

**EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

THE TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2019/0017

BETWEEN:

EMMERSON INTERNATIONAL CORPORATION

Appellant/Counter-Respondent

and

ABC GRANDESERVUS LIMITED

Respondent/Counter-Appellant

Before:

The Hon. Mde. Louise Esther Blenman

Justice of Appeal

The Hon. Mr. Mario Michel

Justice of Appeal

The Hon. Mr. Paul Webster

Justice of Appeal [Ag.]

Appearances:

Mr. Philip Marshall, QC with him, Mr. Ajay Ratan, Mr. Daniel Burgess, Mr. Oliver Clifton and Ms. Colleen Farrington for the Appellant/Counter-Respondent

Mr. Andrew Ayres, QC with him, Mr. Timothy Wright and Ms. Lisa Walmisley for the Respondent/Counter-Appellant

2020: July 20;
September 30.

Interlocutory Appeal – Commercial Appeal – Grounds on which appellate tribunal will upset decision of trial judge – Whether learned judge erred in interpretation of order made by judge of coordinate jurisdiction – Costs – Rule 64.6 of Civil Procedure Rules 2000 – Whether learned judge erred in awarding costs in its entirety to respondent – Rule 20.1(2) of Civil Procedure Rules 2000 – Whether learned judge erred in permitting appellant to amend counterclaim – Rule 26.2(2) of Civil Procedure Rules 2000 – Whether learned judge erred in amending order on his own volition

This appeal emanates from proceedings which includes, among other claims, a Third Ancillary Claim brought by Emmerson International Corporation (“Emmerson”) against 17 defendants including ABC Grandeservus Limited (“ABC”). As events unfolded, Emmerson

applied to the commercial court in the Territory of the Virgin Islands (“BVI”) for, among other things, a freezing order against ABC. This ex parte application was heard on 31st December 2018 before Wallbank J who granted the freezing order and gave Emmerson permission to amend the counterclaim and ancillary claims, as appropriate to add “the remaining respondents as parties” and leave to serve all documents in the proceedings on “the remaining respondents” out of the jurisdiction. The order was dated 2nd January 2019 (“the January Order”).

Following this, Emmerson amended its ancillary claim to include Tiwel Holding AG, Liwet Holding AG and Berdwick Holding Limited (“TLB”) and served the amended ancillary claim form and amended statement of ancillary claim on ABC. ABC, having been served with a copy of the January Order, and the amended ancillary claim form and amended statement of ancillary claim, then applied on 6th February 2019 (“February Application”) to discharge the January Order in its entirety, challenge the court’s jurisdiction and set aside service of the amended statements of case on the basis that Emmerson did not have permission to make personal claims against ABC and that ABC had to be served out of the jurisdiction, not in it. ABC subsequently abandoned most of its grounds of the February Application, and only pursued the ground to set aside service of the amended statements of case. Emmerson cross-applied for declarations that ABC was properly served within the jurisdiction and had been deemed to admit the claims against it pursuant to rule 18.12 of the **Civil Procedure Rules (2000)** (“CPR”).

The February Application was heard by Jack J (“the learned judge”) who, upon a narrow construction of Wallbank J’s order, held on 9th May 2019 (“the May Order”), that Emmerson did not have permission to make the amendments which were made and that all the amendments made to the statements of case to bring personal claims against ABC should be disallowed. In addition, the learned judge, of his own volition, in paragraph 1 of the May Order, disallowed Emmerson’s personal claims in the amended ancillary claim and amended statement of ancillary claim against TLB. The May Order, in paragraph 3, also permitted Emmerson to amend the ancillary claim and the counterclaim as distinct from the Third Ancillary Claim to bring a proprietary claim against, among other parties, ABC. The cross-application was refused, and Emmerson was ordered to pay 100% of ABC’s costs.

Emmerson, being dissatisfied with the May Order, filed a number of grounds in appealing against this order. ABC also being dissatisfied with paragraph 3 of the May Order, has filed a number of grounds in a cross-appeal challenging same. The condensed issues for this Court to determine are: (i) whether the learned judge erred in his interpretation/construction of the January Order; (ii) whether the learned judge erred in making an order of his own volition contrary to rule 26.2(2) of the CPR; (iii) whether the learned judge erred in awarding the costs in its entirety to ABC; and (iv) whether the learned judge erred in permitting Emmerson to amend the ancillary claim and counterclaim.

Held: allowing the appeal; setting aside the order of the learned judge in its entirety; dismissing the counter appeal; reinstating the amendments made by Emmerson in the

schedule as being in accordance with Wallbank J's order; and making the costs orders set out in paragraph 66 of the judgment, that:

1. In interpreting the January Order, it is necessary for the transcript of proceedings to be scrutinised so as to appreciate the interactions between the Wallbank J and Mr. Marshall, QC which led to the order being made. It is clear from a careful reading of the transcript, which detailed the exchange between Wallbank J and Queen's Counsel, and having considered the clear and unambiguous wording of the January Order, that Wallbank J crafted the order in broad terms granting Emmerson permission to bring personal claims against ABC and TLB. The inescapable conclusion is that the learned judge erred in concluding that Emmerson was not permitted to bring personal claims against both ABC and TLB and further that Emmerson was only permitted to amend the ancillary claim form but not the statement of ancillary claim. In relation to the latter, it would have served no practical purpose to permit the amendment of the ancillary claim form but not the statement of ancillary claim.
2. In relation to the judge's unilateral amendment of the January Order without hearing the parties, rule 26.2(2) of the CPR provides that where a judge proposes to make an order of his own initiative, the judge is required to give the party to be affected a reasonable opportunity to prepare to deal with the matter where necessary. It is clear that Wallbank J's order permitted Emmerson to bring personal claims against TLB. The effect of paragraph 1 of the May Order is to disallow not only the claims in the amended ancillary claim against ABC but also the claims against TLB. This order was made in circumstances where TLB were not parties to the application, were unrepresented at the hearing and Emmerson was not invited to make submissions on whether or not the January Order granted such permission to bring personal claims against TLB. Accordingly, insofar as Jack J granted the order on his own motion, contrary to rule 26.2(2) of the CPR, that order must be set aside.

Rule 26.2(2) of the **Civil Procedure Rules 2000** applied.

