EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

COMMONWEALTH OF DOMINICA

DOMHCVAP2013/0003

BETWEEN:

[1] MARINOR ENTERPRISES LIMITED
[2] MICHAEL ASTAPHAN

Appellants/Applicants

and

FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LTD.
formerly known as Barclays Bank Plc

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

Appearances:

Mr. Hugh Marshall Jr., with him, Ms. Zara Lewis
instructed by Mrs. Noelize Knight-Didier for the Appellants/Applicants
Mr. Alick Lawrence, SC for the Respondent

2015: November 11;
2016: April 4.

Application to vary or discharge order of a single judge of the Court of Appeal – Application to further amend notice of appeal refused by single judge – Principles relating to amendments – Approach of appellate court to exercise of case management discretion of lower court judge – Powers of the Court of Appeal – Section 32(3) of the Eastern Caribbean Supreme Court (Dominica) Act

On 22nd February 2006, the respondent ("First Caribbean") instituted a mortgage claim against the applicants. The applicants filed their defence on 31st October 2006. On 25th September 2009, the applicants filed an amended defence and counterclaim, the same

day that an application for leave to amend the defence and counterclaim was heard by the master. The master refused the application and ordered that the amended defence filed on that day be struck out. On 13th April 2012, the applicants, acting by new counsel, filed another application to amend the defence. At that time the trial had been fixed for 8th May 2012. The applicants submitted in support of the application that the amended defence and counterclaim consisted of factual and legal grounds which were much more substantial and extensive than those in the existing defence. The court dismissed the application. The claim proceeded to trial and on 13th December 2012, the judge in the court below delivered judgment for First Caribbean.

The applicants filed a notice of appeal against the judgment on 29th January 2013, which was amended on 12th March 2015. The appeal came up for hearing in mid-June 2015 but was adjourned to the November sitting of the Court as a result of an application made by the applicants on 8th June 2015 for an adjournment to enable them to properly retain counsel of their choosing. By application dated 5th October 2015, the applicants applied to further amend the notice of appeal to add as grounds of appeal, the two interlocutory orders in the court below refusing their application to amend the defence, notwithstanding that there was no appeal against these orders. The application was opposed by First Caribbean and on 20th October 2015, a single judge of the Court of Appeal dismissed the application. No reasons were advanced by the single judge for the dismissal.

Aggrieved by the single judge's decision, the applicants filed an application to discharge or vary the order of the single judge. The application came before the Full Court for hearing on 11th November 2015, the same date set for the hearing of the appeal. The applicants argued, *inter alia*, that section 32(3) of the Eastern Caribbean Supreme Court (Dominica) Act ("Supreme Court Act")[1] allows the Court of Appeal to re-examine the two interlocutory orders which denied the applicants permission to amend the defence, notwithstanding that they did not appeal the interlocutory orders. The applicants contend however that the single judge's refusal of their application to further amend the notice of appeal denied the Court this opportunity.

Held: dismissing the application to vary or set aside the order of a single judge and ordering costs to First Caribbean, such costs to be assessed within 21 days of this order, that:

1. The grant or refusal of an application to amend involves the exercise of the court's discretion. In exercising that discretion, the overriding objective, with its emphasis on enabling the court to deal with cases justly,is of the utmost importance, but the just disposal of a case is not reserved only for the party seeking amendment. The court must consider all parties and has to perform a balancing act as it seeks to strike a fair balance. The factors relevant to doing so depend on the facts of the

[1] Cap. 4.02, Revised Laws of Dominica 1991.

case and as such cannot be exhaustively listed. However, they are likely to include the history as regards the amendment and an explanation as to why it is being made late; the prejudice which will be caused to the applicant if the amendment is refused; the prejudice which will be caused to the opposing party if the amendment is allowed; and whether the text of the amendment is satisfactory in terms of clarity and particularity.

Brown and others v Innovatorone PLC [2011] EWHC 3221 (Comm) at para. 14 applied.

2. There is a heavy burden on a party making a very late application to amend. An explanation for the lateness is called for and the court must consider the consequences for the opposing party. Where an amendment imperils a trial date which has been fixed, this is a significant factor to put into the scale. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to weigh heavily against the grant of permission. In the present case, the application to amend the amended notice of appeal was filed late – approximately 5 weeks before the date set for the hearing of the appeal – and the lateness of the application jeopardised the hearing date of the appeal. In the circumstances, it was incumbent on the applicants to provide a good explanation for the delay and they failed to do so.

   Brown and others v Innovatorone PLC [2011] EWHC 3221 (Comm) at para. 14 applied; **Swain-Mason and others v Mills & Reeve LLP** [2011] EWCA Civ 14 applied; **Rahan Ali v Abu Bakar Siddique** [2015] EWCA Civ 1258 at para. 45 and 46 referred; **Quah Su-Ling v Goldman Sachs Internaitonal** [2015] EWHC 759 (Comm) referred; **John Lawrence Monks v National Westminster Bank** PLC [2015] EWHC 1172 (Ch) referred.

3. When considering the competing arguments of prejudice to parties to an application for amendment, the prejudice to the amending party in not being able to advance its amended case is a relevant factor, but is only one of the factors to be taken into account by the court in reaching a conclusion. Moreover, when, as in the case at bar, the prejudice is as a result of the amending party's own making, such a consideration is much less important in the court's balancing exercise. In this case, the proposed amendments would have resulted in a completely new defence compared to the pleaded defence on which the case was tried. The effect would be a new trial with the attendant costs and delay resulting in prejudice to First Caribbean. These important factors, coupled with the unexplained lateness of the application, acted against the Court exercising its discretion in favour of granting the application to amend.

CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd [2015] 1345 (TCC) at para. 19 applied; **Swain-Mason and others v Mills & Reeve LLP** [2011] EWCA Civ 14 applied; **Archlane Limited and Johnson Controls Limited and Another** [2012] EWHC B12 (TCC) applied; **Wani LLP v Royal Bank of Scotland plc and another** [2015] EWHC 1181 (Ch) at para. 65 applied.

4. The law in relation to compensation in costs to a prejudiced party is clear. The court will not discount prejudice to a party on the basis that the party could be compensated in costs. The court is enjoined to consider the holistic effect of the disruption. This assessment includes the impact of the disruption on the parties, as well as on efficient case management and the administration of justice. Accordingly, in this case, the applicants' position that any prejudice to First Caribbean caused by an amendment could be compensated in costs was not sustainable.
   CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd [2015] 1345 (TCC) at para. 15 applied; **Worldwide Corporation Ltd v GPT Ltd** [1998] All ER (D) 667 applied; **Savings and Investment Bank Ltd v Fincken** [2003] EWCA Civ. 1630 at para. 79 applied.

5. The wording of section 32(3) of the Supreme Court Act is clear. Section 32(3) does not confer any power on the Court separate and apart from the powers conferred by section 32(1). It does not provide any free standing ground for amending a notice of appeal. It merely ensures that the Court, in exercising the plenitude of powers granted under section 32(1), is not restricted in any order it considers making by virtue of any interlocutory orders made therein. This is quite sensible, as in determining an appeal, it may be necessary for the Court to examine interlocutory orders made. This however is not synonymous with an appellant praying in aid that section for the purpose of amending a notice of appeal so as to appeal interim orders where the time for so doing has already expired and thus circumvent the rules of court governing such appeals.

   The Attorney General of Grenada v Charles David Peter (2008) 72 WIR 155 considered.

6. An appeal court should not interfere with a case management decision of a judge who has applied the correct principles and taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge. In the present case, section 32(3) of the Supreme Court Act cannot be interpreted in a manner inconsistent with the well-established jurisprudence and has to be read in accordance with that jurisprudence. Further, the Court was not dealing

with an appeal from any order of the High Court but rather an application to vary or set aside the order of a single judge of the Court of Appeal. Accordingly, in the circumstances of this case, section 32(3) could not be relied on, or invoked as authority in support of the application and could not avail the applicants.

HRH Prince Abdulaziz v Apex Global Management Ltd. and another [2014] EWCA Civ 1106 at para. 21 applied; **Walbrook Trustee (Jersey) Limited and others v Fattal and others** [2008] EWCA Civ 427 at paragraph 33 applied.

JUDGMENT

[1] **BAPTISTE JA:** This is an application to vary or discharge the order of a single judge. It arises in the context of the dismissal by a single judge of the Court of Appeal of an application to further amend a notice of appeal. Through the proposed amendment, the applicants seek to add as grounds of appeal, two interlocutory orders refusing their application to amend the defence, notwithstanding that there was no appeal against these orders.

[2] In seeking to add these grounds of appeal, the applicants rely, inter alia, on section 32(3) of the **Eastern Caribbean Supreme Court (Dominica) Act** ("Supreme Court Act"),[2] which states that 'the powers of the Court of Appeal in respect of an appeal shall not be restricted by reason of any interlocutory order from which there has been no appeal.' The applicants contend that that provision should allow them the opportunity to have their further amended defence considered by the Court of Appeal, but for the single judge's denial of their application to further amend their notice of appeal. Mr. Marshall, the applicants' counsel, posits that the effect of section 32(3) of the Supreme Court Act is to permit the Court of Appeal to re-examine the two High Court interlocutory orders which denied the applicants permission to amend the defence, notwithstanding that they did not appeal the orders. Mr. Marshall cites **The Attorney General of**

[2] Cap. 4.02, Revised Laws of the Commonwealth of Dominica 1991.

Grenada v Peter Charles David et al,[3] as providing direct judicial authority for that proposition.

[3] In **Peter David**, the Court of Appeal referred to section 35(3) of the **West Indies Associated States Supreme Court (Grenada) Act**[4] (the equivalent to section 32(3) of the Supreme Court Act of Dominica). The Court stated at paragraph 5 of the judgment that:

> '… the effect of subsection 3 is to permit the Court of Appeal to re-examine any interlocutory order given earlier in the appeal before the court whether the same has been appealed against or not and, in the particular circumstance, permits this court to re-examine the order of the single judge.'

In that regard, Mr. Marshall urges that it is just and equitable to allow the application to amend so as to enable the applicants to fully present their amended defence as part of the grounds of appeal.

[4] Mr. Marshall also takes issue with the jurisdiction of the single judge of the Court dealing with the application to further amend the notice of appeal. Mr. Marshall contends that rule 62.16A(1) of the **Civil Procedure Rules 2000** ("CPR 2000") does not empower a single judge of the Court of Appeal to hear and determine an application of that nature and as such the single judge lacked jurisdiction and his decision was a nullity. Mr. Marshall also states that whether or not the decision is declared a nullity by the Court of Appeal, that Court has jurisdiction to vary or discharge the order of the single judge. I note here that the parties do not dispute that CPR 2000 empowers the Full Court of Appeal to vary or discharge the order of a single judge. In fact the matter proceeded on that basis. The issue was whether the Court should exercise that power.

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[3] (2008) 72 WIR 155.

[4] Cap. 336, Revised Laws of Grenada 2010.

[5] Mr. Marshall further argues that the interests of justice require that the parties place before the court their full case and in keeping with the overriding objective of CPR 2000, matters should be determined on the merits and not by procedural measures. Mr. Marshall complains that because the applicants were not allowed to amend their defence, they were severely compromised in defending the claim. Mr. Marshall also invokes the applicants' right to a fair hearing guaranteed by the **Constitution of the Commonwealth of Dominica** ("the Constitution")[5] and contends that that right necessitates allowing the applicants to further amend the notice of appeal. Mr. Marshall submits that the Court of Appeal should remit the matter to the High Court for retrial based on the inclusion of the amended defence in the pleadings. Mr. Marshall posits that any prejudice occasioned to the respondent ("First Caribbean") can be accommodated with an appropriate costs order.

[6] Mr. Lawrence, SC, First Caribbean's counsel, submits that though speaking to the extensive nature of the Court of Appeal's powers, section 32(3) of the Supreme Court Act was not meant to subvert the rules and procedure governing interlocutory appeals. Mr. Lawrence, SC argues that the section should not be interpreted as permitting an applicant to bypass the facility for an interlocutory appeal. Mr. Lawrence, SC points out that CPR 2000 contains detailed provisions for bringing interlocutory appeals, including applications for leave, and an applicant must meet the requisite threshold so as to enable the Court to exercise its discretion in its favour. Mr. Lawrence, SC complains that the applicants have bypassed and leapfrogged those rules. In further resisting the application, Mr. Lawrence, SC contends that where an applicant seeks leave to add grounds of appeal on the basis of section 32(3) of the Supreme Court Act, a minimum requirement is that he should furnish the Court with an acceptable explanation as

[5] Cap. 1 Revised Laws of the Commonwealth of Dominica 1991.

to why an interlocutory appeal was not pursued. Mr. Lawrence, SC submits that for the applicants to now seek to do what they could have done by an interlocutory appeal, sans offering any explanation for their failure, is an abuse of the Court's process.

[7] In my view, in dealing with this application, the first task of this Court is to consider the principles relating to amendments. The grant or refusal of an application to amend calls for the exercise of the court's discretion. In exercising that discretion, the overriding objective – with its emphasis on enabling the court to deal with cases justly – is of the utmost importance. Just disposal of a case is not, however, the preseve of one party. The court has to perform a balancing act as it seeks to strike a fair balance. The factors relevant to doing so depend on the facts of the case and as such cannot be exhaustively listed. However, they are likely to include the history as regards the amendment and an explanation as to why it is being made late; the prejudice which will be caused to the applicant if the amendment is refused; the prejudice which will be caused to the opposing party if the amendment is allowed; and whether the text of the amendment is satisfactory in terms of clarity and particularity.[6] There is a heavy burden on a party applying for a very late application to amend. An explanation for the lateness is called for and the court must consider the consequences for the opposing party. Where an amendment imperils a trial date which has been fixed, this is a significant factor to put into the scale. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission.

[8] I will refer to a few cases where the principles have been expressed. In **Rahan Ali v Abu Bakar Siddique**,[7] the Court of Appeal stated the following:

[6] See Brown and others v Innovatorone Plc [2011] EWHC 3221 (Comm) at para. 14 (Hamblen J).
[7] [2015] EWCA Civ 1258 at paras. 45 and 46.

> "45. In considering any application to amend a court is concerned to ensure that the case is dealt with justly and that, so far as practicable, the real issue between the parties can be adjudicated upon. However, the court is also concerned to ensure that a party faced with an amendment is not unfairly prejudiced. If an amendment is sought at any early stage in a claim, it will often be the case that any such prejudice can be adequately compensated in costs. But where an amendment is sought at a very late stage and perhaps, as here, at the trial, the position may be very different. A party faced with an application to make such a late amendment may be placed in great difficulty in giving it adequate consideration, in determining how it affects the case that has been prepared and in assessing whether, for example, it requires a corresponding amendment to its own pleading, further disclosure or fresh evidence or even an adjournment.
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> "46. For all of these reasons a court will not only consider the prejudice that would be caused to the party seeking a late amendment if it were refused but will also have careful regard to the prejudice that would be caused to the party faced with the amendment if it were allowed. Moreover, relevant factors to consider will include the degree of precision with which the proposed amendment is formulated and any explanation as to why it is being made so late. Indeed it has been emphasised on more than one occasion by this court that a party seeking a late amendment bears a heavy onus to justify it: see, for example, *Swain-Mason v Mills & Reeve* [2011] EWCA Civ 14, [2011] 1 WLR 2735 at [72] per Lloyd LJ (with whom Elias and Patten LJJ agreed)."

[9] In **Quah Su-Ling v Goldman Sachs International**,[8] Mrs. Justice Carr refused a claimant's application for permission to amend her particulars of claim at a late stage. The key points emerging from that judgment are that:

(i) In last minute applications to amend, the correct approach is not that a very late amendment should be allowed.

(ii) There is a heavy burden on a party seeking a very late amendment.

(iii) Parties have a legitimate expectation that trial fixtures will be kept.

(iv) It is not enough to state that the other party can be compensated in costs.

[8] [2015] EWHC 759 (Comm).

(v) It is more readily recognised that costs may not be adequate compensation.

(vi) It is incumbent on a party seeking the indulgence of the court to raise a late claim to provide a good explanation for the delay.

(vii) A much stricter view is taken of non-compliance with the Civil Procedure Rules and directions of the court.

(viii) Parties can no longer expect indulgence if they fail to comply with their procedural obligations.

[10] Mrs. Justice Carr was referred to a number of authorities including **Swain- Mason and others v Mills & Reeve**;[9] **Worldwide Corporation Ltd v GPT Ltd and another**;[10] and **Hague Plant Ltd v Hague and others**[11] and at paragraph 41 of the judgment stated the relevant principles as gleaned from the authorities:

> "(a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;
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> (b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;
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> (c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;

[9] [2011] 1 WLR 2735.
[10] [1999] All ER (D) 3.
[11] [2014] EWCA Civ 1609.

(d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;

(e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;

(f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;

(g) a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so."

[11] In **John Lawrence Monks v National Westminster Bank PLC**[12] the defendant bank made a late application to amend its defence. In refusing the application, the judge noted that in the evidence filed in support of the application there was not even one word to explain why the defence, which had stood for almost two years, and had been the subject of a detailed reply, should have be amended only 3 working days before the trial. The court held that:

> "It is utterly inappropriate to come to a court a matter of days before the trial and seek to adduce substantial further primary evidence-in-chief and to amend a pleaded case without even one word of explanation as to why that amendment and why that further evidence is sought to be introduced at such a late stage and why – if such be the case – it could not have been put before the court much earlier."

[12] [2015] EWHC 1172 (Ch).

[12] At paragraph 70 in **Swain-Mason and others v Mills & Reeve LLP**,[13] Lloyd LJ cited the following passage from the judgment of Waller LJ in **Worldwide Corporation Ltd v. GPT Ltd**:[14]

> "Where a party has had many months to consider how he wants to put his case and where it is not by virtue of some new factor appearing from some disclosure only recently made, why, one asks rhetorically, should he be entitled to cause the trial to be delayed so far as his opponent is concerned and why should he be entitled to cause inconvenience to other litigants? The only answer which can be given and which, [counsel for Worldwide] has suggested, applies in the instant case is that without the amendment a serious injustice may be done because the new case is the only way the case can be argued, and it raises the true issue between the parties which justice requires should be decided. We accept that at the end of the day a balance has to be struck. The court is concerned with doing justice, but justice to all litigants, and thus where a last minute amendment is sought with the consequences indicated, the onus will be a heavy one on the amending party to show the strength of the new case and why justice both to him, his opponent and other litigants requires him to be able to pursue it."

At paragraph 72, Lloyd LJ observed that:

> " … I do accept that the court is and should be less ready to allow a very late amendment than it used to be in former times, and that a heavy onus lies on a party seeking to make a very late amendment to justify it, as regards his own position, that of the other parties to the litigation, and that of other litigants in other cases before the court."

Lloyd LJ identified four considerations at paragraph 104:

> "The matters which need to be considered for this purpose include the terms of the amendment, the previous history as regards amendment, including the sequence of events [at the time in that case] which led to the first amendments, the absence of any evidence explaining why the re-amendment was sought to be made so very late, and the various factors relevant to prejudice to each side."

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[13] [2011] EWCA Civ 14.
[14] [1998] All ER (D) 667.

[13] All of the above principles relating to amendments are quite apt to the application that was before the single judge and which presently arises for the Court's consideration and I respectfully endorse them. No reason was advanced by the single judge in dismissing the application to amend. This court is free to exercise its discretion in the matter.

[14] Before proceeding further, it would be in order to encapsulate the background facts. On 22nd February 2006, First Caribbean instituted a mortgage claim against the applicants. The applicants filed their defence on 31st October 2006. On the morning of the hearing of 25th September 2009, the applicants filed an amended defence and counterclaim. After hearing arguments, Master Cottle denied the application for leave to amend the defence and counterclaim and also ordered that the amended defence filed that day (25th September 2009) be struck off. The order was entered on 29th September 2009. On 13th April 2012, the applicants, acting by new counsel, filed another application to amend the defence. At that time the trial date had been fixed for 8th May 2012. The defence and counterclaim sought to be introduced by the applicants through that application, consisted of factual and legal grounds which were much more substantial and extensive than those in the existing defence. I note that the applicants' skeleton submissions described the amended defence as very detailed and complex. To my mind, this was a very material consideration taking into account that the trial date was set for 8th May 2012. The court would have been entitled to consider the jeopardy occasioned to the integrity of the trial date by that late application. The court dismissed the application. The claim proceeded to trial and on 13th December 2012, Cottle J delivered judgment for First Caribbean.

[15] The applicants filed a notice of appeal on 29th January 2013, which was amended on 12th March 2015. The appeal came up for hearing in mid-June 2015 but was adjourned to the November sitting of the Court at the behest of the applicants. The applicants had filed an application on 8th June 2015 for an adjournment of the hearing of the appeal to the next sitting of the Court to enable them to properly retain counsel of their choosing. By application dated 5th October 2015, the applicants applied to further amend the notice of appeal. First Caribbean opposed the application. On 20th October 2015, a single judge of the Court of Appeal dismissed the application. No reasons were advanced by the single judge for the dismissal. The application to discharge or vary the order of the single judge came before the Full Court for hearing on 11th November 2015, the same date set for the hearing of the appeal. After hearing extensive submissions from the parties, the Court reserved its decision on the application. The hearing of the appeal was accordingly adjourned pending the Court's decision on the application.

[16] Was the application to amend a late one? I recognise that lateness is a relative concept, as opposed to an absolute one. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing and a fair appreciation of the consequences in terms of work wasted and consequential work to be done.[15] From my reckoning, the application to amend the amended notice of appeal was filed late – on 5th October 2015, approximately five weeks before the date set for hearing of the appeal during the week of 9th November 2015. The lateness of the application had the potential to jeopardise and did in fact jeopardise the hearing date of the appeal. It was incumbent upon the applicants to provide a good explanation for the delay. They failed to do so.

[15] See Hague Plant Ltd v Hague and others [2014] EWCA Civ 1609 at para. 33 (Briggs LJ).

[17] The second applicant, Michael Astaphan, furnishes no explanation in his affidavit in support of the application to further amend the notice of appeal as to the reasons for that lateness. This repudiates the requirement that a party seeking the court's indulgence in making a late application for an amendment should provide a good explanation for the delay. Likewise, in his affidavit in support of the application to vary or discharge the order of the single judge, Michael Astaphan gives no explanation or reason as to why the application to further amend the notice of appeal was not made much earlier. In paragraph 7 of the affidavit in support of the application to further amend the notice of appeal, Michael Astaphan deposes that he was advised by counsel that the application is founded both in substantive law – section 32(3) of the Supreme Court Act and in the Court's case management powers. Of moment here, is the position that the reappraisal of newly instructed counsel of the merits of a case is not in itself a good explanation for a late amendment. This was a feature of **Worldwide Corporation Ltd v GPT Ltd**. In **Worldwide Corporation**, the claimants appealed the refusal of a judge to permit amendments to the claim in the first week or so of the trial. The amendments were prompted by a reappraisal of newly instructed counsel of the merits of the case. Counsel felt that the case previously pleaded would fail and that only by way of amendment could the case be put on an arguable basis. The appeal was dismissed.

[18] In **Brown and others v Innovatorone Plc and others**,[16] Hamblen J said that parties had a legitimate expectation that trial dates would be met and they would not be put back or delayed without good reason. At paragraph 14 of his judgment, the judge set out some of the likely factors that would be involved in striking a fair balance. They were:

> "(1) the history as regards the amendment and the explanation as to why it is being made late;

[16] [2011] EWHC 3221 (Comm).

(2) the prejudice which will be caused to the applicant if the amendment is refused;

(3) the prejudice which will be caused to the resisting party if the amendment is allowed;

(4) whether the text of the amendment is satisfactory in terms of clarity and particularity."

[19] The history of the amendment together with an explanation for its lateness is a matter for the applicants, as the amending party, and is an important factor in the balancing exercise. In essence, there must be a good reason for the delay. I have considered the history of the amendment and noted that the applicants have furnished no explanation as to why it is being made late. In **Swain-Mason**, the Court of Appeal stressed that when dealing with very late amendments, the court should be less ready than in former times to grant a late application to amend. I respectfully endorse that approach.

[20] I now deal with the issue of prejudice. Mr. Justice Coulson summarised the issue of prejudice quite aptly in **CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd**,[17] and I respectfully adopt his summary. The prejudice to the resisting parties if the amendments are allowed will incorporate at one end of the spectrum, the simple fact of being "mucked around", to the disruption of and additional pressure on their lawyers in the run up to the trial or hearing of the appeal and the duplication of cost and effort at the other. If allowing the amendments would necessitate the adjournment of the trial or the appeal, that may be an overwhelming reason to refuse the amendment. Prejudice to the amending party if the amendment is not allowed will obviously include its inability to advance its amended case, but this is just one factor to be considered.

[17] [2015] EWHC 1345 (TCC) at para. 19.

Moreover, if that prejudice has come about by the amending party's own conduct, then it is a much less important element of the balancing exercise.[18]

[21] It goes without saying that if the amendments are not allowed, prejudice to the applicants will include their inability to advance the further amended defence and they would be confined to arguing the appeal on the existing grounds. That however, is just one factor to be considered. In **Swain-Mason**, Lloyd LJ said that when considering the competing arguments of prejudice, the prejudice to the amending party in not being able to advance its amended case was a relevant factor, but was only one of the factors to be taken into account in reaching a conclusion. Moreover, it appears to me that having fully considered the matter, that prejudice would have come about by the applicants own making and as such is a much less important element of the balancing exercise. The fact is that there is no good reason why the application to further amend the amended defence should not have been made earlier. In **Archlane Limited and Johnson Controls Limited and Another**,[19] Edwards-Stuart J said that 'to the extent that the First Defendant will suffer prejudice by the refusal of this amendment, which I accept is a clear possibility; it seems to me clear also that it is very substantially the author of that prejudice'. Likewise in **Wani LLP v Royal Bank of Scotland plc and another**,[20] Mr. Justice Henderson noted at paragraph 65, that the prejudice to the claimant was largely of its own making, because, viewed objectively, there was no good reason why the application to amend should not have been made earlier.

[22] With respect to prejudice to First Caribbean, I agree with Mr. Lawrence that the proposed amendments would result in a completely new defence compared to the pleaded defence on which the case was tried. The effect would be a new trial with

[18] See Archlane Limited and Johnson Controls Limited and Another [2012] EWHC B12 (TCC).
[19] [2012] EWHC B12 (TCC) at para 25.
[20] [2015] EWHC 1181 (Ch).

the attendant costs and delay resulting in undoubted prejudice to First Caribbean. These are important factors, coupled with the unexplained lateness of the application, which militate against the court exercising its discretion in favour of granting the application to amend. I endorse the statement of Mr. Justice Henderson in **Wani LLP**:

> "Litigants who leave a substantial application to amend until a late stage cannot reasonably complain, in my judgment, if the undoubted prejudice to them caused by refusal of the application is found to be outweighed by the other factors which the court has to take into account."[21]

[23] Mr. Marshall appears to contemplate that prejudice by suggesting that any prejudice to First Caribbean can be accommodated with an appropriate costs order. I will consider the merit of that argument. A review of the authorities shows that it is pretty clear now, that whatever the position may have been in the past, the court would not discount prejudice to a party on the basis that the party could be compensated in costs. The court is enjoined to consider the holistic effect of the disruption. This assessment would include the impact of the disruption on the parties, as well as on efficient case management and the administration of justice.

[24] In **CIP Properties**, Mr. Justice Coulson opined that the traditional approach outlined by Peter Gibson LJ in **Cobbold v Greenwich LBC**,[22] to the effect that '[a]mendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party or parties caused by the amendment can be compensated for in costs…'[23] is no longer the right starting point. Indeed it is arguable that it never was. In the earlier Court of Appeal decision of **Worldwide Corporation**, Waller LJ stressed

[21] At para. 65.
[22] [1999] EWCA Civ 2074.
[23] At para. 15.

that a payment in costs was not adequate compensation for the other party being "mucked around" at the last moment. As Waller LJ stated :

> "…in previous eras it was more readily assumed that if the amending party paid his opponent the costs of an adjournment that was sufficient compensation to that opponent. In the modern era it is more readily recognised that in truth the payment of the costs of an adjournment may well not adequately compensate someone who is desirous of being rid of a piece of litigation which has been hanging over his head for some time, and may not adequately compensate him for being totally (and we are afraid there are no better words for it) mucked around at the last moment. Furthermore, the courts are now much more conscious that in assessing the justice of a particular case the disruption caused to other litigants by last minute adjournments and last minute applications have also to be brought into the scales".

[25] Subsequently, in **Savings and Investment Bank Ltd v Fincken**,[24] Rix LJ noted that **Worldwide Corporation** was authority for the proposition that "the older view that amendments should be allowed as of right if they could be compensated in costs without injustice had made way for a view which paid greater regard to all the circumstances which are now summed up in the overriding objective."

[26] In **Norcross and others v The Estate of Georgallides (deceased)**,[25] Smith J said at paragraph 87:

> "It no longer needs to be repeated that the court does not discount prejudice to other parties on the basis that they can be compensated in costs or an adjournment or both. It takes account of the impact of the disruption not only on the parties, but on the efficient case management and on the administration of justice generally."

I entirely agree.

[27] From the authorities, Mr. Marshall's position that any prejudice caused to First Caribbean could be compensated in costs is not reflective of and stands in

[24] [2003] EWCA Civ. 1630; [2004] 1 WLR 667 at para. 79.
[25] [2015] EWHC 2405 (Comm).

discordance with the contemporary jurisprudence. In the circumstances, his argument is not sustainable. As part of his argument seeking the discharge of the order of the single judge, Mr. Marshall sought to invoke the right to a fair hearing guaranteed by the Constitution. Mr. Lawrence, SC contends, and I agree, that this right has not been violated.

[28] This brings me back to section 32 of the Supreme Court Act. Section 32(1) states:

> "On the hearing of an appeal from any order of the High Court in any civil cause or matter, the Court of Appeal shall have power to –
>
> "(a) confirm, vary, amend or set aside the order or make such order as the High Court might have made, or to make any order which ought to have been made, and to make such futher or other order as the nature of the case may require;
>
> (b) draw inferences of fact;
>
> (d) direct the High Cout to enquire into and certify its findings on any question which the Court of Appeal feels fit to be determined before the final judgment in the appeal."

Section 32(2) states:

> "The powers of the Court of Appeal under this section may be exercised notwithstanding that no notice of appeal or respondent's notice has been given in respect of any particular part of the decision of the High Court by any particular party to the proceedings in Court or that any ground for allowing the appeal or for affirming or varying the decision of that Court is not specified in the notice; and the Court of Appeal may make any order in such terms as the Court of Appeal thinks just to ensure the determination of the merits of the real question in controversy between the parties."

Section 32(3) states:

> "The powers of the Court of Appeal in respect of an appeal shall not be restricted by reason of any interlocutory order from which there has been no appeal".

[29] So far as is relevant, section 32(1) of the Supreme Court Act deals with the powers of the Court of Appeal on hearing of an appeal from an order of the High Court in a civil cause or matter. The powers include: confirming, amending, varying or setting aside the order or making such order as the High Court might have made or the nature of the case may require. Section 32(2) speaks to the plenitude of the exercise of the powers conferred by section 32(1). The section (32(2)) also seems to import a discretion; it says that the powers 'may be exercised'. The wording of section 32(3) is clear; it does not confer any power on the Court separate and apart from the powers conferred by section 32(1). It does not provide any free standing ground for amending a notice of appeal. It merely ensures that the Court, in exercising the plenitude of powers granted under section 32(1), is not restricted in any order it considers making by virtue of any interlocutory orders made therein. This is eminently sensible, as in determining an appeal, it may be necessary for the Court to examine interlocutory orders made. This however is not synonymous with an appellant praying in aid that section for the purpose of amending a notice of appeal so as to appeal interim orders where the time for so doing has already expired and thus circumvent the rules of court governing such appeals. I do, however accept that the **Peter David** case stands for the broad proposition being urged by the applicant.

[30] Be that as it may, in so far as the interlocutory orders in issue arise from discretionary case management decisions, they are manifestly the preserve of the case management judge. It would therefore be inappropriate for an appellate court to reverse or otherwise interfere with them unless they were plainly wrong in the sense of being outside the generous ambit where reaonable decision makers may disagree.[26] The appeal court does not exercise the discretion for itself and

[26] See HRH Prince Abdulaziz v Apex Global Management Ltd. and another [2014] EWCA Civ 1106 at para. 21 (Arden LJ).

would be cognizant of the jurisprudence that such decisions are not to be lightly interfered with. An appeal court should not interfere with a case management decision of a judge who has applied the correct principles and taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge.[27] To my mind section 32(3) of the Supreme Court Act cannot be interpreted in a manner inconsistent with the well established jurisprudence and has to be read in accordance with that jurisprudence. In the circumstances of this case, I am not of the view that section 32(3) would avail the appellants.

[31] It must be noted that this Court is not here dealing with an appeal from any order of the High Court. The Court has before it an application to vary or set aside the order of a single judge dismissing an application to further amend the notice of appeal. The Court is being asked to exercise its discretion afresh. From a reading of section 32 of the Supreme Court Act, it stands to reason that section 32(3) cannot be relied on, or invoked as authority in support of the present application. The application before the Court calls for the exercise of its disretion and for reasons already advanced I am of the view that this Court should not exercise its discretion in favour of granting the application to further amend the notice of appeal.

[32] In conclusion, I would dismiss the application to vary or set aside the order of a single judge dismissing the application to further amend the amended notice of appeal. In summary, my reasons are that, in the context of this case, the application was made too late and no proper reasons have been advanced for that

[27] Walbrook Trustee (Jersey) Limited and others v Fattal and others [2008] EWCA Civ 427 at paragraph 33 (Collins LJ).

lateness. Any prejudice to the applicants in being unable to pursue its new contentions in the further amended defence is largely of its own making. In any event such prejudice is not sufficient to overcome the prejudice to First Caribbean in terms of inconvenience, delay and expense in having the claim retried based on a further amended defence, nine years after they instituted proceedings against the applicants and three years after obtaining judgment after the trial of the claim. Moreover, the due administration of justice is likely to be impaired by the grant of the application. The Court considers the heavy demand on scarce judicial time and resources and is cognizant of the wider public interest of ensuring that other litigants can attain justice efficiently and proportionately and that it enables them to do so.

[33] It is ordered that the application to vary or set aside the order of a single judge dismissing the application to further amend the amended notice of appeal is dismissed with costs to First Caribbean, such costs to be assessed within 21 days of this order.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Mario Michel
Justice of Appeal

I concur.

Gertel Thom
Justice of Appeal