hendry v Chartsearch Ltd** [1998] CLC 1382 and **Kevin Munday and Another v Hilburn and Another** [2014] EWHC 4496 (Ch).

[21] Mr Piper also supported the learned judge's decision to apportion the costs of the hearing, as he did. He argued that the learned judge had a discretion to award costs according to the circumstances and that Batts J had properly exercised his discretion in the circumstances of this case.

The analysis

[22] The basic requirements that an applicant in the position of these applicants must satisfy are as follows:

a. the length of the delay in making the application for extension of time should not be unduly long;

b. there should be a good reason for the delay;

c. there should be a real prospect of success if the permission to appeal were granted;

d. the respondent would not be prejudiced beyond what an order for costs would compensate, and

e. the interests of justice are in favour of granting the extension of time and permission to appeal.

These guidelines were repeated in **Commissioner of Lands v Homeway Foods**. The issues raised by those guidelines may be assessed in the context of this case.

a. The length of the delay

[23] There was a 10 month delay in making the present application. Batts J made his order on 21 April 2015. The application for permission to appeal ought to have been made within 14 days of that date (rule 1.8(1) of the CAR). That meant that it should have been filed on or before 5 May 2015. The application ought to have been first made in the Supreme Court. It was made in that court, but was not filed until 29 September 2015, which was over five months after the order had been made.

[24] Although the application did not come on for hearing until February 2016, the applicants ought to have, in the meantime and out of an abundance of caution, filed a separate application in this court (see page 6 of **Evanscourt Estate Company Limited v National Commercial Bank Jamaica Limited** SCCA No 109/2007 App No 166/2007 (delivered 26 September 2008)). **Evanscourt** is authority for the principle

that, in the event that the application for permission to appeal is refused in the court below, the filing of an application in that court does not satisfy the requirements of rule 1.8(1) of the CAR, which stipulates the time for filing the application in this court.

[25] Undoubtedly, if the application had been made in good time in the court below, and were refused there, this court would be more inclined to entertain an application that was promptly filed in this court after the refusal in the court below. That, however, is not the situation here. Although the applicants filed their application in this court within 14 days of the date of the delivery of Batts J's decision, that would not have been a prompt filing in the circumstances, especially as they were woefully out of time in respect of the filing in the Supreme Court. They filed their application in this court on 26 February 2016, which was over 10 months after Batts J had made the order, from which they seek to appeal.

[26] The length of the delay is, by itself, not usually determinative of the application. The next issue to be considered is the reason for that delay.

b. <u>The reason for the delay</u>

[27] The reason given for the delay was that the attorneys-at-law representing the applicants were unsure of how to proceed after Batts J had made the orders of 21 April 2015. It is apparent, however, that the attorneys-at-law were initially prepared to abide by the orders made. Their stance seemed to have changed when Mr Bacchas commenced the process to secure the costs that had been awarded to him by Batts J. Learned counsel for the parties are in agreement that, based on the order by Batts J

concerning costs, Mr Bacchas was not obliged to await the completion of the litigation before seeking to recover those costs. For convenience that order is repeated below:

> "3. Costs of the [applicants'] Application filed on March 13, 2015 and [Mr Bacchas'] Application of February 26, 2015 to [Mr Bacchas] to be taxed or agreed **and paid**;" (Emphasis supplied)

[28] The view that the applicants' attorneys-at-law were initially of a different opinion, and were taken by surprise by Mr Bacchas' steps to collect his costs, may be taken from the following paragraphs of the affidavit of Mr Delford Morgan, attorney-at-law for the applicants. His affidavit was filed on 26 February 2016, in support of these applications. After expressing uncertainty as to the nature and effect of the order for costs, Mr Morgan said, in part:

> "18. It was also not clear how the quantification of the costs would be carried out since the Case Management Conference Costs would be computed at the end of the proceedings. We interpreted the costs to [Mr Bacchas] to have been 'costs in any event'. These are some of the reasons for the delay in seeking leave to appeal within the prescribed time.
>
> 19. [Mr Bacchas'] Costs were not summarily assessed, but he has commenced Taxation proceedings and served Notice thereof on the [applicants] on the 13th day of August, 2015. The Applicants fear that if the Taxation proceedings are not stayed pending the hearing of the Application, [Mr Bacchas] will obtain a Costs Certificate."

[29] Mr Morgan's explanation for the delay cannot be accepted as a good one. The costs aspect of the order did not require an extensive amount of research to determine what its effect was. Similarly, the research required to ascertain the applicants' position

in respect of the validity of the pleadings would have already been done so that they could have been advanced at the hearing. There is no justification for the delay involved in this matter. Again, however, the absence of a good reason for the delay is not necessarily determinative of the application before this court.

[30] One issue arising from the acceptance by the attorneys-at-law, of blame for the delay, is the principle summarised by Lord Denning MR in **Salter Rex & Co v Ghosh** [1971] 2 All ER 865 at page 866 where the learned Law Lord said:

> "...If [the applicant] had any merits which were worthy of consideration, we could certainly extend the time. We never like for a litigant to suffer for the mistake of his lawyers."

In that case, the application was dismissed for lack of merit.

[31] It must also be considered that if the prejudice to the litigant is the expense of costs, the litigant has a remedy against the attorney-at-law who has caused him that expense. In **Wood v H G Liquors Ltd** (1995) 48 WIR 240, Wolfe JA (as he then was) applied the principle of the recourse to the attorneys-at-law even to cases where the prejudice to the litigant was greater. He said at page 255:

> "A plaintiff cannot hide behind the ineptitude of the attorneys at law. The attorneys at law's failure to act promptly cannot be a basis on which to deprive a party of his rights to have the action dismissed for inordinate delay. The plaintiff's remedy in such a case lies against the defaulting attorney at law; see *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 1 All ER 543 at page 547."

[32] The questions of merit, the impact on the applicants of a refusal of the application, and the potential for recourse to their attorneys-at-law would, therefore, all

be relevant considerations in the circumstances of this case. The question of merit raises the issue of the prospects of success of the proposed appeal.

c. Prospects of success

[33] It is unnecessary, in this application, to embark on a detailed analysis of the applicants' complaints about the orders made by Batts J. The question, at this stage, is whether the proposed appeal has "a real chance of success". Rule 1.8(7) of the CAR formulates the test to be applied:

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

The CAR does not provide, as does the Civil Procedure Rules of England and Wales, for setting aside a default judgment for "some other good reason" (rule 13.3(1)(b)).

