IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Civil Appeal No. 10 of 1999 and 38 of 1998
Grand Court Cause No. 104 of 1995

BETWEEN:

OMNI SECURITIES LIMITED
(In Liquidation)

Plaintiff/Appellant (CICA 10/99)
Plaintiff/Respondent (CICA 38/98)

- and -

(1) DELOITTE & TOUCHE (a firm)
(2) DELOITTE HASKINS & SELLS (a firm)
(3) IAN AUBERON NIGEL WIGHT
(4) RICHARD DOUGLAS
(5) ROBERT E. AXFORD
(6) MICHAEL PILLING
(7) ADRIAN HAMMOND
(8) DELOITTE & TOUCHE A.G.
(9) PAUL HUBBARD
(10) DAVID BODEN

CAYMAN ISLANDS COURT OF APPEAL

Defendants/Respondents (CICA 10/99)
Defendants/Appellants (CICA 38/98)

BEFORE: The Rt. Honourable Mr. Justice E. Zacca, President
The Rt. Honourable Mr. Justice P.T. Georges, J.A.
The Honourable Mr. Justice G. Collett, J.A.

Robert Hildyard Q.C. and Dominic McCahill instructed by Walkers for the Plaintiff.
Geoffrey Voss Q.C. and Nigel Clifford instructed by Hunter & Hunter for the First to Seventh, Ninth and Tenth Defendants.
Geoffrey Voss Q.C. and Graham Ritchie instructed by Charles Adams, Ritchie & Duckworth for the Eighth Defendant.

December 1st, 2nd, 3rd, 6th, 7th and 8th 1999 May 5th 2000

JUDGMENT

COLLETT, J.A.

These consolidated appeals raise a compendium of separate issues which have arisen in the course of preparation for trial of Grand Court Cause No. 104 of 1995; a number of challenges have been made to several considered rulings of Smellie C. J. That litigation itself concerns claims alternately sounding in contract and in tort by Omni Securities Limited (The Plaintiff), a Cayman Islands registered company now in liquidation against its former auditors (the Defendants) represented here by the local firms of Deloitte and Touche and Deloitte Haskins and Sells, together with a number of their present or former partners and the associated Swiss firm of Deloitte and Touche A.G. The Plaintiff company was at the material times in 1988 and 1989, a wholly owned subsidiary of the Swiss company Omni Holding A.G., of which, it is common ground, the chairman and principal shareholder was a Mr. Werner Rey, a Swiss entrepreneur.

The first issue concerns the decision of the Chief Justice to refuse leave to the Plaintiff to amend its Statement of Claim by way of additions to paragraphs 3, 46A to F, 61.7 to 61.11, 62.6, 62.7, 64.6, 65.7 and 66.5. These disallowed amendments have been referred to at the hearing as the 'Rey amendments' because they seek to allege further breaches of the professional duty owed by the auditors to the Plaintiff in respect of alleged failures to enquire into and report upon transactions which the Plaintiff had entered into with Mr. Rey or at his behest in the period up to 31st December 1989.

The existing Statement of Claim, delivered some two years before the application for leave to amend, was in essence concerned to allege failure to enquire into and report upon quite separate transactions in

1989 by which the Plaintiff had advanced loans to three German companies to enable them to finance the acquisition by its parent of another German company, Harpener A.G. It also alleged a failure to comment upon the value of certain receivables listed in the Plaintiff's balance sheet for that year.

At the date of the application for leave to introduce the Rey amendments, it is common ground that the limitation period for such claims under the relevant Cayman Limitation Law had expired. In consequence, therefore, of the provisions of Section 41 of that Law read with the relevant parts of Grand Court Rules, Order 20, Rule 5, the Rey amendments could only be allowed, as a matter of jurisdiction, if they did not introduce a new cause of action into the pleading, or, if they did so, then if that new cause of action arose out of the same facts or substantially the same facts as were already in issue on the claims already pleaded. Even then, the allowance or otherwise of the proposed amendments would have been in the discretion of the Grand Court Judge.

