

BARBADOS

**IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
CIVIL DIVISION**

NO. CV 509 OF 2012

BETWEEN

BAJAN SERVICES LIMITED

CLAIMANT

AND

THE BANK OF NOVA SCOTIA

DEFENDANT

Before: The Honourable Mr. Justice Barry L. Carrington, Judge of the High Court.

Date of Hearing: March 15, 2021

Date of Decision: February 18, 2022

Appearances:

Mr. Roger C. Forde, Q.C. in association with Ms. Trish L. Bryan, Attorneys-at-Law for the Claimant.

Mrs. Alicia V. Richards-Hill of Messrs. Yearwood & Boyce, Attorneys-at-Law for the Defendant.

DECISION

Introduction

- [1] The Claimant and Defendant entered into an agreement for the payment of a commission for the sale of a property over which the Defendant held a charge by way of legal mortgage and was exercising its power of sale. The agreement entailed the payment of the commission when the Claimant introduced a prospective purchaser and whose transaction proceeded to the completion of a sale. A purchaser, introduced by the Claimant, bought the property through a vehicle of several companies and Counsel for the Claimant was later informed that it was not entitled to the commission. The Defendant refused to pay the commission because the company and not the prospective purchaser bought the property, and that company was introduced by an attorney-at-law.
- [2] The Claimant commenced proceedings for payment of the commission and a Defence was filed. Approximately eight (8) years later, the Claimant applied to the court to have its Statement of Claim amended and for leave to file the affidavit of a witness. The Defendant vigorously opposed the application on the grounds that the purported amendment was not based on new information that became known through discovery, rather it was the recollection of a conversation about how the sale was to be facilitated. The Defendant argued that if allowed, the amendment would lead to the creation of new causes of

action and, the Defendant would be deprived the benefit of relying on the **Limitation of Actions Act, Cap 231 (“Limitations of Action Act”)**. The court is required to determine, if in the circumstances, the Claimant should be given leave to amend its Statement of Claim and file the affidavit.

Background

- [3] Bajan Services Limited (“the Claimant”) is a company registered in accordance with the **Companies Act Cap.308** with its office at Battaleys, St. Peter. The Bank of Nova Scotia (“the Defendant”) is a company governed by the **Bank Act of the Laws of Canada** and registered as an external company in Barbados with its principal place of business at Broad Street, Bridgetown.
- [4] By an Agreement dated August 11, 2011, the Claimant was appointed by the Defendant in the exercise of its power of sale, to act as a real estate agent for the sale of the property known as “Kings Beach” in Road View, St. Peter over which the Defendant held a charge by way of a legal mortgage.
- [5] The terms of the Agreement provided for the payment of a commission to the Claimant of 2.5% plus VAT only in circumstances where the Claimant introduced a prospective purchaser whose transaction proceeded to completion of a sale. Subsequently, at a meeting between the parties on September 9, 2011, it was agreed that Mr. Simon Nixon of England was

introduced to the Defendant by the Claimant as a prospective purchaser, who would purchase the said property through the vehicle of certain companies and the Claimant would be entitled to the commission on completion of the sale.

[6] Moreover, Counsel for Mr. Nixon informed the Defendant via email of his client's intention to purchase the said property and later executed an Agreement dated September 29, 2011, for the purchase of the property. On completion of the sale around October 2011, the Claimant submitted a Proforma Invoice to the Defendant for the payment of the commission but was advised via letter that it was not entitled to the said commission. The Claimant's Counsel wrote to the Defendant seeking payment but was told by Counsel for the Defendant that it was not entitled to it.

[7] As a result, the Claimant on March 27, 2012, commenced an action for breach of an Agreement seeking to recover the sum of \$937,062.50 together with interest. The Defendant entered a Defence denying each allegation and later filed Applications for the striking out the Claim and to have summary judgment entered on the Claimant's claim.

[8] On February 19, 2020 at a case management conference, orders were made for the filing of additional affidavits and written submissions re. the Application

by the Defendant for Summary Judgment. Following that conference, the Claimant allegedly discovered new information material to the proceedings, and has now sought leave to amend its Statement of Claim and to file an affidavit of a witness.

Claimant's Submissions

- [9] Counsel for the Claimant Mr. Forde Q.C. submitted that the amendment should be allowed as there is a dispute which requires further investigation. As alleged in paragraph 9 of the Statement of Claim, the invoice for payment was submitted on September 15, 2011, and it was only after the closing of the sale on October 3, 2011, that it was disclosed that the Claimant was not entitled to the commission.
- [10] Mr. Forde Q.C. argued that the proposed amendment discloses that the allegations in paragraphs 6, 7, and 13 do no more than amplify paragraph 5 of the Statement of Claim to make it clear that a meeting was held re. the agreement to pay the commission and to identify the companies that comprise the vehicle of companies pleaded in paragraph 5.
- [11] As for the proposed amendment at paragraph 13, Counsel argued that it simply contends that the Defendant had no intention of paying the commission. However, in response to counsel for the Defendant's claim that paragraph 13

is a material change in which the Claimant is alleging fraud and negligence for the first time, Mr. Forde Q.C. essentially admits that paragraph 13 will introduce new causes of action which arose some eight (8) years ago. Relying on **Part 8.5 of the Civil Procedure Rules, 2008 (“CPR”)**, he said that the Claimant is entitled to put forward a new cause of action to determine the real issues in dispute, subject only to the **Limitation of Actions Act** and **Part 20.2 (2) of the CPR**. Counsel indicated that the particulars of fraud are found in the proposed paragraph 13 of the amended Statement of Claim and there was no need to repeat them. Counsel however indicated that for the avoidance of doubt, the particulars of fraud are that “the Defendant knew that it did not intend to pay the commission or that it did not care whether the representation that it would pay the commission was true or false.”

[12] Counsel referred to **Charlesworth v Relay Road Ltd. (in liquidation) and others [1999] 4 All ER 397 (“Charlesworth v Relay Road Ltd.”)** and argued that **Part 20** of the **CPR** does not specify how the Courts’ discretion should be exercised. However, the case law indicates that the overriding objective should be used as a basis for the decision and as such the court should allow amendments which enable the real matters in controversy to be determined.

Defendant's Submissions

- [13] Counsel for the Defendant Mrs. Richards-Hill strongly resisted the amendment as a tactic considering the Defendant's pending summary judgment application, and contended that no good reason has been advanced for the amendments being sought which is an important consideration for the Court in determining whether to exercise its discretion in the Claimant's favour.
- [14] Counsel surmised that on reviewing the proposed changes, the Claimant is seeking to make material changes to its Statement of Claim that are not supported by any documents now introduced. Rather, the alleged discovery would appear to be one of 'memory' of a specific methodology by which the sale would be assured by Mr. Nixon, which the Claimant failed and/or neglected to mention at the time of filing or the intervening eight (8) years.
- [15] Further, Counsel stated that the Claimant is seeking to introduce two (2) new causes of action, namely, fraud and negligence both of which are not properly pleaded. Counsel referred to **Hague Plant Ltd v Hague [2014] EWCA Civ. 1609** as authority for the proposition that proposed amendments must comply with the rules of drafting and pleading. Counsel added that the information is not new and only became known through the process of discovery but rather,

were material terms of a purported oral contract made on September 9, 2011, and are being introduced after the period set out in the **Limitation of Actions Act**. Counsel strongly contended that the new causes of action do not arise from the facts already pleaded and, those facts set out in the draft Claim, draft Affidavit and Affidavit in Support, do not support the newly proposed causes of action.

Law & Discussion

Amending the Statement of Case

[16] Changes to Statement of Case generally, and after the end of a relevant limitation period, are dealt with by **Part 20** of the **CPR**. **Part 20.1(1)** states that a statement of case may be amended at any time prior to a case management conference and the filing of a defence without the court's permission. Subparagraph (2) provides that the court may give permission to amend a statement of case at a case management conference or, at any time afterwards, on an application being made to the court.

[17] By subparagraph (3), a statement of case may not be amended without permission under this rule if the amendment involves a change of parties which could not be made without permission under **Part 19** or if **Part 20.2** (changes to statement of case after the end of a relevant limitation period), applies. An amended statement of case should be filed promptly, and a copy

served on all other parties within seven (7) days (subparagraph 4), while a certificate of truth must be included (subparagraph 5).

[18] **Blackstone's Civil Practice, 2011 ("Blackstone's")** at **para. 31.1** stipulates that the basis on which the Court allows an amendment, is as follows:

“Permission is generally granted where there is no prejudice to other parties, and in general there is no prejudice if the other parties are adequately protected by the usual order that the costs of and occasioned by the amendments are paid by the amending party”.

[19] The courts have for the most part applied and expanded this principle in appropriate cases. In **Clarapede and Co. v. Commercial Union Association (1883) 32 WR 262 (“Clarapede”)**, **Brett M.R.** said:

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

[20] However, **Blackstone's** at **para. 31.19** placed the issue of amendments in its proper context. They learned authors state that the court is required to consider the whole statement of case in its effort to assess whether the proposed amendment amounts to a new cause of action or is a mere clarification of an existing cause of action. (**Leeds and Holbeck Building Society v. Ellis (2000) LTL 5/10/2000**). That position was buttressed by **Toulson L.J.** in **Evans v Cig Mon Cymru Ltd. [2008] EWCA Civ 390**, who said:

“[I]n asking whether the proposed amendment was, in truth, an amendment to raise a new cause of action or merely to clarify an internal inconsistency in the pleaded case, it is proper to look at the pleaded case as a whole”.

[21] In the Barbadian High Court decision of **Gillian Dowrich v The Attorney General BB 2020 HC 17 (“Gillian Dowrich”)** the Claimant/Applicant applied to the Court for Orders to amend the Claim Form and Statement of Claim and for an extension of time to file the Application. Master Holder in her judgment referred to **Charlesworth v. Relay Roads Ltd.** and the judgment of **Neuberger J.** therein. She said at **para. 38:**

“The Court considered an application to amend. The applicable principles were discussed. After referring to the above stated principle, **Neuberger J** made a comment which is pertinent to the matter under discussion. He said: “I do not believe that these principles can be brushed aside on the ground that they were laid down a century ago or that they fail to recognise the exigencies of the modern civil justice system. On the contrary, I believe that they represent a fundamental assessment of the functions of a court of justice which has a universal and timeless validity”.

[22] In **James Martin Scobie v Fairview Land Ltd. [2008] EWHC 147, Akenhead J.**, provided the following instructive guidance at **para. 12:**

“I proceed upon the basic principle that amendments ought in general to be granted to enable the real disputes between the parties to be adjudicated upon unless there is prejudice to the other party which cannot be compensated for by a costs order or unless there is harm occasioned to the administration of justice”.

[23] **Blackstone's** at **para. 31.4** indicated that:

“In answering the question whether there is any injustice that cannot be compensated in costs, the court has to determine whether the Respondent will suffer any prejudice through the amendments and whether the Claimant can pay the usual costs order”.

[24] In the context of the overriding objective and its relevance in this area, **Morison J. in British Credit Trust Holding v. UK Insurance Ltd. [2003] EWHC 2404 (Comm)** made the following remarks at **para.33**:

“If I permit the Particulars of Claim to be amended to give effect to what the Claimant always intended-am I permitting an amendment which amounts to a new cause of action? The answer to that question lies, I think, by keeping well in mind the overriding objective”.

[25] After thorough examination of the above authorities, the court in **Gillian Dowrich, supra**, found that the proposed amendment added detail to what transpired. In that case, the claimant, a registered nurse was stationed in the dressing room of the clinic sitting in a wooden chair. She was about to get up from the chair, when the back of the chair broke and she fell to the ground. As a result, she felt pain in her lower back. She reached into the cupboard for the gauze. On sitting up the chair back broke. The important change was the fact that she did not actually fall but broke the fall with her hand. She felt pain in her “left shoulder” as opposed to her “lower back.

[26] The Court further asserted that the proposed amendment affected whether the claimant fell from the chair and where she felt pain, with added particulars pertaining to what she did while sitting in the chair. The court found that there was no evidence before it which suggested that the claimant could not satisfy the costs order to be made considering the amendment. The Master therefore granted permission for the claimant to amend its Statement of Case and made the following statement at **paras. 104-105**:

“I am not persuaded that an order for costs will not be an adequate remedy to compensate the Respondent. I am not satisfied that the Respondent will suffer any injustice. The likelihood of having to pay a higher award is not a sufficient reason to justify refusal of the application.

The matter must be dealt with justly. This requirement will be satisfied if the Applicant is allowed to amend her Claim Form and Statement of Claim”.

[27] The case of **Salon Professionals Ltd v Browne et Al BB 2017 HC 19** is instructive and made clear its position regarding amendments where the cause of action had not been altered in a significant manner. Before finding that the amendment in this case could not be considered a late amendment and that the Defendant had not demonstrated that the amendment substantially altered the case it had to meet, the court at **para.20** suggested:

“The Court's discretion notwithstanding, “the normal rule is that the applicant should pay the costs of the application to amend (**Lidl UK GmbH v. Davies [2008] EWCA Civ**

976, LTL 101712008).” See **Blackstone's Civil Procedure 2011. Chapter 31.5.**”

[28] The Court relied heavily upon the commentary found in **Blackstone's** at **para. 66.31** and reproduced its contents at **paras. 22-23** of the judgment:

“The Beoco Ltd. case ... has been described as a case which demonstrates the consequences in costs of a late application to amend a statement of claim.

The following commentary on the case is instructive therefore I consider it appropriate to include it here.

“...[I]f permission is sought at a very late stage to make amendments having a fundamental effect on the way the case is set out, particularly where the other side is prejudiced, such as by being unable to make an effective Part 36 offer to settle, the court may impose very stringent costs terms when granting permission to amend. Thus, **in Beoco Ltd. v. Alfa Laval Co. Ltd. [1998] OB 137** permission to amend was granted on terms that the claimant paid the defendant's costs up to the date of amendment, and 85% of the defendant's costs thereafter. Such a penal approach is not always correct.”

“Material change in successful party's case. When the basis of a party's case is changed, that party usually has to amend their statement of case, which usually results in an order that they pay the costs of and occasioned by the amendment. Sometimes the court goes further and makes an order for costs covering all or part of the proceedings (**Beoco Ltd. v. Alfa Laval Co. Ltd. [1995] OB 137**). It is a frequent occurrence that the case that emerges at trial is not the same as that set out in the statement of case. It is a question of degree whether this will require the statement of case to be amended, and in practice it is only substantial changes which justify such a course. Likewise, it is a question of degree whether any difference between the pleaded case and the facts as they emerge at trial justify departing from the general rule that costs follow the event. It is wrong to depart from the general rule where any differences are small. **Calli Luton and Dunstable**

NHS Trust [2005] EWCA Civ 551, LTL 2714/2005). Where the differences are material and particularly where the losing party may have been misled, it would be appropriate to deprive the successful party of some or all of their costs.” **Blackstone's Civil Procedure, 2011. Chapter 66.7**”.

[29] In the case at bar, the bulk of the authorities cited above highlights a clear position which runs like a golden thread throughout the decisions. This golden thread is that the courts have been furnished with a discretion to permit amendments at the case management level and beyond, where an application is made to the court, but in circumstances where a ‘costs order’ is the appropriate penalty for lateness and for any inconvenience caused to the Defendant. The authorities also appear to suggest that there can be no real prejudice or unfairness caused to the Defendant if an amendment is allowed and an order for costs is an adequate remedy.

Pleading fraud?

[30] Counsel for the Defendant asserted that the changes proposed are radical in nature and include two new causes of action: fraud and negligent misrepresentation which were not particularised as required by law and are serious allegations requiring support. Counsel cited the case of **Hague Plant Ltd. v Hague [2014] EWCA Civ 1609** to the effect that all proposed amendments must comply with the rules of drafting and pleading.

[31] Counsel for the Defendant further pointed out that the Claimant has not sought leave to introduce the new causes of fraudulent misrepresentation and negligent misrepresentation in accordance with the provisions of the **Limitation of Actions Act**. Counsel further posited the view that the effect of the Claimant’s application will be to deprive the Defendant of the limitation defence.

[32] In **Three Rivers District Council v Governor and Company of the Bank of England (No 3) [2001] UKHL 16 Lord Millett** identified two overarching principles re. pleading fraud, as follows:

1. The pleading must give a party sufficient notice of the case being made against it, and consequently, in the case of a fraud claim, it may not be sufficient to say “wilfully” or “recklessly”.
2. An allegation of fraud or dishonesty must be sufficiently particularised; and therefore, in the case of dishonesty, it is necessary to plead the facts which will be relied upon at trial to justify inferences of dishonesty.

[33] In **McEneaney and others v Ulster Bank Ireland Ltd and others [2015] EWHC 3173 (Comm)** the court reminded practitioners that pleadings, especially those alleging fraud, need to be clear and specific. This includes identifying the relevant causes of action and relief claimed. Furthermore, if

the claimant wishes to plead negligence (in the alternative to fraud), then fraud must be pleaded first, clearly and separately from the plea of negligence.

[34] In **JSC Bank of Moscow v Kekhman and others [2015] EWHC 3073 (Comm)** it was held that there is no need for the particulars pleaded to be consistent *only* with the defendant's dishonesty. The correct test is whether, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence.

Pleading dishonesty against a corporate body

[35] In **Sofer v Swissindependent Trustees SA [2020] EWCA Civ 699**, the Court of Appeal was faced with an appeal against the striking out of a breach of trust claim. The claim was brought by the son of a deceased millionaire who had established a number of trusts for the benefit of himself, and his children and grandchildren. The trustee, Swissindependent Trustees SA (the "**Trustee**"), had paid large sums to the late Mr. Sofer prior to his death out of the trusts as loans with no repayment terms.

- Clause M1(1) of the relevant trust provided that the Trustee "**must not pay convey or transfer any part of the corpus of the Trust to any Beneficiary for any purpose prior to the date of death of Hyman Sofer**".
- Clause D3(3) of the relevant trust stated that the Trustee had power to "**lend any money forming the whole or any part of the assets of this Trust to any person who may for the time being, be a Beneficiary**

upon such terms as to repayment and interest or interest free as the Trustees may in their absolute discretion think fit”.

[36] The loans were never repaid, and the claimant alleged that the Trustee knew that it was acting wrongly (i.e. in breach of trust) when making the payments (which were in truth, gifts) and never believed that they were loans. The claimant applied to amend his Particulars of Claim. The judge at first instance had said of the Particulars:

“... version A does not give any sufficient particulars of the allegation of deliberate breach of trust. Such a breach requires knowledge, and the pleading rules require particulars of knowledge to be given. These must include which individuals with the defendant are alleged to have known, which terms of the trust are alleged to have been breached, and in respect of which payments made by the defendant”.

“The strike out application was made on the basis that the relevant trust deed contained a “trustee exoneration clause” which provided a complete answer to the claim, in circumstances where the Particulars of Claim contained no properly pleaded allegation of dishonesty”.

[37] The Court of Appeal held that this criticism was equally applicable to the claimant’s amended Particulars. Counsel for the claimant submitted that the Judge was wrong to hold that it was mandatory for particulars of claim to identify at the outset the individuals whom the claimant alleged to have had the relevant knowledge at the relevant time, and that it was permissible for a

claimant to provide such particulars subsequently, in an appropriate case following disclosure.

[38] The Court of Appeal agreed stating that:

“[I] do not doubt that, where an allegation of dishonesty is made against a body corporate, it is necessary to plead the relevant state of knowledge of that body at the relevant time. I do not accept, however, that a mere failure to identify at the outset the directors, officers or employees who had that knowledge means that such an allegation is liable to be struck out without further ado. Clearly such particulars should be given as soon as is feasible, and there may be situations in which the claimant’s unwillingness or inability to give such particulars when requested to do so justifies striking out; but that is another matter”.

[39] The authorities are compelling even though persuasive. I hold that the information provided by Mr. Forde Q.C. indicating the nature of the causes of action are adequate to put the Defendant on notice to defend the new causes of action. In addition, this court has noted in some of its written Decisions **(CV 355 of 2016- Charles Hoad v Peter Hunte (unreported October 29, 2020); CV 1031 of 2013-Beverley Nicholls and Ralph Thorne v Jacqueline Bartlett and Others (unreported November 12, 2021)** that it will observe the principles of the overriding objectives and the authorities in support and allow parties, in appropriate cases to correct defects in pleadings rather than use ‘the nuclear’ option to strike out.

Prejudice/injustice to the opposing party

- [40] The Court must also consider the overriding objectives of the **CPR**, particularly at **Rule 1.1(1)**, that states the Court must deal with matters justly and in so doing must ensure that no prejudice accrues to the rights of either party.
- [41] Counsel for the Defendant has averred that it will be deprived of the limitation defence if the amendment is allowed. He relied on **para. 31.21** of **Blackstone's Civil Practice, 2016** which states that such amendments are not generally permitted since the Defendant will suffer prejudice not compensated by an order for costs.
- [42] The Court in **Gillian, supra**, noted at **para. 92** that in **Gabriel v. Haywood [2004] EWHC 2363 (TCC)**, (“**Gabriel v. Haywood**”) the Court found that the Defendant was deprived of a limitation defence and could not be compensated in costs. **Judge Richard Havery, QC** took the position that justice was the paramount consideration. The fact that the Defendant could not be compensated in costs was said to be the lesser evil. However, the amendment was allowed because it was required in the interest of justice and the court later found that there was no abuse of process.

[43] The Court in **Salon, supra**, at **para. 27** stated that prejudice resulting from an amendment of a statement of claim is usually discussed within the context of injustice, and there is no injustice if the other side can be compensated in costs. In this regard, relevant express prejudice is required. (See **Blackstone's Civil Practice 2011. Chapter 31.4**).

[44] **Chandler J.** in **Macdonald Farms Ltd., Supra**, at **para.123** made the following remarks regarding the Defendant's assertion that it suffered severe prejudice:

“...the Court is not satisfied that the amendments would cause “serious injustice and severe prejudice” to the defendant. No evidence has been adduced of any such prejudice or injustice and making a bare allegation without showing any evidence of it is far from sufficient. Evidence of prejudice is required. Moreover, the Court is of the view that any likely prejudice or injustice can be remedied by giving leave to the defendant to amend its Defence within a reasonable period of time after service of the Amended Statement of Claim”.

[45] His Lordship went further to clear the air regarding the instance where the Defendant could not prove prejudice but where it believed that the information regarding the amendment was unavailable or uncertain. The Court said at **para.124**:

“Counsel for the Defendant justified the absence of evidence by alleging that he could not provide any evidence of the difficulties likely to be faced because of

the proposed amendments, as the defendant had not received the particulars of the allegations and could not, therefore, say whether the evidence required to answer it remained available. To my mind, **this is not persuasive; it is merely speculative**". [Emphasis mine].

[46] The Court in **Macdonald Farm Ltd., supra**, before granting the Plaintiffs leave to amend their Statement of Claim, made an observation at **para.125** regarding the alleged prejudice to the Defendant:

"The existing claim remains to be resolved. The defendant will still need to call evidence in its defence of that claim. There is no reason why in its defence, the defendant cannot (or will not be able to) answer both the existing claim and the amended claim at the same time. In these circumstances, the Court is not persuaded that granting leave to amend as proposed would be unjust and prejudicial to the interests of justice and therefore grants leave to the plaintiffs to amend the Statement of Claim filed in this matter".

[47] In the current case, I am not persuaded that there will be prejudice or harm vis a vis the case which the Defendant has to meet. The Defendant has not satisfied me that there is the likelihood of prejudice to its case if the amendment is granted. Taken at its highest, it seems to me that inconvenience in preparing and defending the new causes of action would be their paramount consideration. They have alleged that the proposed amendment seeks to reveal information which is not really 'new' but was already known to the parties. If this is the case, then there can be no harm caused to the case which the

Defendant has to meet. As mentioned earlier, there is no proof of any injustice to the Defendant which cannot be cured by a simple order of the Court requiring that costs be paid by the Claimant for the expense and delay which an amendment may cause. The question whether the Defendant will be deprived of its limitation defence which cannot be compensated by costs will be considered later but respectfully, I prefer to adopt the reasoning of the court in **Gabriel v. Haywood**. When the identical argument was advanced, it allowed the amendment and reasoned that justice was the paramount consideration.

[48] The Defendant will now be required to amend its defence to appropriately respond to the new evidence being introduced via the proposed amendment. It is unlikely that there will be a higher award of damages as this is a matter of an alleged breach of contract for a specified sum of money and consequently, there will be little or no prospect of injustice in that regard.

[49] I therefore hold that the Claimant ought to be allowed to amend its Statement of Claim for the reasons which it advanced. Such information may or may not be crucial to the adjudication of this matter and the court should be allowed the privilege of examining of all the facts and any new information which could aid in adjudicating this matter.

Amendments following the Limitation period

[50] **Rule 20.2 (1) & (2)** provide clarity in situations where the limitation period has passed and applications to change the statement of case are to be considered. The Rule states that:

- 20.2 (1) This rule applies to a change in a statement of case after the end of a relevant period of limitation.
- (2) The court may allow an amendment, the effect of which will be to add or substitute a new claim, if the new claim arises out of the same or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings. (my emphasis).

[51] **Section 57** of the **Limitation of Actions Act** governs the court's approach to amendments sought where the limitation period for the bringing of the new claim has expired. **Section 57(5) & (6) (a)** provide as follows:

- (5) Rules of court may provide for allowing a new claim to which subsections (3) and (4) apply to be made as therein mentioned, but if only if the conditions specified in subsection (6) are satisfied and subject to any further restrictions imposed by the rules.
- (6) The conditions referred to in subsection (5) are the following:

- (a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue or any claim previously made in the original action; ...

[52] Counsel for the Claimant argued that a perusal of the proposed amendment discloses that the allegations contained in paragraphs 6, 7 and 13 do no more than amplify paragraph 5 of the Statement of Claim and set out the real issue in dispute. Further, that **Part 20.2** of the **CPR** authorizes the Court to amend in these circumstances as the matters are merely evidential and there can be no good reason for not granting the amendment. Counsel argued that **Part 20.2** of the **CPR** authorizes the Court to amend in these circumstances as the matters are merely evidential and there can be no good reason for not granting the amendment.

[53] **Chandler J.** in **Macdonald Farms Ltd, supra**, also reiterated the position of the Court regarding amendments following the expiration of the limitation period at **para.112**:

“The Court has a broad discretion to grant amendments after the expiry of a relevant limitation period. However, in exercising this discretion the Court must, according to the Court of Appeal in **Manufacturers Life** consider and determine the following three issues:

- “(i) Will the effect of the amendment be to add or substitute a new cause of action?

- (ii) If the answer to (i) is “yes”, does the new cause of action arise out of the same or substantially the same facts as are already in issue on the claim previously made in the original action?
- (iii) If the answer to (ii) is “yes”, does the Court nevertheless think it just in the circumstances mentioned in (ii) to grant leave to make the amendment?”

[54] The Court in **MacDonald Farms Ltd., supra**, in the end granted the Plaintiffs leave to amend their Statement of Claim but noted that additional facts were pleaded; but these facts were so closely connected to those pleaded in the original claim, that their addition does not substantially transform the claim into one of a wholly different nature.

[55] In the current matter, Counsel for the Claimant admitted that the proposed amendment will introduce new causes of action that will require the Defendant to answer. Additionally, the Claimant’s proposed amendment seeks to correct numerous erroneous dates as previously stated in the original pleadings which help to clarify the information before the Court thereby enhancing the adjudication of this matter. The Claimant further seeks to add evidence stemming from Mr. Nixon to the effect that he would not have completed the purchase until the commission payment had been resolved.

[56] Since the new causes of action result from the same or substantially the same pleaded facts as stipulated in **section 57(6) of the Limitation of Actions Act**,

along with the authorities, they are permissible. Having so satisfied myself, following the staged approach identified by **Chandler J in Merchandani, supra**, I think it just and reasonable in the circumstances to permit the amendment.

Can the Affidavit be filed after the 14-day deadline?

[57] The Claimant filed an application seeking the Court's permission to file an affidavit which should have been filed some fourteen (14) days following an Order made on February 19, 2020. **Part 26.1 (b)** of the **Supreme Court (Civil Procedure) Rules, 2008** provides guidance on the Court's general powers under Case Management and the scope of the Court's power to make Orders of its own initiative. By virtue of **Rule 26.1(2)(b)**:

- 26.1 (1) The list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or by any enactment.
- (2) Except where these Rules provide otherwise, the court may:
 - ...
 - (b) extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed
 - ...

[58] In the case at bar, the Claimant filed an application seeking the court's permission to file an Affidavit which ought to have been filed some fourteen (14) days following an Order made on the 19th day of February 2020.

[59] Unlike the case of **Gillian, supra**, where the Applicant sought permission almost one (1) year later on the 9th day of January 2019 to file an Application in compliance with an Order made on March 2018; the Claimant in the current matter was only tardy by some five (5) months which is not detrimental at this stage.

[60] Moreover, it is only fair and just that this matter be propelled in the direction of the Overriding Objective and in doing so, this Court holds firm to the belief that the Claimant ought to be permitted an opportunity to file the Affidavit in support of its claim.

[61] Therefore, the Court grants an extension of time for the Claimant to file its Affidavit.

Disposal

[62] It is ordered as follows:

- i. The Claimant is granted leave to amend the Statement of Claim filed on the 27th day of March 2012 in accordance with the Draft amended Statement of Claim.
- ii. The amended Statement of Claim is to be filed and served within fourteen (14) days of the date of this decision.

- iii. The amended Defence is to be filed and served within twenty-eight (28) days of the receipt of the Amended Statement of Claim.
- iv. The Claimant to file a Reply to the Amended Defence, if necessary, within fourteen (14) day of receiving the Amended Defence.
- v. The Claimant is hereby granted an extension of time to comply with the Order made on the 14th day of February 2020 and file the affidavit within fourteen (14) days of the date of this judgment
- vi. The Claimant shall pay to the Defendant the costs of and occasioned by this Application, to be assessed if not agreed.

BARRY L. CARRINGTON
Judge of the High Court