

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMERCIAL DIVISION

2020/COM/adm/00016

BETWEEN

MS AMLIN CORPORATE MEMBER LIMITED

(suing on behalf of itself and all other underwriters subscribing to policy of insurance No. B0621MMILYFY16CVA, including underwriters at Lloyds of London)

Claimant

AND

BUCKEYE BAHAMAS HUB LIMITED

Defendant

Before: Her Ladyship The Honourable Madam Senior Justice
Deborah Fraser

Appearances: Mr. Terry North and Mr. Richard Horton for the Claimant
Mr. Oscar Johnson Jr. K.C. and Mr. Keith Major Jr. for
the Defendant

Judgment Date: 04 December 2023

Application to Amend Statement of Case – Part 20 of the Supreme Court Civil Procedure Rules, 2022 – Promptness of Application – Prejudice to the Claimant – Prejudice to the Defendant – Limitation Period – Compensation through Costs - Administration of Justice

JUDGMENT

1. This is an application brought by the Claimant, MS Amlin Corporate Member Limited (“**Claimant**”), requesting leave to amend its Statement of Case.

Background

2. The Claimant is an insurance underwriter transacting business in the Lloyds of London Insurance Market with their principal place of business in London, England.
3. Buckeye Bahamas Hub Limited (“**Defendant**”) is a company organized and existing under the laws of the Commonwealth of The Bahamas, owning and operating an oil storage terminal located in Freeport, in the said Commonwealth.

4. The action arises from substantial damage to the M/Y “Dream”, a 2001 1987 Abeking and Rasmussen Motor Yacht (“**Dream**”) which, at all material times, was moored at Bradford Marine’s facility in Freeport, The Bahamas across a channel from the Defendant.
5. The damage claim was resolved by the Claimant with the owner of the Dream and the Claimant acquired all rights of subrogation resulting from the payment of the aforementioned claim/action.
6. The Dream is and was at all material times alleged to be insured by its owners with the Claimants for the sum of US\$46,225,400.00.
7. The substantial damage occurred during Hurricane Matthew in October 2016. On 03 October 2016, while securing alongside Dock 3 (Green Dock) at Bradford Marine, the fourteen member crew aboard the Dream began preparing the vessel for the possible impact of Hurricane Matthew.
8. The Dream was securely moored in accordance with its hurricane plan. Dream was moored directly across from the Defendant pending landfall of Hurricane Matthew.
9. The Dream’s crew noticed and determined that the vessel was covered in some kind of oil as the hurricane passed overhead.
10. The Claimant alleges that the pattern of the oil residue covering the majority of the exterior surfaces of the Dream indicated that it emanated from the crude oil storage facility (approximately ½ mile south of the vessel’s mooring position) at the Defendant.
11. The Claimant further alleges that several other vessels moored adjacent to the Dream were also covered in the same type of oil residue.
12. The Claimant also claims that the oil migrated onto the Dream as a direct and proximate result of the failure of a fuel tank dome at the Defendant.
13. The claim was reported to Ms. Karen Weiss (“**Ms. Weiss**”), the Manager for Insurance and Risk for the Defendant, who in turn allegedly admitted liability. Through correspondence sent by Ms. Weiss on 25 October 2016 to Mr. Stewart Hutcheson (the Claimant’s Surveyor) and Captain Gurmeet Ahluwalia (the Dream’s Manager) she stated:

“As you are aware, Buckeye Bahamas Hub (“BBH”) has offered at its expense to clean the oily substance from the hull of the M/V Dream. Additionally, we continue to offer to perform a detail of the hull only with the approved products, while the vessel is in The Bahamas located at Bradford Marine. This can be done quickly and cost efficiently by the contractors we have engaged to perform such cleaning services...BBH remains willing to pay the costs of cleaning

the hull of the M/V Dream in The Bahamas. However, BBH will not pay any additional amounts attributable to having that work performed in the United States and it will not be responsible for any delays or other consequences to the vessel resulting from your decision to proceed to the United States rather than have the cleaning performed in The Bahamas at the Bradford Marine facility.”

14. Despite the Defendant's offer, the Dream's crew attempted, at the paint manufacturer's recommendation, to clean the vessel using Joy and other mild cleaning agents but, were unsuccessful in removing the oil stains created by the alleged failure of the Defendant's fuel tank dome.
15. The Defendant was advised that the Dream would likely need to be repainted and that its teak deck surfaces would need to be replaced. Thereafter, multiple demands were made for disclosure of liability insurance information at which point the Defendant and/or its parent, Buckeye Partners, L.P. and/or its insurers purportedly refused to respond to demands for assistance and restoration of the Dream.
16. It was subsequently determined by the Claimant's surveyor, in conjunction with a joint survey which took place at the Defendant, that the dome in issue failed during Hurricane Matthew, that the dome had not been properly maintained and was not fit for its intended purpose, specifically to prevent fuel oil stored therein during a storm.
17. It was also determined in the joint inspection between the Defendant's foreman and Neil Maclaren, another surveyor retained by the Claimant, that the cause of the leakage of tank #0815 was two-fold: (a) a skylight/geodesic dome over the tank failed during Hurricane Matthew; and (b) the flashing between the tank walls and the geodesic dome peeled off.
18. The Claimant alleges that the Defendant had a non-delegable duty of care to ensure that its fuel tanks were fit for their intended purpose and properly maintained.
19. The Claimant further alleges that the Defendant breached its duty of care by failing to properly maintain the dome on tank #0815 in good order and condition or in compliance with all local building codes then in place, thus rendering tank #0815 unfit for its intended purpose. The Claimant also alleges negligence and claims that it has suffered loss and damage.
20. On 06 March 2020, the Claimant filed a Writ of Summons and a Statement of Claim on 21 September 2020 against the Defendant alleging negligence based on the above. They claim reliefs in the form of damages, interest and costs.
21. On 19 October 2020, the Defendant filed its Defence denying the allegations made in the Statement of Claim and putting the Claimant to strict proof thereof. It

avers that the Claimants' failure to accept the Defendant's reasonable non-admission of liability offer, was a failure on the Claimant's part to observe its own duty to mitigate.

22. The Defendant further avers that it placed the Claimant on notice that the Defendant would not be responsible for any delays or other consequences to the vessel resulting from the Claimant's insured choosing not to accept the Defendant's early and reasonable offer of assistance.
23. It also avers that its tanks were fit for their intended purpose and properly and adequately maintained at all material times; additionally the extent and type of damage sustained to such tanks by the natural causes during the passing of Hurricane Matthew were not reasonably foreseeable.
24. After discovery, on 17 July 2023, the Claimant brought an application for leave to amend its Statement of Case (as the action and this application are now governed by the Supreme Court Civil Procedure Rules, 2022 – "CPR") based on certain information disclosed by the Defendant during discovery. It attached a draft Statement of Case to the application outlining the amendments it wishes to make.
25. The Defendant objects to such amendments on the basis that the relevant limitation period (in relation to the purported changes) has expired and that the suggested amendments are not in compliance with part 20.1 of the CPR.

ISSUE

26. The issue that this Court must decide is whether the Court ought to grant leave to the Claimant to amend its Statement of Case in the manner set out in the draft Statement of Case?

EVIDENCE

Claimant's Evidence

27. On 17 July 2023, the Claimant filed the First Affidavit of Shenique R. Hanna ("**SH Affidavit**"). It provides that: (i) the initial pleadings focused on the escape of fuel oil from fuel tank #8015, with the cause being a result of insufficient maintenance; (ii) as part of the discovery process the Defendant voluntarily disclosed documents to the Claimant on or about 22 October 2021 concerning fuel tanks #8013 and #8014 in addition to fuel tank #8015 ("**Discovery**"); and (iii) both parties engaged in an extended process of obtaining further and better particulars from each other which process was to conclude by virtue of this Honourable Court's Further Case Management Order made 20 March 2023, on 14 April 2023 with the exchange of further Supplemental Lists.
28. The SH Affidavit further states that: (i) After Discovery and upon the Claimant instructing its fuel tank expert, the Claimant has been advised that it is necessary

to widen the scope of its pleadings based on the documents available and their contents so that the claim is not confined only to tank #8015, and so that other possible causes of the fuel oil leak are encompassed; (ii) the application for leave to amend was made promptly upon receiving the expert's advice; (iii) it is unlikely that the Defendant would suffer any prejudice that could not be remedied by costs. The amendments only concerns documentary evidence that has already been produced by the Defendant, and the Defendant has ample opportunity to amend and take further instructions if required; and (iv) on the other hand, if the Claimant was denied the opportunity to amend then it may be argued that its pleadings are insufficient to support the evidence, and its claim may fail.

29. On 24 August 2023, the Claimant also filed the Second Affidavit of Shenique R. Hanna ("**Second SH Affidavit**"). It states that: (i) the affidavit is in response to the Affidavit in Opposition to the Claimant's Amendment Application; (ii) the issues for the court to consider on this application are set out in Part 20.1 of the CPR, the first of which is how promptly the application to amend has been made after the Claimant became aware that the change was one it wished to make; and (ii) in the SH Affidavit, it was stated that the amendment could not have been contemplated until discovery was complete and the documents were provided to the experts for their review and report; the Defendant's letter of 24 October 2022 shows that there were numerous relevant documents specifically requested by the Claimant which the Defendant alleged not to have in its possession. The Defendant indicated that it would file a verifying affidavit and when it had not been provided by March 2023, the Claimant sought and the Court ordered that both parties had until 14 April 2023 to file any supplemental list of documents and give inspection with verifying affidavits due on or before 17 May 2023.
30. The Second SH Affidavit also provides that: (i) Subsequent to 14 April 2023, the Claimant provided the relevant documents to its engineering and weather experts with instructions to provide their report; (ii) Upon review of the draft reports, it became apparent that the source of the leak which caused damage to the Dream may have been not only the Defendant's tank #8015 but also tanks #8013 and #8014; (iii) it also became apparent that the leak may also have been a result of the Defendant's failure to properly design and/or construct and/or operate the tanks; (iii) the Claimant did not wish to amend until after it received its experts' draft reports since these matters are in the purview of subject-matter experts; (iv) the Defendant provided disclosure (prior to the limitation period) as though the Claimant originally pleaded that the leak was other than a mere failure to maintain the tanks; and (v) it is unclear what prejudice the Defendant would suffer;

Defendant's Evidence

31. On 31 July 2023, the Defendant filed an Affidavit in Opposition to Claimant's Amendment Application ("**Opposing Affidavit**"). It provides that: (i) the instant action arose out of an event which allegedly occurred on or about 06 October 2016. It is important to note that due to the lack of any specific reference thereto, it is not clear what if any regard has been had by the Claimant to the fact that the relevant period of limitation, being six (6) years in relation to claims arising from the alleged tort prescribed under the Limitation Act, Chapter 83 of the Statute Laws of the Bahamas, has expired for more than a year now; (ii) by letter dated 01 December 2021, the Claimant requested specific discovery of noted documents. The Defendant responded to all requests made by the Claimant to date; and (iii) by letter dated 03 December 2021, the Defendant in turn requested specific discovery of noted documents. For more than a year, the Claimant failed to respond to the discovery requests made by the Defendant.

SUBMISSIONS

Claimant's Submissions

32. The Claimant's Counsel submits that the amendments being sought are of a technical nature as to which of the Defendant's tanks the oil leaked from and what failings on the Defendant's part led to the leak. He contends that such amendments are therefore adjustments to an existing claim, not the addition of new claims or parties.
33. He relies on **Part 20 of the CPR** regarding amendment (which I will go into further in my judgment). Counsel asserts that the Claimant only became aware of the need to make the amendments upon receiving input from its experts – such expert reports not being received until the week of 07 July 2023 (being the date on which expert reports and other witness statements were due).
34. Counsel further submits that, the expert could not be properly instructed until at least 14 April 2023 (the date on which both sides were ordered to file and serve any supplemental lists of documents, and to give inspection) or perhaps 17 May 2023 because the experts needed to be provided with as full and complete a set of documents as possible in order to form a proper view of the matter.
35. The Claimant's Counsel also contends that, although the application is late in terms of the date when proceedings were commenced and in terms of when the cause of action arose, the CPR provides that the question is when the Claimant should have been aware of the need to amend, which for the reasons stated was not until about the 03 July 2023, fourteen (14) days before the application was filed, and only one day before the Defendant was given notice to the intended application.

36. Counsel further submits that the experts advised that the cause of the oil leak may not only be a failure on the Defendant's part to maintain its tanks, but (either in addition to or in the alternative) a failure to design and/or construct and/or operate the tanks properly. The experts also advised that the oil leak could have come from one or more other tanks belonging to the Defendant, either in addition to or instead of the tank initially pleaded.
37. Counsel asserts that, if amendment is not allowed and the Court finds that the leak originated from another tank or tanks belonging to the Defendant and/or the failure of the tank in question was due to some other issue other than maintenance, its claim may fail.
38. He submits that the Defendant complains of prejudice due to the lateness of the application, but has not provided any evidence as to any prejudice. He asserts that the Defendant's List of Documents filed 22 October 2021 shows that the Defendant voluntarily began disclosing documents related to tanks other than #8015 from the very start along with correspondence relating to other potential causes of the leak beyond mere lack of maintenance without objection.
39. In relation to the fact that the amendments are sought to be made after the expiration of the limitation period, Counsel contends that **Rule 20.2 of the CPR** only provides for this to be a potential obstacle where the amendment consists of the addition or substitution of a new claim and only where such new claim does not arise out of the same or substantially the same facts.
40. The Claimant's Counsel further contends that, though the Defendant has failed to show any prejudice, should the Defendant need to amend its Defence in response to any amendments, this can be compensated in costs.
41. Counsel also asserts that the trial date is still achievable even if the Claimant's application is granted.
42. The Claimant's Counsel further submits that the balance of the factions mentioned in Rule 20.1(3) of the CPR clearly weigh in its favor. He then draws the Court's attention to the Eastern Caribbean Supreme Court decision of **Mark Brantley v Dwight C. Crozier [2015] ECSC J0827 – 1 ("Brantley")** where the Court stated:

"In exercising its discretion with regard to the appellant's application to amend his defence, the Court should be guided by the general principle that amendments should be made where they are necessary to ensure that the real question in controversy between the parties is determined, provided that such amendments can be made without causing injustice to the other party and can be compensated in costs."

43. Counsel concludes by submitting that: (i) the proposed amendments are necessary in the order to ensure that the real questions between the parties are determined; (ii) can be made without causing injustice to the Defendant; and (iii) the Defendant can be compensated in costs.

Defendant's Submissions

44. The Defendant's Counsel submits that the proposed amendments should not be allowed. He also relies on **Part 20 of the CPR** and highlights that it is incumbent upon the Claimant to bring such an application promptly after becoming aware that the change was one which it wished to make.

45. Counsel then cites **Belgravia International Bank & Trust Company Limited et al v CIBC Trust Company (Bahamas) Limited [2014] 1 BHS J. No. 58** where Conteh JA made the following pronouncements at paragraph 145:

"145 The discretion granted to the Court in relation to amendments is one, like all judicial discretion, that must be exercised judicially."

46. Counsel asserts that, having regard to the principle of "relating back" it is to be noted that should the Court permit such amendments without regard as to whether it relates to claims which are now statute barred, the amendments would from the date of any grant, relate back to the original filing date of the Writ.

47. Counsel submits that, pursuant to section 5(1)(a) of the Limitation Act, the limitation period for bringing an action in tort is six years from the date on which the cause of action accrued.

48. Counsel asserts that, as the limitation period has lapsed, any amendment would prevent any benefit under the Limitation Act. He relies on the case of **Davies v Elsby Brothers Ltd [1961] 1 WLR 170** for the following pronouncements:

"...but a different point of view emerged in Challinor v. Roder which caused Denman J. and Grove J. to differ. Grove J held that it was wrong to allow the plaintiff to amend ex post facto if that would deprive the defendant of the benefit to which he had become entitled as of right under the Statute of Limitations. That latter view prevailed in the later cases, and has been clearly laid down in this court, so far as the addition of a plaintiff is concerned, in Mabro v. Eagle, Star & British Dominions Insurance Co. Ltd."

49. The Defendant's Counsel also cites **Paragon Finance Plc and another v VDB Thakerar & Co (a firm) and another – 1 ITELR 735 ("Paragon")**, a case where the English Court of Appeal denied an amendment applications on the basis of statute of limitations concerned. There, Millet LJ found:

"For the purposes of the Limitation Act 1980 (the 1980 Act) any new claim made in the course of existing proceedings which involves the addition or substitution of a new cause of action is treated as a

separate action commenced on the same date as the original proceedings: Section 35(1) and (2) of the 1980 Act. Where the pleadings are amended to add such a claim after an applicable limitation period are expired, the effect is to deprive the defendant of an accrued limitation defence. By the combined effect of Section 35(3) – (5) of the 1980 Act and RSC Order 20 Rule 5(2) and (5), however, the Court may not allow such an amendment after the expiration of any relevant limitation period unless the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action...

The proper approach to an application for leave to amend in such circumstances was considered by this Court in *Welsh Development Agency v Regpath Dorman Long Ltd* [1994] 1 WLR 1409. The Court observed that a new claim is not made by amendment until the pleading is amended. It follows that the relevant date for the purpose of calculating the limitation period is the date at which the amendment is actually made, which by definition must be no earlier than the date at which leave to make the amendment is granted..."

50. Counsel also draws the Court's attention to the case of **Jalla and another (Appellants) v Shell International Trading and Shipping Co Ltd and another (Respondent) – [2023] UKSC 16**. There, the appeal concerned the tort of private nuisance due to an oil spill. It resulted from a rupture in equipment carrying the oil which was extracted from the seabed 120km from Nigerian coast. The appellants issued the claim form in 2017 which was under six years after the spill. In 2018, the Appellants amended the claim and changed one of the parties to the First Respondent. In 2019, various applications to amend their claim form and particulars of claim. The Respondents argued that such amendments were being sought after the expiration period. The appellants argued that there was a continuing nuisance, as such their application to amend was within the limitation period. The Court had to determine whether there was a continuing private nuisance and a continuing cause of action so that the limitation period runs afresh daily. The Court opined:

"39 To accept Mr. Seitler's submission would be to undermine the law on limitation of actions – which is based on a number of important policies principally to protect defendants but also in the interests of the state and claimants...because it would mean that there would be a continual re-starting of the limitation period until the oil was removed or cleaned up.

40 It is not surprising that Mr. Seitler could cite no case directly supporting the position he was advocating. And while there may be no authority that directly contradicts his central submission, that submission is contrary to principle and would have the unfortunate policy consequence of undermining the law of limitation."

51. Counsel submits that judges of appellate jurisdiction expressed great hesitancy to undermine the law of limitation.

52. With respect to costs, Counsel cites **Crystal Decisions (UK) Limited v Vedatech Corporation [2008] EWCA Civ 848**, where the Court held that where there is no effective means of ensuring payment is made, then unless there is some overwhelming consideration that would cause the court to take a different view, the court should seek to ensure compliance and may make it a condition of the paying party to be able to continue the litigation.

53. The Defendant's Counsel asserts that the application should not be allowed due to the following reasons:

- The purported amendments contain no reasonable cause of action against the Defendant and would therefore be useless, but most importantly the relevant period of limitation has expired.
- Opposing the Claimant's application does not prejudice the Claimant or leave the Claimant without avenues to pursue recourse in the action as currently pleaded.
- The Claimant admits that it was put on notice as early as 22 October 2021 through the Defendant's discovery that more than one (1) tank was damaged (by reason to be determined in the substantive trial).
- To accede to the application would undoubtedly imperil the current trial date.
- To allow the amendments would mean that the Defendants are not only allegedly negligent in the maintenance of the domes, but also that the Defendant negligently designed and/or constructed and/or operated the dome(s) in question. This, Counsel submits, widens the claim's scope in a manner the Defendant did not anticipate having to defend.
- The application was not made promptly.
- The Defendant is prejudiced by the manner in which the Claimant has prosecuted the claim.
- To accede to the application would not accord with the administration of justice as it would deprive the Defendant of its rights afforded to it by the Limitation Act.

54. Counsel concludes by submitting that justice lays in its favor and that the Claimants have not satisfied the tests required in an amendment application.

DISCUSSION AND ANALYSIS

Whether the Court ought to grant leave for the Claimant to amend its Statement of Case in the manner set out in the draft Statement of Case

55. The Claimant's Counsel submits that the amendments ought to be allowed, *inter alia*, as it will assist the Court in determining the true questions in controversy as between the parties, there is no new cause of action arising and any matters/prejudice which the Defendant would wish to address or may suffer can be remedied by way of compensation through costs. The Defendant's Counsel opposes the application, *inter alia*, on the basis of the prejudice that it would suffer by not being allowed to rely on the limitation defence. Also, the Defendant's Counsel submits that the Claimants could have made this application long ago, there is no reasonable cause of action emanating from the purported changes and to allow the amendment would widen the scope of the claim in a manner not anticipated by the Defendant.

56. The starting point in an amendment application is **Rule 20.1 of the CPR. Rule 20.1(1) to (5) of the CPR** states:

“20.1 Changes to statement of case.

(1) A statement of case may be amended once, without the Court's permission, at any time prior to the date fixed by the Court for the first case management conference.

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

(3) When considering an application to amend a statement of case pursuant to paragraph (2), the factors to which the Court must have regard are —

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

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

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

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

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

(f) the administration of justice.

(4) 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) rule 19.4; or

(b) rule 20.2.

(5) An amended statement of case must include a certificate of truth under rule 3.8 (emphasis added)."

57. **Rule 19.4 of the CPR** addresses adding or substituting parties in an action after the relevant limitation period has expired. Accordingly, it is not relevant for the purposes of this ruling. **Rule 20.2(1) and (2) of the CPR**, however, provides:

"20.2 Changes to statements of case after end of relevant limitation period.

(1) This rule applies to a change in a statement of case after the end of a relevant limitation period.

(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 (emphasis added)."

58. Accordingly, in an amendment of statement of case application, the Court must bear in mind the following factors: (a) how promptly the applicant has applied to the Court after becoming aware that the change was one which he wished to make; (b) the prejudice to the applicant if the application was refused; (c) the prejudice to the other parties if the change were permitted; (d) whether any prejudice to any other party can be compensated by the payment of costs and or interest; (e) whether the trial date or any likely trial date can still be met if the application is granted; and (f) the administration of justice.

59. Furthermore, I must consider the impact of the limitation period expiring. I shall address each factor in turn.

(A) Promptness the applicant has applied to the Court after becoming aware that the change was one which he wished to make

60. By its own admission in the SH Affidavit, the Claimant has had knowledge of the possibility that tanks other than #8015 could have leaked and caused the oil damage to the Dream since 22 October 2021. This application was filed on 17 July 2023.

61. I acknowledge the Claimant's Counsel's submissions that the Claimants needed experts' opinion on certain aspects of the case (which they could not render until further information was provided to them during discovery) and that the discovery

process was lengthy. However, these documents mentioning the existence of other tanks were amongst the first documents the Claimant had sight of. It was given at the genesis of the discovery stage of this action. It is curious why the Claimant did not bring this application sooner in that regard.

62. In relation to the purported amendment regarding alleged negligence not only due to the Defendant's purported failure to maintain tank #8015, but also due to the design, construction and/or operation of the tank, the Court agrees, that this information may not have come to the knowledge of the Claimant's experts until further discovery occurred. This further discovery, according to the SH Affidavit, did not occur until around 14 April 2023. The Claimant's experts would have needed time to review and consider the information received, then provide an expert report. This aspect of the desired amendment may genuinely have only come to the Claimant's attention only after the extended discovery phase of these proceedings.

63. Though the Defendant's Counsel strenuously argued that certain aspects of the claim were in the Claimant's knowledge, there were others that did not come to its knowledge until very late – through no fault of either party.

64. I, however, am bound by the very serious restriction regarding the limitation point – which has great merit. I cannot allow such amendment because, as the Defendant highlights, it would deprive it of a limitation defence. The amendments regarding the design, construction and/or operation of the tank would be a novel pleading. I do not see this as related to the initial facts. Accordingly, I am not prepared to allow this amendment.

(B) The prejudice to the applicant if the application was refused; (C) The prejudice to the other parties if the change were permitted; and (D) Whether any prejudice to any other party can be compensated by the payment of costs and or interest;

65. I will address these factors together as they are similar. In relation to the prejudice that the applicant would suffer if the application was refused, the Claimant submitted that it may not be able to properly argue the full claim if all the matters relevant to the issues in controversy between the parties were not before the Court. In that vein, Counsel refers to the possibility that it may not only be tank #8015 that caused oil damage, but may also be tanks #8013 and/or #8014.

66. The Claimant's case may very well fail if the only tank being investigated was #8015 as opposed to #8013 and/or #8014. This action clearly involves highly technical matters which require thorough investigation by the Court. I do not wish to deprive any litigants of any potentially meritorious claims due to lengthy discovery. It appears that there may be prejudice suffered by the Claimant if the amendments were not allowed.

67. With regard to any potential prejudice that the Defendant may suffer, I acknowledge the potential deprivation of the limitation defence should I accede to the Claimant's application. A number of authorities were relied upon by the Defendant's Counsel (as mentioned earlier in my ruling). In principle, I agree that limitation periods should be adhered to and only controverted where justice demands it.
68. Bearing in mind the pronouncements in *Paragon*, such changes (in relation to the oil tanks) do not create any new claim. Whereas the mention of only one tank as opposed to other tanks was an oversight on the Claimant's part, I do not see why compensation through costs cannot remedy this issue. Particularly because no witness statements or expert reports have yet been filed in this matter – despite a case management order being presently in effect.
69. In essence the purported amendments do appear to be substantially based on the same facts. It is unclear why the Defendant could not foresee an amendment application forthcoming once further discovery occurred – especially because this matter is highly technical and will require expert testimony to address the issues.
70. With respect to the amendment in relation to the design, construction and/or operation of the tanks. My position remains unchanged. This is novel. I cannot allow this.
71. On that basis, I am minded to grant the amendments and ensure that the Defendants are not unduly burdened by making an order as to costs in its favor.

(E) Whether the trial date or any likely trial date can still be met if the application is granted

72. It is unlikely that the present trial date can be preserved as no party has filed any witness statements in this matter – particularly, no expert witness statements have been filed as yet. To my mind, granting leave to amend is inconsequential (in relation to the trial date) since neither party appears to be ready for trial.

(F) The administration of justice

73. The administration of justice requires that fairness to all parties be done. I remind myself of the overriding objective as provided under **Rule 1.1 of the CPR**. That rule reads as follows:

“1.1 The Overriding Objective.

(1) The overriding objective of these Rules is to enable the Court to deal with cases justly and at proportionate cost.

(2) Dealing justly with a case includes, so far as is practicable:

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate to —

(i) the amount of money involved;

(ii) the importance of the case;

(iii) the complexity of the issues; and

(iv) the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice directions and orders (emphasis added)."

74. The substantive claim concerns an asset allegedly insured at US\$46,225,400.00. This is a very substantial claim which ought to be ventilated as comprehensively as possible to ensure my determination on the issues is sound and just. I must ensure justice is done. As it relates to the Claimant, it should be permitted to bring its claim as fully as possible. In relation to the Defendant, it should not be placed in a lesser position either. It too shall be afforded an opportunity to bring as full a defence as possible.

75. On that basis, I am of the view that amendment, with respect to the inclusion of the additional oil tanks, is appropriate in these circumstances. I am, however, not prepared to allow the amendment regarding design, construction and/or operation of the tanks. The law expressly forbids this on the basis that this is a brand new claim and would disregard the limitation defence.

76. As the Claimant is not without blame, I shall make an appropriate order as to costs for the Defendant to properly defend the claim and to ensure all parties are on equal footing. This is also consistent with the principles emanating from *Brantley*.

77. I also note that **Rule 72.26(3)(a) the Supreme Court Civil Procedure (Amendment) (No. 2) Rules, 2023** obliges the Claimant to pay the costs for this application. I shall, accordingly, make the appropriate order as to costs.

CONCLUSION

78. In the premises, I exercise my powers pursuant to **Rules 20.1(2) and 20.2(2) of the CPR** and grant the Claimant leave to amend its Statement of Case as outlined in its draft amended Statement of Case.

79. My Order shall read as follows:

- (a) The Claimant is granted leave to amend its Statement of Case as outlined in its draft Statement of Case attached to the Notice of Application filed 17 July 2023 – save and except, any amendments relating to the design, construction and/or operation of the oil tankers – such amendments are disallowed. The Claimant shall file and serve its amended Statement of Case within twenty-one (21) days from the date of this judgment.
- (b) The Defendant is granted leave to file and serve any amended Defence within twenty-eight (28) days from the full 21 days from the date of this judgment.
- (c) The Claimant is granted leave to file and serve a Reply to the amended Defence within fourteen (14) days from the date of service of the Defendant's amended Defence.
- (d) The Claimant shall pay the Defendant's costs for any amendments to its Defence, to be assessed by the Registrar if not agreed.
- (e) The Claimant shall pay the Defendant's costs for this application, to be assessed by the Registrar if not agreed.

80. I shall set a new date for case management for this matter.

Senior Justice Deborah Fraser

Dated this 04 day of December 2023