[2024] JMCA Civ 17

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MRS JUSTICE G FRASER JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2021CV00050

BETWEEN	**KAREN THAMES**	**APPELLANT**
AND	**NATIONAL IRRIGATION COMMISSION LIMITED**	**RESPONDENT**

Written submissions filed by Oswest Senior-Smith & Company for the appellant

Written submissions filed by Wentworth S Charles & Company for the respondent

Civil Procedure - Application to amend statement of case - Whether judge hearing application erred in refusing to allow amendment - Civil Procedure Rules Part 20, rule 20.4

22 March 2024

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

BROOKS P

[1] I have had the privilege of reading, in draft, the judgment of my learned sister, P Williams JA and I agree with her reasoning and conclusion.

P WILLIAMS JA

[2] Karen Thames ('the appellant') has brought this procedural appeal against the decision of Master Mason ('the learned master'), made on 14 May 2018, in which she

refused the appellant's application to amend her a claim. The appellant had commenced the claim against the National Irrigation Commission Limited ('the respondent') in relation to its decision to terminate her employment in December 2008. In the application, the appellant also sought permission to file a supplemental witness statement or that the supplement witness statement that she had already filed stand as being filed in time. The appellant contends that the learned master misdirected herself in fact and in law in her approach to the consideration of the application.

Background

[3] The appellant was first employed by the respondent as a personnel assistant in 1988. By January 2008, she was appointed to act as director of corporate and legal services/company secretary. While she was on vacation leave in August 2008, the chief executive officer of the respondent wrote to the appellant advising her of possible disciplinary breaches on her part regarding the preparation of contracts for the National Irrigation Development Programme. He also advised the appellant that she was placed on interdiction as per the disciplinary code with effect from 19 August 2008. The appellant responded to a request for a written report on the matter by way of a report, dated 18 August 2008, denying knowledge of any contractual breaches. In a letter, dated 2 December 2008, the chairman of the respondent's board informed the appellant that a determination was made in the matter based on her written response. She was informed that the respondent was ultimately of the view that she was neglectful in respect of the duties for which she was engaged. As such her contract of employment was terminated effective 5 December 2008.

[4] The appellant through an attorney-at-law requested a disciplinary hearing and sought the intervention of the Ministry of Agriculture, Fisheries and Mining and by letter, dated 1 June 2009, the ministry promised to investigate the matter. With no resolution in sight, the appellant applied for and was granted an extension of time within which to apply for leave to apply for judicial review. The appellant filed an amended fixed date claim form, dated 25 February 2011, seeking *inter alia* the following:

> "(i) A declaration that the appellant's termination of employment and the removal of the appellant from the post of director of corporate and legal services/company secretary were void.
>
> (ii) An order of certiorari to quash the respondent's decision to terminate the appellant's employment.
>
> (iii) That damages be awarded in a sum equivalent to what the appellant would have earned for the period from the date of her termination to March 2011…"

[5] Evan Brown J (as he then was) heard the claim and delivered his decision on 11 November 2011 refusing to grant the relief sought. The appellant appealed that refusal and this court in **Karen Thames v National Irrigation Commission** [2015] JMCA Civ 43, allowed the appeal in part. Phillips JA, writing on behalf of the court, set out the conclusion arrived at as follows:

> "[73] In light of the above it is clear that the respondent is a body that is amenable to judicial review but its decision to dismiss the appellant from its employment is not so susceptible. Since the relationship between the respondent and the appellant was one of master and servant, the only remedies to which the appellant would be entitled were those in civil law. There may have been breaches of the appellant's employment contract (due to improper application of the disciplinary procedures and a breach of the implied duty of trust and confidence) which may have entitled her to additional damages. She certainly was entitled to a direction under rule 56.10(3) of the CPR. As a consequence, I would allow the appeal in part. I would affirm Evan Brown's judgment to the extent that he refused the orders of certiorari and the declaration sought. I would, pursuant to rule 56.10(3) of the CPR direct that the whole application be dealt with as a claim and I would also direct, pursuant to part [sic] 26 and 27 of the CPR that a case management conference should be scheduled at the earliest possible time…"

