



[2023] JMSC Com. 7

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2021CD00036

BETWEEN	J WRAY & NEPHEW LIMITED	CLAIMANT
AND	RESTAURANT ASSOCIATES LIMITED	DEFENDANT

Trudy-Ann Dixon-Frith and Samantha Grant instructed by Dunn Cox, Attorneys-at-law for the Claimant.

Melissa McLeod and Shayanne Hylton, Attorneys-at-law instructed by MS McLeod Law for the Defendant

IN CHAMBERS

Heard: 25th January 23rd February 1st March and May 1, 2023

Application for amendments to Claim Form after Case Management Conference – Whether the amendments constitute a new cause of action- whether application to amend should extend to new provisions regarding interest rate – Civil Procedure Rules, 2002 Rule 20.4 (2) and 1.1, The Limitation of Actions Act – Law Reform (Miscellaneous Provisions) Act

STEPHANE JACKSON-HAISLEY J.

INTRODUCTION

[1] The Notice of Application for Court Orders filed by the Claimant J Wray & Nephew Limited on May 6, 2022 seeks Orders, against the Defendant Restaurants

Associates Limited, that the Claimant be permitted to amend its Claim Form and Particulars of Claim both filed on June 29, 2018 and that it be permitted to file and serve the Amended Claim Form and Amended Particulars of Claim within seven (7) days of the date of the Order. Further, that the Defendant be at liberty to file and serve an Amended Defence to the Amended Particulars of Claim within fourteen (14) days of service.

- [2] The Application is made pursuant to the inherent jurisdiction of the Court and Rule 20.4(2) of the Civil Procedure Rules, 2002 (CPR) as the first Case Management Conference has already been held in the matter. The Defendant has opposed the application substantially on the basis that the proposed amendments constitute new claims and are statute barred so they should not be allowed.

THE CLAIMANT'S CASE

- [3] The application is supported by an Affidavit of Samantha Grant also filed on May 6, 2022. She deponed that the substantive claim is for recovery of outstanding rent payable by the Defendant pursuant to a Lease Agreement dated June 1, 2014, and executed between the parties concerning premises known as 1 Lydford Way, Golden Grove in the parish of Saint Ann (hereafter referred to as "the said premises"). The Lease Agreement contained certain specific terms and conditions, one of which was that the Defendant would pay the sum of US\$35,000.00 per calendar month as rent for the first ten months and the sum of US\$25,000.00 per month for the remainder of the Lease. Another term of the Lease Agreement is that rent was payable by the Defendant in United States (US) Currency.

- [4] The Claimant terminated the lease on December 2, 2015, with effect as of June 2, 2016. The Claimant alleged that the Defendant acted in breach of the terms of the Lease as it failed to make the rental payments in accordance with the conditions of the Lease Agreement and by letter dated January 13, 2016, the Claimant

demanded payments of the arrears. As of May 17, 2016, the amount due to the Claimant by the Defendant in respect of the outstanding rental was US\$183,297.27.

- [5]** On August 4, 2016, the Defendant made a payment of J\$10,000,000.00 which was applied against the outstanding rental leaving a remainder of J\$12,020,797.46 outstanding. By letter dated February 1, 2018, the Claimant demanded payment of the sum owing as of July 31, 2017, in the sum of J\$12,020,797.46. In the Claim the Claimant claimed the sum of US\$98,438.44 or the Jamaican Dollar equivalent of \$12,020,797.46 and interest on the outstanding balance at a rate of 16.75% per annum.
- [6]** Ms Grant alleged that sometime after the filing of the Claim it was discovered that the Pleadings contained certain errors which needed to be corrected. The errors related to the calculation of the outstanding rent owed by the Defendant pursuant to the Lease Agreement, along with the interest rate accrued thereon. She pointed out that the claim is for recovery of rent pursuant to the Lease Agreement and contended that the terms of the Lease provided that rent is payable in US currency and the amendment now being sought is merely to clarify the errors of outstanding rent pursuant to the Lease Agreement and interest.
- [7]** The Claimant further claims that by Clause 3.1.1 of the Lease Agreement, where payments of rent were made in Jamaican dollar currency the applicable foreign exchange rate to be applied to the payments was the Bank of Jamaica (“BOJ”) published selling rate as at the date of payment plus 2.5 points for the purpose of the payments to the US Dollar conversion.

