[2024] JMCA Civ 22

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE DUNBAR GREEN JA

SUPREME COURT CIVIL APPEAL NO COA2022CV00102

BETWEEN ALCOVIA DEVELOPMENT COMPANY LIMITED APPELLANT

AND KEMTEK DEVELOPMENT & CONSTRUCTION LIMITED RESPONDENT

Written submissions filed by Joseph D Willis instructed by Daly Thwaites & Co for the appellant

Written submissions filed by Seyon Hanson instructed by Beecher Bravo Hanson & Associates for the respondent

24 May 2024

Civil procedure – Statement of case– Leave granted to amend defence after summary judgment but before hearing for assessment of damages - Correctness of decision - Relevant considerations - Civil Procedure Rules, 2002

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4 of the Court of Appeal Rules 2002)

F WILLIAMS JA

[1] I have read in draft the judgment of my sister Dunbar Green JA and agree with her reasoning and conclusion. There is nothing that I wish to add.

SIMMONS JA

[2] I, too, have read the judgment of my sister, Dunbar Green JA. I agree with her reasoning and conclusion.

DUNBAR GREEN JA

Introduction

[3] On 21 September 2022, Mott Tulloch-Reid J ('the learned judge') granted an application by Kemtek Development & Construction Limited ('the respondent') to amend its defence. This amendment was made subsequent to the grant of summary judgment in favour of Alcovia Development Company Limited ('the appellant').

[4] The amendment is of monetary significance to the parties and is now the basis of this appeal.

Background

[5] The appellant and respondent are companies duly incorporated under the laws of Jamaica, with registered offices (or main offices) at 99 Balmoral Heights, Tower Isle, and Shop 6a Pompano Commercial Complex, Tower Isle, in the parish of Saint Mary, respectively. The respondent is also the proprietor of lands, registered at Volume 1447 Folio 894 in the Register Book of Titles, and located at Lot Section 1, Part of Huddersfield Saint Mary ('the property').

[6] In 2008, the appellant entered into an agreement ('the agreement for sale') with the respondent (the vendor) to purchase the property for $23,000,000.00. The other principal terms of the agreement for sale were that: (a) $6,900,000.00 was to be paid on the signing of the agreement for sale; (b) a further $4,600,000.00 was to be paid on or before 60 days from the date of signing, or the date of the agreement for sale, whichever was sooner; (c) the balance of $11,500,000.00 was to be paid within 60 days of the receipt of the certificate of compliance from the relevant parish council together with the claimant's (appellant's) share of the costs of the transfer; (d) the completion date was to be 60 days after the receipt of the certificate of compliance with the payment of "all sums due under the contract including all half costs and fees"; and (e) possession would be vacant upon completion.

[7] The appellant paid $11,500,000.00 in accordance with the terms of the agreement for sale. However, in February 2017, the sale price was reduced to $20,000,000.00, and a new completion date of 1 May 2017 was agreed.

[8] In April 2017, the appellant discovered that a structure had been erected on the property, which appeared to be occupied by squatters. The appellant wrote to the respondent on 1 May 2017, requesting the demolition of the structure and an assurance that the property would remain vacant. In May 2017, the respondent's attorney-at-law undertook to have the structure demolished. In June 2017, the appellant's attorney issued a letter of undertaking to the respondent's attorney-at-law and sought confirmation that the property was vacant. In February 2018, the respondent's attorney confirmed that the structure had been demolished, and that they could complete the sale with vacant possession.

[9] The appellant subsequently commissioned a survey of the property, but it was reported that the surveyor was barred by an individual asserting proprietary rights over a section of the property. An encroachment was also identified in the survey. The appellant's attorney brought these developments to the attention of the respondent's attorney in March 2018.

[10] In December 2018, the appellant changed attorney, and a new letter of undertaking, dated 19 December 2018, was issued to the respondent's attorney. The letter of undertaking requested the duplicate certificate of title in the appellant's name, a property tax certificate evidencing that the payment of taxes was up to date, a letter of possession, a letter to the Jamaica Public Service, a letter to the National Water Commission, and a completed Tax Registration Number form (TRN).

[11] On 23 April 2019, a notice making time of the essence was served on the respondent's attorney. The notice required the respondent to complete the sale and provide proof of beneficial ownership and vacant possession of the property on or before

3 May 2019, failing which the appellant would terminate the contract and pursue recovery of the sums paid under the agreement for sale, and damages for breach of contract.

[12] There were no further developments until 6 May 2019, when the appellant's attorney cancelled the agreement and demanded a refund of the sums paid. The appellant's attorney also advised that a claim for breach of contract would follow.

Proceedings in the Supreme Court

The claim

[13] On 9 July 2019, in furtherance of a letter making time of the essence, the appellant filed suit against the respondent, claiming, among other things, a declaration that it had lawfully rescinded the agreement for sale, recovery of specified sums for the total failure of consideration, damages for breach of contract, and costs.

