

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ST. CHRISTOPHER AND NEVIS

NEVHCVP2025/0007

BETWEEN:

- [1] NOTRE DAME INVESTMENTS LIMITED
(a registered minority shareholder of BCM International Limited)
[2] ANGELA DIALA LIST
[3] NGUVU HOLDINGS LIMITED
(formerly BCM Investments Limited)

Appellants

and

- [1] ROWNTRY TRADING LIMITED
[2] PAUL LIST
[3] BCM INTERNATIONAL LIMITED

Respondents

Before:

The Hon. Mr. Trevor M. Ward
The Hon. Mde. Esco L. Henry
The Hon. Mr. Gerard St. C. Farara

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Delano Bart, KC and with him Ms. Midge Morton and Mr. Errol Williams Jr. for the Appellants
Mrs. Jean Dyer and Mr. Jaydee Bourne for the Respondents

2025: December 10;
2026: February 24.

Civil appeal – Application to adduce expert evidence of foreign law – Rules 31.2 and 32.6 of the Civil Procedure Rules (Revised Edition) 2023 – Exercise of judicial discretion to permit evidence of foreign law Final judgment - Issue estoppel – Duty to sufficiently plead case - Costs – Whether the learned judge erred in awarding costs to the respondents

This is an appeal against the decision and order of a learned judge of the High Court sitting in Nevis in the Federation of St. Christopher and Nevis dated 21st March 2025 in Consolidated Claims Nos. NEVHCV2021/0194 and NEVHCV2022/0013. By the judgment and order, the learned judge dismissed the notice of application filed on 27th February 2025 by the second appellant, Mrs. Angela Diala List, pursuant to rules 31.2 and 32.6 (“the Expert Evidence Application”) of the Civil Procedure Rules (Revised Edition) 2023 (“the CPR”). By the Expert Evidence Application, Mrs. List sought the permission of the court below to adduce evidence from Dr. Kweku Ainuson on three questions of Ghanaian law posited in the said application. However, question 3 (calling into question the veracity and authenticity of the signatures of Paul List and/or Jonathan Adongo on an instrument of transfer of shares) was not pursued by the second appellant, Angela List.

Question 1 concerned the finding at paragraph [81] of a judgment dated 24th October 2024 of the Superior Court of Judicature in the High Court of Justice, Commercial Division, Accra, Ghana (“the Ghana judgment”) that even though by letter dated 3rd October 2020 Mrs. List resigned her position as director of BCM Ghana Limited, “there is ample evidence that supports the finding that she subsequently withdrew that resignation with the consent of the Company by her continuing in her position of finance director of the Company well past the effective date her resignation had been pegged”; and whether the Ghana judgment was delivered after a trial on the substantive merits and is a final decision, such that an argument of issue estoppel arises in relation to the issues determined by the Ghanaian court in that judgment, particularly as it relates to Mrs. List’s position as director of BCM Ghana Limited, and, if final whether there are any appeal periods and or other factors that would affect such judgment.

Question 2 concerned the assertion that Mrs. List had pleaded in the proceedings below that “based on a common intention to share in the beneficial ownership of BCM International Limited, she acted to her detriment”, as specifically stated at paragraph 69 of her witness statement.

The respondents, who on 10th March 2025 filed a notice of objection to the Expert Evidence Application, contended, inter alia, that (i) no foreign law had been pleaded by Mrs. List; (ii) no notice of intention to adduce evidence of foreign law has been given pursuant to CPR 31. 2; and (iii) in any event, evidence as to Ghana law is not ‘reasonably required to resolve the [consolidated] proceedings ... justly’. It was also contended that the Ghana judgment does not create any issue estoppel in these proceedings, since the fact sensitive issue joined in the Ghana proceedings of whether Mrs. List remained a director of BCM Ghana Limited, does not arise in these proceedings, wherein the said company is not a named party.

The learned judge held that the Ghana judgment was not final and as such, there was no need for any expert evidence of foreign law to allow the court to justly resolve the matters in dispute between the parties to the proceedings. The learned judge, however, went on to consider the matter of issue estoppel and made a consequential order permitting expert evidence of Ghanaian law on that issue. The learned judge also found that the issue of detrimental reliance was not pleaded by the appellants, and that section 69 of Mrs. List’s witness statement was an attempt to recast the appellants’ case through the

instrumentality of adducing expert evidence of Ghanaian law. The learned judge also made an order awarding costs in the sum of \$1,250.00 to the second respondent, Paul List.

Dissatisfied with the decision of the learned judge, the appellants appealed on 12 grounds. The four issues for determination by the Court concern: (1) the requirements of CPR 31.2 and 32.6 for adducing expert evidence of foreign law and the judge's exercise of discretion; (2) issue estoppel; (3) the pleading issue -detrimental reliance and paragraph 69 Mrs. List's witness statement; and (4) the cost order

Held: dismissing the appeal, except that the order awarding costs to the second respondent is set aside and an order for costs in the cause substituted, setting aside the finding and order of the learned judge at paragraph 9 of the judgment in the court below granting permission to Angela List to adduce and to rely on the expert evidence of Dr. Kweku Ainuson on Ghanaian law on the issue of issue estoppel, and awarding costs of the appeal to the respondents to be assessed by a judge or master, if not agreed by the parties within 21 days from the date of this judgment, that:

1. The question of whether and what evidence a party to civil proceedings is permitted to adduce by way of expert evidence of foreign law falls to be decided by a judge under rules 31.2 and 32.2 of the CPR. It is part of the exercise of a case management power by the judge to be decided judicially as a matter of the court's discretion and having regard to the overriding objective under the CPR. The permission of the court must be limited to only evidence which is reasonably required to resolve the proceedings (or an issue in the proceedings) justly. Rule 32.6, which sets out the procedure for applying for permission to adduce expert evidence and the court's power to restrict its permission to the expert witness proposed by the applicant and to the issues or questions upon which the judge, in his judgment, considers he could benefit from expert evidence of foreign law, is to be decided having regard to the standard stipulated by rule 32.2. Together these provisions subject the entirety of the deployment of expert evidence to active judicial control by way of case management in pursuit of the overriding objective and in particular, ensuring proportionality and economy in the resolution of civil disputes. The learned judge was therefore required to consider whether the evidence of Ghanaian law sought to be adduced by Mrs. List relates to an issue in the proceedings and is evidence of the kind reasonably required to resolve the proceedings or that issue justly.

Rules 32.2 and 32.6 of the **Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023** applied; **Bergan v Evans** [2019] UKPC 33 applied.

2. If the evidence sought to be adduced as expert evidence does not concern or arise from the appellants' pleaded case or an issue raised in the defence, it would be impermissible for the appellants to be allowed to adduce such evidence by way of an expert witness. Pursuant to rule 8.7, a claimant's duty when pleading their case is to include in the claim form and statement of claim a statement of all the facts on which the claimant relies and the statement of claim must be as short as

practicable. Pursuant to rule 8.8, a claimant may not rely on any allegation or factual argument which is not set out in the claim, but which could have been set out therein, unless the court gives permission or the parties agree. Once the case is sufficiently pleaded, witness statements may furnish the particulars or details of the allegations or facts contained in the statement of claim. In this way and to this extent, particulars provided in witness statements do not constitute a change of case, provided that the allegation was sufficiently pleaded. In this case, what is stated at paragraph 69 of Mrs. List's witness statement as the issue with respect to which permission to adduce expert evidence of foreign law was sought, is not 'particulars' or an 'amplification' of the case as pleaded in the statement of claim. The learned judge was therefore correct in concluding that it was an impermissible recasting or reshaping of the pleaded case relating to the haulage business and detrimental reliance arising from the alleged mutual understanding between Mr. Paul List and Mrs. Angela List. Accordingly, grounds 5, 6, 7, 8, 9, 10, 11 and 12 in the notice of appeal also fail.

