

EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

**SAINT LUCIA
COMMERCIAL DIVISION**

CLAIM NO. SLUHCM2018/ 0068

BETWEEN:

PIGEON ISLAND DEVELOPMENT COMPANY LIMITED

Claimant/ Applicant

And

- 1. THE LANDINGS PROPRIETORS UNIT PLAN NO. D2/2007**
- 2. LANDINGS COMMERCIAL ASSETS LTD.**
formerly
LANDINGS RESORT MANAGEMENT COMPANY LIMITED

Defendant/ Respondent

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini

High Court Judge

Appearances:

Mr Deale Lee for the Claimant /Applicant

Ms Renee St Rose with Ms Rowana-Kay Campbell for the Defendant /Respondent

2020: January 15, 30

DECISION

- [1] **ST ROSE-ALBERTINI, J. [Ag]:** The parties to this action are (1) the claimant Pigeon Island Development Company Ltd ("PID"), the current developer of the condominium

development known as The Landings, located on the Pigeon Island Causeway, Gros Islet ("the development"); (2) the first defendant The Landings Proprietors Unit Plan No. D2/2007 ("The Landings"), the body corporate of the development; and (3) the second defendant, Landings Commercial Assets Ltd ("LCA"), a nominee of The Landings created to hold certain property on its behalf. The parties are engaged in a dispute over PID's entitlement to appoint directors to the board of The Landings, which turns on the meaning and effect of a Memorandum of Understanding between the parties executed on 18th November 2014 ("MOU"), consent order in Claim No SLUHCV2012/0222 dated 27th March 2012 ("the court order"), an Agreement for Donation dated 12th October 2015, a Deed of Donation dated 28th October 2015, the Condominium Declaration and Bylaws and the Condominium Act.

- [2] When the matter came to trial on 18th November, 2019 at PID's request permission was given to file an application to amend its statements of case.

The Issues

- [3] The sole issue for determination is whether PID should be permitted to amend its statements of case at this stage and to the extent that it has sought.

The Substantive claim

- [4] PID claims that it is entitled to appoint 4 directors to the board of The Landings pursuant to the terms of the MOU. In consideration for that right, it agreed to divest to LCA its ownership of the commercial units of The Landings, which carry the right to appoint directors. In pursuance of the MOU, it divested ownership in the commercial units by a Deed of Donation which is registered in the Land Registry as Instrument No. 641/2016. Alternatively, PID claims that its right to appoint directors is enshrined in the Bylaws of The Landings, based on the current phase of the project, which gives it the right to appoint 5 directors.

- [5] PID therefore seeks specific performance of the MOU or alternatively a declaration that the development is currently in phase 2 and it is entitled to appoint 5 directors to the board pursuant to clause 2 of the Bylaws and rescission of the MOU and Deed of Donation. Additionally, PID seeks damages for breach of contract, misrepresentation and a declaration that it is entitled to occupy a residential unit rent-free until completion of the development, as well as interest and costs.
- [6] The defendants contend that appointment of directors is governed by the Bylaws and the court order which arose out of Claim No. SLUHCV2012/0222 (“the 2012 claim”), brought by a group of unit owners against The Landings, seeking to have a receiver appointed to manage its affairs. The claim was concluded by a consent order between The Landings and the unit owners, whereby the composition of the board was agreed to be as “*At completion of Phase 4*”, which is 8 directors appointed by residential unit owners and 3 by commercial unit owners, making a total of 11 directors. The defendants say that PID is no longer the owner of the commercial units, having donated the units to LCA pursuant to the Agreement for Donation and Deed of Donation, which together superseded the MOU. PID is therefore no longer entitled to appoint directors to the board of The Landings and consequently is not entitled to the relief sought.

