

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL
(COMMERCIAL DIVISION)

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2024/0011

BETWEEN:

CULGOA LIMITED

Appellant

and

BASEMENT INVESTMENTS LIMITED

Respondent

Before:

The Hon. Mde. Esco Henry
The Hon. Mde. Nicola Byer
The Hon. Mde. Gertel Thom

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

Appearances:

Ms. Elizabeth Jones KC with her Ms. Arabella di Iorio and Mr. Paul Adams for the Appellant
Mr. David Brownbill KC with him Mr. Nicholas Burkill, Ms. Catherine Harston and Ms. Holly Challenger for the Respondent

2025: October 16

Application for leave to amend claim form and statement of claim – Application to adduce fresh evidence – Application to amend notice of appeal – Whether permitting the applicant to adduce fresh evidence and to amend its claim form and statement of claim would be in accordance with the overriding objective of the CPR – The circumstances under which the Court of Appeal may grant permission to amend a statement of case and claim form - Whether the new evidence was not available in the lower court – Whether the new evidence is credible – Whether the new evidence is likely to have an important influence on the outcome of the appeal – Whether the proposed amendments support a claim with real

prospects of success – Whether the application to amend on appeal may be an abuse of process

REASONS FOR DECISION

INTRODUCTION

- [1] **HENRY JA:** This is an application filed on April 8th 2025 by the applicant Culgoa Limited (“Culgoa”), a company registered in the British Virgin Islands, seeking orders for permission to a) amend its Claim Form and Statement of Claim (“SoC”) filed on 12th June 2023; b) adduce fresh evidence on appeal; c) amend its Notice of Appeal filed on 9th July 2024; and d) rely on paragraph 47 of its skeleton arguments filed on 8th April 2025, as additional submissions at the hearing of the substantive appeal if necessary. The underlying claim was initiated by Culgoa against Basement Investments Limited (“Basement”) in the Commercial Division of the High Court in the British Virgin Islands by claim form and SoC filed on 12th June 2023.
- [2] In that claim, Culgoa sought declarations that Basement holds as trustee for Culgoa 144,470.65 Class A GBP shares in an investment fund called Egerton Capital European Fund Plc¹ which were transferred (by Culgoa) to Basement in March 2008 (“the Egerton Transfer Shares”) and their traceable proceeds on an express bare trust for Culgoa. Basement denied the claim and asserted that it took the shares beneficially. The learned judge ruled that Culgoa had no real prospect of success on the claim and entered summary judgment against Culgoa by order dated 18th April 2024.
- [3] Leave to appeal was granted to Culgoa by order dated 28th May 2024 of a single judge of the Court. Culgoa filed its appeal on 9th July 2024. The appeal was heard on 16th October 2025 after the instant application was determined and judgment on the substantive appeal was reserved.

¹ Subsequently renamed Egerton Capital Equity Fund.

- [4] The Court considered the present application, refused the orders sought and indicated that full reasons for its decision would be provided subsequently. These are the reasons for the decision.

Background

- [5] The factual context within which the dispute arises was set out on Culgoa's behalf in its oral and written submissions and Chronology of principal events.² They are largely mirrored in the learned judge's *ex tempore* decision, Basement's submissions and its Chronology of principal events³. I will content myself with rehearsing only such contextual background as is necessary to frame the dispute.
- [6] Culgoa was incorporated in the BVI on 3rd February 1988. Mr. Nigel Hutchings was appointed director of Culgoa on 20th September 1990. Soon after the only other director resigned. It is ultimately owned by the trustees of three BVI law discretionary trusts, the Figa Trust, the Futi Trust and the Moffat Trust ('the BVI Trusts')⁴ in equal shares. By Instruments dated 15th November 1990, Stella⁵ as settlor declared the BVI Trusts that were to hold Culgoa and naming charities as the beneficiaries. The first Trustee appointed was Theseus Ltd. It was succeeded by GZ Trust Corporation ('GZ Trust') in 1996. On 24th September 1996, Cordico Management AG ('Cordico') was appointed a director of Culgoa and with Mr. Hutchings returned the number of trustees to two. On 22nd July 2002 GZ Trust appointed Stella, Gail and Gail's issue as beneficiaries of the Figa Trust, Stella, Karin and Karin's issue beneficiaries of the Futi Trust and Stella, Daryl and Daryl's issue. In each case Stella is constituted as protector and principal beneficiary of each of the BVI Trusts.
- [7] On 18th July 2007, Mr. Rees-Pulley a consultant with whom the Shawzin family was familiar and with whom Nigel Hutchings seemed to have had a professional relationship, emailed Mr. Hutchings as follows:

² Filed on 10th October 2025.

³ Filed on 13th October 2025.

⁴ Para. 1 of Affidavit of Mark Philip Renouf filed on 18th September 2025, Appeal HB 2 at pg. 106.

⁵ Mrs. Shawzin's Christian name is used for the sake of brevity only and is not intended to be disrespectful.

“...you and I discuss with Stella how to make provision for Daryl and the very sensitive issues concerning equality of treatment amongst siblings. This has ultimately resulted in an agreement from Stella as protector of the overall trust structure to the effect that a separate and new trust should be established solely for Daryl’s benefit.”

[8] The following month on the 30th, Stella signed the Pentera application documents for the establishment of Basement and the Carastel Trust. On October 11th 2007 Stella established the Carastel Trust with she being the protector and principal beneficiary, the other beneficiaries being Daryl and Daryl’s family. Stella contributed the initial trust fund of £100,000 and Pentera Trustees Limited (‘Pentera’) was appointed the first trustee.

[9] Basement is also a BVI Company. Stella became its owner on 12th October 2007.

[10] The parties rely on emails passing between Mr. Hutchings and Mr. William Sutton in 2007 as part of the factual background in this case. Of note in this regard, is an email from Mr. Sutton to Mr. Hutchings on 15th October 2007 stating:

“In due course, as and when Mrs Shawzin is in a position to transfer her shareholding in the Egerton Capital Fund to Basement Holdings Limited, we will issue a further 9,998 no par value shares to Pione Nominee Limited and Bireme Investments Limited to hold as nominee for her at an ascribed value equivalent to the value of that shareholding.”

[11] On 12th November 2007 Mr. Hutchings emailed Mr. Sutton indicating that he will prepare paperwork ‘so that we end up with Culgoa holding Egerton shares as nominee for Stella, and then Culgoa can transfer the shares on her instructions directly into the name of Basement.’

[12] Mr. Hutchings was appointed a director of Basement on December 6th 2007. Mr. Sutton and Ms. Jamie Hamilton of Pentera were appointed his co-directors. The Form of Transfer on Culgoa’s behalf is signed by Mr. Hutchings on 20th February 2008. On 5th March 2008 Basement’s board passed a resolution to accept the transfer of the Egerton Shares and that same day Basement’s directors Mr. Sutton and Mr. Hamilton signed the transfer form effecting the transfer of the 144,470.65

Class A GBP shares in Egerton Capital European Fund Plc. (“The Egerton Transfer”).

- [13] Pentera’s Annalise Hulse emailed the signed Egerton Transfer Form to Pentera for the urgent attention of Tommy Ogbuka. Ms. Hulse indicated in her email that it should be noted that the ultimate beneficial owner of Culgoa and Basement is Mrs. Stella Shawzin and further ‘we are not transferring to an external party.’
- [14] When the Egerton Transfer took place Basement was held by two nominee companies for Stella absolutely. Soon after the Egerton Transfer Stella settled her interest in Basement on a Jersey law discretionary trust named the Carastel Trust. Stella, Daryl and Daryl’s issue are within the class of discretionary objects of that trust. However, Gail, Karin and their issue are not.
- [15] Two interesting features on the transfer were relied on by Culgoa in support of its express trust claim. The first is a checked box on the transfer form confirming that there was no change to the beneficial ownership of the Egerton Shares. The second is the answer provided in response to the query on the form ‘Please provide a detailed reason as to why the transfer is taking place. This is required by the Directors of the Fund in order to consider granting approval.’ The succinct response recorded on the form was ‘Restructuring of affairs for family reasons. No change of beneficial ownership.’
- [16] There is no evidence that Cordico or the trustee of the BVI Trusts approved the Egerton Transfer or that Mr. Hutchings informed them of it. Likewise, there is no evidence that anyone notified Gail, Karin or Daryl about it.
- [17] Stella passed away on 8th September 2020. She is survived by her daughters Gail, Karin and Daryl. Mr. Nigel Hutchings died sometime after. Basement submitted that the evidence reveals that Mr. Hutchings was a trusted adviser to Stella until her death.

- [18] Culgoa maintained that before the Egerton Transfer it was the legal and beneficial owner of the Egerton Shares. Consequently, in view of the entry on the transfer form that there was no change in beneficial ownership, this means that it remained the beneficial owner of the Egerton Shares after the Egerton Transfer. As a result, Basement took the Egerton Shares as its bare trustee. Culgoa submitted that its claim merely sought recognition and enforcement of that trust in the absence of any evidence from Basement that the Egerton Transfer did not mean exactly what it said. It submitted that its case was one that presumed regularity and honesty on Mr. Hutchings' part.
- [19] Culgoa submitted that Mr. Hutchings, in accordance with fiduciary duties that he owed to Culgoa, could not properly have decided unilaterally to cause Culgoa to give away the valuable Egerton Shares to Basement for no consideration. It contended that Basement is yet to disclose any document which would tend to suggest that Culgoa's shareholder (ultimately the trustee of the BVI Trusts) knew or approved of the transfer. It submitted that on its face, this was a transaction overseen by Mr. Hutchings in secret and one that he seemed, thereafter, to have been keen to keep secret. Culgoa argued that the words 'beneficial interest' on the transfer form referred to equitable ownership which for all intents and purposes was vested in Culgoa.
- [20] Culgoa pointed to an email from Mr. Hutchings to Stella in 2010 enclosing financial accounts in respect of the trusts, which showed the Egerton Shareholding in a Jersey Structure for Daryl's benefit (i.e. the Carastel Trust). He also provided her with another version excluding the Carastel Trust and suggested that Stella might wish to shred the former. Culgoa argued that based on the suggestion to shred, there is a strong inferential case that if Culgoa's case theory is not correct, something seriously untoward – and potentially fraudulent – occurred.
- [21] It was submitted that in those circumstances, it was inappropriate for the judge to dismiss Culgoa's factual case and accept Basement's on a summary basis. Further,

if Culgoa's factual case was to be dismissed, it should – in the circumstances – only have been after Basement has been required to give proper disclosure so as to shed further light on what precisely had occurred. Such disclosure would either support Culgoa's pleaded case that nothing irregular has occurred (because there has been no disposal of Culgoa's beneficial interest), such that its case should succeed; or else it may show that Basement can succeed only by seeking to rely on a serious breach of duty by Mr. Hutchings, which would put a wholly different complexion on proceedings.

