EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

GRENADA

GDAHCVAP2014/0007

BETWEEN:

[1] GEORGE ALLERT
(Administrator of the Estate of
George Gordon Matheson, deceased)
[2] GEORGE ALLERT
[3] EDMUND ALLERT
[4] ANTHONY ALLERT
[5] MARY GLENNIE ALLERT
[6] PEARL ALLERT

Appellants

and

[1] JOSHUA MATHESON
[2] MADELINE MATHESON

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Louise Esther Blenman	Justice of Appeal

On written submissions:

Mr. Alban M. John for the appellants
Ms. Kindra B. Maturine-Stewart for the respondents

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2014: November 24.

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Civil appeal – Interlocutory appeal – Amendment to statement of case after the first date fixed for the case management conference without leave of the court – Application to strike out – Appeal against judge's case management discretion – Whether the learned judge erred in the exercise of the case management discretion in refusing to strike out an amended defence and counterclaim – Rules 20.1 and 20.2 of the Civil Procedure 2000

The appellants ("the Allerts"), filed a claim against the respondents ("the Mathesons"), for possession of certain property they allege that their grandfather, Mr. George Matheson,

had paper title to since 1938. The Allerts claim that the property was devised to their mother, and after her death, her husband, Mr. Prince Allert, gave Mr. Joshua Matheson's father, Mr. Herbert Matheson, permission to occupy the property.

On 20th July 2012, the first respondent, Mr. Joshua Matheson, filed a defence and counterclaim and at paragraph 12 pleaded that Mr. Herbert Matheson's possession was not based on prescription either against the Allerts or their deceased mother but rather that his possession was based on the purchase of the property from the Allerts' father. On 18th September 2012, the Mathesons filed a reply to the defence and counterclaim disputing the legality of the purported claim and also indicated that since Mr. Joshua Matheson was not relying on adverse possession or prescriptive title, he would be estopped from so doing.

On 15th November 2012, Mr. Joshua Matheson filed an amended defence and counterclaim in which he deleted the last sentence of paragraph 12 of the defence and counterclaim, namely, that Mr. Herbert Matheson's ownership of the property is not based on any prescription against the Allerts or their mother.

The first hearing of the claim was fixed by the court for 30th July 2012; however, on that day it was adjourned to 26th November 2012. On 30th July 2012, Mr. Joshua Matheson had also filed an application to have his mother, Mrs. Madeline Matheson, joined as a defendant in her capacity as the representative of Mr. Herbert Matheson. The application was heard by the learned judge on 15th November 2012 and she ordered, inter alia, that Mrs. Matheson be joined as a defendant and that the Allerts file a re-amended defence and counterclaim by 28th November 2012 to reflect the joinder of Mrs. Matheson. Pursuant to the order, the Mathesons filed a further amended defence and counterclaim which maintained the deletion of the last sentence of paragraph 12 of the defence and counterclaim.

The Allerts were aggrieved by this development in the proceedings and on 30th November 2012 filed an application to strike out the amendment to the defence and counterclaim, which amendment was also repeated in the further amended defence and counterclaim. The application was refused by the learned judge. The Allerts subsequently applied to the court for leave to appeal the learned judge's decision and for a stay of proceedings, both of which were granted. This is an appeal against the decision.

Held: dismissing the appeal against the learned judge's decision and ordering that the Mathesons are to have two-thirds of the costs awarded in the court below, that:

1. The appellate court will only interfere with the exercise of a judge's discretion if it is satisfied that the judge either erred in principle in his or her approach, or has left out of account or taken into account some aspect that he or she should or should not have considered and as a result the decision exceeded the generous ambit within which reasonable disagreement is possible or the decision is wholly wrong. The learned judge in the court below failed to take into account all of the relevant factors in deciding whether or not to strike out the amendment to the Mathesons'

defence and counterclaim. Accordingly, this Court will exercise its discretion afresh taking into account the relevant factors.

Tafern Ltd v Cameron-McDonald and Another (Practice Note) [2000] 1 WLR 1311 applied; Dufour and other v Helenair and other (1996) 52 WIR 188 followed; Enzo Addari v Edy Gay Addari, Territory of the Virgin Islands, BVIHCVAP2005/0001 (delivered 23rd September 2005, unreported) followed; AEI Rediffusion Music Ltd v Phonographic Performance Ltd [1999] 1 WLR 1507 applied; Stuart v Goldberg Linde (a firm) and another [2008] EWCA Civ 2 applied; Charles Osten and Company v Johnson [1942] AC 130 applied; Bellenden (formerly Satterthwaite) v Satterthwaite [1948] 1 All ER 343 applied.

2. There are several factors that the court must take into consideration when deciding whether to exercise its discretion to amend a statement of case. These factors include: the justice to the parties; the legitimate expectation that the basis of a claim will not be fundamentally changed at the last minute; the adverse effect on other litigants of lost judicial time; the stage reached in the proceedings; whether the other side can be adequately compensated in costs; and whether the amendment will serve any useful purpose.

   Ketteman and others v Hansel Properties Ltd [1988] 1 All ER 38 applied; Practice Direction 20(4) No. 5 of 2011 applied.

3. The court should be guided by the principle that amendments to a statement of case should be allowed which are necessary to ensure that the real issues which are in dispute between the parties are determined, provided that such amendments can be made without there being injustice to the other party and that the other party can be compensated in costs. In this appeal, considering all the factors, the Allerts would not suffer any injustice which cannot be adequately compensated in costs. As a result, although the learned judge did not take all of the relevant factors into consideration in the exercise of her discretion, this Court, having taken all of the relevant factors into consideration and on a proper exercise of the discretion, reached the same conclusion as the learned judge.