The Application

- [7] PID now seeks to amend its claim form and statement of claim. The amended claim remains one for specific performance of the MOU, in particular the terms granting PID 4 seats on the board of The Landings and entitling it to occupy a residential unit rent-free until completion of the development. Alternatively, to representation on the board pursuant to the Bylaws on the basis of the current phase of the development. In the proposed amendments shown as Exhibit DJP2, PID wishes to expand the relief sought to include:
1. an order setting aside or varying the court order;
 2. a declaration that the current composition of the board of directors of The Landings is ultra vires the Condominium Declaration and Bylaws and is unlawful; and
 3. Alternatively, a declaration that the development is currently at phase 3 and PID is entitled to 3 seats on the board of directors pursuant to clause 2 of the Bylaws.

- [8] The amendments also include removal of the relief that PID no longer intends to pursue, namely rescission of the MOU and Deed of Donation, damages for breach of contract, damages for misrepresentation and interest thereon.
- [9] The main ground of the application is that at the heart of the claim is the issue of the correct composition of the board of directors of The Landings. During preparation for trial it became apparent to counsel that certain questions which are central to the issue of the correct composition of the board were not pleaded in a manner which placed the real issue between the parties, before the court for determination. This included (i) whether the court order is valid and an effective bar to the relief PID seeks and (ii) whether the current board is lawfully appointed. The proposed amendments seek to challenge the court order on the grounds that: (1) it is ultra vires the Condominium Act and therefore illegal; (2) it is also ultra vires the Bylaws and therefore illegal; (3) that it was entered into on the basis of a mutual mistake as to the nature and object of the agreement; and (4) the Court is empowered to set aside a consent order in an action brought specifically for that purpose. The amended statement of claim also pleads that the current board has been unlawfully appointed, as it is not in compliance with the Condominium Act, Declaration and Bylaws and the Court is empowered to make this determination.
- [10] PID says the amendments are necessary to clarify the full extent of its claim and to ensure that the real matters in issue are examined by the Court. If the amendments are not permitted, it will be significantly prejudiced as it will not be able to present its full case for determination. The defendants will not suffer any prejudice, which cannot be remedied by costs and removal of the reliefs no longer being pursued will reduce the defendants' exposure to liability. PID asserts that the overriding objective requires that the parties put forward the real matters in dispute in order to achieve efficient use of judicial resources and furthermore, the amendments will eliminate the need for additional litigation by PID to challenge the validity of the court order. If granted, the defendants may require an amendment to their defence, and both sides may wish to file additional witness statements. Consequently, further case management would be necessary.

- [11] The application is supported by affidavit of Debra Jules Polius, Legal Assistant to PID's attorney, which substantiates the information as set out in the application. She deposed additionally that the need for the amendments was recognized in the first week of November 2019 during preparation for trial which was scheduled for 18th November 2019. The parties attended court on 18th November, when leave was granted to file the application. It is therefore made in compliance with that order and as soon as practicably possible. She says PID will be significantly prejudiced if the amendments are not permitted as the challenge to the court order and composition of the board are directly related to PID's right and entitlement to representation on the board under the Bylaws, the Condominium Act and Declaration. The defendants will not be prejudiced as they will have adequate opportunity to respond to the issues and be compensated in costs.
- [12] The defendants oppose the application in part and the affidavit in answer is deposed by Ann-Alicia Fagan, a legal practitioner of the firm that represents the defendants. The defendants state unequivocally that the opposition is only in relation to the proposed amendment to plead mistake as a ground for setting aside or varying the court order and have no objection to the remaining amendments sought by PID.
- [13] The reasons for opposing are that:
1. The parties in the 2012 claim are different to the parties in the present claim:
 - a. The claimant in the 2012 claim was The Landings Unit Owners, which was appointed as the representative body of the unit owners listed in the schedule to the court order. Some 72 unit owners represented by The Landings Unit Owners are not parties to this present claim.
 - b. The Landings Limited who was the developer at the time of the 2012 claim and agreed to the terms of the court order is not itself a party to this present claim.
 - c. PID was not a party to the 2012 claim. It was not a unit owner listed in the schedule to the order appointing The Landings Unit Owners, nor was it the owner of any unit in the development at the time the court order was made.

2. In the 2012 claim The Landings Limited offered to hand over its control of the board of The Landings to the unit owners despite the terms of the Condominium Declaration and Bylaws. The parties were therefore fully aware of the Bylaws, Condominium Act and Declaration and the court order was fully and effectually intentional and has been complied with for over 7 years.