3. The general rule is that costs follows the event and therefore the unsuccessful party should pay the costs of the successful party. However, rule 64.6 of the CPR provides, that the court may order that the successful party pay all or part of the costs of the unsuccessful party. In determining the February Application, the learned judge heavily considered the material non-disclosure of Emmerson at the ex parte hearing of the application for a freezing injunction. However, not only did ABC abandon the application to discharge the injunction on this ground but the parties agreed on a consent order which addressed the material non-disclosure thereby making it a non-issue. Though Emmerson was not entirely successful in resisting the February Application, the learned judge was required to consider, by virtue of rules 64.6(c) and 64.6(d) of the CPR respectively, its partial success and whether it was reasonable for ABC to have pursued a particular allegation or raise a particular issue. In the totality

of the circumstances the learned judge erred in the exercise of his discretion when he ordered Emmerson to pay 100% of ABC's costs. It therefore falls to this Court to exercise its discretion afresh.

Rule 64.6 of the **Civil Procedure Rules 2000** applied; **F & C Alternative Investments Limited v Bathelemy (No.3)** [2011] EWHC 1731 (Ch) applied.

4. During the case management of a claim, the judge has a plenitude of powers available to him. One such power being the discretionary power to grant permission to amend a statement of claim pursuant to rule 20.1(2) of the CPR. In the circumstances, where all of the all of the claims and ancillary claims are being case managed together and no trial date has been set, the learned judge in making his order would have considered these factors and the impact of the proposed amendments on the court's timetable. Therefore, this Court is not of the view that anything would be achieved by having the amendments form part of the Third Ancillary Claim as distinct from the ancillary claim and the counterclaim. Further, it is of significance that ABC was the author of the May Order and that any improper proposed amendments should have been brought to the court's attention before the order had been perfected. There is no doubt that it was open to the learned judge to make the case management order which he did.

Rule 20.1(2) of the **Civil Procedure Rules 2000** applied.

JUDGMENT

Introduction

- [1] **BLENNMAN JA:** At the heart of this appeal is the issue of whether or not Jack J (or "the learned judge") correctly interpreted and construed an order that was made by Wallbank J. The appellant, Emmerson International Corporation ("Emmerson") contends that the order was misconstrued and misinterpreted, while the respondent, ABC Grandeservus Limited ("ABC") argues that Jack J did not err in his construction and interpretation of the earlier order. Consequently, Emmerson urges this Court to allow the appeal and reverse the ruling of Jack J based on his alleged erroneous construction. Meanwhile, ABC implores this Court to affirm the decision of Jack J on the basis that he accorded Wallbank J's order its proper interpretation and construction.

- [2] By order dated 9th May 2019 (“the May Order”), Jack J held that: (i) Emmerson was not granted permission by an order of Wallbank J dated 2nd January 2019 (“the January Order”) to bring personal claims against the respondent, ABC, and to amend the claims against the Chabra defendants, Tiwel Holding AG, Liwet Holding AG and Berdwick Holding Limited (“the remaining Chabra Parties” or “TLB”); (ii) the application by Emmerson pursuant to rule 18.12 of the **Civil Procedure Rules 2000** (“the CPR”) was dismissed; and (iii) Emmerson should pay all of ABC’s costs. It should be noted that ABC has also filed a counter-appeal challenging the learned judge’s order in paragraph 3 whereby he ordered that ABC be added to the counterclaim or to the ancillary claim.

Background

- [3] This appeal arises out of an application dated 3rd December 2018 (“the application”) for a freezing order against Mr. Vekselberg, ABC and, TLB. The factual background has been helpfully set out in the submissions of both Emmerson and ABC. I gratefully adopt them with some expansions to provide the relevant context and I do find that it is necessary to recite them in some detail, given the nature of the appeal and counter-appeal.
- [4] The underlying claim involves two Russian businessmen, Mr. Viktor Vekselberg (“Mr. Vekselberg”) and Mr. Mikhail Abyzov (“Mr. Abyzov”), each of whom has several companies across a number of jurisdictions. Emmerson is the principal corporate entity associated with Mr. Abyzov. The corporate entities associated with Mr. Vekselberg form a part of the Renova Group, the principal holding company being Renova Holdings Limited (“Renova”). ABC is a Cypriot company and the corporate director of Integrated Energy Systems Limited Belize (“IES Belize”).
- [5] Emmerson brought proceedings claiming the sum of almost US\$1 billion dollars against Mr. Vekselberg and Renova in connection with a joint venture entered into by Mr. Abyzov and Mr. Vekselberg. Emmerson sued both Mr. Vekselberg and Renova for dishonest assistance, breach of trust, deceit and unlawful means

conspiracy. There is also a Third Ancillary Claim brought by Emmerson against 17 defendants including ABC. This claim is concerned with the fraudulent dissipation of assets in 2011 from IES Belize. ABC's main defence in the Third Ancillary Claim was that in dissipating the assets, it was following orders from individuals within the Renova Group. Emmerson has rejected this as a defence in law and maintained that ABC submitted to the jurisdiction in respect of the Third Ancillary Claim, filed a defence, engaged BVI attorneys and participated in the proceedings.

[6] Emmerson asserted that it also discovered that Mr. Vekselberg and Renova had been engaged in the further dissipation of assets, also involving ABC. Berdwick Holdings Limited, an indirect subsidiary of Renova held all the shares in Liwet Holding AG ("Liwet"). Liwet held all the shares in Schmolz-Bickenbach AG and OC Oerlikon Corporation AG. Emmerson says that it subsequently discovered that shares in Liwet were transferred to two of Mr. Vekselberg's business associates and 6 senior employees of the Renova Group ("the Liwet Transfers"). The transfers were made to three trusts namely, the Polaris Trust, the Olympia Trust and the Next Generation Trust, for all of which ABC was the trustee. Emmerson states that these trusts are shams and that the assets are being held for the benefit of Mr. Vekselberg and Renova. Emmerson alleges that the purpose of those transactions is to put those assets out of the reach of their creditors, which include Emmerson thereby frustrating the enforcement of any judgment which Emmerson might obtain in these proceedings. Emmerson therefore sought the assistance of the court in order to obtain the requisite disclosure.

[7] By order dated 29th October 2018, Wallbank J, on an application by Emmerson for disclosure relating to the structures of these companies, ordered Mr. Vekselberg and Renova to disclose documentation regarding the Liwet Transfers. Renova did not comply with this order and Emmerson was unimpressed with Mr. Vekselberg's disclosure, which though described as "woefully inadequate" revealed the trust arrangements.