- [8] In calculating the sum of US\$98,438.44 as claimed initially in the Pleadings, the correct BOJ foreign exchange rates were not applied to the payments made by the Defendant in Jamaican currency, and the plus 2.5 points was erroneously not included. By calculations, the correct principal rent due and owing by the Defendant is US\$107,018.97.
- [9] Ms. Grant further alleged that the Lease Agreement provided for interest to accrue on outstanding rent by clauses 3.18, 1.13 and 1.14 with the manner of calculations being 5% over the Claimant's principal bank's overdraft rate on US Dollar overdrafts or alternatively "at another interest rate closely comparable with the Interest Rates decided on by the landlord acting reasonably". The rate of interest as pleaded was an estimate of the Claimant's principal bank's overdraft rate on US Dollar overdrafts and the Claimant has had a difficulty retrieving its principal bank's overdraft rate on US Dollar overdrafts that was operable at the time of the Lease Agreement as its bank overdraft rate differs based on each client's credit.
- [10] The Claimant highlighted that the Statement of Case and Pre-Trial Memorandum filed by both parties show that the main issue between the parties concerns the applicable interest rate to the outstanding rental owed under the Lease Agreement. The amended Pleading will assist in the resolution of the issues between the parties.
- [11] Ms. Grant also advanced submissions to buttress her averments. She emphasized that the amendment does not constitute a new cause of action and that an amendment of the Pleadings is generally allowed where there is no new cause of action as found at paragraph 53 of **The Attorney General v Abigail Brown** [2021] JMCA Civ. 50. Counsel further submitted that if a new cause of action arises out of the same or substantially the same facts, it is permitted as stated at paragraph 60 of the judgment.
- [12] She sought to convince the Court that the amendment does not constitute a new breach of duty or obligation and does not differ from the initial claim. Moreover, there is no new remedy or cause of action as the issue relates only to calculation

of damages in the Claim Form. Counsel averred that the calculations are provided for in the Lease Agreement and arise out of the same breach of non-payment of rent and so the proposed amendment as pleaded in the original Claim Form does not constitute a new cause of action.

- [13] In addition, she submitted that the amendment will cause no prejudice to the Defendant and that the Defendant will be allowed to amend its Defence. She contended that the amendment is necessary to determine the issues between the parties and that the proposed amendment has a reasonable prospect of success.

THE DEFENDANT'S CASE

- [14] The Defendant's evidence is set out in the Affidavit of Deniesha Buchanan filed on June 9, 2022, opposing the Claimant's Application to amend its claim. Ms. Buchanan provided an overview of the history of the matter and pointed out that the Claimant had more than ample opportunity to consider the amendments and that the delay in seeking to do so after several adjourned hearings for an application for summary judgment is inordinate and inexcusable.

- [15] She pointed out that they have expended significant resources to arrive at this point and will have to repeat the whole process. She stressed that the claims for rent are statute barred and that the original claim did not contemplate the proposed amendment, so it is an entirely new claim. The proposed amendments regarding the foreign exchange rates introduce a brand-new issue. If the amendment regarding the interest rate provision is allowed this would deprive them of their Defence. They would suffer unnecessary expense and prejudice, and this would not further the overriding objective of the CPR.

- [16] Ms. McLeod emphasized that the parties attended the Case Management Conference on January 20, 2021, and the trial dates scheduled for October 25-27, 2021, had to be vacated to facilitate the Claimant's application for Summary Judgment which was scheduled for hearing on November 17, 2021. Ms. McLeod

further stated that an abundance of time and resources had been expended on the claim including preparing a defence and counterclaim, engaging in disclosure, preparing witness statements and taking steps to contest the summary judgment application filed by the Claimant on September 30, 2021. She further contended that the Claimant failed to move with alacrity and was unprepared for the hearing of its Summary Judgment application as a result of which there were several adjournments.

- [17]** Ms. McLeod contended that the Claimant applied an arbitrary rate during the existence of the Sub-lease between June 2014 to June 2016 and this rate was not supported by any documentation. It was denied that rent is owed to the Claimant for the months of April and May 2016 or that the Claimant was kept out of its money due to arrears of rent from December 2015. The Defendant further denies that the Claimant is entitled to apply a different exchange rate than that which was previously applied to claim a sum greater than that which it claimed was owed at the date of the arrears. Any claim for a different exchange rate being calculable and due from March to April 2016 (or even from December 2015 depending on how the claim is interpreted) would be statute barred before the application to amend the claim was filed on May 6, 2022.
- [18]** Ms. McLeod advanced that before and up to the date of filing of the substantive claim, the Claimant treated all of the Defendant's Jamaican Dollar payments as converted to the foreign currency equivalent of the rent. Allowing the Claimant to adjust or retroactively apply the foreign exchange rate by 2.5 points, when the pleadings originally never contemplated this would mean an entirely new claim on the matter of foreign exchange.
- [19]** She contended that the original claim, the defence and the reply to the defence did not mention the foreign exchange rate as an issue and none of the parties contested whether the correct foreign exchange rate was applied. Ms McLeod submitted that the Claimant's claim for a new interest rate raises a new cause of

action which is now statute barred. In this regard, she relied on the Limitation of Actions Act.

[20] She submitted that both parties agree that where the amendment causes no new cause of action the amendment can be allowed however the parties differ in that this is a new claim for interest therefore, the claim should not be allowed. She also relied on the case of **AG v Brown** cited by Claimants to support her contentions.

[21] She submitted that the authority of **Judith Godmar v Ciboney Group Ltd** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 144/2001, judgment delivered 11 April 2003 referred to at paragraph 56 of **AG v Brown** illustrate that although substantially the same facts arose from the injury, the court did not permit the amendment as it would unjustly deny the defendant of an accrued defence under the Limitations of Actions Act

THE LAW

[22] The guiding principles on an application to amend have been admirably set out in cases such as **Caricom Investments Limited & Others v National Commercial Bank Limited** [2020] JMCA Civ 15 and **Jamaican Redevelopment Foundation, INC v Clive Banton and Sadie Banton** [2019] JMCA Civ 12 both of which were cited before me. In the **Caricom Investments Ltd** case the court was of the view that even at as late a stage as a retrial it is possible for a party to be allowed to amend its statement of case, however the power should be restrictively exercised. At paragraph 31 of the judgment Brooks JA (as he then was) demonstrated his reliance on guidance from cases such as **Charlesworth v Relay Roads Ltd (in liquidation) and others** [1999] 4 All ER 397 wherein two competing factors were identified as being relevant to the court's determination. The first factor was identified at pages 410 - 2:

“...The first factor is that it is desirable that every point which a party reasonably wants to put forward in the proceedings is aired: Particularly where the other party can be compensated in costs for any damage suffered as a result of the late amendment being granted, there is obviously

a powerful case to be made out that justice indicates that the amendment should be permitted”

[23] The court identified the second factor as relating to the consideration of prejudice to the opposing party. Not only should a court consider the question of compensation in cost, but the court should be guided by the question of where justice lies and fairness to the other side as set out in paragraph 46 of the judgment in these terms:

*“The learned judge’s reference to the strain of litigation is a reference to the second “competing factor to which Neuberger J referred in **Charlesworth v Relay Works**. Neuberger J made the point at page 402 of the report. He said, in part:*

“On the other hand, even where, in purely financial terms, the other party can be said to be compensated for a late amendment or late evidence by an appropriate award of costs, it can often be unfair in terms of the strain of litigation, legitimate expectation, the efficient conduct of the case in question, and the interests of other litigants whose cases are waiting to be heard, if such an application succeeds...”

[24] At paragraph 36 of the **Caricom Investments Ltd** judgment, the court however acknowledged that in addition to the relevant considerations of the individual case, there existed prohibitions which should be observed and enforced and listed them to be as follows:

- a. relevant limitation periods;
- b. risk of injustice to the other parties in the case;
- c. prejudice to litigants in other cases; and
- d. general considerations of the administration of justice.

