IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. W-016/2002

BETWEEN	EDNA WATSON	PLAINTIFF
AND	TREVOR OFFICER	FIRST DEFENDANT
AND	JOSLYN LAING	SECOND DEFENDANT

Heard on June 24, September 24, 25, November 7 and 29, 2002, and October 8 2003.

Mr. Richard Reitzin instructed by Reitzin and Hernandez for Plaintiff; Mr. Christopher Samuda instructed by Piper and Samuda for the First Defendant; Ms. Yvonne Ridgard for Second Defendant.

ANDERSON J.

In this matter, both the Plaintiff and the second defendant have filed summonses seeking interlocutory relief. During the course of the hearing, which extended over several days over a period of months, and evoked the citation of scores of authorities, the first defendant also applied for and was granted permission to file his defence out of time.

The Plaintiff, Ms. Edna Watson, had previously been the registered proprietor of certain lands in Portland, registered at Volume 1140 Folio 126 in the Register Book of Titles. The said land is now registered in the name of the second defendant, Laing, who claims he purchased it from or through the first defendant, he, the first defendant having at the relevant time of that agreement, been the beneficial, if not the legal, owner thereof. I state these, not as findings of fact, as the court is not in any position, nor indeed is it at

this stage required, to make any such finding, but merely to contextualize the nature of the applications with which the court must now deal.

The Plaintiff's summons seeks, pursuant to Section 307 of the Judicature (Civil Procedure Code) Law, judgment for the Plaintiff based upon admissions purportedly made by the said defendant in his pleadings and/or affidavits filed herein. Section 307 of the Judicature (Civil Procedure Code) Law provides as follows: -

"Any party may, at any stage of a cause or matter where admissions of facts have been made, either on the pleadings or otherwise, apply to the Court or a Judge for such judgement or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court or a Judge may, upon such application, make such order or give such judgement as the Court or a Judge may think just".

In particular, the Plaintiff seeks relief in terms of the following Orders:

1. Judgment be entered for the plaintiff against the second defendant in terms of the statement of claim filed herein pursuant to the provisions of section 307 of the Judicature (Civil Procedure Code) Law on the basis of admissions of facts made by the second defendant herein on the pleadings and/or otherwise including in his defence dated 14 March, 2002 and filed 15 March, 2002 and in his affidavit sworn 8 May, 2002 and filed 9 May, 2002.
2. Alternatively to Order 1 hereof, that such order or judgment as this Honourable Court may think just be made or given in favour of the plaintiff against the second defendant pursuant to the provisions of section 307 of the Judicature (Civil Procedure Code) Law upon the basis of admissions of facts made by the second defendant on the pleadings and/or otherwise including in his said defence and in his said affidavit.

3. Further to order 1 or order 2 hereof, that the plaintiff be granted leave to amend her statement of claim herein in accordance with the draft amended statement of claim exhibited to the plaintiff's affidavit in support of this application for the purposes of incorporating in her statement of claim admissions of fact made herein by the second defendant in his said defence and in his said affidavit and of making such further amendments as are rendered necessary thereby.
4. Alternatively, that the second defendant's defence and counter-claim dated 14 March, 2002 be struck out on the grounds that the defence discloses no reasonable grounds of defence and/or is frivolous, vexatious and/or oppressive and/or otherwise amounts to an abuse of process and that the counter-claim discloses no reasonable cause of action and/or is frivolous, vexatious and/or oppressive and/or otherwise amounts to an abuse of process.

5. That in the event that this application is not heard and determined on the date upon which it is initially set down for hearing, an order that the second defendant forthwith deliver up possession of the property comprised in Volume 1140 Folio 126 of the Register Book of Titles to the plaintiff.
6. Alternatively to order 5 hereof, in the event that this application is not heard and determined on the date upon which it is initially set down for hearing, an order that the second defendant, by himself, his servants and/or agents be restrained, pending the hearing and determination of this application, from selling, disposing of, mortgaging, charging, encumbering or dealing in any manner with the property comprised in Volume 1140 Folio 126 of the Register Book of Titles.
7. That the second defendant pay the costs of this summons and the proceedings on a trustee basis.
8. Such further or other order or orders as this Honourable Court shall think fit.

The terms of Section 307 are very similar to Order 27, Rule 3 of the Rules of the Supreme Court, ("The Supreme Court Practice 1995") which is in the following terms: -

"Where admissions of fact or of part of a case are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter

may apply to the Court for such judgement or order as upon those admissions he may be entiltled to, without waiting for the determination of any other question between the parties and the Court may give such judgement, or make such order, on the application as it thinks just".