- [8] Emmerson therefore sought and obtained an order dated 19th November 2018, granting a worldwide freezing order against Renova. Emmerson then applied for a freezing order against Mr. Vekselberg, and four other parties involved in setting up the trust structure pursuant to the Chabra jurisdiction¹ which included ABC. This ex parte application was heard on 31st December 2018 before Wallbank J. During the hearing, there were a number of important exchanges between the judge and counsel for Emmerson. This resulted in Wallbank J making an order upon which Emmerson relied in order to amend its ancillary claim form and amended statement of ancillary claim.
- [9] Indeed, by the January Order, based on Emmerson's interpretation, Wallbank J granted the freezing order and the Chabra freezing order and gave Emmerson permission to make further claims against the Chabra parties. Following this, Emmerson served an amended ancillary claim form and amended statement of ancillary claim on ABC's then legal practitioners, whose office was located in Tortola, in the Territory of the Virgin Islands ("BVI"). This is the order which is at the heart of the contention between the opposing sides in this appeal.
- [10] ABC, having been served with a copy of the January Order and the amended ancillary claim form and amended statement of ancillary claim, then applied on 6th February 2019 ("February Application") to: (i) discharge it in its entirety; (ii) challenge the court's jurisdiction; and (iii) set aside service of the amended statements of case. At the hearing on 7th and 8th May 2019, importantly, ABC only pursued the application to set aside service of the amended statements of case on the basis that Emmerson did not have permission to make personal claims against ABC and that it had to be served out of the jurisdiction, not in it. Emmerson cross-applied for declarations that ABC was properly served within the jurisdiction and had been deemed to admit the claims against it pursuant to rule 18.12 of the CPR. This application was heard by Jack J who held, based on Wallbank J's order, that Emmerson did not have such permission and all the

¹ TSB Private Bank International SA v. Chabra [1992] 1 W.L.R. 231.

amendments made to the amended statements of case against ABC should be “disallowed” (May Order). The cross-application was refused and Emmerson was ordered to pay 100% of ABC’s costs. In addition, the learned judge made a number of other orders which will be stated shortly. This latter order is also at the root of the controversy. It is therefore important to recite both orders in some detail.

The January Order

[11] It is imperative that the relevant aspect of Wallbank J’s order which is at the centre of the contention between the parties should be highlighted. Insofar as it is relevant to the appeal, the January Order in which Wallbank J granted a freezing order against ABC and TLB, also stipulated that:

- “ ...
14. Service of this Order on ABC’s legal practitioners, being Campbells, 3rd Floor Banco Popular Building, Road Town, Tortola, VG1110, British Virgin Islands shall be good and proper service of this Order on that Respondent including for the purposes of enforcement by way of committal.
 15. The Applicants shall have permission to amend the Counterclaim and ancillary claims herein, as appropriate to add the remaining Respondents as parties.
 - 15A. Leave to serve all documents in these proceedings on the remaining Respondents out of the jurisdiction is granted.
 - 15B. The Applicant shall file its amended claim form and notify the Renova Parties (being the Claimants; the First to Seventh, Nineteenth and Twentieth Defendants to the Counterclaim; and the First to Eighth Defendants to the Ancillary Claim) of the amended claim in respect of the Respondents by 4pm on 18 January 2019.
 - 15C. Such notification can be effected by email to the Renova Parties’ counsel of record in the territory.
- ”

The May Order

[12] Given the thrust of Emmerson’s complaint, it is necessary to recite in detail the orders which are relevant to the appeal. They read as follows:

- “1. The amendments set out in the Amended Ancillary Claim Form and Amended Statement of Ancillary Claim that Emmerson has

purported to make pursuant to the 31 December Order are disallowed.

2. Service of the Amended Ancillary Claim Form and Amended Statement of Ancillary Claim on ABC is set aside.
3. Emmerson has permission to amend, in the form of the Amended Ancillary Claim Form for the Counterclaim and Re-Amended Ancillary Claim Form for the Ancillary Claim of the First, Second, Fourth, Fifth and Sixth Claimants by way of Ancillary Claim (as three times amended), as filed at Court in the Supplementary Bundle in support of Emmerson's application dated 3 December 2018.
4. The order made under paragraph 3 above, is without prejudice to Emmerson's right to apply, by way of an inter partes application, for permission to amend the Ancillary Claim Form and Statement of Claim to plead a personal claim against ABC.
- ...
6. The Extension Application is granted.
7. The r.18.12 Application is dismissed.
8. Emmerson shall pay ABC's costs of the Extension Application to be assessed if not agreed (the **"Extension Costs"**).
9. Emmerson shall pay 100% of ABC's costs from 31 December 2018, to include the costs of and incidental to:
 - a. the initial consideration of the 31 December Order;
 - b. the applications for the continuation of the 31 December Order;
 - c. the 6 February Application; and
 - d. the r.18.12 Application,(together, **"ABC's 100% Costs"**), with such costs to be assessed

if not agreed.

..."

The Appeal and Cross Appeal

- [13] Emmerson, being dissatisfied with the May Order, by Notice of Appeal filed 5th July 2019, detailed a number of grounds contesting this order. ABC has vehemently opposed the appeal and has by Notice of Counter Appeal filed 9th August 2019, filed a number of grounds in a cross-appeal challenging paragraph 3 of the May Order.

Condensed Issues on Appeal and Cross-Appeal

- [14] Emmerson has filed a number of grounds which primarily challenge Jack J's interpretation of the January Order and the costs order that he made. ABC also challenges paragraph 3 of the May Order that Emmerson should be permitted to amend the ancillary claim and counterclaim in support of its 3rd December 2018 application. The main condensed issues that arise for this Court's determination are: (i) whether the learned judge erred in his interpretation of the January Order ("the interpretation issue"); (ii) whether the learned judge erred in making an order on his own volition contrary to rule 26.2(2) of the CPR ("own volition issue"); (iii) whether the learned judge erred in awarding the costs in its entirety to ABC ("the costs issue"); and (iv) whether the learned judge erred in permitting Emmerson to amend the counterclaim and ancillary claim ("the amendment issue").

Submissions on behalf of Emmerson

- [15] Mr. Marshall, QC took this Court through several parts of the transcript of proceedings before Wallbank J on the 31st December 2018 which resulted in the judge making the January Order. Mr. Marshall recited paragraph 15 of the January Order in support of his argument that Wallbank J granted Emmerson permission to bring personal claims against ABC. He argued that Jack J misinterpreted Wallbank J's order and whilst he correctly agreed that the order permitted Emmerson to bring proprietary claims against ABC and to add ABC as a defendant to the ancillary claim for that purpose, he erroneously held that this did not permit personal claims to be brought against ABC.
- [16] Mr. Marshall elaborated further that Jack J's interpretation of Wallbank J's order was wrong for primarily two reasons. Firstly, in his view, the order imposed no such limitation on the amendments that Emmerson was allowed to make, nor did it limit the amendments to the proprietary claims. He argued that Wallbank J did not limit the order but instead phrased it in broad terms and provided that Emmerson had permission to amend the ancillary claim as appropriate.

