IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Rajapaksha Appuhamilage Lionel Ranjith,
282/1, Pahala Karagahaamuna,
Kadawatha.
Plaintiff-Respondent-Appellant

SC/APPEAL/100/2020
WP/HCCA/GAM/42/2018
DC GAMPAHA 328/L

Vs.

1. Suraweera Arachchige Dona Leelawathi,
   282/1, Pahala Karagahaamuna,
   Kadawatha.
2. Nawalage Anushka Udayanga Cooray,
   306/1, Neligama,
   Ragama.
3. Registrar, Land Registry,
   Gampaha.

   Defendant-Respondent-Respondents

Before: Hon. Justice Kumudini Wickremasinghe
Hon. Justice Mahinda Samayawardhena
Hon. Justice Sobhitha Rajakaruna

Counsel: P. Peramunugama for the Plaintiff-Respondent-Appellant.
S.N. Vijithsingh for the 1st and 2nd Defendant-Respondent-Respondents.

Argued on: 05.03.2025

Written Submissions:
By the Plaintiff-Respondent-Appellant on 19.10.2021.

By the 1st and 2nd Defendant-Respondent-Respondents on 10.03.2025.

Decided on: 14.05.2025

Samayawardhena, J.

Factual matrix

By Deed No. 981 dated 18.04.1989 the 1st defendant gifted the land described in the 6th schedule to the plaint to the plaintiff. Thereafter, the 1st defendant revoked that gift by Deed No. 159 dated 24.06.2014, and transferred the land by Deed No. 176 dated 24.12.2014 to the 2nd defendant.

The plaintiff filed this action in the District Court of Gampaha seeking a declaration that he is the owner of the land described in the 6th schedule to the plaint, and cancellation of Deed Nos. 159 and 176. The Land Registrar of Gampaha was made the 3rd defendant to give effect to the said orders in the event he succeeds.

The 1st and 2nd defendants filed a joint answer seeking the dismissal of the plaintiff's action, while the 3rd defendant filed a separate answer. The District Judge fixed the case for pre-trial on 23.03.2018.

In the meantime, the 1st and 2nd defendants filed a joint list of witnesses and documents, and proposed admissions and issues with copies to the opposite parties. The plaintiff and the 3rd defendant also did so.

On 23.03.2018, when the case was taken up for the pre-trial, the revocation papers of the then existing proxy and the new proxy were filed on behalf of the 1st defendant, and the 1st and 2nd defendants tendered separate amended answers. The plaintiff objected, and the District Judge, after hearing the parties by way of written submissions, refused to accept the amended answers by order dated 28.11.2018, as the Court was not satisfied that the conditions stipulated in section 93(2) of the

Civil Procedure Code had been fulfilled by the 1st and 2nd defendants. In reaching that finding, the District Judge analysed the statutory provisions and relevant case law in the said order.

Being dissatisfied with this order, the 1st and 2nd defendants appealed to the High Court of Civil Appeal of Gampaha with leave obtained. By judgment dated 09.01.2020, the High Court set aside the order of the District Judge without referring to any statutory provisions or case law governing the amendment of pleadings in a civil case, and directed the District Judge to accept the amended answers. I regret that I am unable to comprehend the reasoning (quoted below) upon which the High Court set aside the order of the District Judge.

