[2015] JMSC Civ.169

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2009HCV06410

BETWEEN	**CONTINENTAL BAKING COMPANY LTD**	**FIRST CLAIMANT**
AND	**RAINFOREST SEAFOODS LTD**	**SECOND CLAIMANT**
AND	**COPPERWOOD LTD**	**THIRD CLAIMANT**
AND	**SUPER PLUS FOOD STORES LIMITED**	**FIRST DEFENDANT**
AND	**TIKAL LIMITED**	**SECOND DEFENDANT**

IN CHAMBERS

Georgia Gibson Henlin and Kristen Fletcher instructed by Henlin Gibson Henlin for the claimants

Nigel Jones and Kashina Moore instructed by Nigel Jones and Company for the defendants

July 21, 24 and August 13, 2015

CIVIL PROCEDURE – APPLICATION TO WITHDRAW ADMISSIONS – APPLICATION FOR SUMMARY JUDGMENT – WHETHER ADMISSIONS SHOULD BE WITHDRAWN – SUMMARY JUDGMENT – WHETHER THERE IS REAL PROSPECT OF SUCCESSFULLY DEFENDING THE CLAIM

SYKES J

[1] Super Plus Food Stores Limited ('Super Plus') and Tikal Limited ('Tikal') admitted owing money to the first and third claimants. They now wish to withdraw those admissions. Until 2015, that is to say, nearly six (6) years into this claim no one thought that the defendants did not owe any money. The only question was which of the claimants was the correct creditor.

[2] There is another application. The claimants have applied for summary judgment. What has happened here for there to be these two applications? We need to go back a few years and trace the history of this matter. There is a journey from the Supreme Court to the Court of Appeal and back to the Supreme Court which must be told.

The journey

[3] In December 2009, Continental Baking Company Ltd ('Continental'), Rainforest Seafoods Ltd ('Rainforest') and Copperwood Limited ('Copperwood') sued Super Plus and Tikal to recover the following sums:

a. JA$139,951,452.00 owed to Continental;

b. JA$16,953,744.00 owed to Rainforest;

c. JA$41,153,680.00 owed to Copperwood.

[4] The first particulars of claim spelt out the details behind these figures. The defendants responded with equally detailed pleadings of their own. The first defence clearly stated that the defendants owed Continental the sum pleaded. It actually reads:

> *The defendants admit the allegations contained in paragraph 7 of the particulars of claim.*

[5] What could be clearer?

[6] In respect of the sum owed to Rainforest, the defendants pleaded:

> *Save that the defendants deny owing the 2nd claimant of $16,953,744.00 the defendants admit the remaining allegations contained in paragraph 10 of the particulars of claim, the defendants owe the 1st claimant the sum of $16,774,552.00.*

[7] The essence of this admission was made twice in the defence: paragraphs 7 and 8.

[8] Regarding the sum owed to Copperwood, the defendants pleaded the following:

> *Save that the defendants deny owing the 3rd claimant the sum of $41,153,680.00 the defendants admit the remaining allegations contained in paragraph 12 of the particulars of claim. The defendants owe the 1st claimant the sum of $33,093,241.00.*

[9] If that were not enough the defendants in the very next paragraph stated:

> *The defendants admit the allegations contained in paragraph 13 of the particulars of claim. The defendants will however say that the amounts acknowledged as owing on October 13, 2010 was, after further reconciliation, proven to be inaccurate. The amount owed by the defendant was in fact the sum of $33,093,241.00, which the 3rd claimant has acknowledged is accurate.*

[10] This defence was signed by Mr Richard Chen for both defendants.

[11] On May 24, 2013, judgment on admissions was entered against the defendants. The problem that arose was the terms of the judgment. The material part reads:

> *Judgment on admissions is entered for the first claimant against the defendants on the amounts of $139,951,452.00, $16,774,552.00 and $33,093,241.00 with interest to be assessed at 1% above the commercial banks' prime lending rate for such period as shall be determined on assessment of damages.*

[12] The sticking point was that the pleaded case did not say that all sums were owed to Continental, that is to say, judgment was entered in favour of Continental for a sum greater than that pleaded. The pleadings were not amended to reflect the terms of the judgment. Thus the judgment was based on a case that was not pleaded.