[22] For its part, Basement filed its defence on 3rd October 2023 acknowledging that Culgoa was the registered holder of the Egerton Shares at the time that it executed the Egerton Transfer Form and that it held those shares as a nominee for Stella. It denied that the Egerton Transfer gave rise to an express trust in Culgoa's favour, refuted that Culgoa had given them away for no consideration and maintained that it took them beneficially for its own exclusive benefit. It maintained that Stella was the beneficial owner of the Egerton Shares before the transfer to it.

[23] Basement relied on the fact that in executing the Egerton Transfer form, Basement checked a box signifying that it was taking the shares for its own account. It asserted further that the references to 'beneficial interest' in the Egerton Transfer did not bear their usual technical, legal meaning; but bore a wider meaning akin to that utilised in an anti-money-laundering ('AML') context, in particular, the meaning contained in the 40 Recommendations published by the Financial Action Task Force in October 2004 ('FATF 40'). It was Basement's contention that Culgoa had held the Egerton Shares as nominee for Stella by reason of a nominee arrangement in her favour executed by Culgoa at some point before the transfer.

Decision of the Learned Judge

- [24] By *ex tempore* decision and order made on 18th April 2024⁶ the learned judge granted Basement summary judgment. He cited **Myett's Enterprises v Leigh**⁷ and **Saint Lucia Motor & General Insurance Co. Ltd. v Peterson Modeste**⁸ as authorities that set out the principles on which summary judgment may be granted. He also relied on **Sagicor Bank Jamaica Limited v Taylor-Wright**⁹, **The Bank of Bermuda v Pentium**¹⁰ and **Korea National Insurance Corp. v Allianz Global Corporate & Specialty AG**¹¹.
- [25] The learned judge accepted that what was done with the Egerton shares was for Stella, with the help of financial and corporate professionals. He noted that Stella was a beneficiary of the three trusts in common with each of her daughters respectively. He noted further that the three trusts each held a one third share in Culgoa through a nominee. He accepted further that Stella had somehow appropriated control or ownership of the Egerton Shares, by exerting some influence, sway, power or other mechanism and caused Culgoa (in which she had a beneficial share) to transfer them to Basement for the purpose of transferring the shares from Basement (which she effectively controlled) to the Carastel Trust for Daryl's benefit to the exclusion of Gail and Karin. The learned judge ruled that this was a 'family restructuring'¹².
- [26] As to Basement's indication to Egerton (on the Transfer Form) that it was taking the shares on its own account, the learned judge remarked that there is no evidence that Basement was thereby attempting to mislead anyone or lying and it is not alleged that this was its intention. He treated this statement as material and supportive of his finding that if Basement had been taking the shares on an express

⁶ Order entered on 23rd April 2024, at pg. 203 of Appellant's Bundle for Interlocutory Appeal.

⁷ BVIHCVAP2020/005 (delivered 19th May 2021, unreported).

⁸ SLUHCVP2009/008 (delivered 11th January 2010, unreported).

⁹ [2018] UKPC 12.

¹⁰ BVI Civil Appeal No. 14 of 2003 (delivered 12th January 2005).

¹¹ [2007] EWCA Civ 1066.

¹² Pg. 192 of Appellant's Bundle for Interlocutory Appeal, at lines 10 – 11 of the Transcript.

trust it would not have declared that it was acting for its own account. He also took into account that the professionals who were involved in the transaction (including Pentera, a trust company) treated Stella as the beneficial owner of Culgoa and Basement.

- [27] The learned judge acknowledged that as a matter of law, Culgoa may be right in contending that the beneficial owner of Culgoa is not in fact the beneficial owner of its assets and that a valid transfer may not have taken place from Culgoa to Stella to enable her to set up the transfer to Basement. He accepted further that Culgoa may be correct in their contention that no proper legal basis had been established to enable the transfer to be effected at Stella's behest. He concluded however that by virtue of the doctrine of limitation the time was long past to inquire into the validity of such actions and the transaction could not be unwound based on any irregularity in the procedures adopted to transfer the Egerton Shares to Basement. He determined that on the evidence before the court, the purpose of the transaction was ultimately to get the Egerton Shares into Daryl's beneficial ownership. He ruled that there is no evidence that an inverted trust was established to pass the beneficial ownership of the Egerton Shares back to Culgoa. He expressed the view that if the transaction could not be unwound, the persons behind Culgoa will suffer an injustice. However, the learned judge held that on the overwhelming evidence and the pleadings before him Culgoa had not advanced a case that had a reasonable prospect of success. He therefore entered summary judgment for Basement with costs.

The Application

- [28] The Application is supported by affidavit of Michael Polonsky filed on April 8th 2025¹³ with Certificate of Exhibit 'MSP-1'; affidavit of Wayne Phillip Elliott ('Elliot 1')¹⁴ filed on April 8th 2025 with Certificate of exhibit 'WPE-1'; the first affidavit of Karin Lorain

¹³ Comprising 14 pages, excluding the exhibits.

¹⁴ Comprising 15 pages, excluding the exhibits.

Ginsberg filed on April 8th 2025¹⁵ with Certificate of exhibit 'KG-1'; first affidavit of Gail Shawzin De Avillez filed on April 8th 2025¹⁶; the affidavit of Raanji Fara Baharuddin Lugin filed on April 8th 2025¹⁷ with Certificate of Exhibit 'RFBL-1'; and the affidavit of Michael Samuel Polonsky¹⁸ filed on September 26th 2025 with Certificate of Exhibit 'MSP-2'.

- [29] Michael Polonsky is a solicitor of the Superior Courts of England and Wales, is employed at Stonehenge Fleming Law Limited a company within the Stonehage Fleming Group which provides fiduciary and family office services. He explained in his affidavit that Culgoa's sole director is an entity forming part of the Stonehage Fleming Group. Mr. Wayne Elliott is a director of Chasseral (Directors) Limited ("Chasseral") which is Culgoa's director. He is also a manager of Primafides (Suisse) SA ("Primafides") which is the trustee of the Figa and Futi Trusts. Ms. Lugin was formerly employed with HSBC Guyerzeller Trust Company SA ("HSBC") as Team Head during part of the time that HSBC served as trustee of the BVI Trusts.
- [30] Basement filed a Notice of Opposition on April 15th 2025 and it strenuously resisted the application.
- [31] In its application, Culgoa asserted that at the time it issued the Express Trust claim and during the summary judgment proceedings it did not realize that there were grounds on which it could properly allege fraud or dishonesty against Basement or anyone connected with Basement, on which to displace the *prima facie* limitation defence. It said that it considered that whilst the circumstances of the Egerton Transfer were suspicious and indicative of a possibility of fraud, it was not in a position to positively plead an allegation of fraud or dishonesty and in any event it appeared that any claim subject to a primary limitation period of six years would likely be time-barred. It nonetheless relied on the existence of grounds to suspect

¹⁵ Comprising 6 pages, excluding the exhibits.

¹⁶ Comprising 5 pages, excluding the exhibits.

¹⁷ Comprising 10 pages, excluding the exhibits.

¹⁸ Comprising 6 pages, excluding the exhibits.

that fraud or other serious wrongdoing might have taken place as a reason why the Express Trust Claim should proceed to trial.

[32] Culgoa asserted that in the interim, it considered whether additional claims could be brought and following further enquiries after the summary judgment proceedings it unearthed evidence between November 2024 and April 2025 to substantiate a case of fraud against Culgoa by reason of the conduct of Mr. Nigel Hutchings one of its directors and at the same time address the limitation concerns. In this regard, Culgoa contended that the information unearthed revealed that Mr. Hutchings without involving the other director, Cordico, would have been able to and in fact did, instruct that the Egerton Transfer take place; that Cordico did not know the Egerton Transfer Shares even existed as an investment held by Culgoa and never knew that the Egerton Transfer took place; and Culgoa could not have discovered the Egerton Transfer with reasonable diligence because Mr. Hutchings and others involved deliberately concealed the information.

[33] Culgoa submitted that an order granting it permission to adduce as new evidence the testimony of Mr. Polonsky, Ms. Lugin, Mr. Wayne Elliott, Ms. Karin Ginsberg and Ms. Gail Shawzin De Avillez regarding these discoveries, to rely on the fresh evidence to amend its claim form and statement of claim and set aside the summary judgment order would further the overriding objective. It was submitted further that if the new claims were permitted it would follow that the learned judge was wrong to grant summary judgment on the action on the Express trust claim and as such if the amendment was allowed it would necessarily follow that the appeal would be allowed.

Issues

[34] The issues for consideration are fourfold, namely whether permission should be granted to Culgoa to: -

- (1) amend its claim Form and Statement of Claim as proposed in the draft amended statement of case;

- (2) adduce fresh evidence on appeal;
- (3) amend its Notice of Appeal filed on 9th July 2024 as proposed in the draft amended Notice of Appeal; and
- (4) rely on paragraph 47 of its skeleton arguments as additional written submissions on the substantive appeal.

Fresh Evidence Application

[35] For practical purposes, it is preferable to deal with the application to adduce fresh evidence first and I will do so. The fresh evidence that is the subject of this application was set out in the referenced affidavits of Mr. Polonsky, Ms. Lugin, Mr. Elliott, Ms. Ginsberg and Ms. Shawzin De Avillez.¹⁹ Essentially, they among other things, respectively supplied aspects of the narrative regarding the alleged belated discovery by Culgoa, Karin and Gail in the summer of 2021 of the Egerton Transfer Shares, the subsequent inquiries and investigation by Culgoa (through its corporate director) of the facts and circumstances of the Egerton Transfer and the results of those inquiries and investigations; that it was only in 2024 that Culgoa thought that it had grounds on which to properly allege fraud or dishonesty against Basement or anyone connected with Basement that was not subject to a primary limitation period; Culgoa thought that Cordico might with reasonable diligence have discovered the Egerton Transfer earlier or had access to books and records from which this information could have been gleaned; Culgoa had already taken steps to obtain information and evidence about the circumstances of the Egerton Transfer and was unaware of any further steps that it could have taken that was likely to yield further material or evidence and ultimately considered that the right and proper course was to pursue only the Express Trust claim in the first instance and to consider on an ongoing basis whether it might be possible to add further claims based on fraud and dishonesty.

¹⁹ Comprising a total of 56 pages, excluding the exhibits.

