The Republic of Trinidad and Tobago

IN THE COURT OF APPEAL

Civil Appeal No. S353 of 2016
Claim No. CV2014-00690

Between

PEGGY-ANN RILEY-GILL
[Administratrix of the estate of Kafiya Joy Gill, deceased]

DESIREE WADDLE
[Administratrix of the estates of Khertima Emlee Taylor, deceased, and Khadija Evana Sasha Taylor, deceased]

Appellants/Co-Defendants

And

MARITIME GENERAL INSURANCE COMPANY LIMITED

Respondent/Claimant

EDWARD MARK LEE WEN

Respondent/Defendant

_____

Claim No. CV2014-00496:

Between

PEGGY-ANN RILEY-GILL
[Administratrix of the estate of Kafiya Joy Gill, deceased]

Appellant/Claimant

And

EDWARD MARK LEE WEN

First Respondent/First Defendant

DAVID BALKISSOON

Second Respondent/Second Defendant

MARITIME GENERAL INSURANCE COMPANY LIMITED

Respondent/Co-Defendant

_____

Claim No. CV2014-00497

Between

DESIREE WADDLE
[Administratrix of the estates of Khertima Emlee Taylor, deceased, and Khadija Evana Sasha Taylor, deceased]

Claimant/Respondent

And

EDWARD MARK LEE WEN

First Defendant/Respondent

DAVID BALKISSOON

Second Defendant/Respondent

MARITIME GENERAL INSURANCE COMPANY LIMITED

Co-Defendant/Applicant

PANEL:

N. BEREAUX J.A.
C. PEMBERTON J.A.
M. HOLDIP J.A.

Date of delivery: December 17, 2021

APPEARANCES:
Mr. R. Persad and Mr. R. Paul instructed by Mr. J. Mohammed attorneys-at-law for the applicant
Mr. C. Persadsingh instructed by Mr. V. Bridgemohan attorneys-at-law for the respondents

JUDGMENT

Delivered by Bereaux J.A.

Introduction

(1) The applicant, Maritime General Insurance Company Limited (Maritime) has sought, by motion of 18th August 2020, to vary the decision, made in Chambers by Moosai JA, to grant leave to the respondents to amend their notice of appeal.

(2) The order of Moosai JA was made on 10th February 2020 but due to Covid-19 restrictions, the applicant could not file its motion to the full court until 18th August 2020 and for the same reason the motion was not heard until 17th September 2021.

(3) Moosai JA had granted permission to the respondents to amend their notice of appeal which was filed on 22nd November 2016. The application to amend was filed some three and half years after the filing of the notice of appeal, the order of Moosai JA consistent with the grounds of the application to amend was that *"leave be granted to the Appellants to amend their Notice of Appeal filed on 22nd November, 2016 to augment ground 3(c) as per the draft Amended Notice of Appeal…"*

The history

(4) The respondents to this application are Desiree Waddle and Peggy-Ann Riley-Gill. Both have brought Claim Nos. 2014-00497 and 2014-00496 in respect of the deaths of their daughters Kafiya Gill and twin sisters Khertima and Khadija Taylor, in a motor vehicular accident in the early hours of the 9th June 2013. The girls died in a car negligently driven by David Balkissoon. The car was owned by Balkissoon's uncle Edward Mark Lee Wen.

(5) They were met with an action by Maritime, against Lee Wen to avoid the policy of insurance

issued in respect of the car, because Lee Wen had failed to disclose on the insurance proposal form that Balkissoon, as a named or specific driver, was involved in three accidents between 2012 to 2013. Both mothers are joined as co-defendants. The three actions were heard together by the trial judge who upheld Maritime's avoidance application, while holding Balkissoon to have been negligent in driving the vehicle. He also held that Balkissoon was not the servant/agent of Lee Wen. He then awarded damages in favour of the respondents against Balkissoon. The consequence of these findings in favour of Maritime and Lee Wen, is that Balkissoon is solely liable to pay the damages awarded. It is also a consequence that neither mother is likely to recover damages because Balkissoon is, more than likely, a man of straw.