[34] The issue concerning the timing of the amendment and the effect on the limitation defence as raised by the applicants and argued by Mr Brown is not at all a straightforward issue. The judgment of Harris JA in **National Commercial Bank Jamaica Limited and Another v Scotiabank Jamaica Trust and Merchant Bank Ltd** shows how carefully the principles have to be applied in each case. It cannot be said that this case does not call for such an assessment.

[35] The circumstances show that, as in **Busch v Stevens**, there was no prior indication of the nature of the amendments that Mr Bacchas sought. It was therefore open to Batts J to have reviewed the amendment that was actually made. This court, if

it applies **Busch v Stevens**, would be entitled to examine the amendments that were made in order to decide whether they could properly remain. In the circumstances, the appeal does have a real prospect of success.

[36] It is unlikely, however, that this court would disturb an award of costs in the circumstances in which Batts J made his award. The award of costs is one for the discretion of the judge hearing the particular case. This court does not easily disturb a decision based on an exercise of discretion (see **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1).

d. The prejudice to Mr Bacchas

[37] If the application and the appeal were allowed, there would be prejudice to Mr Bacchas' case. That prejudice could not be cured or compensated for by an order for costs. The prejudice is that, in his claim, he averred that Mr and Mrs Beharie committed certain acts "between 2009 to 2010". If the amendments were to be struck out, he would not be able to file a new claim at this stage without the strong likelihood of being met by a defence under the Limitation of Actions Act. Such a defence would be insurmountable.

e. The interests of justice in the circumstances

[38] Although the applicants have been tardy in their application and do not have a good excuse for their delay, there are issues raised by the circumstances that could benefit from close consideration from this court. The delays besetting our court system have, however, worked hardship once again. It would seem that if Mr Bacchas'

amendments to his claim were struck out, he would be placed in a very challenging place concerning his claim against Mr and Mrs Beharie. Realistically, he would be left without any recourse against Mr and Mrs Beharie, assuming that he is entitled to relief against them. Had he received an adverse ruling in 2014 when he filed his amended particulars of claim, he could have filed a fresh claim against them and applied for a joinder of the two claims.

[39] On the other hand, Mr and Mrs Beharie, if the application is not granted, will be required to defend a claim which could have properly been brought against them within time, had a prompt ruling been made in respect of their objection to being joined to the claim against the Westmoreland Parish Council. If they are successful in defending the claim, they will be entitled to costs in the claim. A refusal of their application does not leave them without a remedy as in the case of Mr Bacchas, if there were to be an adverse ruling on his amendment.

Summary and conclusion

[40] In order to secure permission to appeal, the applicants have to satisfy a number of requirements. They have failed on the issues of their delay and the reasons for that delay. That failure is not, however, determinative of their application. Whereas they have shown that they have a real prospect of succeeding if they were granted permission to appeal, a result in their favour would work real hardship on Mr Bacchas. The delays in the system of administering justice would have placed him in a position from which he would, realistically, be left without a remedy. In the circumstances, it

would not be in the interests of justice to grant the application for leave to appeal. The claim should be set for trial according to the amended particulars of claim, and to the victor will go the spoils.

[41] In the circumstances there should be no order as to costs.

[42] The order made should be:

a. The application for extension of time in which to apply for permission to appeal is refused.

b. No order as to costs.

SINCLAIR-HAYNES JA (DISSENTING)

[43] The applicants are seeking an extension of time to file their appeal against the refusal of Batts J to grant them an extension of time to appeal against his order for costs and to remove the 2nd and 3rd applicants as defendants.

Background

[44] The matter has indeed wended its way through the courts at an alarmingly slow pace, with the respondent changing and adding parties; removing and returning parties who had been removed as defendants; and applying for injunctions in the Supreme Court and in the Parish Court simultaneously without informing the Parish Judge of the pending application in the Supreme Court.

[45] The matter commenced on 1 September 2008 in the Supreme Court with the filing of a claim form and particulars of claim. The 2nd and 3rd applicants were then not parties to the claim. They were added by way of amended claim and amended particulars of claim on 17 July 2014. In that claim, the respondent averred that the 2nd applicant, Mr Charles Beharie, was a retiree of the 1st applicant, Westmoreland Parish Council (WPC), and the 3rd applicant was the 1st applicant's secretary. The 2nd and 3rd applicants will be referred to as the Beharies whenever it is convenient to do so.

[46] Prior to the addition of the Beharies, there were approximately 16 applications before the Supreme Court by the respondent and one by the WPC. These applications included, among others, an application for judgment against the 1st applicant; the withdrawal of the claim against National Work Agency (NWA) and Gene Gooden against whom the respondent had alleged trespass and nuisance; applications for adjournments because of absence of counsel; and further applications for adjournment of trial for various reasons. WPC's application was for an injunction against the respondent.

[47] A defence was entered by WPC on 26 October 2009. To this defence was attached a certificate of truth which was signed by the 3rd applicant who was WPC's secretary, having been appointed to that post on 3 November 2008.

[48] On 17 July 2014, the respondent filed an amended claim form and particulars of claim which added the Beharies as respondents. Gene Gooden and the NWA were also returned as the 1st and 2nd defendants. They (Ms Gooden and the NWA), were however not named as parties on the notice of case management conference.

[49] The amended claim alleged that the respondent was deprived of the natural use of his property because the Beharies obstructed and/or blocked the natural flow of water which caused his property to be flooded, resulting in loss and damage to him. On 17 November 2014, a further amended claim and particulars of claim were filed. The applicants did not file a defence to the amended claim within the stipulated time.

[50] On 27 October 2014, at the case management conference before Dunbar-Green J (Ag) (as she then was), by way of an oral application, the respondent requested and was granted leave to further amend his statement of claim. The terms of the proposed further amendments were not stated in respondent's oral arguments, neither was a draft of the further amended statement of case before the court.

Mr Delford Morgan's evidence

[51] Mr Morgan, counsel who appeared for the Beharies at the case management conference, deponed in his affidavit filed in this court, that at the said case management conference, the applicants indicated their intention to apply to strike out the amendments. They were of the view that the addition of the Beharies was an attempt to embarrass them because Mrs Beharie had signed the certificate of truth in her capacity as secretary of WPC. The case management conference was consequently adjourned to 21 April 2015 and fixed for two hours to hear the application. The applicants complied with Dunbar-Green J (Ag)'s order of 27 October 2014 by filing their application by 13 March 2015 to strike out the amendments which had been made six years after the claim was instituted.

