[2013] JMCC Comm. 16

IN THE SUPREME COURT OF JUDICATURE

IN THE COMMERCIAL DIVISION

CLAIM NO. 2013 CD 00137

BETWEEN	**PETROJAM LIMITED**	**CLAIMANT**
AND	**SEA VENTURES SHIPPING LIMITED**	**1st DEFENDANT**
AND	**WORLDWIDE GREEN TANKERS**	**2nd DEFENDANT**
AND	**The owners and/or persons interested in the M/T GREAT NEWS**	**3rd DEFENDANT**
AND	**EVEROL BAILEY**	**4th DEFENDANT**

Mrs. Gibson-Henlin and Mr. Herbert Hamilton, instructed by Lightbourne & Hamilton, Attorneys-at-Law for the Applicant/3rd Defendant.
Mr. Maurice Manning and Miss Arlene Williams, instructed by Nunes, Schofield, DeLeon and Co. Attorneys-at-Law for the Respondent/ Claimant.

Heard: 18th September, 1st November 2013

CIVIL PRACTICE AND PROCEDURE - APPLICATION TO VARY OR REVOKE ORDER - APPLICATION MADE BEFORE ORDER PERFECTED - SPARING EXERCISE OF POWER - OVERRIDING OBJECTIVE TO BE PURSUED, SUBJECT TO PRINCIPLED CURTAILMENT OF THE PRINCIPLE

Mangatal J.

[1] This Application is in relation to orders made by me on July 5th, 2013.

[2] In June 2009, the Claimant, Petro Jam Limited ("Petro Jam"), a company duly incorporated under the laws of Jamaica, had commenced admiralty proceedings against the 1st-3rd Defendants to recover damages caused by the collision of the M/T Great News into its pier. It was alleged by Petro Jam that the collision was caused by the 1st-

3rd Defendants, who negligently caused the vessel to collide into Petro Jam's pier and that this resulted in extensive damage being done to it. The 3rd Defendant filed a Defence in response on July 16th, 2009. In June 2010, Petro Jam amended its Claim Form and Particulars of Claim to include as a party to the suit, the 4th Defendant, a Marine pilot employed to the Port Authority of Jamaica and who was the one navigating the ship at the time of the collision. No amended Defence was forthcoming from the 3rd Defendant.

[3] On May 30th, 2013, Petro Jam filed an Application for Court Orders. In that application, Petro Jam was seeking among other things to have the 3rd Defendant's Defence struck out as disclosing no reasonable grounds for defending the claim and that judgment be entered in its favour against the 3rd Defendant with damages to be assessed. In the alternative, Petro Jam also asked for Summary Judgment to be entered against the 3rd Defendant.

[4] On the 5th July, 2013, that application was heard *inter-partes* before me. At that time, the 3rd Defendant was represented by Counsel Miss Donaldson who was instructed by Lightbourne and Hamilton. Miss Donaldson was quite candid with the Court and indicated that the primary issue that her clients wished to protect was the limit of liability that was determined by the order of my brother Justice Glen Brown on June 18th 2009 and not the issue of liability in and of itself. The only other issue raised by Miss Donaldson was that Rule 15(3) (e) of the CPR 2002 specifies that Summary Judgment may not be given by the Court in Admiralty Proceedings. It was at this time that Counsel for PetroJam, Mr. Manning, withdrew that aspect of the application and indicated that solely the striking out aspect would be pursued instead. In those circumstances, I indicated that I was constrained to only examine the statements of case of the parties. Having done so, and heard submissions from Counsel on both sides, the following orders were made:

i. That paragraphs 4 and 5 of the Third Defendant's Defence are struck out and the defence as set out in the remaining paragraphs stand.

ii. That judgment is entered for Petro Jam against the 3rd Defendant on the issue of liability with damages to be assessed.

Subsequent to the orders being made and before the formal order was perfected; the 3rd Defendant filed the instant Application for Court Orders dated July 10th, 2013.

[5] On the date when this Application came up for hearing before me, Counsel for the Applicant, Mrs. Gibson-Henlin made an application to amend the Notice of Application, so that the orders being sought were consistent with the grounds stated. The Application was opposed by Counsel for the Respondent, Mr. Manning. On hearing the respective arguments, I allowed Mrs. Gibson-Henlin's application.

[6] By way of Amended Notice of Application for Court orders, filed September 19th, 2013, the following orders are being sought by the Applicant/3rd Defendant:

1. That the Court varies its order to permit the 3rd Defendant to amend its Defence filed on the 16th July, 2009 to respond to the Second Amended Particulars of Claim by filing and serving an amended Defence within 28 days of the date thereof.
2. That the order for Judgment be vacated.
3. Orders for case management be made accordingly.
4. Alternatively, an order granting permission to appeal the Judgment of the Honourable Miss Justice I. Mangatal, delivered on the 5th July 2013.
5. Costs of this application to be Costs in the Claim.
6. Stay of proceedings in the Supreme Court pending the hearing of the appeal.
7. Such further relief as this Honourable Court deems fit.

[7] The 3rd Defendant enumerated several grounds on which this application was being pursued, namely:

1. The overriding objectives and the interest of justice. The non-compliance with rule 10.5 can be remedied by amendment.
2. A Judge can revoke his/her order at any time provided the formal order has not yet been drawn up.
3. The 3rd Defendant has a real defence to the Claim. It was not able to put the evidence before the Court because of the time between service of the Application and the hearing. The Application for Summary Judgment was short-served. The Respondent did not have sufficient time to put in evidence which would have demonstrated its defence. This evidence would also have remedied the alleged defects relating to any alleged reasonable grounds for defending the claim.
4. The Defence before the Court was not responsive to the 2nd Amended Particulars of Claim. There was therefore no, or no sufficient basis on which the Court should or could have made the findings it did having regard to the full terms and effect of rule 10.5, the rules that permit amendments and the overriding objectives.
5. In the circumstances the striking out of the Defence was too draconian a measure when compared with any prejudice caused to Petro Jam than the sanction permitted by rule 10.5 of the CPR having regard to all the circumstances of the case including the following:
    a. Petro Jam and the Defendants were generally dilatory in prosecuting and defending the matter.
    b. Petro Jam amended its Particulars of Claim on two occasions prior to the hearing of the Applications on the 5th July 2013.
    c. The Second Amendment was on the 1st June 2010 and served on the 3rd Defendant on the 3rd June 2010.
    d. The 3rd Defendant became entitled by virtue of the CPR to amend its Defence once without permission prior to the

Case Management Conference within twenty-eight (28) days thereof.

e. The 3rd Defendant missed that deadline. In consideration of saving costs the 3rd Defendant was awaiting the notification of the Case Management Conference to make its amendments to the said Defence.

6. That had the 3rd Defendant been given an opportunity to provide evidence, it would have produced a report of the Port Authority's Inquiry dated the 1st June 2009 which demonstrates that Petro Jam is aware that 3rd Defendant has an arguable Defence on liability as between it and the 4th Defendant. In other words, the full facts were not placed before the Court. Petro Jam participated in that inquiry and is or ought to be aware of the report and its findings. This is a material fact that was not brought to the attention of the court and is likely to have caused the Court to exercise its discretion in favour of the 3rd Defendant.
7. Striking out the Claim and entering judgment against the 3rd Defendant deprives the 3rd Defendant of the opportunity of filing an Ancillary Claim against the 4th Defendant for contribution and indemnity. This is relevant in so far as the 3rd and 4th Defendants are sued as joint tortfeasors.
8. The Application was based on the Affidavit of Arlene Williams.
9. Counsel for the 3rd Defendant Mr. Herbert A. Hamilton was unavailable and overseas on a medical appointment. This was part of the reason that affected the ability of the firm to get instructions from its overseas clients to respond to the applications.
10. Permission to appeal is sought pursuant to Part 1.8 of the Court of Appeal Rules, 2002.
11. The Applicant has a real chance of success on the appeal.
12. The Claim is complicated and will require expert assessors having regard to the facts. The 3rd Defendant will be deprived of an

opportunity of calling evidence at the assessment if it is not permitted to amend its Defence on liability and quantum in relation to Petro Jam and the 4th Defendant.

