IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRIROTY OF THE VIRGIN ISLANDS

BVIHCMAP2018/0021-0038

In the matters of eliza limited (in liquidation) Glenalla properties limited (in liquidation), Roxinda limited (in liquidation), Thorson investments limited (in liquidation), Violet capital group limited (in liquidation), Oscatello investments limited (in liquidation), Alzama properties limited (in liquidation),Brigetta investments limited (in liquidation), Tazamia limited (in liquidation), Seacourt limited (in liquidation), Safina limited (in liquidation)

And in the matter of rule 3.14(1)(d) of the Civil Procedure Rules of the Eastern Caribbean Supreme Court 2000, (as amended)

BETWEEN:

ROBERT TCHENGUIZ

Applicant/Respondent

and

[1] MARK MCDONALD (in his capacity as Joint Liquidator)
[2] STEPHEN JOHN AKERS (in his capacity as Joint Liquidator)
[3] ELIZA LIMITED (IN LIQUIDATION)
[4] GLENALLA PROPERTIES LIMITED (IN LIQUIDATION)
[5] ROXINDA LIMITED (IN LIQUIDATION)
[6] THORSON INVESTMENTS LIMITED (IN LIQUIDATION)
[7] VIOLET CAPITAL GROUP LIMITED (IN LIQUIDATION)
[8] OSCATELLO INVESTMENTS LIMITED (IN LIQUIDATION)
[9] ALZAMA PROPERTIES LIMITED (IN LIQUIDATION)
[10] BRIGETTA INVESTMENTS LIMITED (IN LIQUIDATION)
[11] TAZAMIA LIMITED (IN LIQUIDATION)
[12] SEACOURT LIMITED (IN LIQUIDATION)
[13] SAFINA LIMITED (IN LIQUIDATION)
[14] VINCENT AZIZ TCHENGUIZ
[15] RAWLINSON & HUNTER TRUSTEES S.A (in its capacity as Trustee of the Tchenguiz Family Trust)

[16] WILLIAM PROCTER
[17] BPAR LIMITED
[18] EURO INVESTMENTS OVERSEAS INC
[19] ALTRACIA LIMITED
[20] BALVINO LIMITED
[21] BEAUCETTE INTERNATIONAL LIMITED
[22] BRIGADIER HOLDINGS LIMITED
[23] CHARLENA ENTERPRISES LIMITED
[24] CLEOBURY LIMITED
[25] DEGANO LIMITED
[26] FRANKELLA LIMITED
[27] GOLDEN MIST LIMITED
[28] GOLDWAY SERVICES LIMITED
[29] KALIO LIMITED
[30] OMATOLA INVESTMENTS LIMITED
[31] PIRATINE LIMITED
[32] PRAKARA LIMITED
[33] VALLEYMIST INVESTMENTS LIMITED

Respondents/Appellants

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Anthony Gonzalves, QC	Justice of Appeal [Ag.]
The Hon. Mr. Eamon H. Courtenay, SC	Justice of Appeal [Ag.]

Appearances:

Mr. Richard Wilson, QC, with him Mr. Mo Haque, QC for Appellants
Mr. Terence Mowschenson, QC, with him Mr. Stuart Cullen for the Respondent
Mr. Ben Mays for the Liquidators

2018: September 11.

Commercial Appeal – Trust – Trustee – Entitlement of beneficiary – Right to inspect under Rule 3.14 of the Civil Procedure Rules 2000 – Trustee Act. Cap 303 Revised Laws of the Virgin Islands – BVI Insolvency Act No. 5 of 2003, Laws of the Virgin Islands – BVI Insolvency Rules 2005 – Jurisdiction of the Court of Appeal to award costs – Originating application – Whether originating application and affidavits attached are to be considered fixed date claim form for the purposes of the Insolvency Rules – Section 31 West Indies Associated States Supreme Court (Virgin Islands) Act Cap. 80 Laws of the Virgin Islands.