(6) On 11th May 2016 during the course of the hearing, the judge upheld an objection by Mr. Persad to the cross-examination of Maritime's witnesses, Mr. Baliram Sawh and Mr. David Lee-A-Ping, by the respondents' counsel, on the ground that the respondents had filed a bare defence and no witness statements and that the issue was thus one of pure law. Mr. Sawh's evidence was that the non-disclosure was material to Maritime's decision to accept the risk, that coverage was granted based on information provided on the proposal form and was issued based on a premium calculated as commensurate with the risk as assessed by the information provided. He also upheld Sawh's evidence that Maritime had been induced, by the *"representation on the proposal form that Balkissoon had had no prior accident, to accept the further risk, upon the payment of an additional premium but which did not take account of any prior accidents"*. He also accepted Mr. Lee-A-Ping's evidence.

(7) Mr. Sawh's and Mr. Lee-A-Ping's evidence was thus critical to the judge's decision and to Maritime's case. The decision to disallow cross-examination was also a critical one for the respondents because it curtailed any attempts at discrediting Mr. Sawh's and Mr. Lee-A-Ping's evidence. The trial judge's order as to non-cross examination extended to all of Maritime's witnesses.

(8) The respondents did not appeal the decision to disallow cross-examination either during the trial or in their notice of appeal against the substantive decision to grant Maritime the avoidance order sought. They sought to correct that omission by their application to amend. The relevant parts of the amended notice of appeal reads as follows:

> ***"3(a) That the Learned Judge erred in law in ruling that the fact that a potential insured was involved in three (3) previous accidents was so obviously material that Maritime need not have provided evidence of materiality in all the circumstances of the case.***
>
> ***(b) That the order dated the 14th October, 2016 of the Learned Judge granting judgment against the Appellants is wrong in law insofar as–***
> ***(i) The learned trial judge failed to apply the proper test as laid down in Pan Atlantic Insurance Co. Ltd and Another v. Pine Top Insurance Co. Ltd.: HL 27 Jul 1994 in which the insurer's evidence is to prove self inducement and the expert evidence as the objective test for a prudent insurer; and***
> ***ii. The learned trial judge was plainly wrong in disallowing the Appellants/Co-Defendants to cross examine both the Third Defendants witnesses, that is, David Lee-A-Ping and Balitam Sawh (sic), despite being given leave to be joined as Co-Defendants pursuant to the Motor Vehicles Insurance (Third Party Risks) Act, and that had he allowed the cross examination, ought to have found that the three accidents were not material and/or obviously material."***

(9) Maritime has now sought by their notice of motion to have ground 3(b)(ii) struck out; that is to say, to have any appeal against the no-cross-examination order pre-empted. In summary the grounds of the objection are:

(i) The application to amend was in breach of Part 64.4(7) of the Civil Proceedings Rules (1998)(as amended)("CPR") and there has been no proper explanation for the delay

of three and a half years in making the application to amend. Contrary to the impression given by Mr. Nancoo in his affidavit in support of the application to amend, Mr. Sanguinette was not retained solely for the appeal. He had been counsel in the trial and had settled the notice of appeal. The trial judge's judgment was available immediately upon its delivery on 14th October 2016. In effect, the applicant contends that there was sufficient time to prepare the notice of appeal in terms of what it has now been amended to include.

(ii) Any prejudice which accrues to the respondents by a refusal of the amendment is offset by the remedy which they have against their attorneys for failing to have properly appealed the no-cross-examination order within the appropriate time. On the other hand there is great prejudice to applicant if ground 3(b)(ii) is not struck out because Baliram Sawh is no longer prepared to give evidence again.

(iii) The overriding objective is not promoted because the amendment undermines the timelines prescribed by Parts 64.1(2)(a) and 64.5(b) of the CPR and increases the resources to be expended by the parties and the court in the disposition of this appeal. Further, a new trial will have to be ordered because the judge is now ensconced in the Court of Appeal.

(iv) The respondents should have appealed the no-cross-examination order. They had 42 days from 11th May, 2016 to do so. That order did not form part of the judgment order because it was a separate order made earlier in the trial. The ground of appeal at 3(b)(ii) was not an augmentation of the existing grounds of appeal, as now alleged but was instead a new ground of appeal.

Issues

(10) The issue is whether Moosai JA was plainly wrong in his decision to grant the amendment.

That turns on the question of how the court exercises it discretion to grant permission to amend pursuant to Part 64.4(7) of CPR.

Summary of decision

(11) The application must be dismissed. Moosai JA was right to grant the amendment. While it is true that there was delay in applying to amend the notice of appeal, for which no proper explanation was provided, the delay was not undue because no trial date was fixed. Further, on a proper application of the Part 26.7 factors (without the threshold) it was the interests of the administration of justice and in the furtherance of the overriding objective in dealing justly with cases, that the amendment should be granted.

Analysis and conclusions

(12) Moosai JA sitting as a single judge in chambers exercised his discretion to grant the amendment under Part 64.4(7). His decision is not to be lightly disturbed unless it can be shown that he was plainly wrong. See **Attorney General of Trinidad and Tobago v. Miguel Regis, Civil Appeal No. 79 of 2011** paragraphs 10 and 11. We have no written judgment from Moosai JA and while that allows the full Court of Appeal greater leverage in reversing his decision, the Court must still pay due deference to the exercise of his discretion, and, if there is a proper basis for his decision, to uphold it.

(13) Part 64.4(7) provides that an appellant may amend the grounds of his substantive appeal (but not a procedural appeal), once, and without any permission from the court, any time before 28 days have expired from (a) the date of receipt of a notice from the court office that a transcript of the evidence and judgment have been prepared; or (b) the date of any hearing under Rule 64.11.

(14) It is accepted by all that the application to amend was made well outside this timeline and that the permission of the court is required to amend the notice of appeal. It is also not in

dispute that relief from sanctions is not required because Part 64.4(7) does not provide a sanction for non-compliance. The question arises as to the approach to be adopted in considering whether to grant permission to amend the notice of appeal after the 28 days have expired.

(15) The authorities which I have considered are all cases in which there were applications for extensions of time without the need to apply for relief from sanctions. Those decisions all hold that, in such a case, the Part 26.7 considerations (without the mandatory threshold requirements – which are irrelevant when relief from sanctions is not required), the overriding objective and the question of prejudice are all applicable. See Rajnauth-Lee JA in **Rowley v. Ramlogan, Civil Appeal No. P215 of 2014** at paragraphs 10 to 16. In my judgment, these considerations are also applicable to a case such as this, in which permission is required from the Court to amend the notice of appeal. In **Rowley**, Rajnauth-Lee JA set out the relevant considerations at paragraphs 14 to 16. She said:

> ***"14. The following Rule 26.7 factors are therefore applicable without the restriction of the threshold:***
>
> ***(a) whether the application was made promptly;***
>
> ***(b) whether the failure to comply was not intentional;***
>
> ***(c) whether there is a good explanation for the application;***
>
> ***(d) whether the party in default has generally complied with all other relevant rules, practice directions, orders and directions;***
>
> ***(e) the interests of the administration of justice;***
>
> ***(f) whether the failure to comply was due to the party or his attorney;***
>
> ***(g) whether the failure to comply has been or can be remedied within a reasonable time; and***
>
> ***(h) whether the trial date or any likely trial date can still be met if relief is granted.***
>
> ***15. Rule 1.1(1) sets out the overriding objective of the CPR which is to***

enable the court to deal with cases justly. Dealing justly with the case includes –

(a) ensuring, as far as practicable, that the parties are on an equal footing;

(b) saving expenses;

(c) dealing with 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

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

16. In addition, inherent in the overriding objective to enable the court to deal with matters justly are considerations of prejudice. It is for the judge to consider on which party lies the greater risk of prejudice if the application is granted or refused. The court will take account of the various disadvantages to the parties should the application be granted or refused."

(16) I shall next examine these considerations keeping in mind that their relevance and importance will vary according to the facts of this case.

Promptness

(17) The applicant contends that a delay of three and a half years is not prompt; especially because counsel (Mr. Sanguinette) who advised that the notice of appeal should be amended, had conduct of the trial and settled the notice of appeal. When the notice of appeal was filed, he had the judgment of the trial judge which had been immediately available on 14th October 2016 when the decision was given.

(18) I agree with Mr. Persad that there was no good reason why the decision to amend should have taken three and a half years. The decision of the trial judge was immediately available and the notes of evidence were also available in fairly short order. Further, the issue of amending the notice of appeal appears to have been raised at the cause list hearing before Pemberton JA. Certainly if the amendments had been made earlier, the cause list hearing could have been utilized solely for directions which may have advanced the appeal. Mr. Nancoo's evidence at paragraph 15 of his affidavit is that the respondents and their attorneys-at-law *"acted promptly and diligently in pursuing this appeal and the only reason for now considering the need to augment as opposed to add new grounds is because prior to the appeal coming on for cause list hearing, careful deliberation was again given to the appeal and the ways in which we can narrow the real issues to be determined"*. While this makes attractive reading; as evidence it is unpersuasive. It ought to have been quite clear to Mr. Sanguinette from the outset that the no-cross-examination order was a major obstacle to the respondents' defence to the avoidance action, given the judge's acceptance of Mr. Sawh's and Mr. Lee-A-Ping's evidence. But a mitigating factor on this issue of promptitude is the fact that no hearing date had been fixed for the hearing of the appeal such as to result in its postponement. Additionally, any delay in this case was not the fault of Ms. Riley-Gill or Ms. Waddle.

Intentionality of the breach

(19) No issue has been raised that the non-compliance with Part 64.4(7) was intentional. Mr. Nancoo asserts that it was not.

Good explanation

(20) Mr. Nancoo, who deposed to an affidavit in support of the application to amend, stated that the delay was due to the departure of instructing attorney-at-law who had initial

conduct of the matter and *"there was a delay in the resumption of conduct by a subsequent attorney-at-law... It was only upon the court fixing a date with respect to this appeal and counsel was engaged and an all counsels conference had, that it was realized that it was necessary… to augment paragraph 3(c) of the grounds of appeal."*

(21) I do not consider that explanation to be a good explanation. Proper administrative arrangements should be in place when an attorney leaves a law firm so that there is a seamless transfer of responsibility from one attorney-at-law to another. There is no evidence that the instructing attorney-at-law's departure was sudden or unplanned. The fact that it took a notice of a cause list hearing to the respondents to rouse them out of their reverie does not advance the respondents' cases. It reveals inefficient office management. But I must once again take into account that it is not the fault of either client.

General compliance

(22) No issue has been taken with respect to this consideration.

The interests of justice

(23) As Rajnauth-Lee JA observed in **Rowley** *"The interests of the administration of justice involve consideration of the needs and interests of the parties before the court as well as other court users".* The respondents contend that the amendment was necessary so as to make specific, the issues the court has to determine under paragraph 3(c). Mr. Nancoo deposed that:

> ***"Allowing the Appellant the opportunity to amend their Notice of Appeal will in fact limit and make specific the issues the Court has to determine under paragraph 3(c), which generally read that, "That the order dated the 14th October, 2016 of the Learned Judge granting judgment against the Appellants is wrong in law.". With the amendment, it would include the***

very narrow two areas of law so that arguments, analysis and consideration can be specific and deliberate thereby preserving judicial time. These two areas are (1) "The learned trial judge failed to apply the proper test as laid down in Pan Atlantic Insurance Co. Ltd and Another v. Pine Top Insurance Co. Ltd.: HL 27 Jul 1994 in which the insurer's evidence is to prove self inducement and the expert evidence as the objective test for a prudent insurer"; and (2) "The learned trial judge was plainly wrong in disallowing the Appellants/Co-Defendants to cross examine both the Third Defendants witnesses, that is, David Lee-A-Ping and Balitam Sawh (sic), despite being given leave to be joined as Co-Defendants pursuant to the Motor Vehicles Insurance (Third Party Risks) Act, and that he allowed the cross examination, ought to have found that the three accidents were not material and/or obviously material."

Maritime takes objection only to the second limb of that ground with respect to cross-examination because it also contends that any appeal of the no-cross-examination order should have been made during the trial and within 42 days of the ruling. Those submissions are misconceived for reasons I shall give shortly.

(24) In my judgment while there has been delay and no proper explanation for that delay and the breach of Part 64.4(7), these must yield, in this case, to the considerations of the administration of justice and the overriding objective. It is in the interest of the administration of justice that the no-cross-examination order be challenged. Ground 3(b)(ii), as a new ground, brings into focus the point of law on which the decision turned in the High Court. The trial judge based his decision on the **Pan Atlantic Insurance Co. Ltd. v Pine Top Insurance Co. Ltd. [1994] 3 WLR 677** decision of the House of Lords. In that case it was held that it must be shown that the misrepresentation or the non-disclosure was not only material but also that it induced the insurer into making the policy. The trial judge held that the *"Nil"* response of Lee Wen on the proposal form, admitted to a non-disclosure

or misrepresentation that a prudent insurer would have considered Lee Wen's misrepresentation/non disclosure to be material. He said at paragraph 79:

> ***"To my mind, any prudent insurer would be influenced by the previous accident history of a potential "authorized driver" in their determination of whether to undertake the associated risk of such a decision. Implicit in such a consideration would also be what conditions and at what cost would coverage be extended, if at all"***

(25) The judge went on to consider the statement of Mr. Sawh that a young inexperienced driver's history *"is critical in the assessment of risk and the calculation of the premium if accepted"*. He also looked at a similar comment made by Mr. Lee-A-Ping and then applying Mendonça JA in **Alleyne v Colonial Fire and General Insurance Company Limited and Anor., Civil Appeal No. 58 of 2004** concluded that:

> ***"the fact that a potential insured was involved in three (3) previous accidents was so obviously material that Maritime need not have provided evidence of materiality in all the circumstances of this case"***

He added that:

> ***"In respect of the issue as to whether Maritime proved that the misrepresentation induced them to extend coverage to Balkissoon … I am of the opinion that the evidence of Mr. Sawh once again provided a complete answer. He specifically stated that based on the information provided to Maritime by Lee Wen in respect of Balkissoon's previous accident history, coverage was extended and so done at a premium commensurate with same."***

He also accepted a specific statement by Sawh that *"Maritime had been induced by the the representation on the under-aged driver request that David Balkissoon had had no prior accidents to exercise its discretion in the Defendant's [Lee Pen's] favour and to accept the*

further risk …"

(26) Sawh's and Lee-A-Ping's evidence were thus critical to the judge's substantive decision and the decision to refuse cross-examination of them both deeply affected the respondents ability to conduct their defence.

(27) It is not for the Court of Appeal, at this stage, to decide whether that decision was wrong. But in my judgment there are strong grounds for arguing that it was, for the following reasons:

(i) The respondents were in no position to contradict Maritime's assertion that Balkissoon has three prior accidents (Maritime had obviously begun investigating Balkissoon's history soon after the accident and its investigations had led it to searching the respective police stations' diaries in the expectation of finding accident reports). There was little by way of fact that the respondents could assert, by way of contradiction, in their defences or in witness statements.

(ii) Even though they could not factually contradict the occurrence of the accidents, the respondents were entitled to probe Lee-A-Ping and Sawh's evidence in cross-examination as to materiality and inducement and to question the basis of their evidence without putting facts to them.

(iii) There is much in Sawh's and Lee-A-Ping's affidavit evidence which is self-serving and open to astute and searching cross-examination. It includes Sawh's statement that Maritime was induced. The respondents were entitled to probe that evidence in cross-examination so as to cast doubt on the issue of inducement given that at least two accidents appear to be minor and that in at least one accident Mr. Balkissoon was not at fault. Further Mr. Sawh's convenient statement that the fact of three accidents, irrespective of fault, was sufficient to reject the insured's application was also a matter which the respondents were entitled to probe.

(28) As to Mr. Persad's submission that the respondents should have appealed the no-cross-

examination order, this is contrary to authority. First of all, such an appeal would not have qualified as a procedural appeal under Part 64.1(2) of the CPR. Part 64.1(2) defines *"procedural appeal"* as an appeal from a decision of a *"… judge which does not directly decide the substantive issue in a claim but excludes (a) any such decision made during the course of the trial or final hearing of the proceedings."* The latter exception effectively scuttled any immediate appeal from the no-cross-examination order. It meant that, ordinarily, the respondents had to appeal the order at the end of the trial as part of their substantive appeal, unless there were exceptional circumstances to justify an early appeal. This is consistent with the practice adopted by our Court of Appeal prior to the CPR.

(29) In **American Life and General Insurance Co. Ltd. & Ors. v. Super Chem Products Ltd. (1993) 51 WIR 298** the appellants during the course of the hearing, applied to re-amend certain paragraphs of their defences. The judge refused the application and the appellant filed an appeal. The respondent raised a preliminary objection to the appeal on the ground that the application to amend was part of the trial but would form one ground of appeal after judgment had been delivered upon the hearing of the whole of the actions. Counsel for the respondent argued that while the Court of Appeal had jurisdiction to hear the appeal, it was only in exceptional circumstances that the power should be exercised and in any event it was a practice which should not be encouraged.

(30) The Court of Appeal upheld that submission and quoted with approval the following dictum of Jessel MR in **Laird v. Briggs (1881) 16 Ch. D 663** at 664:

> ***"The refusal to leave to amend is simply part of the trial. As you have appealed from the whole judgment the whole case will be open on the appeal, and if the Court of Appeal shall be of opinion that you ought to have leave to amend it will have power to give you leave then. There is no necessity for a separate trial."***

(31) It is also approved in comments of Sir Jack Jacob and Iain S. Goldrein in **Pleadings:**

Principles and Practice (1st Edition) at Footnote 52 at page 197:

> ***"It is highly undesirable that there should be appeals to the Court of Appeal in the course of trials of actions. It is altogether better that matters of an interlocutory nature should work themselves out in the course of the trial without interlocutory recourse to the Court of Appeal before the facts have been completely determined and the trial has been concluded. The Civil Division of the Court of Appeal may hear appeals in the course of the trial but only in exceptional circumstances. The reason is not just that it interrupts the trial, although that is usually a sufficient reason, but that if it became the practice to give leave to appeal in the course of a trial the Court of Appeal would soon be overwhelmed with appeals, ,any of which might prove academic …"***

(32) That approach has now been codified in the definition of procedural appeal. Part 64.1(2)(a) specifically excludes the no-cross-examination order from being pursued as a procedural appeal. It meant that unless there were circumstances to justify, exceptionally, an appeal from the no-cross-examination order, the respondents had no choice but to pursue any appeal against that order as part of their substantive appeal. They have now sought to do so by way of an amendment to their notice of appeal.

Overriding objective

(33) As Rajnauth-Lee JA noted in **Rowley**, inherent in the overriding objective to enable the court to deal with matters justly are considerations of prejudice (See **Rowley supra** – paragraph 16 of that decision).

(34) The question of prejudice must be balanced between both sides. The applicant contends that any prejudice which accrues to the respondents by a refusal of the application to amend is offset by the remedy they have against their attorneys for failing to have properly

appealed the order. But on the other hand there is greater prejudice to the applicant if the application to strike out is refused because Baliram Sawh is no longer prepared to give evidence again. The submission is misconceived. Mr. Sawh's unwillingness to give evidence again is another self-serving assertion to achieve the desired result. As a senior manager in a large multi-million dollar company, such testimony is expected and is commensurate with his pay grade. Any stress associated with it comes with the territory.

(35) On the other hand, the prejudice to the respondents will be substantial. Firstly, they will be deprived of pursuing an appeal in which there is a high probability of success on the basis that cross-examination was wrongly disallowed. Secondly, in all probability David Balkissoon is likely a man of straw who will be unable to satisfy the judgment and they will be deprived of recourse to a multi-million dollar insurance company which can.

(36) Factors (a), (c) and (e) of Part 1.1(1) of the overriding objective are also relevant factors. These are:

(a) Ensuring, as far as practicable, that the parties are on an equal footing;

(b) …

(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) …

(e) Allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

(37) On the question of ensuring that the parties are on equal footing, I believe this is also a relevant consideration. Maritime appears to have undertaken investigations into the accident history of Balkissoon shortly after the fatal accident, an accident widely reported

throughout Trinidad and Tobago. It resulted in the appointment of private investigators and produced the reports of Balkissoon's accident history (It is a pity that a similar *"due diligence"* was not conducted by Maritime prior to accepting Mr. Lee Wen's business). The respondents, most likely do not have the resources to compete with Maritime in doing background investigations.

(38) Consequently, it is no surprise that they have been unable to produce evidence of fact by way of witness statements or even other insurance experts to contradict the assertions of Maritime. All the more reason why they should have been permitted (as they are entitled to) to probe the evidence of Sawh and Lee-A-Ping. Items c (i) (iii) and (iv) of the overriding objective are also important here. The judgment figure is a significant sum which Balkissoon given his age is likely unable to pay. Thus if Maritime is struck out as a party, the respondents are unlikely to recover from Balkissoon. The case is of considerable importance to both respondents in their effort to obtain justice for the death of their children. As to Part 1.1(1)(e) of the overriding objective, the respondents' appeal is sufficient and viable enough to justify the deployment of the court's resources towards its hearing and determination.

Conclusion

(39) When the respective principles are considered and balanced, I have little difficulty in agreeing with Moosai JA that the amendment should be granted. The considerations against the grant are that the application to amend was made some three and a half years after the original notice of appeal and no good explanation has been put forward. Against that should be weighed the fact that it was the fault of the instructing attorney-at-law rather than the respondents themselves, the fact that the amendment brings into proper focus the true basis upon which the trial judge granted Maritime's claim and the fact that the respondents are more than likely to succeed on the ground that the no-cross-examination order was wrongly made. Further, even though the delay was three and a half years it did not unduly affect the fixing of a date for the appeal and there is of course the

overriding objective which enjoin us to seek to deal with cases justly and which I have considered at paragraphs 33-38. It cannot be that the respondents should be deprived of the opportunity of contesting the true basis upon which their claim for indemnification from Maritime was thrown out, when, in all probability, they are unlikely to recover any damages from Balkissoon. That in my view would be deeply unjust.

(40) I consider that Moosai JA, was not plainly wrong to allow the amendment. Indeed, I consider that he was plainly right to do so. The application is dismissed. We will hear the parties on costs.

Nolan Bereaux
Justice of Appeal

I have read the judgment of Bereaux J.A. that I have read in draft. I agree with the findings, conclusions and orders and have nothing to add.

C. Pemberton
Justice of Appeal

I agree with the judgment of Bereaux J.A. which I have read in draft. I have nothing to add.

M. Holdip
Justice of Appeal