[13] In the Court of Appeal the judgment was upheld in respect of the $139, 951,452.00. Judgment in the other two sums was set aside. The matter was sent back to the Supreme Court for the other two sums to be dealt with. As stated earlier, no one thought that the sums for which judgment had been entered were controversial or disputed.

[14] After the matter returned to the Supreme Court the claimants filed an amended claim form and particulars of claim to give effect to the decision of the Court of Appeal. The amended statement of case says that the sum of $16,973,774.00 is owed to Rainforest and/or Continental and the $41,153,680.00 is owed to Copperwood and/or Continental.

[15] The defendants have adopted a new stance which is now being introduced after half a decade of litigation. It suddenly dawned upon the defendants that no good were delivered to them. In response to the claim for $16,973,774.00 the defence now is *'no goods were supplied and the 1st and 2nd claimants are put to strict proof*.' On the debt of $41,153,774.00 the defendants now say that '*no goods were delivered amounting to $41,153,680.00 and puts the 1st and 2nd claimant to strict proof of same*.' It is this new defence that has precipitated the application to withdraw the admissions.

[16] Mr Richard Chen in his supporting affidavit states that the sums now claimed were not 'based on any proof of the sums owed but based on what was averred in the defence filed on April 6, 2010' and the 'statements in that defence [were] not however supported by our records as far as I have seen.'

[17] This statement is quite remarkable in face of the claim for $41,153,680.00 by Copperwood and the defendant saying in the April 6, 2010 defence that '*after reconciliation, prove to be inaccurate*' and the amount owed '*was in fact the sum of $33,093,241.00 which the 3rd claimant has acknowledged to be accurate*.' Mr Chen's new position comes in the face of a document headed 'Copperwood Limited Reconciliation of Super Plus Food Stores Account, Account No 526235/526295' dated October 13, 2009, signed by Super Plus' financial manager, Mr Richard Chen who was Super Plus' Chief Operating Officer and Mr Foster, Copperwood's representative. There are two other signatures from Super Plus on the document. This means that four persons signed on behalf of Super Plus. The sentence immediately preceding the signatures read: *We are in*

agreement with the total outstanding balance of $41,1512,512.53 (sic). This is clearly an error. When the entire document is examined it is beyond doubt that the parties met and agreed that the sum owed by Super Plus was $41,153,680.82.

[18] That this document was not the product of guess work or poor guesstimates is shown by the entries on the document. The document begins with the balance as at June 30, 2009. From that sum were deducted the following: balances on paid invoices, invoices that cannot be located and invoices need to be credited. In other words, where Copperwood could not find the invoices for an amount, that amount was credited to Super Plus and subtracted from the balance owed. There are other amounts added and subtracted on the document.

[19] In order for Mr Chen to have signed off on the first pleaded defence in the terms actually stated in that defence the conclusion has to be that Mr Chen or someone else met with Copperwood to indicate that Copperwood's claim was too much and presumably produced documents to supports the claim for the $33m. The first defence states that Copperwood agrees with the figure and that was why the defendants made the admission of the $33m. This was not a mistake but the outcome of deliberate thought, calculations, examination of records which were reconciled. One cannot sensibly speak of 'further reconciliation' unless there were records and figures to reconcile. This begs the question of what kind of records would these be? The answer must be invoices, bills and proof of delivery on the side of Copperwood and documents acknowledgment of receipt of goods, cheques, receipts and such like. The parties would have been reconciling delivery dates, quantities, payments and the like.

[20] In speaking to the $16m, Mr Chen is now saying that no goods were delivered. This is quite astonishing in the face of the first pleaded defence that he signed indicating that the sum claimed was overstated by just under $200,000.00. How

could the defendants have come up with such a precise figure in the absence of some documentation suggesting that that was the case?