[36] In Mr. Polonsky's words this approach was 'mandated by the professional obligations of Culgoa's lawyers in terms of alleging fraud and not pleading claims which would not be properly arguable, [that this] had the advantage of keeping the proceedings relatively simple and narrowly focused, thereby reducing cost and the burden of the proceedings on the Court.' He added, 'Culgoa regarded the Egerton Transfer as suspicious and indicative of a possible fraud but considered that on the evidence then available it was not properly able to plead an allegation of fraud and dishonesty and that any claim subject to a primary limitation period of six years would likely be time-barred.'²⁰

[37] He averred further since the express trust claim was the subject of a reverse summary judgment, 'It therefore renewed its efforts to obtain further relevant information from third parties. In particular, ... during the second half of 2024 and early 2025, Culgoa:

- (a) wrote to Cordico and its liquidator seeking copies of any further relevant documents;
- (b) wrote to GZ Trust Corporation asking various questions (including as to what, if anything, GZ Trust Corporation had known about the Egerton Transfer Shares held by Culgoa until March 2008, and about whether GZ Trust Corporation received regular statements setting out Culgoa's holdings in Egerton funds) and seeking copies of any further relevant documents;
- (c) wrote to HSBC entities which had acted as director of Culgoa after Cordico and as trustee of the BVI Trusts after GZ Corporation, asking various questions and seeking copies of any further relevant documents;

²⁰ Paragraph 26 of Michael Polonsky's affidavit filed on 8th April 2025.

- (d) wrote to Egerton asking questions pertaining to, ... the Egerton Transfer Shares, Egerton's communications with representatives of Culgoa and the identity of the persons considered by Egerton to be authorised signatories on behalf of Culgoa, and requesting copies of various documents;
- (e) after it transpired that GZ Trust Corporation had been liquidated and dissolved and was therefore not in a position to answer questions about what it had known many years earlier, contacted various individuals who had been involved in the administration of Cordico or GZ Trust Corporation around the time of the Egerton Transfer to seek further information...;
- (f) upon successfully making contact with Ms. Lugin, during the period from November 2024 to April 2025 engaged with Ms. Lugin to ascertain and understand, first her recollections of the facts relevant to this matter, and second what evidence she would be able to give;
- (g) wrote to the widow and son of Mr. Hutchings noting that the files previously obtained from Mr. Hutchings' office appeared to be incomplete and suggesting that there must have been further records in Mr. Hutchings' possession, including his communications with Egerton, and proposing a forensic analysis of Mr. Hutchings' computer; and
- (h) contacted Mr. Rees-Pulley and met with him to discuss the Egerton Transfer.²¹ (Emphasis added)

[38] On Mr. Polonsky's testimony, Culgoa admitted that at some point it discontinued its efforts to pursue inquiries about the legitimacy of the Egerton Transfer until late 2024 and early 2025. This is revealing. He explained further that unsurprisingly

²¹ Paragraph 29 of Michael Polonsky's affidavit filed on 8th April 2025.

these efforts initially yielded little and resulted in the retrieval of a small quantity of additional documentation. According to him and Mr. Elliott, Culgoa had by this time already made other efforts to obtain further information. Mr. Polonsky averred that it was only in November 2024 as a result of a personal intervention by Brent Hoberman (Gail's son) with Egerton's co-founder an email was received from Egerton dated 15th November 2024. The email identified Nigel Hutchings as the sole registered contact and authorised signatory for Culgoa, from investment inception through to 2008 when the shares were transferred and no separate authorised signatory list was provided or updated outside the initial subscription document signed by Mr. Hutchings and that Cordico was not listed as a registered contact or authorised signatory on the Culgoa account according to Sumi Trust's records and would not have been in receipt of any account specific information during the time that the investment was held in Culgoa's name.

- [39] The other significant development noted by him was that Ms. Lugin was contacted and she agreed to be interviewed about the BVI Trusts, Culgoa and the Egerton Transfer, and was in fact interviewed on November 21st 2024 and provided the information that is reflected in the affidavit she signed on April 1st 2025 that was filed in these proceedings. Ms. Lugin's evidence relates to the role she played between October 2007 and July/August 2016 as team head at HSBC Guyerzeller Trust Company SA ('HSBC') overseeing three team members at one time and five others at a later date. She explained that she served as team head of one of Guyerzeller Zurmunt Bank AG's ('GZ') books of clients. She recalled that during most of her time at HSBC, Cordico Management AG ('Cordico') which was a Swiss subsidiary of the HSBC Group was the corporate director usually appointed to corporate entities within the trust structures and had been appointed to Culgoa. She also recounted details of occurrences before she joined HSBC based on information received from others.²²

²² For eg. at para.3 of her affidavit.

- [40] Based on the information received from Ms. Lugin, Culgoa made further inquiries including of Mr. Rees-Pulley, allegedly the only other known and living participant in planning the Egerton Transfer. Mr. Elliott met with him on 23rd August 2024. One month after Ms. Lugin's interview, a formal letter was sent to him dated 20th December 2024²³ for him to provide any relevant information in light of Ms. Lugin's recollections. Through his lawyers by letters dated 30th January 2025 and on February 28th 2025 he requested further information.
- [41] Mr. Elliott's testimony seeks to introduce details of the exchanges between him (on Culgoa's behalf and Mr. Richard Rees-Pulley (including through his legal practitioners) arising from information received from Ms. Lugin. It is alleged that Mr. Rees-Pulley advised or may have advised the Shawzin family or some of its members on family matters including in relation to the administration of the BVI Trusts.
- [42] Mr. Elliott averred that it was after the summary judgment application that someone (unnamed) who was involved in the administration of Culgoa and identified from documents already in Culgoa's possession suggested to someone (unnamed) at Stonehage that Fara Lugin be contacted and this recommendation was pursued. He attests further to exchanges that took place from 16th August 2024 to 18th February 2025 between Culgoa's representatives²⁴ and Mr. Lloyd Hutchings, (Mr. Nigel Hutchings' son) about among other things 'large gaps' in the documentation Culgoa had received in 2020 and about whether other files existed, including electronic documents stored on Nigel Hutchings' computer, that had not been handed over to Culgoa. Queries were reportedly also made of Mrs. Anne Hutchings, Mr. Nigel Hutchings' widow by letter dated 10th February 2025. Here again, it appears that Culgoa was jolted into action only after the summary judgment determination.

²³ By Culgoa's BVI lawyers. See paragraph 39 of Elliott 1.

²⁴ Legal practitioners and Mr. Elliot included. Paragraphs 42 to 56 of Elliott 1.

[43] Mr. Elliott's affidavit testimony recited steps taken between 8th August 2024 and September 2024 to obtain information from SMT Fund Services (Ireland) Limited ("SMT") and Daiwa Europe Fund Managers Ireland Limited ("Daiwa") and Egerton Capital (UK) LLP, SMT and Daiwa, being respectively the fund administrator of the Egerton funds and its predecessor. He also explained that Brent Hoberman got involved after November 6th 2024 and made contact with one of Egerton's co-founders Mr. John Armitage. For his part, Mr. Elliott contacted Egerton's CEO Mr. Jeff Blumberg on or about 7th November 2024 following which an email response was received to Culgoa's August 2024 request.²⁵ This further account lends credibility to Mr. Elliott's averment that Egerton's agents and servants were not responsive to requests for information from Culgoa until Mr. Hoberman intervened and this is taken into account.

[44] Mr. Elliott then outlined what was initially done with the documents previously received from Nigel Hutchings' office. At some point he directed that a review be conducted of certain documents that were stored in a cupboard. He gave no reasons why that review was not conducted earlier, or why the unnamed person who provided Ms. Lugrin's name was not contacted before and why he did not approach Mr. Blumberg directly before the claim form was issued. To the extent that those questions remain unanswered, the Court is reluctant to conclude that Culgoa acted with reasonable diligence in the circumstances.

[45] The affidavits provided by Karin and Gail set out general background regarding the creation of the BVI Trusts and certain information about the Futi and Figa trusts respectively and the circumstances under which they became aware of the Egerton Transfer and the establishment of Carastel Trust around July 2021. Their interest in resolution of the dispute in these proceedings is also expressed.

[46] Mr. Polonsky's second affidavit deals primarily with the application filed by Basement on 18th September 2025 for permission to file late evidence and

²⁵ Paragraph 60 of Elliott 1.

submissions. It also includes statements about Basement's new written submissions to the instant application. Nothing of consequence was added to the background relative to the applications under consideration.

Culgoa's Submissions

- [47] Citing **Price v Filcraft**²⁶ Culgoa argued that the fresh evidence was not readily available for use at the hearing of the summary judgment application or easily made available and there existed no reason to obtain it in the circumstances then existing. It acknowledged that the evidence in Mr. Polonsky's, Mr. Elliott's, Gail's and Karin's affidavits could have been obtained before but maintained that there was no point in getting that evidence before the court without the new information from Ms. Lugin and Egerton. It was submitted that the information from Egerton was obtained only after a personal intervention by a third party while Ms. Lugin's affidavit was received in April 2025. Culgoa submitted that the fresh evidence is credible and is supportive not only of the proposed new claims but also of the express trust claim. Accordingly, the claims proposed to be made on the basis of the fresh evidence raise a triable issue and both are likely to have an important influence on the court's decision.
- [48] On Culgoa's behalf, learned King's Counsel Ms. ones argued that Culgoa has demonstrated that it acted with reasonable diligence in light of the surrounding circumstances including that the Stonehage agencies took over the BVI Trusts in 2020 after Mrs. Stella Shawzin's and Mr. Nigel Hutchings' deaths; Daryl did not disclose that they should have been investigating the Egerton Transfer and her lawyers pushed back against the investigation by Culgoa, Mr. Hutchings' widow and son did not provide critical information until 2021, that access to Nigel Hutching's laptop was refused due to confidentiality concerns and password issues; that HSBC has now disclosed all documents related to the BVI Trusts and that Egerton released further important information only after being contacted by Mr. Brent Hoberman. It was submitted that when considering this application,

²⁶ [2020] EWCA Civ 850.

whether Culgoa acted with reasonable diligence is not a factor that should weigh heavily against the other relevant considerations.

- [49] Culgoa cited among other authorities **Ladd v Marshall**²⁷, **Guy Joseph v The Constituency Boundaries Commission et al**²⁸ in which the Court adverted to a relaxation of the **Ladd v Marshall** principles in interlocutory appeals, and in **Bilzerian v Weiner et al**²⁹ in which it was stated that the discretion to adduce fresh evidence is a power exercised under the court's inherent jurisdiction. It was submitted further that in this case the strict approach is not appropriate in view that the application at first instance resulted in the case being struck out on summary judgment application. Reliance was likewise placed on the **Playboy Club London Ltd v Banca Nazionale Del Lavoro SpA**³⁰ on the basis that the circumstances in the case at the appeal bar have parallels to those in **Playboy** in that among other things they both involve consideration of whether it is an abuse of process for the claimant to bring a claim alleging dishonesty after issuing an earlier claim based on a different cause of action.
- [50] Additionally, Culgoa submitted that the new evidence would serve to establish that the express trust claim has a real prospect of success that should go to trial and therefore the learned judge erred in granting summary judgment for reasons that were not before him. In this regard, learned King's Counsel contended that on the evidence and the surrounding circumstances disclosed by the fresh evidence, there is no evidence that the Egerton shares had been appointed to Stella Shawzin. Therefore, she had no interest in them, and objectively the Egerton Transfer is capable of being construed as creating an express trust in favour of Culgoa. For these reasons the express trust claim should have survived the summary judgment application.

²⁷ [1954] 3 ALL ER 745.