[25] Although this case had to do with retrials, the principles can be applied to applications for amendments during the trial process. McDonald Bishop JA in the **Jamaican Redevelopment Foundation** case set out in detail general principles relative to the approach the court should take when treating with applications for permission to amend a statement of case at paragraph 26 of the judgment. I hope I have done justice in seeking to summarize the principles as follows:

- a. whether the proposed amendment is necessary to determine the dispute;
- b. the need to avoid prejudice to the other party as well as the need for the efficient administration of justice;
- c. general case management principles such as intolerance to late amendments;
- d. the overriding objective;
- e. heavy onus on the party seeking the late amendment to justify it;
- f. the application is fact sensitive; and
- g. whether the amendment has a reasonable prospect of success.

[26] In considering all of the factors highlighted in the cases mentioned, regard must be had to the fact that in this case the limitation period has already expired and although that is no bar to an amendment being entertained, it is clear from these authorities that the court is encouraged to take a restrictive approach to amendments after the limitation period.

[27] In the **AG v Brown** case where an amendment was made outside the limitation period the learned Judge of Appeal posited at paragraph 37 of the judgment that

'...it is clear that there is a restriction on amendments after the limitation period has run. Although the rule is only explicit in allowing amendments to

the name of a party to correct a genuine mistake, there is a plethora of case law that has demonstrated that amendments may be made after the relevant limitation period’.

After reviewing the decision of Harrison JA in **The Jamaica Railway Corporation v Mark Azan** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 115/2005 judgment delivered on 16 February 2006 (‘Azan’), at paragraphs 25, 27 and 28, Brown JA (Ag) arrived at the following position at paragraph 39:

“The guiding principles that emanated from the approach of Harrison JA, are that “an amendment should be allowed if it can be made without injustice to the other side”. Secondly, consideration should be given to the overriding objective as contained in rule 1.1 of the CPR and the general principles of case management”.

[28] Brown JA (Ag) reviewed other cases such as **Peter Salmon v Master Blend Feeds Limited** (unreported), Supreme Court, Jamaica, Suit No CL 1991/S 163, judgment delivered 26 October 2007 and **Judith Godmar v Ciboney Group Limited** where the Court was of the view that it should not allow an amendment of a new cause of action after the expiration of the limitation period. Brown JA (Ag) also reflected on the principle laid down in **Weldon v Neal** that the court should not allow a plaintiff to amend its statement of case by setting up a fresh claim in respect of a cause of action that has been statute barred. She however sought to strike a balance between the established principles in **Weldon v Neal** (1887) 19 Q.B.D. and a more flexible approach as seen in the **Sandals Resorts International Limited v Neville L Daley and Company Limited** [2008] JMCA App 24 case where it was held that although an amendment may result in a new cause of action, it may be granted if it is founded upon the same or substantially the same facts upon which the claim was originally filed. She thereafter concluded at paragraph 69:

“... however late the application may be, it should be allowed if it is necessary and will not injure or prejudice the applicant’s opponent. “Different considerations, however, govern each case, and it is a matter in the discretion of the learned trial judge.”

[29] Having considered the facts of the instant case along with the submissions advanced and the law it is my view that the following issues should be dissected and determined:

ISSUES

1. Do the proposed amendments reflect a new cause of action or new claim?
2. Are the proposed amendments necessary to determine the dispute?
3. Do the proposed amendments have a reasonable prospect of success?
4. Will the Defendant be prejudiced by the proposed amendments?

Do the proposed amendments reflect a new cause of action or new claim?

[30] The essence of the Defendant's preliminary objection was that the proposed amendments constitute fundamental changes and essentially amount to the filing of a new claim or case and are statute barred. There is no dispute as to whether or not the limitation period has passed. The Claimant's contention is that although the limitation period within which to bring the action has passed, the Court has the power to allow an amendment and, in any event, the proposed amendments do not reflect a new claim or cause of action.

[31] Part 20.4 of the Civil Procedure Rules (CPR) provides broadly for amendments to statements of case with permission. Statements of case may only be amended after a case management conference with the permission of the court. Rule 20.6 of the CPR gives the court the power to allow a party to amend a claim after a limitation period in certain circumstances. The court may allow an amendment to correct a mistake as to the name of a party but only where the mistake was genuine and not one which would in all the circumstances cause reasonable doubt as to the identity of the party in question. Nothing further is said in relation to the power of the Court to amend beyond that.

[32] The authorities examined have demonstrated that the categories are not closed nor are they limited to amendments regarding the name of a party but rather there exists some discretion on the part of the judge. The nature of the amendment being sought would affect the exercise of the court's discretion. If it is a new cause of action or claim the Court's approach would be different from a case in which what is sought is merely to correct a formality.

[33] The **Jamaica Railway Corporation** case provides some guidance in determining what amounts to a new cause of action at paragraph 29:

*(i) If the new plea introduces an essentially distinct allegation, it will be a new cause of action. In **Lloyds Bank plc v Rogers** (1996) *The Times*, 24 March 1997, Hobhouse LJ said inter alia:*

'...if factual issues are in any event going to be litigated between the parties, the parties should be able to rely upon any cause of action which substantially arises from those facts.'

*(ii) Where the only difference between the original case and the case set out in the proposed amendments is a further instance of breach, or the addition of a new remedy, there is no addition of a new cause of action. See **Savings and Investment Bank Ltd v Fincken** [2001] EWCA Civ 1639, *The Times*, 15 November 2001.*

(iii) A new cause of action may be added or substituted if it arises out of the same facts, or substantially the same facts, as give rise to a cause of action already pleaded.

*(iv) In the case of **Brickfield Properties Ltd. v Newton** (1971) 1 WLR 862 a general endorsement on the writ claimed damages against an architect for negligent supervision of certain building works. The particulars of claim were served after the expiry of the limitation period and contained claims both for negligent supervision and negligent design. It was held by the Court of Appeal that the negligent design claim arose substantially out of the same facts as the negligent supervision claim and in its discretion the court allowed the amendment."*

[34] Therefore, if a proposed amendment is found to constitute a new cause of action, it may still be allowed if it arises out of the same or substantially the same facts. An examination of the pleadings is therefore essential to the determination. It would be essential to determine the nature of the amendment being sought. I have set out for ease of reference the nature of the amendments being sought and the pertinent points to consider in respect of each of them.

[35] The Applicant has sought to include a new figure as being the amount due for outstanding rent being “US\$107,017.97” and a stipulation that the outstanding rent being claimed is “as contained in the Lease agreement dated June 2014 executed between the parties (“the Lease”) plus interest accrued on the outstanding rent pursuant to clauses 1.13 and 1.14 of the Lease”. The new figure of “US\$107,017.97” was arrived at by giving effect to the terms of the Lease Agreement which provided that where payments of rent were made in Jamaican currency that the applicable foreign exchange rate to be applied to the payments was the BOJ published selling rate as at the date of payment, plus 2.5 points, for the purposes of the payment to the US dollar conversion. The Claimant avers that in calculating the initial sum the correct BOJ foreign exchange rates were not applied and the 2.5 points was erroneously not included.

[36] Although the original claim made no mention of the foreign exchange rate as being an issue, the claim was for a United States dollar amount or the Jamaican Dollar equivalent. There was no indication in the claim as to the exchange rate applied or how this was arrived at but, if necessary, the rate can be ascertained by mathematical calculation. The reference to both currencies in the original claim suggests that even if the rate was not an issue it must have been taken into account in providing an alternative currency. The Lease Agreement which was attached to the Claim does refer to the foreign exchange rates. Specifically, clause 3.1.1 referred to the BOJ published selling rate as being the applicable rate for conversion plus the 2.5 points. It would therefore not have been outside the contemplation of the Defendant that they could be required to pay a conversion rate consistent with the BOJ rates plus 2.5 points. The Defendant should therefore not be taken by surprise by the Claimant’s intention to now apply terms consistent with the Lease Agreement. The Defendant being a party to this Lease Agreement would have originally agreed to these terms.

- [37] Additionally, the amendments being sought relate to outstanding rent and so it is clear to me that the factual issues would be the same as would arise by virtue of the original Claim. This amendment arises out of essentially the same facts, which is to seek recovery of rent owed. I am therefore of the view that it does not amount to a new claim or cause of action.
- [38] The Claimant also seeks to include a provision for “*Damages for breach of contract*”. This, they have expressed is tantamount to the claim for rent owed and so would not constitute a new remedy. In any event even if it were to constitute a new remedy, it does not follow that there is an addition of a new cause of action. However, in the submissions advanced in support of the application of these new particulars, I got the distinct impression that the addition of this would take the Claimant’s case no further so then it would seem to me to be otiose and would hinge on whether it is necessary to determine the dispute between the parties, a point which I will return to.
- [39] The Claimant also seeks to amend the provision relating to interest to include interest on damages and/or outstanding rent pursuant to Clauses 1.13 and 1.14 of the Lease. In the alternative they also seek interest on damages at the BOJ Commercial Banks Foreign Currency Loan Rates on US Currency from June 2, 2016 until the date of the judgment or alternatively interest at such rate and such relevant period that this Honourable Court deems just pursuant to the provisions of the Law Reform (Miscellaneous Provisions) Act.
- [40] On the issue of interest, I have to consider whether the Claimant is seeking to claim interest on an entirely different basis. It was clear from the original Claim that there was always an intention to claim interest on the outstanding sums. They had pleaded that “Interest accrues on the outstanding balance with effect from August 1, 2017, at the rate of 16.75% per annum. However, the Claimant is now asking the court to go further and is no longer seeking interest on damages and on outstanding rent at a rate of 16.75% per annum. They are now seeking to make interest pursuant to Clauses 1.13 and 1.14 of the Lease Agreement. When

Clauses 1.13 and 1.14 are examined, interest is clearly provided for. Clause 1.13 provided for interest at “the then prevailing rate or, should the base rate referred to in clause 1.14 ‘THE INTEREST RATE’ cease to exist, at another rate of interest closely comparable with the interest rate decided on by the Landlord acting reasonably”. Clause 1.14 defines the interest rate to mean “the rate of five percent per annum above the overdraft rate of the Landlord’s principal bankers on the US Dollar overdrafts”.

[41] The amendment being sought would result in giving effect to the terms of the Lease Agreement and so this is something which would have been within the contemplation of the Defendant at the time the agreement was entered into and so they would not be prejudiced by the amendment being granted. It is therefore not a new cause of action, nor does it introduce an essentially distinct allegation.

[42] However, the Claimant is also seeking in the alternative interest on damages at the Bank of Jamaica Commercial Bank’s Foreign Currency loan rates. Although the Lease Agreement made reference to the BOJ lending rates in the context of the conversion for foreign exchange rates in clause 3.11, there was no such reference to BOJ in the clauses dealing with interest. If it was within the contemplation of the parties to make interest subject to the BOJ lending rates, then no doubt the Lease Agreement would have provided for this. The absence of the BOJ lending rates in these provisions is very telling and suggests that that was not what the parties intended.

[43] To seek to impose BOJ rates now as opposed to the landlord’s principal bankers’ rates would be to have interest calculated in a new manner. I therefore agree with the Defendant’s contention that to do this would be to seek to put forward interest on an entirely new basis of applying the BOJ foreign currency lending rates and that the court may now be called upon to assess not only who their principal bankers are but also the reasonableness of applying the BOJ foreign currency lending rates. Although, I am not in agreement that this would mean a new claim or cause of action, I am of the view that this would take the case outside of the

contemplation of the parties and so raises concerns about its fairness and likely prejudice to the opposing party, a point which I will deal with in more depth under the heading relating to prejudice.

Are the proposed amendments necessary to determine the dispute?

- [44] The foremost consideration when deciding whether or not to grant an amendment is whether the proposed amendment was needed in order to determine the real issue in dispute. The main issue in dispute in the instant case is whether rent is owing and outstanding and in what amounts and what interest rate is to be applied to the outstanding sums. In the Defence the Defendant pleaded that the interest applied, which rate is not admitted, is excessive, grossly unjustifiable and unreasonable.
- [45] The Statement of Case and the Pre-Trial Memoranda filed by both parties identified some of the main issues to be determined. The Defendant identified some of the issues to be whether the Defendant breached the Lease Agreement by failing to pay all rent due, whether the Defendant owes rent together with interest at a rate of 16.75% to the Claimant and whether the interest applied by the Claimant is excessive, grossly unjustifiable and unreasonable. The Claimant also identified issues such as to whether the Claimant is entitled to rent, interest and costs outstanding as claimed. Any Court embarking on a trial of the matter would have regard to the terms of the Lease Agreement. For the most part, the amendments being sought if granted would result in the Court having to consider the same issues.
- [46] In determining the dispute, the Court takes into account that the interest of justice requires that it is desirable that every point which the Claimant reasonably wants to put forward in the proceeding is aired. The proposed amendments if granted would put all issues arising from the Lease Agreement and any ambiguity contained therein on the table to be discussed and ventilated. I am therefore of

the view that the proposed amendments are necessary to determine the dispute save and except for the one relating to the inclusion of "Breach of Contract".

Do the proposed amendments have a reasonable prospect of success?

[47] The **Jamaican Redevelopment Foundation** case also makes it clear that the Court will only allow a "late" amendment if it has a reasonable prospect of success. A reasonable prospect of success simply means that the prospect is not merely fanciful. To the extent that the proposed amendments are consistent with the terms of the lease they could not be said to be fanciful. The use of the BOJ foreign exchange rate plus 2.5 points is provided for in the Lease Agreement and so would lend credence to the Claimant's contentions. I am therefore of the view that this is more than fanciful and so would have a reasonable prospect so success.

[48] I am not so convinced as it relates to all the amendments being sought regarding interest payments. The reliance on the alternative basis to calculate interest set out in clause 1.13 in lieu of the principal bank's overdraft rate, is provided for in the Lease Agreement so could not be describes as fanciful, this is not so in relation to the proposed alternative. The claim for interest on damages at the BOJ Commercial Bank's Foreign Currency Loan Rates was not provided for in the Lease Agreement. The Court would be called upon to determine the question of reasonableness and this would impact the likelihood of success on this issue. Regarding the alternative sought pursuant to the **Law Reform (Miscellaneous Provisions) Act**, the Court may in any event be inclined to consider this even if the amendments were not made and so this alternative is preferable as it also has a reasonable prospect of success.

Will the Defendant be prejudiced by the proposed amendments?

[49] The **Jamaican Redevelopment Foundation** case also stresses that there is a heavy onus on the party seeking to make the amendment to justify it.

*“Prejudice to the opposing party is an important consideration...Harrison JA has distilled principles from the **Jamaica Railway Corporation** case which still hold true which is that there is a general discretion to permit amendments where this is just and proportionate. The principle has always been that an amendment should be allowed if it can be made without injustice to the other side.”*

[50] I had previously indicated that with respect to the imposition of interest at the BOJ rate I was concerned about the likely prejudice to the Defendant. It is my view that it would be prejudicial to seek to introduce at this late stage interest consistent with the BOJ rates. The Claimant is entitled to interest and would suffer no prejudice as they are still left with two alternatives which is to seek interest pursuant to the plain terms of the Lease Agreement and/or the alternative position that a court would be obliged to consider in any event which is the Claimant’s entitlement to rely on interest rates pursuant to the provisions of the **Law Reform (Miscellaneous Provisions) Act** concerning interest on foreign currency. When I consider the late stage at which the matter is at and all the other factors discussed, I feel even more fortified in the view that to allow an amendment to the interest provision to now incorporate the BOJ rate would not be in the interest of justice.

[51] I have to bear in mind throughout and consider whether based on the late stage at which the amendments are sought it would be in the interest of justice to grant them. The question of whether it is just to allow the amendment must be balanced with general case management principles. This is essentially the conclusion arrived at by Harrison J in the **Jamaica Railway Corporation** case that in the final analysis in deciding whether or not to grant such an application, one ought to apply the overriding objective and the general principles of case management. It has been noted in **Jamaican Redevelopment Foundation** case at paragraph 32 that if permission to amend is sought close to the trial date, the court would refuse

permission if it would add an excessive burden on the opponent or risk losing the trial date and delaying the final resolution.

[52] This Claim was filed on June 29, 2018, and so the application to amend is being made almost five years after filing of the claim and over two years since the Case Management Conference. There is at this point no trial date set however, there was previously a trial date of October 25 - 27, 2021 and a pre-trial date. At the pre-trial review date of October 4, 2021, the trial dates were vacated, and the Claimant's Notice of Application for Court Orders for Summary Judgment set for hearing on November 17, 2021. Up to the pre-trial review date the parties had filed witness statements and had largely complied with the case management orders.

[53] The effect of any amendments would mean that the Defendant would be permitted to file an Amended Defence. Thereafter there may be a need for additional witness statements. This would cause some delay in setting a date for trial. However, since I have deemed that in large part the amendments are necessary to determine the issues the court would have to utilize its case management powers to ensure the process going forward is conducted as efficiently as possible.

[54] There is an aspect of the proposed amendments that causes me some concern and this relates to the imposition of the terms of Clause 3.11 to include the BOJ rates and the 2.5 points from the commencement of the lease. From the submissions advanced, it became evident that in arriving at this figure the Claimant had applied the BOJ rate plus 2.5 points to all rental sums from the beginning of the lease which included sums already paid.

[55] In the original Claim, the claim for outstanding rent was from February 1, 2016, and this was the time that the Claimant has originally expressed having an issue with. This is reflected in the Account Statement dated July 28, 2017, as well as the excel version. There appeared to have been no issue of outstanding rent being claimed prior to February 1, 2016. The original Account Statement spanned a period up to July 31, 2016, based on the account statement generated on that day. There was no indication of any shortfall starting from 2014. In 2014 there was never

any indication of sums owing but rather the indication was that there was overpayment. To go back to that time period when there was no indication of any issue with rent would raise concerns regarding fairness and prejudice to the Defendant. To allow the entire sum would mean that the Claimant would be seeking to take the claim further outside the limitation period.

[56] Although I have found that it is not reflective of a new cause or action or claim, that it is necessary to determine the dispute and it has a reasonable prospect of success, I am concerned about the likely prejudice to the Defendant. To seek to apply this rate and the 2.5 points to all the rent already paid dating back to 2014 at this late stage would take the claim outside the contemplation of the parties when the Claim was filed. This has to be balanced with the likely prejudice that the Defendant would suffer by having to respond to sums owing for an earlier time period than was first contemplated.

[57] The amendments have sought to include all of the shortfall from the commencement of the Lease, but the Court would not be prepared to grant the amendment in the full sum filed for. However, where it is possible to arrive at a sum which excludes the earlier time period and which is consistent with the claim as filed regarding the dates as set out on the statement of account, the court would be prepared to grant the amendment to include a new figure.

[58] At all times the court is guided by the overriding objective of the CPR which is to deal with cases justly. This of course includes dealing with the parties justly. The fact of the late stage of the application is a serious concern and impacts the disposition of the matter in a timely manner, moreover the Claimant has not provided any cogent reason for the delay in making this application. The Defendant would now have to re-adjust their case to meet these new amendments and would no doubt have to spend some time and energy to respond to the Amended Claim. All of this begs the question as to how the scales can be adequately balanced.

[59] The question of compensation in costs comes to mind. I am of the view that there should be some cost consequence for the Claimant's tardiness in filing the application and so although costs usually follow the event, I find it necessary to divert from that here. Despite the Claimant being largely successful in the application, the Claimant is required to compensate the Defendant for the costs associated with this Application.

[60] On May 1, 2023, Counsel for the Claimant made an application for leave to appeal. The Court took the view that the issues raised are far from being clear cut so there may be a reasonable prospect of success and so the application for leave to appeal was granted.

[61] My Orders are as follows:

1. The Claimant be permitted to amend its Claim Form and Particulars of Claim, both filed on June 29, 2018, consistent with the Draft Amended Claim Form and Draft Amended Particulars of Claim save for the following particulars:
 - "i. Damages for breach of contract"
 - "ii. Damages and or"
 - "iii. Alternatively, interest on damages at the Bank of Jamaica Commercial Banks' Foreign Currency Loan Rates on United States Currency from June 2, 2016, until the date of judgment or"
2. The requested amendments to the "sum of US\$107,018.97" where it appears in both the Claim Form and Particulars of Claim are permitted on the condition that the Claimant is able to arrive at and stipulate a figure which excludes the earlier time period, that is, from June 1, 2014, to January 31, 2016.

3. The Claimant be permitted to file and serve the Further Amended Claim Form and Further Amended Particulars of Claim within seven (7) days of the date of this Order.
4. The Defendant be at liberty to file and serve an Amended Defence to the Amended Particulars of Claim within fourteen (14) days of the service of the Amended Claim Form and Amended Particulars of Claim.
5. The Application for leave to appeal is granted.
6. Costs of the Application to the Defendant to be agreed or taxed.

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S. Jackson Haisley
Puisne Judge