[21] The admission did not end there. When the claimants pleaded in the original statement of case that:

> *The defendants have acknowledged this debt in writing and a copy of this acknowledgment is attached hereto as APPENDIX "C". Negotiations have been conducted between the parties with a view to arriving at a mutually satisfactory method for the liquidation of the defendants' debt, all to no avail.*

[22] Could any pleading be plainer? The direct response to this in the defendants' initial defence was:

> *The defendants deny the allegations contained in paragraph 13 of the particulars of claim. The defendants, as the claimants are well aware, have every intention of discharging their indebtedness to the claimants and have consistently indicated this to the claimants. The defendants have no intention to avoid their obligations and the suggestion by the claimants that they would take steps to avoid their obligations is baseless.*

[23] All this was followed by a certificate which reads:

> *I, Richard Chen, Director of the defendants, certify that all the facts set out in this defence are true to the best of my knowledge, information and belief. (emphasis added)*

[24] The certificate is no idle statement. It is saying that the person who signed the document honestly and genuinely believes that what is stated in the defence is true. These pleadings are not the product of haste, imperfect consideration or imprudence. They seem to be the outcome of deliberate, detached and objective assessment.

Discussion

[25] There is no doubt that a party may amend or withdraw an admission (rule 14.1 (6) of the Civil Procedure Rules ('CPR')). The defendants are relying on **Gale v Superdrug Stores PLC** [1996] 1 WLR 1089. In that case it was said that when a defendant seeks to withdraw or amend an admission the judge had to balance the prejudice to the defendant if he was to be deprived of his prima facie right to resile from his admission against any prejudice to the claimant if the admission was withdrawn. The majority also held that prejudice had to be specifically established and the absence of a good reason for the change of position was merely one of the factors to be considered. Millett LJ reasoned by analogy and concluded that in the same way a defendant may raise a new defence not previously raised so too a defendant should be able to withdraw an admission. According to his Lordship, the defendant, in both circumstances, is seeking to raise an issue which cannot be raised without an amendment and never mind that the amendment may cause delay, that fact in and of itself should not prevent the court from exercising its discretion to grant the withdrawal of admission. Millett LJ distinguished between cases where the admission was made a part of a deliberate strategy and cases where an honest mistake had been made when liability was admitted. His Lordship seemed to be suggesting that where the admission came after a mature deliberate choice then it is unlikely to be unjust to hold the defendant to his election. On the contrary, where an honest mistake was made and there was no suggestion of strategic manoeuvring then the court should be more willing to permit the defendant to change course.

[26] The dissenting judgment of Thorpe LJ seems to have found favour in more recent times. Thorpe LJ was impressed with the submission that a formal admission of liability is of such a nature and carries with it such fundamental consequences that a defendant ought not to be permitted to resile from it without some good explanation. Thorpe LJ held that despite the absence of any specific prejudice the decision of the trail judge to refuse permission to withdraw the admission was acceptable because the admission was made by the insurers and that admission stood for over two years while the parties sought to reach a compromise on quantum. His Lordship hinted that the particular case was more one of strategic manoeuvring than it was a genuine desire to contest liability.

[27] This was decided before the CPR came into effect in England and Wales. In addition it was a pre-action admission.

[28] In **Sollitt v DJ Broady** (unreported) (delivered February 23, 2000), a case in the post CPR era, one sees a stiffening resistance to these kinds of applications. In that case, the admission of liability was made in the defence served in response to the claim. The defendants sought to withdraw the admission. The defence was signed by the solicitors for the defendants. The Court of Appeal while recognising that Waite LJ's judgment in **Gale** showed how the judge should go about weighing the matters to be considered nonetheless felt that the dissenting view of Thorpe LJ was very persuasive in light of the CPR. The Lord Chief Justice added that generally the court should look at the prejudice which either party may suffer if permission to withdraw the admission is given or not given. The Lord Chief Justice examined the evidence, did the balancing and despite the fact that trial judge did not conduct the exercise in the manner required his Lordship held that had he done so he would have come to the same decision. The decision was upheld. This case differs from **Gale** in that **Gale** was a pre-action admission and this case as post-commencement of action admission.

[29] In **Sowerby v Charlton** [2005] All ER (D) 343, the admission came from the defendant's solicitors in a letter to the claimant's solicitors before a claim was issued. One of the issues in the case was whether the CPR applied to pre-claim admissions. Brooke VP concluded that it did not because at the time such an admission is made the claimant's case is not formulated properly until the claim form or particulars of claim are prepared and in addition it is not appropriate to refer to someone as a party to the proceedings until legal proceedings have been commenced. Thus English rule which, at the time, was in identical terms to the Jamaican rule 14.1 (1) ('party may admit the truth of the whole or any part of any other party's case') was not intended to apply to pre-claim admissions and therefore the defendant did not need the court's permission to withdraw the admission. The Vice President concluded that the trial judge was wrong to apply the English rule 14.1 to the pre-claim admission.