Rules 8.7 and 8.8 of the **Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023** applied; **National Lotteries Authorities v Jerome De Roche** GDAHCVAP2021/0025 (delivered 21st November 2022, unreported) followed; **McPhilemy v Times Newspaper Ltd and other** [1999] 3 All ER 775 applied; **Saint Lucia Motor & General Insurance Co. Ltd v Peterson Modeste** SLUHCVP2009/008 (delivered 11th January 2010, unreported) followed.

3. While the learned judge did not indulge in an examination of the requirements under rule 31.2 of the CPR for permitting a party to adduce evidence on a question or questions of foreign law, nor did he specifically examine Mrs. List's application and determine whether she had met the requirements of rule 32.6 as to the expert evidence to be adduced and the name and qualifications of the person proposed as an expert on Ghanaian law, it is clear from a reading of the judgment that the learned judge must have been mindful of each of these requirements of an application to adduce expert evidence of foreign law. His focus was however on whether such evidence was necessary in order to decide justly the three issues or questions posited by the notice of application. Further, there was no real issue before the judge as to whether the applicant, Mrs. List, had complied with the requisite procedural requirements of rules 31.2 and 32.6. Accordingly, in this regard, the learned judge did not err in his approach to dealing with Mrs. List's application.

Rules 31.2 and 32.6 of the **Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023** considered.

4. A judgment that is not a final judgment cannot support an argument or pleading of estoppel. In this case, while the learned judge was correct in finding that the Ghana judgment was not a final judgment, the learned judge's finding and subsequent order permitting expert evidence of Ghanaian law on the issue of whether the finding at paragraph [81] of the Ghana judgment creates or constitutes an issue estoppel as to whether or not Mrs. List had by her letter dated 3rd October

2020 effectively resigned her position as finance director, must be set aside. While Mrs. List is a party in the Ghana proceedings giving rise to the Ghanaian judgment, the 'finding' of the Ghanaian court at paragraph [81] relate to BCM Ghana Limited, which company is not a party to these proceedings. It is therefore highly unlikely that what is said at paragraph [81] of the Ghanaian judgment can create or constitute an issue estoppel as to Mrs. List's resignation as a director of any of the companies which are parties to these proceedings. It is also at least arguable that what is said at paragraph [81] is not a positive finding of fact that Mrs. List had subsequently withdrawn her letter of resignation dated 3rd October 2020 as a director of BCM Ghana Limited with the consent of the said company. The finding of lack of finality of the Ghana judgment ought to have led the judge inexorably to hold that there was no proper basis upon which expert evidence of Ghanaian law could assist the court to resolve the issues justly and to the dismissal of the Expert Evidence Application in its entirety.

5. Costs incurred at a pre-trial review or at a case management conference are part of prescribed costs to be assessed as part of the proceedings and cannot be the subject of an independent costs order. Pursuant to rule 65.5, the general rule is that where rule 65.4 (fixed costs) does not apply, costs are to be determined in accordance with Appendices B and C of Part 65 and paragraphs (2) and (4) of rule 65.5. Accordingly, by rule 65.3(b), the costs of this application fell to be determined in accordance with rule 65.5 - prescribed costs. Furthermore, rule 65.11(1) expressly exempts from the assessed costs regime interlocutory applications determined at a case management conference, pre-trial review or trial (procedural applications). For these reasons, the award of \$1,250.00 as costs of the application to the second respondent was wrong in principle and an erroneous exercise of discretion by the learned judge, and must be set aside.

Part 65 of the **Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023** applied.

JUDGMENT

- [1] **FARARA JA [AG.]:** By this appeal filed 29th May 2025 with the leave of the Court, Notre Dame Investments, Angela List and Nguvu Holdings Limited (collectively "the appellants") appeal against the decision and order of a learned judge of the High Court sitting in Nevis in the Federation of St. Christopher and Nevis dated 21st March 2025 in Consolidated Claims Nos. NEVHCV2021/0194 and NEVHCV2022/0013. By the judgment and order, the learned judge dismissed the notice of application filed on 27th February 2025 by the second appellant, Angela Diala List ("the Expert Evidence Application") pursuant to rules 31.2 and 32.6 of

the **Civil Procedure Rules (Revised Edition) 2023** (“CPR”). Interestingly, while the second appellant was the only applicant to the Expert Evidence Application, all three appellants have appealed against the decision of the learned judge on the said application. However, nothing turns on this ‘peculiarity’ as Mrs. List, as one of the appellants, has appealed the decision on her said application having obtained the leave of a judge of this Court.

The Expert Evidence Application

- [2] By the Expert Evidence Application, Mrs. List sought the permission of the court below to adduce expert evidence from Dr. Kweku Ainuson (a partner in the Ghanaian law firm of AB Lexmall & Associates) on three questions of Ghanaian law posited in the said application. By the notice of application, Mrs. List also applied pursuant to **CPR 27.8(3)** for an order varying the period stipulated by the case management order timetable dated 7th October 2024 for the filing by the parties of interlocutory applications, from 28th February 2025 to 14th March 2025 ‘to allow the applicant to file an application to admit a forensic handwriting expert, as an expert witness, in accordance with CPR 32.6... by 13th March 2025.’ However, this second limb of the application was not pursued either before the judge below or on appeal.
- [3] It is to be observed that the notice of application was filed one day before the date set by the case management order dated 7th October 2024 for the filing by the parties of interlocutory applications in the underlying proceedings. However, nothing turns on this observation as clearly the Expert Evidence Application was in fact filed within the permitted period and, accordingly, could not be disallowed on the basis that it was filed in disobedience to or out of the time permitted by the case management order for the filing of interlocutory applications in the said proceedings.

- [4] The three question and bases upon which the applicant sought to have the court below grant permission to adduce expert evidence of Ghanaian law pursuant to rules 31.2 and 32.6 are:

Question 1: This question concerns the pronouncement at paragraph [81] of the judgment dated 24th October 2024 of the Superior Court of Judicature in the High Court of Justice, Commercial Division, Accra, Ghana which reads:

“From the foregoing, it is my finding that on the record, even though by Exhibit AL11 (Angela List’s letter dated 3 October 2020) Applicant (Angela List) resigned her position as Director of the 3rd Respondent (BCM Ghana), there is ample evidence that supports a finding that she subsequently withdrew that resignation with the consent of the Company by her continuing in her position of finance director of the Company well past the effective date her resignation had been pegged.”

- (i) Whether the judgment was delivered after a trial on the substantive merits and is a final decision, such that an argument of issue estoppel in relation to the issues determined by the court in that judgment (particularly as it relates to Mrs. Angela List’s position as director of BCM Ghana Ltd?
- (ii) If the said judgment is final, whether there are any appeal periods and or other factors that would affect such judgment?

Question 2: This question concerns the assertion that Angela List has pleaded in the proceedings that ‘based on a common intention to share in the beneficial ownership of BCM International Limited, she acted to her detriment as specifically stated at paragraph 69 of the witness statement of Angela List, which states:

“This followed an earlier agreement and understanding coming out of events in 2015. At that time BCM Ghana had not won any contracts since the one it had terminated prior to my involvement in the companies. It was in pursuit of a mining contract. However, in order for it to be entitled to securing the contract, it had to be wholly locally owned in accordance with the country’s local content policy in the mining industry at the time. This local content policy has now turned into a local content law, where the Ghanaian Government seeks to restrict certain jobs in the mining sector to fully owned Ghanaian companies and restricts foreign companies from access to those jobs. I had the option of securing the contract with other companies but chose to work through BCM Ghana Limited.”