> අතිරේක දිසා විනිසුරුතුමියගේ 2018.11.20 වන දින තීන්දුව දෙස අවධානය යොමු කිරීමේදී, 2 වන විත්තිකාර පෙත්සම්කරු වෙනුවෙන් කරුණු දක්වා ඇත්තේ 2 වන විත්තිකාර පෙත්සම්කරුට සිදුවන ලද අගතිය සම්බන්ධයෙන් උගත් අතිරේක දිසා විනිසුරුතුමිය කරුණු දෙස අවධානය යොමු කර නොමැති පදනමය.
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> අධිකරණය විසින් මෙම නඩුවේ ගොනු කොට ඇති පැමිණිලිකාර වගඋත්තරකරුගේ පැමිණිල්ල දෙස අවධානය යොමු කිරීමේදී නිරීක්ෂණය කලහැකි කරුණක් වුයේ, පැමිණිලිකාර වගඋත්තරකරු 2014.06.24 වන දිනැති ලියා සහතික කරන ලද ඔප්පුවක් සහ 2014.12.24 වන දිනැති ලියා සහතික කරන ලද විකුණුම්කරයක් ශූන්‍ය සහ බලරහිත කර ගැනීමට අයැදීමක් කර ඇති පදනමය.
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> අධිකරණය විසින් මෙම අවස්ථාවේදී 1 වන විත්තිකාර පෙත්සම්කරුගේ සංශෝධිත උත්තරයේ ආයාචනය දෙස අවධානය යොමු කිරීමේදී එකී කරුණ සම්බන්ධයෙන් වලංගුතාවයක් ලබා ගැනීමට අයැදීමක් කර ඇති පදනම අධිකරණයට නිරීක්ෂණය කලහැක.
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> ඒ අනුව එම කරුණ සම්බන්ධයෙන් පැමිණිලිකාර වගඋත්තරකරු කිසිදු ආකාරයක වික්ෂිප්තභාවයකට පත් වීමක් සිදු නොවන අතර, පැමිණිලිකාර වගඋත්තරකරු විසින් යම් අවලංගු කිරීමට කරන ලද ඉල්ලීමට වලංගුතාවයක් ලබා ගැනීම සඳහා 1 වන විත්තිකාර වගඋත්තරකාරිය කටයුතු කර ඇති පදනම සංශෝධිත උත්තරයෙන් අධිකරණයට නිරීක්ෂණය කලහැක.

ඒ අනුව අධිකරණය විසින් මෙම අවස්ථාවේදී උගත් දිසා විනිසුරුතුමිය ඒ සම්බන්ධයෙන් අවධානය යොමු නොකර ඇති පදනම මත උගත් අතිරේක දිසා විනිසුරුතුමියගේ 2018.11.28 දිනැති නියෝගය අවහරණය කිරීමට තීරණය කෙරේ.

This Court granted leave to appeal against this Judgment of the High Court on the following question of law:

> *Did the High Court of Civil Appeal err in law by not considering whether the 1st and 2nd defendants have complied with section 93(2) of the Civil Procedure Code as amended?*

Historical development of statutory provisions

The Civil Procedure Code dedicates a separate chapter—Chapter XV—to the subject of amendment of pleadings. This chapter contains only one section, namely, section 93. The fact that an entire chapter is devoted to a single section underscores the importance the legislature has attached to it.

As originally enacted, section 93 granted the Court broad discretion to allow amendments to pleadings at any hearing of the case, up until the delivery of the final judgment. Section 93, as it originally stood, read as follows:

> *At any hearing of the action, or any time in the presence of, or after reasonable notice to, all the parties to the action before final judgment, the court shall have full power of amending in its discretion, and upon such terms as to costs and postponement of day for filing answer or replication or for hearing of cause, or otherwise, as it may think fit, all pleadings and processes in the action, by way of addition, or of alteration, or of omission. And the amendments or additions shall be clearly written on the face of the pleading or process affected by the order; or if this cannot conveniently be done, a fair draft of the document as altered shall be appended to the document intended to be amended, and every such amendment or alteration shall be initialled by the Judge.*

This section was repealed and replaced by a new section under the Civil Procedure Code (Amendment) Act No. 79 of 1988. Following this amendment, section 93 read as follows:

> *93(1) The court may, in exceptional circumstances and for reasons to be recorded, at any hearing of the action, or at any time in the presence of, or after reasonable notice to all the parties to the action, before final judgment, amend all pleadings and processes in the action by way of addition, or of alteration or of omission.*
>
> *(2) Every order for amendment made under this section shall be upon such terms as to costs and postponement of the date fixed for the filing of answer, or replication, or for the hearing of the cause or otherwise, as the court may think fit.*
>
> *(3) The amendments or additions made in pursuance of an order under this section shall be clearly written on the pleadings or processes affected by the order; or if it cannot be conveniently so done, a fair draft of the document as altered shall be appended to the document intended to be amended and every such amendment or alteration shall be initialled by the judge.*

Section 93 was again repealed and substituted with a new section under the Civil Procedure Code (Amendment) Act No. 9 of 1991. Following this amendment, section 93 read as follows:

> *93(1) Upon application made to it before the day first fixed for trial of the action, in the presence of, or after reasonable notice to all the parties to the action, the Court shall have full power of amending in its discretion, all pleadings in the action, by way of addition, or alteration, or of omission.*
>
> *(2) On or after the day first fixed for the trial of the action and before final judgement, no application for the amendment of any pleadings shall be allowed unless the Court is satisfied, for reasons to be*

recorded by the Court, that grave and irremediable injustice will be caused if such amendment is not permitted, and on no other ground, and that the party so applying has not been guilty of laches.

(3) Any application for amendment of pleadings which may be allowed by the Court under subsection (1) or (2) shall be upon such terms as to costs and postponement or otherwise as the Court may think fit.

(4) The additions or alterations or omissions shall be clearly made on the face of the pleading affected by the order; or if this cannot conveniently be done, a fair copy of the pleading as altered shall, be appended in the record of the action to the pleading amended. Every such addition or alteration or omission shall be signed by the Judge.

After this amendment, section 93 was amended by the Civil Procedure Code (Amendment) Act No. 8 of 2017 whereby, for the words "first fixed for trial" in subsections (1) and (2), the words "first fixed for Pre-Trial" were substituted.

Thereafter, by the Civil Procedure Code (Amendment) Act No. 29 of 2023, the words "first fixed for Pre-Trial of the action" in subsections (1) and (2), were substituted by the words "first fixed for Pre-Trial conference of the action".

Section 93, as it presently constitutes reads as follows:

93(1) Upon application made to it before the day first fixed for pre-trial conference of the action, in the presence of, or after reasonable notice to all the parties to the action, the Court shall have full power of amending in its discretion, all pleadings in the action, by way of addition, or alteration, or of omission.

(2) On or after the day first fixed for the pre-trial conference of the action and before final judgement, no application for the amendment of any pleadings shall be allowed unless the Court is satisfied, for

reasons to be recorded by the Court, that grave and irremediable injustice will be caused if such amendment is not permitted, and on no other ground, and that the party so applying has not been guilty of laches.

(3) Any application for amendment of pleadings which may be allowed by the Court under subsection (1) or (2) shall be upon such terms as to costs and postponement or otherwise as the Court may think fit.

(4) The additions or alterations or omissions shall be clearly made on the face of the pleading affected by the order; or if this cannot conveniently be done, a fair copy of the pleading as altered shall, be appended in the record of the action to the pleading amended. Every such addition or alteration or omission shall be signed by the Judge.

Ironically, as section 93 originally stood, the Judge had no discretion to amend the pleadings before trial. Amendments were permitted only after the commencement of the trial but before judgment. Section 93 began with: "*At any hearing of the action, or any time in the presence of, or after reasonable notice to, all the parties to the action before final judgment, the court shall have full power of amending in its discretion*" all pleadings in the action. In *Lebbe v. Sandanam* (1963) 64 NLR 461 at 467, Basnayake C.J. observed: "*The Court may not exercise that power before the hearing or after final judgment. The words 'at any time' in the context mean at any time after the hearing and not at any time before the hearing*." What must be emphasised is that the current legal position stands in stark contrast to this.

Under the present law, amendments are permitted only before the day first fixed for the pre-trial conference of the action, except in exceptional circumstances falling within section 93(2).

The previously accepted view that all amendments necessary for the proper ventilation of the dispute and the determination of the real

controversy between the parties should be permitted at any stage from the commencement of trial to final judgment, so long as any resulting prejudice or injustice could be cured by costs, can no longer be regarded as good law.

The administration of justice today extends beyond the resolution of disputes between individual parties. The modern conception of justice emphasises fairness and access to justice for all, rather than justice for one at the expense of many. A significant backlog of cases exists at every level of the judicial hierarchy. The concept of effective case management has gained global recognition as essential to the proper functioning of the justice system. When cases are repeatedly postponed and allowed to stagnate, effective case management is undermined, the efficiency of the entire system is compromised, and access to justice is ultimately denied. Access to justice is a cornerstone of the rule of law. If undue delays and procedural inefficiencies are allowed to persist, the erosion of public confidence in the legal system becomes inevitable.

Whether in superior Courts or original Courts, there is no doubt that litigants must be afforded a fair hearing, but the Court cannot afford, in my view, an unlimited hearing. We must understand that the demands and exigencies of contemporary justice are fundamentally different from those that prevailed decades ago. Litigants are not entitled to unfettered use of judicial time, as other litigants await their turn. This shift reflects the current trend across all major jurisdictions, which I will discuss further under the subheading “Global Trends”.

Amendment of pleadings before accepting the plaint or answer

Once the plaint or answer is filed, the Court may, *ex mero motu*, return it for amendment without accepting it. Sections 46 and 77 of the Civil Procedure Code are relevant in this regard.

Section 46 deals with when a plaint can be returned for amendment or rejected by the Court.

46(1) Every plaint presented by a registered attorney on behalf of a plaintiff shall be subscribed by such registered attorney. In every other case in which a plaint is presented, it shall be subscribed by the plaintiff; and his signature shall be verified by the signature of some officer authorized by the court in that behalf.

(2) Before the plaint (whether presented by the plaintiff or by a registered attorney in his behalf) is allowed to be filed, the court may, if in its discretion it shall think fit, refuse to entertain the same for any of the following reasons, namely:-

(a) if it does not state correctly, and without prolixity, the several particulars hereinbefore required to be specified therein;

(b) if it contains any particulars other than those so required;

(c) if it is not subscribed, or subscribed and verified, as the case may be, as hereinbefore required;

(d) if it does not disclose a cause of action;

(e) if it is not framed in accordance with section 33;

(f) if it is wrongly framed by reason of non-joinder or misjoinder of parties, or because the plaintiff has joined causes of action which ought not to be joined in the same action;

and may return the same for amendment then and there, or within such time as may be fixed by the court, upon such terms as to the payment of costs occasioned by the amendment as the court thinks fit;

Provided that no amendment shall be allowed which would have the effect of converting an action of one character into an action of another and inconsistent character;

And provided further, that in each of the following cases, namely:-

(g) Where the relief sought is undervalued, and the plaintiff, on being required by the court to correct the valuation within a time to be fixed by the court, fails to do so;

(h) Where the relief sought is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff on being required by the court to supply the requisite stamps within a time to be fixed by the court fails to do so;

(i) When the action appears from the statement in the plaint to be barred by any positive rule of law;

(j) When the plaint having been returned for amendment within a time fixed by the court is not amended within such time;

(k) When the plaint is not accompanied by such number of summonses as there are defendants;

the plaint shall be rejected; but such rejection shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

Section 77 deals with when an answer can be returned for amendment or rejected without accepting it.

77. If any answer is substantially defective in any of the particulars hereinbefore defined, or is argumentative or prolix, or contains matter irrelevant to the action, the court may, by an order to be endorsed thereon, reject the same or return it to the party by whom it was made, for amendment within a period not exceeding one month from the date on which the answer was so returned, and the court may impose such terms as to costs or otherwise as it thinks fit.

If the answer is rejected or left unamended as ordered, the defendant shall be regarded as having failed to file answer.

The order so endorsed shall specify the ground of the rejection.

Amendment of pleadings before the case is fixed for pre-trial

Section 93(1) applies when an application to amend pleadings is made by a party before the day first fixed for pre-trial of the action or, as

amended by Act No. 29 of 2023, before the day first fixed for pre-trial conference of the action.

According to section 93(1), "*Upon application made to it before the day first fixed for pre-trial conference of the action, in the presence of, or after reasonable notice to all the parties to the action, the court shall have full power of amending in its discretion, all pleadings in the action, by way of addition, or alteration, or of omission.*"

Once pleadings are accepted, the Court cannot, *ex mero motu*, amend pleadings. Only a party to the action may make such an application, in the presence of, or with reasonable notice to, all other parties to the action. The Court must first hear the parties before making a decision.

It may not be irrelevant to emphasise that, notwithstanding section 93(1) stating that "*the Court shall have full power of amending in its discretion all pleadings in the action*" before the day first fixed for pre-trial conference of the action, this discretion is not unfettered. The judge must act reasonably and not arbitrarily. The following observation made by Lord Wrenbury in *Roberts v. Hopwood* [1925] AC 578 at 613 aptly summarises the standard expected in the exercise of discretion:

> *A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so—he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by the use of his reason, ascertain and follow the course which reason directs. He must act reasonably.*

According to section 93(3), any application for amendment of pleadings which may be allowed by the Court under subsection (1) or (2) shall be upon such terms as to costs and postponement or otherwise as the Court may think fit. The phrase "*otherwise as the court may think fit*" empowers the Court to allow the amendment without costs, depending on the facts and circumstances in which the application is made.

As a general rule, the Court shall adopt a liberal approach when considering applications to amend pleadings before the day first fixed for pre-trial conference of the action, bearing in mind its duty (a) to facilitate the presentation of the real dispute or disputes in controversy between the parties and (b) to prevent a multiplicity of actions arising from the same set of facts.

At this stage, amendments that serve only to clarify or define the real issue or issues between the parties will readily be granted. (*Hatton National Bank Ltd v. Whittal Boustead Ltd* [1978-79] 2 Sri LR 257, *Abeywardena v. Euginahamy* [1984] 2 Sri LR 231, *Wijesinghe v. Karunadasa* [1987] 2 Sri LR 179)

In *Rajesh Kumar Aggarwal v. K.K. Modi* (2006) 4 SCC 385, the Supreme Court of India stated: "*It is settled by catena of decisions of this Court that the rule of amendment is essentially a rule of justice, equity and good conscience and the power of amendment should be exercised in the larger interest of doing full and complete justice to the parties before the Court.*"

In terms of section 34 of the Civil Procedure Code, every action shall include the whole of the claim to which the plaintiff is entitled on the cause of action. Actions cannot be filed on a piecemeal basis.

According to section 75(e), if the defendant sets up a claim in reconvention in the answer, it shall have the same effect as a plaint.

As a general principle, new causes of action arising after the institution of the action, even if they stem from the same transaction, cannot be accommodated. This is due to the general rule that the rights of the parties are determined at the time of the institution of the action. (*Hatton National Bank v. Silva* [1999] 3 Sri LR 113) However, as with most rules, exceptions may apply. An amendment that introduces a new cause of action arising from the same transaction may be allowed prior to the day first fixed for pre-trial conference of the action, provided it does not alter the fundamental character of the action and remains within the

framework of the law, bearing in mind that the policy of the Civil Procedure Code is to avoid multiplicity of actions. In *Grace De Alwis v. Walter De Alwis* (1971) 76 NLR 444, it was held that "*The statement in the judgment of a divisional bench in Lebbe v. Sandanam (64 N.L.R. 461) that in no circumstances can a new cause of action be added when a plaint is amended was made obiter and is now not followed*."

However, the Court is not bound to grant the amendment solely because it was sought before the pre-trial conference but must consider the nature of the application.

Amendments made *mala fide*, in abuse of the process of Court, with the sole intention of prolonging proceedings, and thereby gaining an unfair advantage, must not be permitted.

Amendments that introduce entirely new causes of action and new positions, altering the fundamental character of the action cannot be allowed. For example, if a plaintiff initially files an action claiming damages for breach of the contract and later seeks to amend the plaint to claim damages based on fraud arising from the same transaction, such an amendment, which introduces a new cause of action, would alter the fundamental character of the case and would therefore be impermissible.

The first proviso to section 46 of the Civil Procedure Code states: "*Provided that no amendment shall be allowed which would have the effect of converting an action of one character into an action of another and inconsistent character*."

Amendments that would prejudice defences such as a plea of prescription are not permitted. (*Weldon v. Neal* (1887) 19 Q.B.D. 394, *Hall v. Meyrick* [1957] 2 Q.B. 455, *Waduganathan Chettiar v. Sena Abdul Cassim* (1952) 54 NLR 185) For instance, a plaintiff files an action on 01.01.2023 for breaches of a written contract that occurred on 01.01.2018. Under section 6 of the Prescription Ordinance, since the

cause of action prescribes within six years, the claim is within time. However, if the plaintiff in 2025 seeks to amend the plaint to introduce a new claim based on a breach of the same contract that occurred on 01.01.2017, which was within time when the action was filed but is now prescribed, the amendment cannot be permitted, as allowing such an amendment would deprive the defendant of the defence of prescription. This is because, when pleadings are amended, they are deemed to relate back to the date of the original plaint or answer. In *Lucihamy v. Hamidu* (1923) 26 NLR 41 at 43-44, Bertram C.J. stated:

> *It has been settled both by local and by English decisions that when an amended plaint or statement of claim is filed, it is considered for all purposes as relating back to the date of the original plaint or statement of claim. In Weldon v. Neal (1887) 19 Q.B.D. 394 an amendment of a statement of claim was disallowed, on the ground that it sought to include fresh claims which at the time of the amendment was barred by the Statute of Limitations, although not barred at the date of the writ. Lord Esher M.R. said: "If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust. We have the converse case in our own books (see Morris v. Dias (1892) 2 C.L.R. 185). In that case, after the institution of an action on a promissory note, the plaint was amended by the addition of an alternative count for goods sold and delivered. It was there held that the period of limitation must be reckoned up to the date of the original summons, and not up to the date of the amendment. "This new cause," said Withers J., "relates back to the date of the original writ."*

Amendments that would result in grave prejudice to the opposite party shall not be permitted. The Court must weigh the potential irremediable injustice that may arise from refusing the amendment against the substantial prejudice that may be occasioned to the opposing party if it is allowed. Where the latter outweighs the former, the Court shall exercise its discretion to refuse the amendment. For instance, if an amendment seeks to introduce a material factual assertion that was not pleaded in the original plaint, or to withdraw an important admission already made in the original pleading, thereby nullifying or undermining the defence raised in the answer, such an amendment would cause grave prejudice to the opposing party and cannot be permitted.

Addition, deletion, misjoinder and nonjoinder of parties and causes of action

It may also be relevant to note that section 18, which permits the addition or deletion of parties, section 22, which addresses misjoinder and non-joinder of parties, and sections 35 to 38, which govern the misjoinder of causes of action, are all closely linked to the amendment of pleadings.

While the addition or deletion of parties could previously be made at any time before the hearing, the amendment Act No. 29 of 2023 now permits such applications to be made only on or before the day first fixed for the pre-trial conference. Section 18(1) reads as follows:

> *The court may on or before the day first fixed for the pre-trial conference, upon the application of either party, and on such terms as the court thinks just, order that the name of any party, whether as plaintiff or as defendant improperly joined, be struck out; and the court may at any time, either upon or without such application, and on such terms as the court thinks just, order that any plaintiff be made a defendant, or that any defendant be made a plaintiff, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be*

necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in that action, be added.

Section 21 makes it mandatory to amend the plaint once a defendant is added after the institution of the action. Section 21 reads:

Where a defendant is added, the plaint shall, unless the court directs otherwise, be amended in such manner as may be necessary, and a copy of the amended plaint shall be served on the new defendant and on the original defendants.

The objections as to misjoinder or nonjoinder of parties shall be taken before the day first fixed for pre-trial conference. Section 22 enacts as follows:

All objections for want of parties, or for joinder of parties who have no interest in the action, or for misjoinder as co-plaintiffs or co-defendants, shall be taken at the earliest possible opportunity, and in all cases before the day first fixed for pre-trial conference. And any such objection not so taken shall be deemed to have been waived by the defendant.

Sections 35 to 38 deal with misjoinder of causes of action. Section 35 reads as follows:

35(1) In an action for the recovery of immovable property, or to obtain a declaration of title to immovable property, no other claim, or any cause of action, shall be made unless with the leave of the court, except-

(a) claims in respect of mesne profits or arrears of rent in respect of the property claimed;
(b) damages for breach of any contract under which the property or any part thereof is held; or consequential on the trespass which constitutes the cause of action; and

(c) claims by a mortgagee to enforce any of his remedies under the mortgage.

Example:- A sues B to recover land upon the allegation that the land belongs to C, and that he A, has bought it of C. A makes C a party defendant; but he cannot, without leave of the court, join with this claim an alternative claim for damages against C for non-performance of his contract of sale.

(2) No claim by or against an executor, administrator, or heir, as such, shall in any action be joined with claims by or against him personally unless the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor, administrator, or heir, or are such as he was entitled to or liable for jointly with the deceased person whom he represents.

Section 36 allows the Court to separate causes of action.

36(1) Subject to the rules contained in the last section, the plaintiff may unite in the same action several causes of action against the same defendant or the same defendants jointly, and any plaintiffs having causes of action in which they are jointly interested against the same defendant or defendants may unite such causes of action in the same action.

But if it appears to the court that an such causes of action cannot be conveniently tried or disposed of together, the court may, at any time before the hearing, of its own motion or on the application of any defendant, in both cases either in the presence of, or upon notice to, the plaintiff, or at any subsequent stage of the action if the parties agree, order separate trials of any such causes of action to be had, or make such other order as may be necessary or expedient for the separate disposal thereof.

(2) When causes of action are united, the jurisdiction of the court as regards the action shall depend on the amount or value of the aggregate subject-matter at the date of instituting the action, whether or not an order has been made under the second paragraph of subsection (1).

In terms of sections 37 and 38, separation of causes of action can be done upon the application of the defendant.

37. Any defendant alleging that the plaintiff has united in the same action several causes of action, which cannot be conveniently disposed of in one action, may at any time before the hearing apply to the court for an order confining the action to such of the causes of action as may be conveniently disposed of in one action.

38(1) If, on the hearing of such application, it appears to the court that the causes of action are such as cannot all be conveniently disposed of in one action, the court may order any of such causes of action to be excluded, and may direct the plaint to be amended accordingly, and may make such order as to costs as may be just.

(2) Every amendment made under this section shall be attested by the signature of the Judge.

Until sections 36, 37 and 38 are amended in line with the legislative intent to make any amendment before the day first fixed for pre-trial conference, these sections shall be read with section 93. As I have already emphasised, amendments are not permitted after the day first fixed for pre-trial conference of the action, unless the requirements under section 93(2) are fulfilled.

Amendment of pleadings after the case is fixed for pre-trial conference

Where an amendment was sought on or after the date the case was first fixed for pre-trial of the action (as provided under Act No. 8 of 2017) or

for pre-trial conference of the action (as the law now stands under Act No. 29 of 2023), the discretion of the Court was, and continues to be, significantly curtailed.

Let me first make it clear that there is a difference between "the day first fixed for pre-trial conference of the action" and "the day the case is first taken up for pre-trial conference of the action". What is contemplated in section 93(2) is the former, not the latter.