[30] Unfortunately for the defendant the matter did not end there. The learned Vice President acceded to the submission 'that if this court were satisfied that a complete denial of any primary liability had no real prospect of success, it could properly uphold the judgment on liability, albeit by a different route' (para. 22). In other words, the Court of Appeal was invited to determine whether the claimant could succeed on a summary judgment application and if that was the case then the judgment ought to be upheld.

[31] The Vice President examined the facts of the case and concluded that 'all the circumstances we considered that there was no real prospect of the Defendants resisting a finding of primary liability' and summary judgment might therefore be entered against the defendant (para 32). The judgment on liability was indeed upheld on the basis that on the case as pleaded summary judgment was available to the claimant. The court proposes to determine whether summary judgment should be granted and if yes, then there is no useful purpose in permitting the withdrawal of admissions.

[32] Brooke VP considered **Gale** and concluded 'that the judgments in this court in ***Gale v Superdrug Stores Ltd*** [1996] 3 All ER 468, [1996] 1 WLR 1089 and particularly the judgments of the majority, should now be approached with caution because they were concerned with the effect of a regulatory regime which was abolished on 26 April 1999' because 'there were features of pre-CPR practice, as faithfully described by Millett LJ, which would no longer be acceptable practice today' (para 34).

[33] Brooke VP commended the first instance decision of Sumner J in **Braybrook v Basildon & Thurrock University NHS Trust** [2004] EWHC 3352 as the correct approach to deciding whether to permit withdrawal of an admission after an action has commenced. Brooke VP said at paragraphs 35 and 36:

> ***[35]*** *Finally, the unreported judgment of Sumner J in Braybrook v Basildon & Thurrock University NHS Trust (7 October 2004) appears to us to offer valuable guidance (at para 45) on the way in which a court should exercise its discretion when determining whether or not to permit the withdrawal of an admission that was made after an action was commenced. After referring to a number of earlier cases he said:*
>
> *"45. From these cases and the CPR I draw the following principles.*
>
> *1. In exercising its discretion the court will consider all the circumstances of the case and seek to give effect to the overriding objective.*
>
> *2. Amongst the matters to be considered will be:*
>
> *(a) the reasons and justification for the application which must be made in good faith;*

(b) the balance of prejudice to the parties;

(c) whether any party has been the author of any prejudice they may suffer;

(d) the prospects of success of any issue arising from the withdrawal of an admission;

(e) the public interest, in avoiding where possible satellite litigation, disproportionate use of court resources and the impact of any strategic manoeuvring.

3. The nearer any application is to a final hearing the less chance of success it will have even if the party making the application can establish clear prejudice. This may be decisive if the application is shortly before the hearing."

[36] *Above all, the exercise of any discretion will always depend on the facts of the particular case before the court. The words "will consider all the circumstances of the case" have particular resonance in this context.*

[34] This court accepts the considerations laid down by Sumner J as appropriate for this case. The court also accepts that Part 14 applies only to post-claim admissions. The law has moved on since **Gale**. There is no good reason to return to the pre-CPR cases on this issue. The CPR is a new procedural code intended to usher in a new mode of thought. From this court's perspective **Gale** is now a historical marker but not a point of departure for considering the law in this area. The modern and better approach is shown the cases cited after **Gale**. That is the position this court will adopt for this case.