[52] The further amended statement of case was filed on 17 November 2014 and was served on the applicants on 19 November 2014. That claim removed Gene Gooden and the NWA as defendants. According to counsel, Mr Bacchas' further amended statement of case differed substantially from both his statement of case and amended statement of case. Mr Morgan averred that the applicants were of the view that the application to disallow the amendments was valid. Consequently, the 21 days within which the applicants were allotted by Dunbar-Green J (Ag) to file their amended defence were insufficient as new causes of action were introduced which required an application for relief from sanctions.

The application before Batts J

[53] At the adjourned case management conference of 21 April 2015 before Batts J, there were three applications before the learned judge. The applicants sought an order to disallow the amendments of 17 July 2014 and the further amendments of 17 November 2014; alternatively, an extension of time to file an amended defence to the further amended claim form and particulars of claim with which they were served on 19 November 2014. The respondent also applied for judgment against the 2nd and 3rd applicants for failing to file a defence.

[54] The bases on which the application to disallow the amendments sought were:

(a) The amendments were done after the limitation period had expired without leave of the court and after the first case management conference.

(b) The addition of the Beharies was done without the leave of the court in breach of rule 29 of the Civil Procedure Rules (CPR).

(c) At all material times, the allegations of trespass, nuisance and other acts which interfered with the respondent's use and enjoyment of his property contained in his statement of case, were levelled against the WPC and other persons. The addition of the Beharies was therefore calculated to embarrass the WPC in the conduct of its defence.

(d) There was confusion as to with whom the Beharies were being sued as joint tortfeasors in respect of the 2006 and 2008 incident because they were served with an amended statement of case and a further amended statement of case with persons who had been previously named as defendants in the statement of case but no longer appeared as parties on the claim form.

(e) The respondent had introduced new causes of action, negligence and nuisance, thus resulting in the need for them to seek legal advice and additional time to settle their defence and to apply to the court to strike out the respondent's statement of case.

The evidence in support of the application before Batts J

[55] The applicants' application was supported by an affidavit of Mr Canute Brown, attorney-at-law for the applicants. Attached to his affidavit were four exhibits. Mr

Brown's evidence pointed the court to the fact that in 2006, the respondent first instituted proceedings for trespass by way of a plaint against Richard Bandoo, Gene Gooden and NWA in the Westmoreland Parish Court, where he alleged, that Richard Bandoo acting on the instructions of Gene Gooden (a contractor of the NWA), unlawfully entered upon his land by breaking down his fence and drilled a 41 feet long drain which resulted in destruction to his trees and vegetation.

[56] In 2008, by way of another plaint filed by the respondent, the WPC was added as a defendant. Having failed in his attempt to obtain an injunction to prevent the WPC from cleaning the drain, he blocked the said drain.

[57] Whilst that matter was still pending, on the same allegations, he instituted proceedings on 1 September 2008 in the Supreme Court against Gene Gooden, NWA and the WPC, in which he alleged that the WPC, by its servants and/or agents, trespassed on his land by tearing down the fence that he had repaired and digging a trench on the land in the area where Richard Bandoo, on the instructions of Gene Gooden, had dug the drain.

[58] The respondent had further alleged that on 16 June 2008, the WPC's servants and/or agents unlawfully entered his land and excavated the trench in a different direction, which leads the water onto his land, resulting in flooding, pollution and mosquito infestation.

[59] The WPC was not served and the respondent failed to disclose to the court that proceedings were pending in lower court. The Supreme Court discharged the injunction

on 12 November 2008. Subsequently, the WPC's efforts to clean the drain have been thwarted by the respondent in spite of the Supreme Court's order of 12 November 2008 that he should not obstruct the WPC's workers.

[60] The evidence on behalf of the applicants is that the Beharies' land is also subjected to flooding whenever it rains heavily.

[61] Batts J refused the applicants' application to disallow the amendments on the basis that Dunbar-Green J (Ag), having permitted the amendments, he had no jurisdiction to disallow them. The respondent withdrew his application for judgment to be entered against the 2nd and 3rd applicants for their failure to file their defence. The learned judge granted the applicants' application to file their defence but ordered the applicants to pay the costs of their application and the respondent's. He also ordered half costs of the case management conference to be costs in the claim.

[62] Being utterly aggrieved with the learned judge's failure to disallow the amendments and his award of costs, the applicants sought leave of the learned judge to appeal his decision. The application before Batts J was however made five months after his decision instead of the prescribed 14 days, and the application was refused.

[63] The applicants have consequently filed the following proposed grounds of appeal.

> "a The Learned Judge erred in law when he declined jurisdiction to consider the Application to disallow an amendment made by the Claimant to his Statement of Case on the 11th July, 2014, adding Charles

Beharie and Opal Beharie as Fourth and Fifth Defendants, respectively, after the Limitation period had expired, and without having first obtained the permission of the Court.

b The Learned Judge misdirected himself on the law, when he ruled that Further amendments made to the Claimant's Statement of Case cannot be struck out or disallowed by him, those amendments having been made pursuant to a permission granted without the proposed amendment being submitted to the Court and thereupon approved.

c The Learned Judge erred in law, in failing to consider the provisions of Rule 20 of the Civil Procedure Rules 2002, that the Application made by the Defendants to disallow amendments to the Claimant's Statement of Case, whereby the Second and Third Defendants were added to the Claim, was being made at a Case Management Conference as required by the Civil Procedure Rules.

d Failed to apply the correct principles and thereby erred in law in awarding costs to the Claimant, in that the general rule is that costs on Case Management Conference are costs in the Claim, and that unless a reason exists for departure from the general rule, costs should follow the event, that event being the trial or final disposition of the Claim and that power to award costs on Case Management Conference is circumscribed by law.

e The learned Judge in exercising his discretion to award costs to the Claimant, failed to consider or have regard to all the circumstances, and in particular, the matters enumerated in **Rule 64.6(4)** of the Civil Procedure Rules 2002, he failed to, or sufficiently examine the manner in which the claimant has pursued his case, and whether it was reasonable for the Defendants to raise the issue of the amendments to the Claimant's Statement of Case and the addition of the second and third Defendants after the Limitation period had expired without leave of the Court.

f The learned Judge erred in the law in holding that the amendments to the Claimant's Statement of Case were carried out with the prior permission of the Court and thus declining jurisdiction to consider disallowing the amendments, he therefore had no material before him on which to exercise his discretion according to law, to award costs to the Claimant." (Emphasis as in the original)

The judge's reasons

[64] In his subsequent written reasons for refusing the application for leave to appeal, Batts J opined that an appeal in the matter "will in all probability be fruitless". He expressed the following reasons at paragraph [8] of his reasons for so concluding.

> "…This is because the court on the 27th October 2014 granted permission for a Further Amended Claim and Particulars of Claim. It was not then contended that the intended Amendment ought to be particularised. Be it noted that an amended Claim adding the 2nd and 3rd Defendants had earlier been filed since in or about the 24th July 2014. …"

[65] The learned judge acknowledged at paragraph [9] that:

> "…[T]he Civil Procedure Rules 2002, Rules 19.4 and 20.6, deal separately with the addition of parties and amendments to Statement of Case after a period of limitation has expired. However, the Defendants failed, since July 2014 and did not do so when the opportunity arose on the 27 October 2014, to challenge the jurisdiction to add parties or to amend. Permission to further amend on the 27th October 2014 was granted for a claim which by that date all parties recognised as including the 2nd and 3rd Defendants as parties. That is the only way that the Order to file an acknowledgement and Defence by the 2nd and 3rd Defendants could make sense. There was, let me be clear, no appeal against the order of the 27th October 2014. Indeed my brief note of Mr Brown's

> submission on the 21st April 2015 before me had him say at one stage,
>
> > 'Challenge to Amended Claim although permission granted to Further Amend Claim. No challenge to the Further Amended which was without permission see Order of Justice Dunbar-Green Acting'."

[66] According to the learned judge, at the hearing in October 2014, they were permitted to file acknowledgement of service and defence. In those circumstances, he opined that:

> "…Their addition as parties could not credibly be regarded as an abuse of process they having acceded to the joinder." (paragraph [11])

The applicants' submissions

[67] Counsel for the applicants argued that the learned judge erred in forming the view that a judge having granted permission to allow the respondent to further amend his pleadings, he had no jurisdiction to disallow the said amendments. It was counsel's contention that the learned judge failed to consider that the application before Dunbar-Green J (Ag) to amend was oral, as there is no record of a written application nor was there a "draft" of the proposed amendments which were to be included in the further amendment statement of case. Permission to amend would have been granted without the judge having the benefit of the formulated amendments and were therefore not subject to the necessary judicial scrutiny.

[68] Counsel further pointed out that Dunbar-Green J (Ag)'s allocation of two hours to consider all applications at the adjourned case management conference, would have

been consequent on the applicants' indication that they were objecting and for arguments to be presented.

[69] It was also his firm submission that the learned judge's refusal to examine the amendments and the further amendments which were filed 16 July and 16 November 2014 respectively, was fundamentally wrong as it was the first time they would have been subject to the court's scrutiny. Dunbar-Green J (Ag)'s decision was therefore *per incuriam.* For that submission he relied on the English case, **Busch v Stevens** [1962] 1 All ER 412.

[70] It was also posited on behalf of the applicants that the learned judge erred because the applicants were not seeking permission to set aside the judge's order granting permission to amend, but rather to:

i) disallow the addition of the Beharies after the expiration of the limitation period; and

ii) to strike out the offending clauses in the further amended claim form and particulars of claim, which were purportedly made pursuant to the permission of Dunbar-Green J (Ag).

The respondent's arguments

[71] Mr Piper QC submitted that the learned judge was correct in refusing to disallow the amendment to the claim. He argued that the cases that had been cited on behalf of the applicants were not relevant to the circumstances of this case. According to

Queen's Counsel, it was permissible to add causes of action which arose after a claim had been filed. He submitted that the defects were procedural and the learned judge was correct in allowing the amendments. In support of that proposition, he relied on **Kevin Munday and Another v Hilburn and Another** [2014] EWHC 4496 (Ch).

Law/analysis

[72] In determining whether to accede to the applicants' request for an extension to file its appeal out of time, it is necessary to consider:

(1) the length of the delay in making the application for extension of time;

(2) the reason for the delay;

(3) whether there is a real chance of success if permission to appeal is granted; and

(4) prejudice to the respondent

The length of the delay and the reason for the delay

The failure to appeal within 14 days

[73] On 29 September 2015, the applicant filed their application in the Supreme Court for an extension of time to appeal Batts J's decision. The application was heard on 3 February 2016 and was refused on 12 February 2016. The application before this court was made on 26 February 2016. There was a delay of five months in applying to Batts J. The applicants applied to this court within two weeks of Batts J's refusal to extend

the time within which to appeal his decision. By then, however, 10 months had elapsed.

[74] Mr Morgan explained that his failure to comply with the rules within the time allotted was not intentional, but consequent on the time it took to ponder how to proceed. He deponed that although there was merit in an appeal against the learned judge's refusal to disallow the amendments, an appeal would only serve to further delay the trial of the matter against the 1st applicant which had been before the courts at all levels on several occasions over seven years in respect of one issue, namely: whether the WPC has a statutory right to enter the claimant's land in order to maintain a drain adjacent to the public road.

[75] Mr Brown submitted that upon scrutiny of the perfected order, he formed the view that an appeal against the costs order was meritorious, but at that point in time, 14 days had already elapsed. He was unsure whether costs ought to have been awarded to the respondent on the application which the respondent withdrew and whether the award of half costs of the case management conference "to be costs in the claim", was consistent with the award of costs to the claimant on applications made at the case management conference.

[76] He was also uncertain as to how costs would be quantified because case management costs are computed at the end of the proceedings. He interpreted the costs to the respondent as costs in any event hence the delay in leave to appeal being sought.

[77] Counsel further deponed that although the costs awarded the respondent were not summarily assessed, the respondent commenced taxation proceedings on 13 August 2015. (Batts J's judgment stated that the amount claimed at taxation was for the sum of $655,561.65). The applicants, he deponed, feared that if the taxation proceedings are not stayed pending the application, the claimant would obtain a costs certificate.

The respondent's submission

[78] Mr Piper trenchantly resisted the application. He argued that the applicants' attorneys-at-law's failure to conduct research of the applicable areas of law was inexcusable. Queen's Counsel submitted that the delay in filing the application for permission to appeal against the learned judge's decision was inordinate and not in keeping with the Court of Appeal Rules. For that submission, he referred the court to the case of **The Commissioner of Lands v Homeway Foods Limited and Stephanie Muir** [2016] JMCA Civ 21.