- (i) What is the position in Ghana with respect to the Ghanaian Government awarding mining contracts to companies whose shareholders and or directors are not of Ghanaian descent/nationality or differently put to foreign versus Ghanaian companies?
- (ii) Was this position prior to 2018 a policy position and then subsequently codified?

Question 3: This concerned 'the veracity of signatures of Paul List and/or Jonathan Adongo'. However, this issue was not pursued on appeal.

- [5] An affidavit of Angela List was filed on 27th February 2025 in support of the Expert Evidence Application by which she exhibited the curriculum vitae of the proposed expert witness, Dr. Kweku Ainuson, and a report under his hand 'on which the evidence is to be adduced' from the said expert ("AL1"). Also exhibited to the affidavit as "AL2" are the exchanges of correspondence between the affiant's legal team and the Ghana Police Service.
- [6] The exhibited report of Dr. Ainuson stated at Section D Legal Opinion paragraph 1: 'However, it [the judgment or decision of the High Court, Accra, (Commercial Division) dated 24th October 2024] is not final to the extent that an aggrieved party has the right of appeal.' The fact that the Ghana judgment had been appealed and is therefore not a final judgment such as to give rise to an issue estoppel, was admitted by Dr. Ainuson, albeit he opined (at paragraph 6) that the filing of an appeal 'will not mean that the judgment cannot be enforced'; and that enforcement steps can only be stopped by a stay of execution of the judgment granted by the court. That the correct legal position is that the judgment is not final as a matter of Ghanaian law giving rise to an issue estoppel, has now been accepted by the appellants in these proceedings, as was confirmed to the Court by their leading counsel, Mr. Bart KC.
- [7] The respondents filed on 10th March 2025 a notice of objection to the Expert Evidence Application. They contended, inter alia, that (i) no foreign law has been

pleaded by the applicant, Angela List; (ii) no notice of intention to adduce evidence of foreign law has been given pursuant to **CPR** 31.2; and (iii) in any event, evidence as to Ghanaian law is not 'reasonably required to resolve the [consolidated] proceedings ... justly.' It was also contended that the decision or judgment of the High Court of Justice, Commercial Division Accra, Ghana dated 24th October 2024 ("the Ghana judgment") does not create any issue estoppel in these proceedings, since the fact sensitive issue joined in the Ghana proceedings of whether Angela List remained a director of BCM Ghana Limited, does not arise in these proceedings, wherein the said company is not a named party.

The Consolidated Claims

- [8] As mentioned above, Claims NEVHCV2021/0194 and NEVHCV2022/0013 were consolidated. Claim 194/2021 was commenced on 7th December 2021 by Paul List, as claimant, against Angela List, Nguvu Holdings Ltd and Morning Star Holdings Company Limited, as defendants. In brief, by Claim 194/2021, Paul List alleges unlawful means conspiracy against Angela List as one of the directors of Nguvu Holdings Ltd (formerly BCM Investments Limited - a company incorporated under the laws of Nevis), and of acting 'to disentitle and/or exclude and/or hijack and/or deceive [Mr. List] to his detriment of his legal and/or equitable share and shareholdings', including, *inter alia*, forging documents and resolutions to amend section 1 of the Articles of Incorporation of BCM Investments Limited and changing its name to Nguvu Holdings Limited, and holding a board of directors meeting of BCM Investments Limited to cause the change of name to be registered. It is also alleged in Claim 194/2021 that Mrs. List unlawfully transferred the shares of Rowntry Trading Limited to the second appellant, Nguvu Holdings Ltd, Mr. List being the sole shareholder of Rowntry Trading Limited which is a 50% shareholder in Nguvu Holdings Ltd and is therefore the beneficial owner of 50% shares in Nguvu Holdings. By Claim 194/2021 Mr. List sought several declarations, damages and other orders.

[9] Claim No.13/2022 endorsed with statement of claim was filed in the High Court on 7th February 2022 by Notre Dame Investments Limited and Mrs. List as claimants, against Rowntry Trading Limited, Paul List, BCM International Limited and Morning Star Holdings Limited, as defendants. By Claim 13/2022, the claimants seek the following relief (in material part):

“1. A declaration that the Register of Shareholders of BCM International Limited as at 8th April 2020 is accurate and reflects the true ownership of the said entity, that is to say, that Rowntry Trading Limited is 75% beneficial owner and Notre Dame Investments Limited as a 25% beneficial owner.

2. An injunction restraining the 1st and 2nd Defendant [Rowntry Trading Limited and Paul List], their servants and agents from:

- a. acting in a manner which is unfairly prejudicial to the interest of the minority shareholder of the 3rd Defendant [BCM International Limited];
- b. dealing in any way with the assets of the 3rd Defendant and from disposing of and or dissipating the assets and or diminishing the value of the assets of the 3rd Defendant;
- c. holding themselves out as the sole shareholder of the 3rd Defendant;
- d. that the 4th Defendant [Morning Star Holdings Limited] forthwith produce and make available a certificate of incumbency for and in respect of the 3rd Defendant to the Claimants.

3. Alternatively, that as at April 2020, the 1st Defendant holds on trust for the 1st Claimant [Notre Dame Investments Limited] 25% of the beneficial shareholdings in the 3rd Defendant and that as for the 2nd Claimant [Angela Diala List] , 5% of the beneficial shareholdings in the 3rd Defendant and that the Claimants are entitled to be registered as the holder of such shares.

4. An Order for rectification of the 3rd Defendant's share register, to have the 1st Claimant entered therein as the registered owner of 25% of the shares of the 3rd Defendant and the 2nd Claimant entered therein as a 5% registered owner of the shares of the 3rd Defendant accordingly.”

[10] It is significant to observe that BCM Ghana Limited is not a party to the underlying consolidated proceedings before the High Court in Nevis. This is significant because it is with respect to the company BCM Ghana Limited that Angela List

purported to resign as a director by letter dated 3rd October 2020. This resignation letter was the subject of paragraph [81] of the Ghana judgment, and it is with respect to what the Ghanaian court said or held at paragraph [81], that Angela List sought permission of the court below to rely on expert evidence of Ghanaian law as to whether the Ghana judgment was final, giving rise to an issue estoppel in the underlying consolidated proceedings in this matter.

[11] It bears identifying, at this juncture, certain paragraphs of the statement of claim relied on by the appellants in support of their grounds of appeal and the basis for such reliance, without entering upon a detailed analysis of them. For the purposes of this judgment, I do not find it necessary or expedient to set out these paragraphs in full. Suffice it to be stated that before this Court, learned counsel for the appellants, Mr. Bart KC, relied specifically on paragraphs 11 to 15, 24 to 30 and 43 of the statement of claim, as illustrative of the contention that the appellants had pleaded a 'common intention constructive trust', and that these paragraphs provide a pleaded foundation upon which the judge ought to have granted the application for permission to adduce expert evidence of Ghanaian law.

[12] I will consider later in this judgment, to the extent necessary, what is pleaded in these paragraphs of the statement of claim and compare them with what is averred at paragraph 69 of Angela List's witness statement, in determining whether paragraph 69 ought, appropriately, to be viewed as an 'amplification' of the case already pleaded by the appellants. The significance of this is because the appellants' argument is that what is stated at paragraph 69 (relied on as the foundational basis of the Expert Evidence Application) is not a recasting of their pleaded case, but an amplification of what was already pleaded in the statement of claim, and had this been appreciated by the learned judge, he would have concluded that there was sufficient of a case made out for permission to adduce expert evidence of Ghanaian law in relation to issues 1 and 2 in the Expert Evidence Application.

- [13] The appellants also rely on what is pleaded at paragraph 26 of the statement of claim as to the policy in Ghana regarding a foreign registered company, such as the third respondent, BCM International Limited, being able to obtain a license to engage in the haulage business in Ghana. It is their submission that paragraph 69 of Mrs. List's witness statement is an amplification of paragraph 26 of the statement of claim; further, it is evidence of their 'motivation' for entering into the arrangements; and is, in and of itself, a sufficient basis for granting the application to adduce expert evidence of Ghanaian law.

Defence and Counterclaim

- [14] On 4th October 2023, the first, second and third appellants (1st, 2nd and 3rd Defendants) filed an amended defence and counterclaim. The most pertinent pleading in the defence, for the purposes of the Expert Evidence Application, as referenced by Mr. Bart KC before this Court, is paragraph 17(f). Paragraph 17(f) states:

"Angela List did not join BCM Ghana on the basis of the understanding that she would have a beneficial interest in BCM International and/or its affiliates as alleged or at all. There was no such understanding or agreement as alleged or at all that Angela List would share in the beneficial interest in BCM International. Paul List did not create any expectation that Angela List should have a certain interest in BCM International. Further or alternatively Paul List did not take unconscionable advantage of Angela List as she was all material times compensated as an employee for the services she provided to the BCM Group. Angela List did not act to her detriment as alleged or at all on the basis of any common understanding or agreement with Paul List as alleged or at all."

The Judgment in the Court Below

- [15] On the issue of whether the Ghana judgment was final, the learned judge held that it was not. At paragraph 6 of the judgment, the judge held that the 'inescapable inference is that the October judgment was not final and as such there was no need for any expert evidence of foreign law to allow this court to justly resolve the matters in dispute between the parties to these proceedings.' Further, at

paragraph 7, the judge observed: 'For the avoidance of doubt it is accepted that a judgment is final until it is appealed and set aside by a higher tribunal but the fact that an appeal appears to have been filed puts an end to the need for any expert evidence on this point.' In my judgment this finding by the learned judge that the Ghana judgment is not a final judgment and its consequence to the necessity for any expert evidence of Ghanaian law on this issue, is sound and beyond reproach.

[16] Paragraphs 6 and 7 of the judgment were challenged in the notice of appeal as findings of fact. Neither of the said paragraphs were challenged as findings of law. As a matter of principle, a finding that a foreign judgment is final or not final is a finding of fact and also a finding of law based on the law of the country where the judgment was given by a court of competent jurisdiction. As mentioned above, the appellants' proposed expert witness, Dr. Ainuson, in his report at section D paragraph 1 opined that the Ghana judgment having been appealed is not a final judgment. The appellants have, sensibly and correctly, not pursued, but have abandoned ground 3 of their notice of appeal and, hence, any notion that the Ghana judgment is final. This puts completely to rest the 'finality' issue and any question of the necessity for expert evidence of foreign law as to whether the Ghana judgment is final.

[17] In my considered view, it also puts to rest the second line of argument dealt with by the learned judge, that is, whether the Ghana judgment and, in particular, the statements/findings at paragraph [81], was capable of creating an issue estoppel. Paragraph [81] of the Ghana judgment concerns the resignation letter of Angela List as a director of BCM Ghana Ltd, a company incorporated under the laws of Ghana and which company is not a party to the consolidated proceedings in the court below. Paragraph [81] is set out in full in the Expert Evidence Application.

[18] The learned judge having correctly held that the Ghana judgment is not final, went on to consider the matter of issue estoppel, the second issue posited by Mrs. List as the applicant. However, this led him to make the curious declaration or finding

at paragraph 9 of the judgment concerning 'issue estoppel'. The 'issue estoppel' issue is whether Mrs. List's directorship of BCM International and/or BCM Investments Ltd came to an end with the tendering of her 3rd October 2020 letter of resignation as a director of BCM Ghana Limited. Paragraph 9 reads:

"It seems to me that this court can benefit from receiving expert evidence on this issue in order to resolve the proceedings justly. For this reason, this court is minded to permit the Applicant to call the evidence of Dr. Kweku Ainuson on this issue of issue estoppel. Fairness dictates that Mr. List is entitled to call his own expert evidence in response."

[19] It is perhaps more curious that the respondents, who filed a respondents' notice in the appeal on 12th June 2025, did not challenge this finding at paragraph 9, and the consequential order made by the learned judge permitting expert evidence of Ghanaian law on the question of 'issue estoppel'. Instead, the respondents merely sought to uphold the judge's decision on the third issue - pleading point issue - on different or additional grounds.

[20] This brings me to the pleading point issue and the judge's treatment with it. Put simply, this issue is whether the appellants had pleaded in their statement of claim in Claim No. 13/2022 'detrimental reliance'. This issue was identified by the judge as the third point relied on by Mrs. List in support of her Expert Evidence Application. The judge referred to letter d(i) of the notice of application which speaks to the position under Ghanaian law regarding the 'policy' of the government of Ghana with regard to the award of mining contracts in that country to companies whose directors and/or shareholders are not of Ghanaian descent or nationality. The judge also referenced letter d(ii) of the notice by which Mrs. List sought permission to adduce expert evidence to address a policy position in 2018. The learned judge stated at paragraph 13:

"None of these are new matters or matters which Mrs. List's counsel has said could not have been addressed in their claim form filed in February 2022. They have not offered an explanation for why these matters were not previously pleaded and the unescapable inference is that in drafting their witness statements they have now appreciated the importance of the mining contracts and the evidence they wish to deploy on this issue."

This statement at paragraph 13 of the judgment, is challenged on appeal as a finding of fact.

- [21] The judge's finding that the issue of detrimental reliance has not been pleaded by the appellants and that paragraph 69 of Mrs. List's witness statement is an attempt to 'recast' and/or to 'reshape' the appellants' case through the instrumentality of adducing expert evidence of Ghanaian law, is at paragraphs 15, 16 and 17 of the judgment. Each of these paragraphs have been challenged in the appeal as findings of law, and paragraph 15 also as a finding of fact. Paragraphs 15, 16 and 17 state:

"15. The dispute between the parties focuses on corporate and equitable principles but there is no gainsaying the fact that the corporations at the heart of this dispute are engaged in 'civil earthwork contract services' or mining contracts and/or works. Such works are central to the case for Mrs. List and to now recast the case to adduce expert evidence on a question that should have been uppermost in her mind having regard to the matters above is not permissible. The trial date is likely to be adversely affected if this relief is granted and it is difficult to see how the matters at paragraph 69 of the witness statement were not set out with any degree of particularity in the statement of claim.

16. Paragraphs 19, 20 and 21 of the statement of claim set out details of Mrs. List's efforts to recover bad debts in Burkina Faso, Sierra Leone and with the Caterpillar company. There is no express reference to detrimental reliance as a basis of Mrs. List's efforts on behalf of BCM International Limited. There is no express pleading titled particulars in the statement of claim. This in my view, speaks volumes. Mrs. List cannot now seek to reshape the case to address matters that could and should have been pleaded with significant particularity at an earlier stage of the proceedings.

17. For all these reasons I am not persuaded that it was necessary for the court to receive expert evidence on this question in order to justly resolve the proceedings. This aspect of Mrs. List's application fails."

- [22] On the issue of costs, the learned judge having assessed that Mr. List had received the 'lion's share' of success in the matter, awarded him costs in the sum of \$1,250.00. This decision and award at paragraph 18 of the judgment have been challenged in the appeal as a finding of law.

The Appeal

[23] In the notice of appeal the appellants rely on 13 grounds of appeal. As noted above, ground 3 dealing with the judge's finding that the Ghana judgment is not final, has been abandoned by the appellants. Also, ground 13 dealing with the award of costs to Mrs. List has, effectively been conceded by Mrs. Dyer, learned counsel for the respondents as being wrong as a matter of procedural law and principle. Interestingly, by ground 4 of the notice of appeal the appellants contend that the learned judge having found that the Ghana judgment was not final, 'erred in law by thereafter stating that it could still find the same evidence [of Ghanaian law] useful in aid of issue estoppel.'