[6] The appellant returned to the Supreme Court to pursue the claim as ordered by this court. A case management conference was held in the court below on 30 May 2016. The first order made was for the amended fixed date claim form previously filed to be treated as if commenced by way of a claim form. Among the orders made thereafter was that the appellant was permitted to file her particulars of claim on or before 30 June 2016

and the respondent was to file its defence within 42 days of the service of the claim form. Further, the parties were ordered to file and serve witness statements on or before 28 February 2017.

[7] In the particulars of claim filed on 30 June 2016, the appellant asserted that the decision to terminate her employment took her by surprise and caused her "great ignominy and depression" and that she had "been mentally affected by the trauma she went through". She further asserted that the decision had so seriously affected her physical health that she suffered extensive weight loss, insomnia, frequent headaches, and aggravation of hypertension. She indicated that she intended to rely on the psychological report prepared by Dr Terrence Bernard ('Dr Bernard'). She claimed the following *inter alia*:

> "1. Damages for breach of contract of employment and/or wrongful dismissal to include damages equivalent to her net salary for the period which it would have taken for the required procedures to have been observed and damages for psychological injury;"

[8] In its defence, the respondent denied the assertions and put the appellant to specific proof of the allegations. It denied that the respondent was entitled to any relief claimed or had suffered injury, loss, and damages as alleged or at all.

[9] A witness summary was filed on behalf of the appellant and a witness statement was filed from Milton Henry, the director of engineering and technical services of the respondent, on 28 February 2017. On 8 May 2017, the appellant filed her witness statement, in which she restated the assertions about the effect the decision to terminate her employment had had on her as stated in her particulars of claim. She stated that she had seen Dr Bernard on 21 August 2015 and was recommended for further treatment and care since she was diagnosed with post-traumatic stress disorder and major depressive disorder. She indicated an intention to rely on the psychiatric report prepared by Dr Bernard for which she had paid $70,000.00.

[10] On 8 May 2017, she also filed an amended particulars of claim in which she indicated an intention to rely on the psychiatric rather than psychological report of Dr Bernard. She further sought to amend the particulars of claim by detailing the particulars of special damages as being cost of the medical report and psychiatric evaluation and for future medical care. She also sought to include major depressive disorder as a particular of her injuries. On 13 June 2017, the appellant filed a notice of application for court orders for permission to amend the claim. The primary order she sought was for permission to amend the claim form and particulars of claim filed on 30 June 2016 and/or that the amended particulars of claim filed on 8 May 2017 stand as filed.

[11] On 8 May 2018, the appellant filed an amended notice of application where she additionally sought permission to file a supplemental witness statement. This supplemental witness statement was filed and served on the respondent on 10 May 2018. In her affidavit in support of her application, the appellant stated that the supplemental witness statement was necessary to address documents she had previously disclosed and which had formed part of her notice of intention to tender hearsay evidence. She asserted that the information had been left out of her earlier witness statement by inadvertence but had previously been included in her affidavits filed in her claim for judicial review. The amended notice was heard by the learned master on 14 May 2018 and was refused. On 27 May 2021, the appellant sought and was granted leave to appeal this decision by Lindo J.

[12] There is no written decision from the learned master as to her reason for refusing the appellant's application. However, in the notice and grounds of appeal, the appellant detailed findings of fact and law that are being challenged. The skeleton submissions filed on behalf of the respondent, set out what was described as the grounds on which the application was refused. These were largely consistent with the findings identified by the appellant. Thus it seems that the application was refused for the following reasons:

(i) The application was only before the court on 8 May 2018.

(ii) The delay was inexcusable.

(iii) The respondent would be severely prejudiced by the granting of the application.

(iv) The amendment sought would raise a new cause of action.

(v) The applicant did not have a reasonable chance of success in claiming damages for psychological harm.