Law/analysis

[79] This court has adopted and applied the view expressed by Lord Denning MR in **Salter Rex and Co v Ghosh** [1971] 2 All ER 865, in respect of counsel's errors. At page 866 he said:

> "So [the applicant] is out of time. His counsel admitted that it was his, counsel's mistake and asked us to extend the time. The difference between two weeks and four weeks is not much. If [the applicant] had any merits which were worthy of consideration, we could certainly extend the time. **We never like a litigant to suffer by the mistake of his**

> **lawyers**. I can see no merits in [the applicant's] case. If we extended his time it would only mean that he would be throwing good money after bad. I would, therefore, refuse to extend the time. I would dismiss the application." (Emphasis added)

The delay in seeking leave to appeal before Batts J was inordinate. The application ought to have been made within two weeks. The overriding consideration however is to ensure that justice is achieved between the parties. The tardiness of counsel *per se* therefore does not dispose of the matter.

[80] It must be also be noted that "circumstances alter cases". The circumstances which operated in **Commissioner of Lands v Homeway** were entirely disparate and warranted the court's refusal to extend time. In **Lloyd Kerr (T/A Empire Supermarket) and Chrisryon Limited v Christene Myers** [2016] JMCA App 31, I pointed out at paragraph [115] that:

> "The case, **The Commissioner of Lands v Homeways [sic] Food[s] Ltd and Stephanie [sic] Muir** [2016] JMCA Civ 21 is distinguishable. The appellant had taken possession of the respondents' land from 2006 without compensating the respondent. In that case, quite apart from the several delays in complying with timelines, the appellant had no real prospect of succeeding on their appeal. To have allowed the appellant to further delay the matter would have greatly prejudiced the respondents while benefitting the appellant. In those circumstances an extension of time would have been wholly unjust."

[81] Indeed, in **Evanscourt Estate Company Limited v National Commercial Bank Jamaica Limited** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 109/2007, Application No 166/2007, judgment delivered 26 September 2008, the applicant's application for extension of time was made late because of counsel's

several blunders. Nevertheless, in spite of the delay, Smith JA with whom the other members concurred, at page 9 said:

> "...[I]n the circumstances of this case where there was obviously confusion on the part of Counsel for the applicant as to the effect of the early filing of a written application for leave in the court below, if there is a real chance of an appeal succeeding the court should give permission."

The applicants' chance of success

[82] Rule 1.8(7) of the CAR provides the circumstances in which the court will grant permission to appeal. It reads:

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

The determinative factors in this case, in my judgment, are whether the applicants have a real chance of succeeding and whether the respondent will suffer prejudice which costs cannot address.

Proposed grounds a, b, c and f

Law/analysis

The statement of case

[83] Is there a chance of the applicants succeeding on their proposed grounds of appeal? The respondent had alleged in his statement of case (which was not before this Court, but was made manifest by the amended statement case) that Gene Gooden, the NWA and the WPC were liable for trespass to his property and nuisance. It was then his averment that on or about 25 September 2006 and divers other dates, Gene

Gooden, whether by himself or the servant and or agent of the NWA, entered upon his land and dug a 41 feet drain, destroyed vegetation and committed acts of destruction.

[84] He further averred that the WPC entered his land on 12 May 2008 and on divers other days, its servant and/or agents entered his land and tore down his fence and dug a trench, among other acts of destruction. The trench led water unto his land. Consequently, his land close to his house is flooded causing the said house to become uninhabitable because the land is now prone to flooding.

[85] In that claim, he alleged that he was deprived of the use and enjoyment of his property and suffered loss and damage. He claimed special damages in the sum of $22,000.00, costs and interest. He also requested an injunction to restrain the WPC, NWA and Gene Gooden from causing the water to flow unto his premises and a mandatory injunction ordering the defendant to remove the blockage of the water drain.

The amended statement of case

[86] An amended claim form was filed on 17 July 2014 which added Mr Charles Beharie, as the 4th defendant and stated that he was a retiree of the WPC. Mrs Opal Beharie, was added as the 5th defendant and was stated to be the secretary of WPC. In his amended claim, he alleged that they obstructed and/or blocked the natural flow of water thus causing his property to be flooded and consequently deprived him of the use and enjoyment of his land resulting in loss and damage.

[87] He amended his particulars of claim to state that his land is a part of a large subdivision and there are pockets of ponds on each parcel. These pockets have been interconnected from time immemorial by excavation drains which traverse several properties before the water reaches the sea. The drain on his property also traverses the Beharies' property. He averred that between the years 2009 - 2010, the Beharies blocked the drain and continue to block the said drain thereby causing his premises to flood. He further alleged that they have blocked the natural water way which has resulted in flooding to his property.

The effect of the amended statement of case

[88] By virtue of the Limitation of Actions Act, the limitation period for claims for trespass to land is 12 years. In respect of negligence and nuisance, it is six years. The claim having been filed on 1 September 2008 and the amended claim on 17 July 2014, would have fallen within the relevant limitation period. The Beharies would therefore have been added within the relevant limitation period.

The addition of the Beharies

[89] Rule 19.2(1) of the CPR allows a claimant to add a new defendant before case management conference. Rule 19.2(2) reads:

> "A claimant may add a new defendant to proceedings without permission at any time before the case management conference."

The court's permission was therefore not required for the addition of the Beharies. Furthermore, even if the addition of the Beharies required the permission of the court,

rule 20.1 of the CPR confers upon the court the discretion to allow amendments made without the permission of the court in cases where such amendments were made the before the expiration of the relevant limitation period. Rule 20.1 reads:

> "A party may amend a statement of case at any time before the case management conference without the court's permission unless the amendment is one to which either-
>
> (a) rule 19.4 (special provisions about changing parties after the end of a relevant limitation period); or
>
> (b) rule 20.6 (amendments to statements of case after the end of a relevant limitation period),
>
> applies."

Rule 19.3(1) speaks to the procedure for adding or substituting a party. It reads:

> "The court may add, substitute or remove a party on or without an application."

Having been served with the amended statement of case, the Beharies were, therefore, obliged to file their defence, at the latest, by 12 December 2014 as ordered by Dunbar-Green J (Ag).