The learned Chief Justice in his ruling delivered on 31st March 1999 held that he had no jurisdiction to allow these amendments because firstly, they sought to introduce a new cause of action and, secondly, they did not rely upon the same or substantially the same facts as already pleaded. Accordingly, he did not enter into the question of whether or not discretion ought to be exercised in the Plaintiff's favour.

The first question for consideration therefore, is whether or not the Rey amendments do indeed introduce a new cause of action. This is a question of mixed law and fact and the starting point is to ask, what is a cause of action? The answer is supplied by the opening sentence of the judgment of Diplock L. J. (as he then was) in Letang v Cooper (1965) 1Q.B. 232 at p. 242: -

> "A cause of action is simply a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person".

Commenting upon that observation in Paragon Finance Plc v D. B. Thackeray & Co. (1999) 1 A.E.R., 400 Millett L. J. stated –

> "however it is formulated only those facts which are material to be proved are to be taken into account … the selection of the material facts to define the cause of action must be made at the highest level of abstraction".

A further illuminating observation was made by Glidewell L. J., in Darlington v O'Rourke (1999) 1 Lloyds Rep. P.N.33 where he stated –

> "In my view where an amendment pleads a duty which is different from that pleaded in the original Statement of Claim it will, or certainly will usually, raise a new cause of action. If there is no allegation of a different duty but different facts are alleged to constitute a breach of he duty it is more difficult to decide whether a new cause of action is pleaded".

In the same judgement the learned Lord Justice (at p. 370) stated that what was required was a comparison of the unamended pleading with the proposed amendment to determine –

a) whether a different duty is pleaded;

b) whether the breaches pleaded differ substantially; and

c) where appropriate, the nature and extent of the damage of which complaint was made.

The submission of Mr. Hildyard Q.C. for the Plaintiffs in regard to this test was to the effect that if a single duty is pleaded then in essence there is but one cause of action and fresh instances of breach of that duty amount to no more than further and better particulars of it. I find this difficult to reconcile with the tenor of the judicial observations cited above. Nor am I much attracted by his submission to the effect that the building cases, as exemplified by the decision of the English Court of Appeal in Steamship Mutual Underwriting Association v Trollope & Colls (City Ltd.) (1986) 33 BLR 77, on which the Chief Justice relied, are sui juris and stand in a category of their own which is not applicable to a professional audit situation. As May L. J., put it in that case at p. 98 –

> "I do not think one can look only to the duty on a party but one must look also to the nature and extent of the breach relied upon as well as to the nature and extent of the damage complained of".

There is nothing in his judgement or in the following one of Lloyd L. J. to indicate that the Court there considered their statements of legal principle to be confined to building cases only. Moreover, we were referred to a number of more recent decisions of the English Courts which have cited with approval and relied upon the Steamship decision in other areas of dispute, such as breaches of solicitors' and architects' professional duties to their clients and the issue of Lloyds Certificates of Seaworthiness.

Having carefully reviewed the portion of his ruling in which the learned Chief Justice concluded that a new cause of action was pleaded by the proposed Rey amendments, it appears to me that he correctly directed himself in law as to the tests to be applied. As to the facts also, I can see no hint of error. In order that the Plaintiff should make good the allegations contained in these amendments it would be necessary for it to establish that Mr. Rey was a 'shadow director' of the Plaintiff, that he owed fiduciary duties to it in this capacity or, alternatively, in the capacity of an agent, that he and the local directors acted illegally and contrary to Cayman company law and that the Defendant auditors ought to have discerned this in the course of their investigations and to have reported upon it. Every one of these factual allegations is entirely new to the pleading and, at whatever level of abstraction they are considered, each is a necessary step in the establishment of the new head of liability asserted, including the liability to pay further damages in respect of this further breach of duty.

