**THE EASTERN CARIBBEAN SUPREME COURT**
**SAINT VINCENT AND THE GRENADINES**

**IN THE HIGH COURT OF JUSTICE**

**SVGHCV2015/0099**

**BETWEEN**

**GLENNIS MARLON MIILS**

**CLAIMANT**

**AND**

**CARIBBEAN RESORTS LIMITED**
**TRADING AS**
**MARINER'S HOTEL**

**FIRST DEFENDANT**

**AND**

**THE FRENCH VERANDAH INC.**

**SECOND DEFENDANT**

**Appearances**:

Mrs. Zhinga Horne Edwards legal practitioner for the claimant
Mr. Stanley John Q.C. with him Ms. Keisal Peters of Elizabeth Law Chambers, legal practitioners for the defendants

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2019: Jul. 6
Sept. 19

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## DECISION

### BACKGROUND

[1] **Henry, J.:** Ms. Glennis Mills and Mr. Vidal Browne were married for several years. They jointly acquired a number of properties including one or more corporate entities. After their divorce in

2003 they were engaged in proceedings for division of their assets. Ms. Mills subsequently pursued a claim against Island Holdings Limited ('IHL'), Young Island Resorts Limited, St. Vincent Manufacturing Company Limited ('SVGML') and Caribbean Resorts Limited ('CRL') in relation to distribution of assets acquired jointly by the parties. Her husband Mr. Vidal Browne was involved as director of some of the companies. CRL is a company and carries on business under the name of Mariner's Hotel. Ms. Mills served as CRL's director up to January 10th 2010[1].

[2] In or about 2011, Ms. Mills, Mr. Browne, IHL, SVGML and CRL concluded a settlement agreement and a consent order regarding those associated proceedings[2]. Mr. Browne represented IHL, SVGML and CRL as their director and signed in that capacity on their behalf in connection with the civil claim filed by Ms. Mills. He signed in his personal capacity in respect of the ancillary matrimonial proceedings. He is also the director of the French Verandah Inc. ('TFVI') which operates a restaurant business at Villa.

[3] CRL and TFVI had been using lands at Villa ('the disputed lands') as a parking lot in connection with their respective businesses prior to the agreement. TFVI does so under licence and permission from CRL. The settlement agreement and consent order purported to obligate IHL to transfer the disputed lands to Ms. Mills. A transfer to this effect was subsequently executed and registered[3]. CRL and TFVI continued to use the parking lot without paying rent to Ms. Mills although she requested rent. The land was previously registered to IHL.

[4] On 15th July 2015, Ms. Mills filed this claim against ('TFVI') and against CRL trading as MH[4]. She seeks possession of the disputed lands which includes a knoll on which signage was erected by CRL; an injunction restraining CRL and TFVI from trespassing on the disputed land, *mesne* profits, interest and costs. They resisted the claim. They contended that they have acquired an interest in the subject land by adverse possession. They claimed a declaration that Ms. Mills is not entitled to possession of the disputed property; a declaration that they are entitled to possession of the disputed

[1] From October 2nd 1991.

[2] Matrimonial ancillary proceedings and the civil claim initiated by Ms. Mills.

[3] By Deed No. 2599 of 2011.

[4] Referred to hereafter as 'CRL'.

land as owners and to maintain their signage on the knoll; and an injunction restraining Ms. Mills from trespassing on the disputed land and costs.

[5] The matter came on for trial on 6th March 2018. The parties were directed to file submissions on the effect and import of the settlement agreement and the consent order on the proceedings in the present claim; whether and to what extent *res judicata* is applicable and if so, which parties are so bound; and whether enforcement proceedings under the CPR 2000 or a fresh claim would be the appropriate avenue for addressing matters arising from the referenced consent order or the settlement agreement. The parties submitted that *res judicata* and did not arise in respect of all of the issues. A decision on those issues was deferred for conclusion of the trial.

[6] The case proceeded to trial on 12th June 2018, the trial date having been vacated previously[5]. It was adjourned for resumption of trial. Subsequent trial fixtures were vacated. The matter was then scheduled for resumption of trial on June 18th 2019. On June 17th 2019, CRL and TFVI[6] filed an application for leave to amend their defence. The proposed amendments seek to introduce an allegation issue estoppel and abuse of process allegations. The defendants contended that those are matters which should be ventilated in the interest of justice. Ms. Mills opposed the application. She argued among other things that it is a very late application which would substantially prejudice her. The application is dismissed for the reasons set out below.

**ISSUE**

[7] The issue is whether leave should be granted to CRL and TFVI to amend their defence?

**ANALYSIS**

**Issue – Should leave be granted to CRL and TFVI to amend their defence?**

[8] The trial of this case was postponed on several occasions. The initial trial dates were fixed for March 7th and 9th 2017 but were vacated. It was next set down for March 1st 2018. No hearing took place on that date. On the next trial date, March 6th 2018 the parties were invited to address the

[5] March 7th and 9th 2017 and March 1st and 6th 2018.

[6] In this decision, they will be referred to individually at times and on occasions jointly. When joint reference is made to them, they will be described as 'the applicants' or 'the defendants'.

court on the issue of res judicata. At their request, the matter was adjourned to enable them to file written submissions.

[9] When the trial commenced in June 2018 Ms. Mills led her evidence and closed her case on the same day. The defendants called their first witness Mr. Vidal Browne. The matter was adjourned during his cross-examination. The resumption of trial was scheduled for October 11, 2018 and then April 9th 2019. Both dates were vacated due to short service of the notice of hearing. The trial was once again re-scheduled, this time to June 18th 2019. Trial was again adjourned pending consideration of the present application.

[10] It is useful to provide a brief chronology of the instant proceedings to date. By her claim, Ms. Mills alleged that she is the registered owner of a parcel of land at Villa comprising approximately 3 acres and registered by vesting deed number 2599 of 2011. She claimed that IHL had previously owned the land. She pleaded that part of it had been used by CRL and TFVI as a parking lot and part for placing their signage prior to the land being vested in her name in May 2011.