- [14] The defendants' further say that the court order was not made on the basis of mutual mistake or any mistake of fact or law. PID purchased the property within the development with full knowledge of the existence and effect of the court order, which was clearly stated in the MOU on which PID relies. Thus, the Court has no jurisdiction to consider setting aside or varying the court order in these proceedings.

PID's Submissions

- [15] Counsel for PID, Mr. Deale Lee, submitted that in deciding whether to allow the amendments, the court must consider the 5 factors set out in CPR 20.1(3). He relied on the case of **Mark Brantley v Dwight Cozier**¹, stating that the primary concern is to ensure that the real question in controversy between the parties is determined at trial. The real issue concerns PID's entitlement to appoint directors to the board of The Landings, which requires a finding in relation to three questions. The first question relates to the validity and effect of the MOU and has already been pleaded. However the second and third questions concern the validity and effect of the court order and PID's entitlement under the Bylaws and the Condominium Act and they have not been addressed in the pleadings. Absent these amendments, the whole controversy is not before the court.
- [16] Mr. Lee then addressed each of the factors contained in CPR 20.1(3) as follows:-

1. Promptness of the application: It was made promptly after it became clear that the court order had not been adequately addressed in the pleadings and pursuant to an order of this Court granting leave to make the application.

¹ Claim No. SKBHCVP2014/0027

2. Prejudice to PID if the application is refused: In order to fully investigate and determine PID's entitlement to representation on the board, the Court must examine all matters which establish or derogate from that entitlement. That includes the court order and the Condominium Act. The claimant is tied to its pleaded case at trial and if the amendments are not permitted, PID may be confronted with the court order in answer to the claim without the ability to challenge its validity. Similarly, PID would not be in a position to obtain declarations in relation to its statutory entitlements. The prejudice is that it would be deprived of legitimate causes of action, unless it engaged in the expense of filing a new claim.

3. Prejudice to the defendants if the application is granted: The amendments would not prejudice the defendants as the parties had erroneously attempted to effect the amendments via a consent order. Therefore the defendants would have already considered their position and deemed the amendments not to be prejudicial.

4. Whether any prejudice can be compensated by costs: Any prejudice to the defendants can be compensated by costs and based on the pronouncement by Brett MR in **Clarapede & Co v Commercial Union Association**², which was adopted by our Court of Appeal in **Brantley v Cozier**³, once prejudice can be compensated by costs, there is no injustice and the amendment should be allowed.

5. Whether the trial date or any likely trial date can still be met if the application is granted: Counsel stated that the trial date has already been vacated; consequently, the focus should be on ensuring that when the matter comes to trial, the true questions in controversy between the parties are determined by the Court.

6. The administration of justice: In this regard, Mr Lee said that the overriding objective as stated in CPR 1.1(1) requires the court to deal with matters justly. In doing so, the court

² (1883) 32 WR 262

³ Supra Note 1

must ensure that the parties are able to deploy their full case and must also consider the prudent use and allocation of judicial resources.

[17] In written submissions, Mr. Lee addressed the question whether this Court has jurisdiction to adjudicate on PID's request to set aside or vary the court order. He submitted that **Siebe Gorman & Co Ltd v Pneupac Ltd**.⁴ establishes that there are two types of consent orders: one which indicates parties' non-objection to a decision of the court, which can only be challenged on appeal; and the other which has been arrived at through negotiation and agreement between the parties and is therefore a contract that can only be set aside on the grounds for setting aside any contract. He relied on the case of **De Lasala v De Lasala**⁵ where it was held that a consent order could be challenged and set aside in an action brought specifically for that purpose. He then submitted that whether the court order falls within the category of a consent order which is a contract between the parties is a question of fact, which must be determined on the evidence at trial.