13. The appeal is not rendered nugatory.
14. The interest of justice favours the grant of permission

3rd Defendant's Submissions

[8] The 3rd Defendant in their written submissions filed September 16th, 2013 submitted that a judge has the power to amend his or her ruling at any time before it is perfected, if it is in the interest of justice to do so. It was argued on behalf of the 3rd Defendant that the basis of this power is found in Part 26.1(7) of the CPR. It was further argued that even though Part 26.1(7) of the CPR does not prescribe how this power should be exercised, the case of ***Stewart v Engel [2000] 1 WLR 2268, CA*** provides useful guidance as to considerations to be applied in the exercise of this discretion.

[9] The 3rd Defendant sought to offer several reasons as to why the Court should vary its order. It was their submission that certain facts were omitted or otherwise not brought to my attention at the time when the Respondent's earlier application was being heard. The 3rd Defendant claims that such facts would have been material in the exercise of my discretion. At paragraph 21 of the 3rd Defendant's written submissions, the following were the matters raised, which it contends ought to have been brought to my attention:

a. The delay in prosecuting the Claim by both sides.
b. The only defence on file was not responsive to Petro Jam's Second Amended Particulars of Claim.
c. The Defence was filed on the 16th July 2009.
d. During the period of delay, Petro Jam and 3rd Defendant were parties to an inquiry into the accident that is the subject matter of the Claim. This was in accordance with Section 23 of the Pilotage Act.

e. This inquiry produced a report on the 1st June 2009 which included certain findings in relation to the position of liability as between the 3rd and 4th Defendant.

f. Petro Jam amended its Particulars of Claim and filed the Second Amended Particulars of Claim on the 1st of June 2010, to add the 4th Defendant.

g. The Defendant failed to amend within the time specified in the rules to amend its Defence. It may do so once without permission within this specified period.

h. The answers in the Defence are not aligned to the averments in the Second Amended Particulars of Claim served on the Defendants on the 3rd June 2010 which was amended to include the 4th Defendant and liability under the Pilotage Act.

[10] The 3rd Defendant further submitted that there is no prejudice or inconvenience to be suffered by Petro Jam if the Court were to vary or revoke its order and grant the amendment. The 3rd Defendant's position was that since this is an interlocutory matter, and no case management conference having been held or a date set for such conference, there would be no prejudice to Petro Jam if the application was to be granted. Accordingly, as this is an application to amend, it was argued that this Court should be guided by previous authorities which have acknowledged that parties are to be given every opportunity to amend or it is desirable that amendments be permitted so that matters in issue can be fully litigated and placed before the court.

Petro Jam's Submission

[11] Counsel for Petro Jam, Mr. Manning agreed in their written submissions that by virtue of Rule 26. 1(7) of the CPR, I have the power to vary or revoke my order at any time before it is perfected if it is in the interest of justice to do so. They too also relied on the ***Engel*** decision for this proposition. However, Petro Jam seems to differ on the approach that I should adopt in deciding whether to exercise this jurisdiction or power. It was submitted by Mr. Manning that any exercise of my power pursuant to the rule can

only be done in very limited or restricted circumstances. These circumstances he submitted include: i) where there had been a material change of circumstances since the order was made ii) where a manifest mistake was made on the part of the judge in the formulation of the order iii) where at the time the judge was making the earlier order, he/she was misled in some way as to the correct factual position before him or her whether innocently or otherwise misstated.

[12] Mr. Manning rejected the 3rd Defendant's assertion that there were facts material to the issue that were not brought to my attention at the time the application to strike out was being made. It was argued that as it relates to the issue of the Inquiry Report of the Port Authority, that is a fact that was available, known or ought to have been known to the Applicant at the earlier hearing or time of the original order. Consequently, following the recent decision of ***Tibbles v SIG plc [2012] 1 WLR 2591 (CA),*** that position would point in the direction of refusing the application. On the other matters put forward as not being disclosed, it was argued on behalf of Petro Jam that those matters would have been matters that were evident on the pleadings before me at the time the original order was made. Consequently, the 3rd Defendant has not demonstrated a material change of circumstance since the making of the order that would justify there being an appropriate revisit of the order originally made.

[13] The contention continued that in the interest of justice, the order made by me should not be revisited. It was argued that Rule 26.1(7) was not created to enable an Applicant who was properly served with process and who was in attendance at the hearing of an application, but who through their own error or ill preparation did not raise certain issues, to have a second opportunity to reargue the application or present new evidence. Further, that Rule 26.1(7) was not tantamount to an appeal and the 3rd Defendant should not be allowed to reargue the application or appeal the order through the back door via the application now before the Court.