[24] There is a considerable amount of overlap in the remaining 11 grounds, several of which can conveniently be dealt with together. These 11 grounds of appeal can be condensed into the following issues, which accord generally with the approach adopted by Mr. Bart KC in arguing the appeal for the appellants, and which approach has been followed, to some extent, by learned counsel Mrs. Dyer for the respondents. These four issues are:

- (1) The requirements of **CPR** 31.2 and 32.6 for adducing expert evidence of foreign law and the judge's exercise of discretion.
- (2) Issue Estoppel.
- (3) The Pleading Issue - detrimental reliance and paragraph 69 Mrs. List's witness statement.
- (4) The cost order – is it bad as a matter of principle?

Appellants' Submissions on the Four Issues

[25] Grounds 1 and 2 of the appeal pertain to the first issue set out above. By ground 1, the appellants contend that the learned judge 'erred in law by failing to consider and to apply the relevant principles to the Application to adduce Expert Evidence.' By ground 2, the appellants contend that the learned judge erred 'by taking irrelevant factors into consideration in his conclusion and/or inferences of fact and

law as to the effect of the Judgment of the Ghanaian Courts dated 24th October 2024.'

- [26] Learned King's Counsel for the appellants spent some time addressing the Court with regard to this issue and grounds of appeal. It is the appellants' submission that the judge did not consider, as he was obliged to do, the requirements of an applicant under **CPR** 31.2 and 32.6 and whether Mrs. List had satisfied him as to the basis for exercising the court's discretion to permit the appellants to adduce expert evidence, particularly as it relates to Question 1 posited by the notice of application. He argued that it is the, or one of the, main issues in the appeal. Learned King's Counsel referred to and examined certain requirements under **CPR** 31.2 and 32.6, which an applicant must satisfy.
- [27] Rule 31.2 sets out the procedure to be followed by a party to civil litigation when applying to adduce evidence on questions of foreign law. These requirements are: (i) to give every other party at least 42 days' notice of their intention to adduce the expert evidence; (ii) attach to the said notice a document which forms the basis of the evidence for which permission to adduce will be sought; and (iii) specify the question or questions on which expert evidence is to be adduced. Rule 32.6 deals with the court's power to restrict expert evidence and the factors which a judge must consider when exercising his discretion whether to permit expert evidence and, if so, on what questions or issues of relevance in the case. Also, rule 32.6(3) requires that an applicant must name the expert witness and identify the nature of his or her expertise; and states that any permission granted by the judge must be in relation to that expert witness only.
- [28] In seeking to make good the appellants' appeal on this first issue, counsel for the appellants referred to the notice of application to adduce expert evidence filed by Mrs. List in this matter which names the proposed expert witness, gives his qualifications and background, and sets out the specific questions on which the court was invited to grant permission to adduce evidence of Ghanaian law.

However, counsel for the appellants accepted that question 1 was no longer relevant they having accepted that the Ghana judgment is not final. The focus was therefore on question 2 which deals with the statement at paragraph 69 of the witness statement of Mrs. List and about what is or was the position under the law of Ghana with respect to the government's policy in awarding mining contracts to companies whose directors and/or shareholders are not of Ghanaian decent or nationality, and has the policy position in 2018 been subsequently codified. It is submitted by the appellants that this two-part question remains relevant, and it is with respect thereto that expert evidence should be permitted to be adduced by them in the proceedings below.

- [29] The appellants submit that they had fully complied with the requirements of **CPR** 31.2 and 32.6 in making the application to adduce expert evidence of foreign law in relation to question 2, posited in Mrs. List's notice of application. Furthermore, the said application having been filed on 27th February 2025 was timely, having been made within the period mandated by the CMC order for the parties to make interlocutory applications in the proceedings. As regards the trial dates, the said application was heard by the judge on 20th March 2025 some 42 days before the trial date. In this regard, the respondents filed no application themselves.
- [30] The appellants criticize the judge's analysis and statements at paragraph 10 of the judgment. There he held, in essence, that having only partially acceded to the application to adduce expert evidence limited only to the question or issue of 'issue estoppel', which issue is a matter of law, he was not minded to push-back the trial date from the week of 12th May 2025 to the week of 26th May 2025, as proposed by counsel for Mrs. List.
- [31] Grounds 5,6,7,8,9,10 and 11 are concerned with the judge's findings that the appellants had not pleaded detrimental reliance, and they were attempting by paragraph 69 of Mrs. List's witness statement, to recast or reshape their pleaded case. In response to these findings, the appellants submit that the issue as to the

alleged inadequacy or lack of their pleading was not a matter properly before the judge for consideration on the application to adduce expert evidence, but is a matter more properly for consideration, if raised, at the trial. Counsel for the appellants submitted that, in any event, detrimental reliance was pleaded in the statement of claim at paragraphs 11,12,13,14,15,24,25,26,27,29,30 and 43. Counsel also referenced paragraph 17 of the Amended Defence¹ to show that the respondents fully appreciated that the appellants had pleaded 'detrimental reliance' since they had provided therein a 'full frontal' response to it. Paragraph 17 is headed 'No common intention constructive trust as alleged'.

[32] Counsel for the appellants also relied on paragraph 69 of Mrs. List's witness statement. It is submitted that what is stated therein is an amplification of the already pleaded case of detrimental reliance and is not a recasting or attempt to reshape the appellants' case, as the learned judge erroneously held at paragraphs 15 and 16 of the judgment.

[33] Counsel for the appellants also relied on paragraph 26 of the statement of claim. This pleading of a 'policy' or requirement under Ghanaian law was, it is submitted, amplified by paragraph 69 of Mrs. List's witness statement. It is also submitted that on the pleading at paragraph 26 alone, a proper case could be made out for permission to adduce expert evidence of Ghanaian law on that issue. Paragraph 26 of the statement of claim states:

"Indeed, in 2018, it had become necessary for the share transfers to be done due to the fact that the company had decided to go into the haulage business. The sole shareholder of the company – BCM Investments Limited – was a foreign registered company – which meant that the company did not qualify to be issued with a license to engage in the haulage business. The company, however, required this license in order to clear some 34 Volvo Trucks, which had been imported. Thus, the shares of BCM Investments Limited were transferred, 70% to the 2nd Defendant (who is Australian but has naturalized as Ghanaian) and the 2nd Claimant, 30%." (punctuation added)

¹ Supplemental Hearing Bundle, page 10.

[34] Regarding the ‘value’ of having expert evidence to assist the court on this issue, it is the appellants’ case that this would be part of the evidence required or necessary for a just resolution of the case as pleaded and therefore ought to be permitted by the court below. They argue that this evidence goes to the issue of Mrs. List’s ‘motivation’ and is a relevant factor. In support of this submission, the appellants cite the cases of **Eastern Caribbean Flour Mills Limited v Ormiston Ken Boyea**,² **Richardson v Richardson**,³ **McPhilemy v Times Newspaper Ltd and others**.⁴

Respondents’ Submissions

[35] Ms. Dyer, learned counsel for the respondents, seized upon the appellants’ concession that the Ghana judgment is not final. It is submitted that the consequence of this is that the judge was correct to hold that no expert evidence of Ghanaian law would be necessary or required on this first issue in deciding the case justly. However, Ms. Dyer did not stop there. She also submits that it flows from this concession that the decision and order of the learned judge to permit expert evidence of Ghanaian law on the second issue of issue estoppel, was wrong and must fall away.