The respondent, Mr. Robert Tchenguiz brought two claims in the High Court in the capacity of beneficiary pursuant to sections 82 or 60 of the Trustee Ordinance 1961 or Part 67 of the Civil Procedure Rules 2000 ("CPR") or the Court's inherent jurisdiction ("the Trust Claim"). He sought all documents in relation to the Trustees' claims in liquidation matters. The respondent also claimed pursuant to CPR rule 3.14 access to any documents filed by the Ordinary Applications, including affidavits of Rodney Hodges dated 13th April 2017 and of Mr. Vincent Tchenguiz dated 6th April 2017 and the exhibits.

The claims were made because despite his requests, in the capacity of beneficiary, Rawlinson & Hunter Trustees AS ("Rawlinson"), trustees of Tchenguiz Discretionary Trust ("TDT"), a sub-trust created to segregate assets in the Tchenguiz Family Trust ("TFT"), refused to hand over copies of the documents the respondent requested. Therefore, the respondent, Mr. Robert Tchenguiz, as beneficiary of the TFT, applied to the court for an order against the trustee Rawlinson giving him access to all documents (the Trust Claim) delivered to the Joint Liquidators in relation to claims made by Rawlinson in the Liquidation of BVI Companies. At about the same time he pursued the 3.14 Claim seeking access to a subset of the documents which he sought in the trust claim.

Mr. Tchenguiz's case was that he had pursuant to the Court's exercise of discretionary power in rule 3.14 ("the New Ground") of the CPR, permission to inspect and take copies of any documents filed in the ordinary applications claim filed pursuant to section 273 of the BVI Insolvency Act.

The learned judge ordered that the respondent was entitled to inspect and take copies of the affidavits. Being dissatisfied, the appellants appealed against the decision of the learned judge.
The main issue for determination on this appeal is whether the learned judge was wrong to order disclosure of the affidavits; whether the respondent was entitled as of right to inspect the documents under CPR 3.14(a); whether the Claim Form together with the two affidavits that were filed under Rule14(4) of the Insolvency Rules for all intents and purposes constituted the claim form and thus whether the Court can determine an appeal on a ground not stated in a notice of appeal.

On the issue of whether the Court of Appeal should exercise its discretion under rule 3.14 of the CPR, the appellants advanced no arguments but on costs argued that in light of the Court reaching its decision on rule 3.14 there should be no order as to costs on this appeal. The appellants argued that the respondent could have taken the new ground in their counter notice and saved time and expense.

Mr. Robert Tchenguiz's case was that pursuant to the BVI Insolvency Rules Rule 13(3) ordinary or originating applications are to be regarded as fixed date claim forms and he submitted that an originating application along with affidavit attached are to be treated as a fixed date claim form and therefore, he has a right to inspect both documents under rule 3.14 of the CPR.

Held: dismissing the appeal; awarding costs to the respondent in the court below to be assessed, if not agreed within four weeks from the date of this order and awarding costs to

the respondent in the appeal at the rate of two-thirds of the costs awarded in the court below or agreed, that:

1. Originating applications are to be regarded as fixed date claim forms. In order to comply with the mandatory requirement of Rule 14(4) of the Insolvency Rules, the originating application must contain the grounds on which the applicant claims to be entitled to the relief or order sought. The appellants opted to set out the grounds in affidavits attached to the originating applications. The appellants intended the originating application and the attached affidavits to be read as one and together to constitute the single originating application. As such the originating application which did not include the grounds to be relied upon along with the two affidavits which included the grounds to be relied upon are to be treated as one, and that they are therefore together to be regarded as a fixed date claim form.

   Rule 13 and 14 Insolvency Rules 2005 Laws of the Territory of the Virgin Islands applied; Rule 13(3) Civil Procedure Rules 2000 applied.

2. The Court can through its discretion determine an appeal on a ground not stated in a notice of appeal or rather a new ground. This case remains one of interpretation of the applicable rules and forms. There is no dispute of fact and no requirement to make new findings of fact or to draw inferences from facts. The parties were given ample opportunity to present arguments on the issue.

