[2011] JMCA Civ 2

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE SMITH, JA
THE HON MR JUSTICE HARRISON, JA
THE HON MR JUSTICE DUKHARAN, JA

SUPREME COURT CIVIL APPEAL NO 112/2008

BETWEEN	PAN CARIBBEAN FINANCIAL SERVICES LTD	APPELLANT
AND	ROBERT CARTADE	1ST RESPONDENT
AND	JACK KOONCE	2ND RESPONDENT
AND	SHIRLEY SHAKESPEARE	3RD RESPONDENT
AND	WESTERN CEMENT COMPANY LTD (IN RECEIVERSHIP)	4th RESPONDENT

SUPREME COURT CIVIL APPEAL NO 115/2008

BETWEEN	JAMAICA REDEVELOPMENT FOUNDATION INC	APPELLANT
AND	ROBERT CARTADE	1ST RESPONDENT
AND	JACK KOONCE	2ND RESPONDENT
AND	SHIRLEY SHAKESPEARE	3RD RESPONDENT
AND	WESTERN CEMENT COMPANY LTD (IN RECEIVERSHIP)	4TH RESPONDENT

SUPREME COURT CIVIL APPEAL NO 116/2008

BETWEEN	**NATIONAL INVESTMENT BANK OF JAMAICA LTD**	**APPELLANT**
AND	**ROBERT CARTADE**	**1ST RESPONDENT**
AND	**JACK KOONCE**	**2ND RESPONDENT**
AND	**SHIRLEY SHAKESPEARE**	**3RD RESPONDENT**
AND	**WESTERN CEMENT COMPANY LTD (IN RECEIVERSHIP)**	**4TH RESPONDENT**

SUPREME COURT CIVIL APPEAL NO 117/2008

BETWEEN	**ROBERT CARTADE**	**1ST APPELLANT**
	JACK KOONCE	**2ND APPELLANT**
	SHIRLEY SHAKESPEARE	**3RD APPELLANT**
	WESTERN CEMENT COMPANY LTD	**4TH APPELLANT**
AND	**PAN CARIBBEAN FINANCIAL SERVICES LTD**	**1ST RESPONDENT**
AND	**JAMAICA REDEVELOPMENT FOUNDATION INC**	**2ND RESPONDENT**
AND	**NATIONAL INVESTMENT BANK OF JAMAICA LTD**	**3RD RESPONDENT**

Gordon Robinson and Jerome Spencer instructed by Lynda Mair of Patterson, Mair, Hamilton for Pan Caribbean Financial Services Ltd

John Vassell QC and Courtney Bailey instructed by DunnCox for Robert Cartade, Jack Koonce, Shirley Shakespeare and Western Cement Company Ltd

Mrs Sandra Minott-Phillips and Gavin Goffe instructed by Myers Fletcher and Gordon for Jamaica Redevelopment Foundation Inc

Charles Piper and Miss Yualande Christopher for National Investment Bank of Jamaica Ltd

18, 19 February; 23, 24 March 2009; and 28 January 2011

SMITH JA

[1] I have had the benefit of reading in draft the judgment of my brother Harrison JA and I agree with his reasoning and conclusion.

HARRISON JA

[2] These four appeals, which were consolidated by order of the court, have challenged orders made by Brooks J on 15 and 24 October 2008, whereby the learned judge refused to strike out a claim brought by Robert Cartade, Jack Koonce, Shirley Shakespeare and Western Cement Company Ltd (the respondents), granted the respondents' application to amend their claim forms and particulars of claim and had ordered that Pan Caribbean Financial Services Ltd, Jamaica Redevelopment Foundation Inc and National Investment Bank of Jamaica Ltd (the appellants) were entitled to have their respective costs taxed immediately in respect of the respondents' application to amend the claim form and particulars of claim.

The Background

[3] Robert Cartade was a shareholder and investor in Western Cement Company Ltd (Western Cement), a company incorporated under the Companies Act of Jamaica. Jack Koonce and Shirley Shakespeare were also shareholders and directors of Western Cement. On 20 October 1995, a Consortium Loan Agreement (CLA) was entered into between Western Cement, Trafalgar Development Bank (TDB), Island Victoria Bank Ltd (IVB), Mutual Security Bank Ltd (MSB) and Capital and Credit Merchant Bank (CCMB) to provide loan facilities to Western Cement. Under the CLA, Western Cement received loans totaling US$1,941,000.00 and J$14,000,000.00 from the consortium of banks. The loan was guaranteed by Jack Koonce and Shirley Shakespeare. TDB was the lead bank in the consortium.

[4] Under a mortgage clause in the insurance policies made pursuant to the CLA, TDB had authority to receive, apply and dispose of insurance proceeds payable to the consortium by Western Cement's insurers.

[5] On 8 June 2002, Western Cement's kiln was damaged during torrential rains and lightning storms. The insurers AHI Co and West Indies Alliance Co were notified of the damage through brokers. Claims were submitted by Western Cement amounting to US $650,000.00 but AHI Co denied its claim. West Indies Alliance Co whilst denying liability decided however, to make an ex-gratia payment in the sum of US$325,000.00 in respect of the claim. By letter dated 18 June 2002, Western Cement wrote to TDB requesting that the consortium of lenders authorize the insurer to pay over the

US$325,000.00 to it, so that repairs could be carried out to the kiln. Western Cement and its shareholders contended that the consortium of lenders was not entitled to receive payment since it was one that was made ex-gratia and not made pursuant to the insurance policy. By letter dated 24 June 2002, TDB replied to Western Cement as follows:

> "We refer to your letter dated June 18, 2007 regarding the above matter and the handling of the related insurance claim.
>
> Please be advised that TDB on behalf of the lending consortium will not agree to the insurance company paying the proceeds of the claim directly to Western Cement Company Limited.
>
> In our capacity as mortgagees the proceeds of the claim will be paid directly to TDB. You have our assurance that TDB will in turn disburse those proceeds expeditiously against invoices for the replacement of the kiln."

[6] On 1 May 2003, TDB and CCMB by virtue of a deed of assignment assigned to National Investment Bank of Jamaica Ltd (NIBJ), absolutely all their rights, title and interest under the debts. TDB was absorbed into Pan Caribbean Financial Services Ltd (PCFS). IVB and MSB had assigned their respective rights under the CLA to Dennis Joslin Jamaica, Inc. Jamaica Redevelopment Foundation Inc (JRF) eventually became the successor and assignee of the interests, rights, title and obligations of Dennis Joslin Jamaica Inc.

[7] The damaged kiln was not repaired. Western Cement was unable to function and it was eventually put in receivership.

[8] The respondents commenced an action in the Supreme Court on 16 August 2006 by filing a claim form and particulars of claim. The appellants were named as defendants in the claim. It was alleged that as a result of the appellants' breach of contract, Robert Cartade, Jack Koonce and Shirley Shakespeare suffered loss of or diminution in the value of their shareholdings in Western Cement. It was further alleged that Western Cement had suffered loss, damage and expense. On 15 September 2006, an amended claim form was filed.

[9] On 21 November 2007, JRF filed an application for court orders and sought the following orders:

> "1. The Claimants' Statement of Case be struck out against the 3rd Defendant;
>
> 2. The costs of this application and of the claim generally to date be paid by the 1st, 2nd and 3rd Claimants to the 3rd Defendant to be taxed if not agreed."

[10] NIBJ and PCFS also filed notices of application for court orders on 5 December 2007, and sought orders to strike out the claim on the ground that the respondents' statement of case, in so far as it purported to advance the claims of the 1st, 2nd and 3rd respondents, revealed no reasonable grounds for bringing the claim against them.

PCFS contended in the alternative, that the statement of case against it was an abuse of the process of the court.

[11] The applications which sought to strike out the claim came before Brooks J, at a case management conference (CMC) on 28 April 2008, which lasted over a period of five days. During the hearing, an application was made by the respondents to amend the claim form and the particulars of claim. Brooks J made the following orders:

> "1. The applications by the 1st 2nd and 3rd Defendants respectively to strike out the Claimants' claim are refused;
>
> 2. The Claimants shall be at liberty to prepare, file and serve on or before 31st October 2008, an amended Particulars of Claim in terms of that appended to its amended notice of application for court orders filed July 22, 2008 with such further amendments as regards the issue of the Deed of Assignment as it deems necessary;
>
> 3. The Defendants shall be at liberty to respectively file and serve, on or before 17th November 2008 an amended Statement of Defence with or without a Counterclaim as they are respectively advised;
>
> 4. The Claimants shall be at liberty to file and serve replies and/or defences to counterclaims, if so advised, on or before 28th November 2008;
>
> 5. The Claim by the Fourth Claimant may only proceed if there is filed on or before the 31st October 2008, either an undertaking to indemnify the Fourth Claimant for the costs it will incur in this claim and for any costs which it may be ordered to pay the Defendants herein or the consent of the Fourth Defendant's receiver for the claim to be prosecuted. In the event that neither the indemnity nor the

consent is provided the Fourth Defendant's claim shall stand as struck out;

6. The Case Management Conference is adjourned to a date to be agreed between counsel and the Case Management Judge, being not later than the 16th December 2008;

7. Costs of the application to strike out, the application to amend the particulars of claim and the costs of and occasioned by the amendment shall be paid by the Claimants to the Defendants;

8. Special costs certificate granted."

[12] On 24 October 2008 Brooks J, made a further order which reads:

"1. The Defendants are hereby granted leave to appeal this Order as well as the Order made on the 15th of October, 2008.