[36] I have already in this judgment stated that in my view, any question of expert evidence on the issue of whether paragraph [81] of the Ghana judgment creates or can create an issue estoppel would now be moot. Accordingly, on this issue I am in agreement with Ms. Dyer as a matter of principle. However, the respondents and Ms. Dyer have another hurdle to get over. It is that the respondents having filed a Respondent’s Notice in the appeal did not cross-appeal or invite this Court to set aside the order of the learned judge permitting expert evidence of foreign law on the question of issue estoppel. This matter is further complicated by ground

² No. 12 of 2006 (delivered 16th July 2007, unreported) at paragraphs 42- 44 and 46.

³ ANUHCVP2023/0148 (delivered 18th February 2025, unreported) at paragraphs 64-69.

⁴ [1999] 3 All ER 775.

4 of the appellants' notice of appeal by which they put that very matter in issue.

Ground 4 states:

"4. The learned trial judge consequently erred by thereafter stating that it could still find the same evidence useful in aid of issue estoppel."

[37] By ground 4, the appellants themselves called into question the correctness of the learned judge's finding and order permitting expert evidence on the question of issue estoppel, having found that the Ghana judgment was not a final judgment. An issue estoppel cannot arise as a matter of law from the decision or finding of another court in a judgment which is not final. Of course, the judgment remains enforceable against the losing party until an appeal has been successful and the judgment overturned and any order set aside or a stay of that judgment is granted.

[38] Regarding the appellants' point that what is said by Mrs. List at paragraph 69 of her witness statement is evidence of her motivation, Ms. Dyer submitted that this point was never argued in the court below and is being raised for the first time in the appeal. It is also submitted that the learned judge was correct in his approach to a consideration of the Expert Evidence Application and his dismissal of it (in part at least) ought not to be set aside. In support of this, counsel argued that in relation to Part 32 of **CPR** the judge has to perform a 'gatekeeping' exercise. He had to decide whether the expert evidence was reasonably required to decide the proceedings justly. In this regard, the respondents' two bases of objection to the application in the court below were: (i) the expert evidence relates to foreign law which must be pleaded, but the appellants have not pleaded foreign law on any issue in the statement of claim; and (ii) the evidence relating to the policy in Ghana also related to 'detrimental reliance'.

Analysis and Conclusion

Whether Mrs. List had Satisfied the Requirements of CPR 31.2 and 32.6

[39] In my respectful view there is nothing to this issue. While the learned judge did not indulge in an examination of the requirements under rule 31.2 for permitting a

party to adduce evidence on a question or questions of foreign law, nor did he specifically examine Mrs. List's application and determine whether she had met the requirements of rule 32.6 as to the expert evidence to be adduced and the name and qualifications of the person proposed as an expert on Ghanaian law, it is clear from a reading of the judgment that the learned judge must have been mindful of each of these requirements of an application to adduce expert evidence of foreign law, but his focus was on whether such evidence was necessary in order to decide justly the three issues or questions posited by the notice of application. There was no real issue before the judge as to whether the applicant, Mrs. List, had complied with the requisite procedural requirements of rules 31.2 and 32.6. The live issue was whether the judge could benefit from expert evidence of Ghanaian law in seeking to resolve any of the said three issues or questions.

- [40] In this regard, the learned judge did not err in his approach to dealing with Mrs. List's application. The first question as to the finality of the Ghana judgment was correctly decided by the learned judge and is no longer a live issue in appeal. The judge considered the test for permission to rely on expert evidence of Ghanaian law in relation to the second question of issue estoppel arising from paragraph [81] of the Ghana judgment and determined that he could benefit from such evidence. As indicated above and as is held in the section below dealing with this second issue, the learned judge's decision was wrong as a matter of law and principle and must be set aside. The third issue - the pleading issue of detrimental reliance - is a matter for the judge not for expert evidence of foreign law.

Issue Estoppel

- [41] In this instance, it is the very statement/finding at paragraph [81] of the Ghana judgment upon which an expert as to Ghanaian law would be opining as to whether it was capable of or did give rise to an issue estoppel, such that Mrs. List could not relitigate that issue of mixed fact and law before the courts in Nevis in these proceedings.

[42] The finding by the learned judge at paragraph 9 of the judgment that ‘this court can benefit from receiving expert evidence on this issue [issue estoppel] in order to resolve the proceedings justly’, is respectfully untenable and fundamentally wrong as a matter of sound judgment and law. A party cannot rely on a judgment (or some finding in it) which judgment they now admit is not final as giving rise to an issue estoppel in other proceedings. A judgment that is not a final judgment cannot support an argument or pleading of issue estoppel, even where the other requirements of an issue estoppel are present. In the instant matter, the Ghana judgment is undoubtedly not a final judgment it having been appealed. The learned judge was therefore correct when he so held at paragraphs 5 and 6 of the judgment. However, the finding at paragraph 9 is erroneous and the order made permitting expert evidence of Ghanaian law on the issue of whether the finding at paragraph [81] of the Ghana judgment creates or constitutes an issue estoppel as to whether or not Mrs. List had by her letter dated 3rd October 2020 effectively resigned her position as finance director must be set aside.

[43] However, the appellants have a further problem with their argument on issue estoppel. In the Ghana proceedings giving rise to the judgment, while Mrs. List was a party to those proceedings, the ‘finding’ of the Ghanaian court at paragraph [81] is in relation to her resignation as a director of BCM Ghana Limited, which company is not a party to these proceedings. Accordingly, it is highly unlikely that what is said at paragraph [81] can create or constitute an issue estoppel as to Mrs. List’s resignation as a director of any of the companies that are parties to these proceedings. Moreover, it is at least arguable that what is said at paragraph [81] is not a positive finding of fact that Mrs. List had subsequently withdrawn her letter of resignation dated 3rd October 2020 as a director of BCM Ghana Limited with the consent of the said company, ‘by her continuing in her position of finance director of the company well past the effective date her resignation had been pegged’. This is because at paragraph [81] the Ghanaian court merely stated that there was ‘ample evidence that supports’ such a finding but did not actually make a positive finding as such. While there may be found to be evidence which supports a

particular finding of fact, absent a finding of that fact, it is at least arguable that no issue estoppel can arise as a matter of law.

[44] I am constrained to say simply that having found, correctly, as it is now accepted by both sides, that the Ghana judgment was not final since it has been appealed, the learned judge was constrained to find that it was neither useful or relevant to permit or to receive expert evidence of Ghanaian law on whether the findings of fact at paragraph [81] of the Ghana judgment constitute or could create an issue estoppel, such that Mrs. List cannot now assert in these proceedings that at the relevant time she was not a director of the respondent companies. Moreover, in my judgment, the finding of lack of finality of the Ghana judgment ought to have led the judge inexorably to hold that there was no proper basis upon which expert evidence of Ghanaian law could assist the court to resolve the issues justly and to the dismissal of the Expert Evidence Application in its entirety. Put simply, to go on to consider that the court could be assisted on the issue of whether under Ghanaian law paragraph [81] of the Ghana judgment could create an issue estoppel in these proceedings is simply not tenable on any sound basis.

[45] For these reasons, and being mindful that it is the appellants who by their ground 4 have called into question the correctness of the judge's determination and order permitting expert evidence on the second issue of 'issue estoppel', I am satisfied that it is open to this Court to set aside the said order, notwithstanding the absence of a counter-appeal by the respondents challenging the said determination and order.