Secondly, at the ex parte hearing, Mr. Marshall addressed Wallbank J on personal claims against the Chabra respondents including ABC and permission was granted for said claims to be made.

[17] Mr. Marshall advocated that when considering the issue of appropriate gateway for service out of the jurisdiction, Wallbank J expressed reservations on the 'necessary or proper party gateway' contained in rule 7.3(2)(a) of the CPR and invited counsel to consider other potential gateways. It was at this juncture, he submitted, that he addressed the court on the tort gateway in rule 7.3(4) on the basis that Emmerson had claims in tort on the same basis as the claims in the Third Ancillary Claim, namely transactions to defraud creditors. Learned Queen's Counsel submitted that Emmerson satisfied Wallbank J of both gateways and thereafter he explained that Emmerson would need to plead its claims. Following this, Wallbank J ordered that the amended claim form be served on other parties to the ancillary claims before the return date for the freezing orders. He maintained that Jack J's failure to consider all these factors caused him to erroneously interpret the January Order.

[18] Mr. Marshall posited that Jack J erred in law when he concluded that Emmerson was not permitted to amend its statement of ancillary claim but only the ancillary claim form. He reiterated that the January Order did not limit amendments to ancillary claim forms and there would be no practical purpose in amending and serving a claim form but not the statement of claim. He took issue with the argument that the draft claim form did not refer to most of the matters and therefore Wallbank J could not have permitted the amendments which were made. He said that in so far as Wallbank J did not see it, there was no basis to restrict the permission that was granted.

[19] Mr. Marshall explained to this Court that Jack J also erred in removing any amendment to bring personal claims against TLB. He contended that the effect of paragraph 1 of the May Order was to disallow the claims in the amended ancillary

claim against ABC and also the claims against TLB. Mr. Marshall further stated that TLB were not parties to the application and were not represented at the hearing nor was Emmerson invited to make submissions on whether or not the January Order granted it permission to bring personal claims against TLB. He therefore urged this Court to set aside the order that was made by Jack J of his own volition and without affording the parties a hearing pursuant to rule 26.2 of the CPR. He also strenuously argued that: (i) no reasons were given contrary to the fundamental principle of law that litigants ought to know the reason they won or lost; (ii) Jack J appeared to have proceeded on the basis that both ABC and TLB were in the same position and/or that the order against TLB was a logical consequence of the order against ABC; and (iii) the effect of the order is to treat both ABC and TLB differently.

[20] He maintained that Jack J's dismissal of the rule 18.12 application was a consequence of the compounded errors outlined in the previous paragraphs. He contended that ABC had submitted to the court's jurisdiction in these proceedings, that Emmerson was obliged to serve the company within the jurisdiction and had permission to do so. He argued that ABC was properly served with the ancillary claim form on 21st January 2019 by service on its legal practitioners. It was therefore obliged to file and serve its defence by 19th February 2019 and failed to do so, even to date. Accordingly, he submitted, the operation of rule 18.12 of the CPR came into play. Mr. Marshall submitted that ABC's submission on extension of time is both wrong in law and unavailable. He was adamant that once the sanction applied, it can only be displaced by a court order. He relied on the cases of **Attorney General v Universal Projects Ltd**² and **Emmerson International Corporation v Starlex Company Ltd et al**³ in support of this argument.

² [2011] UKPC 37.

³ BVIHCMAP2018/0044 (delivered 11th March 2019, unreported).

[21] Turning next to the costs awarded by Jack J, Mr. Marshall was adamant that the learned judge's decision on costs was wrong for a plenitude of reasons. He argued that the ultimate test for an appeal in respect of costs was whether the decision challenged was wrong. He relied on the case of **F & C Alternative Investments Limited v Bathelemy (No.3)**⁴ in support of his argument that an appellate court may only interfere with a costs decision if it is wrong in principle, takes into account irrelevant matters or is just plainly unsustainable. He submitted that this appeal meets all the criteria.

[22] Firstly, Jack J awarded costs in ABC's favour on the finding that at the December hearing, there was material non-disclosure by Emmerson. He argued that this was wrong in circumstances where there was a consent order to correct this, ABC agreed the freezing injunction should not be discharged and ABC abandoned its application to discharge. Secondly, he submitted that the judge failed to consider or give any proper weight to the fact that Emmerson succeeded on most of the February Application. He relied on rules 64.6(6)(c) and 64.6(d) of the CPR to advance this argument.

[23] In relation to the counter appeal, Mr. Marshall submitted that it does not raise any substantial issue since the issue is whether permission should have been granted to amend one ancillary claim rather than another. He maintained that Jack J's decision to grant permission to amend the counterclaim in the form of the draft claim form was an exercise of his judicial discretion pursuant to rule 20.1(2) of the CPR and there was no proper basis on which this Court could interfere with that decision. He relied on the well-known pronouncements of Sir Vincent Floissac CJ in **Michel Dufour et al v Helenair Corporation Ltd et al**.⁵ He stated that even if the learned judge made a technical mistake, which he does not accept, the appropriate course of action would have been for ABC to avert the judge's attention to this before the order was drawn up. Mr. Marshall argued that if the

⁴ [2011] EWHC 1731 (Ch).

⁵ (1996) 52 WIR 188.

learned judge made such a mistake in the order, then ABC should have asked that he rectify it under the slip rule rather than appeal to this Court. Mr. Marshall submitted that the issue of whether Emmerson should have been granted permission to amend its counterclaim or ancillary claim has no bearing on any of the issues in dispute. Finally, on this point, Mr. Marshall argued that since ABC did not oppose Emmerson's proprietary claim, did not, on this appeal, oppose Emmerson being granted such permission and a fresh application to the Commercial Court to bring the proprietary claim would serve no useful purpose, it is difficult, in these circumstances, to understand why ABC decided to bring a counter-appeal. He therefore urged this Court to allow Emmerson's appeal and reverse the decision of the judge.