A further suggestion was made by Counsel for the Plaintiff that the Chief Justice was in error in that he failed to take account of the other proposed amendments which he allowed to be made to the Statement of Claim when making his comparison with the pleading as sought to be further amended by the Rey amendments. It is true that this approach was approved as correct by the English Court of Appeal in Welsh Development Agency v Redpath Dorman Long Ltd. (1994) 1 WLR 1409 at p. 1416. It is not clear whether that particular passage was cited to Smellie C. J. upon the hearing of the application. But in any event, a careful examination of this pleading and the other amendments allowed to it do not lead to the conclusion that his ruling would have taken any different course had the approach commended in the Welsh Development Agency case been adopted. This point, therefore, falls away. In my judgement the Rey amendments were correctly found to constitute a new cause of action, which is out of time.

Having arrived at that conclusion, it is necessary further to consider whether the Rey amendments arise out of the same, or substantially the same, facts as were already pleaded in the Statement of Claim. The learned Chief Justice was in no doubt that they did not. To a certain degree no doubt the facts do coincide: the same audit of the same company's accounts for the same years is involved. But that is as far as it goes. Smellie C. J., was impressed by the extent of the further inquiries which would be necessary to establish the contention that Mr. Rey was a 'shadow director' or otherwise acted as an agent of the Plaintiff and the averment that the Rey transactions – more than 70 of them – were transacted in breach of fiduciary duty. He concluded that there was no sufficient overlap or similarity between the respective factual issues raised in the original pleading and the amendments respectively.

The concept of overlap is one which was first enunciated by Cross L. J. in Brickfield Properties v Newton (1971) 3 AER 328 at p. 342 where he stated, "it is enough if the overlap is so great that the new cause of action can fairly be said to arise out of substantially the same facts as the old cause of action''. In that case, an amendment which added a claim in respect of faulty design of a building by an architect to a claim already pleaded, alleging faulty superintendence of construction, was allowed. This concept has been followed and applied in a number of subsequent English cases, one of these being Hydrocarbons G.B. v Cammell Laird (1991) 58 BLR 127 which is referred to in the ruling of Smellie C. J. In that case an amendment to add a claim for a negligent misstatement in a Lloyds Certificate to an already pleaded claim for the negligent issuance of the same Certificate was rejected; there being insufficient overlap between the respective issues in the case.

As was pointed out by Glidewell J., in the Welsh Development case (p. 1418) the question whether in any given case the same or substantially the same facts are involved is "a matter of impression''.

Smellie C. J., referred to this passage in his ruling but said that, in the instant case, he regarded the differences as "stark and obvious". Lloyd L. J., in the Steamship Mutual case (p. 101) observed that in most cases it will be easy to say on which side of the line the case falls. He added – "but even if it fell in the grey area, where different views were possible, I would hesitate long before reaching a different conclusion from a judge of such wide experience".

Having reviewed the facts of the instant case and in particular the considerations already adverted to in this judgment I find myself so far from hesitating that I endorse the conclusion of the learned Chief Justice in its entirety. The differences here are too great to be overlooked; the case falls clearly on the wrong side of the line for the Rey amendments to be accepted as falling within the relevant provisions of G.C.R. Order 20, Rule 5. It follows that there is no jurisdiction to allow these amendments and that appeal of the Plaintiff must fail.

Before leaving that appeal and turning to the other matters for our consideration, I should perhaps add, if only by way of obiter dicta, that even if there had been jurisdiction to allow the Rey amendments, I should not have felt inclined in the exercise of the resulting discretion to have allowed them nevertheless. These amendments would have relied and relied heavily upon the allegation that Mr. Rey was a 'shadow director' of the Plaintiff. The concept of a 'shadow director' is a creature of United Kingdom statute which appears to have first seen the light of day in 1917. There has been no authority cited to us which so much as hints at its existence in the Common Law of England before that date. That same concept is conspicuously absent from the Cayman Islands statutes, and since English Common Law was received into these Islands, not later than 1865, there can be no room to discover its existence in Cayman Law at all. There is of course no Cayman Common Law as distinct from the

Common Law of England received into the dependency when these islands were deemed first settled. The suggestion to the contrary made in para 4.2 of the Plaintiff's skeleton argument is thus untenable.