²⁸ SLUHCVP2015/0013 (written reasons delivered 1st October 2015, unreported).

²⁹ SKBHCVP2019/0033 (delivered 21st July 2020, unreported).

³⁰ [2018] EWCA Civ 2025.

[51] Culgoa contended that the fresh evidence is relevant to the appeal against the summary judgment as well as the proposed resulting trust, constructive trust and breach of duty claims and should therefore be admitted. In support **Nottingham Finance v Sheikh**,³¹ **Rainy Sky SA v Kookmin Bank**,³² **Snell's Equity**,³³ **Chitty on Contracts**³⁴ and **Lewison on Interpretation of Contracts**³⁵ were cited.

[52] In reliance on **Zhao v Endushantum**³⁶ Culgoa argued that contrary to the learned judge's supposition that any other possible claims would likely be subject to a limitation bar, this is not a relevant consideration in respect of the proposed new resulting trust and constructive trust claims since they are based on information that was recently discovered. In any event, it is easier to introduce those claims in the extant proceedings than in a new claim. This is because it does not involve a strong case for limitation objections to be made and it is open to Basement to apply on that basis irrespective of whether the amendments are introduced now or if a new claim is pursued. **Duke of Sussex v News Group Newspapers Ltd**³⁷ was relied on for this proposition.

Basement's submissions

[53] Basement argued that the fresh evidence has no bearing on the issues arising on the appeal which involves the express trust claim which is distinct from resulting or constructive trust and breach of duty on which the new claims are premised. It was submitted that there is no prospect that the new evidence outlined in support of Culgoa's new claims could ever lend support to the express trust claim.

[54] Learned King's Counsel Mr. Brownbill stated that in general the fresh evidence in relation to the allegations of fraud by Nigel Hutchings is incredibly weak and contains

³¹ EWCA Civ 1337 at paras. 26 and 31.

³² (SC (E)) [2011] 1 WLR 2900.

³³ 35th Ed., paras. 21-017, 21-020, 21-021 and 22-013.

³⁴ 36th edition Vol. 1, Sweet and Maxell.

³⁵ Lewison, Kim, The Interpretation of Contracts (8th edition, Sweet and Maxwell 2023).

³⁶ BVIHC (COM) 2017/0151 (delivered, 1st September 2022, unreported).

³⁷ [2024] EWHC 1208 (Ch).

no material about events that took place from the inception of the trust in 1996 to 2002, or between 2006 – 2009. Further, other than Ms. Lugin, no former employee of the trust company provides evidence. He remarked that a consistent complaint with Ms. Lugin's fresh evidence is that it is very vague in several respects in that, among other things, she omitted relevant dates including with respect to her onboarding period, the date when her team took over responsibility for the Shawzin family trust, the dates when relevant risk reviews took place or when certain requests were made. He noted further that she stated that she was requesting information from Nigel Hutchings in 2011 which suggests a more relaxed approach in her dealings with him than she otherwise indicated.

[55] He argued that significantly, Ms. Lugin makes no averments about her team's knowledge of or involvement with this matter in relation to distributions to Stella and she mentions no other person on her team or on GZ Corporation's staff that was administering the trust before she took over. He argued that it is quite conceivable that Nigel Hutchings might have been communicating with other staff and it is therefore possible to conclude that it would have taken nothing for someone else from her team to approve the Egerton transfer.

[56] Citing **Henderson v Henderson**,³⁸ **Koza v Koza**³⁹ and **Floreant Real Estate Limited v XYZ & Ors**,⁴⁰ learned King's Counsel submitted that the court requires parties to bring forward their entire case even in interlocutory proceedings. Pointing to Mr. Elliott's testimony that Culgoa restarted investigations after the summary judgment application, he stated that Culgoa has thereby acknowledged that it stopped making enquiries after issuing the express trust claim. Therefore, they were thereby looking for support for an entirely different claim in fraud that was not initially pleaded. He described this as an abuse of process and characterised the commencement of the initial claim by Culgoa as a fishing expedition and a purely

³⁸ (1843) 3 Hare 100.

³⁹ [2020] EWCA Civ 1018

⁴⁰ BVIHMAP2023/0017 (delivered 3rd May 2024, unreported).

tactical decision to forego its research efforts. He submitted that they could and should have located Ms. Lugin before they filed the express trust claim and have not acted with reasonable diligence.

Discussion

[57] The criteria on which the Court will grant permission to adduce fresh evidence on appeal are well established. They were articulated by Lord Denning in **Ladd v Marshall**⁴¹ and have been applied extensively in decisions from this court. In determining such an application, the court exercises the discretion pursuant to its inherent jurisdiction. To be successful, an applicant must advance strong grounds to satisfy the court that it ought to grant the application to adduce fresh evidence. The governing principles are neither rules nor special rules but rather are three distinct but cumulative criteria or limbs that are considered by the court in deciding whether it is just to allow the applicant to introduce the new or fresh evidence. As such, the criteria are not to be rigidly applied, but instead, in seeking to give effect to the overriding objective they are to be relaxed in appropriate cases including in interlocutory appeals: **Bilzerian v Weiner**.

[58] In making its decision the court will consider all the circumstances. It will assess whether the three limbs are satisfied, namely that the evidence a) could not have been obtained with reasonable diligence for use at the trial or hearing at first instance; b) is such that, if given, it might not be decisive but would probably have had an important influence on the result of the case; and c) is apparently credible, but not necessarily incontrovertible. As held by this Court in **Geminis Investors Limited v Goods Technology Starting International Limited**⁴² it is settled law that a failure to satisfy one of the limbs will lead to a refusal to admit the fresh evidence.

⁴¹ [1954] 3 All ER 745 at 748.

⁴² BVIHMAP2022/0020/BVIHMAP2022/0043 (delivered 30th January 2025, unreported).

- [59] Much of Culgoa's emphasis was placed on the evidence set out in Ms. Lugin's affidavit. Messrs. Polonsky and Elliott supplied the background about how Ms. Lugin was identified and the circumstances under which she agreed to provide information for purposes of this case. As described earlier, Gail's and Karin's affidavits detailed how material was discovered about the Egerton Shares Transfer after their mother's demise and adds nothing substantive to the allegations of fraud and dishonesty. Overall, the new evidence is generally credible. I am inclined to accept that initially Culgoa experienced challenges in obtaining relevant information from HSBC and Egerton which arguably was overcome only after Mr. Hoberman's intervention.
- [60] I however harbour a lingering suspicion that Culgoa's efforts before the filing of its initial claim were not as comprehensive or as persistent as they could otherwise have been. I am however content to resolve that doubt in its favour and conclude that it could not have with reasonable diligence discovered the breadth of the material it now seeks to rely on to support the new causes of action.
- [61] In relation to Ms. Lugin's evidence it seems to me that it could not have been obtained with reasonable diligence before the summary judgment hearing. Without her evidence, deployment of the other fresh evidence at the summary judgment hearing would have been pointless. Nonetheless, Basement makes a compelling argument that much of Ms. Lugin's affidavit omits relevant details such as dates, which makes those parts unreliable, interrogation of that new evidence difficult if not impossible and it is such as would negatively impact its probative value. I agree. For these reasons, I am satisfied that the fresh evidence is unlikely to have an important influence on the outcome of the appeal. Accordingly, the application to adduce the fresh evidence of Raanji Fara Lugin, Michael Polonsky, Wayne Elliott, Gail Shawzin De Avillez and Karin Ginsberg (including related exhibits) is refused having failed to satisfy the second limb of the established criteria.

Amendment of Claim Form and Statement of Claim

Culgoa's submissions

- [62] The proposed new claims by Culgoa contain allegations of fraud and dishonesty in addition to its primary Express Trust Claim. Ms. Lugin's affidavit account is that in March 2008 and subsequently as regards Egerton, Mr. Hutchings was the sole signatory and contact on behalf of Culgoa. Culgoa submitted that it was therefore possible for Mr. Hutchings to instruct the Egerton Transfer without the knowledge or involvement of Cordico or the trustee of the BVI trusts, that he in fact did so and did not subsequently inform either trustee about the Egerton Transfer or of the existence of the Egerton Shares.
- [63] The proposed amended Claim Form and Statement of Claim were exhibited to the application as Schedules A and B. In them, Culgoa pleaded that Mr. Hutchings arranged for the Egerton Transfer to be effected in circumstances where he knew that if he were to approach Cordico for approval of the transfer, Cordico would not or could not approve it; and that Mr. Hutchings acted in breach of the fiduciary duties he owed to Culgoa as director and in breach of the duty to act honestly on what he believed to be Culgoa's interests. It was asserted further that Mr. Hutchings did not reveal the fact of the Egerton Transfer to Cordico or Culgoa's sole shareholder but instead, with others, concealed it and as a result Culgoa did not learn of the transfer until after his demise in or about September 2020.
- [64] The causes of action captured in the proposed amended pleadings are claims in constructive trust, knowing receipt and dishonest assistance. Culgoa relies on the fact that Mr. Hutchings was a director of Basement at the time of the Egerton Transfer to support the contention that his knowledge and state of mind are to be attributed to Basement. Further, for among other reasons, the draft statement of case seeks to introduce an alternative case of resulting trust arising from the content of the Transfer Form by reason that Cordico and Culgoa's sole shareholder were not involved in the implementation of the Egerton Transfer.

- [65] Culgoa asked that if the Court grants permission to make the amendments they should not relate back to the date of the Claim Form but instead should take effect from the date of the application to amend or the date on which the Court grants permission to amend. It was noted that rule 20.2 of the **Civil Procedure Rules (Revised Edition) 2023** (“CPR”) empowers the Court to allow amendments to add a new claim after the end of its limitation period if the new claim arises out of the same or substantially the same facts as a claim in respect of which a remedy has already been claimed. Culgoa asserted that the proposed amendments emanate from the same circumstances as the original claim therefore the application should be addressed under this rule.
- [66] Reliance was placed on **Comodo Holdings Ltd. v Renaissance Ventures Ltd**⁴³ for the general principles governing the exercise of judicial discretion on application to amend a statement of case. With respect to the exercise of discretion at the appellate level, it was submitted that among the factors to be considered are a) the stage that the underlying proceedings have reached, b) the nature of the hearing at first instance, c) the nature of the new points sought to be raised on appeal, d) the explanation as to the time at which the new points are raised, and e) the extent of prejudice to the respondent if permission is granted to amend the statement of case. **Nottingham Finance Ltd and Win Business (Caofeidan) Ltd v Anadarko China Holdings 2 Company**⁴⁴ were cited in support.
- [67] Culgoa contended that Basement would suffer no material prejudice or any prejudice that could not be compensated in costs if the amendments were allowed. Culgoa argued that the prejudice suffered by Basement relates to the expense and inconvenience attendant on being engaged for a one-day hearing while Culgoa on the other hand, stands to lose its claim valued in millions of dollars. It was submitted that its delay in advancing the new claims was occasioned by difficulties associated with obtaining information from Mr. Hutchings’ estate due to technical issues with

⁴³ BVIHCMAP2014/0032 (delivered 3rd May 2016, unreported).

⁴⁴ BVIHCMAP2022/0044 (delivered 5th July 2023, unreported).

his computer in that his password was not available and subsequently the computer was destroyed.

[68] Noting that the established practice (as articulated in **Ballinger v Mercer**⁴⁵ and **Zhao Long v Endushantum Investments Co Ltd**) is that where a new claim sought to be introduced by an amendment is arguably time-barred, permission to amend will ordinarily be refused on the basis that the claimant should instead bring a new claim, to ensure that the claimant cannot derive a benefit from having the new claim date back to the date of the original claim, Culgoa submitted that it is not seeking to derive such a benefit. It was submitted further that in a case where there are limitation issues the court may allow an amendment pleaded on the basis that it does not relate back to the date of the Claim Form. It argued that the court should do so where it is just and convenient as a matter of case management that there should be a single set of proceedings rather than two. It argued further that this is just such a case since its new and existing claims relate to the Egerton Transfer and do not give rise to any issues concerning limitation. Submitting that it is possible to make an order in this case for the amendments to be effective from the date on which permission is granted to amend, Culgoa cited **Advanced Control Systems Inc v Efacec Engenharia E Sistemas SA**⁴⁶ and **Zhao** as examples where this principle was exemplified. However, it expressed a preference for the amendments to take effect from the date permission is granted to amend, the course adopted in the **Advanced Control Systems** case.

[69] Other considerations were raised by Culgoa as being relevant or incidental to the application to amend. Among them was its stated intention to issue new proceedings in furtherance of its objective of stopping time from running for limitation purposes and to make an application to consolidate both matters at the appropriate time, should the application to amend be refused. In fact, Culgoa disclosed that it had filed a new claim in respect of the fraud and resulting trust allegations on 10th June

⁴⁵ [2014] 1 WLR 3597 (English CA).

⁴⁶ [2021] EWHC 914 (TCC).

2025 as a fall back option. Further, Culgoa noted that Basement might seek to criticise any new proceedings as an abuse of the court's process on the ground that the new claims should have been brought in the instant proceedings when the claim was filed. It was explained that service of the new claim had not yet been effected and would be undertaken subsequent to the court's determination on the instant application.

[70] As to the scope of the Court's powers to grant permission to amend its statement of case on appeal, it was submitted that the law confers broad authority on the Court to do so. Citing **Christofi v Barclays Bank**,⁴⁷ **Burnden Holdings (UK) Ltd v Fielding**⁴⁸ and **Kensell v Khoury**⁴⁹ as examples of cases in which this was considered and/or permitted, Culgoa submitted that it makes no difference that the proposed amendments seek to introduce a new claim or allegation of fraud or that the existing claims have been the subject of summary judgment at first instance. **Notting Hill Finance Ltd v Sheikh**⁵⁰ was also relied on as being illustrative of an instance in which the Court granted permission to raise new points on appeal.

[71] Culgoa accepted that it may be an abuse of process for a party to pursue one claim to a final determination and then subsequently seek to pursue another claim which could and should have been initially pursued, sometimes referred to as **Henderson v Henderson** abuse, so called after the name of the case in which the principle was enunciated. However, relying on **Playboy Club London Ltd v Banca Nazionale Del Lavoro SpA**, the argument was made by Culgoa that while it is well-established that in cases involving two separate sets of proceedings it is not abusive to bring a second claim based on fraud if the fraud claim could not properly have been pleaded at the time of the earlier claim or even if capable of being pleaded it was speculative, inferential or weak, it is however justifiable for a claimant not to launch the fraud

⁴⁷ [2000] 1 WLR 937

⁴⁸ [2016] EWCA Civ 557; [2018] AC 857.

⁴⁹ [2020] 2 P&CR 17.

⁵⁰ [2019] 4 WLR 146.

claim unless and until it has better and stronger evidence. It was submitted that Culgoa's stance is of the latter category of cases.

[72] Likewise, in reliance on **Walbrook Trustees (Jersey) Ltd v Fattall**⁵¹ it was submitted by Culgoa that where the defendant disputes the materiality of new information on which the claimant hinges its decision to bring the new claim, the Court should recognise that it is not possible to determine at an interlocutory stage whether the new information is material or not. It follows that since the burden rests on the defendant to establish that the claim is an abuse of process and Basement is unable to discharge that burden in the present case, the court should permit the new claim to be made.

[73] Additionally, it was submitted that where a new claim is being brought on the basis of fraud, the court will, when considering the question of abuse take into account what the claimant knew at the time of the earlier claim and may find it to be abusive if the claimant had all of the evidence supporting the fraud claim but simply decided to hold the claim back. However, the court will not ordinarily require the claimant to show that the evidence supporting the fraud claim could not with reasonable diligence have been obtained at the time of the earlier action. **Goldman v Zurich Insurance Plc**⁵² and **Takhar v Gracefield Developments Ltd**.⁵³ were relied on for this proposition.

[74] Culgoa also cited **Orji v Nagra**⁵⁴ where the court held that there was no manifest unfairness to the respondent to permit the applicant to proceed with its deceit claim on the basis of new evidence that came into its possession after the material time, in circumstances where it did not deliberately decide for tactical reasons to keep material up its sleeve until after it saw what became of its negligence claim. Culgoa contended that while the question of reasonable diligence may be a factor in

⁵¹ [2010] CP Rep. 1.

⁵² [2020] EWHC 192 (TCC).

⁵³ [2020] AC 450.

⁵⁴ [2023] EWCA Civ 1289; at paras. 51 and 55.

assessing whether there is an abuse of process it is unlikely to weigh heavily in the balance if other factors lean against a finding of abuse. It maintained that it exercised reasonable diligence and this factor should therefore not weigh against it.

[75] It was submitted further that the proposed amendments disclose claims with a real prospect of success in view of Ms. Lugrin's categorical and credible denials that she knew of the existence of the Egerton shares and the absence of evidence that the trustee intended to or did make a distribution in Stella's favour to the exclusion of the other beneficiaries of the trusts. Culgoa contended that no resolution of the trustee to such effect was in evidence and such a step would have required action by Ms. Lugrin's team and her testimony is that this did not take place. In those circumstances, Culgoa submitted that contrary to Basement's case, there is no evidence that the Egerton Shares were appointed to Stella.

[76] As to the approach that the court should adopt in considering the application to amend, Culgoa argued that there were many authorities that held against allowing new points on appeal, but, on the authority of **Price v Flitcraft** it is right that in this case involving pleadings of express trust and intended pleadings of resulting and constructive trust, the exercise should not be approached the same way as if a trial had been held at first instance. Instead, as stated in **Rainy Sky, Snell**,⁵⁵ **Chitty on Contracts** and **Lewison on Interpretation of Contracts** the Court is required to look at all the surrounding circumstances including the language used.

[77] It was submitted that the new evidence is highly relevant to the express trust claim. Moreover, if Culgoa succeeds on the appeal, the trial judge should have all options before him including the constructive trust and resulting trust claims. The fact that the new evidence tends to show that there is no limitation bar is likewise relevant and weighs in favour of granting permission to amend.

⁵⁵ Para. 22-013.

Basement's submissions

- [78] In response Basement argued that the application to amend the statement of case should be denied or stayed pending hearing of the appeal. It noted that the application is being made twelve months after the claim was dismissed on a reverse summary judgment application, almost two years after the express trust claim was issued and some fifteen years after the Egerton Transfer. It was submitted that the application to amend is predicated on the new evidence chronicled in Culgoa's affidavits in support of the application in respect of which the court's permission is required to enable it to deploy. In addition, Culgoa cannot satisfy the essential **Ladd v Marshall** requirement that the evidence would have an important influence on the result of the express trust case therefore, the application to amend must be refused in the absence of evidence on which the court may act to grant it.
- [79] It was submitted further that Culgoa have identified no reason why the steps taken to discover the new material could not have been taken earlier. In any event, the proposed new claims are diametrically opposed to and wholly contradict the factual case of an express trust claim that was advanced at first instance as well as being outside the applicable six-year limitation period. Basement contended that Culgoa has failed to identify any good reason why its new claims should be introduced into the appeal as they have no possible relevance to the appeal, the subject of which is the Judge's clear conclusion that Culgoa's express trust claim had no prospect of success.
- [80] As to its submission that the application ought to be stayed, Basement argued citing **Win Business** that the Court will always exercise caution before permitting a party to make new points on appeal. It was submitted that the new points that Culgoa seeks to raise with the proposed amendments are not only substantial but are irrelevant to the issues arising on appeal and it is therefore not just or convenient to introduce the new claims on appeal. Basement contended further that another reason why it is highly inexpedient to permit the amendments is that the application gives rise to complex issues of fact and law, the resolution of which would entail full

assessment of the voluminous new evidence that Culgoa seeks to have admitted for the first time on appeal. It was submitted that the issues that arise for consideration include whether Culgoa is entitled to add new claims after the end of a limitation period, whether the proposed new claims raise triable issues and whether the court should exercise its discretion to permit the amendments. Basement contended that it is more appropriate that such an exercise be conducted at first instance as this Court is entitled to the benefit of the lower court decision and that course would ensure that Basement is not deprived of an appeal.

[81] In relation to the limitation question, Basement submitted that a new claim introduced by way of an amendment will be deemed to relate back, for limitation purposes, to the date of the original claim. However, where a new claim is out of time, it cannot be introduced into an existing claim unless the requirements of the CPR r. 20.2 are satisfied. Further, as stated in **Zhao Long v Endushantum Investments Co Ltd** the following three-stage test applies: '(i) Is it reasonably arguable that the proposed amendments are outside the applicable limitation period; (ii) if so, do they seek to add or substitute a new cause of action; (iii) if so, does the new cause of action arise out of the same or substantially the same facts as are already in issue in the existing claim.'⁵⁶

[82] Basement contended that Culgoa is unable to satisfy that test because its proposed amendments are intended to introduce new causes of action, well outside the six-year limitation period; the new claims do not arise out of the same or substantially the same facts as are already in issue, and since 'a new allegation of fraud when none is currently pleaded is conceptually incapable of being substantially the same as any pleaded fact' as held in **Frontiers Capital I Limited Partnership v Flohr**⁵⁷ citing **Paragon Finance plc v D B Thakerar & Co.**⁵⁸

⁵⁶ Ibid. at para. 24.

⁵⁷ [2025] EWHC 678 (Ch) at para. 153.

⁵⁸ [1999] 1 All ER 400.

- [83] Basement noted that in **Advanced Control System Inc.** the court considered section 35 of the **English Limitation Act 1980** and rule 17.4 of the English CPR which are to similar effect as CPR r. 20.2 in this jurisdiction. It was submitted that the posture adopted by the Court in **Advanced Control System Inc** on which Culgoa relies to circumvent the requirements of rule 20.2 has been overtaken by the decision in **Frontiers Capital**. It was submitted further that the current position is that the general rule is that 'a claimant should be required to commence a new claim where there is an arguable limitation defence to a claim sought to be introduced by amendment'⁵⁹ while the approach taken in **Advanced Control Systems** is usually followed based on party consent. In the absence of party consent, the court will consider any prejudice which that party may suffer, and whether it has strong grounds for prior determination of the limitation issue.⁶⁰
- [84] Basement reasoned that in view of the principles articulated in the **Frontiers Capital** case, it would not be expedient to introduce Culgoa's new claims into the original proceedings, where that pleaded case stands dismissed. Instead, it would be far more convenient for Culgoa to issue fresh proceedings, rather than try to bring the original proceedings back to life, with an entirely different focus.
- [85] With respect to whether the proposed amendments have a real prospect of success, Basement contended that it is an issue that is unsuitable for determination by the Court of Appeal by reason of the large volume of material (being well over 380 pages) that would need to be examined to determine that question. Further, Basement argued that this is quintessentially a matter for the first instance court, as it requires a consideration of Culgoa's conduct over the 17 years since the Egerton Transfer, a period in which it is clear that crucial documentary evidence ceased to be available and two essential witnesses (Stella and Mr. Hutchings) died.

⁵⁹ At para. 167.

⁶⁰ At para. 165 of **Frontiers Capital**.

- [86] As to whether the respective parties will suffer prejudice arising from the outcome of the application, Basement contended that Culgoa will suffer no prejudice or inconvenience if the application is stayed as it clearly considers that it can pursue its new claims in fresh proceedings, in which case the two sets of proceedings can be consolidated or managed together if the appeal is allowed. Basement submitted further that there are no considerations of abuse of process relevant to the question of whether Culgoa should be permitted to amend its statement of case on appeal since these are new claims with entirely new evidence bearing no relation to the original claim.
- [87] Concerning Culgoa's assertions that the amendment is relevant to the appeal, Basement concluded that there is no prospect that Culgoa's new claims or new evidence could ever improve its express trust claim as they have no bearing on the issues arising on appeal which concerns the express trust claim and the reverse summary judgment in relation to it. **Pleshakov v Sky Stream Corporations**⁶¹ was relied on for the principle that an express trust, as distinct from a resulting or constructive trust, requires that there must be shown an intention to create the alleged trust and the essential question is 'whether in substance a sufficient intention to create a trust has been manifested.'⁶² It was submitted that the proposed new claims based on allegations of resulting trust, constructive trust and breach of duty contradict the express trust claim and have no relevance to the express trust claim - the subject of the appeal.
- [88] Basement argued that even if the Court should consider that Culgoa's new claims should go to trial, this would be no reason why the express trust claim should be litigated further. It reasoned that there is no basis for Culgoa's contention that, if its new claims are to go to trial, then the appeal should be allowed in relation to the express trust claim as well. Likewise, it was submitted that where the Judge so strongly concluded that the express trust claim should not be litigated to trial, it would

⁶¹ [2021] UKPC 15.

⁶² Ibid. at para. 48.

be contrary to principle to pursue it further, would be a waste of the Court's and parties' resources and be contrary to the overriding objective.

Discussion

- [89] Pursuant to section 30(1) of the **Eastern Caribbean Supreme Court (Virgin Islands) Ordinance ('Supreme Court Ordinance')** this Court is vested with all powers of the High Court including by implication the power to grant permission to amend a statement of case. CPR 62.24 is to similar effect as section 30(1) of the **Supreme Court Ordinance** and adds that this includes the general case management powers set out in CPR Part 26. By extension and necessary implication, the High Court's jurisdiction to amend statements of cases under CPR Part 20 is vested in this court. Rule 26.1(2)(y) expressly provides that the court may take any step (other than those itemised in the preceding sub-paragraphs) to give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective.
- [90] Similarly, section 31(2) of the **Supreme Court Ordinance** empowers the Court to make any order on such terms as the court thinks just to ensure the determination on the merits, the real question in controversy between the parties. In view of the referenced provisions, there can be no doubt that this Court may consider and determine an application to amend a statement of case even if that issue does not arise on the substantive appeal.
- [91] In considering the application to amend, a sub-issue that arises is whether the proposed amendments support the existing claim of an express bare trust. Culgoa contends that it does. Basement argued to the contrary. Inextricably bound up in consideration of this sub-issue is the extent to which the court will permit a party to raise new points on appeal, be they factual or legal. In recognition of their relevance to the amendment application, I propose at this stage to touch on some of the related legal principles.

[92] Regarding introduction of new points on appeal, the court in **Nottingham Finance Ltd** noted that an appellate court will act cautiously before allowing a new point to be raised on appeal but, will do so where if the justice of the case warrants such a course. Among the factors to be considered are whether a full trial transpired in the court below, whether the respondent had a full opportunity to respond to new contentions and any prejudice that may be occasioned to him/it if the new point is allowed to be argued.

[93] The Court opined:

“26 These authorities [*Singh v Dass* [2019] EWCA Civ 360, *Mullarkey v Broad* [2009] EWCA Civ 2 and *R(Humphreys) v Parking and Traffic Appeals Service* EWCA Civ 24 [2017] RTR 22] show that there is no general rule that a case needs to be “exceptional” before a new point will be allowed to be taken on appeal. Whilst an appellate court will always be cautious before allowing a new point to be taken, the decision whether it is just to permit the new point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken.

27 At one end of the spectrum are cases such as the *Jones* case in which there has been a full trial involving live evidence and cross-examination in the lower court, and there is an attempt to raise a new point on appeal which, had it been taken at the trial, might have changed the course of the evidence given at trial, and/or which would require further factual inquiry. In such a case, the potential prejudice to the opposing party is likely to be significant, and the policy arguments in favour of finality in litigation carry great weight. As Peter Gibson LJ said in the *Jones* case (at para 38), it is hard to see how it could be just to permit the new point to be taken on appeal in such circumstances; but as May LJ also observed (at para 52), there might none the less be exceptional cases in which the appeal court could properly exercise its discretion to do so.

28 At the other end of the spectrum are cases where the point sought to be taken on appeal is a pure point of law which can be run on the basis of the facts as found by the judge in the lower court: see eg *Preedy v Dunne* [2016] EWCA Civ 805 at [43]–[46]. In such a case, it is far more likely that the appeal court will permit the point to be taken, provided that the other

party has time to meet the new argument and has not suffered any irreparable prejudice in the meantime.”⁶³ (Emphasis added)

- [94] The court remarked further that in an appropriate case an appellate court may allow an appeal based on a new point of law (other than for procedural irregularity) where the appeal court discerns that the lower court’s decision was wrong:

“**40** In a case in which, for example, there has been a hearing conducted with scrupulous fairness and complying with all relevant rules in the lower court, but the appeal court permits a new point of law to be taken on appeal which it decides in favour of the appellant, the appeal court must obviously have the power to give effect to the decision that it has made. It would not, however, be sensible to allow the appeal on the basis that the lower court decision was “unjust because of a serious procedural or other irregularity in the proceedings”. In the example given, there would have been no such defect in the lower court proceedings in any normal sense of the language used in CPR r 52.21(3)(b). In my view, the appeal in such a case would be allowed simply because, admittedly with the benefit of the new argument, the appeal court can see that the decision of the lower court was not the decision that should have hence that it was the “wrong” decision within the meaning of CPR r 52.21(3)(a).”⁶⁴

- [95] In similar vein, this court in **Win Business** held:

“A case need not be exceptional before a new point may be argued on appeal, however, whether or not an Appellate Court will permit a new point depends on where such new point lies on the spectrum between pure points of law that can be argued on the findings of the judge below, and those which, had they been raised below, might have changed the course of the evidence given at trial. Where a new point would require further evidence or, had the new point been argued below it would have resulted in different evidence being filed, an Appellate Court should err on the side of caution in allowing such new points to be raised. This caution is even greater where the other party has not had adequate time to deal with the new point.”⁶⁵ (Emphasis added)

- [96] The kernel of the referenced holdings in **Nottingham Finance Ltd.** and **Win Business** is that where an appellate court is determining an application to permit an amendment to a statement of case it seeks to give effect to the overriding

⁶³ Ibid at paras. 26-28.

⁶⁴ Ibid. at para. 40.

⁶⁵ At para. 83.

objective in the exercise of its discretion. In doing so, it remains mindful that while it may grant the application even where the case is not exceptional, it should approach the competing submissions with caution, analyse all relevant factors including whether the amendment relates to a matter of pure law that can be determined based on the factual findings below, the nature of the proceedings at first instance and the likely prejudice to the respective parties depending on the outcome of the application. In the case at the appeal bar, other pertinent factors were highlighted by the parties including legal contentions.

[97] One such point of law focused on a criticism of the learned judge as to how an express trust is created. Culgoa relied on **Snell's Equity**⁶⁶ in support of its contention that the learned judge erred in granting summary judgment in respect of its express trust claim, in that he failed to appreciate that he was required to examine all the surrounding circumstances and not just the language of the transfer form and supporting documents in deciding whether an express trust was created. In this regard, Culgoa argued that the proposed new pleadings and new evidence describes relevant circumstances that support a finding that it had advanced an express trust claim which had a reasonable prospect of success, such as Ms. Lugrin's averments that tend to show among other things that no consideration was received by Culgoa for the Egerton shares, disproves that Stella was the beneficial owner and that she was not appointed the shares.

[98] As regards the creation of an express trust and specifically the settlor's intention, the learned authors of **Snell's Equity** state:

"No particular form of expression is necessary for the creation of a trust if, on the whole, it can be gathered that a trust was intended. It is unnecessary for the settlor to use the word 'trust': the court construes the substance and effect of the words used, against the background of any relevant surrounding circumstances. Indeed, the settlor need not even understand that his words or conduct have created a trust if they have this effect on their proper legal construction. Conversely, it is not enough that the settlor describes the transaction as a trust if on its proper construction the transaction was not intended to operate as a trust. The settlor's intention

⁶⁶ 35th Ed. Para. 22-013.

must be clear on two main questions: (1) that they intended the trustee to owe legally enforceable duties rather than duties of a merely social or moral nature; (2) that if they intended to create a legal relationship, it was to involve trust duties as distinct from some kind of legal relationship, such as a simple relationship of debtor and creditor.”

[99] In **Rainy Sky** the court remarked:

“21 The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.”⁶⁷

[100] Culgoa’s contention is that on the face of the transfer documents the expression ‘no change in beneficial ownership’ can be true in the existing circumstances and be supportive of a finding that an express trust was created where Stella had no interest in the shares, if the instrument is construed to create an express trust in favour of Culgoa. As I understand it, this supplied the rationale for Culgoa’s attempt to amend its pleadings (and provide fresh evidence) to introduce the additional factual background to support its express trust claim.