Submissions on behalf of ABC

- [24] Mr. Ayres, QC was adamant that Jack J correctly construed Wallbank J's order and this Court should not interfere with that construction. Mr. Ayres argued that the reference in paragraph 15 to "the remaining respondents" meant only TLB and not ABC. Therefore, in his view, Wallbank J could only have given permission in relation to the Third Ancillary Claim.
- [25] Mr. Ayres, emphasised that in cases which concern reviewing the decision of a first instance judge exercising his judicial discretion, the appellate court is slow to interfere unless it is satisfied that the judge was clearly and blatantly wrong. He purported to rely on the case of **Tawney Assets Limited v East Pine Management Limited et al**⁶ in support of this argument. He maintained that Emmerson has failed to address the second part of the test and therefore there was no basis on which this Court should interfere.
- [26] Mr. Ayres posited that the only claim to which Emmerson could have sought an amendment, in the terms that it did, was the Third Ancillary Claim because both ABC and Emmerson were already parties to that claim as defendant and claimant

⁶ BVIHCVAP2012/007 (delivered 17th August 2012, unreported).

respectively. He submitted that the learned judge could not have given blanket permission to Emmerson to bring a claim in any other claim. He argued that the draft claim form which should have formed the basis of the application to amend at the hearing of 31st December 2018 sets out declaratory relief against ABC and no mention is made of any personal claim against ABC or TLB. Mr. Ayres argued that the skeleton argument relied on by Emmerson before Wallbank J mentioned only the Counterclaim and the Third Ancillary Claim and there is no mention of the Ancillary Claim which Emmerson purported to serve on ABC on 21st January 2019 following Wallbank J's order.

[27] Mr. Ayres contended that in the arguments on why there should be service out on TLB, reference was made only to joining them (TLB) because ABC was already a party to the BVI proceedings. He maintained that this was an unequivocal reference to the Third Ancillary Claim since at that juncture, it was the only claim to which ABC was a party. In his view, this is proof that Emmerson was seeking to join TLB to the Third Ancillary Claim and no other. To buttress his arguments, Mr. Ayres focused a lot on the guiding procedure as stipulated in Part 20 of the CPR.

[28] Mr. Ayres said that in light of all the above, it is clear that Wallbank J was under the mistaken belief that he was authorising a joinder of TLB to the Third Ancillary Claim (to which ABC was already a party) and an amendment to the existing claim form, which he did not see due to technical difficulties. He posited that had Wallbank J seen the draft amended claim form, he would have seen that it purports to join TLB and ABC as defendants to the counterclaim. He maintained that following this, there could have been no intention to allow an amendment in the terms of the draft ancillary claim form. He said that the basic response to this aspect of the appeal is that in order to amend pleadings which require the court's permission, the terms of amendment must be seen and approved by the court.

- [29] Mr. Ayres maintained that in so far as Jack J was correct in relation to grounds 1 and 2 of Emmerson's grounds of appeal, it follows that the learned judge did not err in dismissing the application pursuant to rule 18.12 of the CPR. He argued that if the Court agreed with grounds 1-3 of Emmerson's grounds, then an extension of time should be granted to ABC to file a defence.
- [30] On the issue of costs, Mr. Ayres stated that the judge's finding was neither wrong in principle nor an incorrect exercise of his discretionary powers. He said that Jack J's conclusion that Emmerson should pay ABC's costs was clearly based on the fact that in the judge's view, ABC was the substantial winner. He submitted that the material non-disclosures and misrepresentations were considerations that were required by rule 64.6(6)(a)-(e) to be considered by the learned judge. Finally, he stated that in relation to the matters that had substantially caused the costs, such as the amendment of the claim form and statement of claim, Emmerson was wholly unsuccessful.
- [31] In relation to the counter-appeal, Mr. Ayres submitted that paragraph 3 of the May Order should be set aside as it contemplates that ABC should be added to the counterclaim or ancillary claim (in relation to the proprietary claim) in circumstances where this was not applied for or ordered. He argued that Jack J erred for a number of reasons. He stated that the reference to a document as an "Amended Ancillary Claim Form" is confusing since it implies a claim in the counterclaim rather than in the ancillary claim. He said that while Emmerson is a claimant in the counterclaim, ABC is not a defendant and there has been no application to have ABC joined as such and no order to that effect. Secondly, he argued that if the permission granted by Jack J relates to the ancillary claim then it is impermissible and void. He submitted that this is because: (i) there has been no permission to join Emmerson as a claimant and ABC as a defendant to the ancillary claim and no order to that effect; (ii) the draft claim form did not include Emmerson as a claimant to the ancillary claim; and (iii) it seems as though

Emmerson made its application in the Third Ancillary Claim and not in the counterclaim or ancillary claim.

[32] Mr. Ayres further argued that on any objective reading of the documents that were before Wallbank J and the January Order, it is clear that Emmerson did not apply for or obtain permission to join ABC to any claim, that is, the counterclaim or the ancillary claim. ABC was already a party to the Third Ancillary Claim and no other. He submitted that if paragraph 3 of the May Order related to the ancillary claim and not the counterclaim, then it means Emmerson did not apply for or obtain permission to join itself as an additional claimant to that claim. He said that in these circumstances, it could not have been correct for the learned judge to order that ABC has been added to the counterclaim or to the ancillary claim. He strenuously maintained that neither the application, draft order nor the January Order contemplated the joinder of ABC to the ancillary claim or counterclaim or the joinder of Emmerson as an additional claimant to the ancillary claim.

[33] Mr. Ayres disagreed with Mr. Marshall's submission that once a person is a party to one claim in proceedings, there is no need for permission to be sought to add that person as party to another claim. He asserted that if this were correct, there would be no point in having claims and ancillary claims. Further, he argued that ancillary claims ought to be treated as separate claims as required by rule 18.2(1). He repeated that joining parties, whether to a claim or ancillary claim, after case management conference always requires permission.

[34] In all the circumstances, he urged this Court to dismiss Emmerson's appeal in its entirety and allow ABC's counter appeal.

Discussion and Conclusion

The Interpretation Issue

- [35] The main focus of this appeal is not the application of the relevant civil procedural rules, as argued by ABC. To the contrary, the gravamen of Emmerson's appeal is whether Wallbank J granted permission for a personal claim, a claim for conspiracy to be specific, to be advanced against ABC or whether the claim that was permitted to be advanced against ABC was confined to a claim that it held assets on behalf of Mr. Vekselberg that should be amenable to the execution of a judgment if it were obtained in the appellant's favour in these proceedings. In my view, this brings into sharp focus the construction and interpretation of the clear order of Wallbank J dated 2nd January 2019 which was a case management order.
- [36] The critical starting point in determining this issue is to examine the context, in some detail, in which the decision of Wallbank J was made. For emphasis, and as alluded to earlier, Wallbank J granted a freezing injunction against ABC and TLB after a hearing held on 31st December 2018. This resulted in the January Order. On 6th February 2019, ABC filed an application seeking to discharge the freezing injunction, challenge the court's jurisdiction and to set aside the amended statements of case. Emmerson resisted the application and cross-applied to say that having been properly served, ABC failed to acknowledge service and file a defence. It was against the backdrop of seeking to determine these matters that the learned judge sought to review and interpret Wallbank J's decision, a decision which was clearly an exercise of Wallbank J's discretion.
- [37] One can readily appreciate that Wallbank J was of the view that steps should be taken which would eventually bring all of the pleadings to a close with a view to having the protracted matter heard on its merits. It is conceivable that Wallbank J quite properly wished to bring to an end the filing of a number of applications. A close perusal of the transcript reveals that there were allegations that some assets were removed which necessitated the addition of parties.

[38] It is noteworthy that in so far as Jack J sought to interpret Wallbank J's order, this was not a question of the exercise of discretion but rather he was seeking to ascertain what transpired and the context in which it was said that permission was given. It was, in fact, Wallbank J who exercised his discretion in making the orders which are the subject of the appeal in the January Order. Accordingly, ABC's argument on an appellate court reviewing a judge's decision based on the exercise of his discretion is misplaced and the well-known principles on appellate intervention in these matters are inapplicable. This Court is enjoined to determine the objective meaning of the clear words of Wallbank J's order and seek to ascertain whether the interpretation and meaning ascribed to the order by Jack J are correct.

[39] In light of the above, it is self-evident that the transcript of proceedings has to be carefully scrutinised in order to appreciate the interactions between Wallbank J and Queen's Counsel which led to the order made in Emmerson. It is critical to examine the context in which the order was made with a view to objectively ascertaining the nature of the case management order made by Wallbank J on 2nd January 2019 and whether Jack J erred in the construction of the January Order.

[40] At the ex parte hearing, having concluded that the freezing order against Mr. Vekselberg should be granted, Wallbank J then asked Mr. Marshall to address the basis for proceeding against TLB and ABC. At page 57 of the transcript, Wallbank J repeated the three requirements that must be satisfied in order for the court to grant leave to serve out of the jurisdiction as set out in the Privy Council decision of **AK Investments CJSC v Kyrgyz Mobil Telecom and Others 2000**⁷ and asked that Mr. Marshall expound on how they have been satisfied. To this, Mr. Marshall explained that the basis for making personal claims against TLB is that there is a serious issue to be tried and a good arguable case against them regarding the true ownership of the assets. He expressed that the transactions

⁷ [2011] UKPC 7.

have resulted in assets being placed in ABC's name and the question of a serious issue to be tried arises in circumstances where he is contending that these are in actuality sham arrangements or at the very least ones under which the true beneficiaries are Mr. Vekselberg or Renova. He then went on to provide an exegesis for joining the parties and whether the appropriate forum limb was satisfied. He stated that:

“...it would be on the basis that that issue is closely connected up with the other issues which we are pursuing as against Mr. Vekselberg. It's a central matter in these proceedings regarding his control and ownership of the various companies within the Renova Group, whether that's defined as the Renova Holdings part of it or the Russian part of it. And it would make no sense at all...for that to be determined in another jurisdiction with a resulting risk of inconsistent determinations. And it's for the same reasons that we respectfully submit that the matter is most conveniently or appropriately dealt with in the British Virgin Islands as far as forum conveniens is concerned...”⁸

[41] It is apposite to refer in some more detail to the transcript of the hearing before Wallbank J since it is a relevant backdrop to the January Order. Indeed, the transcript reveals that Wallbank J expressed some reservations as to the necessary and proper party gateway and examined the jurisdictional gateways in rule 7.3 of the CPR through which a party could obtain leave to serve out of the jurisdiction and enquired about which gateway was being relied on. It was at this juncture that Mr. Marshall addressed the tort gateway in rule 7.3(4) of the CPR. Mr. Marshall indicated that having brought claims against Mr. Vekselberg and the other defendants on the basis that they have engaged in transactions which are designed to defeat its claims, these recent transactions (which also involves the Liwet transactions) are, ‘tortuous claims which are designed to attack conspiracies of fraud and other fraudulent action’. He explained that the reason the matter was being brought in the BVI was because it was commenced there in 2013 by Mr. Vekselberg who brought a claim against them seeking a declaration that a put option exercised by Mr. Abyzov and his associates/entities was

⁸ Pages 58 to 59 of Transcript of Proceedings dated 31st December 2018.

ineffective and the claim has since progressed, with a number of counterclaim and ancillary claims being filed.

[42] The transcript further reveals that Mr. Marshall, then explained to Wallbank J that his client's case would be brought under the tort gateway on the basis that damage was sustained within the jurisdiction. The follow up question would then be whether the damage was sustained by one of the Emmerson parties which was based in the jurisdiction. Put another way, as Wallbank J phrased it, if it can be established that Emmerson, a BVI company, was the victim of tort then rule 7.3(4) of the CPR would be satisfied.

[43] On the necessary and proper party gateway, Mr. Marshall told Wallbank J that it was for the purpose of determining whether or not damage was sustained and to afford the BVI court the opportunity to grant appropriate remedies or compensation for that damage. He posited that one way of compensation would be to ensure that in so far as there are transactions being undertaken to defeat enforcement in the claims being pursued, that those transactions are either given no effect or there be some other form of relief that the court deems appropriate.

[44] It is clear that Wallbank J was alive to the matters before him based on the comments he made and the interaction that he had with Mr. Marshall. Wallbank J expressed that both jurisdictional gateways were satisfied. Importantly, he said:

“Very well. Okay. Good. So on that basis, I am prepared, to make the order because clearly the others would be made out. And I think you've satisfied me on the first requirement. You then, the second requirement somewhat. You've dive straight into the third, satisfied me on the third because clearly these matters have to be heard together and it would make no sense for them to be hived off into other jurisdictions. And they are intimately linked, as you've explained, so the real battle is whether you came in under the gateway and I am satisfied that you do. So on that basis, I am prepared to grant you your order.”⁹

⁹ Page 69, lines 1-13 of the Transcript of Proceedings dated 31st December 2018.