The absence of such a concept in Cayman Law not only casts a long shadow over the legal basis of the Rey amendments; it also calls into serious question how the Defendant auditors could realistically be shown to have failed to appreciate that Mr. Rey in relation to the Plaintiff occupied such an insubstantial or non-existent niche. Without any sound legal basis for the allegation so made there is a danger that the entire pleaded edifice might collapse like a pack of cards. This by itself and quite apart from the other considerations advanced by Mr. Voss Q.C. in argument would have induced me to refuse in the exercise of discretion to have allowed the introduction of these amendments.

Attention must now pass to the cross-appeal of the 8th Defendant, the Swiss firm of auditors, against the decision of Smellie C. J., in his ruling upon the second part of the Plaintiff's same application to allow them to add a new para 17A to the Statement of Claim alleging that the 8th Defendant was, in the alternative, the contractual auditor of the Plaintiff for the relevant period and liable for breach of its contractual duties as such. The main ground in that cross-appeal is that in their Writ of Summons served in March, 1996 the Plaintiff had alleged breaches of duty both in contract and in tort against all the Defendants but, when the original Statement of Claim was delivered some 13 months later, the claim sounding in contract against the 8th Defendant had been omitted deliberately from the pleading. It is common ground that, in accordance with established pleadings rule and practice, the Plaintiff was thereby deemed to have abandoned the claim sounding in contract against that Defendant and to have elected to proceed against it for tortious breaches only. Furthermore, by the date of the application to amend, the claim in contract against it had been statute barred for over 3 years.

Since it was further common ground that the present cause of action against the 8th Defendant in contract arose out of the same facts as the claim against them in tort, it was, as we have seen, a matter for the discretion of the judge whether or not to allow that claim to be restored. The Defendants submit that it was nevertheless a wrong decision to permit that amendment to be made since the Court should lean heavily against permitting such an amendment to be made after a conscious decision earlier to abandon it.

In support of its cross appeal the 8th Defendant relied upon the English cases of Cargill v Bowen (1878) 10 Ch. 502., Lewis v Duckford (1907) TLR 64 and, most pertinently, Harries v Ashford (1950) 1 AER 427, a decision of the Court of Appeal. Following the latter decision, in Cellular Clothing Co. Ltd. v G. H. White & Co. Ltd. (1953) RPC9 Harman J. refused leave to amend and stated (at p. 12) –

> "it is very rare that one refuses leave to amend on terms but here, as Counsel very candidly said, he decided, when he issued his Statement of Claim to abandon infringement because he felt he had no case for it. Once abandoned the Claim remains abandoned and it does not lie in the mouth of the Plaintiff to say 'Now I should like to put it back again'. If it be as I think it probably is, a matter of discretion, I refuse leave because the Plaintiffs having deliberately taken the course they did … now seek to rely on other particulars altogether, which either were or ought to have been within their knowledge before they issued their writ".

In response, Counsel for the Defendants relies upon the more recent decision of the English Court of Appeal in Leicester Wholesale Fruit Market v Grundy (1990) 3 BLR 6 in which the earlier authorities were considered. This also was a case in which the abandoned claim was time-barred under the relevant Limitation Act. The Court, nevertheless, allowed the amendment to be made and expressly approved the dictum of the Judge at first instance when he said – "I think the true principle, whether a Plaintiff abandons or elects not to proceed with a claim made in the Statement of Claim, is that the Court has the discretion to allow the claim to be revived but will not exercise it in favour of the Plaintiff unless a good explanation is given for the dropping of the claim and the desire to revive it".