Application to facts

[35] The court will deal with the $41,153,680.00 first. This sum was agreed by the debtor in a document signed by no less than four representatives of Super Plus. The document is a pre-claim one. When the defendants filed their defence they admitted that approximately $33m were owed. This was a formal admission in the defence signed by Mr Richard Chen who described himself as a director of the defendants. This is a post-claim admission made by a party to the claim. The defendants had the advice of a reputable firm of attorneys who are well versed in commercial matters. It is extremely unlikely that this admission was done in error. Indeed, Mr Chen signed a defence that said that the figure of $33m was arrived at after further reconciliation. It is not entirely accurate to say, as Mr Chen has sought to do, that the sum was not based on any proof of the sums owed. The document referred earlier conveys extensive discussion and examination of documents. The same conclusion can be arrived at in respect of the actual pleading in the defence regarding the $33m. This position was maintained for nearly six years. A judge, at any trial, would undoubtedly be impressed by the fact that it was the defendants who clearly stated what they accepted that they owed.

[36] Mr Chen seeks to say that the claimants will not be prejudiced because they are not entitled to judgment for sums they cannot prove they are owed. Herein lies the problem. The parties met before the claim was issued and obviously had discussion after the claim was issued and the defendants accepted that they owed at least $33m.

[37] Mr Chen has not pointed to any new evidence that has come forward. He seems to be taking his stand on whether the claimants can actually prove their case as distinct from an affirmative position that he can disprove the claim. To be fair, the new defence to the $41m claim is that no goods were delivered. It is truly remarkable that this is only now coming to light after six years during which the defendants were always represented by counsel and very experienced counsel

at that. If this were the case, then the document signed by all the parties in October 13, 2009 is inexplicable. If no goods were delivered how could four representatives of Super Plus sign a document which has expressions such as 'balance on paid invoices'; 'balance as per General Ledger'; 'add goods on invoices not paid for'? What would they be agreeing to. Not only that, Mr Chen signed the defence on behalf of both defendants. Until, shown otherwise the court has to proceed on the basis that both companies were properly run which means that the internal organs of the companies examined the claim, conducted proper internal enquiries and accepted liability in the sums stated by them. The court has to assume that Mr Chen was properly authorised by the companies to make the admissions that he did.

[38] Mr Nigel Jones submitted that when the claimants' amended statement of case is examined there is some uncertainty regarding who actually sold the goods. In the $16m claim it is not clear whether the claimant is Rainforest or Continental and in respect of the $41m it is not clear whether the claimant is Copperwood or Continental. The implication here is that a trial is needed to say who the true creditor is.

[39] Mrs Gibson Henlin submitted that the relationship between the parties was conducted on the basis that claimants and the defendants were for all practical purposes operating as one entity. By this it was meant that the claimants are so closely connected in terms of leadership and operations that they simply supplied goods to both defendants without regard to clearly identifying which company was the real purchaser because the defendant companies were operated as one.

[40] Mr Wongford Lewis, who swore an affidavit on behalf of Rainforest, stated that the arrangement between the parties for the supply and payment of goods was not formalised in writing. It was mainly word of mouth and upon the honour of the defendants that they would pay their bills as and when due.

[41] Mr Wongford Lewis also swore that when the claim was issued in 2009 in light of the defendants' considered response to both pre-claim and post-claim the claimants did not bother to secure all the documents necessary to prove the fine details of the case. They were archived and there is now great difficulty in locating them. Even though Mr Wongford Lewis did not say so there would also be the problem of relying on memories of witnesses who were involved in the sale of products. The claimants would now have to find the actual persons who in fact received the orders; those persons who now need to try and recall exactly to whom they spoke; when and where the conversations took place. The witnesses would now need to recall the amount of product ordered. The claimants would now need to find out the precise nature of the receipt of goods. Is it that the claimants delivered the goods to the stores of the defendants or was it that the defendants sent for the goods? These are matters that would be prejudicial to the claimants in putting forward their case at this stage. The same problems of proof would arise in relation to the $16m.

[42] Turning now to the $16m Mr Nigel Jones submitted that the situation for the claimants here is even worse than it was for the $41m. It was submitted that the document submitted by the claimants was not signed by any representative of Super Plus. In addition it refers to Tikal and not Super Plus. From this court's perspective, the document is consistent with Mrs Gibson Henlin's submissions regarding the close connection between Super Plus and Tikal. When one looks at the entire document it is headed 'Rainforest Seafoods Customer Reconciliation As At November 02, 2009.' It then lists twenty two Super Plus stores locations ranging from Brown's Town in St. Ann to Falmouth, Trelawny, to Stony Hill St Andrew. The end of the documents states this: *Reconciled Balance Per Tikal $16, 953, 744.66.* The document refers to both Tikal and Super Plus without any rigid distinctions between the two entities. Indeed the supply of goods to Super Plus was regarded as supplying Tikal. Consistent with Mrs Gibson Henlin's submission, when the defence came in, Mr Chen did not distinguish to indicate whether the actual sum was owed by either Super Plus or