[18] Counsel submitted that the composition of the board must be assessed in relation to the constitutional documents of The Landings. PID was not a party to the court order and the Bylaws have not been amended to reflect the terms of the court order in relation to the composition of the board. Therefore, whether PID is entitled to board representation based on the Bylaws and Condominium Act is a live issue for determination. PID is not barred from bringing a separate claim in this regard; however, to do so would be an inefficient use of judicial resources and incur unnecessary expense to PID.

[19] Counsel further stated that the Court is not required at this stage to make a determination on the likelihood of success of the proposed amendments but to simply consider whether the amendments should be granted, to have all matters properly pleaded for deliberation at trial. He relied on dicta in **Brantley v Cozier**⁶ where the Court of Appeal held that on an application for permission to amend, it was not appropriate to go into the substance of the defence.

⁴ [1982] 1 All ER 377

⁵ [1980] AC 546

⁶ Supra Note 1

[20] He submitted that the defendants have responded to the substance of the proposed amendments but these are matters which should be addressed at trial where it is more appropriate to consider and determine all the issues and arguments. They involve mixed questions of fact and law on which the court would have to receive evidence to determine whether the causes raised are successful. He acknowledged that PID was not a party to the court order but states that this is not the appropriate time or forum to address this question.

[21] Mr. Lee argued that the defendants' assertion that PID was not a party to the court order raises the additional questions of whether PID's entitlement under the Condominium Declaration is affected by the court order, and whether PID as the current developer is bound by it. He also noted that much was made of the fact that the agreement stemmed from offers made by the original developer for resolving an impasse, and took the view that PID has in law stepped into the shoes of the original developer and is party to the court order in the same manner as the original developer would have been in the earlier claim. He submits that the only way these matters can be addressed is if the court is seized of all the issues touching and concerning PID's rights to representation on the board of The Landings. Counsel stated that pleadings are allegations of fact which must be proven on the evidence led at trial and it would be inappropriate at this time to make a determination on what evidence may or may not be led at trial. He concluded that the claimant has met the threshold set by the rules and urged that the application be allowed in entirety.

The Defendants' Submissions

[22] Counsel for the defendants, Ms. Renee St. Rose, submitted that the sole question for consideration is whether the court has jurisdiction to set aside or vary the court order in these proceedings. She submits that the court only has jurisdiction to do so in a fresh action involving the same parties to the initial proceedings in which the court order was made, and where the claimant pleads and proves that it was made as a result of fraud, mistake and/or misrepresentation.

[23] Ms St Rose says PID has two hurdles in relation to this: firstly, it was not a party to the proceedings in which the court order was made; and secondly, this fresh action that it is seeking to embark upon does not include all the parties to the earlier proceedings. She says PID has failed in respect of both criteria. She relied on the **Siebe Gorman & Co v Pnepak Ltd**⁷ to advance the position that the court order was meant to establish a real contract between the parties, which immediately constituted the board as "*At completion of Phase 4*". She also relied on the **De Lasala v De Lasala**⁸ stating that the court order may only be challenged by appeal or a fresh action between the same parties. She referred to the case of **CC&F Inc v Manor International Inc and others**⁹ where the court held that a consent order which evidences a real contract remains in full force and can only be set aside on the grounds of fraud, mistake or misrepresentation. Counsel submitted that it is not possible to establish fraud, mistake or misrepresentation in relation to the court order in these proceedings, unless all the parties in the original action are present to address such allegations.

[24] In response to Mr. Lee's submission that it was not appropriate for the Court to consider the substance of the proposed amendments on this application, she maintained that there is no realistic prospect of success on this issue and it is at best fanciful for PID to seek to set aside the court order in these proceedings. She argued that there would be no starting point to commence adjudicating on whether the court order should be set aside because the court would have to hear all the parties to the consent order, on the issue of mistake, misrepresentation or fraud, because it is a consent order which amounts to a contract between the parties. PID was not a party to the 2012 claim and is not in a position to plead particulars of the mindset of the parties to that claim. Further, it would not be possible to determine the parties' intention without hearing from them. Counsel opined that any amendments with respect to varying or setting aside the court order are bound to fail and begs the question should leave be given to amend, on a matter that the Court has no jurisdiction to adjudicate upon.