[11] Ms. Mills alleged that the defendants have continued to use those portions of the land as a parking lot and for signage purposes since then. She alleged that she had no objections to such use provided that she received payment of rent in return. She claimed that the defendants have failed to honour her repeated written requests for rent by letters that she issued in 2012, 2013 and 2014. She pleaded that their continued use of the land created a tenancy at will which has been terminated by their failure to honour her requests and by her letter to that effect.

[12] Ms. Mills alleged that the defendants have remained in occupation of the disputed land and have thereby become trespassers. By their Defence and Counterclaim[7] CRL and TFVI acknowledged that Ms. Mills is the paper title owner of the subject lands. They pleaded that they have occupied the disputed land since 2003. They acknowledged receipt of the letters sent to them by Ms. Mills seeking payment of rent. They denied that they are tenants at will; that any tenancy at will has been

[7] Filed on 15th October 2015.

terminated; that they have become trespassers; or that they have given no consideration for the use of the disputed land as alleged.

[13] CRL and TFVI pleaded that they have occupied the disputed land for over 12 years and that the signage was located in that spot in excess of 20 years. They alleged that TFVI has occupied the parking area with CRL's permission. CRL claimed that it incurred significant cost in developing the parking area. The defendants denied that Ms. Mills or IHL were in possession of the disputed land at the time that they (CRL and TFVI ) entered into possession. They pleaded that even if Ms. Mills or IHL was in possession at that time, her claim is barred pursuant to the provisions of the Limitation Act. They denied that Ms. Mills had suffered any loss or damage or is entitled to the relief claimed.

[14] The defendants claimed that alternatively, Ms. Mills and/or IHL acquiesced in their acting to their detriment in expending considerable sums of money to improve the parking area in the belief that it would become part of the hotel premises. They pleaded that Ms. Mills is therefore estopped from denying that the parking lot or the knoll forms part of their property. In this regard, they claimed that Ms. Mills and Mr. Browne were both directors of CRL which was a subsidiary of IHL. CRL and TFVI pleaded that they were encountering difficulties due to lack of parking for their customers and therefore a small portion of IHL's land was used to build the parking area for their exclusive use. They claimed that the construction cost of $140,585.30 was paid by CRL. Ms. Mills did not admit that such difficulties were being encountered; that the construction was undertaken; and if so, at what cost.

[15] CRL and TFVI alleged that in 2003, IHL arranged for a survey to be conducted to delineate and excise the parking area. They pleaded further that pursuant to the agreement in the 2010 proceedings, Ms. Mills resigned as a director of IHL and CRL in 2011 and received a lump sum payment from IHL which also vested its proprietary interests in the disputed land to Ms. Mills. CRL and TFVI claimed that they have continued to use and maintain the parking area and the display area on the knoll exclusively. They pleaded that it would be unjust and unconscionable for Ms. Mills to maintain a beneficial right of ownership to either the parking area or the knoll and thereby deny their proprietary rights to them.

[16] Ms. Mills denied all claims to proprietary estoppel in respect of the parking area and knoll. She denied

owning any share, right, title or interest in the parking lot when it was being developed by its then owner, IHL. She denied knowledge of IHL's or the defendants' business dealings at that time, including any expenditure allegedly incurred in developing the parking lot. She contended that any sums spent by the defendants in developing the parking lot were utilized at their own risk and with full knowledge that they did not and would not own the disputed property.

[17] Ms. Mills filed a Reply and Defence to Counterclaim[8]. She joined issue with CRL and TFVI regarding the date on which they went into possession of the disputed land. She pleaded that the defendants went into possession of the parking area and knoll with IHL's express permission which was then acting through its director Mr. Browne. She denied that the defendants have occupied the disputed land exclusively and undisturbed for over 12 years and she refuted specifically, the defendants' claim that their signage had been on the knoll for over 20 years.

[18] She added that if CRL granted TFVI permission to use the parking area, CRL would have been authorized by IHL to grant such permission for use of the parking area. She claimed that her April 17, 2015 letter to TFVI demanding that it cease use of the disputed property, terminated any licence or permission given by IHL or CRL to use the disputed land.

[19] Ms. Mills referred to the pleadings in the 2010 proceedings where she had alleged that the affairs of IHL and CRL were being conducted in an oppressive and unfairly prejudicial manner which unfairly disregarded her interest as shareholder and director. She pleaded that in her supporting affidavit in that claim she 'expressed her desire to have ... full ownership of (CRL) ... its assets including its real estate with an adjustment to the title deed that would extend the boundaries of the property to encompass the parking area.' She alleged that the settlement arising from those proceedings vested the subject property in her.

[20] Ms. Mills pleaded further that the consent order expressly directed IHL to execute and deliver all documents required to transfer and vest in her 'the entire beneficial title in fee simple absolute and free of all encumbrances in respect of [t]he three acres more or less of land situate at Villa ... adjacent to

[8] On 30th November 2015.

the Mariners Hotel which is owned by [Island Holdings] and is more particularly described in deed of Conveyance dated 28th October 1987 and registered by Deed Number 2764 of 1987.' She claimed that the settlement agreement and consent order amounts to a written acknowledgment of IHL's title to the disputed land and operates to prevent the defendants' reliance on the Limitation Act. Further, she pleaded that by signing the settlement agreement and consent order, CRL signified its agreement to and acceptance of the terms of the consent order and waived any right it might have had to claim the disputed property.

[21] Ms. Mills pleaded that during the negotiations leading to the settlement agreement and consent order in the 2010 proceedings, CRL did not claim ownership of the disputed property; never disputed or challenged IHL's title to it or its right to transfer it to her; and did not raise any objections to the transfer. She pleaded that Mr. Browne was a party to the agreement and consent order as director for CRL and IHL and in his personal capacity. She countered that Mr. Browne, CRL and TFVI now seek to take advantage of her by avoiding and frustrating the vesting order.