   Clarapede & Co v Commercial Union Association (1883) 32 WR 262 applied; Charlesworth v Relay Roads Ltd and others [2000] 1 WLR 230 applied; Easton v Ford Motor Co Ltd [1993] 1 WLR 1511 applied; Ketteman and others v Hansel Properties Ltd [1988] 1 All ER 38 distinguished.

4. The court has a discretion whether to strike out a statement of case for noncompliance with a rule, direction or order, however, it must also consider whether there are other appropriate remedies available to it which are more proportionate. Therefore, the court may, pursuant to its general case management powers under CPR 26.1, take any other step, give any other direction, or make any other order for the purpose of managing the case and furthering the overriding objective to deal with cases justly. The decision of the

learned judge in the court below to refuse to strike out the amended defence and counterclaim and instead impose a sanction of costs against the Mathesons was appropriate and proportionate in all of the circumstances of the case.

Rule 26.1(2)(w) of the Civil Procedure Rules 2000 applied; Real Time Systems Limited v Renraw Investments Ltd CCAM and Company Limited, Austin Jack Warner 2014 UKPC 6 applied; Citco Global Custody NV v Y2K Finance Inc, Territory of the Virgin Islands, BVIHCVAP2008/0022 (delivered 19th October 2009, unreported) followed.

JUDGMENT

[1] BLENMAN JA: This is an interlocutory appeal against an order of the judge in the court below in which she refused to grant an application to, among other things, strike out the amended defence and counterclaim which contains the deletion of the last sentence of paragraph 12 of the defence and counterclaim, which sentence was also deleted in paragraph 12 of the further amended defence and counterclaim.

[2] Indeed, by order dated 23rd May 2013 the judge ordered that:

(1) the defendants' further amended defence and counterclaim is not struck out; and

(2) the defendants to pay the claimant's costs of the application in the sum of $750.00.

[3] The appellants ("the Allerts"), are dissatisfied with the order and applied to the judge for a stay and for leave to appeal, both of which were granted. They are now before this Court.

[4] The respondents ("the Mathesons"), vigorously oppose the appeal and contend that the trial judge acted quite properly in refusing to strike out their amended defence and counterclaim.

Grounds of Appeal

[5] The Allerts have filed several grounds of appeal. The grounds can be conveniently crystallised as follows:

(a) Whether the judge erred in the exercise of her discretion not to strike out the amended defence and counterclaim in which the respondents deleted the last sentence of paragraph 12 of the amended defence and counterclaim as well as the further amended defence and counterclaim.

(b) Alternatively, whether the judge was plainly wrong, in the exercise of her discretion.

Background

[6] The Allerts' claim against the Mathesons is for possession of certain property. They claim that their grandfather, Mr. George Matheson, had paper title to the property since 1938 and that he devised the property to their mother, Ms. Madonna Allert and after her death, her husband, Mr. Prince Allert, gave Mr. Joshua Matheson's father, Mr. Herbert Matheson, permission to occupy the property. The Allerts contend that since Mr. Hebert Matheson was a licensee he could not give the property to his widow by deed or otherwise, which eventually was purportedly passed on to the Mathesons.

[7] The Allerts therefore sought, among other things, a declaration that Mr. Herbert Matheson was a licensee of the property and was never in adverse possession. More importantly, they sought an order for possession of the property.

[8] The first respondent, Mr. Joshua Matheson, at paragraph 12 in his defence and counterclaim which was filed on 20th July 2012, pleaded that Mr. Herbert Matheson's possession was not based on prescription either against the Allerts or their mother. Instead, he averred that his possession was based on a purchase of the property from the Allerts' father. On 18th September 2012 the Allerts filed a reply to the defence and counterclaim and took issue with the legality of the

purported sale. They also indicated that since Mr. Joshua Matheson had stated in the defence and counterclaim that he was not relying on adverse possession or prescriptive title that he would therefore have been estopped from doing so. They indicated that Mr. Joshua Matheson will be prevented from relying on the Limitation of Actions Act[1] in support of his defence and counterclaim.

[9] On 15th November 2012, Mr. Joshua Matheson filed an amended defence and counterclaim in which he deleted the averment contained in the last sentence of paragraph 12 , namely, that Mr. Herbert Matheson's ownership of the property is not based on any prescription as against the Allerts or their deceased mother. The effect of this was to reintroduce the defence of prescription which was abandoned in the defence and counterclaim.

[10] However, prior to the above date, on 30th July 2012, Mr. Joshua Matheson had filed an application to have his mother Mrs. Madeline Matheson joined in the claim as a defendant in her capacity as the personal representative of the estate of Herbert Matheson. The judge heard both sides on the application and on 15th November 2012 made the following orders:

> "(ii) That Madeline Matheson as the Personal Representative of the Estate of Herbert Matheson, deceased, be and is hereby joined as a Defendant in this claim.
>
> (i) The Defendant is to file and serve a re-amended Defence and Counterclaim to reflect the join[d]er of the Defendant Madeline Matheson on or before 28th, November 2012.
>
> (ii) The Claimants to file and serve an amended reply and defence to counterclaim on or before 11th December, 2012.
>
> (iii) The case management conference schedule for 26th November, 2012 is hereby vacated.
>
> (iv) Case management conference is adjourned to 24th January, 2013."