[14] In addition, having regard to Section 29 of the Pilotage Act, allowing the 3rd Defendant to amend its defence to blame the 4th Defendant for the collision would not

take the 3rd Defendant's case any further on the issue of liability. The Court would therefore be acting in vain.

[15] Petro Jam closed with the submission that in all the circumstances of the case, the Court should not vary the order to permit the amendment to the Defence, as the 3rd Defendant has not provided a proper basis for doing so.

Resolution of the Issues

[16] The following are the issues which must be resolved:

a) Whether, having made an order on July 5th, 2013 to have portions of the 3rd Defendant's defence struck out, the order not yet being perfected, does the court have power to revisit that order to have it varied or revoked to facilitate the 3rd Defendant amending its defence?

b) If the court has such power, what are the principles that govern any exercise of the power or discretion to vary or revoke an order or judgment of the Court?

c) Has the 3rd Defendant established any basis on which I can exercise that power?

d) In the alternative, has the 3rd Defendant demonstrated that permission should be granted to appeal the order made July 5th, 2013?

Jurisdiction to vary or Revoke Order before order has been perfected

[17] Rule 42.8 of the Civil Procedure Rules ("CPR") states:

> **"A judgment or order takes effect from the day it is given or made unless the Court specifies that it is to take effect on a different date."**

Notwithstanding this, Rule 26. 1(7) provides that:

> **"A Power of the Court under these rules to make an order includes a power to vary or revoke that order."**

Whilst a judgment or order of the Court is to have immediate effect, unless otherwise stated by the Court, the Civil Procedure Rules have given the Court express power to vary or revoke such orders or judgment. The rule is not specific

as to when or the circumstances in which the power can be invoked. As the rule does not have a temporal element to it, it would seem that a Court could revisit its order or judgment, with a view to revoking or varying it, between the time it was handed down and the date which it was sealed or otherwise perfected. This contrasts with the Court's general power to correct a clerical mistake or accidental slip or omission at any time (Rule 42.10 CPR).

[18] In the English Court of Appeal decision of ***Stewart v Engel [2000] 1 WLR 2268 (CA***), the plaintiff in that case had made an application to amend her statement of case, prior to the sealing of an order made by the Judge. Her application was made pursuant to Rule 3.1(7) of the English Civil Procedure Rules which is worded similarly to our Rule 26.1(7). The Court was of the view that the English Rules did permit the Court to revisit an original order before it was perfected. In addition to the reason stated earlier, Sir Christopher Slade indicated that prior to the introduction of the English Civil Procedure Rules, the Court did have jurisdiction to revisit its order prior to it being drawn up or perfected. He expressed the view that on reading Rule 3.1(7), that position has not been altered in any way and the Court does continue to possess that power. In my view, it is therefore clear that I do have the power to consider this application.

Sparing exercise of the power

[19] An Order or Judgment made by a Judge should usually follow after very careful and thoughtful consideration of the facts and law. Nevertheless, Rule 26.1(7) affords recognition that the Court is not rigid in its decision- making process and there may be occasions where justice would require the revocation of an order. However, Baroness Hale delivering the opinion of the Supreme Court of England in the recent decision of ***In Re L and another (Children) Preliminary Finding: Power to Reverse) 2013 1 WLR 634*** has warned against what she described as 'Judicial Tergiversation" as the power is meant to be reserved for genuine cases where the circumstances warrant its exercise. It is for this reason, that the power to revoke or vary one's order should be cautiously and sparingly exercised, whether it be on the volition of the judge or on the invitation of a party to the suit.

Principles to be applied in deciding whether to vary or revoke an order

[20] Petro Jam in their written submission had argued that the discretionary power under Rule 26.1(7) should be exercised only in very limited or restricted circumstances and that there must be some compelling reason to do so. Support for what can be described as a very stringent test can be derived from the ***Engel*** decision and several other decisions decided subsequently to that case and which were cited by the Respondent. In the ***Tibbles*** decision, Rix LJ at paragraph 39 (i) and (vii) of his judgment provides some insight as to why this stringent test was applied. He stated:

> 39. (i**) "The rule is apparently broad and unfettered, but considerations of finality, the undesirability of allowing litigants to have two bites at the cherry and the need to avoid undermining the concept of an appeal, all push towards a principled curtailment of an otherwise apparently open discretion."**

He continued:

> 39. (viii) **"The cases considered above suggest that the successful invocation of the Rule is rare. Exception is a dangerous and sometimes misleading word, however, such is the interest of justice in the finality of a Court's orders that it ought normally to take something out of the ordinary to lead to variation or revocation of an order, especially in the absence of a change of circumstances in an interlocutory situation."**

[21] In the ***Engel*** case however, Clarke L.J. who dissented, disagreed with the approach taken by the majority in addressing this issue. It was the opinion of Clarke L.J. that the starting point in the analysis is not whether there are any exceptional circumstances, but whether the power should be exercised having regard to the overriding objective of dealing with each case justly. This he says will depend upon the particular circumstances of the case. According to Clarke L.J., whether or not there are any exceptional circumstances is but one factor to be considered when deciding whether the overriding objective favours a judge revisiting his or her order or judgment. The approach of Clarke L.J. seemed to have found favour with the Supreme Court of England, in ***In Re L and another.***

[22] The exceptional or compelling circumstances test seemed to have arisen in cases pre-dating the CPR and continues to wield considerable influence. Courts have been at pains not to provide any specific definition of the circumstances that would fall to be considered under this principle. Whilst it is understandable that the integrity of an Order or Judgment of the Court must be protected, I have come to the view, particularly, on reading the judgment of the UK Supreme Court in ***In Re L and another***, that it may well be that the circumstances do not necessarily have to be exceptional, but rather that there should be strong reasons for its exercise and, as Rix L.J said in ***Tibbles***, a principled curtailment of the power of the Judge to revoke or vary his or her ruling. The rule must not be interpreted in a manner that creates a high mound over which it is impossible for a litigant to climb, no matter what the facts and circumstances. In instances where a Judge is call upon to vary or revoke any order made, it must be remembered that the Court in exercising this power has to temper its duty with its inherent power to guard against any miscarriage of justice. On the other hand, the power is not to be lightly exercised.

[23] In considering whether the overriding objective favours a variation or revocation of the original order, the following are some considerations which may be helpful in the analysis. As stated by Baroness Hale, “Every case is going to depend upon its particular circumstances.”

1. The Court could consider whether there are any compelling reasons justifying the Court revisiting its orders or judgment. In the ***Engel*** decision, the decision of Neuberger J ***In re Blenheim Leisure (Restaurants) L td (no.3) The Times, 9th November 1999*** was cited as setting out justifiable instances of cases where the jurisdiction might justifiably be invoked. These include:

    i. Plain mistake on the part of the court

    ii. Failure of the parties to draw the Court’s attention to a fact or point of law that was plainly relevant

    iii. Discovery of new facts subsequent to the judgment being given

iv. If the applicant could argue that he was taken by surprise by a particular application from which the court ruled adversely to him and that he did not have a fair opportunity to consider.

2. In the ***Stewart v Engel*** case**,** it was also suggested that where the Court is being asked to revisit its order or judgment in order to allow an amendment to a statement of case, the Court should consider the timing of the application.

3. Both Clarke L.J. and Baroness Hale in their respective judgments indicated that the Court should also consider whether any party had acted upon the decision to their detriment in deciding whether to grant or refuse the application.

4. ***In Re L and another***, Baroness Hale also pointed out that justice might require the revisiting of a decision, for no more reason than the judge having a carefully considered change of mind.

Application of the Law

[24] As seen from the 3rd Defendant's submission, one of the arguments being put forward as to why I should revisit my order rests on the issue of there being material non-disclosure at the time the application to strike out was being heard. I agree with the Counsel for Petro Jam, that save for the Inquiry Report of the Port Authority, all the other matters stated as not being disclosed would have been evident from the Court documents filed. There would not have been an active duty on any party to draw my attention to them, unless it was peculiarly relevant to any issue that I had to decide.

[25] On the other hand, the Inquiry Report, would have had to be brought to my attention, if any party intended to rely on it. From the affidavit of Herbert Hamilton, filed July 10th, 2013 filed in support of the application to vary, it seems that the parties would have been aware of this report from by at least the 3rd of June 2010. This is not a situation where the 3rd Defendant was taken by ambush by Petro Jam's Application to Strike Out. As a matter of fact, at paragraph 10 of the affidavit of Herbert A. Hamilton, it was indicated that the 3rd Defendant was served with Petro Jam's Application to strike out on the 24th June, 2013. It therefore means that if the 3rd Defendant felt that the

Inquiry Report was essential to their response to the application to strike out, that ought to have been raised by them. This was not done.

[26] Rix L.J. in ***Tibbles v SIG plc*** at paragraph 39 (v), which was relied upon by Petro Jam, stated:

> "**Similarly, questions may arise as to whether the misstatement (or omission) is conscious or unconscious; and whether the facts (or arguments) were known or unknown, knowable or unknowable. These, as it seems to me, are also facts going to discretion; <u>but where the facts or arguments are known or ought to have been known as at the time of the original order, it is unlikely that the order can be revisited and that must still be more strongly the case where the decision not to mention them is conscious or deliberate."</u>**

[27] It is clear that Rix LJ's exposition of the law has severely weakened the thrust of the 3rd Defendant's argument in respect of the non-disclosure of the Inquiry Report. As was expressed by Patten J in ***Lloyds Investments (Scandinavia) Ltd v Ager-Hanssen [2003] EWHC 1740 (Ch),***

> **"Counsel now, cannot seek to re-argue that application by relying on "evidence" which would have been available to him at the time at the earlier hearing, but which for whatever reason, he or his legal representation chose not to deploy."**

[28] In ***Stewart v Engel,*** the point was also made that where a party had abandoned a point before judgment was given, that party cannot wish to have the opportunity to re-open the matter, after receiving new legal advice.

[29] The Court has been strident in expressing the view that a litigant should not be allowed multiple bites of the cherry by way of an application to vary or revoke a court order. This is especially so in a case such as the present, where there was a full inter-partes hearing. As was submitted by Petro Jam, Rule 26.1(7) is not a back-door method by which unsuccessful litigants can seek to re-argue their cases. Nor is it an invitation to

review the same material to come to a different conclusion. If the Court were to do this, it would be adopting an appellate role in reviewing its own orders, a jurisdiction which it does not have.

[30] In any event, the Inquiry Report would not have assisted the 3rd Defendant in proving that it had a reasonable prospect of defending the claim. The report did not come to any findings that would join the issue of liability between the Claimant and the 3rd Defendant. Section 29 of the Pilotage Act reads:

> ***The owner or master of a ship navigating in any Pilotage area shall be answerable for any loss or damage caused by the ship or by any fault of the navigation of the ship in the same manner as he would if navigation in a non-Pilotage area in Jamaican territorial waters.***

It imposes liability on the owner or master of a vessel under compulsory Pilotage for damage caused by the Vessel or by the fault of the navigation in the same way the owner would be liable if navigation is taking place in a non-Pilotage area. The Inquiry Report had found that both the 4th Defendant and the Captain were to be held responsible for the collision. It would therefore seem that on the question of liability, the Report would not have aided the 3rd Defendant as the circumstances would have fallen squarely within the ambit of the statute. At the time the Application to strike out was being heard, Counsel for both sides observed that the real issue in the case surrounds the quantum of damages. If the Inquiry Report had featured at all then indeed, that would have further supported those observations. It is for the reason that quantum of damages is the live issue between Petro Jam and the 3rd Defendant why I did not strike out the portions of the Defence relating to quantum.

Timing of the application to amend defence as to liability

[31] Another factor which weighs heavily against the Applicant is the fact that the application for permission to amend the Defence in relation to the question of liability is being made at a time, when I had already made a ruling on an interlocutory application to strike out. In ***Stewart v Engel***, both the majority and the dissenting opinion agreed that the timing of such an application in these circumstances is an important

consideration in determining whether to vary or revoke one's judgment or order. At page 2275 of the Law Report in which the decision was carried, in response to a submission by Counsel that it makes no material difference as to when the application to amend is made, Sir Christopher Slade said this:

> **"I cannot agree with the submission, which overlooks the fundamental difference in the principles applicable in a case where the argument before a judge is still open and continuing and a case where he has actually delivered judgment. In a case where the application to amend is made before delivery of judgment, the Court has a wide discretion to permit amendment in the interest of justice and even at a late stage will be disposed to exercise that discretion in favour of the applicant, subject to an appropriate order for costs, if it considers that this is necessary to dispose of all the true issues arising between the parties. If the application is made after judgment, however, the situation is quite different….."**

[32] In relation to an application to amend a statement of case after the delivery of judgment in an interlocutory manner, Roch L.J in the same decision stated:

> **"…Such an application must be subject to a more stringent test than would an application for leave to amend made during the hearing of the defendant's application and prior to judgment being given. The question is how that greater stringency is to be expressed? It is clearly not satisfactory for the plaintiff to be allowed to wait to see the outcome of the defendant's application and then, if the judge decides in the defendant's favour to apply for an amendment. <u>There must be some satisfactory reason for the failure to apply for the amendment at the proper time. The proper time is either before the defendant's application is heard or during the hearing of the application.</u>**

[33] Rule 20.3(1) of the CPR provides that where a party is served with an Amended Claim form and Particulars of claim, they are allowed to amend their Defence once, without the permission of the Court within 28 days of being served with the Amended documents. After that time, they would have needed the permission of the Court to do so. The 3rd Defendant was served with the Amended documents on the 3rd June 2010.

In the Affidavit of Herbert Hamilton, filed July 10th, 2013, at paragraph 10, Mr. Hamilton indicated that he asked Mrs. Donaldson to handle the matter on his behalf. He states further that he asked her to indicate to the Court that the firm was unable to obtain instructions on such short notice from his clients who were overseas to present the required evidence. It would appear that Mr. Hamilton was intimating here that Counsel was to move the Court for an adjournment of the matter. However, there was no such application by Mrs. Donaldson on the day when the matter came up for consideration.

[34] From the time the application was served until, July 5th 2013, when the matter came up before me, there was no attempt by the 3rd Defendant to make any application for permission to amend. At paragraph 10 of the further affidavit of Herbert Hamilton, filed July 17th, 2013, he indicated that the reason why no application for permission to amend was forthcoming, until now, was because Counsel was awaiting the Case Management date to do so, as he was being mindful of saving costs and time.

[35] The litigant, through his Counsel is under a duty to properly plead its case. He must also ensure that the necessary steps are taken so as to enable his case to be properly before the Court. Rule 10.5(6) in particular of the CPR, requires that where a Defendant considers any document necessary to its defence, the defendant must identify or annex such document to the defence.

[36] The Court cannot accept the explanation given by Counsel that the reason for not applying for permission to amend in the circumstances was because he was waiting for a Case Management date to do so. Rule 20.4 (1) of the CPR states: "**An application for permission to amend a statement of case <u>may</u> be made at the case management conference."** The rule in my view is obviously not mandatory or such as to prevent an application being made to the Court at an earlier stage. With reference to the word "may", the rules must have contemplated situations where the exigencies of litigation may warrant an application to amend being made before a case management date being made available. An application to strike out on the ground that there is no reasonable ground for defending the claim is based upon what is pleaded in the Statements of case. On receiving Petro Jam's application to strike out, the Applicant should have been spurred into motion, specifically by filing the application to amend, if

they felt it would affect Petro Jam's then application. This could have been done either before Petro Jam's application was heard or at some point during the course of the application.

[37] My brother Sykes J. in **Albert Simpson v Island Resource Limited 2005 HCV 01202 of 2005, delivered 2^{4th} April 2007**, referred to the judgment of Waller J in **Worldwide Corporation Ltd v G.P.T. Ltd (Civil Division, transcript no. 1835 of 1998) delivered December 2, 1998)**, in which the learned judge said:

> "**We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in more leisured age. There will be cases in which justice will be better served by allowing the consequences of the lawyers to fall upon their own heads rather than by allowing an amendment at a very late stage of the proceeding."**

[38] Justice is not a one sided affair. It must be afforded to both parties. The overriding objective is meant to see that justice is done. Given its importance, no Court should apply it in a manner that will encourage litigants to honour it in breach. In my view, the Applicant had ample time to get their affairs in order. Whatever the test that is applied to the Court's power to revoke or revisit its orders, whether the wider or more narrow one, the present application does not fall within the ambits of the Court's power. This is not a case where the judge has had or is having a change of mind. Instead, it seems to be a case where Counsel leading the charge for the 3rd Defendant may now have had a change of mind or been advised differently. In short, no satisfactory reason for the failure to make the application for an amendment at the proper time has been advanced by the 3rd Defendant.