Pleading Point - Detrimental Reliance and Paragraph 69 Mrs. List's witness Statement

[46] I have found that expert evidence of Ghanaian law was not necessary or reasonably required to assist the court with regard to the first and second issues identified by the learned judge, that is, the finality of the Ghana judgment and the issue of issue estoppel stemming from paragraph [81] of that judgment. The third

issue considered by the judge is 'detrimental reliance'. Bound up in this issue is whether a positive case of detrimental reliance has been pleaded by the appellants or whether what was relied on by Mrs. List in her application at paragraph 69 of her witness statement amounts to a recasting or reshaping of the appellants' case as pleaded.

[47] The pleading issue is clearly not an issue on which evidence of foreign law ought to be permitted. This is purely a question for the judge to determine upon an examination of the pleadings of the appellants. In this regard, the learned judge held at paragraphs 15 and 16 of the judgment that the corporations which are at the heart of the dispute before him are engaged in 'civil earthwork contract services' or mining contracts. He considered that such works are 'central' to the case for Mrs. List. He concluded that to permit Mrs. List by paragraph 69 of her witness statement to now 'recast the case to adduce expert evidence on a question that should have been uppermost in her mind having regard to the matters above is not permissible'. He also considered paragraphs 19,20 and 21 of the statement of claim in Claim No.13/2022 and observed that 'there is no express reference to detrimental reliance as a basis for a beneficial entitlement in these paragraphs which read as a clear narrative of her efforts on behalf of BCM International Limited'. No particulars were pleaded, and he held that Mrs. List cannot be permitted 'to reshare the case to address matters that could and should have been pleaded with significant particularity at an earlier stage of the proceedings'.

[48] In considering this issue and the judge's findings on it, I have borne in mind rule 32.2 of the **CPR** which provides that expert evidence must be restricted to that which is 'reasonably required to resolve the proceedings justly'. In **Bergan v Evans**⁵ the question of whether and what evidence a party to civil proceedings is permitted to adduce by way of expert evidence under rule 31.2 and 32.2 was aptly classified as a 'deployment question'. It is the exercise of a case management

⁵ [2019] UKPC 33 at paragraph 38.

power by the judge to be decided judicially as a matter of the court's discretion and having regard to the overriding objective under the CPR, and the permission of the court must be limited to only evidence which is reasonably required to resolve the proceedings (or an issue in the proceedings) justly. Rule 32.6, which sets out the procedure for applying for permission to adduce expert evidence and the court's power to restrict its permission to the expert witness proposed by the applicant and to the issues or questions upon which the judge, in his judgment, considers he could benefit from expert evidence of foreign law, is to be decided having regard to the 'golden rule' or standard stipulated by rule 32.2. Together these provisions – rules 32.2 and 32.6 - have been judicially recognised as bringing about a 'sea-change' in the approach to the deployment of expert evidence in civil proceedings within the jurisdiction of this Court, 'by subjecting the entirety of the deployment of expert evidence to active judicial control by way of case management' in pursuit of the overriding objective and, in particular, ensuring proportionality and economy in the resolution of civil disputes.⁶ It is this approach which the learned judge was required to adopt when considering question 2 in Mrs. List's notice of application.

- [49] The learned judge was therefore required to consider whether the evidence of Ghanaian law sought to be adduced by Mrs. List relates to an issue in the proceedings and is evidence of the kind reasonably required to resolve the proceedings or that issue justly. Accordingly, the judge was required first to consider whether the evidence at paragraph 69 of Mrs. List's witness statement was grounded in the appellants' pleaded case in the statement of claim either directly or as an amplification, elaboration or fleshing out of a pleaded issue.⁷ If the evidence sought to be adduced as expert evidence does not concern or arise from the appellants' pleaded case or an issue raised in the defence, it would be impermissible for the appellants to be allowed to adduce such evidence by way of an expert witness. This much I believe is common ground between the parties to

⁶ Ibid at paragraph 41.

⁷ National Lotteries Authorities v Jerome DeRoche GDAHCVAP2021/0025 (delivered 21st November 2022, unreported).

this appeal. This question also involves a consideration of the role of pleadings and of witness statements in the new regime brought into being by the **CPR**.

[50] In **McPhilemy v Times Newspaper Ltd and others**, Lord Woolf made certain observations and provided the following guidance in relation to the requirements of pleading and the function of witness statements under the modern CPR procedure:

“The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party’s witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular that are still critical **to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader.** This is true both under the old rules and the new rules. ...No more than a concise statement of those facts is required.”
(Emphasis added)

[51] In this vein, rule 8.7 provides, *inter alia*, that a claimant’s duty when pleading their case is to ‘include in the claim form and statement of claim a statement of all the facts on which the claimant relies’ and the statement of claim must be as short as practicable. Rule 8.8 stipulates that a claimant ‘may not rely on any allegation or factual argument which is not set out in the claim, but which could have been set out therein, unless the court gives permission or the parties agree’. These are the requirements of a claimant when pleading their case. By contrast, rule 10.5 stipulates that a defendant has a duty to set out in the defence all the facts on which the defendant relies to dispute the claim. Additional requirements apply to personal injury claims as proscribed by rule 10.6.

[52] These provisions of the **CPR** and the purpose of pleadings and witness statements were considered by this Court in **The National Lotteries Authorities**

v Jerome De Roche.⁸ In that case, the Court reviewed and considered the passage from the judgment of Lord Woolf in **McPhilemy** and the dicta of Barrow JA (as he then was) at paragraph [43] in **East Caribbean Flour Mills Limited v Ormiston Ken Boyea**, and in **Saint Lucia Motor & General Insurance Co. Ltd v Peterson Modeste**.⁹ As such I do not consider it necessary for me to extensively review for these purposes the principles and guidance provided in these authorities.

[53] At paragraphs [38] and [39] of **The National Lotteries Authorities**, Ward JA summarized the position as to the requirements of pleadings under the CPR as follows:

“[38] In short, therefore, the claimant must plead the essential facts that constitute its case, and those facts must be sufficient to establish a cause of action and to enable the other side to know the case it has to meet in sufficient detail.

[39] CPR 8.7 prohibits reliance on allegations or facts not pleaded unless the judge gives permission, or the parties agree. CPR 10.5 and 10.7 place similar strictures on the defendant by providing respectively that the defence must set out all the facts on which the defendant relies to dispute the claim and that a defendant may not rely on any allegation or factual argument which is set out in the defence, but which could have been set out there, unless the court gives permission or the parties agree.”

[54] In **The National Lotteries Authorities**, this Court in considering the purpose of witness statements under the CPR, opined as follows:

“[40] A witness statement constitutes the evidence to prove an allegation of fact made in the statement of claim. It provides the details or particulars of the issues that arise from the pleader’s case. Its contents must, on analysis, be capable of being properly regarded as particulars or details of allegations already made in the pleadings.

[41] Once the case is sufficiently pleaded, then a witness statement may furnish the particulars or details of the allegations or facts contained in the pleadings. This is expressed concisely by the learned Chief Justice Pereira in **Cedar Valley Springs Homeowners Association Incorporated v Hyacinth Pestaina and others** where her Ladyship stated:

⁸ GDAHCVP2021/0025 (delivered 21st November 2022, unreported).

⁹ SLUHCVP2009/008 (delivered 11th January 2010, unreported).

“[19] ... [I]t is now well settled that with the advent of witness statements that the strictures to which pleadings were required to conform in earlier pre-CPR times have now been ameliorated with the advent of [the] CPR, where, once the case is sufficiently pleaded to enable the party to know the case which he has to meet, fuller details may be fleshed out in the witness statements.”

[55] In relation to the dicta of Barrow JA (as he then was) in **Eastern Caribbean Flour Mills** at paragraph [45] that ‘additional instances or particulars of a sufficiently made allegation do not constitute a change in the statement of case’, Ward JA explained at paragraph [44] of **The National Lotteries Authorities** case:

“[44] I understand Barrow JA to be saying that additional particulars do not constitute a change of case, provided that the allegation was sufficiently pleaded. Barrow JA also emphasized the need for the court to give careful scrutiny to whether the impugned material in the witness statement can properly be characterised as particulars of allegations already made in the statement of case or are new allegations.”

[56] I turn now to deal with the competing submissions and arguments on this issue. Mr. Bart KC for the appellants relied on paragraphs 11 to 15, 24 to 30 and 43 and 46 of the statement of claim in support of the appellants’ argument that they had sufficiently pleaded detrimental reliance. Reliance was also placed on paragraph 17 of the defence as showing the respondents’ understanding that detrimental reliance had been pleaded, they having responded to it. Accordingly, as the argument goes, the respondents as defendants cannot say that they were taken by surprise or that they did not know the case which they had to meet. The respondents counter that the learned judge was correct to find at paragraphs 15 and 16 of the judgment that the matters at paragraph 69 of Mrs. List’s witness statement had not been set out as particulars in the statement of claim and there was no express reference to detrimental reliance as a basis for a beneficial entitlement in paragraphs 18,20 and 21 of the statement of claim.

[57] I have carefully read the statement of claim and especially paragraphs 12 to 15 and 24 to 30 relied on by learned counsel for the appellants. I have also considered the rules of pleadings set out at rules 8.6, 8.7 and 8.8 of the **CPR** in

relation to the claim form and statement of claim, rule 10.5 in relation to the defence, and the principles set out in the cases referred to above.

[58] At paragraph 11 of the statement of claim, Mrs. List pleads a mutual understanding between herself and Mr. List that she was to assist him to build BCM International Limited (the 3rd defendant) 'as a family business in which both of them and their children will become owners.' At paragraph 12, Mrs. List pleads that on the basis of this mutual understanding, she agreed to Mr. List's request that she take a leave of absence without pay from KPMG to assist with BCM International Limited as the Finance Director had left abruptly; and that from 2001 she took a leave of absence from KPMG Ghana and commenced full time work immediately with BCM International Limited. At paragraph 12 Mrs. List expressly pleads: '...it is now clear that when [she] left KPMG, that she did so to her detriment based upon [Mr. List's] representations and actions as described herein'. Mrs. List also pleads at paragraph 14 that due to the financial difficulties of BCM International Limited she 'did not receive [a] salary commensurate to her work for several years but again, this was based on the representations of [Mr. List] to [Mrs. List], that she would share in the beneficial ownership of [BCM International Limited].'

[59] It is to be observed that none of the pleaded matters of mutual understanding and acting to her detriment based upon such an understanding at paragraphs 11 to 15 relate to or concern what was stated at paragraph 69 of Mrs. List's witness statement. Paragraph 69 concerns a contention by Mrs. List of the existence of a local policy in Ghana that a company seeking a mining contract had to be wholly locally owned in accordance with the country's local government policy, and that this policy has subsequently been turned into a local content law, by which the government of Ghana seeks to restrict certain jobs in the mining sector to fully owned Ghanaian companies and restricts foreign companies from access to these jobs. Mrs. List also avers at paragraph 69 that she 'had the option of securing the contract [presumably a mining contract] with other companies but chose to work through BCM Ghana Limited.'

[60] The closest pleading in the statement of claim to the issue posited at paragraph 69 in relation to which Mrs. List sought permission of the court below to adduce evidence of Ghanaian law, is at paragraph 26 of the statement of claim which reads:

“26. Indeed, in 2018, it had become necessary for the share transfer to be done due to the fact that the company had decided to go into the **haulage business**. The sole shareholder of the company – **BCM Investments Limited** – was a foreign registered company – which meant that the company did not qualify to be issued with a license to engage in haulage business. The company however required this license in order to clear some 34 Volvo Trucks, which had been imported. This the shares of **BCM Investments Limited** were transferred, 70% to the 2nd Defendant [Paul List] (who is Australian but has naturalized as Ghanaian) and the 2nd Claimant [Angela List], 30%.” (Emphasis added)

[61] I make these critical observations concerning what is pleaded at paragraph 26. First paragraph 26 refers to a foreign company not qualifying to be issued with a license to engage in the haulage business, not the mining business which is what Mrs. List addressed at paragraph 69 of her witness statement. Second, the company which is the focal point of paragraph 26 is BCM Investments Limited, which is not a party to the underlying proceedings in this case. Thirdly, the pleadings at paragraphs 12 to 15 relate to an alleged mutual understanding and to Mrs. List’s agreement to resign her position with KPMG Ghana and going to assist BCM International Limited after the finance director had left, and by so doing she acted to her detriment.

[62] I conclude therefore that what is said at paragraph 69 of Mrs. List’s witness statement as the issue with respect to which permission to adduce expert evidence of foreign law was sought, is not, as argued by the appellants, particulars of or an amplification of the case pleaded in the statement of claim. The learned judge was correct in concluding that it was an impermissible recasting or reshaping of the pleaded case relating to the haulage business and detrimental reliance arising from the alleged mutual understanding between Mr. List and Mrs. List. The appellants have not amended their pleaded case to address this new

allegation concerning policy of the government of Ghana relating to awarding mining contracts which works, as the learned judge mused, were central to the business of the companies and to Mr. List's case. This is not a proper situation where what is being said by Mrs. List at paragraph 69 of her witness statement is an additional instance or particular of a sufficiently pleaded allegation in the statement of claim. I agree with the judge that to permit expert evidence of the government policy or law relative to the awarding of mining contracts to companies whose shareholders and/or directors are not nationals of Ghana, would amount to recasting the appellants' case in a way which is not permissible without an amendment to the pleadings. For these reasons the appellants fail on grounds 5,6,7,8,9,10,11 and 12.

Costs – Ground 13

[63] As mentioned above, Ms. Dyer has in essence conceded that the costs order made at a pre-trial review was wrong as a matter of principle. By rule 65.7, prescribed costs include, among other matters, attendance and advocacy at a pre-trial review. Thus, costs incurred at a pre-trial review or at a case management conference are part of prescribed costs to be assessed as part of the proceedings and cannot be the subject of an independent costs order. In this respect the learned judge erred in awarding costs of the application to the respondents and summarily assessing those costs at \$1,250.00. Furthermore, pursuant to **CPR** 65.5 the general rule is that where rule 65.4 (fixed costs) does not apply, costs are to be determined in accordance with Appendices B and C of Part 65 and paragraphs (2) and (4) of rule 65.5. Accordingly, by rule 65.3(b) the costs of this application fell to be determined in accordance with rule 65.5 -prescribed costs. Furthermore, rule 65.11(1) expressly exempts from the assessed costs regime interlocutory applications determined at a case management conference, pre-trial review or trial (procedural applications). For these reasons, the award of \$1,250.00 costs of the application to the respondents

was wrong in principle and an erroneous exercise of discretion by the learned judge and must be set aside.

Disposition

[64] The appellants have failed on all grounds of appeal except on ground 13 dealing with the award of costs by the judge in the court below and, to the extent stated above, ground 4. I would therefore make the following orders:

- (1) the appeal is dismissed, except that the order awarding costs to the second respondent in the sum of \$1,250.00 is set aside and an order for costs in the cause substituted.
- (2) the finding and order made by the learned judge at paragraph 9 of the judgment in the court below granting permission to Angela List to adduce and to rely on the expert evidence of Ghanaian law of Dr. Kwaku Ainuson on the issue of issue estoppel is set aside.
- (3) the respondents shall have their costs of the appeal to be assessed by a judge or master, if not agreed by the parties within 21 days from the date of this judgment.

I concur.
Trevor M. Ward
Justice of Appeal

I concur.
Esco L. Henry
Justice of Appeal

By the Court

Chief Registrar