[11] On 28th November 2012, Mr. Joshua Matheson filed a further amended defence and counterclaim pursuant to the order of court dated 15th November 2012 in

[1] Cap. 173 of the Revised Laws of Grenada 2010.

which Mrs. Madeline Matheson was joined as a second defendant to the claim. Importantly, paragraph 12 reflected the deleted sentence that Herbert Matheson's ownership of the said property is not based on any prescription as against the claimants or their deceased mother. The effect of that deletion in paragraph 12 of the amended defence and counterclaim and the further amended defence and counterclaim is to permit the Mathesons to now assert adverse possession or prescription.

[12] The Allerts were aggrieved by this new development and on 30th November 2012, they filed an application in which they sought the following orders:

(a) that the amendment to the defence and counterclaim which was repeated in the further amended defence and counterclaim be struck out as being contrary to law, the rules of court and as an abuse of process of the court, likely to obstruct the just disposal of the proceedings;

(b) that the Mathesons be ordered to restore the original pleading in paragraph 12 of the defence and counterclaim; and

(c) that the Mathesons do pay the costs of the application.

[13] The judge refused to accede to their request. As alluded to earlier, the Allerts applied to the judge for a stay of the judge's order and for leave to appeal against her order in which she refused to strike out the amended defence and counterclaim, the effect of which was to reinstate the last sentence of paragraph 12 of the further amended defence and counterclaim.

The Judgment

[14] It is regrettable that neither a judgment nor written reasons for the judge's decision were provided to this Court. Neither does it appear that the Allerts sought to obtain a written note of the judge's oral reasons on the strike out application. Fortunately, on the application for leave to appeal and for a stay, the judge has written a judgment and has sought to indicate the oral reasons that were given in

relation to the application to strike out. In addition, the judge in the written judgment went on to expand on the reasons for her decision not to strike out the paragraphs in the amended defence and counterclaim.

[15] Indeed, in the judgment delivered on 13th February 2014, in relation to the application for leave and the stay, the judge had this to say at paragraph 1:

> "In the May 2013 order the Court refused the Claimants application to strike out the Defendants' Amended Defence and Counterclaim ("the Claimants application to strike out"). The reasons provided by the Court in refusing the Claimants application to strike out were: the Court accepted the Defendants submission that the amendment was a genuine mistake and there were no mala fides intended; at the Case Management Conference ("the CMC") the role of the Court is to narrow the issues between the parties and it was more prejudicial to the Defendants not to permit them to rely on a defence which they had originally intended to rely on since any prejudice to the Claimants can be compensated in costs."

[16] At paragraph 8 of the judgment, the judge indicated that in the oral reasons for the court dismissing the application to strike out, the reasons that were given were that there was no mala fides and the court was merely carrying out its case management functions.

[17] Further, the judge at paragraph 12 of the judgment on the leave to appeal and stay application, stated that the court has the discretion pursuant to rule 20.1 of the Civil Procedure Rules 2000 ("CPR 2000") to allow a party to amend its pleading once without the court's permission at any time prior to the date fixed by the court for the first case management conference and empowers the court to give permission to amend a statement of case at a case management conference or at any time on an application to the court. However, it fetters the court's discretion in granting permission to amend where the changes to the statement of case comes 'after the end of the relevant period'.

[18] In paragraph 13 of the written judgment on the leave application, the court stated as follows:

> "[13] While this was an issue addressed by both parties at the hearing of the instant application it was not one of the reasons set out in

> the Court's oral ruling for dismissing the claimant's application to strike out. At the time of the filing of the Amended Defence and Counterclaim on 15th November 2012, although the first CMC had come up for hearing on 30th July 2012, Case Management had not taken place since the Claimants indicated they wished to file a Reply and Defence to Counterclaim and the CMC was adjourned to 26th November 2012. The rules allow a party to amend without leave of the Court once the CMC had not taken place and in any event in the instant case the Defendants sought leave of the Court to affirm the amended Defence and Counterclaim."

[19] By way of comment, even though the judge has quite candidly indicated that she did not give the reasons that are quoted in paragraph 13 above as part of the basis for the order not to strike out, nevertheless, these reasons may be of some relevance to the appeal at bar.

Appellants' Submissions

[20] Learned counsel for the Allerts, Mr. John, submitted that the Allerts had pleaded their case quite clearly in the statement of case. They had indicated that the Mathesons were not able to prescribe against their interests. The Mathesons at paragraph 12 of their defence and counterclaim had replied to that plea indicating that they were not relying on prescription in order to assert their interests in the property. However, the Matheson's posited that their legal interest arose as a consequence of the purchase of the property. Mr. John complained that it was only when the Allerts, in their reply to the defence and counterclaim, stated that the purported purchase of the property was unlawful or illegal, that the Mathesons, without first obtaining the leave of the court, resiled from their original position. Indeed, it was in their amended defence and counterclaim that they sought to delete the last sentence that was stated in paragraph 12, which had the effect of reintroducing the defence of prescription. Learned counsel Mr. John submitted that this was impermissible.

[21] Learned counsel Mr. John reminded the Court that 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 and in this regard he

referred to CPR 20.1 as amended. Mr. John complained that the Mathesons, in purporting to amend their defence and counterclaim without first obtaining leave from the court, acted unlawfully. He accepted that 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 in accordance with CPR 20.1(2) as amended.

[22] Mr. John also referred the Court to CPR 20.2 as amended, which provides that a statement of case cannot be changed after the end of a relevant limitation period except with the permission of the court.

[23] Mr. John acknowledged that the issue of whether or not to allow an amendment is in the judge's discretion and should not be interfered with unless the appellate Court is satisfied that the judge applied the wrong principle or reached a conclusion that would work a manifest injustice between the parties. He argued that the trial judge was wrong to allow the amendment to restore the pleading that was abandoned by the Mathesons and complained that the effect of this would be to potentially bar the Allerts' claim. He argued that the trial judge exercised her discretion wrongly in not ordering struck the amended defence and counterclaim and the reinstatement of the relevant words in paragraph 12 of the defence and counterclaim; in doing so a grave injustice was done to the Allerts for which they cannot be compensated in costs.