   Section 31 West Indies Associated States Supreme Court (Virgin Islands) Act Cap.80 Laws of the Virgin Islands applied; Jones v MBNA International Bank [2000] EWCA Civ 514 distinguished.

3. The respondent was entitled as of right to inspect and take copies of the documents; the originating application and affidavits on the payment of the prescribed fee.

   Rule 3.14(a) Civil Procedure Rules 2000 applied; Section 31 West Indian Associated Sates Supreme Court (Virgin Islands) Act Cap. 80 Laws of the Virgin Islands applied.

REASONS FOR DECISION

[1] COURTENAY JA [AG.]: This appeal raises the issue whether Mr. Robert Tchenguiz ("Robert") is entitled to access certain documents filed in the Court's registry in the British Virgin Islands ("BVI"). Chivers J ruled that he should have access, the appellants being dissatisfied have appealed against that decision.

[2] Robert brought two claims in the High Court. One in the capacity of beneficiary pursuant to sections 82 or 60 of the Trustee Ordinance 1961[1] or Part 67 of the Civil Procedure Rules 2000 ("CPR") or the Court's inherent jurisdiction ("the Trust Claim"). In the Trust Claim he sought "All and any documentation submitted by the Trustee to the Joint Liquidators, Mr. Stephen Akers and Mr. Mark McDonald of Grant Thornton, or to this Honourable Court, in relation to the Trustees' claims in the liquidations of [the relevant companies]". Secondly, Robert applied pursuant to CPR Part 3.14(d) ("the 3.14 Claim"). In the 3.14 Claim, he sought access to:

> "any documents … filed by the Ordinary Applications in the claims herein on 19th April 2017 … and in particular but not limited to permission to inspect and take copies of:
>
> a. The ordinary applications dated 19th April 2017;
> b. Any draft order filed;
> c. The affidavits of Rodney Hodges dated 13th April 2017 and of Vincent Tchenguiz dated 6th April 2017 and the exhibits thereto."

[3] Chivers J ruled in favour of Robert in both claims. The Trust Claim became Civil Appeal 39 of 2018 which we dismissed with reasons to follow. The 3.14 Claim became Civil Appeal 38 of 2018. At the hearing we ordered that the parties were to file further submissions. They have done so.

[4] On the completion of oral submissions, the Bench was informed that there were related proceedings on foot in the High Court in London, and therefore we were urged to deliver our decision with reasons to follow. The high court proceedings had been scheduled for October 2018, and therefore if there was to be access to the documents, it would be preferred if access could be had in good time. Having received the further submissions as requested, we acceded to the request and on the 11th September 2018 we made the following order:

> "ORDER
>
> The Court makes the following order:
>
> 1. The appeal is dismissed.

[1] Trustee Act, Cap. 303, Revised Laws of the Virgin Islands (as amended).

2. The Respondent is entitled, pursuant to CPR 3.14(a), to inspect and take copies of the Originating Application and affidavits of Mr. Vincent Tchenguiz dated 6th April 2017 and Mr. Rodney Hodges dated 13th April 2017 and the exhibits thereto and any draft orders filed therewith.
3. Full reasons for dismissing the appeal will be made available shortly.
4. The Respondent is to have his costs."

[5] It is now left to us to give the reason for making that Order. We do so now.

Background

[6] By a Letter of Wishes, Mr. Victor Tchenguiz Sr. requested that two sub-trusts be created to segregate the assets in the Tchenguiz Family Trust ("TFT") between his sons Robert and Mr. Vincent Tchenguiz ("Vincent"). As a consequence, the Tchenguiz Discretionary Trust ("TDT") was established. Substantial assets were transferred from the TFT to the TDT, with Rawlinson & Hunter Trustees AS (**"**Rawlinson") as trustees of the TDT, and Robert being the sole beneficiary thereof. However, certain assets remaining in the TFT were for Robert and others were for Vincent and Robert ("together the residual assets").

[7] It follows that Robert continues to have an interest in the TFT, especially in relation to the residual assets.