[22] Essentially, Ms. Mills' claim against the defendants is for trespass on the disputed property which was vested in her pursuant to an agreement and consent order signed by CRL and others. She contended that CRL is estopped from denying her entitlement to and ownership of the disputed property because it was party and signatory to both the agreement and order. CRL's and TFVI's defence is that they have acquired an interest in the disputed property by adverse possession and that Ms. Mills' claim is statue-barred. Their claims for declarations to such effect are founded on proprietary estoppel.

[23] On 17th June, 2019, the applicants filed this application to amend the defence and counterclaim. It is supported by affidavit sworn by Shelly-Ann Luckham. Ms. Luckham deposed that when counsel was reviewing the files in preparation for trial they became alert to the need (out of an abundance of caution) to provide the Court with the facility to address the contentions of both parties on the basis of estoppel or abuse of process, by ensuring that the appropriate application is made for amendment of the statement of case in relation to the latter. She did not provide a timeframe within which this discovery was made.

[24] Ms. Luckham averred that the defendants will not raise any objections to a similar amendment

being made to Ms. Mills' statement of case. She asserted that if the omission from the Defence and Counterclaim filed is not corrected 'the defendant's case would be gravely prejudiced' because it would not be permitted seek the relief as part of its counterclaim. She averred that if the defendant is permitted to correct its Defence and Counterclaim, Ms. Mills would not be prejudiced since she has had notice of this contention and may also amend commensurately to rely on the Consent Order. She deposed that the trial date can still be met if the application is granted. She concluded that if the amendments are allowed, it will be in the interest of the administration of Justice and the overriding objective.

[25] CRL and TFVI seek leave to introduce 3 new paragraphs to their Defence – paragraphs 11, 12 and 13. They also want to amend their ancillary claim by placing reliance on the contents of those new paragraphs.

[26] It is necessary to set out the proposed amendments in full. They state respectively:

> '11. Further or in the alternative, in 2010 with full knowledge that the First Defendant was occupying and using the car park as part of its hotel property for many years, the Claimant expressly sought by her 'pleadings' in *SVGHC (sic) Claim No 109 of 2010* which she instituted against, among others, Mr. Vidal Browne, Island Holdings and the First Defendant sought, inter alia, to obtain control of the First Defendant with *"… full ownership of the First Defendant along with its assets including the real estate intact and with an adjustment to the title deed that would extend the boundaries of the property to encompass the existing car park*."
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> 12. By a Release, Discharge and Settlement Agreement dated the 5th day of May, 2011 (the "**Settlement Agreement**") and a consent order also dated the 5th day of May 2011 (the "**Consent Order**") made in the said Claim No 109 of 2010 the Claimant together with Island Holdings and the First Defendant, through their director, Mr. Vidal Browne, among others, consented to the terms of the Settlement Agreement and Consent Order and signed the Settlement Agreement and the draft of the Consent Order signifying their respective agreement thereto. Copies of the Settlement

Agreement, the draft of the Consent Order and the final Consent Order are exhibited herewith and marked **"F" "G" and "H"** respectively.

13. The Claimant having consented to an order made after it had served pleadings, it is therefore estopped by res judicata as against the First Defendant, from pleading in these proceedings, matters and/or issues that could have with reasonable diligence been addressed in the said Consent Order including the issue of the First Defendant's ownership/and possession of the disputed car park. Accordingly, it is estopped from claiming the reliefs set out in the Fixed Date Claim and/or the same is an abuse of the court's process and should be dismissed as such.

Counterclaim

16. The Defendants repeat Paragraphs 1 to 13 of the Defence.'

[27] The proposed amendments seek to introduce the concept of *res judicata* coupled with estoppel by record as a defence to the claim against CRL. They are also designed to bolster their claim to be recognized as persons who own an interest in the disputed property.

[28] The first part of the proposed paragraph 11 seeks to introduce the notion that in 2010 when Ms. Mills brought her claim, she knew that CRL was using the disputed land as a parking area as part of its hotel business. This would be a new pleading. The second part of the proposed paragraph 11 (from 'full ownership' to 'encompass the') and its substance are set out in Ms. Mills' Reply and Defence to Counterclaim[9]. CRL and TFVI did not expressly traverse that assertion by pleadings and admitted it in the witness statement filed by Mr. Browne[10] and in his evidence in chief. He also exhibited a copy of the referenced affidavit. Accordingly, that second clause of the proposed new paragraph 11 introduces nothing new to the dispute between the parties.

[29] By the proposed new paragraph 12, CRL and TFVI seek to include an acknowledgment that the

[9] At paragraph 4 b).

[10] At paragraph 13.

settlement agreement and consent order were signed by Mr. Browne on behalf of IHL and CRL thereby signifying their consent and agreement to the terms of both. No such full-throated admission is made in their original pleadings. Instead, they admitted there that IHL had vested its proprietary interests in the disputed land to Ms. Mills during the course of their divorce proceedings[11]. Accordingly, mention of the settlement agreement and consent order and CRL's and IHL's undertaking to be bound by them would be new.

[30] The proposed paragraph 13 seeks to rely on *res judicata* and to include a defence that Ms. Mills is estopped from pleading matters or issues which could and should have been addressed in the consent order, such as the subject of ownership of the parking lot. CRL and TFVI have also evinced the intention to claim that Ms. Mills is estopped from seeking the reliefs prayed for on the ground that they are an abuse of the court's process. The proposed changes to the counterclaim seek to incorporate reference to the proposed new paragraphs, as grounds for the ancillary claim. These proposed changes are all new. They were not mentioned in the pleadings or witness statements.