[24] Learned counsel, Mr. John, referred the Court to Steward v North Metropolitan Tramways Company[2] in which Lord Esher MR said:

> "The rule was thus laid down in *Tildesley* v. *Harper* (1) [*10 Ch. D. 393*] by Lord Bramwell, who there says: "My practice has always been to give leave to amend, unless I have been satisfied that the party applying was acting malâ fide, or that by his blunder he had done some injury to his opponent which could not be compensated for by costs or otherwise … The subject was again discussed in *Clarapede* v. *Commercial Union Association* (2) [*32 W. R. 262*], where I stated the rule in terms substantially equivalent to those used by Lord Bramwell. I there said, "The rule of conduct of the Court in such a case is that, however negligent or careless may have been the first omission, and however late the proposed

[2] [1886] 16 QB 556 at p. 558.

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 by costs: but, if the amendment will put them into such a position that they must be injured, it ought not to be made.""

[25] In further support of his position Mr. John referred the court to Svend Henning Berg v Glentworth Bulb Co. Ltd.[3] in which Ralph Gibson LJ cited Lord Griffiths in Ketteman and Other v Hansel Properties Ltd.[4] that:

> "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 on 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 … ".
>
> …
>
> "A defence of limitation permits a defendant to raise a procedural bar which prevents the plaintiff from pursuing the action against him. It has nothing to do with the merits of the claim, which may all lie with the plaintiff; but as a matter of public policy Parliament has provided that a defendant should have the opportunity to avoid meeting a stale claim. The choice lies with the defendant and if he wishes to avail himself of the statutory defence if must be pleaded. A defendant does not invariably wish to rely on a defence of limitation and may prefer to contest the issue on the merits. If, therefore, no plea of limitation is raised in the defence the plaintiff is entitled to assume that the defendant does not wish to rely on a time-bar but prefers the court to adjudicate on the issues raised in the dispute between the parties.
>
> …
>
> "If a defendant decides not to plead a limitation defence and to fight the case on the merits he should not be permitted to fall back on a plea of limitation as a second line of defence at the end of the trial when it is apparent that he is likely to lose on the merits. Equally, in my view, if a defence of limitation is not pleaded because the defendant's lawyers have overlooked the defence the defendant should ordinarily expect to bear the consequences of that carelessness and look to his lawyers for compensation if he is so minded."

[3] 1988 WLR 1599291 at pp. 23 – 24.
[4] [1988] 1AER 38.

[26] Mr. John complained that the learned trial judge ought to have taken into account the fact that if the amendment was permitted it would serve to allow the Mathesons to restore the position they had abandoned and if that did not amount to bad faith, at the very least, it would also cause much injury to the Allerts' case. He contended that the trial judge exercised her discretion improperly.

Respondents' Submissions

[27] Learned counsel for the Mathesons, Mrs. Maturine-Stewart, agreed that the defence and counterclaim was filed on 20th July 2012. She stated that at paragraph 12, the Mathesons had incorrectly pleaded that Mr. Herbert Matheson's ownership of the property was not based on prescription. This was an error. She reminded the Court that the date that was fixed for the first case management conference was 30th July 2012. However, on that date the case management conference was adjourned to 26th November 2012. On 15th November 2012, the Mathesons filed the amended defence and counterclaim in which they deleted the offending sentence from paragraph 12 of the defence and counterclaim that Herbert Matheson's ownership was not based on prescription. Mrs. Maturine-Stewart submitted that the Mathesons, by the amendment, were withdrawing an admission that was erroneously made. There was no mala fides on their part.

[28] Mrs. Maturine-Stewart reminded the Court that on 30th July 2012 Mr. Joshua Matheson had filed an application to add Mrs. Madeline Matheson as the second defendant. The application was heard on 15th November 2012, by which time the Mathesons had filed the amended defence and counterclaim in which they had deleted the sentence from paragraph 12.

[29] Mrs. Maturine-Stewart reminded the Court that by the order dated 15th November 2012 the judge ordered that Mrs. Madeline Matheson be joined as a defendant in her representative capacity. Importantly, she ordered the defendant to file and serve a re-amended defence and counterclaim to reflect the joinder on or before 28th November 2012. Pursuant to the order, on 28th November 2012, the Mathesons filed a re-amended defence and counterclaim and served it on the

Allerts the same day. It is noteworthy that the order of 15th November 2012 has not been appealed and therefore, argued Mrs. Maturine-Stewart, it is still valid. Mrs. Maturine-Stewart posited that, in granting that order, the court would have taken cognisance of the amendment to paragraph 12 and thereby affirmed the amendment which was contained in the amended defence and counterclaim. As a consequence, the Allerts filed the application to strike out the deletions from paragraph 12 of the defence and counterclaim and the court declined to do so.

[30] Learned counsel, Mrs. Maturine-Stewart, conceded that, in so far as the date fixed for the first case management conference had passed, the Mathesons ought to have sought the permission of the court before amending their defence and counterclaim.[5] However, she maintained that they did not do so due to sheer inadvertence. Learned counsel, Mrs. Maturine-Stewart, argued that the failure was a procedural error which could be put right by the judge in accordance with the case management powers provided by CPR 26.9. Mrs. Maturine-Stewart submitted that the fact that the Allerts did not first seek the court's permission in order to amend the defence and counterclaim does not invalidate the amendments. In support of her submission she referred the Court to CPR 26.9(2).