Tikal. In other words, Mr Chen signed pleadings for both defendants without distinguishing clearly between the two. He never said, Super Plus owes this and Tikal owes that. This response in light of Mrs Gibson Henlin's submission seems to be best explicable on the basis that during the course of trading no one paid close attention to whom was actually ordering the goods and treated both defendants as one because the ownership and leadership structures were hardly distinguishable. While legally and technically both defendants are separate legal entities no one was insisting on this rigid legal distinction.

[43] Even Mr Richard Chen has admitted that he has some problem with his records. In his affidavit dated May 6, 2015, he depones that 'I have reviewed what remains of our records.' Miss Kashina Moore, in her affidavit, gives some information that may tell where some of the rest of the records are. Miss Moore deponed that some of them are with the defendants' previous attorneys at law. Attempts have been made to secure them but no success so far.

[44] When the defendants responded in the first defence to the $16m claim they quibbled about a sum less than two hundred thousand dollars. When a creditor is seeking $16 ¾ m in debt and the debtor disputes less than two hundred thousand dollars it would be pennywise and pound foolish for the creditor to insist on the last penny since you are collecting more than 95% of the sum owed.

[45] It is to be noted that the $16m identified the locations to which goods were supplied. This document was clearly being relied on by the claimants in the discussions with the defendants.

[46] The claimants have relied on previous affidavits filed in this matter. For example, Mr Dave Lyn swore an affidavit dated January 23, 2013 in which he refers to a meeting held on January 1, 2011 at the offices of Continental where Mr Wayne Chen, a director and share holder of Tikal, and representative of all three claimants were present. There is dispute over what was eventually agreed

but the main point here is that meetings were held regarding the indebtedness. The court has significant difficulty accepting that a defendant when faced with a combined claim of $57m dollars would have failed to check to see whether the goods were in fact supplied at all or to the value claimed. The court is of the view that it would require more than ordinary advocacy to convince this or any other court that the defendants, operated by experienced businessmen, for nearly six years and many meeting and letters written by experienced commercial lawyers would somehow fail to recall or even confirm that goods were either not supplied or not supplied to the value claimed as is now being alleged. The likelihood of a judge accepting this at trial is not very high.

[47] If more were needed that the defendants have always accepted their indebtedness for goods sold and delivered it can be found in a letter dated August 16, 2011 written by Mrs Jennifer Messado, attorney at law to Mr Dave Lyn of National Continental Corporation Limited. The letter is captioned 'Tikal Group/Super Plus indebtedness.' The letter begins with these words, *We act on behalf of Tikal Group in relation to the indebtedness for this.* Please note that th letter is captioned Tikal Group/Super Plus indebtedness: further proof that both defendants were treated as joint debtors from 2009 to 2015. A clearer acknowledgment of debt is difficult to imagine. The only thing missing from the letter was a statement of the actual amounts. The letter goes on to propose 'two serious avenue of amicable repayment and agreement herein to settle the accounts as follows.' Thus for the defendants to contend that there is real prospect of convincing a judge that they have a real prospect of establishing that they either did not get the goods or the extent of indebtedness is substantially less is not tenable.

[48] In light of what has been said about the steps leading up the post-claim admissions and the documents in existence before the claim was issued (which would be admissible in evidence) it is difficult to resist Mrs Gibson Henlin's submission that the defendants' application to withdraw the admission was not

made in good faith. It is also difficult not to agree with the view that the present predicament of the defendants is of their own making. They were the ones who made the admissions as to precise amounts and they held this position for nearly six years including a trip to the Court of Appeal to correct a judgment. It is virtually impossible to see how the defendants can possibly succeed on the issue the issue of liability.