[101] For its part, Basement’s reliance on **Pleshakov v Sky Stream Corporations**⁶⁸ is also instructive. In it, the Privy Council set out the well-known learning as to the three certainties necessary for the creation of a trust:

“the three certainties necessary to create a trust had been established (see Snell’s Equity, 34th ed, para 22-012): (i) there was certainty of intention, in that the respondents were found to have set up SSC on the instructions of Mr Pleshakov with the intention that the shares in it would be held for his benefit; (ii) there was certainty of subject matter, ie the shares in SSC held

⁶⁷ At para. 21.

⁶⁸ [2021] UKPC 15.

by each of the respondents; and (iii) there was certainty as to the object of the trust, ...”⁶⁹

[102] The Board added that in relation to the certainty of intention:

“neither a written trust instrument nor any formal language is required (this may be subject to formality requirements imposed by statute, but there are none in this case). Informal language can be sufficient and the necessary intention can be inferred from conduct: *Paul v Constance* [1977] 1 WLR 527, 531G (Scarman LJ); *Dhingra v Dhingra* (1999) 2 ITCLR 262 (CA), 265d (Lindsay J); and *Ong v Ping* [2017] EWCA Civ 2069, para 58 (Sir Colin Rimer). As Megarry J said in *In re Kayford Ltd* [1975] 1 WLR 279, 282, “the question is whether in substance a sufficient intention to create a trust has been manifested.”⁷⁰

[103] In considering the foregoing arguments, the Court noted that Culgoa’s stated reason for seeking to amend the statement of case to give further support for the express trust claim is only one factor to be considered among several and that by itself it was not substantial enough to sway the balance towards granting permission to amend. The rules of procedure specific to amendment of statements of case also had to be considered.

[104] As between Culgoa and Basement there was acceptance that resulting trusts and constructive trusts are by nature quite different from an express trust and arise by operation of law. In the case of the resulting trust the resulting trust is imposed to give effect to the intention of parties in specific circumstances involving the transfer of property.⁷¹ A constructive trust attaches by law to specific property that is neither subject to an express trust or a resulting trust, but is held by a person in circumstances where it is inequitable to allow them to assert full beneficial ownership over the property, including in cases where fraud or dishonesty or other wrongful conduct is alleged.⁷² Self-evidently, resulting trusts and constructive trusts are different from express trusts and arise in circumstances that would not support a finding of the creation of an express trust.

⁶⁹ At para. 41.

⁷⁰ At para. 48.

⁷¹ Halsbury’s Laws of England Vol. 98 (2024) para. 139.

⁷² Halsbury’s Laws of England Vol. 98 (2024) para. 122.

- [105] The Court appreciated that Culgoa evinced an intention to use distinct parts of the pleadings and new evidence in support of the express trust claim and other aspects in support of the new claims. Those were thought to be relevant factors to be taken into account, in determining the application to amend the statement of case.
- [106] The applicable rules of procedure governing the grant of permission to amend a statement of case are outlined in CPR Part 20. Rule 20.1 provides that the Court may at any time on application by a party grant leave to amend a statement of case. Sub-rule (4) expressly provides that leave must be obtained where the proposed amendment is being sought after the end of a relevant limitation period.
- [107] In accordance with CPR rule 20.1(3), evaluation of an application for leave to amend necessitates a consideration of all the circumstances. **CPR 20.1(3)** and the decisions in **Comodo Holdings, Notting Hill Finance Ltd** and **Win Business** make clear that among the factors to be considered are how promptly the application was made after the applicant became aware that he or she wished to change the pleading, the prejudice to the applicant if the application is refused and any prejudice to the other parties if it is granted, whether any prejudice can be compensated in costs and/or by the payment of interest; whether the trial date or any likely trial date can be met if permission is granted, the stage that the underlying proceedings have reached and the administration of justice. It is similarly well established that before the court grants permission to amend, the court must be satisfied that an applicant has a real prospect of succeeding on the proposed new claim and that it is just and convenient to make such an order – **Elite Property Holdings Ltd. v Barclays Bank Plc.**⁷³
- [108] In **Comodo Holdings Ltd. v Renaissance Ventures Limited et al** this court discussed rule 20.1 in the context of an application for permission to amend that is made after the first case management conference and ruled that irrespective of the timing of the application to amend, the general principles by which the court is

⁷³ [2019] EWCA Civ 204.

guided are circumscribed by interest of justice concerns. In seeking to achieve a just outcome the relevant factors include the inexhaustive list set out in **CPR 20.1**.

[109] Rule 20.2 of the CPR deals with certain situations in which an application to amend is made after the end of a relevant limitation period. In such instances, the court may allow an amendment to add or substitute a new claim but only if the new claim arises out of the same or substantially the same facts as a claim in respect of which the party wishing to change the statement of case has already claimed a remedy in the proceedings - CPR rule 20.2(2). It states:

‘20.2 (1) ...

(2) The court may allow an amendment the effect of which will be to add or substitute a new claim but only if the new claim arises out of the same or substantially the same facts as a claim in respect of which the party wishing to change the statement of case has already claimed a remedy in the proceedings.’

[110] It is self-evident that Culgoa’s proposed new claims do not arise out of the same or substantially the same facts as the express trust claim. For this reason, rule 20.2 is inapplicable for present purposes. Therefore, the application must be determined pursuant to rule 20.1. Importantly, rule 20.1(4) provides:

‘20.1 (4) A statement of case may not be amended without permission under this rule if the change is one to which any of the following applies—

(a) ...; and

(b) rule 20.2 (changes to statement of case after end of relevant limitation period).’

[111] The issue of limitation having been raised by Basement in the instant case, it must be addressed. In **Ballinger and another v Mercer Ltd and another**⁷⁴ the English Court of Appeal affirmed the three-stage test that a claimant needs to satisfy if it is to succeed on an application to introduce a new claim in an existing suit. Tomlinson LJ stated:

“It is accepted on all sides that the judge correctly set out the three-stage test that the claimants needed to satisfy before being granted permission to raise a new claim in an existing action: (i) Is it reasonably arguable that the

⁷⁴ [2014] 1 WLR 3597.

opposed amendments are outside the applicable limitation period? (ii) If so, do they seek to add or substitute a new cause of action? (iii) If so, does the new cause of action arise out of the same or substantially the same facts as are already in issue in the existing claim?”⁷⁵

[112] Tomlinson LJ provided further guidance regarding how the court should approach the three-step test where the defendant can demonstrate that it has an arguable limitation defence in view of the doctrine of relation back that was introduced by section 35(1) of the UK Limitation Act 1980. It is important to note that no parallel to that provision exists in the BVI Limitation Act. Notwithstanding, it is instructive to consider the recommended approach when the court is faced with an application to add a new claim arising from different facts than those in issue in the original claim where the defendant objects on the ground that it is time-barred, as in the instant case. As noted by Tomlinson LJ, adopting the principles outlined in **Chandra v Brooke North**, the court may direct that the limitation issue be determined preliminarily or it may deal with it as a conventional application.

[113] In **Chandra v Brooke North**, Jackson LJ opined on this issue:

“67. If, as is usually the case, the court adopts the first option [as a conventional amendment application], it will not descend into factual issues which are seriously in dispute. The court will limit itself to considering whether the defendant has a reasonably arguable case on limitation: see *Welsh Development Agency v Redpath Dorman Long Ltd* [1994] 1 WLR 1409 at 1425H. If so, the court will refuse the claimant’s application. If not, the court will have a discretion to allow the amendment if it sees fit in all the circumstances.

68. If the court refuses permission to amend, the claimant’s remedy will be to issue separate proceedings in respect of the new claim. The defendant can plead its limitation defence. The limitation issue will then be determined at trial and the defendant will not be prejudiced by the operation of relation back under section 35(1) of the 1980 Act.”⁷⁶

[114] It is noteworthy that section 35(1) of the **UK Limitation Act 1980** has the effect of deeming any new claim in an existing action as a separate action that is further

⁷⁵ Ibid. at para. 15.

⁷⁶ (2013) 151 Con LR 111, para. 67-68.

deemed to commence on the same date as the original claim, except where made by way of third-party proceedings, in which case they are deemed to have begun on the date that the third party proceedings began. This is referred to commonly as the doctrine of 'relation back'. Section 35(1) provides:

“35 New claims in pending actions: rules of court.

- (1) For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced—
 - (a) in the case of a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced; and
 - (b) in the case of any other new claim, on the same date as the original action.”

[115] On the question of where the burden of proof lies, Tomlinson LJ pointedly noted in **Ballinger v Mercer** that Jackson LJ does not deal with that subject in **Chandra v Brooke**. Tomlinson LJ however reasoned that based on first principles, where the defendant advances a prima facie limitation defence the burden shifts to the claimant to demonstrate that the defence is 'not in fact reasonably arguable'. Quite tellingly, he made the point that by seeking to introduce the new claim the claimant is inviting the court to summarily determine that the limitation defence contended for by the defendant is not available. He noted that if determination of the question of whether a limitation defence exists is dependent on the resolution of hotly contested factual contentions, that is an issue that should go to trial and furthermore, it would be appropriate to deprive the defendant of the prima facie limitation defence at the interlocutory stage, only if, it is clear that the defence is not reasonably arguable.

[116] While the court recognized that Tomlinson LJ and Jackson LJ were, in the referenced cases concerned with the doctrine of relation back under section 35(1) of the UK Limitation Act (which is inapplicable to the instant case) it was mindful that for practical reasons and in furtherance of the overriding objective, deferring determination of whether a limitation defence is available to Basement might be

appropriate in this case, especially since Basement has not had a full opportunity to investigate the fresh evidence (factual bases) on which the new claims rely.

- [117] The Court noted further that in **Zhao Long v Endushantum Inv.** the BVI Commercial Court adopted the three-stage test articulated in **Chandra v Brooke** and applied it. There, Green QC, J opined:

“As limitation issues arise in respect of the amendments, that brings into play CPR 20.2 which prescribes jurisdictional thresholds that a party applying has to get through before the Court even considers its discretion. CPR 20.2 applies where there is “a change in a statement of case after the end of a relevant limitation period”. There is a three-stage test that an applicant needs to satisfy – this is set out in *Ballinger v Mercer Ltd* [2014] 1 WLR 3597...”.

- [118] Being mindful of the foregoing principles, the court considered that on the one hand, Culgoa contended that it learnt of the new factual basis for its new claims only in 2024, while Basement argued on the other hand, that such information could have been discovered by Culgoa much earlier with reasonable diligence, and in such case Culgoa would not be able to rely on 2024 as the date from which time began to run for limitation purposes. In light of these competing contentions, the court felt led ineluctably to the conclusion that limitation is clearly in dispute and is a live issue impinging on the application to amend the statement of case.

- [119] From the foregoing, it is clear that the three-step test set out in **Chandra v Brooke**, **Ballinger v Mercer** and adopted in **Zhao** is anchored in CPR 20.2, is well-established and is the accepted route in determining whether an application for leave to amend a statement of claim involving limitation issues is addressed under that rule or CPR 20.1. Further, the court decided that it is neither necessary nor desirable or in furtherance of the overriding objective to decide at this time whether the proposed resulting trust or constructive trust claims are time-barred. It reasoned that in all the circumstances, the prudent and just course of action would be to defer resolution of the limitation defence issue for a later occasion. This factor was a significant one for purposes of the application to amend in light of the considerable prejudice that would be suffered by Basement by reason that the application is

premised on a large volume of material that it reasonably claims not to have had an adequate chance to investigate.

[120] For those reasons, regarding the limitation contentions, the court decided that it suffices to simply acknowledge that Basement having raised the issue of limitation, that in the interests of justice Basement is entitled to adequate time to make its own inquiries about the new claims now being advanced by Culgoa, as well as the availability and viability of a potential limitation defence to those claims, before the court can properly determine the limitation issue. In other words, the court would refrain from answering the first question in the three-stage test – i.e. whether it is reasonably arguable that the proposed amendments are outside the applicable limitation period.

[121] As to whether the amendments seek to add or substitute a new claim the obvious answer is that the amendments will introduce two new claims. The new claims do not arise out of the same or substantially the same facts as the original claim. This is yet another reason why Culgoa's application to amend its statement of case cannot be considered under rule 20.2 but must be addressed under CPR r. 20.1.

[122] The proposed amendments are substantial and substantive. They comprise some 55 new paragraphs and would increase the physical size of the claim form and statement of claim to a large extent. The affidavit evidence and exhibits were also substantial as noted above.

[123] Culgoa's application was made within one week of the filing of Ms. Lugin's affidavit and within 4 months of her being interviewed for this purpose. It is arguable that it might have been possible to produce the affidavit much sooner. However, the Court took note that Ms. Lugin is not employed by Culgoa or any of the active players in this dispute and the explanations they have provided for the delayed filing is reasonable. The application appears to have been made with reasonable promptitude based on the information presented to the court. In terms of prejudice

to Culgoa if the application is refused, its contentions that its appeal would be adversely impacted is not borne out. The fact that Culgoa has already filed a new claim in which the new causes of action are pleaded suggests that any likely prejudice would be set off by the deployment of that claim.

[124] In the court's estimation, Basement would suffer greater prejudice if the application is granted before Basement has had adequate time to conduct investigations into the new assertions that form the basis for the proposed new claims. It goes without saying that Basement might well be deprived of the opportunity to present an early limitation challenge or defence if the amendment is granted at this time that might not be compensable in costs or interest. As to a likely trial date, no date has been fixed for trial. It would therefore be possible to meet any future trial date.

[125] In relation to the administration of justice question it is common ground that the proposed amendments seek to introduce at this stage entirely new factual bases for the express trust claim and new claims. It is a matter of law that allegations of existence of an express trust are incompatible with constructive trust and resulting trust contentions arising in relation to a similar underlying factual pillar of the case. In this regard, Basement's contention that Culgoa's resulting trust and constructive trust claims are diametrically opposed to the express trust claim is not without merit. These are relevant considerations for purposes of the application to amend that were taken into account in determining the application. In these circumstances, taking all of the foregoing factors into account it is clear that the prejudice to Basement would be significant if the application is granted and it would be contrary to the administration of justice to do so. Permission to amend the claim form and the statement of claim was accordingly refused.

[126] For the sake of completeness, it is worth noting that the court examined the authorities cited by the parties in relation to the effective date of the proposed amendments if the application was granted. Regard was had to the learning in

Advanced Control Systems Inc v Efacec Engenharia e Sistemas SA⁷⁷; **Duke of Sussex v News Group Newspapers Ltd**⁷⁸ and **Frontiers Capital I Limited Partnership v Flohr**⁷⁹. The Court also took into account that if it gave leave for the amendments, it could direct that they take effect from the date of filing of the application or the date of the order granting permission to do so. It did not have to make a determination as to the effective date of the proposed amendments. Therefore, no analysis of those authorities is necessary.

Application to Amend Notice of Appeal

Culgoa's Submissions

[127] On this issue, Culgoa's submissions mirrored in large part those made in respect of the application to amend its statement of case. It added that the court's powers to allow new points to be raised on appeal is governed by the overriding objective. It was submitted that the proposed addition of the two new grounds of appeal would have an important effect on the outcome of the case in that there is a real prospect of Culgoa's appeal succeeding if it is allowed to rely on the fresh evidence and amended statement of case.

[128] In addition, the following pronouncement in **Nottingham Finance** was commended for the court's consideration:

"In a case in which, for example, there has been a hearing conducted with scrupulous fairness and complying with all relevant rules in the lower court, but the appeal court permits a new point of law to be taken on appeal which it decides in favour of the appellant, the appeal court must obviously have the power to give effect to the decision that it has made. It would not, however, be sensible to allow the appeal on the basis that the lower court decision was "unjust because of a serious procedural or other irregularity in the proceedings". In the example given, there would have been no such defect in the lower court proceedings in any normal sense of the language used in CPR r 52.21(3)(b). In my view, the appeal in such a case would be allowed simply because, admittedly with the benefit of the new argument, the appeal court can see that the decision of the lower court was not the

⁷⁷ [2021] EWHC 914.

⁷⁸ [2024] EWHC 1208 (Ch).

⁷⁹ [2025] EWHC 678 (Ch).

decision that should have been made, and hence that it was the “wrong” decision within the meaning of CPR r 52.21(3)(a).”⁸⁰

Basement’s Submissions

- [129] Citing **Win Business**, Basement argued that the Court will always exercise caution before permitting a party to make new points on appeal particularly where further evidence is required to elucidate the new point and/or the opposing party did not have adequate time to address the new argument. It was submitted that Culgoa could not satisfy these requirements because its new claims are substantial and require further evidence. Additionally, Basement contended that Culgoa’s new claims are irrelevant to the issues on appeal. Further, Culgoa considers that they can be appropriately pursued in new proceedings, therefore, it cannot be just and convenient to introduce the new claims on appeal.

Discussion

- [130] The amendments that Culgoa sought leave to introduce are two new grounds of appeal. They are set out as grounds 3 and 4 in its draft amended Notice of Appeal contained in Schedule C to the Notice of Application and state:

“(3) The Claimant has a real prospect of succeeding on the claims set out in the draft Amended Claim Form and draft Amended Statement of Claim and those claims should therefore in any event go to trial.

(4) If it is accepted that the claims set out in the draft Amended Claim Form and draft Amended Statement of Claim should go to trial in any event (whether in these proceedings or in separate proceedings), the existence of those claims constitutes a good reason why the claims originally made in the present proceedings should also go to trial.”

- [131] As is evident on the face of the draft amended Notice, these amendments are conditioned on the success of Culgoa’s application to amend the Claim Form and SoC. Further, Culgoa intends to rely on them to argue that the learned judge erred in granting summary judgment and that he would have refused to do so if the statement of case included the new causes of action.

⁸⁰ At para. 40.

[132] As stated earlier, this Court is vested under section 30(1)(a) and (b) and 31(2) of the **Supreme Court Act** and rule 62.24(1) of the CPR with broad powers to allow amendments. This includes permitting amendments to a Notice of Appeal in appropriate cases. However, in principle the Court would be slow to grant such an application and would do so only if the justice of the case so requires: **Christofi v Barclays Bank, Burnden Holdings (UK) Ltd v Fielding and Anor; Playboy Club London Ltd. v Banca Nazionale Del Lavarò Spa and Notting Hill Finance Ltd. v Sheikh**.

[133] For reasons already articulated, The Court was of the considered opinion that contrary to Culgoa's contentions, the proposed amendments to the Notice of Appeal have no relevance to the issues raised on the summary judgment application or the appeal against that decision. Likewise, a decision granting permission to introduce the new grounds of appeal is contingent on amendments first being made to the Claim Form and SoC. Having indicated that I would refuse the application to amend the statement of case it follows that the application to add the two new grounds of appeal must likewise fail.

[134] In its brief reasons for decision on October 16th 2025, the court opined that it was satisfied that permitting the amendment to the Notice of Appeal would amount to an abuse of process. Germane to this conclusion is the observation in **Koza v Koza** that the application of the **Henderson** and **Hunter** principles:

“... will often mean that if a point is open to a party on an interlocutory application and is not pursued, then the applicant cannot take the point at a subsequent interlocutory hearing in relation to the same or similar relief, absent a significant and material change of circumstances or his becoming aware of facts which he did not know and could not reasonably have discovered at the time of the first hearing... [and] a party should generally bring forward in argument all points reasonably available to him at the first opportunity; and that to allow him to take them serially in subsequent applications would generally permit abuse in the form of unfair harassment of the other party ...’⁸¹ (Emphasis supplied)

⁸¹ At para. 42.

[135] While Culgoa contended that before the hearing of the summary judgment application it could not reasonably have discovered the circumstances that it now seeks to advance as new causes of action in support of the appeal, Basement argued that Culgoa had ample opportunity before then to conduct research and uncover the underlying materials. Basement's further contention is that Culgoa spent roughly 12 months unearthing this supposedly new evidence and it (Basement) will in turn need to conduct its own investigations to enable it to properly respond. In my opinion, Basement's argument is sound.

[136] Making allowances for Basement to carry out inquiries of its own to counter the proposed new cases is reasonable and in the interests of the administration of justice. In my estimation, anything less would be unfair and unjust. In this context and to the extent that it is can be demonstrated that Culgoa had sufficient time to marshal its resources and bring forward the new claims at the time of filing the initial claim, allowing it to amend the Notice of Appeal at this stage would amount to an abuse of process. For those reasons, it was determined that it would not be just to grant permission to the applicant to amend the appeal.

New Submissions on Appeal

[137] Culgoa's application to rely on the submissions at paragraph 47 of its skeleton arguments was similarly contingent on permission being granted to amend its statement of case and/or its Notice of Appeal. Paragraph 47 of the skeleton arguments contains two sub-paragraphs that relate to how Culgoa's appeal against summary judgment would be impacted if the court allowed the amendments to introduce the proposed new claims. Having already determined that the applications to amend are refused, this renders consideration of the paragraph 47 application and submissions unnecessary. Accordingly, the application to permit reliance on them fell away.

Costs

[138] On 3rd October 2025, the parties agreed and a single judge of the Court approved in chambers, a consent order in respect of a notice of application filed by Basement⁸² for permission to rely on further evidence and further written submissions in response to Culgoa's application, in relation to the substantive appeal and for permission to adduce into evidence the affidavit of Mark Renouf filed on 18th September 2025. By paragraph 5 of the order costs of this application was agreed to be costs in the appeal. That order was affirmed in the decision in respect of which these reasons are given.

I concur.

Nicola Byer

Justice of Appeal [Ag.]

I concur.

Gertel Thom

Justice of Appeal [Ag.]

By the Court

Chief Registrar

⁸² On 18th September 2025.