2. Order 2 of the Order dated 15th October, 2008 is hereby amended to insert immediately after the number 2008 in line 2 thereof, the words "*a Further Amended Claim Form and*"

3. The Order made on the 15th of October, 2008 shall take effect on the 24th of October 2008.

4. The Defendants shall be entitled to have their respective costs in respect of the Order made on the 15th of October, 2008 taxed immediately.

5. Costs of today to the Defendants to be taxed if not agreed and the Defendants shall be at liberty to tax those costs immediately.

6. The Claimant is hereby granted leave to appeal in respect of Order 4 hereof.

7. Application for Stay of Action pending payment of costs is refused.

8. Application for Stay of Taxation pending appeal is hereby refused."

Notice and Grounds of Appeal

[13] JRF filed notice of appeal on 31 October 2008 and relied upon the following grounds in SCCA No 115/2008:

"1. The Learned Judge erred in failing to assess separately the Claimants (sic) case against each Defendant.

2. The learned Judge erred in failing to consider at all or sufficiently the factors set out in CPR 26.3 (1) (c) and (d) -- the latter in the context of CPR 8.9(1), (2) and (3).

3. The learned Judge failed to have any or any sufficient regard to the general rule that pleadings are to be confined to material facts. Against that background the learned Judge erred in regarding the amendment subject of his consideration at the time his order was made as the Respondents seeking merely 'to advance an interpretation of a document, which interpretation is contrary to that previously advanced by them.'

4. The learned Judge failed to have any or any sufficient regard to the fact that the Appellant/3rd Defendant had given the Respondents/Claimants timely notice in paragraph 1 of its Defence filed and served on October 25, 2006 (some 1½ years before the hearing of the application) of its intention to apply for the striking out of the Claimants (sic) case via the alternatively available procedures under CPR 26.3 (1) and CPR 15.6 (a) and (b), and that the said paragraph of its Defence set out the bases of its claim of an absence of locus standi on the part of the Respondents/Claimants. The learned Judge therefore erred in his orally expressed view at the hearing that in order to advance its claim for summary judgment the 3rd Defendant would need leave to amend its

application for Court orders filed on November 21, 2007. Alternatively, if leave was required, the learned Judge erred in not granting it in the circumstances before him.

5. The learned Judge was obliged to make an order on the Appellant/3rd Defendant's application for summary judgment which was before him in his capacity as the Case Management Judge and of which application the Respondents/Claimants had received written notice in good time. In failing to do so he fell into error.

6. The learned Judge ought properly to have considered the Appellant's application for summary judgment (based as it was on an issue of law and therefore requiring no affidavit evidence in support) on the statements of Case he had before him at the time the Appellant gave notice to the Respondents/Claimants of its intention to apply for summary judgment. Those Statements of Case remained unchanged as at the date of commencement of the Case Management hearing before the learned Judge. In failing to consider the Appellant's application for summary judgment on the basis of the then existing Statements of Case, the learned Judge fell into error.

7. The learned Judge erred in failing to assess (sic) consider whether that (sic) the amendment sought by the Respondents constituted the raising of an entirely new case against the Appellant by way of an amendment, particularly in the existing circumstances of:

    i. The Appellant's summary judgment application (which is a trial on the merits) being before the court;

    ii. The acceptance by counsel for the Respondents/Claimants that the Appellant's criticism based on **Foss v Harbottle** (1843) 2 Hare 461 was valid; [P. 6];

iii. A failure by the 1st, 2nd & 3rd Respondents/Claimants, or any of them, in their Particulars of Claim (original or proposed amended) to aver that they either had the consent of the Receiver to bring the action or to aver that the assets of the company were not put at risk by their claim.

iv. The factual contradiction in the Respondents' proposed amended Statement of Case alluded to by the learned Judge on page 13 of his reasons, to wit.: "**The Particulars of Claim still seek to assert that liabilities were acquired by JRF, while the thrust of the new position is that the liabilities remained with the members of the consortium** [Appellant's emphasis]. **Mr. Vassell has accepted the criticism** and seeks leave to further adjust the amended pleadings to clarify that aspect, in the event that leave to amend is given."

v. The learned Judge's conclusion that the original pleadings could have led to a successful application to strike out the claim [P. 151]

In all the circumstances before him including those specified above, the learned Judge erred in failing to find that the amendments proposed at the time of the hearing raised an entirely new case against the Appellant/3rd Defendant by way of amendment and, accordingly, in failing to be correctly guided by the decision of this Hon. Court in **Young and Anr. v Chong & Ors** (2000) 59 WIR 369.

8. The learned Judge failed to sufficiently address his mind to the fact that the causes of action against the Appellant/3rd Defendant contained in the original and proposed amended pleadings were completely different. In so doing,

he failed to consider the clear prejudice against the Appellant/3rd Respondent in it being deprived of the defence to which it was entitled under the Limitation of Actions Act where a new cause of action is asserted more than six years after that cause of action first arose.

9. The learned Judge also failed to take into account that up to the time he made his order the Respondents' Particulars of Claim had not been finalized. This is bourne (sic) out by the learned Judge granting leave to the Respondents in paragraph 2 of the order subject of this appeal for a further adjustment of their Particulars of Claim pursuant to a request made by them. The result was that neither the Court below nor the Defendants knew what the final amendments to the Particulars of Claim would be at the time the Court made its order.

10. The learned Judge failed to properly exercise his discretion by refusing to stay the Respondents/Claimants' action pending payment of the costs in the light of the real risk that the Appellant/3rd Defendant might not recover the costs if the Respondents' (sic) were not ordered to pay the costs as a condition of proceeding with their claim."

The Appellant sought the following orders:

"1. Paragraphs 1-6 of the Order of the Learned Judge dated 15th October 2008 are set aside as against the Appellant;

2. Paragraphs 7-8 of the Order of the Learned Judge dated 15th October 2008 are affirmed.

3. Paragraph 7 of the Order of the Learned Judge dated 24th October 2008 is set aside as against the Appellant;

4. The Appellant's application for a Stay of Proceedings pending payment of the Appellant's costs is granted.

5. The Respondents' claim against the Appellant is struck out and judgment is given to the Appellant on the Respondents' claim;

6. The costs of this Appeal and of the claim generally are awarded to the Appellant and are to be taxed if not agreed."

[14] NIBJ filed notice of appeal, SCCA No 116/ 2008, on 3 November 2008, and relied on the following grounds of appeal:

"1). The learned Judge erred in law or misdirected himself as to the law and the facts in neglecting or refusing to strike out the proceedings against this Appellant on the ground that the Respondents' statements of case fails (sic) to reveal any or any reasonable grounds for bringing the claim, having regard to the fact that:

a) the substantive issue relates to a matter of construction of Clause 3 of the Debenture; and

b) the rule in **Foss v Harbottle** precludes the First to Third Respondents from bringing or maintaining their claim, a position which was accepted by their Counsel.

2). The Learned Judge erred in law or misdirected himself as to the law by failing to consider and apply the principles applicable to amendments to statements of case after the expiration of a relevant limitation period, and by granting permission to amend which enables the First to Third Respondents to raise a new cause of action against the Appellant, after the expiration of the limitation period.

3). The Learned Judge erred in law or misdirected himself with respect to the law when he found that there were mistakes in the formulation of the claim which could be corrected without injustice to the

Appellants when the proposed amendments to correct the alleged mistakes:

a) did not affect the substantive claim which is unsustainable;

b) are introducing a new cause of action after the expiration of the relevant period of limitation;

c) are prejudicial to the Appellant and the other Defendants in that, by introducing the new cause of action, these parties are denied the opportunity of relying upon the defence afforded by the Limitation of Actions Act.

4). The Learned Judge erred in law or misdirected himself as to the law in relation to the application of Rule 26.3(1) of the Civil Procedure Rules, 2002, as amended.

THE ORDERS SOUGHT ARE THAT:

i) Items 1 to 4 of the Learned Judge's order dated October 15, 2008 and item 2 of the Learned Judge's order dated October 24, 2008 be set aside.

ii) The action against the Appellant be struck out and Judgment be entered for the Appellant against the Respondents on the claim and counterclaim.

iii) The costs of the appeal and costs in the Court below be the Appellant's to be agreed or taxed.

iv) ..."

[15] Notice and grounds of appeal for PCFS, SCCA No 112/2008, were filed 30 October 2008. The grounds of appeal are as follows:

"(1) The Learned Judge erred in granting an application to amend an allegation of fact, namely that the obligations under the consortium loan agreement were assigned to the National Investment Bank of Jamaica ("NIBJ") and/or the Jamaican Redevelopment Foundation ("JRF"), in the absence of any assertion of fact by any of the Respondents or anyone on behalf of the Respondents whether in an affidavit or otherwise that the factual situation was other than had been originally pleaded preferring instead to rely on a statement that the lawyers had misinterpreted the Deed of Assignment.