[90] Batts J's following statement at paragraphs [11] and [12] of his reasons for judgment is, however, partially inaccurate:

> "[11] …**In this case however, the amendment was made in 2014. The Defendants took no objection**. At the hearing in October 2014 they obtained permission from the court to file acknowledgements and Defences for the 2nd and 3rd Defendants. **Their addition as parties could not**

credibly be regarded as an abuse of process <u>they having acceded to the joinder.</u>

[12] Any conduct to be examined has to be the Defendants' who were in breach of the Order from which there has been no appeal. They failed to file acknowledgements or Defence. I decided in my discretion to accept the failure by Counsel, as a good explanation, and hence to grant relief." (Emphasis added)

[91] The following orders made by Dunbar-Green J (Ag) support counsel's submission that there was objection to the amendments at the case management conference of 27 October 2014, but there was no perlustration of the matter by the learned judge who consequently set the matter for two hours for the hearing of the application to disallow the said amendments.

"6. All Applications and Affidavits in support (where necessary) are to be filed and served by **March 13, 2015 at 3:00 p.m.**;

7. Written Submissions together with Bundles in relation to all Applications are to be filed and served by **March 31, 2015 at 4:00 p.m.**;" (Emphasis as in original)

[92] Evidently, the matter was adjourned for the applicants to register their objection in writing and for the parties to put their submissions in writing. It was plainly intended by the learned judge that the objections would be dealt with at the adjourned case management hearing. No other reason has been advanced for the adjourned case management conference to be set for such a long duration.

[93] In respect of the further amended statement of case, it is unclear as to what exactly was before Dunbar-Green J (Ag). The evidence is that at the case management conference, the applicants and the court were not presented with the proposed amendments. The further amended claim and particulars were permitted to be filed by way of oral application at the case management conference. The absence of any written application and draft amendments support counsel's submission that the matter was indeed adjourned for the objection to be heard.

[94] The court's record reflects that the further amended claim and particulars were filed on 17 November 2014 with Dunbar-Green J (Ag)'s permission. That permission would therefore have been obtained without the proposed further amendments being presented to the applicants and the court.

[95] The proper procedure would, however, have been to provide Dunbar-Green J (Ag) with a draft of the proposed further amendments which would have informed the applicants and the court as to precisely the amendments being sought, and then to allow for arguments before permission was granted. Dunbar-Green J (Ag), not having had sight of the proposed amendments, ought not to have acceded to the respondent's application at that stage.

[96] Consequent on the learned judge's error, the applicants were misled into believing that the case management conference before Batts J was in the circumstances the appropriate venue for airing the matter since the application was granted not only without the proposed amendments, but also not having heard the parties. The

allocation of two hours to accommodate the application served to further exacerbate the error.

[97] Batts J's following statement at paragraph [9] of his reasons for judgment is not entirely correct and demonstrates in my view that he misunderstood what transpired. The applicants did object as aforesaid, however they should have appealed Dunbar-Green J (Ag) as Batts J, a judge of concurrent jurisdiction could not review her decision.

> "[9] …However, the Defendants failed, since July 2014 and did not do so when the opportunity arose on the 27 October 2014, to challenge the jurisdiction to add parties or to amend. ..."

The further amended statement of case

[98] The amendments were extensive. Gene Gooden and NWA were removed as defendants. It was averred that the Beharies are owners of land which adjoins the respondent's land. The said lands are part of a subdivision and are connected by excavated drains which traverse several properties. It was alleged that acting either in concert with WPC or by themselves, the Beharies blocked the drain by backfilling it with earthen material.

[99] A claim for negligence was added and declarations were sought including one that the respondent is entitled to an easement of drainage. In respect of WPC, the acts complained of were allegedly committed between 2006 and 2008. On 27 October 2014, the application to file a further amended claim and particulars of claim which alleged that the WPC in concert with the Beharies blocked the drain in 2009-2010 would not

have fallen outside of the relevant limitation period in respect of the claim for negligence.

[100] The claim for nuisance having been pleaded as continuing would also not have been affected. The acts complained of against the Beharies were allegedly committed between 2009 and 2010 and therefore would not have fallen outside of the relevant limitation period.

[101] Rule 20.6 of the CPR deals with amendments to statements of case after the end of the relevant limitation period. It reads:

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

The amendment to include the claim of entitlement to an easement in the further amended claim form and particulars of claim does not fall into any of the categories enumerated in rule 20.6(1) and (2). This court, in the cases **The Attorney General of Jamaica and Aaron Hutchinson v Cleveland Vassell** [2015] JMCA Civ 47 and **Jamaica Railway Corporation v Mark Azan** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 115/2005, judgment delivered 16 February 2006, has

adopted the principles espoused in **Brickfield Properties Ltd v Newton; Rosebell Holdings Ltd v Newton** [1971] 1 WLR 862, **Lloyd's Bank plc v Rogers and Another** (1996) Times, 11 April and **Savings and Investment Bank Ltd v Fincken** [2001] EWCA Civ 1639; that the court has the discretion to allow an amendment to a statement of case after the limitation period, to add a cause of action where the cause of action to be added is established by the facts outlined in the statement of case.

[102] K Harrison JA, in Jamaica Railway Corporation v Mark Azan observed that:

> "28. Our Rules do not presently state any specific matters that the court will take into consideration in assessing whether a proposed amendment in fact amounts to a new cause of action (as opposed to a new party). In the final analysis, the decision whether or not to grant such an application, one ought to apply the overriding objective and the general principles of case management.
>
> 29. The authorities establish certain principles in relation to what amounts to a new cause of action. The following instances are set out but they are not exhaustive:
>
> (i) If the new plea introduces an essentially distinct allegation it will be a new cause of action. In ***Lloyds Bank plc v Rodgers*** (1996) The Times, 24 March 1997, Hobhouse LJ said inter alia:
>
> '...if factual issues are in any event going to be litigated between the parties, the parties should be able to rely upon any cause of action which substantially arises from those facts.'
>
> (ii) Where the only difference between the original case and the case set out in the proposed amendments is a further instance of breach, or

the addition of a new remedy, there is no addition of a new cause of action. See ***Savings and Investment Bank Ltd v Finkin*** [2001] EWCA Civ 1639, The Times, 15 November 2001.

(iii) A new cause of action may be added or substituted if it arises out of the same facts, or substantially the same facts, as give rise to a cause of action already pleaded.

(iv) In the case of ***Brickfield Properties Ltd. V Newton*** (1971) 1 WLR 862 a general endorsement on the writ claimed damages against an architect for negligent supervision of certain building works. The particulars of claim were served after the expiry of the limitation period and contained claims both for negligent supervision and negligent design. It was held by the Court of Appeal that the negligent design claim arose substantially out of the same facts as the negligent supervision claim and in its discretion the court allowed the amendment."