[49] The court takes into account the view expressed by Waite LJ in **Gale** at page 476 – 477, 1097H where his Lordship said:

> *I prefer Mr Vineall's 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). Although the judge reached his conclusions in the course of a full and careful judgment, Mr Vineall's criticisms of the judge's approach to the exercise of his discretion are also, in my judgment, well founded. The judge had no evidence before him of any specific matter which rendered it more difficult for the plaintiff to prosecute a claim in liability than it would have been if the admission had never been made. No one pointed, for example, to any eye witness whose evidence would have been obtained if liability had been in issue but who cannot now be traced. It is certainly true (as Sir George Waller pointed out) that this is a field in which there is scope for some degree of obvious inference, but the judge had nothing besides a general assumption that all delay is prejudicial to place against the very clear prejudice which the defendants would suffer if they were not allowed to urge the view of liability on which--albeit at a late stage--they had*

received fresh advice from their solicitors as soon as they were instructed. 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 minimise 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.

[50] However, as stated earlier, this was in the pre-CPR period where there was not the same anxiety for utilisation of the court's time and resources. The mantra of the time was that of Bowen LJ in **Cropper v Smith** (1884) 26 Ch D 700, 711:

There is no rule that only slips or accidental errors are to be corrected. The rule says, "All such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy." I have found in my experience that there is one panacea which heals every sore in litigation, and that is costs. I have very seldom, if ever,

been unfortunate enough to come across an instance, where a person has made a mistake in his pleadings which has put the other side to such a disadvantage as that it cannot be cured by the application of that healing medicine.

[51] Costs are no longer seen as the great panacea for all ills. The overriding objective now requires the courts to have regard to impact on other persons waiting to use the court system.

[52] Millett LJ in **Gale** stated at page 477 observed that:

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. 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.

[53] The remedy has not been to add to the delay or simply say, litigation is what it is and will take long. The response has been to demand greater efficiency and better use of court resources and time. More and more it is appreciated that delay, without any thing further, is inherently unjust because until the matter is determined the parties have to keep pumping more and more scarce resources into the matter. The matter has to be kept on the list much longer. Judicial time and court resources have to be allocated to the case. Delay produces (i) uncertainty, (ii) puts lives on hold and (iii) strains budgets especially of poor or not well funded litigants. Being kept of money for extended periods can spell financial doom. A speedy resolution, including collection of debt, may make the

difference between a business surviving and the business going under with the consequential destruction of jobs and loss of earning. This in turn can undermine government revenue and if it is significant systemic problem hamper economic growth. Litigation may be cumbersome but the solution is to add lubrication to make the cumbrous movement, less glacial and more Bolt like. Take this very case, the claimants have been seeking to collect nearly $200m for nearly six years. One wonders how the claimants survived with such a huge debt outstanding which means a de facto loan to the debtors.

[54] Waite LJ took the judge in **Gale** to task for that judge's 'general assumption that all delay is prejudicial' rather than looking for specific prejudice. The very approach of Waite LJ shows how outmoded that thinking now seems. In the modern world where countries are competing for investment the impact of delay cannot be overstated. The specific prejudice in this case has been pointed out and now, in the context of scarce resources, delay is prejudicial to all court users and potential users. It is common knowledge that investors in countries not only look at the fairness of judicial process but how long it takes. These are matters that did not loom large in the consideration of Waite and Millett LJ in **Gale**.

[55] Mrs Gibson Henlin cannot be faulted for suggesting that this latest manoeuvring by the defendants is anything other than strategic and seeking to take advantage of the problems the claimants may face in getting together witnesses and documents.

[56] This court concludes that when one looks at the pre-claim admissions, the post-claim admission, the first defence filed, the fact that it took a businessman whose business is retailing to find out nearly six years later that the goods for which he has been billed were not delivered the prospect of successfully defending the claim is illusory. The court is hard pressed to see why summary judgment should not be granted. The conclusion is that application to withdrawn the admission is refused. The application for summary judgment is granted.

[57] The judgment is granted for the sums admitted. Judgment is granted in favour of Rainforest for the sum of $16,774,552.00 and in favour of CB Foods Limited in the sum of $33,093,241.00. CB Foods Ltd has been substituted for Copperwood. Counsel to submit draft order giving effect to the reasons for judgment and include all necessary consequential orders. Leave to appeal refused.