[8] Pursuant to section 273 of the BVI Insolvency Act[2], Rawlinson, the Trustee of the TFT filed claims in liquidation proceedings of 16 BVI companies which were on foot in the BVI. Robert is particularly interested in the documents, affidavits primarily, that were filed by Rawlinson in those proceedings as he believes that Rawlinson made certain statements in those proceedings that are false and critical of him.

[2] No. 5 of 2003, Laws of the Virgin Islands.

[9] Being a beneficiary of the TFT, Robert requested copies of the documents from Rawlinson. However, Rawlinson refused to hand them over. Therefore, Robert, as a beneficiary of the TFT, applied to the Court for an order against the Trustee giving him access to the documents (the Trust Claim). At about the same time he pursued the 3.14 Claim seeking access to a subset of the documents which he sought in the Trust Claim.

[10] In 2007 Rawlinson, through Oscatello Limited (a BVI registered company), entered into certain banking arrangements with Kaupthing Bank HF ("Kaupthing"), on behalf of the TDT and certain TDT companies. In 2008 Kaupthing, with the support of certain TFT companies, made further advances to Oscatello. As a part of this arrangement, Kaupthing advanced $100 million to Pennyrock Limited, a TFT company. Kaupthing went into liquidation in 2008.

[11] Vincent, Rawlinson and other related companies made claims in the Kaupthing liquidation. These proceedings have been settled but Rawlinson has an interest in the proceeds of the insolvency as it relates to the Oscatello companies.

[12] Prior to the settlement in the Kaupthing liquidation, Rawlinson, Vincent and others had made claims in different liquidation proceedings relating to the 16 BVI companies. Of relevance is that in these proceedings the originating papers do not disclose the grounds on which the claims were made other than "The grounds upon which the Applicants seek the order are set out in the affidavits of Mr. Vincent Tchenguiz dated 6 April 2017 and Mr. Rodney Hodges dated 13 April 2017." It turns out that allegations were made in these affidavits that Rawlinson was induced by false representations made by Robert to enter into the Oscatello transactions with Kaupthing in 2008.

[13] According to Robert, he became aware that the claims filed by Rawlinson may have been based on inaccurate and false information, and that serious allegations

were made by Rawlinson against him specifically that he made false statements. Robert argued that Rawlinson may be pursuing baseless claims and that the TFT may therefore be exposed to substantial costs orders thereby putting the TFT assets at risk. Despite his requests, in the capacity of beneficiary, Rawlinson has refused to provide him with the documents. Robert applied to the BVI High Court for delivery up of all the documents delivered to the Joint Liquidators by Rawlinson in relation to the claims made by the Rawlinson in the liquidation of the 16 BVI Companies.

[14] In the event, Robert was assured that the false allegations made by Rawlinson would be withdrawn if he gave certain undertakings to Rawlinson. However, despite his giving the undertakings, the allegations have not been withdrawn.

[15] It is to be noted that in the settlement of the claims made by Rawlinson in the Kaupthing bankruptcy, the costs were charged solely to the Vincent assets in the TFT. Therefore, it was contended that the residual assets were not at risk, and therefore Robert had no legitimate need for the documents. Robert contends that in the capacity of beneficiary, he is entitled to hold Rawlinson to account for its conduct as trustee and therefore has a continuing interest in seeing the documents.

The Issue in Appeal No. 38

[16] Robert made his application in the Court below pursuant to CPR 3.14(d). CPR 3.14 states:

> "On payment of the prescribed fee, any person is entitled, during office hours, to search for, inspect and take a copy of the following documents filed in the court office, namely
>
> a) A claim form;
> b) A notice of appeal;
> c) A judgment or order given or made in court; and
> d) With the leave of the court which may be granted on an application made without notice, any other document."

[17] Relying on the Court's exercise of the discretionary power in 3.14(d), Robert sought permission to inspect and take copies of any documents filed in the ordinary applications in the claims filed pursuant to section 273 of the BVI Insolvency Act. In particular, he sought copies of "the ordinary applications dated 19th April 2017 in the VINCENT Claims; any draft order filed in the VINCENT Claims; the Affidavits of Rodney Hodges dated the 13th April 2017 and of Vincent Tchenguiz dated 6th April 2017 and the exhibits thereto filed in the VINCENT Claims".

[18] The VINCENT Claims are those filed by Vincent, Rawlinson and other related entities in the liquidation of the 16 BVI companies under section 273 of the Insolvency Act. Chivers J ordered that Robert was entitled to inspect and take copies of the Affidavits only. The Appellants appeal against the Order of Chivers J. The central issue for determination on this appeal is whether Chivers J was wrong to order disclosure of the affidavits.

[19] In order to appreciate how the issue on the appeal developed during oral argument, regard has to be had to BVI Insolvency Rules, 2005 ("Insolvency Rules"), rules 13 and 14. Rule 13(3) states: "(3) For the purposes of applying the CPR, an application made in insolvency proceedings, whether originating or ordinary, shall be regarded as a fixed date claim." Rule 14 insofar as is relevant provides:

> "14. (1) An application, whether originating or ordinary, shall be in writing and in the prescribed form, with such modifications as are appropriate.
>
> (2) …
>
> (3) …
>
> (4) An originating application shall set out the grounds on which the applicant claims to be entitled to the relief sought or order sought.
>
> (5) …

(6) An application may, and where the Rules so provide shall, be supported by an affidavit."

[20] An application brought pursuant to Rule 14(1) must "be in writing and in the prescribed form". Form R14A is the prescribed form for an originating application and states so far as is relevant:

> "I/We [on behalf of applicant] intend to apply for an order under Section [insert details of the order] of the Insolvency Act that [insert details of the order]"

[21] It continues "The grounds upon which I/we seek the order are [set out in an affidavit attached] [as follows] [delete as applicable]".

[22] These Rules read with the prescribed form show the following:

a. Originating and ordinary applications are to be regarded as fixed date claim forms;

b. Originating, but not ordinary, applications must state the grounds on which the applicant intends to rely on; and

c. The prescribed form gives an option for the mandatory grounds to be set out in an affidavit attached to the originating application.

[23] It is to be recalled that the originating applications filed by Vincent and Rawlinson did not disclose the grounds on which the claims were made. The applications stated, "The grounds upon which the Applicants seek the order are set out in the affidavits of Mr. Vincent Tchenguiz dated 6 April 2017 and Mr. Rodney Hodges dated 13 April 2017." Chivers J rightly acknowledged that the appellants chose the option of providing their grounds in the attached affidavits as permitted by the prescribed form.

[24] During argument on this appeal, the Court raised with Counsel the question whether the appeal ought not be determined with reference to CPR 3.14(a) rather than CPR 3.14(d). The Court considered that the crux of the appeal was whether the Claim Form together with the two affidavits that were filed under Rule14(4) of the Insolvency Rules for all intents and purposes constituted the claim form. On this view, we posed the question whether, in fact and law, Robert was entitled as of right to inspect the documents under CPR 3.14(a) ("the New Ground"). Specifically, the Court invited further submissions by the parties on the applicability of section 31 of the West Indies Associated States Supreme Court (Virgin Islands) Act[3] which, inter alia, permits the Court of Appeal to determine an appeal on a ground not stated in a notice of appeal, and on the applicability of CPR 3.14(a).

The Further Submissions of the Parties as requested by the Court

The Appellants' Submissions on CPR 3.14

[25] It is important to set out verbatim the further submissions of the appellants on the issue of the interpretation of CPR 3.14:

> "Having considered the matter, the Appellants have decided that they will not argue that the Court of Appeal should not exercise its discretion to consider the new Ground."

The Court does not regard the position taken by the appellants as a concession that the appeal should be allowed. However, it is clear to the Court that the appellants have offered no argument against the Court exercising its discretion pursuant to section 31 of the West Indies Associated States Supreme Court Act, and to consider the New Ground. Notably, the appellants have not argued that this appeal should not be determined on the basis of CPR 3.14(a).

The Respondent's Submissions on CPR 3.14

[3] Cap. 80 Revised Laws of the Virgin Islands.

[26] The respondent drew attention to the fact that by rule 13(3) of the Insolvency Rules ordinary or originating applications are to be regarded as fixed date claim forms. The respondent therefore submitted that an originating application along with the affidavit attached are to be treated as a fixed date claim form and therefore inspection of both documents are to be as of right under rule 3.14(a) CPR

Determination

[27] The parties were afforded adequate time to assist the Court with submissions on the New Ground. The Court will exercise its discretion and determine this appeal on the basis of the New Ground.

[28] Rule 14(4)[4] is clear and devoid of ambiguity, it states: “An originating application shall set out the grounds on which the applicant claims to be entitled to the relief or order sought”. Similarly, Rule 13(3) is pellucid: “For the purposes of applying the CPR, an application made in insolvency proceedings, whether originating or ordinary, shall be regarded as a fixed date claim”. In order to comply with the mandatory requirement of Rule 14(4), the originating application must contain the grounds on which the applicant claims to be entitled to the relief or order sought. There is no requirement that the originating application be accompanied by an affidavit. An applicant may, where the Rules so permit, file an affidavit in support of an application.

[29] In order to set out the grounds on which they intended to rely in compliance with Rule 14(4), the appellants opted to attach to the originating applications the affidavits of Vincent dated 6 April 2017 and Mr. Rodney Hodges dated 13 April 2017, and to set out the grounds to be relied on therein. Their originating claims specifically stated: "The grounds upon which the Applicants seek the order are set out in the affidavits of Mr. Vincent Tchenguiz dated 6 April 2017 and Mr. Rodney Hodges dated 13 April 2017." It seems incontrovertible that the appellants

[4] Insolvency Rules 2005 Territory of the Virgin Islands.

intended the originating application and the attached affidavits to be read as one and, together, to constitute the single originating application. If not taken together the claim was fatally defective. In this context it is understandable why Rawlinson adopted the position it did in its further submissions as identified in paragraph 25 above.

[30] The Court concludes that the originating application which did not include the grounds to be relied upon along with the two affidavits which included the grounds to be relied upon, are to be treated as one, and that they are therefore together to be regarded as a fixed date claim form: Rule 13(3). It follows that pursuant to CPR 3.14(a) the respondent were entitled as of right to inspect and take copies of the compendium documents on the payment of the prescribed fee.

[31] In light of this conclusion it is unnecessary for the Court to consider whether the decision of the trial Judge, reached via the 3.14(d) route, was right.

Costs

[32] The appellants argue that in light of the Court reaching its decision on the New Ground, there should be no order as to costs on this appeal. They argue that had the respondents taken the New Ground in their Counter-Notice time and expense could have been saved. Whilst attractive, there is little force in this submission.

[33] To support its submission, the Rawlinson relies on Jones v MBNA International Bank.[5] In this case, the appellant Jones sought to amend his notice of appeal to raise a new ground and invited the Court of Appeal to determine the appeal on the new ground. The Court of Appeal declined to do so. In its written submissions, Rawlinson relies on the following dictum from May LJ who agreed with Peter Gibson LJ that the amendment should not be allowed and that the appeal should be dismissed:

[5] [2000] EWCA Civ 514.

"52. Civil trials are conducted on the basis that the court decides the factual and legal issues which the parties bring before the court. Normally each party should bring before the court the whole relevant case that he wishes to advance. He may choose to confine his claim or defence to some only of the theoretical ways in which the case might be put. If he does so, the court will decide the issues which are raised and normally will not decide issues which are not raised. Normally a party cannot raise in subsequent proceedings claims or issues which could and should have been raised in the first proceedings. Equally, a party cannot, in my judgment, normally seek to appeal a trial judge's decision on the basis that a claim, which could have been brought before the trial judge, but was not, would have succeeded if it had been so brought. The justice of this as a general principle is, in my view, obvious. It is not merely a matter of efficiency, expediency and cost, but of substantial justice. Parties to litigation are entitled to know where they stand. The parties are entitled, and the court requires, to know what the issues are. Upon this depends a variety of decisions, including, by the parties, what evidence to call, how much effort and money it is appropriate to invest in the case, and generally how to conduct the case; and, by the court, what case management and administrative decisions and directions to make and give, and the substantive decisions in the case itself. Litigation should be resolved once and for all, and it is not, generally speaking, just if a party who successfully contested a case advanced on one basis should be expected to face on appeal, not a challenge to the original decision, but a new case advanced on a different basis. There may be exceptional cases in which the court would not apply the general principle which I have expressed. But in my view, this is not such a case."

[34] When one reads the lead judgment of Peter Gibson LJ it is abundantly clear that he was of the view that to permit Mr. Jones to change his case would be conspicuously unfair to MBNA as it would be forced to meet a new case for the first time on appeal. He also emphasized that in order to consider and determine the new case it would require the Court of Appeal to make new findings of fact.[6]

[35] The first point to make, which is quite obvious, is that May LJ framed his exposition very carefully and described it as the “normal” case. He expressly stated that there might be “exceptional cases” where the general principle which

[6] Paragraph 39, Jones v MBNA International Bank [2000] EWCA Civ 514.

he described and applied, would not be applied by a court. Importantly, in the very next paragraph May LJ went on to point out the difficulty that the Court of Appeal would have faced had it allowed the amendment. He said that:

> "53. In addition, I am persuaded by Mr Jeans' submissions that the Recorder's finding in relation to the wrongful dismissal claim cannot with justice to the defendant simply be transposed without more to the new version of the claim for breach of the confidence and trust implied term; that this court could not with justice make for the first time necessary primary and inferential findings of fact which the Recorder was not asked to make; that this is in particular so when this court has not seen or heard the witnesses as they gave their evidence, and where the factual case advanced on paper is not, as I think, obviously correct intrinsically; that the bank may well have wanted to call additional evidence if the proposed new case had been advanced before the Recorder; and that the focus of the proposed new case of breach of the confidence and trust implied term is substantially different from the focus of the case which the Recorder decided. These are in my view cumulatively very powerful reasons why this court should not entertain Mr Jones' proposed new case for the first time on appeal and why, if this is necessary, we should not permit him to withdraw any concession implicit in the way in which he presented his case before the Recorder."

[36] Jones v MBNA does not assist Rawlinson.

[37] This Court considers that it is entitled to decide this appeal on the New Ground. Unlike Jones v MBNA there is no shift in the case. The case remains one of interpretation of the applicable rules and forms. There is no dispute of fact and we are not required to make new findings of fact or to draw inferences from facts which we might find.

[38] Additionally, the parties were given a reasonable opportunity to present further arguments on the New Ground. There has been no complaint about this from the Rawlinson. Quite the contrary. As pointed out in paragraph 25 above, in its further submission Rawlinson stated: "the Appellants have decided that they will not

argue that the Court of Appeal should not exercise its discretion to consider the new Ground." Unlike in Jones v MBNA where allowing the amendment would have been grounded on the duty of the Court to have regard to the overriding objective to "deal with cases justly", the procedure we have adopted is permitted by, and rooted in, section 31 of the West Indies Associated States Supreme Court Act.

[39] More broadly, the fact is that Rawlinson should never have resisted the respondent's request to inspect and take copies of the documents. The appellants should have been exceedingly slow to appeal the decision of Chivers J.; on any fair reckoning this was a very weak appeal. As much as the respondent could have raised the New Ground in his Counter-Notice, Rawlinson should have realized that the Originating Application and the Affidavits attached were to have been made available as of right.

[40] In all the circumstances, we accept the submission of the respondent that costs should follow the event. The respondent should have his costs.

Order

[41] I propose the following orders:

(a) The appeal is dismissed on the basis of the New Ground; and

(b) The respondent is to have his costs of this appeal and in the court below. The costs in the court below are, if not yet assessed or agreed, to be assessed if not agreed within four weeks from the date of this order. Costs

(c) in this Court are two-thirds of the costs agreed or assessed in the court below.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Anthony Gonsalves, QC
Justice of Appeal [Ag.]

By the Court

Chief Registrar