It is arguable that the facts outlined in the amended statement of case are sufficient to establish a claim for easement. In the amended particulars of claim, it was averred that "[The] Claimant's land is part of a large subdivision; each parcel of land in the subdivision has 'pockets of ponds' which are all interconnected to one another by excavated drains. This is from time immoral [sic]".

[103] Even if the claim for negligence in respect of WPC had fallen outside of the of relevant limitation period, that claim would also have been established as it was alleged in the statement of case that the applicants blocked the natural flow of water which resulted in the property being flooded.

[104] It is therefore unlikely that grounds a, b, c and f will succeed.

The order for costs

Grounds d and e state:

> "d. Failed to apply the correct principles and thereby erred in law in awarding costs to the Claimant, in that the general rule is that costs on Case Management Conference are costs in the Claim, and that unless a reason exists for departure from the general rule, costs should follow the event, that event being the trial or final disposition of the Claim and that power to award costs on Case Management Conference is circumscribed by law.
>
> e. The learned Judge in exercising his discretion to award costs to the Claimant, failed to consider or have regard to all the circumstances and in particular, the matters enumerated in **Rule 64.6(4)** of the Civil Procedure Rules 2002, he failed to, or sufficiently examine the manner in which the claimant has pursued his case, and whether it was reasonable for the Defendants to raise the issue of the amendments to the Claimant's Statement of case and the addition of the second and third Defendants after the Limitation period had expired without leave of the Court."

The judge's ruling

[105] In respect of the order for costs, he said at paragraphs [6], [13] and [14]:

> "[6] There is I believe very good reason for the limited time available to appeal interlocutory Orders as is being considered in relation to costs. If reasons are required or if what transpired at the hearing requires some clarification the earlier such record can be prepared the better. I, for example, have no great recollection of what transpired other than that which my notes provoke. Mr Morgan has said I gave no opportunity for submissions before making the costs Orders. I do not know. My notes do not reflect that I did; but my notes on such issues whilst Case Management Orders are being considered, would

probably not have so stated in any event. I therefore start with the presumption that the time limits for appealing interlocutory Orders ought to be respected. In this case the Defendant has waited several months before seeking leave to appeal.

…

[13] ...[I]t appears to me that costs are in the discretion of the court. Rule 27.8 says that the 'general rule' is that costs at a Case Management will be costs in the claim. However, **Rules 64.3, 64.4, 64.6(1), 64.6(2), (3) (4) and (5) all confer on the court a discretion to depart from that general rule**. That discretion must however be judicially exercised that is it must be fair.

[14] The costs Orders made had regard to the fact that much of the time at the hearing on the 27 April 2015 was consumed with the Defendant's unsuccessful application to strike out the amended claim and Particulars of Claim and to have themselves removed as Defendants. **I had regard to the fact that the Claimant withdrew his application for judgment once I determined to grant to the 2nd and 3rd Defendants relief from sanction.** A relief that would not have been necessary had they filed an acknowledgement and defence as ordered. I bear in mind that the Acknowledgement and the Defence could have themselves made it a point of contest about the limitation bar and perhaps also challenge joinder; a defence 'without prejudice' to an application challenging the amendment so to speak. The Defendant did not do so and breached the Order of the 27th October 2014." (Emphasis added)

The applicant's submissions

[106] Mr Morgan, in impugning the award of costs to the respondent, submitted that had their application to disallow the amendment been granted, the filing of a defence on behalf of the Beharies would have been unnecessary because they would have been

removed from the claim, thus rendering it unnecessary to respond to the amended statement of case. A defence to the further amended particulars of claim could not be filed within the time allocated by the court, as the CPR allows a defendant 42 days after being served with an amended particulars of claim, to file an amended defence and *a fortiori* a further amended particulars of claim.

[107] Counsel further contended that the general rule is that on case management conference, costs are costs in the claim. Costs having been circumscribed by the rules, counsel said a departure should be demonstrably justified. He referred the court to rules 11.3(1); 20.2(1)-(2); 20.3(1); 27.3(8); 27.3(9); 64.5(2) and 65.8(1) of the CPR which, he submitted, supports the general proposition that the rules enjoin litigants to make interlocutory applications at a case management conference or pre-trial review which is, he submitted, consistent with the overriding objective. Failure to make such applications at case management conference attracts costs sanctions.

[108] Counsel postulated that by failing to consider the relevant rules in exercising his discretion, the learned judge fell into error. He regarded as "wholly misconceived" his imposition of costs on the applicants for "using up the scarce resources of the court" in what counsel pointed out was "in the time allotted" by Dunbar-Green J (Ag) for the hearing. In support of that proposition, he relied on the cases **Busch v Stevens** [1962] 1 All ER 412; **National Commercial Bank Limited and Another v Scotiabank Jamaica Trust and Merchant Bank Ltd** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 22/2008, judgment delivered 19 December 2008 and **Eshelby v Federated European Bank, Limited** [1932] 1 KB 423.

[109] Counsel also complained that costs were awarded without any invitation by the judge, for submissions on the issue. Mr Morgan further deponed that he was of the view that the appeal has a real prospect of success.

The respondent's submission

[110] Mr Piper supported the learned judge's decision to apportion the costs of the hearing, as he did. He argued that the learned judge had discretion to award costs according to the circumstances and that Batts J had properly exercised his discretion in the circumstances of this case.

Law/analysis

[111] Rule 11.3 of the CPR specifically states that all applications relating to pending proceedings are to be dealt with at case management conference. Rule 11.3(1) and (2) reads:

> "(1) So far as is practicable all applications relating to pending proceedings must be listed for hearing at a case management conference or pre-trial review.
>
> (2) **Where an application is made which could have been dealt with at a case management conference or pre-trial review** the court must order the applicant to pay the costs of the application unless there are special circumstances." (Emphasis added)

The matter was adjourned for case management conference for the issue of the amendments to be ventilated. An important consideration is that had the respondent provided a draft of the proposed amendments as required, the applicants' challenge

might have been dealt with by Dunbar-Green J (Ag) which might have obviated the need for the allocation of two hours for the adjourned case management conference.

[112] The learned judge's comment that at the case management conference before Dunbar-Green J (Ag): "[it] was not then contended that the intended Amendments ought to be particularised" is not correct. In any event it was the respondent's responsibility to ensure that a draft of the proposed amendments was presented to the court.