[14] In its defence, filed on 5 August 2019, the respondent asserted, among other things, that it was at all material times ready, willing and able to complete the sale as indicated in a letter to the appellant's attorney on 14 January 2019. Further, by a letter dated 7 February 2019, the appellant's attorney was informed that the breaches were rectified and that the respondent was now in a position to complete the sale. The respondent, therefore, denied that it had failed to comply with the notice to complete and the conditions of the letter of undertaking. It blamed the incompletion of the sale on an ambiguity in the appellant's notice to complete, and the absence of clarification as to what other than the provision of the certificate of title was required by the appellant to prove beneficial interest.

Summary judgment

[15] The appellant applied for summary judgment in response to which the respondent filed two affidavits, neither of which mentioned a defect in title. Both affidavits stated that the respondent was ready and able to complete. The sole issue joined by the parties was whether the respondent was given sufficient time to complete the sale. On 23

October 2020, Hutchinson J granted the application for summary judgment, provided written reasons, and set the dates for case management and assessment of damages hearings respectively.

The respondent's application to amend defence subsequent to summary judgment

[16] Prior to the hearing for the assessment of damages, the respondent proposed amendments to its defence which were predicated on fresh assertions that: (a) it was unable to complete the transfer of the property to the appellant due to its inability to cure defects as to the title; (b) the appellant cancelled the agreement for sale due to the defects to the title; (c) the respondent stood ready and willing to complete, subject to being allowed a reasonable time to rectify defects to the title; (d) the appellant was only entitled to a refund of the sums paid under the agreement for sale and reasonable costs associated with investigating the title; and (e) special condition 4 of the agreement for sale specifically stated that the deposit and further payments should be refunded without interest, upon a rescission of the agreement for sale.

The learned judge's decision to grant the proposed amendments to the defence

[17] On 21 September 2022, the learned judge allowed most of the amendments. In her written reasons handed down on 15 March 2023, she said, among other things, that the defects in title had been considered by Hutchinson J, in her decision to give summary judgment, and since the failure by the respondent to satisfy the requirements of the notice making time of the essence led to cancellation of the agreement, the events which transpired before the notice was served would be relevant at the hearing for assessment of damages. Further, it was for the judge at the assessment of damages to determine what weight, if any, should be put on the allegations contained in the amendments to the defence.

Grounds of appeal

[18] The grounds of appeal, challenging the learned judge's decision at case management, to permit amendment of the defence, are as follows:

"(1) The Learned Judge fell into error in allowing an amendment after the grant of summary judgment.

(2) The Learned Judge erred in granting an amendment which effectively allows the Respondent to pursue a line of defence which is contrary to the unchallenged finding made on the application for summary judgment entered on October 23, 2023.

(3) The Learned Judge's determination that the Respondent's proposed amendment was not insincere is contrary to the:

(a) Respondent's statement of case and evidence prior to, and after, the entry of summary judgment; and

(b) The Reasons for Summary Judgment."

Summary of submissions

[19] Submissions on all grounds will be taken together.

For the appellant

[20] Counsel for the appellant relied on **Hadmor Productions Ltd v Hamilton and Others** [1983] 1 AC 191, **Attorney General of Jamaica v John MacKay** [2012] JMCA App 1, and **Roache v News Group Newspaper Ltd** [1988] EMLR 161 for the principles that should guide the appellate court's review function in these matters.

[21] Counsel submitted that a defect in title was not raised, as a defence, at the hearing for summary judgment, nor was there any specific finding to that effect. That issue was first introduced when the appellant sought to appoint a valuator to address its claim to damages equivalent to the subject property's market value; rather than the return of the sums it paid on the agreement for sale, expenses incurred for investigating the title, and incidental costs. The respondent then opposed an award of damages, for the loss of bargain, on the ground that there was a defect to the title.

[22] Counsel contended that the permission to amend the defence, based on the allegation of a defect to title, two years after the granting of the summary judgment, not only allowed the respondent to pursue a line of defence which was contrary to its previous defence, but was also at variance with Hutchinson J's findings on the summary judgment application. Furthermore, the learned judge's decision to amend the defence was erroneous since a statement of case cannot be amended after judgment had been perfected.

[23] Counsel pointed to the following allegations of facts as being at variance with Hutchinson J's reasons: (a) the respondent was unable to complete the transfer due to its inability to cure defects as to the title, (b) the appellant cancelled the agreement for sale due to its defects as to title and encroachments, and (c) the respondent stood ready and willing to complete the sale subject to being allowed a reasonable time to rectify the defects in title.

[24] Counsel submitted that the amendments undermined Hutchinson J's findings which were never challenged on appeal. It was further submitted that the amendments were insincere based on the respondent's statement of case filed before the entry of summary judgment, and the reasons for summary judgment.

[25] In support of those submissions, counsel relied on **Gloria Moo Young and Erle Moo Young v Geoffrey Chong, Dorothy Chong and Family Foods Limited (In Liquidation)** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 117/1999, judgment delivered 23 March 2000, and **Index Communication Network Limited v Capital Solutions Limited, Kenneth Tomlinson, Spectrum Management Authority, Registrar of Companies and Claro Jamaica Limited** [2012] JMSC Civ 50.

<u>For the respondent</u>

[26] Counsel for the respondent pointed to principles outlined in **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21, and **Hadmor**

Productions Ltd v Hamilton and Others as the bases on which the appellate court will disturb the exercise of a judge's discretion at first instance. Counsel submitted that the amendments did not "disturb" the issue of liability which was settled at the summary judgment stage. Rather, they were limited to the issue of quantum, as provided for in rule 10.2(4) of the Civil Procedure Rules, 2002 ('CPR').

[27] Counsel further submitted that the defect in title was confirmed by the surveyor's identification report, dated 12 and 15 March 2018, which was relied on by the appellant, at the hearing of the summary judgment application, and it was the reason that vacant possession could not be given to the appellant. In the circumstances, counsel argued, the damages available to the appellants are the costs for investigating the title, incidental costs, and nominal damages.

[28] In support of those submissions, counsel relied on **John Bain and John Paterson v Richard Fothergill and T Alers Hankey** [1874] LR 7 HL 158, **Alex's Imports Limited v Keith Tennant** (unreported), Supreme Court, Jamaica, Suit No CL 1999/A109, judgment delivered 5 May 2006, and **Dinsdale Palmer v Caricom Home Builders Company Limited and Devon Evans** [2020] JMSC Civ 43.

[29] Additionally, it was argued that, with the issue of liability having been determined and the hearing as to quantum pending, an amendment as to quantum was permissible once there was only minimum prejudice to the other side.

[30] Counsel cited **Charlesworth v Relay Roads Limited and Others** [2000] 1 WLR 230 in which an amendment was granted after judgment but before the relevant order was perfected; **London Borough of Islington v UCKAC and Other** [2006] EWCA Civ 340 for the principle that a statement of case can be amended, on appeal; and **Julie Ann Cobbold v London Borough of Greenwich** [1999] EWCA Civ 2074 for the principle that applications for amendments should be considered in light of the overriding objective to deal with cases justly.

[31] Counsel sought to distinguish **Moo Young** on the basis that, in the instant matter, the hearing as to quantum has not yet commenced, and **Index Communication Network**, which concerned an application to amend being made amid a striking-out application.

Disposal of ground one – whether the learned judge fell into error in allowing an amendment after the grant of summary judgment

[32] Amendments are always subject to the judge's discretion, even where the court's permission is not required, as they could later be disallowed (see rules 20.1 and 20.2 of the CPR). The current approach is that the decision should be governed by the overriding objective of enabling the court to deal with cases justly under rule 1.1 of the CPR. An amendment should, therefore, be allowed if it would enable the court to determine a dispute justly (see Stuart Sime's: A Practical Approach to Civil Procedure, 14th edition, at page 219 which reinforces this view).

[33] In **Charlesworth v Relay Roads Ltd**, at page 235, Neuberger J had this to say about determining the justice of the case:

> "As is often the case where a party applies to amend a pleading or to call evidence for which permission is needed, the justice of the case can be said to involve two competing factors. The first factor is that it is desirable that every point which a party reasonably wants to put forward in the proceedings is aired: a party prevented from advancing evidence and/or argument on a point, other than a hopeless one, will understandably feel that an injustice has been perpetrated on him, at least if he loses and has reason to believe that he may have won if he had been allowed to plead, call evidence on, and/or argue the point. Particularly where the other party can be compensated in costs for any damage suffered as a result of a late application being granted, there is obviously a powerful case to be made out that justice indicates that the amendment should be permitted.
>
> That view could be said to derive support from the observations of Millet L.J. in *Gale v Superdrug Plc.* [1996] 1 W.L.R. 1089, 1098-1099:

> 'The administration of justice is a human activity, and accordingly cannot be made immune from error. When a litigant or his adviser makes a mistake, justice requires that he be allowed to put it right even if this causes delay and expense, provided that it can be done without injustice to the other party'…"

[34] In **Charlesworth v Relay Roads Ltd**, an amendment was granted after judgment had been issued, but prior to the order being drawn up. The court took the view that it had jurisdiction to allow a pleading to be amended between judgment and the drawing up of the order, even if it involved a new argument being put forward and further evidence being adduced. See also **Preston Banking Co. v William Allsup & Sons** [1895] 1 Ch 141, 144-145, where Smith LJ said: "So long as the order has not been perfected, the judge has a power of reviewing the matter, but once the order has been completed the jurisdiction of the judge over it has come to an end".

[35] The appellants have relied on the latter pronouncement as a basis for saying that the appeal should be allowed. However, the circumstances in the instant case are quite different. The order for summary judgment had been granted; but the case was not at an end. See **Jamaica Public Service v Rosemarie Samuels** [2010] JMCA App 23 at paras. [23] and [24] where Morrison JA (as he then was) discusses summary judgments and the "application principle", and makes the point that orders in the nature of summary judgments where there has been no trial of the issues are interlocutory. Further, the CPR makes it plain that a summary judgment does not necessarily bring an end to proceedings (rule 15.6), and, in the instant case, it did not. A hearing date was set for the assessment of damages. Therefore, the court retained control over the case, and will do so until the hearing for the assessment of damages, or until such time as the case is otherwise determined. It is this second step that brings finality to the case.

[36] It is also noteworthy that rule 15.4(2) contemplates situations in which applications for summary judgments may be made before a defence is filed, in which case the time for filing the defence is extended. Also, under rule 15.6(3), where the proceedings are

not brought to an end by summary judgment, the court must also treat the hearing as a case management conference (see also Part 26 of the CPR, generally, for the court's powers in case management). It was observed in **Leroy Mills v Roland Lawson and Keith Skyers** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 104/1989, judgment delivered 28 May 1990, that an assessment of damages is "a process whereby a judicial determination is called for on some triable legal issue".

[37] As a procedural requirement, a defendant must plead the facts he intends to rely on at a trial (rule 10.5(1) of the CPR, **City Properties Limited v New Era Finance Limited** [2016] JMCC Comm 1, and **Mabel Demercado and George Demercado v Trevor McKenzie and Mavis Esme King** (unreported), Supreme Court, Jamaica, Suit No CLD 059 of 1992, judgment delivered 18 September 1997). To the extent that an assessment of damages is a trial, rule 10.5(1), in my view, would permit, at the very least, consideration of the application to amend a defence to allow for such facts to be pleaded where they were not so pleaded. By extension, an application to cure a deficiency in the defence (for example, to include a certificate of truth in accordance with rules 10.5(8) and 3.12) would not only be permissible (where the justice of the case requires it and the risk of prejudice to the opposing party is minimal) but should not be defeated purely on a technicality, except where the CPR expressly provides otherwise. The respondent also sought to rely on rule 10.2(4) of the CPR, but it is inapplicable as there was no admission of liability.

[38] The learned judge considered that summary judgment did not bring finality to the proceedings, and she weighed the fact that the amendments sought were in relation to issues concerning damages only. She also considered the risk of prejudice to the appellant, should the amendments be granted, and indicated that any such prejudice could be minimized by the opportunity for the appellant to file a reply and cross-examine the witnesses called by the respondent (see rule 16.4 of the CPR).

[39] For those reasons, it cannot be said that the learned judge was plainly wrong in coming to the conclusion that the justice of the case favoured granting the amendments. Ground one, therefore, fails.

Disposal of grounds two and three: the learned judge erred in granting an amendment which effectively allows the respondent to pursue a line of defence which is contrary to the unchallenged findings made on the application for summary judgment entered on October 23, 2020; and the learned judge's determination that the respondent's proposed amendments were not insincere is contrary to the respondent's statement of case and evidence prior to, and after, the entry of summary judgment and the reasons for summary judgment.

[40] Due to the significant overlap in the material to be considered, grounds two and three will be dealt with together.

[41] For a better appreciation of the effect of the amendments, it is useful to set out relevant aspects of the statements of case and the amendments to the defence which were sought and granted.

Appellant's statement of case

[42] The appellant, in paras. 13-20 of its particulars of claim, stated:

> "13. In February 2018, the Defendant's Attorneys-at-Law represented that the Property was vacant, but that representation was proven to be false by virtue of a surveyor's identification report prepared by the firm of Commissioned Land Surveyors, Lofters & Associates, as well as visits made to the Property by the Claimant's representative.
>
> 14. The surveyor's identification report prepared by Lofters & Associates was provided to the Defendant's Attorneys-at-Law under cover of a letter dated March 25, 2018, from Rattray Patterson Rattray.
>
> 15. By letter dated December 19, 2018, the Claimant's Attorneys-at-Law, Patterson Mair Hamilton, issued a letter of undertaking to the Defendant's Attorneys-at-Law, again

signalling to the Defendant the Claimant's readiness and willingness to complete the Agreement.

16. In spite of the letter of undertaking dated December 19, 2018 from Patterson Mair Hamilton, the Defendant failed to address the issues raised by the Claimant in April 2017 and those contained in the surveyor's identification report prepared by Lofters & Associates. Accordingly, Patterson Mair Hamilton issued a Notice to Complete Sale of Freehold Land and Making Time of the Essence ('the Notice') on behalf of the Claimant to the Defendant's Attorneys-at-Law.

17. The Defendant failed to comply with the Notice as well [as] the conditions of the letters of undertaking issued by Rattray Patterson Rattray and Patterson Mair Hamilton.

18. In the premises, the Defendant repudiated the Agreement, and this repudiation was accepted by the Claimant when it cancelled the Agreement on May 6, 2019.

19. By virtue of the foregoing, the Defendant failed to perform its obligation under the Agreement and the consideration for the payment of JMD 11,500,000.00 has wholly failed.

20. Further, the Claimant has incurred additional loss and expenses."

Paras. 6-13 of the initial defence state:

"6. The Defendant will admit to paragraph 13 in so far as a there was Surveyor's Identification Report prepared by Lofters & Associates.

7. The Defendant admits paragraph 14.

8. In response to paragraph 15 the Defendant will say that Defendant was at all material times ready to complete the sale as indicated to the Claimant's attorney in letter dated January 14th, 2019. The Defendant will further state that the Claimant's previous attorneys indicated to us on May 14th, 2018, by letter that they were no longer acting on behalf of the Claimant in this sale.

9. The Defendant will put the Claimant to strict proof of paragraph 16.

10. The Defendant will deny paragraph 17 and will say that it indicated to Rattray Patterson and Rattray through their attorney by letter dated February 7th, 2019, that the breaches as highlighted by them were rectified and further indicated to Paterson Mair that the Defendant is now in a position to complete the sale.

11. The Defendant will deny paragraph 18 and will say that it requested further clarification from Patterson Mair as to what will be needed other than a title to prove beneficial interest in the land, which until the date of filing hereof, we are still without a response to our requests.

12. The Defendant will deny paragraph 19 and will say that it stood ready to complete the sale and was awaiting a response form the Purchasers attorney at the time to seek clarity on the ambiguous Notice to Complete, and specifically sought to gain further clarification as to what further proof of beneficial interest would be needed other than a Certificate of Title showing the vendor as the owner of said land.

13. The Defendant cannot confirm or deny paragraph 20 and puts the Claimant to strict proof."

Grounds on which amendments were sought

[43] The amendments to the defence were sought on grounds that:

(i) "they were necessary to speak specifically to the issue of quantum as the appellant had obtained judgment by summary judgment;

(ii) a Certificate of Truth was omitted from the defence earlier filed, and was required pursuant to rule 20.5 of the CPC;

(iii) no Case Management Conference had been held in the matter;

(iv) the proposed amendment would be in the interest of justice and would not prejudice the appellant insofar as it relied on various documents sent by the appellant to the respondent

prior to the termination of the agreement for sale, and would not affect the already determined issue of liability, which the respondent did not wish to disturb;

(v) the respondent had maintained in the witness statement of Sylvester Tulloch filed 16 February 2022 that the appellant terminated the sale agreement based on a defect in title, namely the encroachment as identified by the surveyor's reports of 12 and 16 March 2018, which the respondent would have had to rectify prior to completion by virtue of the Notice to Complete sent by the appellant to the respondent on 18 April 2019 with a completion requirement by 1 May 2019; and

(vi) the expert reports filed 27 April 2022 revealed a significant disparity in the estimated value of the property."

Amendments granted

[44] The amendments granted by the learned judge included the following averments:

"7. In response to paragraph 15 the defendant will say that the defendant was at all material times ready to complete the sale as indicated to the Claimant's attorney in letter dated January 14th 2019. The Defendant will further state that the Claimant'sprevious attorneys indicated to the Defendant's Attorney on May 14th 2018 by letter that they were no longer acting on behalf of the Claimant in this sale.

8. That in response to paragraph 16 of the Particulars of Claim the Defendant denies that it failed to address the issues raised by the Claimant in April 2017 as the structure erected by the squatter was destroyed and its remnants removed from the property, and in respect of the issues raised in the Surveyor's Report of Lofters & Associates of March 12 & 16, 2018, the Defendant will state that it commenced an investigation into the alleged encroachment, and had the structure identified and had pictures taken of the structure as a preliminary step to rectifying the encroachment, as at the time no previous survey of the property had revealed any encroachment, and subsequently discussions were entered into with the fisherfolk who had constructed the said structure, regarding the rectification of the encroachment, however the Claimant terminated the Agreement prior to the completion of those discussions, and it is admitted that Patterson Mair Hamilton

Issued a Notice to Complete on April 18, 2019 as alleged, which relied on the Defects as to Title and required the Defendant to rectify the said defects prior to completion, and inter alia confirm beneficial ownership and vacant possession.

9. The Defendant was unable to complete the transfer, as well as the conditions of the letters of undertaking issued by Rattray Patterson Rattray and Patterson Mair Hamilton, which would have involved curing the Defect as to Title to provide proof of vacant possession by correcting the encroachment, which, Defect as to Title would have prevented fulfilment of the Letter of Undertaking, and the Claimant's Attorneys-at-Law did not facilitate any undertaking for the said Defect to be rectified at the Defendant's expense after the transfer of the property, which would have allowed the said transfer to have proceeded, notwithstanding the existence of the encroachment/Defect as to Title.

10. The Defendant will deny paragraph 18 and will say that it requested further clarification from Patterson Mair as to what will be needed other than a title to prove beneficial interest in the land until the date of the filing hereof, was not provided, and that it was the Claimant that cancelled the Agreement for Sale as a result of the Defect as to Title/encroachment which it had brought to the Defendant's attention, the rectification of same which was made a condition precedent to completion by virtue of the multiple Letters of Undertaking, and the Notice to Complete sent on the Claimant's behalf.

11. The Defendant will deny paragraph 19 and will say that it stood ready to complete the sale subject to being allowed a reasonable time to rectify the Defect as to Title/encroachment, and were only waiting on a response from the purchaser's attorney at the time to see what further proof of beneficial interest would be needed other than a certificate of title showing the vendor as the owner of the said land.

12. The Defendant cannot confirm or deny and puts the claimant to strict proof of paragraph 20…"

The learned judge's reasons for granting the amendments

[45] In her written reasons, the learned judge considered the respective arguments and the cases relied on by the parties, some of which were also relied on in this court. She considered whether the amendments were necessary to ensure that the real question in controversy between the parties was determined. Having done so, she concluded that the assessment of damages was another stage in the trial process, and if the amendments were allowed then all the issues which could affect the award of damages would be before the court. She was also of the opinion that the proposed amendments would not renew the fight on an entirely different defence as liability was no longer in issue, and Hutchinson J had taken into consideration the fact of the defect in title in coming to her decision. Consequently, if the amendments were allowed, the respondent would get to plead the defect in title. Thereafter, it would be for the judge, at the assessment of damages, to make a decision as to what, if any, weight was to be put on those allegations with respect to damages, and the evidence presented in support of them (para. [8] of reasons).

[46] The learned judge also considered whether the granting of the amendments would be fair to the appellant. She concluded that none of the issues raised in the proposed amendments would be new to the appellant. Furthermore, the appellant would have the right of reply and the opportunity to cross-examine witnesses called by the respondent (para. [9] of reasons).

Discussion

[47] I will first say that the assertion that the appellant did not facilitate an undertaking for the defect to be addressed after the act of transferring title, is entirely disingenuous, as the respondent did not appear to have communicated this to the appellant at any point. Certainly, not from the documents I have seen in the record of appeal.

[48] It appears that the first time the respondent raised the issue of a defect in title, in court, was by the affidavit of Mr Tulloch, filed 9 July 2021, in response to the appellant's

notice of application to appoint an expert witness to assist with the assessment of damages, following the grant of summary judgment. At para. 9 of that affidavit, Mr Tulloch deposed: "I am advised and do verily believe that the Notice to Complete required the Defendant herein to, among other things, provide vacant possession of the subject property, which it was unable to do before the expiration of the said notice".

[49] The application to amend the defence was made shortly after the order was granted for the appointment of expert witnesses.

[50] The respondent has maintained that the documents on which it seeks to rely at the assessment of damages were advanced by the appellant, in its application for summary judgment, and were sent to the respondent by the appellant before termination of the agreement for sale. Those documents were generated by the parties during the different phases of the negotiations and would have some bearing on the certificate of truth, which has to be included in the defence and must be supported by evidence.

[51] The chronology of events and the bare facts gleaned from the correspondence shared between the parties bear out the respondent's assertion that the defect in title argument should not have taken the appellant completely by surprise. The issue of the defect in the title was a constant in the communication between the parties from 2017 up to after the representation was made by the respondent that it could give good title. The following is a summary of the relevant facts as found by Hutchinson J, and set out in the body of her written reasons.

[52] In April 2017, the appellant discovered that a structure had been erected on the property and was being occupied by a squatter. A request was made of the respondent to demolish the structure to ensure that the property was vacant. By letter, dated 14 June 2017, the appellant's attorneys-at-law at the time (Rattray Patterson Rattray) issued the required letter of undertaking to the respondent's attorneys-at-law. In July 2017, the respondent requested further time to remove the squatter(s) off the property and this request was acceded to by the appellant.

[53] Further, by letter dated 7 February 2018, the respondent's attorney-at-law represented that the respondent was in a position to complete the transaction, viz.:"… We are now happy to advise you that the illegal occupants have now been removed from the property and the structures erected by them have also been demolished therefore we are now in a position to complete the sale with vacant possession…".

[54] In March 2018, the appellant commissioned a survey to confirm this. The land surveyors prepared a report that indicated that they had been barred by an individual asserting proprietary rights over a section of the property. The report also identified an encroachment on the property.

[55] In December 2019, the appellant changed representation and their new attorney-at-law issued another letter of undertaking to the respondent's attorney-at-law, in these terms: "… We give our professional undertaking to pay you the sum of J$8,980,290.00, which represents the balance purchase price and our client's costs on transfer as per the statement of account dated June 13, 2016, upon receipt of the following….., and upon receipt of confirmation from our client that the property is vacant…".

[56] On 18 April 2019, the appellant's attorney-at-law wrote to the respondent's attorney-at-law, enclosing a "Notice to Complete Sale of Freehold Land and Making Time of the Essence". In addition to making time of the essence, the notice required that the respondent (a) complete the sale of the land, (b) provide proof of beneficial ownership, and (c) vacant possession. The appellant also indicated that failure to complete by 3 May 2019 would result in termination of the agreement for sale. On 6 May 2019, the appellant's attorney-at-law wrote to indicate that, due to the respondent's failure to comply with the 'Notice to Complete and Making Time of the Essence', the agreement for sale was cancelled and demanded a refund of the monies paid.

[57] They subsequently brought the action which was the subject of the summary judgment.

Whether 'defect in title' was significant in Hutchinson J's ruling

[58] It does not appear that the defect in title was significant in Hutchinson J's decision to grant summary judgment. This is what Hutchinson J said, at para. [40] of her judgment:

> "While the affidavit of the defendant's representative (which was produced in response to this application) asserts that the property was vacant and no lawsuit had been brought by anyone seeking to assert ownership, **it is still unknown whether the encroachment identified has been removed**. In these circumstances, it is evident that although the Applicants had sought to put themselves in a state of readiness, they could take no further steps to complete the transaction in the absence of the Defendant compliance with the terms of the letter of undertaking and sale agreement. Accordingly, they were on good ground in electing to proceed in this manner at the point at which notice was served." (Emphasis added)

[59] Hutchinson J also said this, at paras. [41]-[47] of her judgment:

> "[41]…. On 29th of April 2017, the presence of a third party on the property having come to the attention of the Claimant's representative, on the 1st May 2017 a letter was sent bringing this to the Defendant's attention. It is noted that a number of letters were subsequently exchanged …[but] this situation was addressed several months later in February 2018.
>
> [42] Further delay was occasioned however when the Claimant's Surveyor's ID report revealed an encroachment as well as the continued presence of third parties on the property. Although requests were made for updates on this situation, no information had been provided by the Defendant in this regard neither did they provided [sic]? any of the documents requested in the letter of undertaking. This was the position up to April 2019 when the notice making time of the essence was served.
>
> [43] On an examination of the evidence provided by the Defendant no explanation has been offered for this delay…I find that there had been unreasonable delay on the part of

> the Defendant and the Claimant had been justified in serving the notice making time of the essence.
> …
> [46] On examination of the period allotted and what remained to be done, it is noted that although the Defendant asserted that the period was brief and no less than two weeks would have been required to effect the transfer of the property, they took no steps to complete any of the requirements outlined in the letter of undertaking…
>
> [47] In those circumstances, although the period was short, the completion of the tasks required was not impossible and the explanation that clarification that[sic] was being sought in no way precluded the Defendant from completing the majority of the requirements outlined and depositing the title and instrument of transfer for the relevant processing to be done…"

[60] Clearly, Hutchinson J adverted to the encroachment issue, but it would be an overstatement to say or imply that it was of any significant weight in her deliberation and conclusion. Her ultimate finding at para. [47] was: "It is my finding that the circumstances were such that it required an expeditious approach on the part of the defendants and had they acted with the urgency required they could have completed the process within the relevant period. As such, while the notice period provided was short I am not of the view that it was unreasonable".

[61] In the appellant's notice of application for summary judgment the sole issue was: "Did the [appellant] lawfully rescind the agreement for sale of the property on May 6, 2019?" The respondent did not raise the issue of defect in title, as an explanation for failing to complete the sale, neither in responding to the application for summary judgment nor in its initial defence. The first affidavit of Sylvester Tulloch (filed 16 December 2019) and the subsequent one (filed 28 February 2020) in response to the application for summary judgment stated that the respondent "[was] and [had] been ready and able to complete the sale". In the first affidavit, the explanation given for failure to complete was that the respondent was awaiting clarification of the appellant's request that proof of beneficial interest be shown by the respondent, whilst in the second, Mr

Tulloch deposed that the issue of the encroachment had been dealt with and he was not aware of, nor had he been served with documents detailing any claim by any person to the land the subject of the sale (para. 16).

[62] The appellant has argued that the failure, by the respondent, to raise in its defence the issue of the defect in title, as a possible explanation for its delay in completing the transaction, was fatal to its application for amending its defence. However, the respondent does not agree.

The principles of law which should guide the court in a decision to grant or refuse an amendment in these circumstances

[63] The authorities show that the conduct of an applicant is only one of the considerations in deciding whether to grant or refuse an amendment. In **Clarapede and Co v Commercial Union Association** [1883] 32 WR 262, cited at page 235 of **Charlesworth v Relay Roads Ltd**, Brett MR said: "[H]owever 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...". As will be seen, the later authorities have modified this approach to take account of other factors, including the nature and stage of the application for the amendment, with the justice of the case being the overriding consideration.

[64] In **Gloria Moo Young**, which concerned an application to amend a defence during the course of the trial, this court explained that the judge's discretion should be exercised by reference to (a) the interests of justice, (b) the good faith of the applicant and that (c) the timing of the application in relation to the stage of the proceedings may be taken into account in determining the interests of justice. In that case, the trial started in 1994, and after receiving evidence from several witnesses, the trial judge, in 1998, granted the amendment. On appeal, it was held that the amendment introduced a whole new defence, which was severely prejudicial to the appellant, and was not bona fide.

[65] **Index Communications v Capital Solutions and Others** concerned an application to amend particulars of claim in the face of a striking out application. Midstream submissions, in response to a preliminary objection, counsel applied for an adjournment in order to file an application seeking to amend the claimant's particulars of claim, those having already twice been amended. The trial judge adopted the reasoning in **Moo Young** and dismissed the application to amend. Among her reasons was that the matters sought to be raised in the latest amendment were "really disingenuous, insincere and [had] no real prospect of success …" (para [65]).

[66] In **London Borough of Islington v UCKAC and Another,** an amendment was granted at the appeal stage, to re-amend the particulars of claim to plead, in the alternative, that the grant of a tenancy to the second defendant was null and void, although no permission was sought in the court below. The court dismissed the appeal on other issues, but allowed the application to re-amend the particulars of claim, on the reasoning of Dyson LJ, as follows:

> "To require the council to start fresh proceedings in such circumstances would not further the overriding objective of deciding cases justly…In this case, the judge tried two preliminary issues on assumed facts. I cannot see why justice requires the council to start fresh proceedings in order to raise the new point."

[67] In **Julie Ann Cobbold v London Borough of Greenwich**, there was an application for permission to appeal from a judge's refusal to grant an adjournment and permit an amendment to the defence to plead a variation to the claimant's tenancy and a compromise of the claim for damages. In allowing the appeal and amendment, the court acknowledged that the application was late, but was "unhappy with the way the judge exercised his discretion". Lord Justice Peter Gibson observed at page 5:

> "It is, of course, important that trial dates, when they are fixed, should be adhered to, but I fear that he may have let that factor dictate his approach to the question of the amendment. The overriding objective is that the court should deal with cases justly. That includes, so far as practicable, ensuring that

> each case is dealt with not only expeditiously but also fairly. Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party or parties caused by the amendment can be compensated for in costs, and the public interest in the efficient administration of justice is not significantly harmed."

[68] Finally, in **Groveholt Ltd v Hughes and another** [2010] All ER(D) 196, the United Kingdom Court of Appeal dismissed a defendant's appeal against a judge's refusal to allow him permission to amend his re-amended defence on the basis that the proposed defences were not reasonably arguable.

[69] The principles extrapolated from the authorities are that: (i) amendments are at the discretion of the trial judge; (ii) the discretion should be exercised by reference to the interest of justice and good faith; (iii) the guiding principle should be the overriding objective; (iv) dealing with cases justly will mean that amendments should be allowed to enable the real matters in controversy between the parties to be determined; (v) the effect on the opposing party and the extent to which costs will be an adequate remedy should be considered; (vi) the timing of the application may be a relevant factor; (vii) it is to be considered whether the proposed amendments have real prospects of success or are reasonably arguable; and (viii) an amendment may not be granted if the statement of case would become wholly different.

[70] As acknowledged by the learned judge, the real matter in controversy for the assessment of damages was whether the defect in title issue could impact the measure and quantum of damages to the appellant. Further, the extent of the amendments, whether the appellant had been surprised by them, and the overall justice of the case, were also important considerations for the learned judge. Dealing with the case justly meant allowing the amendments so that the judge at the assessment of damages would be seized of all the relevant material, so long as the amendments could be made without causing injustice to the appellant. In this regard, the learned judge considered that the issues would not be new to the appellant, the appellant would have a right of reply, and

there would be the opportunity to cross-examine witnesses on the issues. Further, the application was made before the hearing for assessment of damages began.

[71] Counsel for the appellant has taken issue with the fact that there had been three case management conferences before the hearing of the application for the amendments. However, that detail does not undermine the substratum of the learned judge's reasoning and decision. I should also say that there is no evidence of insincerity, on the part of the respondent, in bringing the application for the amendments to the defence. It is also not accepted that the amendments effectively allow the respondent to pursue a line of defence which was contrary to the unchallenged finding of Hutchinson J - that there was a breach of the agreement for sale. The question of whether there was a breach is no longer in issue. Accordingly, there is no possibility of the appellant being denied the benefit of relying on the summary judgment, as it sought to persuade us would be the case.

[72] Although the learned judge erred in mischaracterising Hutchinson J 's reference to the defect in title, she gave ample reasons for allowing the amendments, and it, therefore, cannot be said that she exercised her discretion incorrectly. She weighed the relevant factors, including that the appellant's judgment was protected, and concluded that whatever prejudice might result could be ameliorated by the consequential orders made on the application to amend.

[73] The submissions of counsel for the respondent with respect to the rule in **Bain v Fothergill**, the opinion of the authors of Voumard in The Sale of Land, as well as the principles in the other authorities cited are duly noted. Also, the seeming disparity in the experts' reports as regards the estimated value of the property. These would be relevant to whether the issues raised in the amended defence (particularly the basis for and measure of damages) have good prospects of success. It has been decided that an amendment should be refused where the amended case has no real prospect of success (see **Moo Young**). However, this would not be an appropriate case in which to express a view on the merits of the amended defence since the matters raised will no doubt

occupy the mind of the judge at the assessment of damages. To the extent that the circumstances of the breach could possibly determine the measure and quantum of damages, that is a sufficient reason for concurring with the learned judge that the amendments should be allowed.

[74] For those reasons, grounds two and three also fail.

Conclusion

[75] The amendments were sought to address only issues which could arise concerning the measure and quantum of damages, as distinct from liability which had already been decided. The amendments were granted in circumstances where there had been no explanation provided to the court for the breach, the defence was said to be deficient in more than one respect, and there was no apparent inconsistency between the summary judgment and the amendments granted to the defence. Having regard to the role of this court in matters concerning the exercise of a judge's discretion, as expressed in the dictum of Lord Diplock, at page 106 in **Hadmor Productions Ltd v Hamilton and Others**, and adopted by this court in several decisions, including the **Attorney General v MacKay**, there is no basis on which to disturb the learned judge's decision to grant the amendments to the defence.

[76] There was nothing to suggest that the learned judge's exercise of her discretion was based on a misunderstanding of the law or the evidence, or that her decision was "so aberrant that no reasonable judge regardful of her duty could have reached it". Neither did she fail to take account of relevant considerations. I would, therefore, dismiss the appeal, and affirm the learned judge's orders with costs of the appeal to the respondent to be agreed or taxed.

F WILLIAMS JA

ORDER

1) The appeal is dismissed.

2) The orders made by Mott Tulloch-Reid J, on 21 September 2022, are affirmed.

3) The Registrar of the Supreme Court is hereby directed to set the matter for the assessment of damages at the earliest possible date.

4) Costs of the appeal to the respondent, to be agreed or taxed.