It is evident from the Ruling of Smellie C. J., that, having considered these authorities, he was content to adopt the more liberal attitude towards exercise of his discretion which is the ratio of the Leicester Fruit case to the strict test preferred by Harman, J., and with this approach I am in agreement. The movement of legal opinion in recent years has been to favour a more flexible rather than a more rigid approach to the technicalities of pleading. The learned Chief Justice went on to consider in great detail the factors leading up to the decision of the Plaintiff's advisors firstly to drop and secondly to seek to restore the claim in contract against the 8th Defendant. He came to the conclusion that the uncertainties surrounding the question whether the Swiss firm or the Cayman Islands firm were the primary contractual auditors of the Plaintiff were such as to excuse the Liquidators for the "professional misjudgement" which led them to decide that the contractual claim against that Defendant could not stand. Be that as it may, it remains a vexed question why the pleader did not, as he quite properly could have done, include an alternative claim sounding in contract in the original Statement of Claim against the possibility, however remote, that the evidence at trial might substantiate that claim at the end of the day.

Having closely examined the reasons given in the Chief Justice's ruling for his decision to allow the amendment, I cannot conceal my impression that, if the decision at first instance had rested with me, I should have been likely to decide the other way. I am, however, unable to say that the decision which he made was clearly wrong, based upon wrong legal principles, or made without scrupulous regard to the proper considerations and those only bearing upon the exercise of his discretion. In those circumstances, it would be wrong for an appellate court to interfere. At the end of the day after all, it will matter little whether or not the amendment is allowed to stand. The duties of an auditor in tort and in contract respectively are broadly similar and, if the 8th Defendant is held at trial to have acted negligently then the resulting consequences to the parties of such a finding will not be markedly different whether liability is found to exist in tort, in contract or in both. I would, therefore, dismiss this cross appeal also.

The third issue for consideration is raised by way of the Defendants' appeal by leave of Smellie, C. J., against that part of a separate judgment dismissing their application to strike out the Statement of Claim in toto, whereby he allowed (inter alia) paragraphs 66.3 and 66.4 thereof and Schedules 1 – 6 thereto to stand as part of the claim. The essence of these allegations, which concern loans, share transfers and capital injections made by the Plaintiff to or for the benefit of Mr. Rey or other entities controlled by him, is that they

> "would not have occurred if the Defendants had properly discharged their duties as auditors for the year ended 31.12.89 and if Mr. Schuab and Mr. Coleman [Directors of the Plaintiff] had set up and thereafter operated some or all of the appropriate internal controls set out in Schedule 7".

It should be noted at the outset that the transactions listed in Schedules 1 – 6 all took place in 1990 or 1991, that is to say after the period covered by the allegedly negligent audit investigations. The necessary causal link between the negligence alleged and the damage said to have been later suffered by the Plaintiff in consequence of these transactions taking place is postulated by a series of three basic hypotheses. The first is that if the Defendants had properly discharged their duties in respect of their audit investigations for 1989, they would have recommended certain steps to the Directors including the imposition of new internal controls. Secondly, the Directors, thus alerted would have promptly introduced and thereafter operated those controls – presumably for the purpose of preventing the kind of loss represented by the Harpener and receivables problems that the auditors would have reported upon. Thirdly, as a by-product of that exercise the controls if introduced would have operated also so as to prevent the transactions listed in the schedules from occurring in 1990 and 1991 and the consequent losses from being incurred by the Plaintiff.

It is the Defendants' ground of appeal that the causal connection so alleged is not sufficient in law to support liability to the Plaintiff for these particular losses upon the Defendants even if the negligent breaches of duty alleged in the Statement of Claim are proved at trial. In these circumstances they contend that the numerated paragraphs and schedules ought to have been struck out.