- [45] In response, Mr. Marshall indicated that he would need time to properly plead his case which will reflect the evidence the judge had seen and the arguments in the skeleton argument. Wallbank J agreed and gave Emmerson a timeline within which to file the claim form.
- [46] It is clear from a careful reading of the transcript that though there was no written application to bring personal claims against ABC and TLB, Mr. Marshall essentially made an oral application after Wallbank J expressed that he was not entirely convinced on the necessary and proper party gateway. For what it is worth the position taken by the learned judge seems to be contrary to what Wallbank J expressly stated in the exchange between Wallbank J and Queen's Counsel.
- [47] At that point, Mr. Marshall then outlined the tort claims to the satisfaction of the judge and a timetable was discussed thereafter. When one takes the exchange between counsel and the judge into account and properly considered the clear and unambiguous wording of the January Order, I am satisfied that Wallbank J gave Emmerson permission to bring personal claims against ABC and TLB. The corollary of this conclusion is that Jack J also erred in concluding that Emmerson was not permitted to amend the statement of ancillary claim but only the claim form. I agree with Mr. Marshall that the January Order was not limited and that it would serve no practical sense to permit the amendment of the ancillary claim form but not the statement of case, which is more detailed in delineating the party's case. It is no part of this Court's function on this appeal to determine whether Wallbank J correctly exercised his discretion to grant the orders that he did despite the veiled invitation of Mr. Ayres in this regard.
- [48] I also agree with Mr. Marshall that Jack J considered factors that were irrelevant in determining whether or not Emmerson was granted permission by Wallbank J. Having read the transcript together with the amendments that were filed by Emmerson, in my view, the schedule that was filed by Emmerson clearly

comports with the order granted by Wallbank J. It is clear that Wallbank J could not have intended to confine Emmerson to the draft document that was annexed to the application for leave since the transcript reveals that the judge was unable to access the amended draft document. It is sensible therefore for the judge to have granted leave in the wide terms that he did once the record revealed that Wallbank J was persuaded as to the correctness of that approach. In my considered view, Emmerson's application pursuant to rule 18.12 of the CPR also follows this determination as expressed by Queen's Counsel for the appellant.

[49] Rule 18.12 of the CPR stipulates that if the ancillary defendant fails to file a defence within the permitted time, he will be deemed to admit the ancillary claim and will be bound by any judgment or decision in the main proceedings in so far as it is relevant to any matter arising in the ancillary claim. Insofar as it has been determined that Jack J incorrectly interpreted Wallbank J's order and the amendments were permitted then, although ABC filed an acknowledgement of service, it failed to file a defence within the requisite time. This in turn brings rule 18.12 into operation.

[50] The application before Jack J could never have warranted a review of Wallbank J's order with a view to correcting any errors that may have been made. At the very least, the fact that they are judges of coordinate jurisdiction will militate against this. Jack J was required to objectively ascertain the ambit and nature of Wallbank J's order against the backdrop of the hearing. Once the judge was able to do so, his next task was to determine whether Emmerson had complied with Wallbank J's order as distinct from seeking to correct or rewrite it. The effect of the May Order, even though this may have been done inadvertently, is to act as a court of review of Wallbank J's order and amend it. It was not open to him to seek to amend Wallbank J's order. Similarly, it is not open to this Court to seek to amend or rewrite Wallbank J's order. We can only construe it. I agree with Mr. Marshall that there is no basis upon which this Court can properly restrict the clear and extensive wording of the order.

- [51] There is no scope on the face of the order for this Court to accord the order the interpretation that was canvassed by ABC. Wallbank J's order was very wide in its terms and clearly permitted Emmerson to bring personal claims against ABC and TLB. It is evident from all that I have said that I am of the view that Mr. Marshall's submissions on the interpretation issue are more persuasive and attractive and are accordingly accepted. Jack J's conclusion in this regard, even though he read the transcript, was plainly incorrect and this Court can properly deviate from that finding.

Own volition Issue

- [52] Rule 26.2(2) of the CPR provides that if the court proposes to make an order of its own initiative, it must give any party likely to be affected a reasonable opportunity to make representations. In relation to the question of whether or not Emmerson was granted permission to bring personal claims against TLB, the effect of paragraph 1 of the May Order is to disallow not only the claims in the amended ancillary claim against ABC but also the claims against TLB. This order was made in circumstances where TLB were not parties to the February Application or any application before Jack J, not represented at the hearing and Emmerson was not invited to make submissions on whether or not the January Order granted such permission to bring personal claims against TLB. Accordingly, insofar as neither ABC nor Emmerson sought an order to this effect, and Jack J seemed to have granted the order on his own motion contrary to rule 26.2(2) of the CPR, that order must be set aside.

- [53] Insofar as Jack J gave a narrow construction to the wide words used by Wallbank J in the order, he clearly erred in so doing. Wallbank J's order was very wide and granted Emmerson permission to amend. This would definitely include the amendments that were made. I so rule.

The Costs Issue

- [54] Turning now to the third issue which concerns Jack J ordering that Emmerson pay 100% of the costs of ABC. The general rule is that costs follows the event

and the unsuccessful party should pay the costs of the successful party. However, this is discretionary, and the court may order that the successful party pay all or part of the costs of the unsuccessful party. This is evident from a clear reading of rule 64.6 of the CPR which highlights the discretionary powers of the court in dealing with the apportionment of costs. Byron CJ in **Rochamel Construction Limited v National Insurance Corporation**¹⁰ enunciated thusly:

“CPR part 64.6 prescribes that where the Court decides to make an order about the costs of any proceedings, the general rule is that, it must order the unsuccessful party to pay the costs of the successful party. The Court is, however, given very wide discretionary powers to vary the application of the general rule. These include the power to order a successful party to pay all or part of the costs of an unsuccessful party or make no order as to costs or to pay only certain portions of another person’s cost. In exercising these discretions as to costs the Court is required to have regard to all the circumstances. Particular consideration must be given to the conduct of the parties both before and during the proceedings and the manner in which a party has pursued the case in general and particular issues within the case. Thus the order can be affected by whether a party has succeeded on particular issues, even if the party has not been successful in the whole of the proceedings. The Court is also required to consider whether it was reasonable for a party to pursue a particular allegation or raise a particular issue and whether the claimant gave reasonable notice of intention to pursue a claim. The Court also has power to order costs against a person who is not a party, but only on giving prior notice and an opportunity to be heard.”

[55] On any view of this appeal, Emmerson ought to have been successful in resisting ABC’s application, Jack J clearly erred in the orders made. In this appeal, it is critical to acknowledge the principles which guide an appellate court in dealing with an issue which arises from the exercise of a judge’s discretion. It is settled law that an appellate court can only interfere with the exercise of a judge’s discretion in limited circumstances, which have been elucidated in the seminal decision of Sir Vincent Floissac CJ in **Dufour v Helenair Corporation**. The learned former Chief Justice pronounced that:

¹⁰ Civil Appeal No. 10 of 2003 (delivered 24th November 2003, unreported) at para. 8.