[31] Next, Mrs. Maturine-Stewart reminded the Court that if there has been a failure to comply with a rule, practice direction or court order, the court may make an order to put matters right and could do so on its own volition. Mrs. Maturine-Stewart submitted that the failure of the Allerts to obtain permission from the court did not invalidate the amendment to the defence and counterclaim. However, the court on its own volition by order dated 15th November 2012 affirmed the amendment and put matters right when it ordered the Mathesons to file and serve a re-amended defence and counterclaim to reflect the joinder. Mrs. Maturine-Stewart said the judge in making the above order would have seen the amendment to paragraph 12. She reminded the Court that the order of 15th November 2012 has not been appealed.

[5] See CPR 20.1 as amended.

[32] Even though there is no evidence to support the contention (since the transcript of the proceedings has not been provided), nevertheless, Mrs. Maturine-Stewart said that after the filing of the application on 30th November 2012, the Mathesons orally made an application to the judge pursuant to CPR 26.9 to put matters right. The court by re-affirming the amended defence and counterclaim put matters right. In addition, she posited that the judge, in refusing to strike out the amendment, re-affirmed the amendment in exercise of her discretion and in so doing put matters right.

[33] In a similar vein to learned counsel, Mr. John, Mrs. Mathurine-Stewart quite helpfully referred the court to a number of pre-CPR 2000 authorities in support of her argument that the judge exercised her discretion properly in not granting the Allerts' strike out application, since there was no mala fides on the part of the Mathesons when they had erroneously stated that they were not relying on prescription. To the contrary, she asserted that it was a genuine mistake. Mrs. Maturine- Stewart also referred to the case of Svend Henning Berg v Glentworth Bulb Co Ltd, where the court held that the amendment to be made was not shown to have caused the plaintiff the particular prejudice of causing his alternative claim to be statute barred. The court stated that it was:

> "entitled to have regard to the effect upon a plaintiff, against whom a wholly new defence is sought to be raised, in terms of strain, anxiety and the disappointment of legitimate expectations … but the existence of such detriment to a plaintiff, is not … to be regarded as such prejudice, incapable of being compensated by costs as must preclude the grant of leave to amend."[6]

Ralph Gibson LJ went on to state as follows[7]:

> "In my judgment the facts that the plaintiff will be legitimately aggrieved if a new defence is raised against him, and, moreover, raised by the defendants to whom, if it succeeds, that new defence will be as undeserved a benefit as it will be an undeserved detriment to him, do not justify the refusal of leave to the defendants to raise that new defence."

[6] 1988 WL 1599291 (Ralph Gibson LJ) at pp. 24 – 25.
[7] 1988 WL 1599291 at p. 25.

[34] On the issue of permitting a party to resile from its earlier position adopted in his pleadings by way of amendment, Mrs. Maturine-Stewart referred the Court to the dictum of Millet LJ in the case of Gale v Superdrug Stores PLC[8] as very instructive. At page 1098 of the judgment, the learned judge stated:

> "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 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 the 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."

[35] Then at page 1099 of the judgment, Millett LJ said:

> "In my judgment the same principles apply whether or not the amendment involves the withdrawal of an admission previously made in the pleadings. The position of a defendant who belatedly seeks to raise a new defence cannot sensibly be distinguished from that of a defendant who seeks to withdraw an earlier admission. Each is seeking to raise an issue which cannot be raised without amendment; the amendment will almost invariably cause some delay and expense; and it must come as a disappointment to the plaintiff who did not expect to have to litigate the issue now raised for the first time. …. I respectfully agree with the observations of Ralph LJ in *Bird v Birds Eye Walls Ltd.*, The Times, 24 July 1987 when he indicated that a defendant should be relieved of an admission and allowed to withdraw it or amend it "if in all the circumstances it is just to do so having regard to the interests of both sides and the extent to which either side may be injured by the change …"."

[36] Mrs. Maturine-Stewart submitted that it is incorrect for the Allerts to state that the amendment to paragraph 12 of the defence and counterclaim will affect their ability to rely on the Limitation of Actions Act. She maintained that without the amendment this point remained in issue since it was specifically raised in paragraph 15 of the Mathesons' original defence and counterclaim. She reminded the Court that the case management conference has not been held and therefore

[8] [1996] 1 WLR 1089.

any prejudice which the Allerts are likely to suffer from the amendment is minimal. In contrast, if the Mathesons were to be prevented from deleting the last sentence from paragraph 12 of their defence and counterclaim it will seriously prejudice them in their ability to properly prosecute their defence and counterclaim and this would lead to injustice. Further, Ms. Maturine-Stewart stated that the potential of the Allerts claim being stature barred if the amendment is affirmed cannot justify why the court at first instance should have not affirmed it, since it was open to the Mathesons to correctly plead the new position in the first instance. The Allerts should not be able to benefit from a technical error which would prevent the true issues in the case from being ventilated. Therefore, Mrs. Maturine-Stewart argued the trial judge acted quite properly in refusing to strike out the amendment to paragraph 12.

[37] Finally, Mrs. Maturine-Stewart stated that if the lower court did not affirm the amendment it would have led to greater injustice to the Mathesons than the Allerts. In the circumstances, the judge acted quite properly in exercising her discretion to allow the amendment and therefore the appeal should be dismissed with costs.