The Second Defendant, on the other hand, has filed a summons seeking leave to amend his defence. The Defendant applies to the Court for the following:

1. For an order that the Second Defendant be granted leave to amend his Defence and Counterclaim dated the 14th March 2002, in accordance with the draft Defence and Counterclaim filed herein and in accordance with the prior stated intention of the Second Defendant in his affidavits dated the 19th day of June 2002 and the 18th day of September 2002 to apply for the said amendments, for purposes of incorporating the said amendments at the hearing of this matter.
2. For an order to make such further amendments as are rendered necessary.
3. Such further or other orders as this Honourable Court shall deem fit.

I would wish, firstly, at the outset, to apologize to counsel on all sides for having taken this long to deliver this judgment. I had hoped to deliver this within a few weeks of the end of submissions but I was overtaken by events. Secondly, I wish to compliment counsel for the obvious industry which they demonstrated in the prosecution of the claims of their respective clients. I state that at the outset because I would not wish that any apparent failure to analyze (in the course of this written judgment), each and every

of the several dozen authorities cited to me, to be construed as indicating any disrespect of their industry, or lack of appreciation for the efforts.

Finally, it should be noted that the applications were heard together and the submissions often overlapped as indeed is to be expected in light of the law on the issues being canvassed, resiling from admissions and amendment of pleadings which may lead thereto.

Having said that, I believe that it is important to try to reduce the issues in the instant claims to their simplest terms in order to deal with them, as the CPR 2002 says, justly. Indeed, after the disposal of the preliminary points on the objection raised by the Second Defendant's attorney to the plaintiff's application, it was agreed that in substance what was before me were:

a) The Plaintiff's application for judgment on the admissions;

b) The Second Defendant's application to amend his defence; and

c) The First Defendant's application to be granted leave to file his defence out of time.

The issues which I must decide therefore, consistent with the summonses and the manner in which I have articulated them above, are as follows:

a) Are there admissions which have been made by the Second Defendant, which are clear and which in law entitle the plaintiff to a judgment in her favour?

b) Ought the Second Defendant to be allowed to amend his defence, even if the effect of that amendment is the withdrawal of admissions previously made by him?

c) Should the court grant the First Defendant leave to defend?

Insofar as the third question is concerned, the matter was disposed of fairly quickly and was not the subject of any contention, at the hearing on November 7, with permission being given to the first defendant to file his defence out of time and costs being awarded to the plaintiff.

Let me also indicate, as a preliminary matter, that insofar as the Plaintiff's prayer in paragraph 4 of the summons is concerned, (to strike out the counterclaim as disclosing no cause of action and the defence as disclosing no defence in law), the law is quite clear that where such an application is made, no evidence may be adduced in support of the application. It must be patent on the face of the pleading that it has no chance of success. It will be immediately apparent that in light of the voluminous submissions made by Plaintiff's counsel on this particular aspect of the Second Defendant's defence, its import and its implications, that this prayer must fail. Indeed, I must point out that a considerable part of Plaintiff counsel's submissions involved a detailed examination of the affidavit evidence so far available and seeking to draw conclusions from the analysis of that evidence. I have to say, with respect, that it is not the function of the court in interlocutory proceedings, to make findings of fact upon the untested affidavit evidence

before it That is a matter for a trial court at the appropriate time, and this court would do a great dis-service to the proper administration of justice if it usurped that role.

Plaintiff's counsel in support of his application for judgment of admissions makes the point that there does not appear to be any Jamaican authority on the operation of section 307 on which he principally relies. He therefore calls in aid the equivalent English provision, Order 27 Rule 3, which I have already cited above. The learned authors of the Supreme Court Practice for 1995 in dealing with "Admissions of Fact" have this to say:

> "Such admissions may be express or implied, but they must be clear: **Ellis v Allen [1914] 1 Ch. 904** at page 909; **Ash v Hutchinson & Co (Publishers) [1936] Ch 489** at page 503; **Technistudy v Kelland [1976] 3 All E.R.** 632; [1976] 1.W.L.R. 1042".

The plaintiff's attorney in oral submissions on September 24, 2002, in seeking to show the admissions made by the Second Defendant upon which he relies for judgment, points to the Second Defendant's Defence dated March 14, 2002 and his affidavit dated May 8, 2002. However, he does not *specifically* say what are the admissions to which he refers, but rather points to paragraphs 13-22 of an affidavit of the Plaintiff sworn on June 3 2002. "These are the principal admissions on which the plaintiff relies in respect of her contention that the Second Defendant knowingly made false and fraudulent representations of fact to the Registrar of Titles in becoming registered proprietor". The plaintiff's counsel consistently refers to these "representations" which he said were made or which may be inferred (according to the words of the Plaintiff's June 3, 2003 affidavit, "by necessary implication") from the pleadings or affidavits and conduct of the

Second Defendant. Thus, for example, he says that, "by signing the altered instrument of transfer and causing it to be lodged for registration, the second defendant made representations of fact to Registrar of Titles which he did not honestly believe to be true".

He further refers to paragraphs 24-34 of the plaintiff's said affidavit which, he claims, set out certain "admissions of fact on which the plaintiff relies in relation to material alterations by which the Second Defendant became the registered proprietor". Regrettably, counsel does not take the court directly to the specific admissions of the Second Defendant *in his own words*. He does not say: "Here are the words used by the Second Defendant at paragraph 5 of his defence and paragraph 10 of his affidavit of such and such a date, in which he admits the plaintiff's case", but rather suggests the inferred admissions through the prism of the plaintiff's interpretation of the words of the Second Defendant in his defence or affidavit. Indeed, in written submissions by plaintiff's counsel, spanning thirty-four (34) legal size pages, there is nowhere to be found direct quotations of the Second Defendant's admissions.

The plaintiff does not submit that these "admissions", if such they are, come within the ambit of the definition as proposed by the White Book (see above). Plaintiff counsel's submissions, in this regard, cover the gamut from allegations of fraud, to mistake, to misrepresentation to submissions on what is termed "the Second Defendant's 'about face' on the Power of Attorney". The Plaintiff's attorney spends an inordinate amount of time on issues of the indefeasibility of title under the Registration of Titles Act and the

Torrens System, and regretfully, the Second Defendant's attorney seemed to feel that it was necessary to respond in equal measure with submissions of her own. I have to say with respect, that while those issues may have the greatest importance in determining the ultimate issue in the substantive suit for recovery of possession, almost all are quite misplaced when it comes to the issue of consideration of the application for a judgment on admissions.

The Second Defendant's counsel in responding to the submissions on the application for Judgment on Admissions, submits that this is not a proper case for such an Order. She cites **Ash v Hutchinson**, (previously referred to in the cite from the White Book above), and in particular the judgment of Green L.J. as he then was, to the following effect:

> "A plaintiff who relies for the proof of a substantial part of his case on admissions in the defence must, in my judgment, show that the matters in question are clearly pleaded and as clearly admitted; he is not entitled to ask the Court to read meanings in his pleadings which on a fair construction, do not clearly appear, in order to fix the defendant with an admission".

In any event she says, the Second Defendant now has before this Court, an application for an amendment of his defence and which application, counsel for the Plaintiff is opposing. Those proposed amendments purport to shift the emphasis of the Second Defendant's defence from merely an assertion that he is a bona fide purchaser for value without notice, to be more of a reliance upon the Power of Attorney allegedly signed by the Plaintiff, and which purportedly gave power to the first defendant to sign an Instrument of Transfer. This may seem to be, and indeed Plaintiff's counsel contends that they are essentially, retractions of any admissions in the previously filed defence.

The Plaintiff, in opposing the application to amend, argued that the Second Defendant was not entitled to amend because it was too late to do so and it was an abuse of the Court's process; that the Second Defendant had either waived his right to seek such an amendment and/or was estopped by his conduct from now seeking such.

Not surprisingly, the Miss Ridguard disagrees on all counts. Firstly, as to lateness, she makes the point that the decision to seek the amendments in question, were communicated as early as the Second Defendant's affidavit sworn on June 19, 2002. At the resumed hearing on September 24, 2002, the Court had indicated that it was in receipt of the application to amend. Plaintiff's counsel said he had not been served with such an application. In any event, Plaintiff counsel did not seek to have that application adjourned so as to be able to deal with it. Rather, it seemed to have been the counsel's position that whether or not there were allowed amendments to Second Defendant's Defence and Counterclaim, it would not affect Plaintiff's right to get Judgment on Admissions.

She submitted that, in any event, the application to strike out the Second Defendant's defence and counterclaim (one of the prayers in the application for Summary Judgment is *res judicata*, having been heard and refused at a hearing in Chambers earlier.

Ms. Ridguard, submitted that the Second Defendant's application to amend his defence was clearly allowable under the Judicature (Civil Procedure Code) Law Section 259 and Section 264 which allow litigants to amend their pleadings with leave either during or before a trial and on such terms as may be just. As I understand it, an amendment may always be allowed as long as it does not cause prejudice to the other party. In the instant case, the Second Defendant's counsel's submission is to the effect that the amendment to the defence and counterclaim adds assertions of reliance upon a Power of Attorney which it is claimed was duly executed by the plaintiff.

Sections 259 and 264 of the Judicature (Civil Procedure Code) Law are, respectively, set out in the following terms:

> AMENDMENT OF INDORSEMENT OR PLEADINGS
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> The Court or a Judge may, at any stage of proceedings, allow either party to alter or amend his indorsements or pleadings in such manner, and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.
>
> AMENDMENT BY LEAVE
>
> In all cases not provided for by the preceding sections of this Title, application for leave to amend may be made by either party to the Court or a Judge for the Judge at the trial of the action and such amendment may be allowed upon such terms as to costs or otherwise as may be just.

Counsel for the second defendant rejected plaintiff's submissions that the application was late and also made the observation that the intention to seek an amendment had been indicated in the second defendant's June 19, 2002 affidavit in response in opposition to the plaintiff's application for judgment on admissions.

She also submitted that based upon section 677 of the JCPC, the application could even have been made orally at any time during the proceedings. Section 677 is set out below:

> POWERS AND DUTY AS TO AMENDMENT
>
> The Court may order or allow any amendment of any writ, petition, answer, notice or other document whatever, at any time on such terms as justice requires.
>
> It shall be lawful for the Court, and every Judge thereof, and any Judge sitting at any Circuit Court, or other Presiding Officer, at all times to amend all defects and errors in any proceeding in civil causes or matters, whether the defect or error be that of the party applying to amend or not; and all such amendments may be with or without costs, and upon such terms as to the Court or Judge or Presiding Officer may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made.

She submits further that the principles which the court must adopt in determining whether to allow an amendment is set out in Halsbury's Laws of England 4th Edn., Volume 36 paragraphs 68 and 71 which state:

> The court may at any stage of the proceedings allow the plaintiff to amend the indorsement on his writ or any party to amend his pleading. The purpose of amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on the application of any party to the proceedings or of its own motion, on such terms as to costs or otherwise as may be just and in such manner, if any, as the court may direct. The person applying for amendment must be acting in good faith. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side, and there is no injustice if the other side can be compensated by an order as to costs.

Should the Amendment be granted?

In ***Willis Arnold Charlesworth v Relay Roads Limited (In Liquidation) [2000] R.P.C. 300***, (a case involving the issue of patent infringement) an application was made by the defendants to amend pleadings and to re-open the trial so that further evidence could be given, *after judgment had been given but before the order was drawn up*. It was conceded that the judge had jurisdiction to allow the order, but contended that the defendants should have adduced the relevant evidence at trial. The judge, Neuberger J. set out a reasoned analysis on the question of the exercise of discretion. In considering how the court should exercise its discretion in such a case, he said: "It seems to me that this application must be approached with the 'overriding objective', as set out in Rule 1.1, in mind".

He continued:

> As is so often the case where a party applies to amend a pleading or to call evidence for which permission is needed, the justice of the case can be said to involve two competing factors. The first factor is that it is desirable that every point which a party reasonably wants to put forward in the proceedings is aired: a party prevented from advancing evidence and/or argument on a point (other than a hopeless one) will understandably feel that an injustice has been perpetrated on him, at least if he loses and has reason to believe that he may have won if he had been allowed to plead, call evidence on, and/or argue the point. Particularly where the other party can be compensated in costs for any damage suffered as a result of a late application being granted, there is obviously a powerful case to be made out that justice indicates that the amendment should be permitted.

Neuberger J. also referred to the dicta of Millett in ***Gale v Superdrug Stores Plc [1996] 1 W.L.R. 1089 at 1098F***, (in a passage quoted below at page 14 in this judgment)

Ms. Ridguard cited the case of ***Overton Hutchinson vs Ellis Victor Sheppard (1991) 28 J.L.R. 192*** as a local authority for the proposition that a Judge has a discretion to

grant leave to a party to file amended pleadings even where no application for leave is before the court. She submitted that the amendments sought were not being sought in bad faith nor were they creating any new cause of action which is statute-barred. Indeed, she argued, even where counsel had been negligent or careless in the preparation of the pleadings, the Court has allowed the amendment to the pleadings. She also cited dicta of ***Brett M.R.*** in the case of ***Clarapede vs Commercial Union Association 1883 32 W.R.*** where he said:

> "...however negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice on the other side. There is no injustice if the other side can be compensated by costs."

This theme is reflected in the judgment of Millett L.J. in ***Gale v Superdrug Stores Plc***. (the passage above being specifically adopted by him in his judgment), where he says

> The administration of justice is a human activity, and accordingly cannot be made immune from error. When a litigant or his adviser makes a mistake, justice requires that he be allowed to put it right even if this causes delay and expense, provided that it can be done without injustice to the other party. The rules provide for misjoinder and non-joinder of parties and for amendment of the pleadings so that mistakes in the formulation of the issues can be corrected. If the mistake is corrected early in the course of the litigation, little harm may be done; the later it is corrected, the greater the delay and the amount of costs which will be wasted. If it is corrected very late, the other party may suffer irremediable prejudice.
> I do not believe that these principles can be brushed aside on the ground that they were laid down a century ago or that they fail to recognise the exigencies of the modern civil justice system. On the contrary, I believe that they represent a fundamental assessment of the functions of a court of justice which has a universal and timeless validity.

But Neuberger J. also sees the other side of the coin, particularly in light of present-day conditions. Thus he says:

> On the other hand, even where, in purely financial terms, the other party can be said to be compensated for a late amendment or late evidence by an appropriate

award of costs, it can often be unfair in terms of the strain of litigation, legitimate expectation, the efficient conduct of the case in question, and the interests of other litigants whose cases are waiting to be heard, if such an application succeeds. This latter approach seems to have found favour with the Court of Appeal in *Worldwide Corporation Limited v. GPT Limited* (December 2, 1998, unreported) where Waller L.J. (with whom Lord Bingham C.J. and Peter Gibson L.J. agreed) said this:

> "We share Millett L.J.'s concern that justice must not be sacrificed, but we believe his view does not give sufficient regard to the fact that the courts are concerned to do justice to all litigants, and that it may be necessary to take decisions vis-à-vis one litigant who may, despite all the opportunity he or his advisers have had to plead his case properly, feel some sense of personal injustice for the sake of doing justice both to his opponent and to other litigants.

In relation to the application to amend, I also refer to Neuberger J's continuing citation of Waller L.J. in ***Worldwide*** where he in turn had cited Lord Griffith in ***Ketteman v Hansel Properties [1987] A.C. 189 at page 220, D-H:*** where he said:

> "Whether an amendment should be granted ***is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies***. (My Emphasis) Many and diverse factors will bear upon the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other. *Furthermore to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence"* (emphasis added).

Even more so, where the amendment is sought to be made after judgment, Waller L.J. continued:

> " Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business would be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the

> consequences of the negligence of the lawyers to fall upon their own heads rather than by allowing an amendment at a very late stage of the proceedings."

And finally, I adopt as an appropriate summary of the role of the judge in an application of this nature, the concluding remarks in ***Worldwide*** (cited above)

> "Where a party has had many months to consider how he wants to put his case and where it is not by virtue of some new factor appearing from some disclosure only recently made, why, one asks rhetorically, should he be entitled to cause the trial to be delayed so far as his opponent is concerned and why should he be entitled to cause inconvenience to other litigants? The only answer which can be given and which, Mr. Brodie suggested, applies in the instant case is that without amendment a serious injustice may be done because the new case is the only way the case can be argued, and it raises the true issue between the parties which justice requires should be decided.
> We accept that at the end of the day a balance has to be struck. The court is concerned with doing justice, but justice to all litigants, ..."

In applying the foregoing to the instant circumstances, I have come to the view that the court should exercise its discretion in favour of granting the Second Defendant's application to amend. Firstly, the time by which the amendment was being sought is not inordinate or unreasonable. Secondly, it would seem that an order for costs of that summons would be adequate to address any complaints which the Plaintiff might have. But thirdly, and most importantly, I am satisfied that justice may only be served by allowing the amendment to the second Defendant's pleadings.

I turn now to the issue of the summons for Judgment on Admissions, and I proceed on the basis for the purposes of argument only, (no findings to that effect having been made), that the amendments now sought and obtained by the Second Defendant, are tantamount to withdrawal of admissions previously made by him.

What is the Law on "Judgment on Admissions"?

In the case of ***Gale vs Superdrug Stores Plc.***, (a decision of the English Court of Appeal) ***[1996] 1 WLR page 1089*** the court considered the question, of the ability of a litigant to resile from earlier admissions by amending his pleadings. In that case, significant reliance was placed upon an earlier decision, ***Bird vs Birds Eye Walls Ltd. The Times 24th July 1987.*** In that case Ralph Gibson L.J. set out what has now been accepted to be the proper test for allowing a defendant to amend his pleadings in order to resile from previous admissions. He stated the test in the following terms:

> "...when a defendant has made an admission the court should relieve him of it and permit him to withdraw it or amend it if in all the circumstances it is just so to do, having regard to the interest of both sides and to the extent to which either side may be injured by the change in front."

In *Gale*, the test propounded by Ralph Gibson L.J. in ***Bird*** was accepted as correct by a majority of the Court of Appeal, Thorpe L.J., dissenting. The circumstances leading up to the hearing before the Court of Appeal in Gale was as follows.

> The plaintiff, Kathleen Frances Gale, suffered personal injury arising out of an accident which occurred whilst she was in the employment of the defendants, Superdrug Stores Plc. The defendants' insurers admitted liability but, when the case had still not settled nearly three years later, the plaintiff issued particulars of claim dated 22 September 1993 to prevent her claim being time-barred. By a defence dated 10 February 1994 the defendants denied liability. On 28 July 1994 the plaintiff issued a summons to strike out the defence as an abuse of process. District Judge Gale struck out the defence pursuant to Ord. 13, r. 5(1)(d) of the County Court Rules 1981 (S.I. 1981 No. 1687 (L.20)). The defendants appealed to Judge Wroath, who dismissed their appeal on 1 November 1994. By a notice of appeal dated 2 March 1995 the defendants appealed on the grounds that (1) there was no evidence that the plaintiffs case had been prejudiced by the defendants' original admission and their resiling from it later; (2) the plaintiffs disappointment was not a relevant factor; (3) that the payment into court made by the defendants after lodging a defence did not prejudice the plaintiff; (4) the defendants' undertaking not to recover an interim payment of £600 made in December 1992 was not a relevant factor in determining whether the defence should be struck out; (5) it was wrong to apply the test in *Bird v. Birds Eye Walls Ltd.*, The Times, 24 July 1987, alternatively, if it was the right test, the judge erred in holding that it was unjust to permit the defendants to resile from their admission.

The Court of Appeal in ***Gale*** allowed the appeal against the decision of Judge Wroath. In the course of his judgment, Waite L.J. referred to the respective cases advanced for the Appellant/Defendant and the Plaintiff/Respondent, and their interpretation of the test as laid out by Ralph Gibson in ***Bird***. He summarizes the case put forward for the Plaintiff, in the following way, and I cite with approval the following extensive passages.

> Mr. Soole for the plaintiff fastens upon the attention devoted by Ralph Gibson L.J. in the *Birds Eye* case to the sufficiency of the excuse advanced by the party seeking to resile. That, he submits, is the starting point for application of the test, and if no sufficient excuse is established it is also the finishing point. The court, that is to say, must first address the question: is there any reasonable excuse for retracting the admission? If there is not, then the matter goes no further, and the application to resile will be refused without further inquiry. That, he submits, was the approach rightly followed by the judge in this case. The judge's finding that "the explanation given in this case is really a very weak one" was conclusive and, although he referred to other matters as well, provided sufficient justification on its own for the exercise of his discretion in the way that he chose.

He continued:

> I would reject Mr. Soole's preliminary submission. There are certainly instances where, as a preliminary to the exercise of its discretion, the court will insist upon a satisfactory explanation. One such is a case where a plaintiff is seeking an extension of time for service after the validity of the proceedings has expired: see *Ward-Lee v. Lineham* [1993} I W.L.R. 754. But those are instances where a party has been in breach of some rule or direction and needs to make his peace first with the court. *A party withdrawing an admission is to be regarded in a more favourable light. Excuse (or lack of it) is not entitled, in my judgment, to any particular emphasis: it is just part of the overall picture and will carry no more weight than the particular circumstances require*. (Emphasis mine)
> I prefer Mr. Vineall's (counsel for the defendant/appellant) submission that the discretion is a general one in which all the circumstances have to be taken into account, and a balance struck between the prejudice suffered by each side if the admission is allowed to be withdrawn (or made to stand as the case may be).
>
> The judge was entitled to take account, as anyone naturally would, of the disappointment suffered by the plaintiff, but he was wrong in my view to elevate it to the status of a major head of prejudice, thereby giving it a wholly disproportionate emphasis.

> The right order for the judge to have made in a proper exercise of his discretion would, in my judgment, have been to grant the defendants leave to resile from the admission. In saying that, I do not wish to minimize the distress suffered by the plaintiff. She had every reason to be gravely disappointed. Litigation is, however, a field in which disappointments are liable to occur in the nature of the process, and it cannot be fairly conducted if undue regard is paid to the feelings of the protagonists. That does not mean that the late retraction of an admission is something that the courts should encourage. But what it does mean is that a party resisting the retraction of an admission must produce clear and cogent evidence of prejudice before the court can be persuaded to restrain the privilege which every litigant enjoys of freedom to change his mind.
>
> I would allow the appeal and discharge the orders for the striking out of the defence that were made below.

His colleague, Millett L.J. who concurred in his decision, was of a similar view.

> Litigation is slow, cumbersome, beset by technicalities, and expensive. From time to time laudable attempts are made to simplify it, speed it up and make it less expensive. Such endeavours are once again in fashion. But the process is a difficult one which is often frustrated by the *overriding need to ensure that justice is not sacrificed.* (Emphasis mine) It is easy to dispense injustice quickly and cheaply, but it is better to do justice even if it takes a little longer and costs a little more.
>
> The administration of justice is a human activity, and accordingly cannot be made immune from error. When a litigant or his adviser makes a mistake, justice requires that he be allowed to put it right even if this causes delay and expense, provided that it can be done without injustice to the other party. The rules provide for misjoinder and non-joinder of parties and for amendment of the pleadings so that mistakes in the formulation of the issues can be corrected. If the mistake is corrected early in the course of the litigation, little harm may be done; the later it is corrected, the greater the delay and the amount of costs which will be wasted. If it is corrected very late, the other party may suffer irremediable prejudice.
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> The general principles which govern the court's approach to an application to amend the pleadings is to be found in the well known and often cited passage in the judgment of Bowen L.J. in *Cropper v. Smith* (1884) 26 Ch.D'. 700, 710-711, with which A. L. Smith L.J. expressed his "emphatic agreement" in *Shoe Machinery Co. v. Cutlan* [1896] 1 Ch. 10, 112. Bowen L.J. said:
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> "It is a well established principle that the object of courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. ...I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other

> party. *Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace. ...It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right."* (Emphasis Mine)

For completeness of this analysis, I should refer to the dissenting judgment of Thorpe L.J., not only because it arrives at a different interpretation of the test propounded by Ralph Gibson L.J., but also because it has been the subject of recent favourable comment in relation to a case, as yet unreported, a Court of Appeal decision in ***Sollitt v Broady*** *23/2/00 CA*. I am indebted to Espresso News by the Hardwicke Civil Personal Injury Team at the website clerks@hardwicke.co.uk for a case note in relation to the Sollitt judgment. In ***Gale***, Thorpe L.J. in his dissenting judgment said he felt that Judge Wroath's judgment should be upheld on the basis that it accorded with the test of Ralph Gibson L.J. in ***Bird***. He conceded that the Gibson test as generally accepted was probably correct. In looking at the judgment of Ralph Gibson L.J., he had this to say:

> However, later he stressed the significance of the quality of the defendant's justification for shifting his position. For me the essential sentence is: "Asked to give leave in those circumstances, as it seems to me, the court must look to the explanation which the applicant offers for wishing to change his position." On this issue of general principle, I favour the submissions of Mr. Soole. Mr. Vineall's presentation is altogether too favourable to defendants. Authority with which he supports his submission is more relevant to applications to amend pleadings or applications to strike out for want of prosecution. Authority as to the practice in the High Court more than a century ago cannot recognise the demands and exigencies of the civil justice system as it is today. Furthermore it does not seem helpful to me to create a system of stages postponing or excluding altogether the need for the defendant to explain himself.
> Applying the general to this particular case leads me to the conclusion that the decision reached by Judge Wroath was on the very border of the discretion which he exercised.

Thorpe L. J's clear preference was for the threshold test to be, whether the defendant had given a satisfactory explanation for withdrawing a previously communicated admission. *Sollitt* appears to support this view. Indeed Lord Bingham, L.C.J. who delivered the judgment in the Court of Appeal in this case, first referred to Waite L.J's approach in ***Gale*** to the question of withdrawal of admissions. Waite L.J. had stated that in these matters, he preferred to accept the submission made before him "that the discretion is a general one in which all the circumstances have to be taken into account, and a balance struck between the prejudice suffered by each side if the admission is allowed to be withdrawn (or made to stand as the case may be)". Lord Bingham in considering that passage said:

> This passage gives valuable guidance on the correct approach to the exercise of discretion and the striking of a balance in cases of this kind. But it is I think plain that Waite L.J. was not purporting to lay down any rule of law, and that the exercise of any discretion depends on the facts of the case. I would observe that the dissenting judgment of Thorpe L.J. has very considerable persuasive force, particularly in the new procedural environment inaugurated by the Civil Procedure Rules. I would, however, accept that it is generally necessary to look at the prejudice which the parties will respectively suffer if permission to withdraw an admission is given or not given.

Thus the case note from Hardwicke expresses the following view:

> In **Sollitt**, the Court of Appeal recognized that Gale was decided before pre-action protocols, before pre-disclosure and before the effect of the CPR had made litigation more certain.
>
> The effect of both Sollitt and the dissenting judgment of Thorpe LJ in Gale is that the court is required to focus upon the reasons behind the withdrawal. A different (more favourable) interpretation of the merits by defendant solicitors or counsel is unlikely to be a persuasive factor. The emergence of new facts since the admission was made may be persuasive, but probably only if those facts and matters could not have been discovered with reasonable diligence beforehand.
>
> The merits of the defendant's defence are unlikely to be persuasive. In Sollitt, the defendants had (it appears) a cast-iron defence, which they threw away by their

> admission. However, that fact of itself was not determinative to the decision of Bingham LJ who refused to permit the defendant to resile from its admission and dismissed the appeal.

However, even Thorpe L.J. in Gale seemed to concede that the argument which had been made for allowing the defendant to resile in that case, had more cogency where it related to an application to amend than on a pure withdrawal of admissions. Thus, in referring to submissions of counsel, Mr. Soole, for the appellant/defendant, he said:

> Authority with which he supports his submission is more relevant to applications to amend pleadings or applications to strike out for want of prosecution.

A further caveat against the wholesale acceptance of Sollitt, and Thorpe L. J's approach to the issue, is the fact that, as the Hardwicke note points out: "In Sollitt, the Court of Appeal recognized that Gale was decided before pre-action protocols, before pre-disclosure and before the effect of the CPR had made litigation more certain". The "pre-action protocols and pre-disclosure" are matters which might have had significant implications for the way the English Court viewed attempts to resile, but of course they have no relevance to our situation here. It is the view of this court that while we are bound by neither Gale nor Sollitt, the former remains the more persuasive authority to follow, as to the correct statement of the approach to be adopted.

I have already commented upon the fact that there are, in terms, no direct and specific alleged admissions by the second defendant in his own words which have been pointed out by the plaintiff's counsel. The Plaintiff has invited the court to look at statements made by the said defendant and to infer from those statements, certain admissions of fact. Indeed, even if the second defendant has admitted altering a document, (an

instrument of transfer) which is one of the alleged admissions, the issue of whether he had any right so to do must first be considered based upon a fulsome examination of the evidence, before it can be decided that such alteration was illegal or fraudulent. It is, therefore, not sufficient merely to point to these admitted actions, however patent, and then ask the court to draw inferences, as the law is quite clear that the admission must be "clear and unequivocal". At best, these may be seen as mere admissions of facts which on their own mean nothing, but Mr. Reitzin invites the Court to accept his interpretation of the untested evidence and then, in light of that acceptance accordingly, to give judgment for the plaintiff. It surely is not necessary to repeat here the numerous cases where courts have said that they cannot decide issues of fact on the untested evidence, given without passing through the rigours of cross examination.

I have formed the view that these are not admissions, the nature of which, would allow the plaintiff to claim what is in effect a summary judgment on her claim against the second defendant.

But there is another reason why I am convinced that the plaintiff's application must fail. There is, in this case, also a first defendant who has now been given leave to file a defence to the plaintiff's claim. It seems to me that it would be pre-judging the issue as between the plaintiff and the first defendant, and that all the issues between the litigants should be dealt with at the same time. Bear in mind that this is an action for the "Recovery of Possession", and an essential issue which will need to be decided is

whether the first defendant *did have* a beneficial interest in the property, the subject of the action.

The decision in ***Gale*** reinforces the view that the court in the exercise of its discretion must make a judgment that is fair to the parties and in the interest of doing justice. In this regard, I accept that the test of prejudice to a participant is an appropriate one for the court to consider in coming to its decision. Indeed, it is implicit in our own new Civil Procedure Rules 2002, which in Rule 1.1(1) sets out the over-riding objective as "enabling the court to deal with cases justly". It should be noted that in considering whether prejudice will attend either party, one notes that prejudice may take the form of any of the following:

- Taking no steps to investigate liability at all for a long period
- Making no attempt to interview witnesses
- Not trying to negotiate a settlement on the basis of denial of liability
- Identifying and valuing the impact in terms of costs and length of time before trial that the restoration of issues of liability will have on the litigation

While there are certainly other examples of prejudice, it does not appear that there is any overriding prejudice which requires a decision in favour of the plaintiff. In the instant case, what is the potential prejudice to the litigants? In the case of the plaintiff, failure to prevail here merely means she must make many of the same arguments made here when the matter comes on for trial. In the other hand, for the Second Defendant, it would be the end of the litigation as he would be faced with a plea of res judicata should he attempt to argue, at the trial, the issue of his legal and/or beneficial right to the

property. Indeed, even the First Defendant might be able to use the evidence of a "decision" against the Second Defendant giving rise to an order for recovery of possession, to defend any action that the Second Defendant might have against the First Defendant. (This latter is clearly a live issue at his time). The First Defendant himself is also at risk of prejudice if a summary determination of the issue at this time in the present state of the evidence, precipitately grants to the plaintiff all that she seeks herein. The positions of the defendants, therefore, are clearly and considerably, more at risk of prejudice than that of the plaintiff.

In the proper exercise of any judicial discretion, in circumstances such as the instant matter, certainly it is useful to bear in mind our own Rule 1.1(1) as well as the words of Sir George Waller in ***Bird***:

> ".... I find it very difficult to visualize any personal injury case where if a formal admission of liability were withdrawn eighteen (18) months after it had been made, it would not prejudice the claim."

But I also find considerable cogency in the dicta of Millett in ***Gale***, already quoted above, but which I repeat here for emphasis and adopt.

> Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace. ...It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right."

And I say this notwithstanding, indeed fully conscious of, the emphasis in the new rules on efficiency of the trial process in the interests of early and just resolution of disputes between litigants.

In the circumstances, my rulings are that:

There shall be judgment for the Second Defendant on his Summons to amend, but with costs to the Plaintiff to be agreed or, if not agreed, taxed.

Judgment for the Second defendant on the Plaintiff's Summons for Judgment on Admissions, with costs to the Second Defendant to be agreed or, if not agreed, taxed.

Leave to appeal granted to Plaintiff in relation to rulings above.