In support of their appeal counsel for the Defendants has relied heavily on the decision of the English Court of Appeal in Galoo v Bright Grahame Murray (1994) 1 WLR 1360, where the Common Law test of causation was considered in the context of an auditor's negligence claim. In that case the company concerned was in fact insolvent by reason of certain frauds which it was alleged the auditors should have

uncovered: the Plaintiffs pleaded that, if they had done so the company would have at once ceased to trade and that future trading losses would not have occurred. The Court of Appeal, nevertheless, struck out the Plaintiffs' claim to recover those losses as having been caused by the Defendant's negligence.

In his leading judgement Glidewell L. J. referred to two Australian decisions. The facts in Alexander v Cambridge Credit Corporation Ltd. (1987) 9 NSWLR 310 were broadly similar to those in Galoo. In his judgment Mahoney J. A., gave the example of a Plaintiff who is directed to the left road rather than the right road at a crossing by the Defendant, following which he is injured by slipping on the road, collapse on the road or collision upon it with a car. In these circumstances he said,

> "my loss is in a sense the result of the fact that I have been directed to the left road and not the right road. But in my opinion it is not everything which is a result in this broad sense which is accepted as a result for this purpose by the law".

He continued,

> "the fact that the breach has initiated one train of events rather than another is not, or at least may not, be sufficient in itself. It is necessary to determine whether there is a causal relationship to look more closely at the breach and to what (to use a neural term) flowed from it".

The New South Wales Court of Appeal went on to hold that the true causes of the company's losses were the transactions which it entered into while continuing to trade rather than the alleged breaches by the auditors and it allowed the Defendant's appeal against the finding at first instance of liability for these losses. Glidewell, L. J., commenting upon that case in Galoo, said that all of the judges there considered that the "but for" test of causation was not enough and went on to consider the subsequent High Court of Australia decision in March v E. & M. H. Straemere Pty. Ltd (1991) ITI CLR 506 which was to the same effect and in which the same distinction was drawn.

Summing up his conclusions in Galoo (at p. 1374) Glidewell L. J., then continued:-

> "the passages which I have noted from the speeches in Monarch Steamship Co. Ltd. v Karlshamns Olfefabriken A/B (1949) AC.196 make it clear that if a breach by a Defendant is to be held to entitle the Plaintiff to claim damages, it must first be held to have been an 'effective' or 'dominant' cause of his loss. The test in Quinn v Burch Bros. (Builders Ltd.). (1996) 2QB.370 that it is necessary to distinguish between a breach of contract which causes loss to the Plaintiff and one which merely gives the opportunity for him to sustain the loss, is helpful but still leaves the question to be answered 'How does the Court decide whether the breach of duty was the cause of the loss or merely the occasion for the loss? The answer in my judgement is supplied by the Australian decisions to which I have referred which I hold to represent the law of England as well as of Australia, in relation to a breach of a duty imposed on a Defendant

> whether by contract or in tort in a situation analogous to breach of contract. The answer in the end is 'by the application of the Court's common sense'".

Counsel for the Defendants here seek to apply this doctrine to the present Plaintiff's Statement of Claim and submits that as a matter of common sense the losses in question were directly and effectively caused by Mr. Rey's manipulation of the Plaintiff company's affairs and not by the pleaded breaches of duty on the part of the Defendant which, at highest, merely afforded an opportunity for him to manipulate its affairs in that fashion.

Mr. Hildyard in reply draws attention to the plain differences in the nature of the losses pleaded in this Statement of Claim to those relied upon by the respective Plaintiffs in Alexander and Galoo. This is not a case in which it is sought to fix the auditors with liability for the global future trading losses of an insolvent company but rather, he submits, to establish liability for particular losses which would in all probability have been avoided if the Defendants had properly reported to the directors and the directors so alerted in turn had fulfilled their fiduciary duties to the Plaintiff company. He relies upon the recent decision of Cresswell J., in the English High Court case of London United Investment v Mitchell and Others (not yet reported) in which the learned Judge declined to strike out claims for future defalcation losses which it was alleged the Defendant auditors had failed to prevent by failing to notice and report upon similar losses incurred during the relevant year of audit.