[113] Of some consideration also is that the case management conference is in fact the designated forum for such applications. Rule 26.8(4) of the CPR states:

> "The court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown."

There is no evidence of exceptional circumstances in the instant case. The learned judge expressed the following reasons for ordering costs as he did at paragraph [14]:

> "The costs Orders made had regard to the fact that much of the time at the hearing on 27 April 2015 was consumed with the Defendant's unsuccessful application to strike out the amended claim and particulars of claim and to have themselves removed as Defendants. **I had regard to the fact that the Claimant withdrew his application for judgment once I determined to grant the 2nd and 3rd Defendants relief from sanction. …"** (Emphasis added)

The applications were made at case management conference as stipulated by the CPR. Indeed, the respondent was not entirely successful as the learned judge properly permitted the applicants to file the defence. He said at paragraph [12]:

> "…I decided in my discretion to accept the failure by Counsel, as a good explanation, and hence to grant the relief."

His comment that he had regard to the fact the "[t]he [respondent] withdrew his application", ought not to have influenced his award of costs to the respondent as he contested the application and only capitulated at the point in time that Batts J's decision was made to allow the applicant's application.

[114] CPR rule 27.3(8) and (9) states:

> "(8) The general rule is that costs incurred in attending a case management conference are costs in the claim.
>
> (9) **However the court may make some other order where the case management conference has to be adjourned due to the failure of one or more parties to -**
>
> (a) attend the hearing; or
> (b) co-operate fully in achieving the objective of the case management conference." (Emphasis added)

The applicants did attend the case management conferences. Their failure file a defence can be considered a failure to fully cooperate. The case management conference was however not adjourned.

[115] In support for awarding costs as he did, the learned judge relied on rules 64.3; 64.4; 64.5 and 64.6(1)-(5) of the CPR. Rule 64.3 empowers the court "to make orders requiring any person to pay the costs of another person arising out of or related to all or any part of any proceedings". A case management conference is "proceedings", but as previously noted, the matter was not adjourned.

[116] Rule 64.4 of the CPR reads:

> "The court hearing an appeal may make orders about the costs of the proceedings giving rise to the appeal as well as the costs of the appeal."

Rule 64.4 is irrelevant as the learned judge was not hearing the appeal but rather an application for extension of time within which to file the appeal.

[117] Rule 64.6(1) states:

> "(1) If the court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.
>
> (**Rule 65.8(3)(a) contains special rules where a separate application is made which could have been made at a case management conference or pre-trial review.)"** (Emphasis added)

Although the general rule is that the unsuccessful party pays the costs of the successful party, rule 27.3(8) and (9) outlines the circumstances in which costs should be awarded on applications which were heard at case management conference and pre-trial review. The bracketed statement at the conclusion of rule 64.6)(1) strengthens such an interpretation in light of the reference to rule 65.8(3)(a) which 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;**"
> (Emphasis added)

Rule 64.6 (3) states that:

> "In deciding who should be liable to pay costs the court must have regard to all the circumstances."

Rule 64.6(4) enumerates the circumstances to be considered. It reads:

> "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.

On a reading of the bracketed statement at the conclusion of rule 64.6(4), matters to be heard at case management conferences are apparently not captured by rule 64.6. It states:

"(Rule 65. 8 sets out the way in which the courts may deal with the costs of procedural hearings other than a case management conference or pre-trial review.)"

[118] Rule 65.8 is headed "Assessed costs - procedural applications and enforcement".

A reading of this rule is illuminating. It states:

"(1) On determining any application **except at a case management conference, pre-trial review or the trial**, the court must decide which party, if any, should pay the costs of that application, and may

(a) summarily assess the amount of such costs in accordance with rule 65.9; and
(b) direct when such costs are to be paid.

(2) In deciding what party, if any, should pay the costs of the application the general rule is that the unsuccessful party must pay the costs of the successful party.

(3) 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 added)

[119] Section 28E of The Judicature (Supreme Court) Act however confers upon a judge of the Supreme Court, the discretion to order costs. Section 28E(1) reads:

> "(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all civil proceedings in the Supreme Court shall be in the discretion of the Court."

Although the award of costs was within the learned judge's discretion, that discretion ought to have been exercised judicially. It must be borne in mind that Dunbar-Green J (Ag) allowed the respondent's application to amend without having had sight of the proposed amendments. She further adjourned the case management conference for the applicants' application to be heard.

[120] And whilst it is also true that the applicants' challenge was unmeritorious, case management conference was the proper forum to hear the matter. In light of the manner in which the matter unfolded, particularly in circumstances where the respondent withdrew his application, it is arguable whether the application to extend time at the case management conference should warrant an order for costs. It is also arguable that the award of costs to be taxed for the hearing of the application in addition to half the costs of the case management conference seems unreasonable in all the circumstances. On the issue of costs, it seems to me that there might be a chance of the applicants succeeding.

Prejudice to the respondent

[121] It was Mr Brown's submission that the application would not impede the trial or be prejudicial to the respondent as the trial date was fixed for approximately eight

months from the date of the application. The matter has in fact overtaken the trial, but that fact is not attributable to the parties but rather to the backlog which is affecting this court.

[122] In light of the foregoing; I would accede to the applicants' request for an extension of time within which to file their appeal against the learned judge's decision to award costs as he did.

F WILLIAMS JA

[123] I have read in draft the judgments of Brooks JA and Sinclair-Haynes JA. Having done so, I agree with Brooks JA that the application should be refused for the reasons that he has given.

[124] In relation to the issue concerning the award of costs in the court below discussed by my learned sister, I regret that I must respectfully disagree with her conclusion on that issue. To my mind, the orders as to costs made by Batts J were ones that fell within his jurisdiction and discretion. He made them with due consideration for the relevant rules and the particular facts and circumstances of this case. The applicants, in my view, have not demonstrated that they have a real chance of succeeding in relation to the learned judge's award of costs.

[125] I am further of the view that, whilst the applicants, on Brooks JA's reasoning, might have demonstrated a real prospect of success on other aspects of the claim if they were granted permission to appeal, a result in their favour (given the

delays in the court system) would work a real hardship on the respondent, leaving him effectively without a remedy against the 2nd and 3rd applicants. That would not be in keeping with the in the interests of justice.

BROOKS JA

ORDER

By majority (Sinclair-Haynes JA dissenting)

a. The application for extension of time in which to apply for permission to appeal is refused.

b. No order as to costs.