Discussion and Analysis

[38] There is no doubt that at the heart of this appeal is the question whether or not the trial judge erred in the exercise of her discretion in refusing to strike out the amended defence and counterclaim. This is in effect an appeal against the exercise of the learned judge's case management discretion. It is the law that an appellate court will only interfere with the exercise of a judge's discretion if it can be shown that the judge has 'exceeded the generous ambit within which a reasonable disagreement is possible.'[9] The test has alternatively been expressed by Lord Woolf MR in AEI Rediffusion Music Ltd v Phonographic Performance

[9] Tafern Ltd v Cameron-McDonald and Another Practice Note [2000] 1 WLR 1311 (Brooke LJ) at p. 1317 F citing Lord Fraser of Tullybelton in G v. G (Minors: Custody Appeal) [1985] 1 WLR 647; see also Dufour and other v Helenair Corporation Ltd and other (1996) 52 WIR 188.

Ltd[10] citing Stuart-Smith LJ in Roache v News Group Newspapers Ltd[11] as follows:

> "Before the court can interfere it must be shown that the judge has either erred in principle in his approach, or has left out of account, or has taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale".

[39] The appeal court will also interfere where the judge's decision was plainly wrong.[12] The general test has two limbs. The first condition was explained by Viscount Simon LC in Charles Osenton and Company v Johnson[13] where the Lord Chancellor said:

> "The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there had been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified".

[40] The second condition was explained by Asquith LJ in Bellenden (formerly Satterthwaite) v Satterthwaite:[14]

> "We are here concerned with judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere."

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[10] [1999] 1 WLR 1507 at p. 1523 C-D.
[11] [1998] EMLR 161.
[12] See Stuart v Goldberg Linde (a firm) and another [2008] EWCA Civ 2; Enzo Addari v Edy Gay Addari, Territory of the British Virgin Islands, BVIHCVAP2005/0001 (delivered 23rd September 2005, unreported).
[13] [1942] AC 130 at p. 138.
[14] [1948] 1 All ER 343 at p. 345 B.

[41] In view of the principles stated above, it therefore follows that in order for the Allerts to persuade this court to interfere with the judge's exercise of discretion they would have to meet the threshold referred to above.

[42] It is noteworthy that the original CPR 20.1 had provided that a party may change a statement of case at any time before the case management conference without the court's permission. However, in 2011 this rule was amended and in its place was substituted CPR 20.1 as amended which stipulates that:

> "(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." (Emphasis mine).

This amended rule is applicable to the appeal at bar.

[43] It is useful to examine the factual matrix of this appeal in order to determine whether the judge erred in the exercise of her discretion. It is common ground between the parties that the defence and counterclaim was filed on 20th July 2012 and was served on 26th July 2012. Also, the court had fixed 30th July 2012 as the date for the case management conference. CPR 20.1 as amended is clear: should any party desire to amend the pleadings after the date that was fixed for the case management conference, that party would have to obtain the permission of the court in order to do so. It is also common ground that the Mathesons did not seek the court's permission in order to amend their defence and counterclaim. Rather, the Mathesons simply filed and served an amended defence and counterclaim in which they sought to delete the last sentence from paragraph 12. This was in clear breach of the rule which stipulates that the court's permission should have been sought.

[44] Turning now to the trial judge's decision, it is important to state that it is regrettable that the Allerts have not provided the written reasons for the judge's exercise of discretion. This is so even though there is an affidavit deposed to by Dedra Bain, on behalf of the Mathesons, in opposition to the application for leave to appeal, in which she indicated that the judge had provided no reasons for the decision and

therefore the appellants were not in a position to prosecute their grounds of appeal which alluded to several findings that were allegedly made by the judge. Even in the face of that averment there are no reasons for the decision provided in a document. This state of affairs is unacceptable. What may well have saved the day somewhat is the fact that the judge at paragraph 1 of her judgment dated 13th February 2014 (on the application for leave to appeal and stay) has provided reasons for the decision not to strike out.

[45] Let me say straight away that on an interlocutory appeal it is desirable for the judge who made the decision to be requested to provide the full reasons for the decision once an appeal has been launched. This can only be provided by the judge if the appellants make a request to this effect from the judge through the registrar of the High Court. In this appeal, I am reluctant to conclude that the only reasons the judge had for refusing to grant the application to strike out the amendment are the ones stated in paragraph 1 of the judgment on the leave to appeal application and the stay. The judge should have been specifically requested to provide full reasons for the decisions and if none had been forthcoming, the Court of Appeal may, in a suitable case, exercise its own discretion as explained by George-Creque JA in Saint Lucia Motor & General Insurance Co. Ltd. v Peterson Modeste.[15] These considerations do not arise here since there is no reason to believe that the judge had been requested to give reasons and has failed to do so. There is no evidence of any request having been made to the judge.

[46] This Court only has before it the order of the judge in addition to reference to the oral reasons that are provided in the judgment in relation to the application for leave and the stay. This court is therefore in a difficult position since the Allerts have failed to provide this court with the judge's reasons for decision or a copy of the transcript of the application which indicates the full reasons. Neither is there any evidence before this court to indicate that they requested the judge to provide reasons and none was provided. This can hardly be acceptable.

[15] Saint Lucia, SLUHCVAP2009/0008 (delivered 11th January 2010, unreported).

[47] In passing, I indicate that in the court of first instance, learned counsel, Mr. John, had objected to the amendment of the defence and counterclaim on two grounds:

> "(a) it comes after the period within which pleadings are deemed closed, following the filing of the Reply; and
>
> (b) it comes after the statutory limitations period fixed by the Limitation of Action Act, Cap. 173 of the Continuous Revised Edition of the Laws of Grenada, for the bringing of Claims for possession of property."

[48] I shall now refer to some other relevant principles.

[49] In exercising its discretion the court should be guided by the general principle that amendments should be made which are necessary to ensure that the real question in controversy between the parties is determined, provided that such amendments can be made without causing inconvenience to the other party and can be compensated in costs. Indeed, in the exercise of its discretion, where the court's permission is sought, the court, in determining whether or not to grant an amendment, must have regard to the overriding objective and the need to ensure that the real issues in controversy between the parties are determined. The rules must be applied in a manner that is fair to both parties and should not be applied in an inflexible manner that will prevent a litigant from prosecuting its case based on mere technicality.

[50] In Clarapede & Co v Commercial Union Association Brett MR said: [16]

> "however negligent or careless may have been the first omission, and however late the purposed 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 by costs; …. ."

[51] In the post-CPR 2000 English case, Charlesworth v Relay Roads Ltd and others[17], Neuberger J approved the above principle and held that it had a universal and timeless validity.

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[16] (1883) 32 WR 262 as cited by Neuberger J in Charlesworth v Relay Roads Ltd and others [2000] 1 WLR 230 at p. 235.

[52] It is the law that it is inappropriate to refuse an amendment on the merits if one of the main issues turns on a disputed factual situation because that is a matter to be determined at trial.[18] In the appeal at bar, the issue that the Mathesons seek to raise as a consequence of the amendment to the defence and counterclaim can only be determined at trial. It is the issue of whether or not their successors-in-title obtained the property by way of prescription or by purchase.

[53] There is public interest in allowing a party to deploy its real case, provided it is not irrelevant and has a real prospect of success.[19]

[54] In determining whether to exercise its discretion so as to enable an amendment to be made there are many factors that the court must take into consideration. These include the justice to the parties; the legitimate expectation that the basis of a claim will not be fundamentally changed at the last minute; the adverse effect on other litigants of lost judicial time; the stage reached in the proceedings; whether the other side can be adequately compensated in costs; and importantly, whether the amendment will serve any useful purpose. [20]

[55] I find the principles that were enunciated in Easton v Ford Motor Co Ltd[21] very instructive. In this case the claimant sued the defendant for breach of contract in relation to an employee suggestion scheme. The defendant initially defended on the ground that the claimant's suggestion was not novel. Then, over five years after the proceedings had been issued, the defendant applied to amend its defence to add that under the scheme the committee which scrutinized suggestions had the final say and could not be challenged. Although the claim was pending for a long time, it was nowhere ready for trial. The Court of Appeal applied the rule in Clarapede and since the amendment did not cause injustice, as it did not raise any new evidence, it allowed the amendment.

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[17] [2000] 1 WLR 230 at p. 235.
[18] Young (t/a Michael Graham Chartered Surveyors) v JR Smart (Builders) Ltd (No. 1) (2000) LTL 7/2/00.
[19] Cook & Carlton Communications Ltd v Newsgroup Newspapers Ltd (No. 3) [2002] EWHC 1070 (QB).
[20] See also Practice Direction 20(4) No. 5 of 2011, now contained in CPR 20.1(3) as amended by S.R.O. 14 of 2014.
[21] [1993] 1 WLR 1511.

[56] Being guided by the above principles, I turn now to address learned counsel Mr. John's complaint that the proposed amendment comes after the relevant limitation period (even though he does not specify to what he is referring).

[57] In order to attempt to provide the requisite context, it is important to state that CPR 20.2(2) provides that:

> "(2) The court may allow an amendment the effect of which will be to add or substitute a new claim but only if the new claim arises out of the same or substantially the same facts as a claim in respect of which the party wishing to change the statement of case has already claimed a remedy in the proceedings."

[58] In P & O Nedlloyd BV v Arab Metals Co and others[22] it was held that in deciding whether the new cause of action arises out of substantially the same facts as those originally pleaded it was necessary to identify 'the bare minimum of essential facts abstracted from the original pleading' and to compare that 'with the minimum as it would be constituted under the amended pleading'.

[59] Of equal importance is CPR 20.1(4)(b) which provides that:

> "(4) A statement of case may not be amended without permission under this Rule if the change is one to which any of the following applies –
>
> …
>
> (b) Rule 20.2 (changes to statement of case after the end of relevant period)."

However, this must be read subject to the general approach to disallow amendments made without permission, if permission would not have been granted had the required application been made.

[60] It is the law that as a general rule, a party who is required to seek permission of the court to amend should file an application. In the appeal at bar, the Mathesons were required to seek the permission of the court below before amending their defence and counterclaim by deleting the last sentence of paragraph 12. The

[22] [2007] 1 WLR 2483 at para. 14 citing Walker LJ in Smith v Henniker-Major [2002] EWCA Civ 762.

question to be determined is whether their failure to do so is fatal. This in no way negates the fact that the other party could apply to the court, as the Allerts did, to strike out the amendment. The court in determining whether or not to grant the application would pay regard to the general rule together with the relevant and applicable factors alluded to earlier.

[61] In examining what the judge said in relation to the reasons for allowing the amendment, I bear in mind that these were provided in an unrelated judgment and therefore much caution is required. Nevertheless, it is clear that the judge in exercising her discretion did not appear to take into account the relevant factors that were indicated above such as the stage of the proceedings reached and whether an adjournment of the trial will be necessary and the injustice for the parties.

[62] The judge in so doing did not exercise her discretion properly. It therefore falls to this Court to exercise its discretion afresh taking into account the factors to which the judge referred, together with those to which I have particular regard to, namely, the fact that in any event, the Mathesons, in paragraph 15 of the original amended defence and counterclaim had initially pleaded the limitation point. The Allerts are inaccurate in their assertion that the proposed amendment now is likely to clothe the Mathesons with a new defence of limitation. I reiterate that what is required for this Court in exercising its discretion afresh is to balance the above factors while paying regard to the adequacy of costs if an amendment by deleting the last sentence were to be permitted. The Court is not enjoined to order the ultimate sanction for breaches of the rules of procedure if there are other appropriate remedies.