(2) The Learned Judge in Chambers erred in permitting the Respondents to amend their pleading as to the fact of the transfer/assignment of the said obligations to NIBJ and/or JRF in the face of an uncontradicted affidavit of Donovan Perkins sworn to and filed on behalf of the Appellant in which he gave evidence of the circumstances leading up to and the fact of the assumption of those obligations by NIBJ as well as the fact that the Respondents had received formal notice of the transfer of those obligations to NIBJ without demur.

(3) The Learned Judge in Chambers erred in allowing the Respondents to amend to state that the obligations under the consortium loan agreement remained with the Appellant in light of the fact that they had not objected when receiving notice of the transfer of those obligations to the NIBJ and had in fact affirmed that transfer by way of their original pleading which had stood for two years.

(4) The Learned Judge erred in his application of the test for the granting of an amendment ("is there a real prospect of success at trial" as opposed to just a fanciful one), in that he has not relied on any evidence

from the Respondents or any of them in coming to the conclusion that there is such a prospect. Instead, he has contented himself to say that the Deed of Assignment can be interpreted in different ways the determination of which is for the Trial Judge.

(5) The Learned Judge erred in law in leaving the interpretation of a document to an expensive trial when that document was before him in its entirety together with all the evidence from both sides regarding the circumstances of its existence. In so side-stepping the issue, the Learned Judge, who ought to have come to a finding as to the proper interpretation of the document then and there, and had this power under Rule 26.1 of the CPR, failed to discharge his mandate to further the over-riding objective;

(6) The Learned Judge erred in granting what was clearly an insincere amendment brought at the very last minute in a desperate attempt to avoid their Claim being struck out and which was not founded on any evidence of the fact they wished to now plead and in so doing was wrong to refer to the citation of **Moo Young and another v Chong and others** (2000) 59 WIR 369 as "unfortunate" and erred in failing to apply the principles in that case regarding late applications for amendment which were appropriate for the current circumstances;

(7) The Judge erred in granting the application for amendment when the Respondents *pro forma* amended pleading remained contradictory even after the amendments were made and then he compounded the error by giving the Respondents *carte blanche* permission to "clean up" the remaining pleading without first seeing how that "clean up" operation would affect the document as a whole and the Respondents' Statement of Case.

(8) The Learned judge erred in refusing to strike out the Claimants' Claim as being an abuse of the process when the previously filed suit relied upon to ground this application was not withdrawn or amended in any way.

(9) The Learned Judge erred in law in making an order of costs limited to the costs of the Applications only when he ought to have ordered the Respondents to pay the costs of the entire action to date simply because the amendments have created an entirely new case for the Appellants to deal with, directly contradicted their original case and were made at a very late stage."

The appellant sought the following orders:

"(a) That the appeal is allowed and the order of the Honourable Justice Brooks made on 15 October 2008 is set aside, with costs to the Appellant

(b) The Claimants/Respondents' Claim against the First Defendant/Appellant is hereby Struck Out."

[16] In SCCA No 117/2008, Cartade, Koonce, Shakespeare and Western Cement filed a notice of appeal on 4 November 2008. The grounds of appeal state as follows:

"i) The learned Trial Judge erred in finding that the bringing of a claim by the 4th Claimant without the authority of its Receiver was a special circumstance warranting the exercise of the discretion granted by CPR 65.19.

ii) The learned judge erred in finding that the Defendants should not be required to wait until the end of the trial to be paid for the costs occasioned by the amendments to the Claimants' statement of case.

iii) The learned judge erred in ordering costs to be taxed immediately in the absence of special circumstances,

such as misconduct on the part of the Claimants, justifying a departure from the general rule that costs are taxed at the end of the proceedings.

iv) The learned judge improperly exercised his discretion by failing to have any regard or any proper regard to the overriding objective of the Civil Procedure Rules, 2002, in coming to his decision.

The orders sought were:

> "i. That the Order of Mr. Justice Brooks made on the 24th of October, 2008 that the Defendants shall be entitled to have their respective costs in respect of the Order made on the 15th of October, 2008 taxed immediately be set aside.
>
> ii. The costs of the appeal be the Claimants/Appellants to be taxed if not agreed."

[17] The appeals, as I have said before, were consolidated by order of the court. It is certainly not intended that every ground of appeal will be dealt with in this judgment. Rather, I will be examining those grounds and submissions made with respect to them, where major issues arise.

The Submissions

SCCA Nos 112, 115 and 116/2008

[18] In this court, Mr Gordon Robinson for PCFS made very detailed submissions in respect of nine grounds of appeal filed on its behalf. Grounds 1, 2 and 3 were argued together. In effect, he submitted that the matter before the learned judge went beyond being a mistake by the respondent's counsel in the interpretation of the deed of

assignment. It was argued by counsel that the amendment concerning the assignment of the loan agreement, resulted in the presentation of a claim that fundamentally contradicted the original claim. He submitted that in order for the respondents to resile from their original position, evidence was needed to show that the obligations were not assigned/assumed. He submitted that there was no such evidence before the learned judge and that he fell into error by granting the amendments in the absence of such evidence. Mr Robinson argued that the learned judge was under a duty pursuant to the overriding objective and his case management powers to interpret the deed especially as the document was before him in its entirety with no contest as to its authenticity. He argued that both sides had filed affidavits regarding the circumstances leading up to its existence. He therefore submitted that the contents of the deed together with the evidence tendered by all sides established beyond peradventure that the respondents had no real prospect of establishing at any trial that the obligations under the CLA remained with PCFS at the time the claim was filed.

[19] With respect to ground 4, Mr Robinson also submitted that the learned judge was under an obligation when assessing the respondents' applications to amend their statement of case to consider the prospect of the proposed amendment succeeding at trial, since it is trite law that an amendment will not be granted if it serves no useful purpose. He therefore submitted that in order to establish a real prospect of successfully convincing a trial court that the assumption of the obligations of PCFS was ineffectual vis-a-vis the 4th respondent, and thus remained with PCFS, it was for the 4th respondent to adduce some evidence that either the alleged assumption of obligations

by NIBJ did not happen or was unenforceable against the respondents. Mr Robinson argued that since no such assertion had been made in any affidavit sworn to on the respondents' behalf and accordingly, the learned judge had no evidential basis upon which to determine whether the amendment sought, and granted, had a real prospect of success. It was his view that the overwhelming and incontrovertible evidence before the learned judge pointed to the fact that those obligations had in fact been assumed by NIBJ.

[20] Mr Robinson submitted in respect of ground 6 that the principles enunciated by this court in **Moo Young and Another v Chong and Others** (2000) 59 WIR 369 regarding late applications for an amendment were very much appropriate in respect of the current circumstances. In that case, the court had disallowed an amendment principally on the basis that the amendment was in bad faith since the respondents were making a radical change in their case as originally pleaded and a party should not be allowed to raise an entirely new case by amendment. He submitted that much like the **Moo Young** case, the respondents sought to amend their case at a similarly late stage, namely, after the appellant and other defendants in the proceedings below had already submitted on their applications to strike out the claim; and senior counsel for the respondent had been responding to those submissions for some time. Furthermore, he submitted that the application to amend was made:

a. two years after the claim had been commenced; and

b. after the respondents had filed several statements of case, which were certified by or on behalf of the respondents as being true,

> alleging as a fact that the obligations under the CLA and security documents were assigned to NIBJ and further alleging that NIBJ was in breach of its obligations under the CLA.

Mr Robinson therefore submitted that in view of the foregoing, it was "abundantly clear" that the similarities between the instant claim and the **Moo Young** case could not have been any "more apparent".

[21] Mr Robinson did not really argue grounds 7 and 8 as vigorously as he did with regards to the other grounds. The gist of ground 7 is that the learned judge had erred in permitting the respondents to make any further amendments as regards the deed, as they deemed necessary. Mr Robinson argued that the learned judge ought to have been provided with the specific terms of all the proposed amendments so that he could assess whether the amendments were appropriate. Ground 8 deals with an abuse of process issue. Mr Robinson submitted that the clearest evidence was placed before the learned judge that these respondents (except for the 1st respondent) had already commenced and were pursuing a suit against NIBJ alone for the identical relief in which it was specifically pleaded that NIBJ was the one in breach of the obligations under the agreement. Accordingly, he submitted that this claim (which included contrary pleadings) was clearly an attempt to double-recover. He argued that no evidence had been placed before this court that the previous suit had been withdrawn, discontinued or amended in any way. He therefore submitted that there was no obligation on the court to facilitate the respondents in any way.

[22] With regards to ground 9, Mr Robinson argued that the learned judge had also erred in law in making an order for costs limited to the costs of the applications only, when he ought to have ordered the respondents to pay the costs of the entire action to the date when the applications were heard. He submitted that in considering the appropriate costs order, the learned judge should have had regard to the significant change of course which was undertaken by the respondents and the effect which this would have on PCFS. The result of this changed course and the order as to costs made by the learned judge, he said, is that the defence originally filed by PCFS was of no bearing and the costs incurred in taking instructions and preparing that defence would have to be absorbed by PCFS, although all it did was to instruct attorneys to respond to a claim brought by the respondents. He submitted that limiting the costs awarded to PCFS to the costs of the applications, which is a typical cost order for even the most insignificant amendments to pleadings, was wrong and failed to sanction the respondent materially changing course well over two years into the claim. He referred to and relied on the authority of **Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries Ltd** [1951] 1 All ER 873 and submitted that the principle applied in that case was applicable to the proceedings below. He argued that but for the application to amend being granted, the respondents' claim would have been struck out. He further submitted that the application was made at an extremely late stage and therefore, an appropriate order as to costs would have been for the respondents to pay PCFS' costs from the commencement of the claim.

[23] In the circumstances outlined above, Mr Robinson submitted that:

(a) the appeal should be allowed and the order of Brooks J made on 15 October 2008 be set aside, with costs to the appellant; and

(b) the claimants/respondents' claim against PCFS should be struck out.

[24] Mr Goffe dealt with the grounds of appeal filed on behalf of JRF, under six heads. He submitted that it was alleged in the particulars of claim filed on 16 August 2006, that IVB and MSB had assigned their respective loans and all rights and obligations thereto under the CLA to Dennis Joslin Jamaica Inc and that JRF is the successor and/or assignee in the loans issued by IVB and MSB but this assertion was denied by JRF in its defence. He submitted that JRF had contended that the loans to the Western Cement by IVB and MSB were acquired by it as a bona fide purchaser of the receivable for value without notice of any defect. He submitted that on 17 June 2008, when the respondents at the CMC sought permission to amend their statement of case to delete "*all averments therein that the obligations of the 1st defendant (or of Trafalgar Development Bank Limited) were assigned to the 3rd Defendant or any other person*", there was no indication after that application of the existence of any cause of action against JRF.

[25] Mr Goffe further submitted that on 22 July 2008, when the respondents sought to correct this deficiency, one of the grounds for the application to amend was that it was "*necessary to allow for the adjudication of the related claim by the 1st to 3rd Claimants*". What was being sought now was:

> *"A declaration that the 1st, 2nd and 3rd Claimants are discharged from all of their obligations under the respective instruments of Guarantee dated October 20, 1995 executed by them in favour of the 1st Defendant and guaranteeing payment to the 1st Defendant of the indebtedness of the 4th Claimant under the Consortium Loan Agreement dated October 20, 1995."*

[26] Mr Goffe submitted that this amendment to allow the respondents to refer to instruments of guarantee did not, without more, create a cause of action against JRF. He argued that no reference whatsoever was made to JRF in the amendments sought and that the connection between JRF, who was not one of the lenders under the CLA, and the respondents, was not established by the respondents who had a duty under the Civil Procedure Rules to plead every fact on which they intended to rely. Mr Goffe submitted that the amendment to remove the allegation that the obligations, the subject of the suit, were assigned to JRF, removed the nexus between the respondents and JRF and had disposed of the alternative claim alleged in paragraph 29 of the original particulars of claim. He therefore submitted that the failure on the respondents' part to properly plead a cause of action ought to have resulted in the granting of JRF's application to strike out the claim and the entry of summary judgment in its favour.

[27] Mr Goffe submitted that the learned judge failed to take into account that up to the time he gave permission to the respondents to amend their statement of case, the proposed particulars of claim was not yet in its final form. He submitted that the result was that neither the court below nor the appellants knew what the final amendments to the particulars of claim would be at the time the court made its order.

[28] Mr Goffe further submitted that the amendment sought was to include an entirely new claim in both the claim form and the particulars of claim. He argued that with respect to JRF, this new claim was not merely an additional claim, but instead it was the only claim against JRF. He submitted that the learned judge had failed to properly apply the decision of **Moo Young**. He also submitted that the purported cause of action of the 1st to 3rd respondents against JRF was for a declaration that they were discharged from all of their obligations under the instruments of guarantee, which was not truly a cause of action against JRF. He submitted that there was no reason to keep JRF in the proceedings as the three respondents' bases for claiming to be discharged had contained no allegation against JRF. Mr Goffe submitted that at best the declaration sought by the 1st to 3rd respondents represented a possible defence to a claim made by creditors against those respondents under the guarantees. He submitted that there was no pleading that JRF had made a claim against the 1st to 3rd respondents under any instrument of guarantee so it could not therefore be sued on the basis of a defence to an action that it had not yet brought against the respondents.

[29] Mr Goffe submitted that even if the respondents had a cause of action against JRF, which they did not, that cause of action would have been first alleged more than six years after it first arose. He argued that an amendment ought not to have been allowed, if it would defeat a plea based upon the statute of limitations. He submitted that JRF would be prejudiced by the granting of the amendment in a way that costs could not compensate.

[30] On the issue of costs, Mr Goffe submitted that the learned judge failed to consider that in the absence of an order staying the proceedings until the costs are paid, the respondents might not be inclined to pay the taxed or agreed costs until the conclusion of the trial, in which case, the order of the court for interim taxation would have been in vain. Mr Goffe also submitted that the learned judge had failed to consider that the 4th respondent was in receivership and thus there was a real risk that it would be unable to pay the costs. He finally submitted that it was appropriate for the court to have ordered that the proceedings be stayed until the costs are paid into court.

[31] Mr Charles Piper on behalf of NIBJ argued four grounds of appeal. With respect to grounds 1 and 4, which were argued together, he submitted that the issue which the learned judge had to determine was whether on a proper construction of the contract, NIBJ or any of the other appellants had the right to receive the insurance proceeds and if so, whether they were bound to deliver same to the respondents or any of them to be dealt with in the manner claimed. He submitted that the substantive issue was simply one of construction of clause 3 of the debenture, a matter, he argued, that the learned judge ought properly to have undertaken in the exercise of his discretion on an application to strike out proceedings, in circumstances where there are no disputes as to the facts on the issue. He argued that an examination of clause 3 revealed that:

> "a) It authorised TDB to receive and give effectual discharges 'for all monies which may become due and payable due and owing or payable to the Company under or in respect of any such insurance'; and that

b) It provides that all such monies where not applied or committed with the consent of the Debenture Holder within 180 days after receipt to the reinstatement of the property or in the event of extensive damage, 'as to which the Company applies during the 180 days period and is diligently proceeding with restoration thereafter) shall be applied in or towards repayment of any moneys secured by the Debenture ...' "

He therefore submitted that clause 3 of the debenture did not have the meaning contended for by the respondents. It had authorized TDB to receive the insurance proceeds and it did not create the alleged or any obligation in the debenture holder to disburse the proceeds directly to the 4th respondent. In addition, he submitted that clause 3 placed the responsibility of diligently proceeding with the restoration on the 4th respondent. Mr Piper therefore submitted that on a proper construction of clause 3 of the debenture, TDB was entitled to act in the manner adopted in its letter dated 24 June 2002 (supra). Further, he submitted that there were no pleadings or any evidence which showed that the 4th respondent had conducted itself in any manner that would entitle it to rely upon the provisions of clause 3 of the debenture. In these circumstances, Mr Piper submitted, there could not have been the alleged or any breach of contract or breach of trust which was the foundation of the claim filed by the respondents.

[32] Mr Piper also submitted that the claim by the first three respondents could not be sustained by reason of the rule in **Foss v Harbottle** (1843) 2 Hare 461, 67 ER 189 which made this a plain and obvious case which ought properly to have been struck out as revealing no reasonable ground for bringing the claim.

[33] With respect to grounds 2 and 3 Mr Piper submitted that the learned judge had erred in failing to consider the implications of granting permission to the respondents to amend their claim to allege, for the first time, that the conduct of TDB in withholding the insurance proceeds had the effect of discharging the 1st, 2nd and 3rd respondents from their obligations under the instruments of guarantee of the 4th respondent's debt. He argued that this new claim was first raised when, on 19 September 2008, in the course of hearing the applications to strike out the respondents' statement of case, their counsel made an application to amend their statement of case. The application, he said, was for an amendment to plead that TDB's conduct, of which the respondents were aware from 24 June 2002, had the effect of discharging their obligations under the instruments of guarantee. He therefore submitted that the statutory period of limitation of six years had run and that the respondents could only be granted permission to amend if the law permitted this. Mr Piper, thereafter, referred to well-known cases on amendments being made after the expiry of the limitation period. These cases include **Weldon v Neal** (1887) 19 QBD 394; **The Attorney General v Spl. Cons. Anthony Cowell and Anthony Richards**, SCCA No 39/1986 delivered 9 March 1987; **Charlton v Reid** (I960) 3 WIR 33 and **Philmore Ogle (Liquidator for Jamincorp International Merchant Bank Limited) v Jamaica Citizens Bank Limited** (1995) 32 JLR 433.

[34] Mr Piper finally submitted that the learned judge ought properly to have struck out the respondents' statement of case as revealing no reasonable ground for bringing the claim for the following reasons:

a) The First, Second and Third Respondents, being shareholders of the Fourth Respondent, cannot in law commence and maintain a claim for loss and damage allegedly sustained by the Company; and

b) The Fourth Respondent's claim is based on an erroneous interpretation of Clause 3 of the Debenture, and is unsustainable.

c) Permission ought not to have been given to the Respondents to amend their claim so as to permit the new claim for a declaration with respect to the Instruments of Guarantee.

d) On the facts as pleaded, this new cause of action is based on conduct which occurred in excess of six years prior to the date of the grant of permission.

e) The grant of permission to amend in these circumstances was wrong as being contrary to the established legal principles.

[35] Mr John Vassell QC responded on behalf of the respondents with respect to the appeals brought against them. Mr Vassell QC submitted that the decision of Brooks J, save for his order that costs be taxed immediately and for his assertion that the respondents' original pleadings could have led to a successful application to strike out, was correct for the reasons given by the learned judge. He argued that the decision to grant the amendments was well within his discretion.

[36] Mr Vassell QC further submitted that the learned judge had correctly identified the proper approach as stated by Moore-Bick LJ at paragraph 16 of his judgment in **Diamantis Diamantides v JP Morgan Chase Bank and Others** [2005] EWCA Civ 1612:.

> "... On an application to strike out particulars of claim on the grounds that they disclose no cause of action the court will normally consider any proposed amendment since, if the existing case can be saved by a legitimate amendment, it is usually better to give permission to amend rather than strike out the claim and leave the claimant to start again."

[37] On the issue whether the amendment to remove the allegation that obligations were assigned under the deed of assignment should have been granted, Mr Vassell, QC, invited the court to examine the deed which is dated 1 May 2003. He argued that Recital D appeared to say that NIBJ had offered to buy the debts and to assume all the lender's obligations and liabilities under the debts, subject only to the Security Sharing and Inter-Creditor Agreement. He submitted however, that clause 2 of the agreement assigned to the purchaser the assignor's rights, title and interest in the debts which he said included the guarantees and made no mention of the assignor's liabilities. He said that clause 10 had the purchaser giving to the assignors an indemnity in respect of liabilities or claims arising after the date of the assignment. He argued that this recognized that as between the third party and the lenders those liabilities remained with the lenders but for some strange reason there is reference to "... the obligations and liabilities of the lenders under the Loan Documents and which are assigned to the Purchaser under this Assignment". Mr Vassell submitted that it was in this context of "linguistic or conceptual uncertainty" arising on the face of the deed of assignment that the respondents had pleaded at paragraphs 5 and 8 of the original particulars of claim that the document had the effect of assigning TDB's liabilities to the assignee, NIBJ.

[38] Mr Vassell QC further submitted that the striking out application by TDB had triggered a review by the respondents of the above pleading and of the document. He held the view that after this, it was clear that the document did not, on its proper construction, assign liabilities and that the prior plea that it did was mistaken. He submitted that it was in view of these circumstances that the application to amend was made. He therefore submitted that the assertion in the respondents' original pleading that NIBJ and JRF were liable through assignment to them of the lenders' liabilities was therefore also mistaken as a matter of law. In the circumstances, it was proper, he said, for the amendments to be granted to correct those errors.

[39] As to the submissions by Mr Robinson that the learned judge granted the amendments without assessing the merit of the allegations, Mr Vassell submitted that the best evidence on the issue of the assignment of liabilities was the instrument itself, the deed of assignment. He said he agreed with the learned judge that the document lends itself to more than one interpretation and that its true meaning and effect was a matter for the trial judge.

[40] Mr Vassell submitted that on the facts alleged by the respondents and on the basis of **Watts v Shuttleworth** 158 ER 1171 the principle (which was not disputed before the judge) that at the date of the assignment to the 2nd and 3rd appellants of the portion of the debt and guarantee and security claimed by them, the guarantees would have been discharged in consequence of the conduct of TDB in withholding the 4th respondent's insurance proceeds causing the collapse of the 4th respondent. The 2nd

appellant and the 3rd appellant and their predecessor assignees did not therefore obtain the benefit of the 1st to 3rd respondents' guarantees or the supporting securities since it is trite law that an assignee cannot get a better title than its assignor had. In the circumstances, he submitted, the declarations sought against the appellants are rightly sought, the amendments were rightly allowed, and the claims have good prospects of succeeding.

[41] With respect to the limitation point, Mr Vassell argued that it was now raised in the appeal and was never argued before Brooks J. He submitted that the point taken was plainly incorrect, having regard to, inter alia, when time started to run in respect of the causes of action to which the amendment related, and the date the application to amend was made. He submitted that no limitation period applied to an action seeking a declaration. He argued that the grant of an amendment to enable the 1st to 3rd respondents to claim the declaration was particularly reasonable in view of the fact that NIBJ had filed a counterclaim against the 1st to 3rd respondents seeking to enforce the guarantees.

SCCA No 117 of 2008

[42] With respect to SCCA No 117/2008 filed on behalf of the shareholders and Western Cement, Mr Courtney Bailey submitted that an order for the immediate taxation and payment of costs in the matter was certainly unfair and unjust. He submitted that having regard to the overriding objective of the Civil Procedure Rules 2002 (CPR) to deal with cases justly, which includes ensuring that the parties are on an

equal footing and are not prejudiced by their financial position, the learned judge erred in ordering costs to be taxed and paid forthwith. The effect of this order, he said, was to order the party in a weaker financial position to immediately pay costs to the financially stronger parties in a situation where no special circumstances were shown warranting a departure from the general rule. He referred to and relied on the English authority of **Hicks v Russell Jones & Walker** [2001] CP Rep 25. He argued that the provisions in the UK Civil Procedure Rules 1998, CPR 47.1 are in fact similar to the provisions of rule 65.5 of the CPR. In the **Hicks** case, the UK Court of Appeal had refused a request for the immediate assessment and payment of costs after a successful appeal against an order striking out a claim. In refusing the request, the court, he said, had regard to the overriding objective and the substantial injustice that the respondents to the appeal would suffer.

[43] Further, Mr Bailey submitted that the learned judge failed to consider the real possibility that in the event that the respondents were successful on their claim for damages, the costs awarded could be set off against any damages or costs awarded to the respondents.

[44] Mr Bailey also submitted that there was nothing in the respondents' conduct which would justify the imposition of a penal sanction in the form of an order for the immediate taxation of costs. He relied on text taken from paragraph 43.28 of the book "A Practical Approach to Civil Procedure" 10th Edn., by Stuart Sime. The learned author

identifies misconduct as a special circumstance justifying departure from the general rule as to costs and states as follows:

> "As well as disallowing costs, the court has various other powers that may be exercised to reflect a finding of misconduct against either party. These powers include:
>
> 1 ...
>
> 2. Ordering payment of interim costs forthwith, rather than requiring the party obtaining the costs order to wait until after trial for payment."

[45] Mr Bailey submitted that in the instant matter there was no misconduct on the part of the respondents and argued that it would have been sufficient for the learned judge to have awarded the costs of and occasioned by the amendments to the appellants. In the circumstances, he submitted that the order of Brooks J should be set aside and the costs of the appeal in SCCA No 117/2008 should be for the respondents.

[46] However, Mr Gordon Robinson, on behalf of the PCFS, submitted that the learned judge was well within his rights to take into account the premature filing of the suit in the name of Western Cement without the permission of the receiver. He submitted that there is no mention of the term "special circumstances" in rule 65.15 and that it was a concept that the respondents were trying to import from a British textbook into the language of the CPR. He did not agree that "misconduct" is a sine qua non for the order of immediate taxation to be made and submitted that again this was importing into our rules words not used by the "lawmakers". Nevertheless, he

considered the "flagrant abuse" of the court's process by filing suit without the receiver's consent as well as the last minute application to amend, to amount to misconduct. He disagreed with the learned judge that the application was made at an early stage. He submitted that in the peculiar circumstances of this case, where there would have been no trial but for the application to amend the respondents' case, this case was equivalent to the cases where amendments were applied for at trial.

[47] Mr Robinson further submitted that in the **Hicks** case, the request was refused because the claimants, the parties in whose favour the costs order had been made, were legal-aided, and consequently, there were significant restrictions on the amount of costs they would be required to pay if unsuccessful. He submitted that in the instant case there was no doubt that PCFS would be in a position to satisfy an order for costs if it was ultimately unsuccessful at trial.

[48] Mrs Minott-Phillips, for JRF, adopted the submissions made by Mr Robinson in relation to the **Hicks** case and also submitted that the order for costs to be taxed immediately was a proper one. She submitted that the learned judge had set out the bases for the immediate taxation of costs and that in the circumstances he had properly exercised his discretion. In the written submissions filed on behalf of JRF it was submitted that special circumstances did exist in the instant case which warranted a departure from the general principle. These circumstances, it was said, included the fact that Western Cement was already liable to pay costs to the appellants in

circumstances where the consent of the receiver had not been obtained and an indemnity had not yet been given.

[49] Mr Piper for NIBJ was also of the view that the **Hicks** case was distinguishable from the instant case. He submitted that having regard to the circumstances surrounding the various applications, and the need to grant amendments to overcome the applications to strike out the respondents' statement of case, this was a proper case for the exercise of the learned judge's discretion requiring immediate taxation of the costs.

The Issues

[50] It is my view that four major issues arise for consideration in the appeals. They are:

1. Whether the respondents had the power to institute the claim and to join Western Cement in the claim without leave of the receiver since Western Cement had been placed in receivership.

2. Whether the amendments were properly granted in the face of the applications to strike out.

3. Whether the appellants were entitled to have their respective costs taxed immediately.

4. Whether the amendment would deprive any of the defendants/appellants of the benefit of a defence based on the statute of limitations.

Determination of the Issues

[51] The appellants in appeals 112, 115 and 116 made two valid points in relation to the first issue. The first is that the respondents Robert Cartade, Jack Koonce and Shirley Shakespeare had no locus standi to bring the action. As shareholders they could not properly maintain the claim for damages on behalf of Western Cement. This is so because they would have been in breach of the rule in **Foss v Harbottle**. That case held that in seeking redress for a wrong done to a company, the company was the only proper claimant in an action to recover in respect of the wrong.

[52] The second point raised by the appellants is that Western Cement did not have the required consent of the receiver in order to bring the action as pleaded. However in **Tudor Grange Holdings and Others v Citibank NA and Another** [1971] 4 All ER 1 it was held inter alia that:

> "(2) Although it was established that in certain circumstances company directors had power to bring proceedings on behalf of the company even after the appointment of a receiver who had power to bring proceedings on the company's behalf, they had no power to do so where the receiver's position would be prejudiced by their decision to bring proceedings."

In that case the learned trial judge held the view that since an indemnity could have been provided in respect of the possible costs of the defendants to the claim he would not have struck out the claim on the basis that it had not been brought by the receiver.

[53] It was also held in **Newhart Developments Ltd v Co-operative Commercial Bank Ltd** [1978] 2 All ER 896 that:

> "A provision in a debenture empowering the receiver to bring an action in the name of the company whose assets were charged was merely an enabling provision, investing the receiver with the capacity to bring such an action, and did not divest the company's directors of their power to institute proceedings on behalf of the company, provided that the proceedings did not interfere with the receiver's function of getting in the company's assets or prejudicially affect the debenture holder by imperilling the assets. Furthermore, the directors were under a duty to bring an action which was in the company's interest because it was for the benefit of creditors generally, and to pursue that right of action did not amount to dealing with the company's assets so as to require the receiver's consent or concurrence. Since the plaintiffs' action would not stultify the receiver's function of gathering in the assets, the plaintiffs were not required to obtain his consent to bring the action ..."

[54] Also in **Arawak Woodworking Establishment Ltd v Jamaica Development Bank** (1987) 24 JLR 15 it was held inter alia:

> "(i) that the general rule is that the directors of a company in receivership have the power and were under a duty to institute proceedings on behalf of that company provided they do not imperil its assets and provided also that the action is in the company's interest and the suit is for and on behalf of the benefit of the creditors; in the instant case the directors of the company may sue."

[55] In the instant case, it was submitted below by Mr Vassell QC that Western Cement's assets were not at risk. Brooks J, having considered the submission regarding Western Cement being joined as a party, was of the view that an affidavit sworn to by Robert Cartade on 7 December 2007 clearly stated that he was "prepared to indemnify [Western Cement] against the costs of this action". The learned judge held that this may not amount to an actual indemnity but demonstrated that one could be secured. I have no reason to differ with the learned judge's reasoning.

[56] It does seem to me however, that without the amendments which were sought, the appellants' appeals would be bound to succeed. Mr John Vassell QC, had argued below, that the amendments if granted, would "define the real issues in controversy between the parties and would allow the Claimants to put forward their true case". Brooks J realized Mr Vassell's dilemma and opined that if the application to amend the particulars of claim was successful, then the claim would "have been saved from the fate requested by the appellants in their respective applications to strike it out". The test, he said, for allowing an amendment in the face of an application to strike out is that there must be a real prospect of establishing the amended case. The question now for consideration is whether or not the learned judge had properly exercised his discretion in granting the amendments. I will now turn to Issue No. 2.

[57] Did the amendment concerning the assignment of the loan agreement result in the presentation of a claim that fundamentally contradicted the original claim? Brooks J was of the view that the deed of assignment contained wording which required judicial

interpretation in order to ascertain the true effect of the document. This is how he put it:

> "Premise "D" of the document speaks to the "Lenders" (two members of the consortium) agreeing to sell to NIBJ "all the Lender's rights, title and interest", and presumably, for NIBJ "to assume all the Lenders (sic) obligations and liabilities under the Debts". At clause 2, however, the document reveals that the Lenders assigned to NIBJ "all its (sic) right, title and interest in the Debts". No mention is there made of the obligations of the Lenders. Mr. Robinson sought to refer to affidavit evidence concerning the assignment and to the effect of notice thereof being given to the Claimants and their consent thereto. In my view these are properly matters for resolution by a trial judge.
>
> ...
>
> The fact that the original pleading remained in place for two years is not sufficient to prevent amendment. Amendments may come at a late stage. Here the application is being made at the first Case Management Conference. I do not consider that there will be injustice to the Defendants in allowing the amendment."

[58] In **Cropper v Smith** (1884) 26 Ch D 700 it was held that amendments to pleadings generally, may be made by a court at any stage of the trial for the purpose of bringing forward and determining the real question and issues in controversy between the parties.

[59] There is also the well-known case of **Moo Young**. The headnote reads:

> "Amendments are always a matter for the discretion of the trial judge and that discretion will be exercised by reference to the interests of justice and the good faith of the applicant. Although an application to amend may be made at any time, the timing of such application in relation to the stage which the proceedings have then reached may be taken into

account in determining the interests of justice. A proposed amendment which is contrary to a specific allegation of fact previously made by the applicant (for example, in the defence or in answer to a request for particulars) should not be allowed in the middle of a trial as it would not be an application made in good faith; similarly, the applicant should not be allowed to raise an entirely new case by way of an amendment."

Harrison JA stated in the **Moo Young** case:

"The court will view the exercise of this discretionary power quite liberally, as long as it will not do any injustice to the opponent of the party seeking the amendment and, particularly, if the opponent may be adequately compensated in costs consequent on such amendment.

An amendment granted before a trial commences, is usually viewed more liberally as permissible, than one at the end of the trial. In the latter case it should not be made, if the result would be: '. . . to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence' (per Lord Griffiths in ***Ketteman v Hansel Properties Ltd*** [1988] 1 All ER 38 at 62).

In ***Easton v Ford Motor Car Co Ltd*** [1993] 4 All ER 257, an amendment to the defence, prior to the commencement of the trial, was held on appeal to have been correctly allowed. The defendant company had pleaded that the suggestion submitted by the plaintiff (an employee), who had sued for money to be awarded for a suggestion beneficial to the company, was not a novel one. The company was held to be entitled to amend to add to the defence that the plaintiff had signed a prior agreement that the decision of the 'suggestion plan committee' which selected the awardees would be final, and he was bound thereby. Dillon LJ said in the course of his judgment (at p 264):

'Quite obviously, there is more to be said for refusing an amendment when the action is in the course of trial or very nearly ready for trial."

[60] In this particular case Mr Vassell QC argued that "The assertion in the Respondents' original pleading that NIBJ and JRF were liable through assignment to them of the Lender's liabilities was therefore also mistaken as a matter of law." The amendments were sought at the first CMC and I will turn now to the relevant applications and amendments that were sought.

[61] The documentation in the record of appeal reveals the following. The original claim form filed on 16 August 2006, pleaded inter alia:

> "The Claimants' claim is against the Defendants jointly and severally for the following relief:
>
> 1. Damages for breach of contract in the amount of US$8,928,500.00 (or such other sum as this Honourable Court may find), being the loss suffered by the Claimants, as a result of the Defendants (sic) aforesaid breach of contract in unlawfully withholding the insurance proceeds paid over to the 1st Defendant in respect of the damage sustained to the 4th Claimant's kiln on the 8th of June 2002 and/or representing the loss of or diminution in the value of the First three Claimants' investments and shareholding in the Fourth Defendant.
> 2. ..."

[62] On 15 September 2006, an amended claim form was filed. The words "and/or in breach of trust" were inserted after the word "contract" in line 1 of paragraph 1 (supra)

and the word "claimant" was substituted for the word "defendant" in the last line of paragraph 1.

[63] The particulars of claim filed 16 August 2006, alleged inter alia:

> "5. The 2nd Defendant ('NIBJ') is the Assignee of the 1st Defendant's rights, title, interest and obligations in and under a Consortium Loan Agreement dated the 20th of October, 1995, and other loan documents.
>
> 6. Under a Consortium Loan Agreement dated October 20, 1995, WCC received loans totaling US$1,941,000 and J$14,000,000 from a consortium of banks, which consortium included TDB, Island Victoria Bank Limited ('IVB'), Mutual Security Bank Limited ('MSB') and Capital and Credit Merchant Bank ('CCMB')....
> ...
>
> 8. By Deed of Agreement dated May 3, 2003 TDB and CCMB assigned to NIBJ all their rights, title and interest in and obligations under the aforementioned debts...
>
> 9. IVB and MSB assigned their respective loans and all rights and obligations thereto under the Consortium Loan Agreement to Dennis Joslin Jamaica, Inc. The 3rd Defendant, Jamaica Redevelopment Foundation, Inc ('JRF') are successors and/or Assignees of the interests, rights, titles and obligations of Dennis Joslin Jamaica, Inc. in the aforementioned loans issued by IVB and MSB."

The respondents then claimed the following relief:

> "1. Damages for breach of contract and/or breach of trust in the amount of US$8,928,500.00 (or such other sum as this Honourable Court may find), being the loss suffered by the Claimants, (sic) as a result of the Defendants unlawfully withholding the insurance proceeds paid over to the 1st Defendant in respect of the damage sustained to the 4th Claimant's kiln on the

8th of June 2002 and/or representing the loss of or diminution in the value of the First three Claimants' investments and shareholding in the Fourth Claimant.

2. Interest on the said sum of US$8,928,500.00...

3. Costs

4. ..."

[64] Paragraph 6A was added by the proposed amendment to the particulars of claim and it reads as follows:

> "6A - By instruments of Guarantee each dated the 20th of October, 1995, the 1st , 2nd and 3rd Claimants each agreed to personally guarantee payment to TDB of WCC's indebtedness in respect of the Consortium Loan Agreement and the aforementioned loans from the consortium of banks."

[65] Paragraphs 8 and 9 were amended to read inter alia:

> "8. By Deed of Assignment dated May 3, 2003, TDB and CCMB assigned to NIBJ all their rights, title and interest in the aforementioned debts ...
>
> 9. The loans made by IVB and MSB and all rights, title and interest therein and under the Consortium Loan Agreement were ultimately assigned to the 3rd Defendant, Jamaica Redevelopment Foundation, Inc. ('JRF')."

[66] Paragraph 38 was also added and it reads as follows:

> "38 The 1st, 2nd and 3rd Claimants also aver that TDB and NIBJ (acting in their personal capacity and on behalf of the consortium of lenders and their assigns including JRF), in wrongfully and with improper motive withholding the insurance proceeds which should have been paid to WCC, thereby paralyzing its

operations and causing its collapse, impaired WCC's ability to repay its indebtedness to TDB and the consortium of lenders and their assigns, including NIBJ and JRF. Accordingly, the first three Claimants contend that the actions of TDB and NIBJ in withholding the insurance proceeds as alleged above and repeated in this paragraph, were injurious to these Claimants as guarantors of WCC's debt, and on this basis these Claimants are discharged from their obligations under the Instruments of Guarantee and they are entitled to a declaration in this respect."

[67] By notice of application filed 17 June 2008, the respondents sought to amend the statement of case to delete all averments contained therein that the obligations of PCFS and TDB were assigned to JRF or any other person. The grounds on which the respondents sought the orders were stated as follows:

"1. The amendment has become necessary upon a careful review of the relevant deed of assignment by the Claimants, as the deed of assignment does not in fact purport to assign any obligations.

2. The amendment is necessary to harmonize the pleadings with the relevant deed of assignment.

3. The Defendants will not suffer any prejudice if the orders which the Claimants are seeking should be granted, as the Defendants were parties to the deed of assignment and are familiar with its terms

4. The Orders sought are a fair and expeditious way of dealing with these proceedings."

[68] Courtney Bailey, an attorney at law, filed an affidavit on behalf of the respondents and deponed inter alia:

"3. That the statement of case... avers that the obligations of the 1st Defendant (or of Trafalgar Development Bank Limited) were assigned by Trafalgar Development Bank Limited to the 3rd defendant under a deed of assignment dated May 3, 2003.

4. Upon a careful review of the deed of assignment....it is apparent that these averments are in fact inaccurate, as the said deed of assignment does not in fact purport to assign the obligations of Trafalgar Development Bank Limited to the 3rd Defendant. Further, and in any event, as a matter of law the obligations of Trafalgar Development Bank under its agreements with the 4th Claimant could not be assigned by a deed of assignment executed between itself and the 3rd Defendant without the consent of the 4th Claimant.

5. Accordingly, the Claimants now seek to amend the statements of case filed herein on their behalf to harmonize these statements of case with the aforementioned deed of assignment and to reflect the correct position.

6. The Defendants affected by the amendments sought will not be prejudiced by these amendments, as they were parties to the deed of assignment dated May 3, 2003 and are familiar with its terms."

[69] The deed of assignment referred to in the affidavit of Mr Bailey was made on 1 May 2003 between TDB, CCMB and NIBJ. The first and second entities were the 'lenders' and NIBJ was the 'purchaser'. Clause 2 states as follows:

"2. In consideration of the payment of the Purchase Price by the Purchaser to the Lenders on the Commencement Date which payment the Purchaser undertakes to make and the undertakings of the Purchaser set out in this Assignment the Lenders as beneficial owners of the Debts and the Guarantees

> HEREBY ASSIGNS to the Purchaser absolutely all its (sic) right, title and interest in the Debts under the Loan Documents and all interest and all other monies..." (emphasis supplied)

[70] An affidavit dated 19 June 2008, was filed by Donovan Perkins, President of PCFS, in response to the affidavit filed by Courtney Bailey. It reads inter alia, as follows:

> "4. That Mr. Courtney Bailey did not participate in the negotiations, preparation or signing of the documentation required to effect the assignment pleaded at paragraph 5 of the Claimants' Particulars of Claim herein nor did Mr. Bailey certify the facts in those Particulars which were in fact certified by the 1st, 2nd and 3rd Claimants and the 3rd Claimant on behalf of the 4th Claimant.
>
> ...
>
> 7. That none of the Claimants have ever challenged anything in the Notices of Assignment and in fact have pleaded and relied upon the assignment in paragraph 5 of their Particulars of Claim from October 27th 2006 until the present time. I have seen a copy of the Defence, Counterclaim and Claim To Set Off of the 2nd Defendant which seeks to distinguish the pleading in paragraph 5 of the Particulars of Claim from the specific wording of Clause 2 of the Deed of Assignment but in their Defence to the 2nd Defendant's Counterclaim the Claimants 'maintain that the 2nd Defendant is also the assignee of the 1st Defendant's obligations under the Consortium Loan Agreement dated the 20th October 1995'.
>
> 8. That none of the Claimants have given evidence in support of this Application for Amendment to explain to the Court as to whether they are now of the view; if so why are they only now of that view; and if so what has happened to change their minds. So far all I have seen is a strictly legalistic construction of Clause 2 of the Deed of Assignment in a vacuum as if that

was the only matter agreed between and among the parties."

[71] On 22 July 2008, a further application was made by the respondents to amend their statement of case. They sought permission to amend the amended claim form, particulars of claim, reply to the defence of the 1st defendant and defence to the counterclaim and claim to set off of the 2nd defendant. The grounds upon which they relied are set out hereunder:

"1. The amendment has become necessary upon careful review of the relevant deed of assignment by the Claimants, as the deed of assignment does not in fact purport to assign any obligations.

2. The amendment is necessary to harmonize the pleadings with the relevant deed of assignment.

3. The Defendants will not suffer any prejudice if the orders which the Claimants are seeking should be granted, as the Defendants were parties to the deed of assignment and are familiar with its terms.

4. The Order sought is a fair and expeditious way of dealing with these proceedings.

5. The amendment sought is necessary to allow for the adjudication of the related claim by the 1st to 3rd Claimants.

6. The amendment sought is a fair and expeditious way of dealing with these proceedings, particularly in light of the 2nd Defendant's Counterclaim against the 1st to 3rd Claimants.

7. The Defendants will not suffer any prejudice as a result of the amendment sought."

[72] An additional relief was sought at paragraph 2A of the proposed amended claim form and it reads:

> "2A. A declaration that the 1st, 2nd, and 3rd Claimants are discharged from all of their obligations under the respective Instruments of Guarantee dated October 20, 1995, executed by them in favour of the 1st Defendant and guaranteeing payment to the 1st Defendant of the indebtedness of the 4th Claimant under the Consortium Loan Agreement dated October 20, 1995."

[73] The learned judge concluded that there were three aspects of the application to amend and he stated:

> "1. The first aspect of the application to amend is to allow the Claimants to refer to instruments of guarantee, whereby the 1st, 2nd and 3rd Claimants each agreed to personally guarantee payment to TDB of [Western Cement's] indebtedness in respect of the Consortium Loan Agreement...'. Based on the alleged actions of TDB (on behalf of the Consortium) and NIBJ the first three Claimants claim a declaration that they are discharged from their obligations under the respective instruments of Guarantee.
>
> 2. The second aspect of the proposed amendment is to remove the allegation that NIBJ had been assigned the obligations of TDB and PCFS set out in the Consortium Loan Agreement. The resulting averment is that it was the rights alone which were assigned. Mr. Vassell spoke to 'a misreading' of the Deed of Assignment as leading to the original pleading.
>
> 3. The third aspect of the proposed amendment is to claim in the alternative that JRF had

> received, as part of the assignment, from two of the members of the consortium, a 'crystallized liability for the breach of contract', committed by TDB on behalf of the consortium."

[74] In his written judgment, Brooks J, was of the view that if the application to amend the particulars of claim was successful, the claim would have been saved from the fate requested by the appellants in their respective applications to strike it out. He held that the criterion for allowing an amendment in the face of an application to strike out is that there must be a real prospect of establishing the amended case. He referred to and relied on rule 20.4 of the CPR which states:

> "20.4 (1) An application for permission to amend a statement of case may be made at the case management conference.
>
> (2) ...
>
> (3) ..."

[75] The judge also relied on dicta at paragraph 16 of **Diamantis Diamantides v JP Morgan Chase Bank and Others** (supra) The learned judge found that a crucial issue in the case concerned the assignment of the loan agreement. He also found that the issue was not clear-cut in that the deed of assignment contained wording which required judicial interpretation to ascertain the true effect of the document. He concluded that although there were defects in the original pleadings which could have led to a successful application to strike out the claim, the respondents had made out a proper case to allow for an amendment of their particulars of claim. The amendments,

he said, would enable the real matters in controversy to be determined. He further held that there were substantive issues to be tried and that the application to amend was made at a relatively early stage of the claim. In those circumstances he was of the view that the amendments would not work injustice to the appellants.

[76] I see no reason to differ from the approach adopted by Brooks J. I agree with him that the **Moo Young** case is completely dissimilar to the instant case. He concluded that there was "no backtracking on allegations of fact" and that what the respondents sought to do was to advance an interpretation of a document which interpretation was contrary to that previously advanced by them. In my judgment, once there is uncertainty or the possibility of more than one interpretation arising on the face of the deed of assignment, which calls for a judicial interpretation, then it is best left to the trial judge to determine the meaning and true effect of the clause. Mr Vassell QC had submitted:

> "Countless cases illustrate the application of the principle that an application to correct a mistake, made sufficiently early and without bad faith will be granted by the Court unless uncompensatable prejudice to the other side can be demonstrated. See for example Charlesworth v Relay (1999) 4 All ER 397; Clarapede v Commercial Union (1883) 32 WR 262, 263; Gale v Superdrug Stores Ltd. [1996] 3 All ER 468; Sime: A Practical Approach to Civil Procedure 10th Edn. Para 15.08 -15.18."

[77] It is therefore my view that it was proper in the circumstances, for the amendments to be granted to correct errors once they were made in good faith.

[78] I now turn to the costs issue. On 24 October 2008, Brooks J made the following order:

> "The defendants shall be entitled to have their respective costs in respect of the Order made on the 15th of October 15, 2008 taxed immediately."

[79] Brooks J gave the following reasons for coming to his decision:

> "a. Special circumstances existed for the Court to exercise the discretion granted by CPR 65.15.
>
> b. The 4th Claimant had proceeded without the authority of its Receiver, who would be ostensibly responsible for the payment of any costs awarded against it.
>
> c. A test of the 1st Claimant's promise to indemnify the 4th Claimant against any costs ordered against it in the claim is required at this point.
>
> d. The amendment which has been allowed by the ruling creates a situation where a lot of ground already crossed will need to be re-crossed.
>
> e. The Defendants should not have to wait until the end of the trial to be paid for that exercise. The Claimants will have the amendment they seek."

[80] What has to be decided here is whether the order made by Brooks J was a proper one. Was it unfair and unjust in all the circumstances since an order that costs should be taxed immediately is within the scope of rule 65.15 of the CPR. It provides as follows:

> "65.15 The general rule is that the costs of any proceedings or any part of the proceedings are

> not to be taxed until the conclusion of the proceedings but the court may order them to be taxed immediately."

[81] The matter before this court is based on costs arrived at during the hearing of applications to amend and to strike out the claim at a CMC. A trial date has not yet been fixed, so if I am to understand Mr Bailey's submissions, special circumstances would need to be made out in order to justify a departure from the general rule that costs on such an occasion should await the conclusion of the proceedings. The word "proceedings" is not defined in the CPR but some guidance may be derived from rule 47.1 of the English Civil Procedure Rules 1998 which is similarly worded to our rule 65.15. Section 28.1(1) of the English, Costs Practice Direction reads:

> "For the purposes of rule 47.1, proceedings are concluded when the court has finally determined the matters in issue in the claim."

[82] Mr Bailey argued that no special circumstances had existed in this case which would justify the making of this order. The words "special circumstances" are definitely not mentioned in rule 65.15 but when one considers the overriding objective which guides the court, I do agree with Mr Bailey that a court faced with this situation ought to consider if special circumstances had existed. Brooks J himself found that there were special circumstances existing when he exercised his discretion to grant an order for the immediate payment of costs. I do believe that his reasons set out at paragraph 79 (supra) cannot be faulted. Having regard to the circumstances surrounding the various applications, and the need to grant amendments to overcome the applications to strike

out the respondents' statement of case, this was a proper case for the exercise of the learned judge's discretion requiring immediate taxation of the costs. I agree with Mr Robinson that "misconduct" is not a sine qua non for the order of immediate taxation to be made. I should also add that the learned judge was correct in making an order for costs limited to the costs of the application. Had the judge made an additional order for the respondents to pay the costs of the entire action to date, such an order could be considered highly punitive and contrary to the overriding objective.

[83] Finally, I turn to the limitation period issue which was raised by the appellants NIBJ and JRF. Very early in his judgment, Brooks J said that the first question he had to decide was whether the proposed amended claim had a real prospect of success. He said:

> "... If it does, the court should also decide· whether the Claimants should be allowed to proceed with ·the amended claim or be denied that opportunity and left to file a new claim if so advised. Some subsidiary questions arise for adjudication to assist in determining the main questions. They may be tabulated as follows:
>
> 1 ...
>
> 2 ...
>
> 3. whether the amendment, if granted, would deprive any of the Defendants of the benefit of a defence based on the statute of limitations."

Later in the judgment he stated:

> "The possibility that a Limitation of Actions defence may be raised, if the Claimants were ordered to start their claim anew, if so advised, cannot be ignored. I make no

> pronouncement as to that aspect and therefore I will not consider that rule 20.6 of the Civil Procedure Rules 2002 (CPR), concerning amendments after the end of a relevant limitation period, is applicable."

[84] Apart from these two instances, there is no further statement made by the learned judge that this was an issue on which submissions were made by counsel. Mr Vassell QC clearly stated in his written submissions that a limitation defence was never raised before Brooks J and that it was now being raised for the first time in this court. I am of the view that the arguments raised in connection with such a defence ought not to be entertained by this court. In the circumstances, nothing further will be said on the issue.

Conclusion

[85] In my judgment, Brooks J had properly exercised his discretion in relation to the applications for amendment and order for costs. He correctly bore in mind that the hearing before him had taken place at a CMC and was not the trial of the claim. He had also properly considered whether the claim in its amended state was frivolous or vexatious or was an abuse of the process of the court. He clearly did not find that the applications to amend fell in those categories. I am further of the view that the respondents should be given the opportunity to put forward their case and be allowed to argue the substantive issues on which their claim is based. In the circumstances, I would dismiss appeals 112, 115 and 116 with costs to the respondents to be taxed if not agreed. With respect to appeal 117, I would also dismiss it and order that there be costs to the respondents in that appeal to be taxed if not agreed.

DUKHARAN, JA

[86] I agree with the reasoning and conclusion of my brother Harrison, JA that the appeals should be dismissed with costs to the respondents. However I wish to add a few comments.

[87] I agree with my brother Harrison, JA that four major issues arise for consideration in the appeals as set out in paragraph [50] of the judgment. On the first issue it seems clear to me that if the amendments were not sought by the respondents and granted they would have had some difficulty in going forward. I agree with Brooks, J that, based on the affidavit of Robert Cartade in which he stated that he was "prepared to indemnify [**Western Cement**] against the costs of this action", there was an indication that an actual indemnity could be secured.

[88] On the second issue as to whether the amendments were properly granted, I agree with Mr Vassell, QC that the amendment would define the real issues between the parties. As was determined in **Cropper v Smith** (supra) amendments in pleading may be made at any stage of a trial which will determine the issues between the parties. In my view, Brooks J was justified in granting the amendment concerning the assignment of the loan agreement. I also agree with the view of the learned judge that the deed of assignment needed judicial interpretation and were matters for resolution by a trial judge.

[89] On the issue of costs to be taxed immediately, my brother Harrison, JA has dealt with this in a very comprehensive way and I have nothing further to add.

SMITH JA

ORDER

SCCA Nos 112, 115 and 116/2008

Appeals dismissed. Costs to Robert Cartade, Jack Koonce, Shirley Shakespeare and Western Cement Company Ltd to be taxed if not agreed.

SCCA No 117/2008

Appeal dismissed. Costs to Pan Caribbean Financial Services Ltd, Jamaica Redevelopment Foundation Inc and National Investment Bank of Jamaica to be taxed if not agreed.