[31] The proposed amendments seek to introduce certain additional factual and legal disputes. In deciding whether leave should be granted to the defendants, the court will consider and apply the applicable established principles.

[32] The procedural guidelines for the grant of permission to amend a statement of case are outlined in the Civil Procedure Rules 2000 ('CPR') and Practice Directions ('PD'). The Court may permit a party to amend his statement of case. An application to amend a defence must be accompanied by an affidavit and a draft of the proposed amendments.[12] CRL and TFVI have complied with these requirements. The application is usually dealt with at a case management conference, but may take place at any time.[13] This claim was case managed without any of the foregoing issues being raised. The period for case management ended when this matter was scheduled for trial.

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[11] Paragraph 14 (6) of the Defence and Counterclaim.

[12] PD 20. No. 5 of 2011, para. 2.2.

[13] CPR 20.1(2)

[33] In considering the application, the court must seek to give effect to the overriding objective to deal justly with the case.[14] In this regard, the court will endeavour as far as possible to save expense; deal with it expeditiously; ensure that the parties are on equal footing; deal with the case proportionately in view of its importance and difficulty, the sums of money involved and the parties' respective means; allot an appropriate share of the court's resources to the matter while considering the need to allot resources to other cases.[15]

[34] The court must evaluate a non-exhaustive list of factors including how soon the applicant applied to amend its pleadings after it became of the need to do so, the history leading to the application and regarding previous amendments; and the reasons for any delay. It must also take into account any prejudice which might be occasioned to the respective parties if the application is granted on the one hand, or refused on the other; whether the text of the amendment is satisfactory in terms of clarity and particularity; and whether any prejudice can be compensated by costs or interest. The court will also factor in whether the trial date can still be met and any other relevant matters in connection with the administration of justice.[16] The parties are agreed regarding the legal principles underlying the grant of leave to amend a statement of case. They also rely on the same legal authorities in most instances. I will consider the application through the lens of those principles and the relevant legal authorities.

**Promptitude**

[35] CRL and TFVI submitted that the Court of Appeal has encapsulated the general approach to be taken in respect of applications for amendment of statements of case and the factors to be taken into consideration. They relied on the case of **Marinor Enterprises Ltd et al v FCIB**[16]. They acknowledged that the Court of Appeal in that case provided guidance on how to treat with late applications for amendments. Ms. Mills agreed. Baptiste JA delivered the judgment. CRL and TFVI quoted from the decision where it was stated:

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[14] CPR 1.1.

[15] CPR 1.3.

[16] Marinor Enterprises Ltd et al v FCIB DOMHCVAP2013/0003.

'7. 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 ... is of the utmost importance. Just disposal of a case is not, however, the preserve 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…'.[17]

[36] The Court explained:

'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.'[17] (underlining added)

[37] The defendants argued that the classical statement of the general principles were articulated in the English case of **Steward v North Metropolitan Tramways Company** by Lord Esher MR where he stated:

'With regard to questions of amendment of pleadings, a rule has been enunciated by the

[17] At para. 7 of the Marinor Enterprises case.

Court, which is rather a rule of conduct than a rule of rigid law such as can never be departed from; because I take it that the Court might depart from it if there were very exceptional circumstances in any particular case leading the Court to think that it would not be right to apply it. It is nevertheless a rule of conduct which must be generally followed. The rule was thus laid down in *Tildesley v. Harper (1)* 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 mala 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), 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 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." And the same principle was expressed, I think perhaps somewhat more clearly, by Bowen, L.J., who says that an amendment is to be allowed "whenever you can put the parties in the same position for the purposes of justice that they were in at the time when the slip was made.'[18]

[38] CRL and TFVI reasoned that the courts appeared to have made a distinction between a late amendment and a very late amendment. They submitted that the latter description was been adopted by the Court of Appeal in the **Marinor Enterprises case** and explained thus: -

'(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.

(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

[18] (1886) 16 QBD 556 at pg. 558.

be done.'[19]

[39] The decision in the case of **Denise Violet Stevens v Luxury Hotels International Management St. Kitts Limited (formerly Marriott St. Kitts Management Company Inc.)**[20] was advanced by CRL and TFVI as one where the court granted leave to amend particulars of special damages after judgment on admissions was entered and one day before continuation of the assessment of damages hearing. The claimant in that case was permitted to delete some heads claimed and adjust the quantum claimed under other heads. CRL and TFVI highlighted that the application for amendment was filed after the limitation period for commencing the subject claim for negligence had expired.

[40] In delivering the decision in that case, the learned Master opined that the amendments did not introduce a new claim and merely expanded on the original pleadings. She noted that the application for amendment was made some 8 months after the claimant should have become aware of the facts which would make amendment desirable. She concluded that the delay was inordinate. However, she granted leave to amend, having determined that the only prejudice occasioned to the defendant by an amendment would be delay and that compensation in costs would provide adequate relief to the other party for such prejudice.

[41] The learned Master considered the English case of **Cobbold v London Borough of Greenwich**[21] where the England and Wales Court of Appeal ('EWCA') was considering an appeal from the trial judge's refusal to amend the defence. Peter Gibson LJ stated:

> 'It is, of course, important that trial dates, when they are fixed, should be adhered to, but I fear that [the first instance judge in that case] may have let that factor dictate his approach to the question of amendment.'

[42] Gibson LJ emphasized that the court has an overriding duty to deal with cases justly. He remarked that this includes ensuring that each case is dealt with expeditiously and fairly. He stressed that amendments should generally be allowed to ensure that the parties' real dispute can be

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[19] At para. 10.

[20] Claim No. SKBHCV2013/0069.

[21] Cobbold v London Borough of Greenwich [1999] EWCA Civ 2074.

adjudicated upon. He noted that this should happen only if the public interest in the efficient administration of justice is not significantly harmed and where any prejudice caused to other parties by the amendments can be compensated by costs. Gibson LJ observed that there is 'always prejudice when a party is not allowed to put forward his real case, provided that that is properly arguable.'

[43] CRL and TFVI pointed to this rationale as being relevant to the instant proceedings. They submitted that the learned Master in the **Denise Violet Stevens' case** noted that in the **Cobbold case**, the EWCA took into consideration that the amendment being proposed by the claimant was one of which had not taken the defendant by surprise because it had been apprised of it for several months. The EWCA stated that while the defendant should have made the application to amend sooner, the delay was not such as to irredeemably harm the claimant. CRL and TFVI stressed that the amendment being sought in the **Cobbold case** was 'in essence a new case' while in the case at bar a new claim is not being advanced by the proposed amendments. They submitted that the court should find that any prejudice to the claimant can be compensated in costs.

[44] CRL and TFVI argued that it is never enough to oppose an amendment because it is late or to secure one by proffering costs. They cited the case of **Nottinghamshire and City of Nottingham Fire Authority v Gladman Commercial Properties**[22]. In that case, Peter Smith J stated:

> '54 In paragraph 72 of the Mills & Reeves judgment, Lloyd LJ said this: -
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> '... it is always a question of striking a balance. I would not accept that the court in that case sought to lay down an inflexible rule that a very late amendment to plead a new case, not resulting from some late disclosure or new evidence, can only be justified on the basis that the existing case cannot succeed and the new case is the only arguable way of putting forward the claim. That would be too dogmatic an approach to a question which is always one of balancing the relevant factors. However, 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

[22] [2011] EWHC 1918 (Ch); [2011] WLR 3235 per Peter Smith J..

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."[23]

[45] The judge added that giving one factor a higher weighting 'creates difficulties and might fetter the discretion conferred on the Judge. He should consider all factors (including lateness and prejudice) and come to a conclusion weighing all factors but not giving one (lateness) a greater significance.' He accepted that tardiness was one of several considerations and was not decisive on its own. He accepted that the principles articulated in the **Cobbold case** were the applicable ones and should be followed. Importantly, he observed '... The whole purpose of the CPR was to grant Judges a flexible approach in dealing with the application of the rules, ... That objective is plainly designed to ensure trials proceed on a merit basis so that every party has the fullest and fairest opportunity to present its case.'[24]

[46] Smith J. opined that it is understandable that late applications for amendments are sometimes disallowed purely because of the associated costs of adjournments. He remarked that the courts are usually full, trials are expensive and 'litigation is stressful'. Consequently, adjournments will impact the other parties. However, he concluded that in the final analysis exclusion of a late amendment or witness statement could be unfair if their inclusion is not incurably prejudicial to the other side.

[47] The Eastern Caribbean Supreme Court emphasized those principles in the **Marinor Enterprises Ltd case**. Baptiste JA declared: 'The factors ... 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.'[25]

[48] Baptiste JA remarked 'There is a heavy burden on a party applying for a very late application to

[23] At para. 54.

[24] At para. 57.

[25] ~~At~~ para. 7.

amend. ... 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.' Those pronouncements are quite telling and are applicable to the facts of this case.

[49] CRL and TFVI referred to a number of other cases where similar pronouncements were made:-

1. **Rahan Aliv Abu Bakar Siddique**[26]; where the Court stated that an application for a late amendment will require the court to decide how the amendment affects the pleaded case; whether a corresponding amendment to the other side's pleading is necessary; and if further disclosure or fresh evidence might be required.
2. **Swain-Mason v Mills & Reeve**[27].
3. **Quah Su-Ling v Goldman Sachs International**[28] involving a late application which was denied. In that case Carr J. explained that 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. She observed that parties and the court have a legitimate expectation that trial fixtures will be kept. and;

5. **John Lawrence Monks v National Westminster Bank PLC**[29].

[50] CRL and TFVI submitted that they became aware of the matters and issues raised in their proposed changes, only when the parties were invited to file submissions on the issue of *res judicata*. Ms. Luckham's testimony was not that time specific. The defendants argued that they were therefore in a position to seek to plead those matters only as they were preparing for trial. Ms. Mills rejoined that they had ample opportunity to make their application before then. She contended that their defence and counterclaim was filed 4 years before and was met by a detailed reply and defence to counterclaim.

[51] The defendants submitted that the record will confirm that the trial was adjourned for unrelated

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[26] [2015] EWCA Civ 1258.

[27] [2011] EWCA Civ 14.

[28] [2015] EWCH 759 (Comm) (referred to in the Marinor case.

[29] [2015] EWCH 1172 (Ch); (referred to in Marinor case).

reasons and went into abeyance for several months through no fault of theirs. They contended that on the trial resumption the application for the amendment was made. They acknowledged that there is some basis for considering that the CRL is tardy in seeking the amendment which, it should have realised were necessary at the earliest, when the submissions on *res judicata* were first filed pursuant to the Court's directions in March 2018. They correctly argued that lateness is a relative and not an absolute concept, and that other considerations include 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. They also properly submitted that the subject amendment does not fall to be decided on the basis that it is a very late amendment.

[52] Ms. Mills argued that there is no reason why CRL and TFVI should now be allowed to amend their defence and counterclaim especially since their application was made very late and only on the day before the second day of trial. Ms. Mills submitted that the applicants' application was made at the trial, after she closed her case; after the defendants' principal witness had given his evidence in chief and was being cross-examined; and 16 months after the applicants had indicated that *res judicata* was an issue they might pursue by amending their defence. She argued that the application was very late and that the defendants had proferred no reasons (in their submissions) as to why they did not make it earlier.

[53] Ms. Mills submitted that it is also relevant that the parties filed fulsome written submissions on the issue of *res judicata* and its relevance and impact on the instant proceedings in 2018. In this regard, she submitted that the defendants argued in their submissions that the court could either rely on its inherent jurisdiction to decide the issue of *res judicata* or amendments to the pleadings might be required.