⁷ Supra Note 5

⁸ Supra Note 6

⁹ [2018] ECSCJ No. 180

- [25] Counsel submitted further that the allegation that the parties to the court order were mistaken as to the nature and object of their agreement is objectionable on the basis that it is a completely new pleading. Moreover, the issue of whether the court order is binding on PID as the developer is already an issue in the claim and there is no need to set aside the court order to make this determination.

Analysis

- [26] CPR 20.1 deals with amendments to statements of case and provides as follows:

“Changes to Statements of Case

(1)...

(2) The court may give permission to amend a statement of case at a case management conference or at any time on an application to the court.

(3) When considering an application to amend a statement of case pursuant to Rule 20.1(2), ***the factors to which the court must have regard are –***

(a) how promptly the applicant has applied to the court after becoming aware that the change was one which he or she wished to make;

(b) the prejudice to the applicant if the application were refused;

(c) the prejudice to the other parties if the change were permitted;

(d) whether any prejudice to any other party can be compensated by the payment of costs and/or interest;

(e) whether the trial date or any likely trial date can still be met if the application is granted; and

(f) the administration of justice.

(4)...

(5)...

(6)..." [My Emphasis]

- [27] The principles enunciated by our Court of Appeal in **Mark Brantley v Dwight C. Cozier**¹⁰ are instructive on the approach to be taken by the courts, in applying the above rules, when determining whether to grant such applications. There the court said:

“[55] ... Taking into account the prerequisites of CPR 20.1(3), there is no denying that in determining whether to exercise its discretion so as to enable an amendment to be made, there are several factors that the Court must take into consideration. These include the justice to the parties; the legitimate

¹⁰ Supra Note 1

expectation that the basis of a claim will not be fundamentally challenged at the last minute; the adverse effect on other litigants of lost judicial time; the stage reached in the proceedings; whether the other side can be adequately compensated in costs. There is public interest in allowing a party to deploy its real case, provided it is not irrelevant and has a real prospect of success... In exercising its discretion, the court should be guided by the general principle that amendments should be made where they are necessary to ensure that the real question in controversy between the parties is determined, provided that such amendments can be made without causing injustice to the other party and can be compensated in costs.¹¹ [My Emphasis]

[28] It was also stated by the Court of Appeal in **Comodo Holdings Limited v Renaissance Ventures Limited et al**¹² that an amendment which is futile and frivolous will not be permitted. Applying these principles, CPR 20.1(3) must be examined in the context of the amendments being sought.

[29] Promptitude: Promptitude is measured by how soon the application was made after the applicant became aware of the need to make the application.¹³ PID says that leave to make the application was sought some 2-3 weeks after becoming aware of the need to make the amendments. It was filed on 2nd December 2019 approximately 1 month after becoming aware and is therefore prompt. Counsel for the defendants did not make submissions in respect of any of the factors of CPR 20.1(3); therefore the Court must proceed without the benefit of the defendants' position.

[30] In my view the application does not address any new information coming to PID's attention to warrant seeking to amend its statement of claim so late in the day. In fact, PID filed its original claim form and statement of claim on 3rd August 2018, raised the court order therein, provided details of how it arose, set out its terms, and stated its perceived effect. The defendants, in their initial defence filed on 15th October 2018 and in their amended defence filed on 22nd October 2018, also addressed the issue of the court order and its effect. Paragraph 19 of the original and amended defence reads as follows:

¹¹ At paragraph 55

¹² Claim No.: BVIHCMAP2014/0032

¹³ Mark Brantley v Dwight C. Cozier Claim No. SKBHCVAP2014/0027 at paragraph 47; J Astaphan & Co Ltd v Mary-Ann Lee et al Claim No. DOMHCV2011/00282 at paragraph 36; Denise Violet Stevens v Luxury Hotels International Management St. Kitts Ltd. Claim No. SKBHCV2013/0069 at paragraph 29

“The defendants... contend that the constitution of the Board of the First Defendant is set by the Court Order dated 27th March, 2012 which remains in full force and effect. The claimant purchased the immovable property of the Condominium subject to the Court Order.”