[63] There is no denying that the court of first instance is clothed with the ability to strike out a statement of case or part of a statement of case due to the non-compliance with the rules, practice direction or order of court.[23] It was therefore clearly open to the trial judge to grant the strike out application that was sought by

[23] See Part 26 of CPR 2000 as amended.

the Allerts. The question is however whether such a relief was proportionate to the Mathesons breach in not seeking the court's permission in order to be able to amend their defence and counterclaim.

[64] This question of proportionality was decisively answered in Citco Global Custody NV v Y2K Finance Inc.[24] and it was held that it is open to the court in which there has been a breach of an order, rule or direction to impose a sanction other than to strike out the statement of case.

[65] Indeed, the court is enjoined by CPR 26.1(2)(w) to take any other steps, give any other direction, or make any other order for the purpose of managing the case and furthering the overriding objective.

[66] It is true that the Mathesons have not filed an application to be relieved from sanctions. However, what must be borne in mind is that the Allerts filed an application to strike out the impugned sentence. This brings into sharp focus the question of whether it was open to the trial judge to impose another sanction on the Mathesons for their breach short of the ultimate sanction of striking out as was prayed for by the Allerts. Against all of this background it is imperative to take into account that CPR 2000 enables a court to put matters right, even though there are certain procedural dictates to which a court must adhere to in so doing.

[67] Also, Her Majesty's Board in Real Time Systems Limited v Renraw Investments Ltd, CCAM and Company Limited, Austin Jack Warner[25] held that the court has an express discretion whether to strike out. It must therefore consider any alternatives and CPR 26.1(2)(w) enables it to give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective, which is to deal with cases justly. Their Lordships held that there is no reason why the court, faced with an application to strike out, should not conclude that the justice of the particular case militates against this nuclear option. In that case, the Privy Council held that the Court of Appeal was quite correct in

[24] Territory of the Virgin Islands, BVIHCVAP2008/0022 (delivered 19th October 2009, unreported).
[25] 2014 UKPC 6.

deciding that the trial judge had erred in striking the claim on the basis that it was an abuse of process. The Board felt that there were other appropriate options available to the trial judge since the proceedings had not even reached the case management conference stage.

[68] In the appeal at bar, of great significance and analogously, is the fact that the case management conference has not been held. Therefore there is no trial date fixed. Also, the issue of prescription arises based on the same facts even though it is inconsistent with a defence of having purchased the property. The nature of the amendment is one which I am confident that the court would have granted leave to amend the defence and counterclaim had the appropriate application been made. I am fortified in the above view and driven to the ineluctable conclusion based on the fact that the Allerts would suffer no injustice once they can be adequately compensated in costs.[26] In addition, the proceedings are in the very early stage of the process and there is no foreseeable prejudice to the Allerts if the amendment were to be permitted. The justice of the case requires this Court to exercise its discretion to affirm the amendment of the defence and counterclaim in order to ensure that the real controversy between the parties is decided. The judge was quite correct to impose the sanction of costs on the Mathesons and not to strike out the amendment of the alleged offending sentence. Even though the judge did not appear to have taken all of the material factors into consideration, the conclusion reached cannot be assailed when the discretion is exercised properly.

[69] The appeal at bar is clearly distinguishable from the case of Ketteman and others v Hansel Properties Ltd,[27] in which one of the defendants who had been previously defending the action on its merits, applied at trial during the closing speeches to amend its defence to plead that the action was time-barred under the Limitation Act 1939. Lord Griffiths in that case stated that the court must consider where justice lies, and that there may be many factors that bear on the exercise of the court's discretion. These include a legitimate expectation that the

[26] See Easton v Ford Motor Co. Ltd. [1993] 1 WLR 1511.
[27] [1988] 1 All ER 38.

basis of a claim will not be fundamentally changed at the last moment, and the adverse effect on other litigants of lost judicial time through avoidable adjournments. Accordingly, the amendment was refused.

[70] Despite the exercise of discretion to allow the amendment to the defence and counterclaim it must be noted that in the absence of any evidential basis, I am reluctant to place much store on Mrs. Maturine-Stewart's submission that during the application to strike, counsel orally requested the judge to exercise her discretion to put matters right and to allow the amendment even though there was no written application.[28] Simply put, the Mathesons' ought to have applied in writing to the court for permission to amend the defence and counterclaim. Even if they were negligent in doing so there was nothing preventing them from doing so orally and even after the fact to have it deemed proper. However, there is not a scintilla of evidence before this Court upon which the Court can conclude that Mrs. Maturine-Stewart's recollection that during the strike out application the Mathesons' requested the judge to put matters right is correct. This in no way negates the fact that the decision to strike out the amendment would have been disproportionate. It would have been too draconian a sanction. The justice of the matter required that the appeal be heard on its merits subject to the Mathesons paying the Allert the costs which the judge quite properly ordered. The use of the nuclear option is not appropriate in the appeal at bar.

[71] For the above reasons, without any hesitation, I would dismiss the appeal since the judge's decision could stand, notwithstanding the mistake in the application of the principles that were made.

Conclusion

[72] (1) The Allerts appeal against the decision of the judge is dismissed.

(2) The Mathesons are to have 2/3 of the costs awarded in the lower court.

[28] This Court is not seized of a copy of the transcript or the judge's notes of evidence.

[73] I gratefully acknowledge the assistance of all learned counsel.

Louise Esther Blenman
Justice of Appeal

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Davidson Kelvin Baptiste
Justice of Appeal