“Such an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.”

[56] I find the principles that were enunciated in **F & C Alternative Investments (Holdings) Ltd** very useful and apply them to the appeal at bar. As reiterated by Davis LJ in **F & C Alternative Investments (Holdings) Ltd**, ‘the ultimate test...for the purposes of an appeal of this kind is whether the decision challenged is wrong’. It is therefore useful to examine the factual circumstances which undergird this decision.

[57] It is interesting that in awarding costs, it seems as though Jack J was primarily concerned with the material nondisclosure of Emmerson at the ex parte hearing of the application for a freezing injunction. This much is evident from his observation at paragraph 84 of the judgment, dated 27th May 2019, in which he noted that, ‘this is a case where there was extremely serious nondisclosure and misrepresentation in the hearing before Wallbank J on the 31st of December 2018.’ He also emphasised that he could not overlook the fact of material non-disclosures and misrepresentations. However, it is settled law that in cases such as these where a party has breached his duty of full and frank disclosure, the court is entitled to discharge the freezing order and then re-impose it.¹¹ In these circumstances, not only did ABC abandon the application to discharge but the parties agreed on a consent order which effectively makes the question of discharge on the basis of material non-disclosure a non-issue.

[58] It is also important to remember that ABC abandoned most the grounds of its 6th February 2019 application and only pursued the application to set aside service

¹¹ See: *Brink's Mat Ltd v Elcombe and Others* [1988] 3 All ER 188.

of the amended ancillary claim form and statement of claim on the basis that Emmerson did not get leave to make personal claims against ABC and that it had to be served outside of the jurisdiction and not within it. Though Emmerson was not entirely successful in resisting its cross-application, Jack J was required to consider, by virtue of rules 64.6(c) and 64.6(d) respectively, its partial success and whether it was reasonable for ABC to have pursued a particular allegation or raise a particular issue. In any event, based on everything that has been foreshadowed, Emmerson ought to have been successful before the judge as it was on this appeal. It is impossible to discern upon what basis Jack J could have properly ordered Emmerson to pay 100% of ABC's costs. Jack J, in exercising his discretion to order Emmerson to pay 100% of ABC's costs, was plainly wrong.

- [59] Insofar as Jack J committed an error of principle, it therefore falls on this Court to exercise its discretion afresh. Accordingly, I would set aside the costs order that was made by the learned judge and order that Emmerson shall have its costs of defending the application in the court below before Jack J, such costs are to be assessed if not agreed with 21 days of the date of this order.

The Counter Appeal

- [60] The sole issue raised in the counter appeal is whether permission should have been granted to amend one ancillary claim as opposed to another. Essentially, ABC contended that the proprietary claim against it should be included in the Third Ancillary Claim and not in the counterclaim or ancillary claim. Mr. Ayres' position is that the Third Ancillary Claim has been managed separately from the other claims in the proceedings and that, if these matters were brought in the counterclaim and ancillary claim instead of the Third Ancillary Claim, it would mean that ABC would have been thrust into an earlier trial for which it is not prepared. Mr. Marshall has countered that though it is true that the Third Ancillary Claim has been managed separately from the other claims, that was the position up until April 2018.

[61] In April 2018, Mr. Vekselberg and Renova Group company were subject to sanctions by the US Treasury Department. Consequently, Mr. Vekselberg applied for an adjournment of the trial which was listed for June 2018 which was granted by Wallbank J. A case management conference was thereafter fixed to determine how the claims generally could be managed. So far, two have been held; one in March 2019 before Green J and the other in November 2019 before Wallbank J both of which were adjourned to determine how the matters should proceed. Accordingly, it seems to me that the correct position, as I understand it, is that all of the claims are being case managed together and that no trial date has been set as yet. Given the fact that the proceedings are being case managed together as evidenced by the orders of March and November 2019, respectively, I am not persuaded that anything would be achieved by having the amendments form part of a different part of the Third Ancillary Claim as distinct from the ancillary claim and the counterclaim.

[62] It is settled that the power to grant permission to amend a statement of case is discretionary. This is quite clear from a reading of rule 20.1(2) of the CPR which stipulates that, '[t]he 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'. In my view, Jack J would have had the existing state of affairs of the claims at the forefront of his mind when he made the order. To my mind, the learned judge would have evidently considered the fact that the proposed amendments would not have affected the court's timetable since the matters have not been listed since the adjournment.

[63] On any view of the circumstances, the dates for the hearing of the matters have not been set so there is not apparent prejudice to ABC. Further it is of significance that ABC was the author of the order and subject to minor amendments, it was approved by Jack J. In this regard, I am of the view that Emmerson's arguments on this point have fallen on fertile ground. This was a matter that could have been brought to the court's attention before the order had

been drawn up and perfected. Additionally, the 'slip rule' which is reflected in rule 42.10(1) of the CPR provides that the court may at any time (without an appeal) correct a clerical mistake in a judgment or order, or an error arising in a judgment or order from any accidental slip or omission. A party may apply for a correction without notice. This was not done in the circumstances of this case. I fail to see how it could be proper for ABC to advance these complaints. In any event, I am not persuaded as to the correctness of their arguments. This is not a case where it can be said that in this instance, the judge erred in the exercise of his discretion. During the case management of a claim, the judge has a plenitude of powers available to him. It is not for this Court to seek to indicate that Jack J erred when this was precisely in accordance with the draft order that ABC submitted to him. Accordingly, it was clearly open to him to make the case management orders which he did.

- [64] In light of the foregoing, I am not of the view that this is one of the limited circumstances in which the learned judge erred in the exercise of his discretion, warranting this Court to undertake an evaluative assessment and exercise its discretion afresh. The counter-appeal is accordingly dismissed.

Conclusion

- [65] In view of the totality of circumstances, I would allow Emmerson's appeal, set aside the learned judge's order in its entirety and dismiss ABC's counter appeal. The effect of this is to reinstate the amendments made by Emmerson in the schedule as being in accordance with Wallbank J's order.

Costs

- [66] Emmerson, having prevailed on its appeal and in resisting ABC's cross appeal, is entitled to have its costs in the court below and on the appeal and cross appeal, the latter not exceeding two-thirds of the costs in the court below. These costs are to be assessed by a judge of the Commercial Court unless otherwise agreed within 21 days.

[67] I gratefully acknowledge the assistance of all learned Queen's Counsel and that of all learned counsel involved.

I concur.
Mario Michel
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar