JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 117/99

BEFORE : THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

BETWEEN:	**GLORIA MOO YOUNG**	**1ST. PLAINTIFF/APPELLANT**
	ERLE MOO YOUNG	**2ND PLAINTIFF/APPELLANT**
AND	**GEOFFREY CHONG**	**DEFENDANT/RESPONDENT**
	DOROTHY CHONG	**DEFENDANT/RESPONDENT**
	FAMILY FOODS LIMITED (IN LIQUIDATION)	**DEFENDANT/RESPONDENT**

Donald Scharschmidt, Q.C., Andrew Rattray and **Miss Maliaca Wong,** instructed by Rattray Patterson & Rattray for appellants

Michael Hylton, Q.C. , and **Mrs. Michele Champagnie** instructed by Myers Fletcher & Gordon for respondents

6th, 7th, 8th, 9th , 10th December, 1999;
11th, 12th, 17th , 18th January and 23rd March, 2000

DOWNER, J.A.

My brother Harrison, J.A., will deliver the first judgment.

HARRISON, J.A.

This is an interlocutory appeal from a decision of Ellis, J. made on 27th October, 1994 granting amendments to the defence on the application of the first and second respondents.

The history of this case is that the writ filed was dated 21st October, 1987 and the statement of claim dated 17th December, 1987 was filed thereafter. The respondents filed their defence on 15th December, 1994, a reply was filed on 13th April, 1995 and a rejoinder filed dated 20th April 1995. The trial of the action commenced in 1994 before Ellis, J. and continued in 1996, and during the year 1997. The evidence of several witnesses for the appellants was heard. The amendment was sought on 29th April, 1997, and after a hearing of the application on the 1st, 2nd, 6th and 9th day of May 1997, the application to amend the defence was granted by Ellis, J. on 8th October 1998.

The relevant facts are that the 1st and 2nd respondents are the majority shareholders in the third respondents, Family Foods Limited, a limited liability company which operated a supermarket in Ocho Rios, St. Ann. The 1st and 2nd appellants are the minority shareholders in the said company. All parties were directors and together comprised the board of directors. The 1st respondent is the managing director and chairman of the board. The said 1st and 2nd respondents managed and controlled the daily operation of the business of the 3rd respondent company. The appellants emigrated to the United States of America in 1977 and returned in 1982. The 1st and 2nd respondents themselves emigrated in 1979 but returned in 1980. During the entire period the latter retained effective control of the said business. The supermarket was destroyed by fire in June 1986. The appellants allege against the respondents, as minority shareholders, several acts of fraud, diversion of assets to themselves, unjust enrichment, improper use of the Company's funds and assets and breach of duty to the said Company, causing damage and loss to the said appellants. As a consequence the writ was filed.

The pleading relevant to this appeal is contained in the appellants' amended statement of claim, in paragraph 7, inter alia:

> "7(1)a. During or around the year 1979 negotiations were conducted by the first and second Defendants or either of them acting with the knowledge and consent of the Plaintiffs for the purchase of property with a warehouse thereon situated at Ocho Rios, Saint Ann, being the property registered at Volume 1147 Folio 848 of the Register Book of Titles. It was agreed and understood by the Plaintiffs and the first and second Defendants that the property would be purchased by or on behalf of the third Defendant as beneficial owner thereof. The said property was duly purchased for the sum of $70,000.00 and the deposit therefor amounting to $7,000.00 was paid by the third Defendant with monies belonging to the third Defendant. The first and second Defendants in breach of their duty to the third Defendant and in fraud of the third Defendant and of the Plaintiffs caused the property to be registered in the name of the first Defendant thereby depriving the third Defendant of the legal ownership and of the rights and benefits as owner;
>
> (2) In March, 1980 the third Defendant bought certain lands situate at Ocho Rios (hereinafter called 'Pierre Chong Lands') which were registered at Volume 554 Folio 92 and Volume 652 Folio 31 of the Register Book of Titles. The Pierre Chong lands were sold in or around February, 1985 and the first and second Defendants acting for and on behalf of the third Defendant negotiated for and purchased lands known as Mansfield Property being part of the lands formerly registered at Volume 652 Folio 31 now registered at Volume 1201 Folio 466 of the Register Book of Titles. The purchase price of the Mansfield property was some $900,000.00 and part of the proceeds of sale of the Pierre Chong lands was applied in paying the sum of $34,050.00 and $100,950.00 towards the price of the Mansfield property. In fraud of the third Defendant and of the Plaintiffs and in breach of their duty to the third Defendant, the first and second Defendants secured that the Mansfield property be transferred to the second Defendant and registered in her name and carried out sundry manoeuvers to make it appear as if the Mansfield property was purchased by them for themselves and not by the third Defendant or on behalf of the third Defendant or by them as the Directors and/or agents and/or servants of the third Defendant for the Third Defendant."

In answer to these allegations, the respondents in their amended defence said, commencing at paragraph 24:

> "24. As to paragraph 7(1) and 7 (2) generally, the First and Second Defendants state that both the warehouse property referred to in paragraph 7(1) and the Pierre Chong lands referred to were the subject matter of negotiations to purchase generally at or about the same time. It was intended that Pierre Chong lands would be acquired or were being acquired by/or for the Third Defendant. The deposit in respect thereof was, however, paid by the Second Defendant from her own resources and not by the third Defendant.
>
> The warehouse land purchase was being effected by the Second Defendant in her personal capacity and on her own behalf and for her sole benefit and not by nor for the Third Defendant.
>
> 25. The deposit in respect thereof, to wit, the sum of Seven Thousand Dollars ($7,000.00) was paid by cheque drawn on the company's account which cheque was by way of re-imbursement in part of the deposit paid by the Second Defendant on the Pierre Chong lands which were being purchased for-by and in the name of the Third Defendant.
>
> 34. The first and Second Defendants state that the purchase of the Mansfield property was never made by the Third Defendant nor for and on behalf of the Third Defendant but that the said purchase was by the Second Defendant in her own right and the negotiations therefor conducted by her personally and for her own benefit and that the deposit for the purchase was provided by the Second Defendant out of the proceeds of sale of other lands owned solely by the Second Defendant. A small portion of the purchase price was obtained by a loan from the Third Defendant which loan was repaid by the Second Defendant one year later. More specifically, the Defendants deny that the Mansfield property was bought out of the proceeds of sale of Pierre Chong lands as alleged or at all."

The respondents were therefore maintaining, by their defence filed that:

> (1) the Pierre Chong lands were the property of the third respondent, due to the beneficence of the 1st and 2nd respondents;
>
> (2) the Warehouse property was solely owned by the second respondent, having been bought by the 2nd respondent, to the exclusion of the 1st respondent, and;
>
> (3) the Mansfield property was solely owned by the said 2nd respondent,

and that neither of the latter two properties was owned by nor bought with the funds of the third respondent.

After evidence in support of the statement of claim was heard, and particularly the evidence of Yvet Chang, a chartered accountant of the firm of Ernst and Young, Chartered accountants, the 1st and 2nd respondents sought and obtained the said amendments, the subject of this appeal.

Mr. Scharschmidt, Q.C., for the appellants, relied on and argued as his grounds of appeal, summarised, that:

> (1) the effect of the amendments granted would allow a new defence to be presented, distinctly different from that pleaded in May 1988 and pursued up to April 1997;
>
> (2) the application to amend was not made in good faith, but made to meet evidential differences faced by the Second Defendant, because of the evidence led by the appellants;
>
> (3) the need for the amendments must have been clear to the respondents previously.
>
> (4) the amendments did not arise as a result of a mistake or carelessness because the Second Respondent has asserted and sworn to specific facts.
>
> (5) & (6) the amendments rather than pleading material fact, raised arguments, asserted hypotheses and drew conclusions therefrom,

and the primary consideration was whether the application for amendment was made in good faith.

Mrs. Champagnie for the respondents submitted that the primary consideration is whether the amendment will serve the purpose of determining the true issues between the parties and may be made without injustice to the other side. Counsel argued that the evidence to be led by the respondent will be the same as originally intended, is contained in documents agreed and the amendments merely relate to the treatment of relevant accounts, namely the general ledger and financial statements of the Company, an issue not apparent on the appellants' pleadings. There was no prejudice to the appellants, and the amendments made would serve to bring the pleadings "in line with evidence."

Amendment to pleading, generally, may be made by a court at any stage of the trial for the purpose of bringing forward and determining the real question and issues in controversy between the parties. (**Cropper v Smith** (1884) 26 Ch. D. 700). Section 259 of the Judicature (Civil Procedure) Code Law reads:

> "259. The Court or a Judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner, and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

The court will view the exercise of this discretionary power quite liberally, as long as it will not do any injustice to the opponent of the party seeking the amendment and particularly, if the said opponent may be adequately compensated in costs, consequent on such amendment.

An amendment granted before a trial commences, is usually viewed more liberally as permissible, than one at the end of the trial. In the latter case it should not be made, if the result would be:

> "... to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence" (per Lord Griffiths in **Ketteman v Hansel Properties**. [1988] 1 All ER 38 at page 62).

In **Easton vs. Ford** Motor Co. [1993] 4 ALL E.R. 257, an amendment to the defence, prior to the commencement of the trial, was held on appeal, to have been correctly allowed. The defendant company had pleaded, that the suggestion, submitted by the plaintiff, an employee, who had sued for money to be awarded, for a suggestion beneficial to the company, was not a novel one. The company was held to be entitled to amend to add to the defence, that the plaintiff had signed a prior agreement that the decision of the "suggestion plan committee" which selected the awardees would be final, and he was bound thereby. Dillon, L.J. said in the course of his judgment, at page 264:

> "Quite obviously, there is more to be said for refusing an amendment when the action is in the course of trial or very nearly ready for trial."

In the instant case, the amendment granted may be permissible if:

(1) necessary to decide the real issues in controversy, however late,

(2) it will not create any prejudice to the appellants, and is not presenting a "new case" to the appellants,

(3) is fair in all the circumstances of the case, and

(4) it was a proper exercise of the discretion of the learned trial judge on the state of the evidence.

However late may be the application for amendment, it should be allowed, in the above circumstances, if it will not injure or prejudice the applicant's opponent. Different considerations however, govern each case, and it is a matter in the discretion of the learned trial judge.

The relevant amendments sought by the respondents were granted by Ellis, J. on 8th October, 1998 but objected to by the appellants: Vide paragraphs 24-27, 34-34H, 64 and 65.

The fundamental issues before the learned trial judge which concerned the acquisition of three properties, namely, the Warehouse, the Pierre Chong lands, and the Mansfield property, were in particular:

(a) the source of funding

(b) the ownership of the said funds and

(c) the ownership of the beneficial interest, in the said properties.

In respect of the Warehouse lands (Vol. 1147 Folio 846), the appellants maintained in their statement of claim, paragraph 7, that it was agreed to be purchased on behalf of the third respondent, the Company; that the deposit of Seven Thousand Dollars ($7,000.00) was paid by the third respondent; but that the property was fraudulently registered in the name of the first respondent.

In answer to paragraph 7, the defence was, in paragraph 24, that "...the First and second defendants state ...", that it was intended that the Pierre Chong lands be acquired by the third respondent, and the Warehouse lands by the second respondent, who paid the deposit on the Pierre Chong lands on behalf of the third respondent "from her own resources", and the cheque for Seven

Thousand Dollars ($7,000.00) drawn on the Company's account which paid the deposit on the said Warehouse lands, being purchased by the second respondent,

> "... in her personal capacity and on her own behalf and for her sole benefit,"

was by way of re-imbursement of the deposit paid by her on the Pierre Chong lands, purchased on behalf of the third respondent.

The effect of the latter pleading was that, the Warehouse lands were exclusively beneficially owned by the second respondent who provided the deposit of Seven Thousand Dollars ($7,000.00) which was a re-imbursement; exclusively hers because she had made a payment on behalf of the third respondent on the Pierre Chong lands. This pleading was acquiesced in and embraced by the first respondent: he was agreeing that the payment by the second respondent was in fact done by her, to his exclusion.

The relevant amendments sought and granted to the respondents read:

> "24 The Warehouse lands purchase was being effected by the First and Second Defendants in their personal capacity and on their own behalf and for their sole benefit ...
>
> 24A The First and Second Defendant state that the current accounts/Shareholders loan/Loan accounts of the Moo Youngs and the Chongs respectively fall to be treated or alternatively regarded as joint accounts ...
>
> 25A Further and/or alternatively, the First and Second Defendants state that from the beginning of the operations of the Third Defendant and continuously thereafter and at all material times and more particularly during October/November 1979 and thereafter the Third Defendant was indebted to the First and/or Second Defendants in sums substantially in excess of Seven Thousand ($7,000.00), the amount paid by way of deposit by cheque drawn on the Third Defendant on the purchase of the Warehouse land for the sole purpose and benefit of the First and Second Defendants.

> 25C In the premises the Defendants state that the sum of $7,000.00 constituted in law and/or in reality a repayment in part of sums owed by the Third Defendant to the First and Second Defendants leaving a credit balance in favour of the First and Second Defendants. In the premises the $7,000.00 was not and/or was incapable in law of being a "true" loan to the Defendants.
>
> 25D. In the further alternative the First and Second Defendants state that the sum of Seven Thousand Dollars ($7,000.00) paid by way of deposit was initially intended and approved as a Directors loan to the first and Second Defendants (taken by the Second Defendant on their behalf) and the First and Second Defendants were unaware that the same was contrary to the instructions communicated to Mr. Abe Moore by the Second Defendant to enter same as a directors' loan treated and entered in the account books of the Third Defendant as "Pay to Wally Goldsmith - Cash Goods" so entered on the cheque stub by Mr. Abe Moore the then manager and Third Director of the Third Defendant as the said cheque itself was signed by the Second Defendant and was made payable to VLS Scott, the Attorney-at-Law acting for the vendor, Mr. Wally Goldsmith in the sale of the Warehouse premises to the First and Second Defendants. The Defendants state that all other payments for the purchase were undertaken by them." (Emphasis added.)

The effect of the latter amendment, now objected to, was, inter alia, an expansion of the pleadings to include the first respondent in the benefit of the Warehouse lands and the benefit and source of the deposit on the Pierre Chong lands. The first respondent had specifically previously pleaded contrary facts. The respondents had taken up a new posture. It is my view that the amendments sought were less than bona fide.

In **Baker Ltd. v Medway** [1958] 3 ALL ER 54, the Court of Appeal, in allowing an amendment to include a plea of purchaser for value without notice, referred to **Tildesley v Harper** (1878) 10 Ch. D393 (per Jenkins LJ) itself allowing

an appeal against a refusal to amend a defence to plead a general denial of taking a bribe, in which Bramwell, L.J. said, at page 396:

> "My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that , by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise."

Furthermore, in the instant case, the evidence led by the appellants up to the point in time when the amendments were made, revealed that:

> (1) On 31st October, 1979 an offer to purchase the Pierre Chong lands (Vol. 472 Fol. 12, Vol. 532 Fol. 31 and Vol. 183 Fol. 36) was made by Geoffrey Chong and Dorothy Chong to the Bank of Commerce and $10,000.00 was paid as a deposit.
>
> The third respondent was not contemplated nor involved.
>
> (2) Previously on 10th October, 1979 the deposit of Seven Thousand Dollars ($7,000.00) being the third respondent's cheque No. 7899101 was made on the purchase of the Warehouse lands.

There was no prior payment by the second respondent on Pierre Chong lands on behalf of the third respondent to attract the necessity for a "re-imbursement."

> (3) On 25th March 1980 the agreement for sale for the Pierre Chong lands was entered into between the third respondent and the Bank of Commerce, the document acknowledging that "The Purchasers have already paid Thirty Thousand Dollars ($30,000.00) ..."

This was the earliest opportunity that is, on 25th March, 1980 on the documented evidence, on which the second respondent could claim to have made a payment on behalf of the third respondent, as a deposit on the Pierre Chong lands. No such opportunity existed in 1979.

> (4) The monies advanced on the said Pierre Chong lands was first recorded in the records of the third respondent in February 1981.

The evidence of the plaintiffs' witness Yvet Chang highlighted the above facts from the documents, and revealed further that the sum of Forty Thousand Dollars in respect of the Pierre Chong lands was paid to the second respondent Dorothy Chong in February 1981, vide ledger sheets D1A, director's account. The Company's accounts show, vide ledger B6 & B11, that the sums of Thirty One Thousand ($31,000.00) and Thirty Thousand ($30,000.00) were paid to the said second respondent, and at the end of the financial year of 1991 (October), there was a "nil" balance, signifying that the second respondent had been repaid in full by the third respondent, and there was no debt outstanding due to her from the said company to justify an allegation of "debt due to the respondents".

Yvet Chang's evidence revealed still further, that there was no other account in which the Seven Thousand Dollars ($7,000.00) alleged advance was recorded, and if such an advance was made it would have been recorded in the director's ledger D1A. There was no such record.

A company acts through its directors, who are its "brains" and "limbs", and speaks through its records, namely, account books, ledgers, minutes and resolutions. A court must expect to see documentary proof of a company's decisions and actions, as effected by its human functionaries.

By allowing the amendment sought, in relation to the Warehouse and Mansfield lands, the first and second respondents would be permitted to include the first respondent Geoffrey Chong, to supply a deficiency in financial provision, where the evidence, particularly the documentary evidence, had disclosed that there was

no indebtedness of the Company to the second respondent, to justify the former pleading relied on, namely that:

> "25. The deposit... of ($7,000.00) ... was by way of reimbursement in part of the deposit paid by the Second Defendant on the Pierre Chong land ... being purchased in the name of the Third Defendant (Family Foods Limited)." (Emphasis added).

The amendments allowed the first and second respondents now to plead the fact of a joint balance due to them from the third respondent where the evidence showed an absence of resources existing in the second respondent, and an absence of debt due from the Company to the second respondent to justify the use of Seven Thousand Dollars ($7,000.00) of the Company's funds. It is my view that this is a radical change of the respondents' case from its former stance, to the prejudice of the appellants. A trial judge may obtain guidance from the words of Bowen, L J in **Cropper v Smith** (supra), at page 711:

> "I reserve to myself the right to consider how a case should be dealt with where there has been not merely a mistake but due attempt to mislead."

The Mansfield property (Vol. 652 Fol. 31), according to the appellants, was allegedly bought by way of a deposit of One Hundred and Thirty Five Thousand Dollars ($135,000.00), which funds were the property of the third respondent, being part of the proceeds of sale of the Pierre Chong lands owned by the said third respondent (paragraph 7(a) of the statement of claim).

The defence filed by the first and second respondents in answer, denied the above contention, and contended, in paragraph 34:

> "34. The First and Second Defendants state that the purchase of the Mansfield property was never made by the Third Defendant nor for and on behalf of the Third Defendant but that the said purchase was by the Second

> Defendant in her own right and the negotiations therefor where conducted by her personally and for her own benefit and that the deposit for the purchase was provided by the Second Defendant out of the proceeds of sale of other lands owned solely by the Second Defendant. A small portion of the purchase price was obtained by a loan from the Third Defendant which loan was repaid by the Second Defendant one year later. More specifically, the Defendants deny that the Mansfield property was bought out of the proceeds of sale of Pierre Chong lands as alleged or at all." (Emphasis added)

Again, the material facts pleaded by the first and second respondents in their defence were, that the purchase was effected by the second respondent:

(a) "... in her own right..."

(b) "... negotiations conducted by her personally .."

(c) "... for her own benefit ..." and that the purchase was financed by the Second Respondent;

(d) "... out of the proceeds of sale of other funds owned solely by the Second Respondent ..." and,

(e) "... a small portion by a loan from the Third Defendant",

to the exclusion of the first respondent.

The answer to the further and better particulars requested by the appellants re-inforced the latter pleading. In such particulars the respondents maintained, quite pointedly, that the deposit of One Hundred and Thirty Five Thousand Dollars ($135,000.00) on the Mansfield land purchase was made by the second respondent "... by cheque .. in one installment..", by a deposit of One Hundred and Fourteen Thousand Two Hundred and Seventy Seven dollars ($114, 277.00) on 14th February 1985 and the loan of Twenty Thousand Seven Hundred and Seventy Three

Dollars ($20, 773.00) from the third respondent, which loan was "...approved informally..." by the first respondent.

The respondents are bound by these particulars given.

The amendment granted by the learned trial judge (paragraph 34) permitted the first and second respondents to resile from the fact pleaded that the deposit sum of One Hundred and Fourteen Thousand Two Hundred Twenty Seven Dollars ($114, 227.00) was derived from the source, "..out of proceeds of other lands owned solely by the Second Defendant", but instead, to rely on the more non-specific recital "...from her own resources."

Further, the amendment, stated in the alternative, that the said sum of One Hundred and Fourteen Thousand Two Hundred Twenty Seven Dollars ($114, 227.00) was," ..... credited to the second defendant in March 1985 ... (constituting) in law and/or in fact a repayment (not a loan) to the first and second defendant ...", was again an expansion of the allegation to include the first respondent's financial resources, to supplement the second respondent's deficiencies. This is once more, a further example of a radical change in pleadings, to the prejudice of the appellants.

The evidence in this regard, when the amendments were made, shows that an agreement for sale was entered into on 18th February 1985 for the sale of the Mansfield lands and the deposit of One Hundred and Thirty Five Thousand Dollars ($135,000.00) was payable "on signing." This agreement was between Ocho Rios Development Company Limited, as vendor, and Dorothy Petrona Chong, as purchaser. The evidence of the said Yvet Chang reveals that a statement of account dated 13th January 1987 issued by Messrs. Myers Fletcher and Gordon in

respect of the sale of the Pierre Chong lands by the third respondent, shows that out of the deposit, amounts of Thirty Four Thousand and Fifty Dollars ($34,050.00) and $100,950.00 were transferred to account No. 150440. These amounts totalled $135,000.00, the exact amount of the deposit on the purchase of the Mansfield lands.

Account No. 150440 was the account of the second respondent.

A statement of the Pierre Chong account supplied by the said Messrs. Myers Fletcher & Gordon confirmed that the sums of ($34,050.00) and $100,950.00) totalling $135,000.00) were transferred out of the deposit from the said account of the Pierre Chong lands to account No. 150440. A further statement No. 150440 dated 13th January 1987 also from Messrs. Myers Fletcher and Gordon in respect of the purchase of the Mansfield lands, showed that, credited to that latter account No. 150440, were:

(a) $34,050.00 on 18th May 1985 and

(b) $100,950.00 on 16th April 1985, making a total of $135,000.00.

The learned trial judge could hardly avoid the obvious inference.

It was further revealed that the sum of One Hundred and Fourteen Thousand Dollars Two Hundred Twenty Seven Dollars ($114,227.000) was paid by cheque No. 98817 dated 14th February 1985 drawn by "D Chong" c/o Messrs. Fletcher and Gordon who issued receipt No. 162500 dated 28th February 1985 for the said sum as received for Dorothy Chong "on behalf of Family Foods Limited." The statement dated 13th January 1987 in respect of the sale of the Pierre Chong lands also showed that the sum of One Hundred and Fourteen Thousand Two Hundred Twenty Seven Dollars ($114,227.00) was paid into the said account.

The bank statement of Family Foods Limited, the third respondent, dated 29th March 1985 showed that on 6th March 1985 the sum of One Hundred and Fourteen Thousand Two Hundred and Twenty Seven Dollars ($114,227.00) was withdrawn and the notation "land" written beside that amount. The general ledger land account of the third respondent showed an entry of land owned by the said Company for the year ended 31st October, 1985 crossed out. Also, the ledger sheet 57 showed a debt of One Hundred and Fourteen Thousand Two Hundred and Twenty Seven Dollars ($114,227.00) for land, signifying that someone was indebted to the third respondent for One Hundred and Fourteen Thousand Two Hundred and Twenty Seven Dollars ($114,227.00) in a land transaction, as of 31st October 1985. This latter entry was also crossed out. In addition, the ledger L7 showed the said sum of One Hundred and Fourteen Thousand Two Hundred and Twenty Seven Dollars ($114,227.00) entered on 31st March 1985 owed to the third respondent up to the end of the financial year ending 31st October 1985; this latter entry was reversed showing a nil balance and an indebtedness of One Hundred and Thirty Five Thousand Dollars ($135,000.00) then recorded at October 1986. Significantly, the evidence of the witness Yvet Chang revealed that:

> (a) there was no record which showed that there was a loan of Twenty Thousand Seven Hundred and Seventy Three Dollars ($20,773.00) on 18th February, 1985, and ;
>
> (b) an individual owed the company One Hundred and Thirty Five Thousand ($135,000.00) up to the financial year 1985/1986.

The amendments in relation to the Mansfield lands purchase(paragraphs 34 & 34A - H), now permit the first and second respondents to rely on "the combined amounts of the Chongs" or "sums owed by the third defendant to the first and

second defendants", instead of, the second respondent, (as previously pleaded) providing the purchase money in her own right "out of proceeds of sale of other lands owned solely by the second defendant", to show the source of financing. More significantly, the sum of One Hundred and fourteen Thousand, Two Hundred and Twenty Seven Dollars ($114,227.00), alleged by the appellants as the misuse of company funds, and in the former pleading alleged by the respondents, as the second respondent's own funds, is now described as a "repayment" from a balance owing to both respondents. The sum of Twenty Thousand Seven Hundred and Seventy Three dollars ($20,773.00) pleaded by the respondents as an informally approved loan, is now permitted to be pleaded as an "advance" on sums due, or alternatively, as "a repayment" of amount due to both respondents.

The second respondent who was a debtor to the Company, is now, on the amended pleading, a creditor to the said Company. Curious indeed!

I am unaware of any principle of "community of funds" or any concept of joint ownership of monies in an account occasioned by the fact of the existence of husband and wife as directors in a company.

These amendments in paragraphs 34 & 34A to 34H, likewise amount to a radical change of posture and allegation of fact and would present a new case to the prejudice of the appellants.

I disagree with Mrs. Champagnie that the amendments were made because the issue of the accounts was not raised in the appellants' pleadings.

The recitals in the statement of claim, in paragraph 7(1) (a) in respect of the Warehouse lands, that:

> (1)"...the deposit .. amounting to Seven Thousand Dollars ($7,000.00) was paid by the Third Defendant with monies

> belonging to the Third Defendant ..," in respect of the Pierre Chong lands,
>
> (2) "...In March 1980 the third defendants bought certain land...called 'Pierre Chong lands'," and;
>
> (3) in respect of the Mansfield lands, "... part of the proceeds of sale of the Pierre Chong lands was applied in paying the sums of Thirty Four Thousand Five Hundred Dollars ($34,500.00) and One Hundred Thousand Nine Hundred Fifty Dollars ($100,950.00) towards the price of the Mansfield property..",

are clearly referable to a transaction of the third respondent Company supportable only by reference to its accounts. These relevant documents had always been in possession of the respondents and particularly, the general ledger which was not delivered to the appellants until November, 1994. Consequently the evidence contained in those accounts was always available to the respondents.

Neither do I agree with counsel for the respondents that the amendments merely bring the pleadings in line with the evidence and documents filed. The evidence led before the learned trial judge far from supporting the amendments, was evidence from the appellants' witnesses in furtherance of the appellants' contention, as contained in their pleadings.

Furthermore, although counsel for the appellants referred to hundreds of documents in opening his case, only some of these documents were tendered in evidence, and correctly then specifically marked as exhibits, only at the time of their tender.

In so far as the learned trial judge in accepting the submissions of counsel for the respondents, granted the amendments:

> ".. consequential on:
>
> (a) evidence,

> (b) matters addressed in cross-examination of the first plaintiff and;
>
> (c) matters deponed to in examination in chief and elicited in cross-examination of the witness Chang",

he exercised his discretion wrongfully. The evidence then before the court and the amendments on the respondents' behalf were not in harmony.

Neither do suggestions in cross-examination of a witness suffice to elevate such suggestions to the status of "evidence".

A significant guiding principle was enunciated in **Rondel v. Worsley** [1967] 3 All E.R. 993 by Lord Pearce who at page 1017 said of the court's approach to amendments:

> "Where there appears to be good faith and a genuine case the court will allow extensive amendments almost up to the twelfth hour in order that the substance of a matter may fairly be tried. But when a party changes his story to meet difficulties, that fact is one of the matters to be taken into account."

An amendment should not be made if it is in conflict with and contrary to a specific allegation of fact previously made. For example in the instant case, the amendments relative to the ownership of funds which financed the purchases, the source of such funds and the consequential beneficial interest of the properties concerned are distinctly adverse to the former pleadings of the respondents, and cannot qualify as careless or negligent omissions, justifying the amendments.

In the **Ketteman** case (supra), an application for an amendment to pleading to include a new defence, after evidence was heard, was refused, in the circumstances of the case. Lord Griffiths said, at page 62,

> "There is a clear difference between allowing amendments to clarify the issues in dispute and those that permit a

> distinct defence to be raised for the first time. Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies."

Significantly, in **Baker Ltd vs Medway** (supra), ***Easton Ford Motor Co*** (supra) and even in the **Ketteman** case, (although the amendment was refused due to the circumstances of the conduct of the case and the lateness of the application), the amendments were permissible. None of them amounted to a reversal of specifically pleaded allegations of fact, but relied on factors additional to and complementary of those facts originally pleaded.

It is my view, that there exists in the amendments, an absence of good faith, which will not serve to determine the real controversy between the parties. I would allow this appeal.

DOWNER, JA.

In this difficult interlocutory appeal the appellants Gloria and Erle Moo Young who were plaintiffs in the court below seek to reverse the decision of Ellis J. who acceded to the contention of Geoffrey and Dorothy Chong the respondents that they were entitled to amend their defence to meet the averment and evidence of the Moo Youngs during the course of the trial. Leave to appeal was refused in the Court below but this Court granted leave to appeal on 26th October, 1999.

The Moo Youngs have brought a derivative action so as to claim two properties the Warehouse and the Mansfield lands which are now registered in the names of Geoffrey and Gloria Chong. These properties they contend ought properly to have been registered in the name of Family Foods Ltd. a company in which both parties were shareholders and directors. The Chongs were the majority shareholders in the company which operated a supermarket in St. Ann. The company is now in liquidation. A company speaks through its resolutions at the Board level and at general meetings of the shareholders. Prior to the resolution there ought to have been minutes and its financial transactions are reflected in accounts. Dorothy Chong's financial transactions with the Company would also have been reflected in accounting records. During the hearing of the appeal we were informed that Gloria Moo Young and Dorothy Chong are sisters.

The proceedings which gave rise to the amendment are set out concisely in the skeleton argument by the appellants. It reads thus:

> "1. The trial of this action commenced in October 1994; It was heard for two (2) days and adjourned to

> November 1994, when it continued for a further two (2) days. It was resumed in March 1996; evidence was taken over seven (7) days and in May 1996, evidence was taken over six (6) days. The matter came up again in April 1997, and the trial went on for nine (9) days. It was then adjourned. When the trial resumed in May 1997, the First and Second Defendants/Respondents applied for the amendments the subject matter of this Appeal.
>
> 2. At the time of the said Application the Plaintiffs/ Appellants had already called seven (7) witnesses. Six (6) of whom gave evidence in relation to what is described in the Pleadings as the Warehouse and the Mansfield lands and in the context of the issues raised in the pleadings in respect thereto. Five (5) of these witnesses were fully cross-examined according to the issues raised on the pleadings. The relevant witnesses were the First Appellant, Mrs. Gloria Moo-Young, Mr. David Lee, Mr. Eric Chapman, Mr. Michael Costa and Mr. Yuet Chang now deceased. Mr. Chang was being cross-examined when the adjournment was taken. He has since died."

The gist of the appellants' case was that during the course of the hearing below the appellants, the Moo Youngs, had met the Chongs' case as pleaded . In the face of this, the Chongs have sought to present a new defence which it is being contended was not permissible on principle or authority. It is helpful to evaluate the authorities which were cited by both sides in order to ascertain the legal background before turning to the pleadings in issue. Additionally, the grounds of appeal provide an introduction, against which the law and the amended pleadings are to be assessed. They read as follows:

> "AND FURTHER TAKE NOTICE that the Grounds of Appeal are:

(1) That the Order of the Learned Trial Judge dated the 8th day of October, 1998 allowing the First and Second Defendants/Respondents to amend their pleadings was a wrongful exercise by His Lordship of his discretion for the following reasons:-

(a) That by the said amendments the said Defendants/Respondents have been allowed to raise and pursue for the first time a case distinctly different from the case pleaded in May 1988 and pursued up to April 1997;

(b) That the application to amend was not made in good faith but was made to meet evidential difficulties faced by the Second Named Defendant/Respondent after the Plaintiffs/Appellants and their accountants had given evidence concerning factual assertions made by the Second Named Defendant/Respondent and supported by particulars sworn to by her.

(c) That the need for the amendments must have been abundantly clear to the said Defendants/Respondents when their Defence was settled in May 1988, when the case was started in 1994 and/or when it resumed in 1996 and again in 1997.

(d) That the amendments sought by the First and Second Defendants/Respondents did not arise as a result of mistake or carelessness but were made after the Second Named Defendant/Respondent had deliberately stated certain facts and had sworn to particulars in support of those facts.

(e) Alternatively, the amended Defence fails to plead material facts and merely raises arguments on hypotheses proffered by the said Defendants/Respondents.

(f) In the further alternative, the Amended Defence fails to plead material facts, asserts hypothetical situations and draws conclusions therefrom."

The contention of the respondents was reflected in the reasons propounded in the judgment of Ellis J., the Senior Puisne judge. It runs as follows:

> "I respectfully adopt the reasoning in Easton's case. I do so holding that the lateness of the application to amend here is not such as to inhibit the exercise of discretion to grant leave.
>
> A fortiori, the proposed amendments raise no new case and designed to clarify real issues between the parties.
>
> I would therefore grant leave to amend as prayed subject of course to the question of costs and the possible refining of the proposed amendments."

The Law

The evaluation of the authorities demonstrate that the issue of amendments of pleadings is in the discretion of the trial judge and that leave to appeal ought only to be granted in exceptional cases. It follows that this Court will only reverse a trial judge if he exercised his discretion on a wrong principle, or if his decision was not in the interests of justice.

The earliest of the authorities **Duprez v Veret** [1868] Vol. 1 **Courts of Probate and Divorce** L.R. 583 at 586-587 stated:

> "... but the facts were well known to him all along, and it would not be fair to allow him now to bring in a fresh set of pleas founded on those facts only which were within his knowledge in the first instance. I reject the motion."

In an application for leave to appeal the learned judge continued thus:

> "Sir J.P. WILDE gave leave to appeal as the question was an important one, but only as regards his refusal to stay the proceedings; the other point, for leave to amend, was a mere matter of discretion, and not the proper subject of an appeal. He declined to order the suspension of the proceedings pending the appeal."

Here it is important to note that in the instant case the application to amend was made three years after the trial commenced.

Turning to the Court of Chancery, the decision of **Collette v. Goode** [1878] 7 Ch. D.842 emphasises the reluctance to grant amendments even when the point emerges on the Plaintiffs' evidence. Fry J. said at p. 847:

> "I think that the real question in controversy is whether **Hopwood & Crew** have or have not acted in accordance with the bargain between them and the Plaintiff, and that I should be bound to allow any amendment necessary for the determination of that question. It is quite true that the point which the Defendant now desires to raise has come out for the first time in the Plaintiff's evidence. But I do not think I ought to allow an amendment for the mere purpose of enabling the defendant to raise a purely technical objection to the Plaintiff's title to sue, an objection which the Defendant never intended to raise, but of which he now adroitly seeks to avail himself. I think that the Plaintiff had a right to rely upon that which is in effect an admission in the statement of defence, that, in every respect but that one which is mentioned, the registration was duly made. I therefore, refuse to give leave to amend.
>
> The action was ultimately compromised."

In the instant case the real question of controversy up to three years after the case commenced was whether the Warehouse and Mansfield lands were bought out of the resources of Dorothy as she contended in her Defence or out of the Company's resources as pleaded by the Moo Youngs.

Two other cases from the Court of Chancery emphasise the points made previously. **Hipgrave v. Case** [1885] 28 Ch. D. 356 was a case which reached the Court of Appeal. The panel was the Earl of Selborne, L.C., Brett M.R. and Cotton L.J. This

was a case where the plaintiff sought to amend his statement of claim in the Court of Appeal and the Earl of Selborne delivering the leading judgment said at pp 361 – 362:

> "The Defendant, in his statement of defence, alleges, besides other matters which it is unnecessary to go into, that the Plaintiff was not able and willing to perform the contract. Such being the state of the record, the Plaintiff puts it out of his power to perform the contract by selling the property, and so disables himself from doing that which by his pleadings he offers to do. He does not, however, then alter his pleadings or make a new case. It is therefore by his own action entirely that he is placed in his present position. I cannot regard this as a merely technical matter. It appears to me to be a matter of substance. The defendant comes to the trial to meet the case set up by the Plaintiff upon the record, viz., a case entitling the Plaintiff to specific performance or to damages in substitution for performance. I think we are regarding the substance of the case in holding the Plaintiff bound by the form of the claim which he has deliberately elected to make, and in not transforming his claim into a different claim, and the pleadings into different pleadings, at this stage of the proceedings. For these reasons I do not think we ought to give the relief that is now asked for. I also think that it is not for us to express any opinion whether any other form of action will now lie, and that we certainly ought not to reserve the Plaintiff liberty to bring an action for damages, a course which I am sure the Court of Chancery would not have taken in such a case as this before **Lord Cairns's Act."**

Then Brett, M.R. said at 362:

> "I agree. I think that, the Plaintiff having by the form of his pleadings and by his conduct of the case elected to put his claim as one for specific performance, with an alternative claim for damages merely as a substitute for specific performance in case for any reason the Court should feel itself unable to give effect to his prayer for specific performance, the Plaintiff cannot now be allowed to change the whole nature of his action by turning it into an ordinary action for damages as at Common Law." [Emphasis supplied]

Cotton, L.J. was less emphatic but the essence of his ruling is the same. The Lord Justice said at p. 362:

> "I take it that the Plaintiff's claim involves an offer of specific performance on his part, and that he thereby alleges that he is still willing to perform the contract. The essence of his action is the claim for specific performance, and I think the claim for damages must be regarded as merely an alternative claim to meet the possibility of any difficulty arising in Equity with regard to his right to a decree for specific performance. The action being, therefore, essentially an action for specific performance, and continuing to be so up to the hearing, I do not think that any relief can be granted in such an action, when it appears that the Plaintiff has himself prevented specific performance by selling the property. I feel some doubt on the question whether an amendment ought to be allowed, but on the whole I think that, as it was not asked for at the hearing, we ought not to grant leave to amend at the present stage of the proceedings."

Be it noted that the Moo Youngs came to the trial to meet the pleaded Defence and the Further and Better Particulars.

Sometimes there are more numerous citations of authorities in this Court than in the Court below. This was not so in the instant case which was heard on May 1, 2, 6, 9 1997, and judgment delivered on October 8, 1998. Here is how the learned trial judge described Mr. Scharschmidt's efforts:

> "Learned Queen's Counsel relied on several decided cases and passages from **Bullen and Lake on Pleadings, Odgers Principles of Pleading and Practice.**
>
> The industry and research ability of Counsel on this matter attract my approbation and when I do not refer to each case in detail that is not to be interpreted as slighting Counsel's industry."

Moss v. Malings [1886] 33 Ch D 603 shows the firmness with which judges at first instances deal with unmeritorious claims for amendments. North J. said at page 604:

> "I cannot allow the Plaintiff to be recalled and further cross-examined for the purpose of showing that the Defendant has a case for amending his particulars of objection. At present there is no evidence before me to justify an application for leave to amend the particulars. In **Renard v Levinstein (13 W.R. 229; 11 L.T. (N.S.) 505)** the defendant had made a case. **Daw v Eley (Law Rep. 1 Eq. 38)** is to some extent an authority against the application. But I could only grant it if the Defendant showed that he could not with reasonable diligence have discovered the new facts sooner. This he has not done. I must therefore, refuse the application."

In the instant case the accounts reflecting the financial transaction of Dorothy Chong the second defendant and Family Foods Ltd. were under the control of the Chongs as majority shareholders and directors.

G.L. Baker, Ltd. v. Medway Building and Supplies, Ltd. [1958] 3 All E.R. 540 was the last of the cited cases prior to two cases from the House of Lords laying down important principles of limitation on the issue of amendments. The Court of Appeal overruled the trial judge's refusal to grant an amendment and ordered a new trial. Although cited by both sides, the respondents put much reliance on the principle enunciated in the case. To my mind the important statement of principle in this case was stated by Jenkins L.J. thus at page 545:

> "One cannot regard this simply as a matter of carelessness or at all as a matter of a party, if I may use a colloquialism, sitting on the fence with an amendment in reserve to be produced if the case did not go well on the existing pleading. It was a genuine misunderstanding by an experienced pleader of a somewhat obscurely formulated statement of claim."

It is clear that an important factor to be taken into account was the stage at which the application was made. The learned Lord Justice said at page 549:

> "If the point was taken as soon as it was realised on the case being opened, then all the more reason, I should have thought, to have granted leave to amend."

If the Statement of Claim was obscurely formulated, or there was a misunderstanding on the part of counsel who pleaded the defence, then those would have been factors to take into account. But those facts were not present in the instant case.

Be it noted however, that by citing the following passage Jenkins L.J. suggests that the refusal of an amendment could be decided as a preliminary point of law. The passage at p 548 runs thus:

> "I can pass over very shortly **Ellis v. Manchester Carriage Co.** [(1876), 2 C.P.D. 13], for that was, as I understand it, a case in which there was an action for the obstruction of the plaintiff's lights and the plaintiff sought to amend by introducing a claim that the building obstructing his lights also obstructed a right of way to which he was entitled. The court held, not unnaturally, that that was an entirely different claim and they refused to grant leave to raise it by amendment. GROVE, J., said (ibid., at p. 16):
>
> > 'The amendment asked was, I think, properly refused: it would have introduced an entirely different case from that which the defendants came prepared to meet. So far as the lights were concerned, the defendants had a clear right to obstruct them'."

The Court of Appeal granted the prayer for amendment in this case before them when no evidence had been led.

Wilmer L.J. was of the same mind He said at p. 553:

> "I should like to add this, and I do so without wishing to be thought to be in any way expressing any view as to the merits of the dispute which emerged:..."

This suggests that in some instances the seeking of leave to amend is in the nature of a preliminary point of law. This is a theme running through the cases and I shall avoid as much as possible making any comments on the evidence of the instant case as it is part-heard.

Rondel v. Worsley (1967) 3 All E.R. 1017 is the first of the authorities cited where there is a pronouncement coming from the highest Court. Lord Pearce stated the principle in an extreme case where a pleading has been struck out and there was a prayer for an amendment. At page 1017 His Lordship said:

> "By the time the case came to the Court of Appeal the appellant had had legal advice and produced a re-amended statement of claim which now will hold water as a legal document, whether or not there is any substance of truth behind it. That document shows that, contrary to what the appellant had previously maintained, he is now seeking to say that but for his counsel's negligence he would never have been convicted at all. It is admittedly a matter of discretion whether, when a pleading is struck out, the court will give leave to amend. Where there appears to be good faith and a genuine case the court will allow extensive amendments almost up to the twelfth hour in order that the substance of a matter may fairly be tried. But when a party changes his story to meet difficulties, that fact is one of the matters to be taken into account.
>
> In **Lawrence v. Lord Norreys (1888), 39 Ch.D. 213**,a case which was struck out under the inherent jurisdiction – Fry, L.J. said **(1888), 39 Ch.D. at p. 237.**
>
> > 'Then in the next place we have the history of these pleadings. We have the evolution of the plaintiff's claim in its struggle for existence, and we find it gradually growing up and developing as the difficulties are pointed out by the judges of the successive courts before which it comes. The impression produced on my mind by that history is

> that we have here the evolution of a myth, and not a gradual unfolding of real facts.'
>
> The majority of the Court of Appeal **[1966] 3 All E.R. 657; [1967] 1 Q.B. 443** (since LORD DENNING, M.R. did not deal expressly with the point) held that no leave should be given to put in a re-amended statement of claim and that the action should therefore be dismissed. SALMON, L.J. said [1966] **3 All E.R. at p. 674, letter A; [1967] 1 Q.B. at p. 516**.
>
> 'I agree with DANCKWERTS, L.J. that it would be most unjust at this stage to allow this re-amended statement of claim to be delivered some seven and a half years after the plaintiff's claim is alleged to have arisen in an action which is clearly as devoid of merit as it is of any prospect of success'."

A later decision of the House of Lords frequently quoted is **Ketteman and others v Hansel Properties Ltd** [1988] 1 All ER 38. Lord Keith who was in the minority on the issue of amendment said at p. 49:

> "In my opinion, no sensible distinction is to be drawn for this purpose between an amendment seeking to plead limitation and any other sort of amendment. I am not aware of any authority for drawing such a distinction, nor have I experience of any practice to that effect."

Then Lord Griffiths who delivered the principal speech for the majority said at page 62:

> "This was not a case in which an application had been made to amend during the final speeches and the court was not considering the special nature of a limitation defence. Furthermore, whatever may have been the rule of conduct a hundred years ago, today it is not the practice invariably to allow a defence which is wholly different from that pleaded to be raised by amendment at the end of the trial even on terms than an adjournment is granted and that the defendant pays all the costs thrown away. There is a clear difference between allowing amendments to clarify the issues in dispute and those that permit a distinct defence to be raised for the first time."

Then His Lordship continued thus on the same page:

> "Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear on the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposed on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other. Furthermore, to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence."

His Lordship concluded his statement of principle as follows:

> "Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by allowing an amendment at a very late stage of the proceedings."

A case which shows how the discretion of the court ought to be exercised where there was an omission of the defendants to plead a specific point which required no new evidence is **Easton v Ford Motor Co Ltd** [1993] 4 All ER 257. Another feature of this case was that the delays were due to the way the plaintiffs conducted that case. The application to amend was taken before the trial began. Dillon L.J. at p. 264 said:

> "Furthermore, the judge's approach disregards the passage from Fallon's affidavit which he had read, explaining how Mr. Fallon found this obviously relevant point which had

> been previously overlooked. Given that the judge is looking at the case against an erroneous, in my view, assessment of the factual situation it is open to this court to review the decision which he made in the intended exercise of his discretion. Beyond that, however, in my judgment he has misdirected himself in attaching so much importance to the factors to which Lord Griffiths drew attention, for assessing where justice lies, while wholly failing to take into account that this action is nowhere near ready for trial. Quite obviously, there is more to be said for refusing an amendment when the action is in the course of trial or very nearly ready for trial."

This passage must be read in conjunction with an earlier passage which reads thus at p. 261:

> "The position appears to be that, though it is obvious, when the application form and the booklet are looked at, that the 'finality clause' is part of the contract and is something that should have been pleaded, nobody happened to notice it when the papers were being prepared, presumably by the solicitors, for submission to counsel, nor was it spotted by counsel when the pleadings was originally settled. I can see no reason for supposing that there was anything sinister in the fact that the 'finality clause' was not pleaded by counsel in the original pleading and I have no reason to doubt Mr. Fallon's statement in his affidavit that the 'finality clause' and its effect were appreciated by Mr. Fallon for the first time. They were indeed, as is clear from the evidence, known to Mr. Easton and his solicitors at the time that the proceedings were instituted."

Ellis J placed great reliance on **Easton's** case but as will be seen he thought the amendment was granted during the course of the trial when the Court of Appeal granted it before the hearing on the merits had commenced.

There is yet another case after the two seminal cases in the House of Lords, namely **Hancock Shipping Co Ltd v Kawasaki Heavy Industries Ltd.** [1992] 3 All ER 132. This case must be treated with caution as the 1964 provisions relating to amendments after the limitation period are not in force in this jurisdiction. However,

the principles governing the exercise of discretion are unchanged. Here is how Staughton LJ. at page 137 refers to the change:

> "Paragraph 20 is the successor to RSC 1883 Ord 28, r 1, which read:
>
> > 'The Court or a Judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings, in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties'."

This provision is identical with Sec. 259 of our Civil Procedure Code Law. Then the learned Lord Justice continues thus:

> "The change came into force on 1 October 1964 (See RSC 1964, SI 1964/1213).
>
> The courts had construded the old rule in such a way that a plaintiff would not be allowed to amend by setting up fresh claims in respect of causes of action which, since the issue of the writ, had become barred by a statute of limitation **(Brickfield Properties Ltd. v Newton, Rosebell Holdings Ltd v Newton** [1971] 3 All ER 328 at 341, [1971] 1 WLR 862 at 878 per Edmund Davies LJ). In other respects there had, since the late nineteenth century, been a liberal attitude to amendments, although the practice may not always have followed the pronouncements of the Court of Appeal. It is now scarcely necessary to quote from the judgment of Brett MR in **Claraped & Co v Commercial Union Association** (1883) 32 WR 262 at 263:
>
> > ' . . the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated in costs. . .'
>
> That must, of course, now be read in the light of the important observations of Lord Griffiths in **Ketteman v Hansel Properties Ltd.** [1988] 1 All ER 38, [1987] AC 189."

Be it noted that this application was made in the Commercial Court before trial. It was therefore in the nature of a preliminary point of law. Here is the relevant passage at pp 141-142:

> "Thus far the judge would, nevertheless, have allowed the amendments. What persuaded him not to do so was a very late affidavit of Mr. Davis, another of the builders' solicitors, dealing with their system for the destruction of documents. This has to be read in the light of his earlier evidence that the builders' principal designer, Mr. Shimizu, died in June 1988 – eight months after the original points of claim were served – and that others involved either had no recollection of events or could not even be identified.
>
> The affidavit of Mr. Davis has been criticized in some detail. But in my judgment Webster J was entitled to conclude that some relevant documents had been destroyed between October 1987 and July 1990, although others would have been destroyed earlier and others remained in existence. The judge accepted that evidence. He said that the owners' counsel had been unable to persuade him that he –
>
> > 'should not take at its face value that evidence of Mr. Davis or the suggestion implicit in it that those documents or some of them would be relevant to the issues of negligence.'
>
> As I say, he was entitled to reach that conclusion.
>
> For my part I do not think that we should interfere with the judge's exercise of his discretion solely on the ground that he did not expressly consider whether the builders had made investigations into the design history between 1984 and 1987, or whether they should have done. After all, he would have decided in favour of the owners, as he said, but for the affidavit of Mr. Davis dealing with destruction of documents.
>
> This application received lengthy and detailed consideration in the Commercial Court, where the maximum estimate allowed for an application to amend pleadings (absent special leave) is one hour. I do not think that this court should interfere too readily with the conclusions thus reached.

> So I would dismiss this appeal so far as it concerns leave to amend by pleading breach of a duty of care, either in contract or in tort."

We can now turn to the judgment of Ellis J.

What were the circumstances which gave rise to the grant of an amendment?

The reasoning of the senior puisne judge, Ellis J. merits close scrutiny in order to determine whether his discretion was properly exercised. A feature to be recognised from the outset is that an amendment has a retrospective effect. It was put this way by Hodson L.J. in **Warner v. Simpson** [1959] 1 Q.B. 297 at 321-322:

> "Once pleadings are amended, what stood before amendment is no longer material before the court and no longer defines the issues to be tried. Here the defendant has obtained leave to amend, and there has been no appeal against that order; and, whatever may have taken place at the hearing of the application to amend, the court must, I conceive, regard the pleadings as they stand, the purpose of amendment being to determine the real question in controversy between the parties: see **Sneade v. Wotherton Barytes and Lead Mining Co. [1904] 1 K.B. 295; 20 T.L.R. 183** where Lord Collins M.R. said at 297: 'It appears to me that the writ as amended becomes for this purpose the original commencement to the action'."

The other significant feature is that on amendment the party applying for amendments do so in good faith i.e. for the purpose of raising 'the real question in controversy between the parties'. Good faith is also important because parties are bound by their pleadings.

In the course of his judgment Ellis J. stated:

> "The plaintiffs ought not to be heard to say they are surprised since no new case is being sought to be presented by the amendments. It was the cross examination of the plaintiffs accounting documents which gave answers demanding of the amendments so as to clarify the issue."

It must be borne out that the plaintiffs who are the appellants were minority shareholders in Family Foods Ltd., the third respondent. The accounting record namely the general ledger of the Company which impelled the respondent Chongs to request an amendment was under their control as they were the majority shareholders. The general ledger was not the plaintiffs' accounting document as the learned judge found.

The other accounting records were those of Dorothy Chong. Further, what the respondent Chongs now sought to do was to combine the accounts of the Chongs although their original defence and further and better particulars which answered the statement of claim of the Moo Youngs relied on Dorothy Chong's financial resources as reflected in the accounts.

It is clear that the request to combine accounts when there was a previous reliance on one account is a new case. The appellants suggest that the original defence had been met. This would require an assessment of evidence after all the evidence was in. It is not the function of this Court to decide this point. Both sides carried out an elaborate analysis of the evidence so far, but it certainly is not clear to me what was accepted as evidence by the learned judge below and what was put in as agreed bundles. It can hardly be said that to grant an amendment in such circumstances meets the justice of the case as it would be unfair to the plaintiff Moo Youngs.

What is beyond dispute is that the amendments were sought in May 1997 in a trial which commenced in October 1994 when seven witnesses had already deponed on behalf of the plaintiffs. Be it noted that when a trial commences in this jurisdiction and is part-heard, the subsequent trial date depends on dates negotiated by counsel on both sides with the Registrar and the trial dates are dependent on the availability of the trial

judge. There is as yet no specific specialisation in the Supreme Court, so a judge doing a long and complex commercial case one day may be on circuit the next day in a rural parish presiding over a criminal trial.

Continuing his narrative of events the learned judge continued by adverting to the submission of counsel for the plaintiffs thus:

> "He contended that the facts which founded the application to amend appeared in the accounts D1, D1A and D2 which were contained in the general ledger. That ledger was delivered to Rattray, Patterson and Rattray in November, 1994. He made reference to the evidence and submitted that the proposed amendment if granted would raise a new case in relation to the figure of $7000. Moreover, the paragraphs 24 and 25 separated the defendants and it would now be late to join their accounts as one."

The learned judge referred to the substance of the plaintiff's claims thus:

> "The amendments ought not to be granted as they only seek to extricate the defendants from their difficulty consequent upon the evidence given by the witness Chong."

Be it noted that Yvet Chang was a qualified accountant whose opinion was that having regard to Dorothy Chong's accounts she could not have purchased the Warehouse and the Mansfield lands in question in the way she averred in her defence. Further, he was cross-examined and it was his answer which gave rise to an application for amendment. This was not the cross- examination envisaged in **Farrell v Secretary of State** [1980] 1 WLR 172 at 179 which could have given rise to a successful plea for an amendment. If the plaintiffs or their witnesses gave admissions under cross-examination, that may warrant an amendment to pleadings. That was not the position in the instant case.

Then the kernel of the judge's reasons are to be found in the following passages:

> "As a case progresses, changes in the parties' knowledge of the case may occur. Such changes may occur on cross

> examination or otherwise and will make it necessary to apply for amendments to pleadings."

Pleadings are meant to define in advance the issues which are in dispute at the trial. If cross-examination of the plaintiffs' case compels the defendant to alter his defence, then this may be an indication that the plaintiffs are succeeding in the case they pleaded. In our adversarial proceedings the defendants are not permitted at that stage to present a new case in the middle of a trial.

It is arguable as Mr. Scharschmidt, Q.C. , contended that Ellis J. misunderstood the reasoning in **Easton's** case. The learned judge said :

> "In **Easton v Ford Motor Company**, the Court of Appeal through Dillon L.J. granted very late application to amend."

But we know that the amendment was granted at the commencement of the trial. The learned judge continued thus:

> "I respectfully adopt the reasoning in **Easton's case**. I do so holding that the lateness of the application to amend here is not such as to inhibit the exercise of discretion to grant leave."

It is now necessary to examine the Statement of Claim, the Defence and the Further and Better Particulars and amendments granted by Ellis J to ascertain if the learned judge exercised his discretion correctly.

The original pleadings and the amendments which were granted by Ellis J.

The material facts in the Moo Youngs' case as plaintiffs was that the Warehouse lands which it was agreed to purchase for the company was fraudulently registered in the name of he second defendant Dorothy Chong and the relief sought was that the

property be transferred to the Company. Here are the averments and the prayer of the Moo Youngs:

"PARTICULARS OF FRAUD

> 7 (1) a. During or around the year 1979 negotiations were conducted by the first and second Defendants or either of them acting with the knowledge and consent of the Plaintiffs for the purchase of property with a warehouse thereon situated at Ocho Rios, Saint Ann, being the property registered at Volume 1147 Folio 848 of the Register Book of Titles. At all material times it was agreed and understood by the Plaintiffs and the first and second Defendants that the property would be purchased by or on behalf of the third Defendant as beneficial owner thereof. The said property was duly purchased for the sum of $70,000.00 and the deposit therefor amounting to $7,000.00 was paid by the third Defendant with monies belonging to the third Defendant. The first and second Defendants in breach of their duty to the third Defendant and in fraud of the third Defendant and of the Plaintiffs caused the property to be registered in the name of the first Defendant thereby depriving the third Defendant of the legal ownership and of the rights and benefits as owner."

In this regard the prayer of the Moo Youngs as regards the Warehouse lands is important. It reads:

"(10) **AND THE PLAINTIFFS CLAIM:**

> (1) (a) that the first Defendant do transfer without charge the property referred to at paragraph 7 (1) (a) hereof registered at Volume 1147 Folio 848 of the Register Book of Titles to the third Defendant as fee simple owner thereof free from encumbrances save and except such restrictive covenants (if any) as are registered on the Title;
>
> (b) that the first Defendant or the first and second Defendants bear the transfer tax and stamp duties and all other costs of or incidental to the said transfer;
>
> (c) that the first Defendant or the first and second Defendants account to the third Defendant for all income or other benefits whatsoever received or which

> ought to have been received by the first and second Defendants from or in relation to the said property and pay to the third Defendant all sums so determined as payable."

It is necessary to appreciate that there were two other land transactions in issue namely the Pierre Chong lands and the Mansfield property. Paragraph 7 (2) of the Statement of Claim reads:

> "7(2) In March, 1980 the third Defendant bought certain lands situate at Ocho Rios from (hereinafter called "Pierre Chong Lands") which were registered at Volume 554 Folio 92 and Volume 652 Folio 31 of the Register Book of Titles. The Pierre Chong lands were sold in or around February 1985 and the first and second Defendants acting for and on behalf of the third Defendant negotiated for and purchased lands known as Mansfield property being part of the lands formerly registered at Volume 652 Folio 31 now registered at Volume 1201 Folio 466 of the Register Book of Titles and being lands situate at the corner of Dacosta Drive and Buckfield Road, Ocho Rios and being by estimation 2 acres and 25 perches more or less. The purchase price of the Mansfield property was some $900,000.00 and part of the proceeds of sale of the Pierre Chong lands was applied in paying the sums of $34,050.00 and $100,950.00 towards the price of the Mansfield property. The balance of the net proceeds of sale of the Pierre Chong lands was earmarked to be applied in paying for the Mansfield property and the sum of $958,315.37 therefrom was lodged to a deposit account at the National Commercial Bank, Ocho Rios on or around the 29th of May, 1985 with the intention that it should be applied when needed towards the purchase of the Mansfield property. In fraud of the third Defendant and of the Plaintiffs and in breach of their duty to the third Defendant, the first and second Defendants secured that the Mansfield property be transferred to the second Defendant and registered in her name and carried out sundry manoeuvres to make it appear as if the Mansfield property was purchased by them for themselves and not by the third Defendant or on behalf of the third Defendant or by them as the Directors and/or agents and/or servants of the third Defendant for the third Defendant.

> At all material times the first and second Defendants knew that they acted for and on behalf of or were in duty bound to act for and on behalf of the third Defendant and as Director and/or agent and/or servants of the third Defendant and that they were depriving the third Defendant of the legal ownership and of the benefit of the property to which the third Defendant was entitled."

As for the prayer in respect of the Mansfield lands it was as follows:

> "(10) AND THE PLAINTIFFS CLAIM:
>
> (2) (a) that in relation to paragraph 7 (2) hereof the second Defendant do transfer to the third Defendant the Mansfield property without charge and that the second Defendant and/or the first and second Defendants bear the transfer and stamp duties and all other costs of or incidental to the said transfer;
>
> (b) that in relation to 7(2) that the first Defendant or the first and second Defendants account to the third Defendant for all income or other benefits whatsoever received or which ought to have been received by the first and second Defendants from or in relation to the said property and pay to the third Defendant all sums so determined as payable."

It must have been anticipated that the evidence that would be brought to support these paragraphs in the Statement of Claim would include the relevant accounts of the company and that of Dorothy Chong the second and third defendants respectively. On the other hand it must have been logical to expect that there would have been a defence which would state the material facts which answered paragraph 7(1) (a) and 7(2) of the Statement of Claim above. Be it noted that the Defence would have indicated to the Moo Youngs the evidence that they would adduce to repel the Statement of Claim and since an amendment has a retrospective effect, to set up a new defence could not be in

the interest of justice. So what was the defence at the commencement of the trial? Here it is:

> "24. As to paragraph 7 (1) and 7(2) generally, the First and Second Defendants state that if, which is denied, for the reasons set out above the Plaintiffs conceivably had any interest therein or ***locus standi*** to pursue the issue then the Defendants state that both the warehouse property referred to in paragraph 7 (1) and the Pierre Chong lands referred to were the subject matter of negotiations to purchase generally at or about the same time. It was intended that Pierre Chong lands would be acquired or were being acquired by/for the Third Defendant. The deposit in respect thereof was, however, paid by the Second Defendant from her own resources and not by the Third Defendant. The warehouse lands purchase was being effected by the Second Defendant in her personal capacity and on her own behalf and for her sole benefit and not by nor for the Third Defendant."

This is a clear statement that Dorothy Chong was the moving spirit in respect of the Warehouse lands. The Defence continues thus:

> "25. The deposit in respect thereof to wit, the sum of Seven Thousand Dollars ($7,000.00) was paid by cheque drawn on the company's account which cheque was by way of reimbursement in part of the deposit paid by the Second Defendant on the Pierre Chong lands which lands were being purchased for/by and in the name of the Third Defendant"

Again this is a clear statement as to how these two land transfers were financed and it is obvious that accounting records would have to be adduced to support the pleaded defence.

> "26. The First and Second Defendant state that the said transaction was by way of convenience and did not alter in any way the intended legal and beneficial interest by the Third Defendant in the Pierre Chong lands and the Second Defendant in the warehouse lands.

27. The Defendants say that all the accounts as between the First and Second Defendants on the one hand and the Third Defendants were thereafter adjusted and/or settled."

This was the defence settled by counsel and to alter it so as to set up a new defence ought not to be permitted. A significant feature of these averments was the reference to accounts which were adjusted and settled. It is these accounts which were the answer to the Moo Youngs' claims. To reiterate, pleadings are designed to state beforehand the issues to be adjudicated on at the trial.

There was originally an emphatic averment that the deposit was paid for by a cheque drawn on the company but it was later stated in the amendment that it was to reimburse Dorothy Chong for a loan previously made. As regards the Mansfield lands it was also averred that this property was paid for by Dorothy Chong out of her own resources and for her own use. It was therefore open to the Moo Youngs to adduce evidence by way of accounting records of Family Foods Ltd. and the accounts of Dorothy Chong kept at Myers Fletcher and Gordon to show that these transactions were not as stated in the Defence. As to the weight of that evidence, that is a matter for the trial judge and it ought to be examined with particularity in those proceedings. Since Yuet Chang who gave expert evidence for the Moo Youngs died before his cross-examination was completed, **Phipson on Evidence** 14th edition 1990 at paragraph 12-11 (vi) captioned **Death, etc. before Cross-examination** might prove useful in determining the weight to be attributed to his evidence.

What is the nature of the Defence on these two land transactions as adumbrated in the amendments to the Defence granted by Ellis J? Here are the relevant paragraphs:

> "24. As to paragraphs 7 (1) and 7 (2) generally, the First and Second Defendants state that if, which is denied, for the reasons set out above the Plaintiffs conceivably had any interest therein or ***locus standi*** to pursue the issue raised then the Defendants state that both the warehouse property referred to in paragraph 7 (1) and the Pierre Chong lands referred to were the subject matter of negotiations to purchase generally at or about the same time. The Warehouse lands purchase was being effected by the First and Second Defendants in their personal capacity and on their own behalf and for their sole benefit and not by nor for the Third Defendant. Title was taken in the name of the First and Second Defendants."

Here we see a significant shift as the amendment now joins the first and second defendants as the purchasers of the Warehouse lands. Why was this done and was it done in good faith?

Then the amended Defence continued thus:

> "24A. The First and Second Defendants state that the current accounts/Shareholders loan/Loan accounts of the Moo-Youngs and the Chongs respectively fall to be treated or alternatively regarded as joint accounts and all transactions as of the Chongs or Moo-Youngs in that capacity entered in a single account. More especially the First and Second Defendants state that the account of the Moo-Youngs was treated as one and entered in the ledger of the Third Defendant as account D2 and accordingly the account of the Chongs would fall to be entered/treated or regarded in an identical/similar manner."

Certainly, this is not pleading material facts but an argument as to how accounts ought to be treated and this is a pattern that is repeated in almost all the averments. Then 24B reads:

> "24B. The First and Second Defendants state that the failure of the Third Defendants to so treat the transactions by the Chongs as referable to a single account of the Chongs does not detract from nor alter the intrinsic/de facto circumstance that the accounts (if separated) fall to to be combined and to which all credits and debits must be

> entered and balances accordingly ascertained and/or struck from time to time."

Mr. Scharschmidt Q.C. for the plaintiff Moo-Youngs took objections to these paragraphs both as to form and to substance. As to form he submitted that all the amendments sought were not pleadings as to material facts, but arguments, reasons, theories, conclusions, inferences and otherwise extraneous material. He cited **Atkins Court Forms** Vol. 32 1992 pp 12-19 to support his submission. A useful summary is to be found on p.12 which reads thus:

> "An allegation which amounts to pleading evidence ought to be struck out. See **Merchant and Manufacturers Insurance Co. Ltd. v. Davies** [1938] 1 K.B. 697 at 714 and [1937] 2 All E R 767 at 769 C.A per Lord Green M.R."

I have examined all the amendments granted by the learned judge and I would strike them out on this basis.

So considered the grounds of appeal at 1 (e) and (f) ought to be successful. For ease of reference I will restate these grounds. They read:

> "1 (e)Alternatively, the amended Defence fails to plead material facts and merely raises arguments on hypotheses proferred by the said Defendants/Respondents
>
> (f) In the further alternative, the Amended Defence fails to plead material facts, asserts hypothetical situations and draws conclusions therefrom."

A point to be made is that all the amendments could have been struck out by taking a preliminary point of law on this basis.

To illustrate the basic flaws in these amendments I will cite the remaining amendments of paragraph 24. They read as follows:

"24. It was originally intended by the First and Second Defendants that the Pierre Chong lands would be acquired by the First and Second Defendants on their own behalf and for their sole use and benefit and accordingly the First and Second Defendants made a written offer dated October 29 1979 to the Bank of Commerce Jamaica Ltd together with a payment of $10,000 by way of a deposit and on terms and conditions set out therein. The said offer was accepted and pursuant to the conditions thereof a further payment of $10,000 was made in November 1979 by the First and Second Defendants. On or about March 27 1980 the First and Second Defendants made an additional payment of $10,000.00.

24D. The First and Second Defendants subsequent to acceptance of their offer by the Bank of Commerce Jamaica Ltd as directors of the Third Defendant caused the said agreement for sale to be entered into between the Bank of Commerce Jamaica Ltd and the Third Defendant (instead of themselves and thereby giving the benefit of the contract to the Third Defendant) upon the terms and conditions set out in the agreement made on the 25th of March, 1980. The Third Defendant subsequent to the acceptance of the said offer and prior to March 25, 1980 made a payment in the sum of $10,000.00.

24E. In the premises the First and Second Defendants state that the account D1A in the name of the Second Defendant in the ledger of the Third Defendant ought to be, have been and/or must be deemed to be combined with account D1 in the name of the First Defendant more especially as the balance was transferred on the 31st October, 1981 thereby creating a single account. Still further, the First and Second Defendants say that the entry recorded in the ledger account D1A on the credit side of Forty Thousand Dollars ($40,000.00) should be in the sum of Thirty Thousand Dollars ($30,000.00) and the balance of Ten Thousand Dollars ($10,000.00) credited to the Third Defendant (all in respect of the Pierre Chong land).

24F. Still further, the First and Second Defendants state that the debit of Thirty Thousand Dollars ($30,000.00) as at "31st October 1981 – To? Land – B11 Loan" was incorrectly entered in the said account D1A- in the name Mrs D Chong and should correctly have been debited to Gregann Ltd (G1) thereby resulting in an enhanced credit

> balance of $21,000 instead of $1,000.00 being transferred to the account D1 – G Chong and thereby closing the account D1A in the books of the Third Defendant as at 31st October, 1981 and creating a single account."

It will be necessary to return to the narrative of these accounts when dealing with grounds 1(a) (b) (c) and (d)

Turning to the amendments sought at paragraph 25, bearing in mind that I would strike out all the amendments on the basis that they do not plead material facts, it is proposed to show that they presented an entirely new case, and therefore, were not made in good faith. It must be reiterated that since these amendments were granted they have a retrospective effect. It means that the plaintiffs would also have to amend to make a new case. The grounds of appeal at 1(a) (b) (c) and (d) are repeated for easy reference to show how these amendments as well as those at paragraphs 25 are out of accord with the authorities previously cited. Here are the grounds of appeal:

> "(1) (a) That by the said amendments the said Defendants/Respondents have been allowed to raise and pursue for the first time a case distinctly different from the case pleaded in May 1988 and pursued up to April 1997;
>
> (b) That the application to amend was not made in good faith but was made to meet evidential difficulties faced by the Second Named Defendant/Respondent after the Plaintiffs/Appellants and their accountants had given evidence concerning factual assertions made by the Second Named Defendant/Respondent and supported by particulars sworn to by her.
>
> (c) That the need for the amendments must have been abundantly clear to the said Defendants/Respondents when their Defence was settled in May 1988 when the case was started in 1994 and/or when it resumed in 1996 and again in 1997.

(d) That the amendments sought by the First and Second Defendants/Respondents did not arise as a result of mistake or carelessness but were made after the Second Named Defendant/Respondent had deliberately stated certain facts and had sworn to particulars in support of those facts"

As regards ground 1 (b) I do not intend to go into the evidence as its weight must be assessed by the trial judge after hearing from the defence. I prefer to stick to the pleadings and state that such a fundamental change in the pleadings could not have been made in good faith.

The amendment granted at paragraph 25 reads:

"25. The deposit in respect of the warehouse purchase, to wit, the sum, of Seven Thousand Dollars ($7,000.00) was paid by cheque drawn on the company's account which cheque was by way of reimbursement in part of the sums paid by the First and Second Defendants on the Pierre Chong lands as set out in paragraphs grouped 24 herein.

25A. Further and/or alternatively, the First and Second Defendants state that from the beginning of the operations of the Third Defendant and continuously thereafter and at all material times and more particularly during October/ November 1979 and thereafter the Third Defendant was indebted to the First and/or Second Defendants in sums substantially in excess of Seven Thousand Dollars ($7,000.00), the amount paid by way of deposit by cheque drawn on the Third Defendant on the purchase of the Warehouse land for the sole purpose and benefit of the First and Second Defendants.

25B. The Defendants state that the financial statements of the Third Defendant confirmed this in that it records:

Year ending October 1975

Loans by Directors – Mr and Mrs Geoffrey Chong $20,626.24

Year ending October 1976
Loans by Directors- Mrs and Mrs Chong $18,726.76

Year ending October 1977	
Loans by Director – Mr. G. Chong	$22,518.96
Year ending October 1978	
Loan by Director – Mr. G. Chong	$28,218.96
Year ending October 1979	
Loan by Director – Mr. R. Chong (Mr.G.Chong)	$ 34,218.96
Year ending October 1980	
Loan by Directors – Mr. G. Chong	$33,218.96
Mrs D Chong	$10,000.00

That the Defendants state that the account was in the nature of a running account in favour of Mr and Mrs Chong and that the designation in the name of Mr G Chong does not alter the beneficial entitlement of both."

Certainly, there are arguments and evidence in these amendments and they ought not to have been permitted. They are also part of a new defence. Even on appeal there seems to be a dispute as to what is in evidence before the trial judge as distinct from what is before the court as agreed bundles. That is a matter to be resolved in the Court below.

It is relatively easy to see why the learned trial judge erred by examining his opening remarks of his reasons. They read as follows:

"Ruling on Application by Defendants
to amend Defence

Mr. Muirhead Q.C., for the defendants applied for an amendment to the defence. The application as I understand it is consequential on:

(a) evidence;

(b) matters addressed in Cross-examination of the first plaintiff and;

(c) matters deponed to in examination in chief and elicited in cross-examination of the witness Chang.

The proposed amendments seek to clarify the issues and to place those issues before the court for adjudication. Learned Q.C. asked the court to be reminded of the fact that the action here is a derivative action on behalf of the company. That being the nature of the action, matters which go to the issues would be within the knowledge of the plaintiffs."

Pleadings define beforehand the issues to be determined. If, during the course of the trial the plaintiff's evidence is uncomfortable to the defendants, or the suggestions put in cross-examination are denied and the defendants are permitted to alter their defence, the process would never end. The basis of our adversarial proceedings would be set aside, the rules of procedure and the text books thereto would have to be rewritten and the authorities on amendments would have to be reinterpreted. Restraints and limitations imposed on both parties which are the heart of our legal system would no longer ensure stability.

The amendments continued thus in the same pattern:

"25C. In the premises the Defendants state the sum of $7,000.00 constituted in law and/or in reality a repayment in part of sums owed by the Third Defendant to the First and Second Defendants leaving a credit balance in favour of the First and Second Defendants. In the premises the $7,000.00 was not and/or was incapable in law of being a "true" loan to the Defendants.

25D. In the further alternative the First and Second Defendants state that the sum of Seven Thousand Dollars ($7,000.00) paid by way of deposit was initially intended and approved as a Directors loan to the First and Second Defendants (taken by the Second Defendant on their behalf) and the First and Second Defendants were unaware that the same was contrary to the instructions communicated to Mr. Abe Moore by the Second Defendant to enter same as a directors' loan treated and entered in the account books of the Third

> Defendant as "Pay to Wally Goldsmith – Cash Goods" so entered on the cheque stub byMr Abe Moore the then manager and third Director of the Third Defendant as the said cheque itself was signed by the Second Defendant and was made payable to VLS Scott, the Attorney-at-Law acting for the vendor, Mr. Wally Goldsmith in the sale of the warehouse premises to the First and Second Defendants. The Defendants state that all other payments for the purchase were undertaken by them.
>
> 25E. The First and/or Second Defendant state that in or about 1986 when dispute arose with the Plaintiffs more particularly with the First Plaintiff, the First Plaintiff informed the First and/or Second Defendant as to the treatment of the said sum of Seven Thousand Dollars ($7,000.00) in the books of the Third Defendant where upon the accountant was directed to "reverse" the entry and thereby cause the same to be treated/entered as a loan to Director."

The amendments pertaining to the Mansfield lands

Although I do not propose to deal with every amendment granted by Ellis J., I repeat none ought to have been granted. Those dealt with specifically are sufficient to show that the large changes brought about by the amendments resulted in an entirely new case. It is against this background that it is proposed that with the amendments dealing with the third property in issue, the Mansfield lands ought to be considered.

The pleadings relevant to this aspect are the Further and Better Particulars of the Chongs. However, to put it in context Paragraph 34 of the Defence is pertinent. It reads:

> "34. The First and Second Defendants state that the purchase of the Mansfield property was never made by the Third Defendant nor for and on behalf of the Third Defendant but that the said purchase was by the Second Defendant in her own right and the negotiations therefor were conducted by her personally and for her own benefit and that the deposit for the purchase was provided by the Second Defendant from her own resources. A small portion of the purchase price was obtained by a loan from the Third Defendant which loan was

repaid by the Second Defendant one year later. More specifically, the Defendants deny that the Mansfield property was bought out of the proceeds of sale of Pierre Chong lands as alleged or at all."

Then the Further and Better Particulars read:

"Re: Paragraph 34 of the Defence

QUESTION 1 :	What was the amount of the deposit provided by the Second Defendant?
ANSWER	The amount of the deposit provided by the Second Defendant was One Hundred and Fourteen Thousand, Two Hundred and Twenty Seven Dollars ($114,227.00).
QUESTION 2	How was this deposit paid – by cheque or by cash?
ANSWER	This deposit was paid by cheque.
QUESTION 3	Was the said deposit paid in one or more than one installment?
ANSWER	The said deposit was paid in one installment.
QUESTION 4	If paid in one installment, when was this paid?
ANSWER	The deposit of One Hundred and Fourteen Thousand Two Hundred and Twenty-Seven Dollars was paid on February 14, 1985.
QUESTION 6	What portion of the purchase price was obtained by loan from the Third Defendant?
ANSWER	Two point three per cent (2.3%) approximately being $20,773.00 of the purchase price was obtained by loan from the Third Defendant which was added to the deposit of One

Hundred and Fourteen Thousand Two Hundred and twenty Seven Dollars ($114,227.00) provided by the Second Defendant.

QUESTION 7 : When was this loan obtained?

ANSWER This loan was obtained on February 18, 1985.

QUESTION 8 : was this loan approved at a meeting of the Directors of the Third Defendant?

ANSWER : This loan was not approved at meeting of the Directors of the Third Defendant.

QUESTION 10 : If not, when and where was the said loan approved and who was present when the said loan was approved?

ANSWER : The loan was as was the custom approved informally. The first and Second Defendants and the First Plaintiff were all aware of the loan and the First Plaintiff raised no objections to it until the parties had a falling out. Further the financial statements of the Third Defendant were audited and approved and/or adopted by the company for the year from 1975to 1985 and accordingly constituted accounts settled."

The amendments require a combination of the accounts of the Chongs which was not the original defence. This turnaround requires a pleading to combine the accounts of the Chongs which is in marked contrast to the original Defence which averred that the Mansfield lands was bought out of Dorothy Chong's resources together with a small loan from the Company. Additionally, there was a denial that the Mansfield lands was bought out of the proceeds of the Pierre Chong lands. Here are the amendments:

"34A. Alternatively, the Defendants repeat paragraphs 24A and 24B herein and state that the combined accounts of the Chongs at all material times showed an indebtedness by the Third Defendant to the Chongs in excess of One Hundred and Thirty Five Thousand Dollars ($135,000.00).

34B. In the premises the First and Second Defendants say a sum of One Hundred and Thirty-Five Thousand Dollars ($135,000.00) or any lesser sum in particular $114,227.00 credited to the Second Defendant in March 1985 constituted in law and/or in fact a repayment (not a loan) in part of sums owed by the Third Defendant to the First and Second Defendants leaving a substantial credit balance in favour of the First and Second Defendants.

34C. The First and Second Defendants state that the Plaintiffs and the First and Second Defendants on receipt of the proceeds of sale of the Pierre Chong lands [less $20,773.00 "loan"] treated same as their own money and not as that of the Third Defendant by placing same on deposit in the names of the First Defendant and the First Plaintiff and utilising the interest payments for their respective personal purposes in the proportion 55% to 45% The Third Defendant retained in its accounts/financial statement the Pierre Chong lands (although sold) as an asset as at 31st October 1985 although the proceeds of sale had been received on the 25th May 1985."

The amended Defence continues thus:

"34D. In the premises the "loan" of Twenty Thousand Seven Hundred and Seventy Three Dollars ($20,773.00) from the proceeds was no true loan but in the nature of an advance of the portion of the sale proceeds ascribed or ascribable to the Chongs or alternatively a repayment of amount owed by the Third Defendant to the First and Second Defendants.

34E. The Second Defendant by her personal cheque dated February 14, 1985 paid the sum of One Hundred and Fourteen Thousand Two Hundred and Twenty Seven Dollars ($114,227.0) on account of the deposit on the Mansfield land. Save for the loan/reimbursement of $20,773.00 as hereinbefore particularized, all payments in respect of the Mansfield lands and likewise all outgoings since purchase have been made by the Second Defendant.

34F. The First and Second Defendants say that as at March 1985 the combined Chongs account had a balance due to the Chongs from the Third Defendant as hereunder

	317,679.10
Less Bank D1	(1,203.14)
Less Bank D1	(6,015.70)
	310,460.26
Repayment on a/c L7	114,227.00
Balance due to Chongs	196,233.26

34G. In the still further alternative the First and Second Defendants state that it was a practice for the Third Defendants to make "loans" to the Plaintiffs and the Defendants or one or other of them on the authority of the First Defendant and/or more correctly "reimbursements" which reduce credit balances (if any) which sums were utilized by the "borrowers"/"reimbursed persons" for the sole/own use and benefit.

34H. Thereafter the Second Defendant in or about March of 1985 sought repayment from the Third Defendant of sums owing to the First and Second Defendants. Whereupon on March 6, 1985 the Third Defendant on the directions of the First Defendant (agent of the Third Defendant) "reimbursed"/loaned" the Chongs through the Second Defendant or alternatively the Second Defendant One Hundred and Fourteen Thousand Two Hundred and Twenty Seven Dollars ($114,227.00) and the Chongs by the Second Defendant or alternatively the Second Defendant on her own behalf on or about May 13, 1986 made an advance or repayment of $34,050.00 and on May 29, 1986 made a further advance and/or "repayment" of $114,227.00 to the Third Defendant thereby advancing or "repaying" the amount Thirteen Thousand Two Hundred and Twenty Seven Dollars ($13,227.00) in excess of the One Hundred and Thirty Five Thousand ($135,000.00) (comprised of $114,277.00 plus $20,773.00 hereinbefore mentioned) "

So comprehensive were the Chongs' amendments that it included the following amendments:

> "72. By reason of the matters pleaded herein, the Plaintiffs are precluded from maintaining this action for the benefit of the Third Defendant by reason of issue estoppel, promissory estoppel, laches and acquiescence. The Third Defendant is bound by the issue estoppel as a privy of the Plaintiffs and is estopped from pursuing the claims against the First and Second Defendants."

The orthodox method of pleading issue estoppel, promissory estoppel laches and acquiescence is to set out the material facts on which the pleader relies in separate paragrapahs. I would not permit the above averment.

As for the contention that a derivative action is not permissible, that could have been taken as a preliminary point of law (see **Wallersteiner v Moir No. 2** [1975] Q.B. 373) and presumably there could still be an application before Ellis J. I express no views on this issue as it was not argued before us.

Then the final substantive amendment reads:

> "73. The Defendants deny that the Plaintiffs are entitled to the reliefs claimed or to any relief."

Turning to paragraph 66 of the Respondents' Outline Submissions it reads:

> "66. The First and Second Defendants/Respondents do not wish to change their defence as Mr. Scharschmidt is alleging and in fact, what was said in their defence before remained in the amended defence."

If this is so why seek an amendment? Does this not tend to weaken the claim for an amendment? Further paragraph 66 must be read in conjunction with paragraph 109(c). It reads:

> **Summation**
>
> "109. In light of the foregoing submissions it is submitted that the appeal should be dismissed because:

> c) The First and Second Defendants/Respondents have not changed their case. In relation to their case as previously stated in the Defence, the amendment has clarified it and sought to set it out in more detail. In relation to the treatment of the accounts and in relation to the figures of $114,227.00 and $135,000.00 these were not raised as issues by the Plaintiffs/Appellants on their pleadings and as such the First and Second Defendants/Respondents ought to be given the opportunity to amend to deal with these issues raised by the Plaintiffs for the first time while leading their evidence."

Certainly, accounts were referred to by the Chongs in paragraphs 25 and 27 of their Defence which were cited earlier. So it was clear that the Chongs realised that the accounts of the Company and those of Dorothy Chong would be adduced and would therefore require the expert evidence of a qualified Accountant to explain their import in the light of the Moo Youngs' Statement of Claim.

Conclusion

Whether it be constitutional law, substantive law or procedural law implicit in our legal system are restraints or limits to prevent abuse. Limits are imposed on the power of the Chongs to amend their pleadings so as to ensure a fair trial. One objective of those limitations is to prevent a new defence during the course of the trial. As to whether an amendment will be granted, the test must be satisfied that it is being made in good faith and is in the interests of justice. The amendments granted in the court below are so fundamental that they amount to a new defence so they ought not to have been permitted.

Be it noted that no reference has been made to the evidence on appeal so as to preclude any idea that the merits of the case was an issue in this Court. Before parting I

would like to pay tribute to the industry and advocacy of Mr. Scharschmidt, Q.C., for the appellants, and Mrs. Champagnie for the respondents in this demanding case.

The appeal must be allowed, and the order below set aside. Costs of the appeal to go to the appellants, the Moo-Youngs.

LANGRIN, J.A.

I agree with both my brothers Downer, and Harrison JJA and in deference to the submissions of counsel add a small contribution of my own. I am of the view that the learned trial judge erred in granting leave to amend the defence. I do not see how the judge's exercise of his discretion in granting leave to amend can be justified.

The justification for the amendments according to Mrs. Champagnie, learned counsel for respondent, was to brlng the pleadings in line with the evidence. This is clearly not the case. The question in issue is whether the Warehouse and Mansfield Lands were bought out of the resources of Dorothy Chong as pleaded in her defence or out of the Company's resources as pleaded in the Statement of Claim by the Moo Youngs.

The amendments granted have in my view introduced a substantially different defence from that which the plaintiffs have come to meet.

Amendments will invariably be permitted at any stage of the proceedings but when a party changes his story to meet difficulties, as is apparent in this case, the court ought to have taken that into account in deciding whether the amendments should have been granted.

A trial court must always be vigilant in identifying amendments which seek to clarify issues in dispute from those which permit a defence to be raised for the first time.

These substantial amendments having come about almost at the end of the plaintiff's case and in all the circumstances of this case will cause injustice to the plaintiff.

Accordingly, I too would allow the appeal with costs.

DOWNER: J.A.

ORDER

(1) Appeal allowed

(2) Order below dated 8th October 1998 set aside

(3) Matter remitted to the Supreme Court for resumed hearing, which hearing should include the issue of costs of the interlocutory hearing below in the light of this judgment.

(4) Costs of this appeal are for the appellants and they are to be taxed if not agreed.