The appeal and the issues that arise therefrom

[13] On 2 June 2021, the appellant filed six grounds of appeal challenging the decision of the learned master:

> "1. The Learned Master erred and/or misdirected herself in fact and in law when she found that the delay was inexcusable.
>
> 2. The Learned Master erred and/or misdirected [sic] in fact and in law when she found that the Respondent would be severely prejudiced by the granting of the application as there was no evidence before the Court demonstrating same.
>
> 3. The Learned Master erred and/or misdirected [sic] in fact and in law when she found that the amendment sought to the claim would raise a new cause of action.
>
> 4. The learned Master erred and/or misdirected herself in fact and in law when she failed to take into consideration that the Amendment to the Pleadings was already done and served in May, 2017 and as such the application being sought was to regularize said amendment.
>
> 5. The Learned Master erred and/or misdirected herself in fact and in law when she failed to take into consideration that the additional pending evidence in the Supplemental Witness Statement of Karen Thames was evidenced in Affidavits before the Court and as such permitting the information to proceed would not have prejudiced the Respondent.
>
> 6. The learned Master erred and/or misdirected herself in fact and in law when she found that the Appellant did not have a

> reasonable chance of success in claiming damages for psychological/psychiatric harm."

[14] The orders sought:

> "1. Permission to amend Claim Form and Particulars of Claim filed on June 30, 2016 and/or that the Amended Particulars of Claim filed on 8th day of May, 2017 stand as being filed [sic].
>
> 2. Permission to file Supplemental Witness Statement of Karen Thames or that the Supplemental Witness Statement of Karen Thames filed on 10th day of May, 2018 stand as being filed in time."

[15] In the submissions on behalf of the appellant, grounds 2,4 and 5 were grouped and dealt with together whilst the other three grounds were dealt with separately. In the submissions for the respondent, three issues were identified:

> "a. Whether permission should be granted in light of the obvious prejudicial effect this will have on the respondent's case as a result of the delay. (DELAY)
>
> b. Whether the Appellant has a real prospect of success in proving psychological harm consequent on the dismissal of the Appellant –some 13 years after the fact. (PROSPECT OF SUCCESS)
>
> c. Whether a new cause of action has been introduced by the Appellant in seeking to amend the Statement of Case to include damages for psychological harm. (NEW CAUSE OF ACTION)" (Capitalised as in original)

[16] This appeal seeks to challenge the exercise of the learned master's discretion, and the approach of this court to such a challenge is now well settled. The guidance given by Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042, has formed the basis for this approach, as discussed and distilled in several decisions from this court. In **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, Morrison JA (as he then was) succinctly explained it this way at para. [20]:

> "This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of

> the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be so demonstrably wrong, or where the judge's decision is 'so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

[17] Ultimately, for this court to disturb the learned master's decision, it must be shown that the learned master's exercise of her discretion was based on a misunderstanding of the law or the evidence that was before her, or that her decision was palpably wrong. It seems to me that the grounds of appeal need not be disaggregated in seeking to resolve the single issue to be determined namely, whether the decision reached by the learned master demonstrates a proper exercise of her discretion.

The submissions

For the appellant

[18] In the written submissions filed on behalf of the appellant, it was noted that the relevant rule which governs an application of this nature is rule 20.4 of the Civil Procedure Rules 2002, ('the CPR'). It was submitted that the learned master should have considered whether the amendments were necessary to permit the case to be framed in a way that would lead to a decision on the real matters in controversy. The next matter for consideration was whether the amendments would facilitate the real dispute between the parties being adjudicated upon. It was further submitted that the learned master should also have considered if the facts upon which the amendments are based were already in evidence or sufficiently disclosed and the other party had not been caught by surprise. **Alfred Llewellyn Smith Jnr and Donald Anthony Smith v Louise Small** [2018] JMSC Civ 150 and **Gloria Moo Young and Erle Moo Young and Geoffrey Chong**, **Dorothy Chong and Family Foods Limited (in Liquidation)** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 117/1999, judgment delivered 23 March 2000 were relied on.

[19] It was contended that the application for amendment was made after the first case management conference as the report was not available to be appended to the particulars

of claim when filed on 30 June 2016 in compliance with the orders which had been made. It was noted that by way of the particulars of claim first filed on 30 June 2016, the appellant set out a claim for injuries arising from how she was treated by her employer as regards their dismissal of her including post-traumatic stress disorder and depression. These injuries were particularised. The appellant also put the respondent on notice that she intended to amend the particulars of injuries, and special damages as the need arose. It was pointed out that the appellant in fact disclosed the report of Dr Bernard in a supplemental list of documents on 8 May 2017. On 12 May 2017, the respondent was served with the amended particulars of claim, and appended thereto was the report of Dr Bernard.

[20] It was further pointed out that the appellant had set out her claim for the injuries she had sustained in her statement of facts and issues and pre-trial memorandum to which the respondent had responded in its statement of facts and issues and pre-trial memorandum. It was noted that the notice of application for amendment was first filed on 13 June 2017 and the particulars of claim was amended and filed on 8 May 2018. It was submitted that the respondent had not shown how there had been any delay after the receipt of the medical report or that the delay had been inexcusable. In any event, the respondent had not been taken by surprise. **The Attorney General of Jamaica v Abigaile Brown (By next Friend Affia Scott)** [2021] JMCA Civ 50 was referred to where this court had upheld the decision permitting a late amendment to a statement of case made orally.

[21] It was submitted that there was no evidence from the respondent to show why it would be prejudiced or embarrassed by the amendments. It was further submitted that it was trite law that there was no error or mistake, which if not fraudulent, a court ought not to correct, if it can do so without injustice to the other side. It was contended that the court's power should be exercised to allow amendments as soon as it appears that the party has framed his or her case would not lead to a decision on the real matter in controversy. The appellant would not be able to prove an essential part of her case without the report from Dr Bernard and the court would not have been in a position to

determine one of the real matters in controversy. Reference was made to **Sandals Resorts International Limited v Neville L Daley and Company** [2016] JMCA Civ 35 and **National Housing Development Corporation v Danwill Construction Limited, Warren Sibbles and Donovan Hill** (unreported), Supreme Court, Jamaica, Claim Nos 2004HCV000361 and 2004HCV000362, judgment delivered 4 May 2007.

[22] In relation to the matter of whether the amendments sought would raise a new cause of action, rule 20.6 of the CPR was highlighted. It was submitted that the rule did not expressly prevent the court from granting an amendment to introduce a new cause of action outside of the limitation period. The case of **Annissia Marshall v North East Regional Health Authority Saint Ann's Bay Hospital and The Attorney General** [2015] JMCA Civ 56 was relied on as being didactic and on point in respect of an amendment to add a cause of action.

[23] It was noted that in this matter the appellant had set out that she was injured because of the manner in which she was dismissed by the respondent. The appellant contended that the respondent's breaches of the internal disciplinary and grievance procedures were a breach of the implied term of trust and confidence that resulted in her sustaining the injuries she particularized. It was submitted that the respondent was always aware of the claim of the appellant and would not be prejudiced. Reference was made to **Blackburn v Aldi Stores Ltd** [2013] IRLR 846 and **Lafette Edgehill, Dwight Reid and Donnette Spence v Greg Christie** [2012] JMCA Civ 16.

[24] It was opined that the amendment to append the report and to include the costs for future care was foreshadowed in the claim. There was no new set of circumstances being put forward to ground the appellant's claim for damages. It was contended that the respondent could not genuinely state that it would be taken by surprise by the proposed amendment. Reliance was placed on **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.

[25] Finally, it was submitted that the learned master was not in a position to make a finding as to whether the appellant had a reasonable chance of success in claiming damages for psychological or psychiatric harm. This was due to the fact that there was no evidence before her and neither was any case law provided in support of this conclusion.

For the respondent

[26] The submissions relating to the applicable law commenced with noting the applicable rule, that is rule 20.4, and reference to the decision of Brooks J (as he then was) in **National Housing Development Corporation v Danwill Construction Limited, Warren Sibbles and Donovan Hill** where the rule was discussed.

[27] The authority of **Savings and Investment Bank Ltd v Fincken** [2001] EWCA Civ 1639 was referred to as highlighting the principle governing amendment of a statement of case to introduce a new cause of action.

[28] In reviewing the background to the matter, it was noted that the amended fixed date claim form that was originally before the court below in 2011 did not include damages for psychological harm. Further, it was contended that even at the point when the matter was remitted to the court below there was no claim for psychological harm.

[29] Without more, it was submitted that the respondent would be prejudiced due to the late amendment. It was also submitted that in addition to the appellant's initial failure to support the application with affidavit evidence, the appellant had failed to satisfy the limb of promptitude. It was pointed out that the appellant had received the psychiatric report from Dr Bernard in April 2017 after the case management conference had already been completed and some seven weeks before the pre-trial review. It was noted that an oral application to amend the statement of case was made at the pre-trial review which was held on 12 June 2017, but was refused. The appellant then filed her application on 13 June 2017 but did not serve it until 27 April 2018. Up to that time, no affidavit in support of the application was served. Thus, it was submitted that the application was

not properly before the court until 8 May 2018, which was the date on which the affidavit in support was filed. In concluding this issue, it was submitted that the "untimeliness of this amendment does not further the overriding objective".

[30] In addressing the question of whether the appellant had a real prospect of success in proving that the psychological harm caused was as a result of the breach of contract, it was submitted that case law on this kind of harm shows that the court is reluctant to award damages due to issues of causation and remoteness. Further, it was noted that the termination took place in 2008 and the appellant's first visit to Dr Bernard was on 17 April 2017, some eight years later. It was submitted that the claim for psychological harm was a new cause of action in the law of tort and this did not form part of the reference issue by this court for consideration in the court below.

Analysis and disposal

[31] Rule 20.4 of the CPR provides:

> "20.4 (1) An application for permission to amend a statement of case may be made at the case management conference.
>
> (2) Statements of case may only be amended after a case management conference with the permission of the court."

[32] In **Beep Beep Tyres, Batteries and Lubes Limited v DTR Automotive Corporation** [2022] JMCA App 18, this court acknowledged that "the rules do not clearly outline the precise limits on a party's ability to amend, and neither do the rules set out any factors that may be relevant to a court in the exercise of its discretion to allow or disallow an amendment" (see para. [36]). This court proceeded to comprehensively review and discuss several cases that sought to remedy that deficiency by enunciating the requisite principle applicable in determining whether permission to amend ought to be granted (see para. [37]).

[33] Sinclair-Haynes JA, writing on behalf of the court at para. [42], stated:

"[42] The authorities have established that the paramount consideration for the court is to ensure that, having balanced the scales, justice is dispensed between the parties. In so doing, all the circumstances of the case must be taken into account. Stuart Sime, the author of the text, A Practical Approach to Civil Procedure, 14th Edition, captures adroitly, the legislator's intention. Paragraph 15.01 reads:

'The underlying principle is that all amendments should be made which are necessary to ensure that the real question in controversy between the parties is determined, provided such amendments can be made without causing injustice to any other party.' "

[34] At para. [53] she went on to conclude on the issue as follows:

"[53] Although a judge is imbued with wide discretion to determine whether to grant or refuse a proposed amendment, in the exercise of that discretion a judge must seek to achieve fairness and justice between parties. That end is achieved by taking account of all relevant factors in the particular case and, in so doing, having regard to the court's overriding objective. The factors for the court's guidance in its quest to dispense justice and to further the overriding objective of the court can also be derived from the relevant authorities. Some relevant factors for the judge's consideration are listed below. This list is, however, by no means exhaustive and is merely intended as a guide. [sic]

(i) the importance of the proposed amendment in resolving the real issue(s) in dispute between the parties;

(ii) the nature of the proposed amendment, that is, whether it gives rise to entirely new and distinct issues or whether it is an expansion on issues that were already pleaded or otherwise foreshadowed;

(iii) the stage of the proceedings at the time the application to amend is made. If the application to amend is made at a late stage, for example close to the trial date with the result that there may be an adjournment or if the application is made after trial has commenced, it should be considered with greater scrutiny;

(iv) whether there was delay in making the application to amend, the extent of the delay and the reasons for the delay;

(v) the prejudice to the respective parties to the claim, consequent on the decision to grant or refuse the proposed amendment;

(vi) whether any prejudice to the parties may be appropriately compensated by an order for costs;

(vii) the arguability of the proposed amendment;

(viii) the potential effect of the proposed amendment on the public interest in the efficient administration of justice;

(ix) the reason(s) advanced by the applicant for seeking an amendment; and

(x) the importance of having finality in litigation."

[35] To appreciate the amendment that was being sought it is useful to refer to the fact that the appellant was permitted to pursue a claim in relation to her dismissal by the decision of this court in 2015. The respondent pointed to the fact that there may not have been a claim for psychological damages prior to this time. It is noted that the respondent also submitted that this did not form part of the reference from this court for consideration in the court below should be addressed. For this appeal, we were not supplied with the original fixed date claim which was filed on 25 February 2011 seeking judicial review. However, it is noted that Phillips JA stated:

> "[68] In the present case, although Evan Brown J recognized that the court is empowered by rule 56.10(3) of the CPR to direct that any claim for other relief can be dealt with separately from the claim for an administrative order, he nonetheless refused to exercise his discretion. This was because he felt that there was nothing more to litigate since the appellant, although she had sought damages for financial, emotional and physical loss she suffered, was only entitled to three months [sic] salary in lieu of notice and she had already received the same. I do not agree.

> [69] Evan Brown J may well have thought that by virtue of **Addis v Gramophone Co Ltd** [1909] AC 488 damages ought to be restricted to definable pecuniary losses, that is payment in lieu of notice and nothing more and not for injury to feelings and the harshness of the dismissal. However, **Addis v Gramophone Co Ltd** is a century old case and since then, the law has been in a developing mode…
>
> [70] It will be a matter for the trial judge hearing the claim to say whether expressed or implied terms of the appellant's employment contract were breached and whether she is entitled to additional damages or other civil law remedies…"

[36] It is apparent that the appellant had raised the issue of having suffered emotional and physical loss in her claim for judicial review and this court had recognised her right to claim damages for losses other than financial ones. In her particulars of claim filed on 30 June 2016, the appellant had set out the nature of the injuries she said she had suffered as a result of the manner of her dismissal and had also indicated an intention to rely on the report of Dr Bernard. It is not denied that the report was disclosed to the respondent on 12 May 2017. The nature of the amendment to the particulars of claim being sought in this case was to attach the report, particularise the special damages relative to the report, and particularize the injuries allegedly sustained in keeping with the report. In light of this, it is difficult to see how the learned master could have found that the amendment would have given rise to a new cause of action and that the respondent would have been severely prejudiced. In the submissions, on behalf of the respondent other than a bald assertion that the respondent would have been prejudiced, there was no indication of what that prejudice was.

[37] It seems to me that the amendments sought were of great importance in resolving the real issues between the parties. There was no indication of what material was before the learned master that could have caused her to conclude that the appellant had no real chance of success in claiming damages for psychological harm. To my mind, it is only a judge after a trial of the claim and after full submissions by the parties on the material placed before the court, with the report properly included, who could make a proper assessment of the appellant's claim for those damages.

[38] There was no challenge to the appellant's contention that the report was unavailable at the time the particulars of claim was filed in keeping with the timeline set by the court at the first case management conference. The report is dated 17 April 2017. Although the appellant proceeded to file the amended particulars of claim on 8 May 2017, this was clearly not proper since any amendment after the first case management conference could only have been done with the permission of the court. Thus the application to amend was delayed by another month when it was made on 13 June 2017. From the sequence of events outlined this was after an oral application had been made and refused at a pre-trial review held the day before. The delay in making the initial application to my mind was not that significant and could not of itself be determinative of the application. Such a delay in the circumstances could not be described as inexcusable. It is true that the initial application was adjusted to include permission to file a supplemental witness statement on 8 May 2018. However, the significant time to be borne in mind when considering the issue of delay is the date when the initial application to amend the particulars of claim was filed which was 13 June 2017.

[39] As regards the supplemental witness statement, rule 29.4(6) of the CPR provides that a party may apply for permission to file such a document. This is yet another rule that is silent as to the criteria for the exercise of the court's discretion in such an application. It is settled that in these circumstances, the court is to have regard to the overriding objective in applying the rule. Thus each case must be decided on its facts to achieve fairness and justice in the exercise of the discretion. In the instant case, the appellant demonstrated that the information she wished permission to include in her supplemental witness statement was already disclosed to the respondent. She was seeking to comment on documents already shared with the respondent with an indication that she would be relying on them at trial. Indeed, it could be argued that the appellant may well have been able to apply for and be given permission to amplify her witness statement at the trial to give the evidence relative to those documents. In these circumstances, it seems to me the respondent would not have been taken by surprise by

the contents of the supplemental witness statement and fairness dictated that the appellant be permitted to file it.

[40] At the time the notice of application came on for hearing before the learned master on 10 May 2018 and was adjourned to 14 May 2018, the trial date was already set for 4 and 5 June 2018. The issue of the possible prejudice to the respondent in having to prepare to deal with the contents of the report as well as the information in the supplemental witness statement appropriately would have had to be considered. The application having to be considered so close to the trial date meant that there had to be greater scrutiny. The fact that the respondent would not be taken by surprise by either of the issues of the application meant that there would be no injustice to it and this was a case where compensation by an order of cost would have been appropriate if the trial had to be postponed.

Conclusion

[41] The proposed amendment was to append a report that was already referred to but received late. There was no new cause of action. This amendment to my mind was necessary to assist in determining the real issues in controversy between the parties despite its lateness. The supplemental witness statement was necessary for the same reason. The information it contained was already disclosed to the respondent. Although it was entirely within the learned master's discretion to refuse the application, there is merit in the appellant's complaint that in the circumstances of this case, the learned master erred in doing so. Accordingly, I would allow the appeal and grant the orders sought by the appellant to be permitted to amend her particulars of claim and to be permitted to rely on her supplemental witness statement at the trial, which is now set for 15 and 16 October 2025.

[42] On the issue of costs of the appeal, the appellant has successfully demonstrated that the learned master erred in refusing the application. There is no basis to depart from the usual principle that costs follow the event and, therefore, I propose that the costs of the appeal be awarded to the appellant to be agreed or taxed. Given the fact that the

application to amend had to be made because of the appellant's failure to append a relevant document and to include relevant information in her witness statement I would propose that the respondent be awarded the costs in the court below relative to the application.

G FRASER JA (AG)

[43] I, too, have read in draft the judgment of P Williams JA and agree with her reasoning and conclusion. I have nothing useful to add.

BROOKS P

ORDER

1. The appeal is allowed.
2. The judgment and orders of the learned Master handed down in this case on 14 May 2018 are set aside.
3. Permission is granted to the appellant to amend her claim form and particulars of claim and for the amended particulars of claim filed on 8 May 2017 to stand as properly filed.
4. The appellant is to serve the amended particulars of claim within seven days of the date of these orders.
5. Permission is granted for the appellant to file and serve the supplemental witness statement of Karen Thames within seven days of the date of these orders.
6. Costs of the appeal to the appellant to be agreed or taxed.
7. Costs of the application in the court below to the respondent to be agreed or taxed.