Cresswell, J., distinguished the decision in Galoo as being decided by reference to its particular facts which were different to those in London Investment and added:

> "the failure was an effective cause of the loss of further monies and inability to recover monies which would have been recovered if a timely warning had been given. To decide otherwise would render the long established duty of auditors to warn and guard against misappropriation and fraud wholly devoid of content".

Counsel for the Plaintiff submits that the facts underlying this decision are markedly similar to those alleged in the instant case and that the Galoo decision should accordingly be similarly distinguished by this Court.

Mr. Hildyard further submits that this Court should be slow on an application to strike out allegations the force of which can only become fully apparent once evidence has been put before the court of trial. He reminds us that such a summary procedure ought only to be invoked if the allegations advanced by a Plaintiff are shown to be "almost uncontestably bad"; also that each of these allegations in question must be assumed for the purposes of the application to be capable of being established by evidence as a fact. Furthermore, there are judicial dicta which discourage the use of strike out procedure in an area of the law which is in a state of change and development as is the notoriously difficult field of causation of damages for breach of contract which is the nub of the present issue.

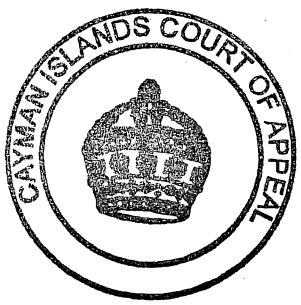
It is evident that the Plaintiff here will have to confront formidable hurdles at any trial of these allegations, even if it can establish negligent breach of duty on the part of these Defendants. Each of the three hypotheses to which I have referred will encounter difficulties of proof and it may be that in the end the putative actions or omissions of the Directors, even if properly warned by their auditors, may

wear the aspect of an intervening cause (novus actus interveniens) such as to prevent the alleged breaches by the latter from being regarded as a dominant or effective cause. Speculation in such matters is to be avoided at this stage of the action.

In the final analysis I am unable to say, as a matter of common sense or otherwise, that the allegations pleaded in the impugned paragraphs and Schedules of the Statement of Claim are so unarguable or bad in law that they ought not to be tested at trial, a trial which in any event will proceed upon the other issues raised. This Court has to weigh in the balance the prejudice which may result to the Defendants if plainly untenable allegations are allowed to be pursued to trial with consequent increases in costs and wasted effort against the prejudice which must result to the Plaintiff through being prevented from developing and persuading an arguable case for damages which it may eventually recover. In this instance I consider the danger of prejudice to the Plaintiff is the greater. I would accordingly dismiss this appeal of the Defendants also.

A further minor issue was argued before us by leave and extension of time granted at the hearing. It concerns new paragraphs 65.8, 65.7 and 66.5 of the Statement of Claim which Smellie C. J., allowed as amendments despite his refusal to allow the 'Rey amendments' to be added. The Defendants complain that he ought not in the circumstances to have done so since these three paragraphs are dependant upon them. Having considered each of them in context, I think that paragraph 65.8 should also have been refused because the reference therein to a breach of Cayman law is clearly dependant upon the similar allegations made in the 'Rey amendments' and nowhere else in the pleading. The latter two paragraphs however are capable of standing on their own and were properly allowed. Accordingly, I consider that the Chief Justice's Order should be varied by rejecting paragraph 65.8 only.

As to costs, each of the challenges to the Orders and Decisions of the Grand Court in these matters has effectively failed. In my view the proper Order is that the costs of the Plaintiff's appeal should be the Defendants and the costs of the Defendant's appeal and cross-appeal should be the Plaintiffs, to be taxed if not agreed and mutually set off against each other. The Orders for Costs of the Grand Court hearings should be affirmed.



Zacca, P.

I agree.

Georges, J.A.

I agree.