[54] The record reflects that while the parties were invited to make submissions to the court on certain issues in March 2018, they did not include issue estoppel, abuse of process or any other new assertions. By their admission, CRL's and TFVI's attention were directed to those new matters over a year ago.

[55] Having regard to all the surrounding circumstances of the case, the application is very late, having been made after the close of Ms. Mills case; after the defendant's principal and sole witness had started giving his evidence; and long after the parties had been invited to consider the partially similar issues to those which the defendants are seeking to introduce by amendment. The application was filed on June 17th 2019. By then, 16 months had elapsed since the initial date set for trial and since the parties' attention was directed to the possibility that issues of *res judicata* were involved. I remind myself that lateness is not the sole deciding factor in such applications.

**Reasons for Delay**

[56] The defendants argued that Ms. Mills admitted in her submissions that the doctrine of *res judicata* in its widest meaning may have application to bar her from setting up against them, averments that were made or could have been made in the 2010 proceedings. They submitted that CRL now desires the court to decide whether or not the claims for relief in the instant case raise issues that are barred by the record via the consent order. CRL and TFVI have supplied no reasons for their delayed application. An explanation is imperative in light of the considerable delay[30]. Ms. Luckham was silent on that issue. This must be weighed in the balance against them.

**History of amendments**

[57] A few minor amendments were made to the Defence and Counterclaim on the first day of trial. They were largely cosmetic in nature and introduced no new issues. Ms. Mills did not object to them. The defendants cannot be accused of repeatedly making applications for amendments.

**Prejudice to CRL and TFVI**

[58] CRL submitted that if the Defence and Counterclaim filed is not amended its case would be gravely prejudiced in that it will not be permitted to advance its case on *res judicata*. This is so to the extent that their reliance on *res judicata* must be pleaded. Ms. Mills submitted that an amendment to the pleadings is not required in order for the real issues in the case to be determined. She submitted that the issues of limitation and estoppel are still alive and would require determination by the court. She accepted that denial of the application would result in a lost opportunity for the

[30] Worldwide Corporation Ltd v GPT Ltd. [1998] All ER (D) 667; and Marinor Enterprises case.

defendants to pursue their proposed new factual and legal contentions. I agree that this would be the result of such refusal in relation to some elements of their proposed new case.

[59] Ms. Mills argued that allowing the amendment would serve no useful purpose because the court may invoke its inherent jurisdiction to strike out any part of her claim if it concludes that the claim is an abuse of the court's process based on the doctrine of *res judicata*. She submitted the defendants would suffer no significant prejudice if the application is dismissed and in any event that any prejudice to them is of their own making.

**Prejudice to Ms. Mills**

[60] CRL argued that if it is permitted to make the amendment Ms. Mills would be in no worse position than she would have been, had CRL specifically pleaded the consent order at the outset in its Defence to Counterclaim. It submitted that Ms. Mills has had their submissions since March 2018, in which they intimated that leave may be sought from the Court to amend to plead *res judicata*. They contended that it is clear that Ms. Mills has been well aware for many months of the point which CRL wishes to take, (i.e. that Ms. Mills is barred by the consent order from bringing its claim against CRL). They submitted further that Ms. Mills having been so aware for several months that it cannot be said that she has been taken by surprise.

[61] They argued that Ms. Mills has had notice of this contention since filing her own Skeleton on *res judicata* where she addressed the point of law. The defendants contended that Ms. Mills may herself amend her pleadings commensurately to rely on the consent order, without there being any loss of time or the administration of justice being thereby otherwise adversely affected. CRL and TFVI submitted that they will raise no objections to a similar amendment being made to the Ms. Mills' statement of case. They reasoned that in such a case the evidence would not be lengthened as it involves primarily looking at legal issues on which the parties have already presented comprehensive written submissions.

[62] They acknowledged that it is true that their case would be differently presented but reasoned that the mere fact that the case is differently presented would not prejudice Ms. Mills. They contended that it must be appreciated that the case is not statute barred. They submitted that no principle of

estoppel arises or prejudice can be relied upon merely because Ms. Mills faces a new case which does not require her to make adjustments to the presentation of her own case; and one which is based on facts admitted by her.

[63] The defendants argued further that save for the usual prejudice when a party is not allowed to put forward her real case, that is properly arguable, there is no real disadvantage nor inconvenience to Ms. Mills that would arise particularly, from an order allowing the amendments, which cannot be compensated for in costs.

[64] Baptiste JA in the **Marinor Enterprises case** summarized the considerations which a court takes into account when assessing prejudice in relation to applications for amendment of pleadings. He relied on pronouncements made by Mr. Justice Coulson in **CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd.**[31]. They are equally apt in the instant case and I respectfully adopt his summary

[65] The court must be mindful on the one hand of the possibility that one party is being played around by the one seeking amendments; 'the disruption of and additional pressure on their lawyers' arising from such amendments at the point of the amendment and at trial; and on the other hand 'the duplication of cost and effort'. Undoubtedly, if the amendments are granted Ms. Mills' counsel would need to review the evidence adduced to date to satisfy her whether she should make an application to recall her. She would also need to evaluate whether a corresponding amendment would need to be made to her own statement of case. Significantly, in such a case it will probably require the filing and service of further witness statements and/or witness summaries, effectively throwing the entire case back to case management and pre-trial mode.

[66] Justice of Appeal Baptiste opined[32] that an overwhelming reason to refuse the amendment would be where it would necessitate an adjournment of the trial. He added that if the prejudice to the party applying for the amendment has come about by that party's own conduct, then it is a much less important element of the balancing exercise. In this case, the very real possibility of a protracted

[31] [2015] 1345 (TCC).

[32] At para. 20 of the Marinor Enterprises case.

adjournment coupled with the reality that CRL and TFVI must shoulder the responsibility for the tardy application serve to tip the scale against them on the issue of prejudice.

[67] I remain mindful that if the proposed amendments are not allowed, CRL and TFVI will suffer the prejudice of being unable to advance the proposed new factual contentions and some of the new legal contentions. In this regard, the contents of Ms. Mills' affidavit and a portion of Ms. Mills' Reply and Defence to Counterclaim are not disputed and have been pleaded and outlined in evidence.

[68] CRL and TFVI filed their Defence and Counterclaim on 15th October 2015, almost 4 years ago. It was open to them then to raise the assertion that in 2010 when Ms. Mills brought her claim, she knew that CRL was using the disputed land as a parking area as part of its hotel business. They had ample opportunity to do so during case management and pre-trial review hearings. They have given no reason why they did not do so. They did not claim that the parties have been in discussions about the possible introduction of such a claim.

[69] Ms. Mills' evidence is in. To permit the defendants to introduce fundamentally new contentions at this stage, after Ms. Mills has prepared herself in accordance with the issues joined between the parties years ago, would be akin to trial by ambush. It would sanction as being acceptable that a party may choose to disclose that it is contemplating a particular course and yet spring it on the other side after the other side has closed its case. This would be highly prejudicial to Ms. Mills and is also contrary to the overriding objective. In the absence of compelling explanation or reasons, none of which have been advanced or appear to exist in the case at bar, such practice is not to be encouraged or countenanced by the court.

[70] The foregoing concerns are just as applicable to the proposed paragraph 12 and proposed amendment to the counterclaim. Aspects of the proposed paragraph 13 attract similar censure, specifically in respect of the *res judicata* by record and associated estoppel allegations and claim.

[71] Regarding other aspects of the proposed paragraph 13, the parties have submitted that the defendants may appeal to the court to invoke the doctrine of *res judicata* to strike out that part of Ms. Mills' claim. They submitted further that the court may do so its own volition. In those circumstances, neither party

would be prejudiced by a refusal to grant those amendments. In the round, the prejudicial factors are considerable as against Ms. Mills if the amendments are granted and less so for the defendants if they are refused.

[72] The sole prejudice to the defendants would be the inability to make their case based on the proposed new factual and legal contentions. One presumes that they have adequately prepared themselves to present that part of the case. I agree with Ms. Mills that such prejudice to CRL and TFVI has come about due to their own conduct and therefore lowers its ranking in the entire scheme of things[33]. It has been stated that:

> 'Litigants who leave a substantial application to amend until a late stage cannot reasonably complain, ... 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.'[34]

[73] CRL and TFVI have submitted that any prejudice to Ms. Mills can be compensated by a costs order. The Court of Appeal has signaled that 'the court would not discount prejudice to a party on the basis that the party could be compensated in costs.'[35] Baptiste JA remarked that the court must 'consider the holistic effect of the disruption' including 'the impact of the disruption on the parties, as well as on efficient case management and the administration of justice.' [38]

[74] The Court of Appeal[36] approved the pronouncement of Smith J where he stated:

> '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.'[37]

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[33] Archlane Limited and Johnson Controls Limited and Another [2012] EWHC B12 (TCC); and Wani LLP v Royal Bank of Scotland plc and another [2015] EWHC 1181 Ch.

[34] Per Henderson J. in Wani LLP v Royal Bank of Scotland plc and another.

[35] Per Baptiste JA at para. [23] of the Marinor Enterprises case.

[36] Per Baptiste JA at pg. 19 of the Marinor Enterprises case

[37] Norcross and others v The Estate of Georgallides [2015] EWHC 2405 (Comm). at para. 87.

[75] Baptiste JA said[38] that the appellants' contention that 'any prejudice caused to [the respondent] could be compensated in costs is not reflective of and stands in discordance with the contemporary jurisprudence.' He ruled that on the facts and in the circumstances of that case, that argument was not sustainable. CRL and TVFI are in similar straits. I am of the considered opinion that costs to Ms. Mills by way of compensation could not adequately or reasonably serve as a counterbalance to the significant prejudice to which she would be subjected if the amendments were granted.

**Rationale for the proposed amendments**

[76] The defendants submitted that a party must plead facts to establish estoppel by deed or record or bring them to the notice of the court in some other appropriate way. They adopted and relied on statements outlined in **Halsbury's Laws of England** where the learned authors explained:

> '313. **Facts relied on must be pleaded.** The old rule was that estoppel by record and deed had to be pleaded if there was an opportunity. If the party against whom the record was used gave by his pleading the opportunity of pleading the estoppel, and this was not done, the record could not be relied on as conclusive, but as evidence only. It was otherwise if no such opportunity was given.
>
> Under the modern practice, the facts relied on to establish an estoppel of any kind must be pleaded; thus in civil proceedings to which the Civil Procedure Rules (`the CPR') apply, such facts should be included in the statement of cases or, where the Part 8 procedure is used, brought to the notice of the court in some other appropriate way.[39]

[77] The defendants acknowledged that both parties rely in their pleadings on facts arising out of the settlement agreement and the consent order. They submitted that none of them had specifically pleaded *res judicata* by reference to the consent order nor did Ms. Mills plead either instrument in her statement of claim. They accepted that Ms. Mills annexed to her pleading both the settlement agreement and consent order. They acknowledged further that they were required under CPR 10(5) (1) and (6) to set out all the facts in their statement of case and annex to it any document on which they rely.

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[38] At para. [23] of the Marinor Enterprises case.

[39] Halsbury's Laws of England Vol. 12, 5th Edition; Morrison Rose & Partners v Hillman [1961] 2 QB 266.

[78] CRL and TFVI contended that CRL gave notice of its intention to rely on the consent order and foreshadowed it in its March 2018 submission. There the defendants argued:

> 'In the circumstances, the court may pursuant to the overriding objective under the CPR exercise its inherent discretion and rule appropriately that the proceedings are barred as a result of *res judicata* or it may permit the parties or either of them to make an appropriate application to amend the statements of case, if necessary so as to plead *res judicata* appropriately to facilitate such a ruling.'

[79] The defendants submitted that in pleading estoppel (arising out of the factual circumstances which those instruments evidence) they referred to the consent order[40]. They argued that Mr. Browne testified to that effect and exhibited the consent order and Ms. Mills' affidavit from the 2010 proceedings. They contended that Ms. Mills took no objection to the admissibility of this evidence. They noted that in her Defence to Counterclaim, she pleaded 'estoppel' and 'waiver' in respect of the alleged effect and import that the settlement agreement and the consent order have in interrupting the running of time and thereby barring their reliance on the Limitation Act.

[80] CRL and TFVI also relied on the contents of the joint pre-trial memorandum[41]. They observed that Ms. Mills admitted there that in her affidavit from the 2010 claim, she expressed her desire to have, *inter alia*, full ownership of CRL, its assets including its real estate with an adjustment to the title deed that would extend the boundaries of the property to encompass the disputed parking area. They pointed out that she also accepted that she executed the consent order thereby signifying her agreement to be bound by it.

[81] The defendants have thereby acknowledged and highlighted that they will be unable to rely on issue estoppel and the other new legal contentions unless they are introduced by way of amendment to the pleadings. This is a given. They submitted that the relevant facts arising from the amendment are not in dispute and therefore a pure point of law arises from them.

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[40] At paragraph 14(6) of their Defence and Counterclaim.

[41] Filed by the parties on June 6th 2016.

[82] The defendants have pleaded proprietary estoppel but not issue estoppel. Issue estoppel on which the defendants wish to rely by way of amendment, introduces another limb on which they can prosecute their ancillary claim for declarations that Ms. Mills is not entitled to possession of the disputed parking lot; an injunction restraining her from trespassing there; a declaration that the defendant is entitled to possession of the parking lot as owner and the right to maintain their signage on the disputed land. They have been represented throughout by very competent counsel. In the absence of some explanation why those points were not taken earlier, the balance swings against them to grant the amendments simply because they arise from the historical circumstances of the case and based on glimpses of them in their submissions.

**Trial Date**

[83] The defendants contended that no trial date has been adversely affected by the need for making the application and that permitting the amendment would not cause the trial date to be lost. They argued that the trial date which is fixed can still be met if the application is granted. I disagree having regard to the consequential additional review, research and filings on which Ms. Mills would be required to embark in order to meet the new allegations. Such undertakings would no doubt involve extensive preparation and substantially increase the 'readiness-for-trial' timeframe.

**Administration of Justice and costs**

[84] The defendants contended that looking at the big picture and the context within which the application is made, if the amendments are permitted it will be in the interests of the administration of justice and the overriding objective. CRL and TFVI submitted that consistent with the applicable principles, the amendments 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 amendments can be compensated for in costs, and the public interest in the efficient administration of justice is not significantly harmed. They cited the cases of **J Astaphan Co Ltd v Mary Ann Lee et al**[42] and **Dwight Cozier v Mark Brantley et al**[43] **where** costs were awarded where leave to amend the statements of case was allowed. For the reasons given in the previous paragraph, I am not so persuaded.

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[42] Claim No. DOMHCV2011/00282.

[43] Claim No. NEVHCV 2009/0180.

**Overriding Objective**

[85] It strikes me that if leave to amend is granted, Ms. Mills would need to amend her pleadings unless her defence would amount to more than joinder of issue. Justice would dictate that she be provided an opportunity to respond orally to the new assertions. This would normally require the filing and exchange of witness statements before the resumption of the trial, to afford the defendants some time to familiarize themselves with any new averments introduced by Ms. Mills, and to prepare and file witness statements also. The result would be that the filing of pleadings and evidence would once more extend the trial timetable. The resumption of the trial would have to be postponed for at least another 3 months. The practicalities and consequences of this would in my mind run contrary to the overriding objective to do justice among the parties.

[86] Presumably, all parties would have addressed their minds fully to those matters after having been given the issue to consider the doctrine of *res judicata* in March 2018. If they did not, it would seem inconvenient and contrary to the overriding objective to afford them another 3 to 4 months to do so. The court reminds itself that the parties have always been represented by seasoned legal practitioners and do not allege or appear to have been prejudiced by lack of adequate representation during the relevant periods.

[87] Conceivably any further protracted delay would have the knock on effect of increasing related expenses and could justifiably be viewed as a situation in which a disproportionate amount of resources is being applied for the benefit of the parties having regard to its importance and difficulty and the parties' means. Importantly, the court remains mindful of its duty to manage and allot its resources among its clientele in a judicious manner. Pronouncements by the court in **Worldwide Corporation Ltd v. GPT Ltd** are particularly instructive. I can do no better than repeat and adopt them for present purposes. In the words of Waller LJ:

> '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?'[44]

[88] In all the circumstances, and having considered the factors, legal principles and circumstances above, I find that granting leave to amend the referenced parts of the defence and counterclaim would not be just. The application to amend is therefore denied.

**COSTS**

[89] Ms. Mills is entitled to her costs. The rules provide that they are to be assessed on application[45]. It is so ordered.

**ORDER**

[90] It is accordingly ordered and declared:

1. Caribbean Resorts Limited's and The French Verandah Inc's application for leave to amend their Defence and Counterclaim is dismissed.

2. Caribbean Resorts Limited and The French Verandah Inc. shall pay to Glennis Mills costs to be assessed on application to be filed and served on or before 16th October, 2019.

3. Adjourned for trial to a date to be fixed by the Registrar in October or November 2019 in consultation with the parties.

[91] I am grateful to counsel for their helpful written submissions.

**Esco L. Henry**
**HIGH COURT JUDGE**

By the Court

Registrar

[44] At para. 70.

[45] CPR 65.12.