[39] The facts and Inquiry Report upon which the 3rd Defendant belatedly seeks to rely were all known or available to the 3rd Defendant prior to the hearing of the application to strike out on July 5th 2013. It is not that new facts have come to the attention of the 3rd Defendant or been discovered. Further, what was in any event being proposed too late would not have turned the issue of liability on its head. The matter has already endured a very protracted history and should not be made to linger any longer. Further, when one considers all the circumstances and borrowing the words of Roch

L.J. in the ***Engel*** decision, I am unable to give the 3rd Defendant's case the "Kiss of life" after its action on liability had been pronounced dead by the order I made on July 5th, 2013.

[40] In addition, I am of the view that the 3rd Defendant cannot by way of this application seek to amend its defence on the issue of quantum. The Court would need to first deal with the application which the 3rd Defendant is making seeking to have the Court revoke its orders striking out the paragraphs of the Defence dealing with liability and ordering judgment for Petro Jam against the 3rd Defendant on the issue of liability. This is necessary so that one can know with certainty exactly what is the state of the Defence that the 3rd Defendant is seeking to amend. The 3rd Defendant would therefore have to file a fresh application if it intends to seek the Court's permission to file an amended Defence relating to quantum. It would not be permissible, and indeed, would place the Court in an invidious position for the 3rd Defendant to roll-up the two applications into one (See the wording of ground 12 of the application, referred to in paragraph [7] above).

[41] Finally on this issue of revocation of the order, I also am in agreement with Petro Jam's submission that denying the 3rd Defendant the opportunity to amend their Defence on the issue of liability would not in any way prejudice them or affect their ability to file an ancillary claim for contribution or an indemnity from the 4th Defendant, as per Rule 18.3. It should be noted that although Petro Jam amended to add the 4th Defendant to the proceedings, Counsel for Petro Jam at the hearing in July advised that the 4th Defendant was never served and thus effectively, he is not a party before the Court.

Whether Permission to Appeal should be granted

[42] In the alternative, the 3rd Defendant has sought permission to appeal the order made on July 5th, 2013. One of the arguments made in this regard is that striking portions of the Defence was too draconian a measure in the circumstances. It was their contention that the remedy for non-compliance with Rule 10. 5(4) and 10.5(5) is that the

party will not be allowed to rely on any fact not stated or set out in the Defence, as per Rule 10.7

[43] Rule 26.3(1) of the CPR allows the Court to strike out parts of a party's statement of case, if it appears to the Court that the parts to be struck out disclose no reasonable grounds for defending a claim.

[44] As I had indicated in my earlier decision, I accepted Petro Jam's contention that paragraphs 4 and 5 of the 3rd Defendant's Defence amounted to bare denials without more. Having denied the allegations, the 3rd Defendant did not go on to set out their version of the events, as required by Rule 10.5(4) and 10.5(5). The authorities are clear that where the Defendants have not pleaded any facts which dispute the allegation of negligence, including the doctrine of *res ipsa locquitur* which was pleaded by the Petro Jam, an inference of causation and negligence can be drawn. The real issue in this case seems to be the measure of damages, and the defence was left intact in relation to this issue.

[45] The 3rd Defendant has not pointed to anything on the given pleadings as to why striking out, which was the very relief applied for by Petro Jam, would not have been an appropriate order. Consequently, I am of the opinion that 3rd Defendant has not demonstrated that it has a real chance or prospect of successfully pursing an appeal of the order made.

Orders

[46] 1. The Applicant's application to vary order made July 5th, 2013 by way of Amended Notice filed September 19th, 2013 for permission to file amended defence is refused.

2. The Applicant's permission to file appeal of order made July 5th, 2013 is refused.

3. Costs to the Claimant to be taxed if not agreed.

4. Permission to appeal from the refusal of the application to vary order is refused.

5. C.M.C. adjourned to 16th of December 2013 at 10.a.m. for two (2) hours.