[31] The original and amended defence both contains several similar averments.¹⁴ Given that the PID was aware of the court order and the defendants' position in relation to it from the outset, responses in relation to this could have been addressed by way of reply in order to adequately set out its case.

[32] Be that as it may, I am guided by the dicta of Brett MR in the **Clarapede & Co. case**¹⁵ adopted by our Court of Appeal in **Brantley v Cozier** that:

*“... 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 to the other side. There is no injustice if the other side can be compensated by costs ...”*¹⁶

[33] It is therefore necessary to go on to consider the other factors in CPR 20.1, as even a finding that PID may not have been prompt, is not decisive of the application.

[34] Prejudice to PID if the application is refused: In **Roosevelt Skerit v Thomas Fontaine et al**¹⁷, the court analyzed the prejudice to an applicant as follows:

“[33] Pleadings are of critical importance to the articulation of any party's case... Additionally, a party is always bound by his or her pleadings thus leaving no room for deficiencies that may be critical to the success of his case. Deficient pleadings may well result in a successful application for summary judgment.

*[34]The defendants would be disadvantaged going forward, especially given Rule 10.7 as recently revised which precludes a defendant from relying on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the court gives permission or the parties agree. A party would suffer prejudice if a request to cure these deficiencies while keeping the claim alive was not favourably considered.”*¹⁸

¹⁴ Defence, paragraphs 9(vii), 10(ii), 15(ii)

¹⁵ Supra Note 3

¹⁶ Supra Note 1 at paragraph 56

¹⁷ Claim No. DOMHCV2011/0388

¹⁸ At paragraphs 33-34

[35] I agree that in order to fully and finally determine PID's entitlement to representation on the board of directors of The Landings, the Court would be required to examine all the documents and circumstances which have a bearing on appointments to the Board. In addition to the MOU, Agreement for Donation and Deed of Donation which have been pleaded; the Court would also need to consider the court order against the backdrop of the Condominium Act, and the Declaration and Bylaws of The Landings. Although PID mentioned these documents in its statement of claim, there were no pleadings in relation to its intention to rely on them, nor how they support its case for the relief sought. The obvious prejudice to PID would be as stated in **Skerrit v Fontaine**¹⁹ that a party cannot at trial rely on an allegation or factual argument not set out in its pleadings which could have been set out there.²⁰ As Mr Lee has stated if the amendments are not permitted PID would not be able to challenge the validity of the court order in response to the defendants' case or obtain declarations of its statutory right to representation on the board. Considering that its entitlement to representation on the board is the singular objective in bringing the claim, I agree that PID would be seriously prejudiced if these matters could not be pursued to the fullest extent and that would justify granting permission to amend.

[36] Prejudice to the defendants if the application is granted: The case of **Murtland Watterton v Nigel Landreth Smith et al**²¹ provides guidance on how this factor is to be considered. In that case, the court stated that the question to be asked is whether granting the amendment placed the respondent in a worse position than he would have been if the amendment had been pleaded from the time a defence was filed.²² The court cited dicta of Lord Keith of Kinkel in delivering the majority judgment of the House of Lords in **Kettelman and others v Hansel Properties Ltd**²³, which explained that:

"The sort of injury which is here in contemplation is something which places the other party in a worse position from the point of view of presentation of his case than he would have been in if his opponent had pleaded the subject matter of the proposed amendment at the proper time. If he would suffer no

¹⁹ Supra Note 18

²⁰ CPR 8.7A

²¹ Claim No. SKBHCV2012/0181

²² At paragraph 26(iii)

²³ [1988] 1 All ER 38

prejudice from that point of view, then an award of costs is sufficient to prevent him from suffering injury and the amendment should be allowed. It is not a relevant type of prejudice that allowance of the amendment will or may deprive him of a success which he would achieve if the amendment were not to be allowed...”²⁴

- [37] Therefore, the real issue is whether a respondent will be precluded from making a particular response by the late amendment.
- [38] While Ms St Rose did not address the issue of prejudice to the defendants, Mr. Lee’s asserts that the defendants were prepared to agree the amendments by a consent order, which signals their considered position as being that they would not suffer any prejudice. I note that the proposed amendments agreed to on the basis of the erroneous consent order were not as extensive as the proposed amendments in Exhibit DJP2. In particular the earlier amendments did not include the allegation of mistake as a basis for setting aside or varying the court order.
- [39] As to Ms. St. Rose’s position that the Court does not have jurisdiction in the substantive claim to set aside or vary the court order, considering that the parties in the 2012 claim are not the parties to this claim and PID is not in a position to speak to the contemplation of the parties in the 2012 claim, I must examine whether it is permissible to assess the substance and prospect of success of these particular amendments.
- [40] I have considered the Court of Appeal decision in **Brantley v Cozier**²⁵ cited by Mr. Lee and in particular the ruling that on the appellant’s application to amend his defence, it was not open to the master to determine whether the defence of justification was available to the appellant, as the matter fell exclusively within the purview of the trial judge. The only issue that fell to be determined by the master at that stage was whether leave should have been granted to amend the defence so as to plead justification.²⁶ I also note that the court stated “*there is public interest in allowing a party to deploy its real case provided it is not irrelevant and has a real prospect of success.*”²⁷

²⁴ Murtland Watterton v Nigel Landreth Smith et al Claim No. SKBHCV2012/0181 at paragraph 26(iii)

²⁵ Supra Note 1

²⁶ At paragraph 58

²⁷ At paragraph 55

[41] Additionally, I observe the position taken by the Court of Appeal in **Comodo Holdings Limited v Renaissance Ventures Limited et al**²⁸, where the court had this to say:-

*"I would go on to say in George Allert v. Joshua Matheson, this Court reviewed the principles that are applicable in obtaining leave to amend pleadings. This Court has stated that amendments which would enable the real issues between the parties to be decided should be permitted subject to the payment of costs. **However, the corollary is also true, namely, that the amendment which is futile or frivolous will not be permitted, once the party who is prejudiced can be properly compensated by costs.**"*²⁹ [My emphasis]

[42] In my view a distinction is to be drawn between the decisions in **Comodo v Renaissance**³⁰ and **Brantley v Cozier**.³¹ In **Comodo**, the Court acknowledged that a judge has discretion, as part of case management powers to refuse amendments where they serve no useful purpose or are irrelevant, fanciful, hopeless, futile or frivolous. This must, of necessity, mean that the Court is entitled to look at the substance of the proposed amendment. The distinction to be drawn with respect to **Brantley** is that the question whether the defence of justification was available to the appellant was at least arguable and ought not to have been determined on the application to amend the pleadings. However, where an amendment is clearly unsustainable, it would be prejudicial and contrary the administration of justice to permit such amendment, simply because the party who is prejudiced can be compensated by costs.

[43] In the present case, the amendment to vary or set aside the court order on the basis of mistake raised from the outset the issue of the court's jurisdiction to do so and the standing of PID to request such relief, having not been a party in the 2012 claim. A challenge on the ground of mistake can only come from the parties that consented to the order in that claim and PID is not one of them. Further the parties to that claim are not parties to the present claim, save The Landings. It is, on the face of it, unsustainable for the reasons cited by Ms. St. Rose and supported by the authorities cited by both Counsels. The cases suggest that it is the parties who agreed the consent order and are contractually bound by it, who are entitled to bring a fresh action to vary or set it aside. I find no merit in Mr Lee's assertion

²⁸ Claim No.: BVIHCMAP2014/0032

²⁹ At paragraph 80.

³⁰ Supra Note 13

³¹ Supra Note 1

that PID now stand in the shoes of the original developer as that developer was not a party to the 2012 claim. For these reasons, I conclude that the proposed amendments relating to setting aside or varying the court order on the basis of mistake are futile and bound to fail at trial and should not be permitted.

- [44] Can any prejudice to the defendants be compensated by costs or interest: The authorities suggest that this factor is paramount and determinative when considering whether to permit an amendment. The general rule is that in circumstances where any potential prejudice can be compensated by an award of costs, the court should grant the amendment. At paragraph 50 of **Brantley v Cozier** it was said that:

*“Even though an award of costs can be made, the question remains as to whether this is an appropriate case in which costs would be adequate given the totality of circumstances including the date of the filing of the claim, the date on which the new information became available, the date on which the judgment was rendered, and taking into account that it was three years after. **The current jurisprudence indicates that a defendant will not be prejudiced if he can be adequately compensated in costs.** It must be remembered that there is no date set for trial or pre-trial. **The general rule is that in these circumstances where any potential prejudice can be compensated by an award of costs, the court should lean in favour of granting the amendment.**”*³² [My Emphasis]

- [45] In the present case the claim was filed on 3rd August 2018 and the defence on 15th October 2018. From that time the information to which the amendments relate, namely the court order, the Act, the Declaration and the Bylaws, were known to PID. However, PID says it only became aware that it needed to make the amendments in November 2019 and with the permission of the Court the application was filed on 2nd December 2019. Although it is some 16 months from the date of filing the claim, there is no apparent prejudice to the defendants, in terms of presentation of their case. The only inconvenience is in having to amend pleadings and file additional witness statements and the delay occasioned thereby, which can be adequately compensated by an award of costs.

- [46] Given all the circumstances, and in particular that some of the amendments will ensure that the real questions in issue between the parties is placed before the Court, without

³² At paragraph 50

causing injury to the defendants that cannot be compensated in costs, this factor weighs strongly in favour of granting the application, in relation to the permissible amendments.

[47] Can any likely trial date still be met: The trial date which had been set for 18th November 2019 has been vacated. No further trial date has yet been set and from all indications case management will have to be reopened. The defendants have not complained that the expeditious progress of the case will be hindered by granting the application. Consequently, this factor also favours granting the permissible amendments.

[48] The Administration of Justice: The court must consider the interests of justice and in so doing give precedence to the overriding objective of the rules,³³ and must conclude that it is appropriate and proportionate in all the circumstances to permit PID to amend its statements of case. The considerations which inform the overriding objective are intended to enable to the court to deal with cases justly. They include ensuring the parties are (i) on an equal footing; (ii) saving expense; (iii) ensuring cases are dealt with expeditiously; (iv) dealing with the case proportionately to the amount of money involved, importance of the case, complexity of the issues, and the financial position of each party; and (v) allotting to the case an appropriate share of the court's resources.³⁴

[49] Applying these considerations to the instant case, I agree that they weigh in favour of granting the amendments sought, except for those pertaining to varying or setting aside the court order on the basis of mistake. The permissible amendments will put the parties on an equal footing as both sides would be able to deploy their entire case for full and final determination. It will save time and expense, and PID will not have to incur the cost of separate proceedings to address all the relevant issues in relation to its claim. The issues will have been narrowed and all the material that the Court would need to consider the questions which arise, would be before it. The issues do not appear particularly complex and judicial time will be contained by granting these amendments.

³³ Brantley v Cozier at paragraph 40.

³⁴ CPR 1.1

[50] The amendments which pertain to varying or setting aside the court order on the basis of mistake will not in any way further the justice of the case or the overriding objective, and to permit these amendments would waste judicial time and resources. It would also put the parties through unnecessary cost to bring and defend an issue to which PID is not entitled by way of remedy, and which is bound to fail at trial.

Conclusion

[51] In light of the foregoing I make the following orders:-

1. The amendments to the claim form shown in Exhibit DJP2 are permitted save and except paragraph 2.
2. The amendments to the statement of claim shown in Exhibit DJP2 are permitted save and except paragraphs 24, 25, 26 and 41(2).
3. The claimant will file and serve its amended claim form and statement of case within 14 days hereof.
4. The defendant is at liberty to file and serve an amended defence within 14 days of service of the amended claim form and statement of claim.
5. The claimant is at liberty to file a reply within 14 days of service of an amended defence.
6. Case management is reopened and a date for case management conference will be fixed by the court office.
7. Cost is awarded to the defendants in the sum of \$2,500.00.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar