IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. SU 2019 CD 00231 (formerly C.L. 2005 HCV 1884)

BETWEEN	**CARICOM INVESTMENTS LIMITED**	**1ST CLAIMANT**
AND	**CARICOM HOTELS LIMITED**	**2ND CLAIMANT**
AND	**CARICOM PROPERTIES LIMITED**	**3RD CLAIMANT**
AND	**NATIONAL COMMERCIAL BANK JAMAICA LIMITED**	**1ST DEFENDANT**
AND	**RIO BLANCO DEVELOPMENT LIMITED** (in Receivership)	**2ND DEFENDANT**
AND	**ESTATE OF KARL AIRD (deceased)** (Receiver of Rio Blanco Development Limited)	**3RD DEFENDANT**

IN CHAMBERS

Mrs Caroline Hay QC and Mr Neco Pagon instructed by Braham Legal, Attorneys-at-law for the Claimants

Mr Charles E Piper QC, Ms Carlene Larmond and Mr D'Angelo Foster instructed by Charles E Piper & Associates, Attorneys-at-law for the Defendants

Heard: 6th and 16th December 2019

Civil Procedure–Application for permission to further amend Claimant's statement of case prior to re-trial of the claim pursuant to an order of the Court of Appeal – Factors to be considered in exercise of Court's discretion

LAING, J

The Background

[1] The litigation which forms the basis for this claim was commenced by the 1st Claimant, by Claim Form filed in Claim Number 2005/HCV 01884 on 6th July 2005. The 2nd and 3rd Claimants were added as parties to the claim by an Amended Claim Form filed 30th September 2009.

[2] The original 3rd Defendant, Karl Aird, was appointed by the 1st Defendant to be the Receiver of the 2nd Defendant pursuant to a debenture which the 1st Defendant held. Karl Aird as receiver of the 2nd Defendant executed agreements for sale with the 1st Claimant dated 3rd May 1993. One agreement was for the sale of land, and the other was for the sale of "*chattels and property*".

[3] The Claimants allege that the Defendants have breached the Agreement for Sale in respect of the land and sought the following reliefs as contained in their Further Amended Claim Form filed on 2nd September 2010, which was amended pursuant to an order of the Honourable Mr Justice Roy Anderson made on 1st September, 2010:

> *" 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 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."

I have deliberately reproduced the amendments as underlined to reflect the extent of the previous amendments made by the Claimant to its Claim Form.

[4] Following the trial of the Claim (the "First Trial"), the judgment of the Supreme Court was handed down on 20th September 2018, but unfortunately, by then, the learned Judge who had heard the case, had retired from the bench.

[5] On an appeal by the Claimants/Applicants, the Court of Appeal, following its earlier judgment in **Paul Chen-Young and Others v Eagle Merchant Bank Jamaica Limited and Others** [2018] JMCA App 7, ruled that the retirement of the trial Judge before his judgement was handed down, resulted in the First Trial before him and the consequent Judgment being a nullity.

The Application

[6] By Notice of Application filed 28th November 2019, the Claimants applied for various orders relating to the appointment of the 1st Defendant to represent the estate of the 3rd Defendant, now deceased, in respect of the continuation of this litigation and for the admission of the 3rd Defendant's evidence given on oath at the First Trial. These orders are not being opposed by the Defendants/Respondents. I will therefore concentrate on the Claimant's application for permission to amend their Statement of Case and for consequential orders.

[7] The Claimants' proposed amendments as reflected in their draft 4th Amended Claim Form and 4th Amended Particulars of Claim can be conveniently summarised in a number of main groups as follows:

a) The particularisation of the claim for damages to include claims for misrepresentation and or negligent misstatement;

b) The particularisation of the facts on which the claim for damages for misrepresentation and negligent misstatement are based;

c) Pleading that at all material times the 1st Defendant was vicariously liable for the acts and/or omissions or the 2nd and/or 3rd Defendants.

d) An averment that the 1st Defendant had a duty to act in good faith in the performance of the Agreement for Sale;

e) An averment that the 1st Defendant and or 3rd Defendant (as employee for purposes of vicarious liability or otherwise and/or an agent acted in bad faith).

f) A claim for interest at the commercial rate to be compounded; and

g) A claim for the reimbursement of capital expenditure and operational losses plus commercial interest.

[8] There is no dispute between the parties that the Court has the power to allow the amendment of statement of case generally. This is provided for by the Civil Procedure Rules ("CPR"). CPR 20.1 allows for the amendment of a statement of case at any time before the case management conference without the Court's permission (subject to certain qualifications which are not here relevant). CPR 20.4(1) provides that an application for permission to amend a statement of case may be made at the case management conference and CPR 20.4(2) provides that statements of case may only be amended after the case management conference with the permission of the Court.

[9] I agree with the submission of Mrs Hay QC, that it is now settled law, that the Court can grant amendments at any time, although this is not expressly stated in our CPR. Mrs Hay also submitted, correctly so, that 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.

[10] By way of a comparison, it should be noted that, the Eastern Caribbean Supreme Court Civil Procedure Rules (the "ECSC CPR") provides a list of the factors which the court should take into account in exercising its discretion on an application by a party to amend its statement of case. The ECSC CPR 20.1 provide as follows:

> *"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."*

Are the claims for damages for negligent misstatement, misrepresentation and vicarious liability new claims?

[11] Mrs Hay submitted that in many of the cases dealing with amendments, the main issue is whether an amendment should be permitted after a period of limitation has expired and the result has often turned on the question of whether the amendment in fact amounts to a new cause of action. Learned Queen's Counsel has placed heavy reliance on the case of **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 the case of ,**The Attorney General of Jamaica** and **Aaron Hutchinson v Cleveland Vassell** [2015] JMCA Civ 47.

[12] I have found paragraph 29 of the judgment of Karl Harrison JA in the aforementioned **Mark Azan** case to be instructive and I reproduce it hereunder:

> *"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 Rogers** (1996) The Times, 24 March 1997, Hobhouse LJ said inter alia:*

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

[13] Mrs Hay focused her submissions on the point that no new claims were being added and in her speaking notes argued as follows:

> *"From the outset the Claimants have maintained that the Defendants made certain representations to the Claimants which caused the Agreement for Sale to be framed in the terms set out therein and that such representations turned out to be false."*
>
> *"The Claimants maintained that those representations influenced the negotiations and the eventual terms of the Agreement for Sale to which the Claimants agreed to and signed, relying on and/or acting on the faith of the said representations. The Claimants always maintained that the Defendant knew that those representations were untrue and/or that they were reckless and/or negligent in making the said representations. The Claimants therefore seek damages in respect of those false, reckless and/or negligent representations and/or that the Defendants acted in bad faith."*

[14] Mr Piper QC agreed that CPR 20 makes no provision for the addition of new claims outside the limitation period and he submitted that the claims for negligent misstatement and misrepresentation are new claims and so too is the addition of the pleading of vicarious liability. He submitted that the case of **Aaron Hutchinson** (supra) was decided on the basis that there was an error and that is the reason the Court permitted the claims to be added. Queen's Counsel urged the Court to place

a restrictive interpretation on CPR 20.6 and sought to rely on the Privy Council case of **Charmaine Bernard (Legal Representative of the Estate of Reagan Nicky Bernard) v Ramesh Seebalack** [2010] UKPC 15 which was an appeal from the Republic of Trinidad and Tobago. Learned Queen's Counsel acknowledged the fact that the Trinidadian CPR 20.1 provision in Trinidad and Tobago which governs amendments is different in its use of the word "*change*" rather than "*amend*". Counsel also highlighted the fact that the Trinidadian CPR 20.1 (3) requires that the party wishing to change a statement of case must satisfy the Court that the change is necessary because of some change in circumstances which became known after the case management conference.

[15] Such a qualification is absent from the Jamaican provision but as the Privy Council observed at paragraph 20 of the Judgment, it was common ground that there was no "*change of circumstances*" within the meaning of Part 20.1 (3) of the Trinidadian CPR after the first case management conference. The case therefore turned on whether the re-amendment sought by the claimant was a change to the statement of case. Neither the claim form nor the statement of case gave any details of the claim for damages and the claimant sought to re-amend the statement of case to include particulars of special and general damages. The Privy Council held that the literal reading of the rule to mean "*any"* change whatsoever to the text (including a typographical error) was unreasonable and could not have been intended. However, it concluded at paragraph 24 of the judgment that "*… the inclusion of particularised heads of loss where no heads of loss are to be found in the unamended statement of case is plainly a "change" within the meaning of Part 20.1(3).*" Accordingly, the Court found that the learned judge had erred in permitting the amendment. Having regard to the particular facts of this case, I did not find it to be of much assistance in determining whether the proposed amendments to include claims for negligent misstatement and misrepresentation created new causes of action or were simply, further particulars of the original claim for damages, and/or that the pleading of vicarious liability was merely an extension of the pleaded averment of agency.

[16] I accept the submissions of Mrs Hay that the proposed pleadings in respect of negligent misstatement, misrepresentation do not amount to new causes of action since they are founded on the same facts or substantially the same facts as given rise to the cause of action for breach of contract already pleaded. The claim in respect of vicarious liability is also not a new claim since it is of course closely related to the fact of agency of the 3rd Defendant which was admitted by the 1st Defendant. Having regard to these findings, I conclude that the proposed amendments which address claims for damages for negligent misstatement and misrepresentation and the pleading in respect of Vicarious Liability would not be impermissible by reason of the fact that the limitation period in respect of these claims would have already expired.

Relevant factors in considering the overriding objective

[17] The case of **Index Communication Network Limited v Capital Solutions Limited and Others** [2012] JMSC Civ. No. 50 was not cited by the parties, but was a case in which the Court refused an application to amend a statement of case which was filed on behalf of the Claimant. In **Index** (supra), the learned Judge, Mangatal J, considered the approach to be employed in applications to amend statements of case. In paragraph 32 of the Judgment, the learned Judge refers to the decision of Brooks, J (as he then was) in **National Housing Development Corporation v Danwil Construction Limited *et al*** Suits Nos. HCV000361 and HCV 000362 of 2004 delivered 4th May 2007. Her Ladyship also quoted from pages 3-5 of the **Danwil Construction** judgment (supra) in which Brooks J referred to Stuart Sime's work **A Practical Approach to Civil Procedure**, **7th Edition,** and which reproduced extracts from **Blackstone's Civil Practice 2005** as follows:

> *"At pages 3-5 Brooks J stated:*
>
> *Apart from the overriding objective, there is no guidance provided in the rules in respect of the principles governing the grant or refusal of permission to amend. The relevant rule which existed prior to the amendment of the CPR was quite restrictive as it provided that the*

Court...could not give permission unless the applicant could show some change in circumstance since the date of the Case Management Conference. That restriction produced some hardship and even some curious results. The amended rule gives the Court far more latitude, but of course, there should be some guiding principles which will allow for parties and their legal representatives to proceed with a degree of assurance as to the likely outcome of such applications..

At page 145 Sime..... goes on to say that:

> *"A Court asked to grant permission to amend will therefore base its decision the overriding objective. Generally dealing with a case justly will mean that amendments should be allowed to enable the real matter in controversy between the parties to be determined".*

This Court is also to seek to achieve the overriding objective (rule 1.2 of the CPR).

The UK rule 17.1(2) and our own rule 20.4 gives 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.

(Page 5)

My reading of the excerpt from Blackstone is that there must be an arguable factual basis for the proposed amendment. That interpretation, in my view, is more in keeping with the myriad cases in which amendments, minor and major, have been allowed over the years, without the addition of a cause of action or ground of defence."

[18] Her Ladyship Mangatal J, also examined the pre-CPR case of **Moo Young and Another v Chong and Others** (2000) 59 WIR 369 in which the Court of Appeal upheld the trial Judge's decision not to permit an application to amend the statement of case to assert a pleading which was contrary to an earlier specific allegation of fact. Sykes J (as he then was), in **Peter Salmon v Master Blend Feeds** (unreported), Supreme Court Jamaica, Suit No Cl 1991/S163 judgment delivered 26th October 2007 also referred to the **Moo Young** case and noted that the circumstances of that case were quite different from the case before him. However, Mangatal J in refusing the application for amendment which was before her in the **Index** case noted that the defendants were alleging that the application to amend was disingenuous and insincere in that there was a lack of sufficient allegations of fact to support them.

[19] In this case before me, I acknowledge that there is not much similarity with the **Index** case or the case of **Moo Young,** in that the Defendants have not gone so far as to assert that the amendments which are being proposed are not being made *bona fide*, and consequently the issue of *bona fides* which was at the forefront in those cases, are of no relevance as far as the instant application is concerned.

[20] The case of **Peter Salmon v Master Blend Feeds Limited** (supra) was commend to this Court for consideration. In **Peter Salmon** (supra) the issue of whether the amendment was a new pleading, was prominent, having regard to the fact that the limitation period had expired. However, the observations of Sykes J at paragraph 23 of the judgment are instructive for our purposes, to the extent that he concluded as follows:

> *" In applying the overriding objective I have to take a multi-dimensional approach because that is what is required when considering rule 1.1 (2). Miss Rose Green submitted that once there is no injustice to the defendant then the amendment ought to be allowed. This approach is too narrow. Rule 1.1 (2) requires that more than injustice to the defendant is taken into account."*

[21] I am of the view that the approach suggested by the ECSC CPR 20.1 (3) is sensible and in keeping with the applicable authorities to which I have referred which call for the Court having "*flexibility, in exercising its discretion whether or not to grant permission to amend*", or "*a multi dimensional*" approach . I will therefore undertake my analysis in keeping with those considerations. For the avoidance of any doubt, I wish to expressly state that I so do with the full recognition that the ECSC CPR are rules applicable to another jurisdiction and have no legislative effect as far as this Court is concerned. I am therefore not under any mis-apprehension that the ECSC governs my discretion.

The issue of the stage of the proceedings at which the application to amend is being made

[22] Mr Piper provided the case of **Shaquille Forbes v Ralston Baker and Others** (unreported), Supreme Court, Jamaica, Claim No. 2006 HCV 02938, judgment

delivered 3rd March 2011. In **Forbes**, an application was made for an amendment to the particulars of claim after the close of evidence and submissions, but before judgment. The need for the amendments arose because the particulars of injury of the Claimant's next friend were appended to the statement of case instead of that of the Claimant's, due to inadvertence. The application for the amendments was not opposed, however the learned Judge was of the view that the Court should nevertheless ensure that the amendments could properly be granted. The learned Judge accepted that, in an appropriate case, amendments can be granted even when all that remains is for judgment to be delivered. He concluded that the amendment sought was merely to ensure that the particulars of claim accurately reflected the injuries and particulars of special damages and did not "…*yield to the claimant any unexpected advantage nor did they in any way prejudice the defence being advanced*." The learned Judge considered, *inter alia*, **Rohan Collins and Sonia Collins v Wilbert Bretton (on behalf of Claudette Davis-Bonnick)** E227 of 2002 in which the Court relied on the case of **Charlesworth v Relay Roads Limited (in liquidation) and Others** [1999] 4 All ER 397; [1999] Lexis Citation 3047

[23] In **Charlesworth** (supra), judgment was handed down but the formal order was not drawn up. There was an application by the Defendants to the Judge who had delivered judgment for permission to amend pleadings and to call further evidence. The Court had to consider whether it had the jurisdiction to grant the application. The circumstances for the Court's consideration in **Charlesworth** are clearly different from those in the instant application, however the learned Judge Neuberger J performed an extensive analysis of the issues to be considered by the Court on applications to amend a statement of case which I find to be most helpful and I reproduce portions of his judgment in extenso below, (from page 5 of the [1999] Lexis Citation 3047):

> *"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.

That view could be said to derive support from the observations of Millett LJ in ***Gale v Superdrug Stores plc*** *[1996] 3 All ER 468, [1996] 1 WLR 1089 at page 1098E to 1099D of the latter report, where he said this:*

> *"The administration of justice is a human activity, and accordingly cannot be made immune from error. When a litigant or his adviser makes a mistake, justice requires that he be allowed to put it right even if this causes delay and expense, provided that it can be done without injustice to the other party. The rules provide for misjoinder and non-joinder of parties and for amendment of the pleadings so that mistakes in the formulation of the issues can be corrected. If the mistake is corrected early in the course of litigation, little harm may be done; the later it is corrected, the greater the delay and the amount of costs which will be wasted. If it is corrected very late, the other party may suffer irremediable prejudice . . ."*

[24] Neuberger J continued on the same page to opine as follows:

"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. This latter approach seems to have found favour with the Court of Appeal in ***Worldwide Corporation Limited v GPT Limited*** *(2 December 1998, unreported) where Waller LJ (with whom Lord Bingham CJ and Peter Gibson LJ agreed) said this:*

> *"We share Millett LJ's concern that justice must not be sacrificed, but we believe his view does not give sufficient regard to the fact that the Courts are concerned to do justice to all litigants, and that it may be necessary to take decisions vis-á-vis one litigant who may, despite all the opportunity he or his advisers have had to plead his case properly, feel some sense of personal injustice for the sake of doing justice both to his opponent and to other litigants."*

He then went on at page 6 to cite observations of Lord Griffiths in **Ketteman v Hansel Properties** [1987] 1 AC 189, [1988] 1 All ER 38, at page 220A-H of the former report where Lord Griffiths said this:

> *"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 by Neuberger J).*

[25] Neuberger J observed that **Ketterman** (supra), **Gale** (supra) and **Worldwide Corporation** (supra) were all cases where the application to amend was made before judgment whereas in **Charlesworth** it was after judgment. **Charlesworth** can be further distinguished from the application before me, because the applicant for the amendment in **Charlesworth** was also seeking to admit new evidence after judgment had been handed down.

[26] 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 an amendment is being made. Each case will of course turn on the precise nature of the amendment which is being sought, but it is not difficult to contemplate situations where the risk of prejudice to the other side will be greater due to the fact that the amendment is being sought at a more advanced stage of the proceedings. It is safe to conclude that as a general principle, all other things being equal, the later the application, the greater will be the risk of prejudice to the other party. I do note however, that

in **Moo Young** the amendments were being sought almost at the end of the appellants' case and in those circumstances the Court was of the view that this would cause injustice to the other party. I also appreciate the submissions on behalf of the Claimants that in the case before me the Defendants could be afforded the opportunity to also amend their pleadings in response if that was deemed necessary and the potential prejudice to the Defendants might not be as great as that which would be faced by the a party responding in the middle of a trial.

[27] I am of the opinion that a retrial in the circumstances as arose in this case are not novel, but are very unusual and constitute special circumstances. In **Charlesworth** Neuberger J expressed the view that:

> *"…in many ways, an applicant seeking to persuade the judge to receive fresh evidence and/or argument on a new point is in a very similar position to an appellant seeking similar relief from the Court of Appeal. He has had a full opportunity to collect his evidence and to marshal his arguments, and there must be a strong presumption against letting him have a second chance, particularly after he has seen in detail from the judgment why he has lost."*

[28] In the case of a retrial, it is my considered view that there ought to be a similar strong presumption against letting the applicant have the proverbial "*second bite of the cherry.*" Both Neuberger J in **Charlesworth** and Judge Behrens in **Hague Plant Limited v Martin Angela Hague and others** 2014 EWHC 568 (at paragraph 48) referred to the following quotation from **Worldwide Corporation v GPT Limited** (supra):

> *"Where a party had many months to consider how he wants to put his case and where it is not by virtue of some new factor appearing from some disclosure only recently made, why, one asks rhetorically, should he be entitled to cause the trial to be delayed so far as his opponent is concerned and why should he be entitled to cause inconvenience to other litigants? The only answer which can be given and which, Mr. Brodie has suggested, applies in the instant case is that without the amendment a serious injustice may be done because the new case is the only way the case can be argued, and it raises the true issue between the parties which justice requires should be decided.*

> *We accept that at the end of the day a balance has to be stuck. The court is concerned with doing justice, but justice to all litigants, and thus where a last minute amendment is sought with the consequences indicated, the onus will be a heavy one on the amending party to show the strength of the new case and why justice both to him, his opponent and other litigants requires him to be able to pursue it."*

[29] Although the quote above places particular emphasis on late amendments, the observations expressed therein are equally apt in cases where there is a retrial. In the case before this Court, the claim was originally filed on 6th July 2005. The application for these amendments are being made over 14 years after the claim was first filed. In these circumstances the consideration stated in the ECSC CPR 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. This is because a possible response by the Claimants would be that they only became aware of the change they wished to make after the decision of the Court of Appeal declaring the First Trial a nullity and therefore on that basis, this application has been made promptly. However, it would not be a proper exercise of the Court's discretion to place much weight on promptness in this sense, without having regard to the fact that the application is being made 14 years after the claim was first filed.

[30] The point was well made by Mr Piper that the Claimants had made extensive amendments prior to the trial (as partly evidenced in the reliefs in the amended claim form which was quoted at the start of these reasons). The Claimants have had the benefit of a reasoned written judgment by a Judge who heard the First Trial on the cusp of his retirement and no doubt brought all his wealth of knowledge and experience to bear in producing his written judgment. The fact that the judgment has subsequently been declared to be a nullity has not rendered valueless the findings, opinions and conclusions expressed therein. This now impugned judgment provides the opportunity for Counsel to analyse that judgment, and determine how the Claimants' case can be bolstered on the retrial by carefully worded amendments.

Is there prejudice to the Claimants?

[31] Mr Piper in his submissions approached many of the proposed amendments from the standpoint of whether they were necessary. This of course is not the only test but his analysis was helpful in convincing me that the Claimant would not be prejudiced if the amendments are not granted. Admittedly, they would not be in as advantageous a position as they would like to be, but that, without more, in my view does not amount to prejudice. They still would be able to advance their claim as they had at the First Trial. What are the circumstances that have led to the Claimant's application for amendment? They are not in the position of the litigants in many of the other cases to which reference has been made, such as **Shaquille Forbes** for example, where there had been an error in the pleadings for which an amendment was critical in order to properly advance the applicant's case and to do justice between the parties. The Claimants have simply decided to take the opportunity of the retrial to seek to reinforce their case.

Is there prejudice to the Defendants?

[32] Mr Piper 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 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 **Azan** 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.

[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 Claimants 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** to which I have already referred that the absence of prejudice to the Defendants is not, without more, determinative of the issue.

[34] I am attracted to the comments of Lord Griffiths in ***Ketteman v Hansel Properties*** [1987] 1 AC 189, at page 220A-H to which I have previously referred and I adopt them although I have taken the liberty to add modifications of my own. It is my view that in considering the prejudice to the other parties if the change were permitted, a Court is not only to consider whether the other party is in a positon to ably respond to the amendments and whether any prejudice to that party (any other party), can be compensated by the payment of costs. I agree with Lord Griffiths that 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, but the Court must also be aware of the commercial realities and the fact that litigation and its results raises the possibility of serious consequences for corporate entities.

[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 Defendants, 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 the learned Judge reached his conclusions were unsustainable. It would not be unreasonable for the Defendants 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).

[36] It is my considered view that 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.

[37] Neither learned Queen's Counsel for the Claimants, nor learned Queen's Counsel for the Defendants, 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. 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. As Langrin JA noted in **Moo Young** (supra) at page 409, "*a trial court must always be vigilant in identifying amendments which seek to clarify issues in dispute from those which permit a defence to be raised for the first time.*" I fully appreciate the submission of Mrs Hay that what the Claimants are seeking to do is simply to clarify the issues but it appears to me that the issues in this case are sufficiently clear to permit a court to make a proper determination on the pleadings and the evidence to be adduced. 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.

[38] A clear example of the Claimants seeking to use the information derived from the proceedings and judgment in the First Trial to refine its statement of case, is evident in the proposed amendment to plead that the 1st Defendant was vicariously liable for the acts and or omissions of the 2nd and/or 3rd Defendants. Mrs Hay candidly admitted that the issue of vicarious liability had not been previously pleaded but had arisen at the trial and this was an attempt to "*plug that gap*" (my words put to her), but although Counsel conceded that this was the possible effect, Counsel insisted that this was being done in the interest of justice.

[39] In this case the trial dates have been fixed for May 15 to June 5, 2020 and the issue of delay is not of any consequence for purposes of my analysis.

[40] As it relates to the amendment in respect of interest, Mr Piper has submitted that it is not necessary and does not need to be pleaded. Mrs Hay has submitted to the contrary that it is required pursuant to the CPR 8.7 which sets out what must be included in the claim form. Mrs Hay also relied on the judgment of Sykes J in **Peter Salmon** to support her position.

[41] In the final paragraph of **Peter Salmon**, Sykes J made the following observation:

> *"33. It has already been pointed out that interest is not a claim or a cause of action. It is something on its own. Thus the question of interest becoming statute barred, as suggested by Miss Christopher, I would think is a legal impossibility in the absence of legislation barring a claim for interest . The proper way to deal with claims that seek to add a claim for interest is to grant the amendment and then the judge at the trial of the claim or assessment examines all the circumstances of the case and then awards an appropriate rate of interest for a specified period that he believes is appropriate. There are wide powers vested in the judge to do justice between the parties on the question of interest...."*

I wholly agree with Sykes J on this issue. This approach is manifestly sensible and this is the approach that I will adopt.

[42] For the reasons herein before expressed, having considered the overriding objective of enabling the Court to deal with this case justly I will refuse the amendments sought save for the amendments in respect of the claim for interest. Although I have concentrated on the amendments relating to negligent misstatement, misrepresentation and vicarious liability I have also considered the other amendments which were highlighted individually by Mr Piper and which I agree add nothing of substance to the pleadings and which I find ought not to be allowed.

[43] Having regard to the conclusions and findings expressed herein, I hereby make the following orders:

1. The National Commercial Bank Jamaica Limited is appointed to represent the estate of the 3rd Defendant, Karl Aird, deceased, in these proceedings and in respect of any other aspects of this litigation.

2. The following documents are to be admitted into evidence at the trial of this claim, namely:

    a) Witness Statement(s) of Karl Aird, deceased ("Karl Aird"), made on 20 May 2009 and filed in herein on 28 May 2009 and/or on such other dates, previously admitted into evidence on the first trial of this claim;

    b) The oral evidence Karl Aird given on oath at the first trial of this action on 9 June 2011 and on such other dates in so far as he gave evidence at the first trial of this action as contained in Supreme Court transcript; and

    c) All exhibits and/or documents admitted into evidence through Karl Aird on the said date and on such other dates in so far as he gave evidence at the first trial of this action.

3. The Claimants' application to amend their statement of Case is refused save for amendments in respect of their claim for interest.

4. Two thirds of the costs of the Claimant's application are awarded to the Defendants in any event to be taxed if not agreed.

5. Leave to appeal is granted.

6. The Defendant's Attorneys-at-Law are to prepare file and serve a copy of this order.