Section 93(2), as presently constituted, reads as follows:

> *On or after the day first fixed for pre-trial conference of the action and before final judgment, no application for the amendment of any pleadings shall be allowed unless the Court is satisfied, for reasons to be recorded by the Court, that grave and irremediable injustice will be caused if such amendment is not permitted, and on no other ground, and that the party so applying has not been guilty of laches.*

Under section 93(2), on or after the day first fixed for pre-trial conference of the action and before final judgment, no application for amendment of any pleadings shall be allowed:

(a) unless the Court is satisfied,
(b) for reasons to be recorded by the Court,
(c) that grave and irremediable injustice will be caused if such amendment is not permitted,
(d) and on no other ground,
(e) and that the party so applying has not been guilty of laches.

As section 93(2) presently stands, the Court must be satisfied that a grave and irremediable injustice is inevitable if the amendment is not allowed. The injustice must not be a mere injustice, but one that is both grave and irremediable. Whether this threshold is met will depend on the specific facts and circumstances of the case. However, even if such grave and irremediable injustice is bound to occur, the Court should not allow

the amendment if the party seeking the amendment is guilty of laches. Both requirements shall be met, not one of them. It must also be emphatically emphasised that the law expressly prohibits allowing amendments on any other ground.

In the oft-quoted case of *Gunasekera v. Abdul Latiff* [1995] 1 Sri LR 225 at 232, Ranaraja J. stated:

> *The amendments to pleading on or after first date of trial can now be allowed only in very limited circumstances. It prohibits court from allowing an application for amendment at this stage unless (1) it is satisfied that grave and irremediable injustice will be caused if the amendment is not permitted, and (2) the party applying has not been guilty of laches. On no other ground, can court allow an application for an amendment of pleadings. Furthermore, court is obliged to record reasons for concluding that the two conditions referred to have been satisfied.*

In reference to section 93(2), in the case of *Kuruppuarachchi v. Andreas* [1996] 2 Sri LR 11 at 13, G.P.S. De Silva C.J. stated:

> *While the Court earlier discouraged amendment of pleadings on the date of trial, now the court is precluded from allowing such amendments save on the ground postulated in the subsection.*

Laches

Laches is an equitable defence that precludes relief where there has been an unreasonable and unexplained delay in asserting a claim. Rooted in the equitable maxim *"equity aids the vigilant, not the indolent"*, the doctrine seeks to uphold fairness in litigation by ensuring that parties do not suffer undue hardship due to the inaction of others.

The term "laches" has been defined in several renowned legal dictionaries.

Black's Law Dictionary, 11th edition, page 1046:

> *Laches. [Law French "remissness; slackness"] (14c) 1. Unreasonable delay in pursuing a right or claim – almost always an equitable one – in a way that prejudices the party against whom relief is sought. – also termed sleeping on rights.*
>
> *Prosecution laches. (1977) Patents. In a claim for patent-infringement, the equitable defense that the patentee did not timely enforce the patent rights.*
>
> *2. The equitable doctrine by which a court denies relief to a claimant who has unreasonably delayed in asserting the claim, when that delay has prejudiced the party against whom relief is sought. Cf. LIMITATION (3).*
>
> *"The doctrine of laches…is an instance of the exercise of the reserved power of equity to withhold relief otherwise regularly given where in the particular case the granting of such relief would be unfair or unjust." Willim F. Walsh Treatise on Equity 472 (1930).*

Chambers 20th Century Dictionary (1983), page 704:

> *Negligence or undue delay, esp. such as to disentitle to remedy. Anglo-French lachesse.*

K.J. Aiyar's Judicial Dictionary, 11th Edition 1992, page 673:

> *Slackness, negligence in pursuing a legal remedy whereby the party forfeits the benefits upon the principle vigilantibus non dormientibus jura subveniunt. [Wharton's Law Lexicon, 1976 Reprint Ed. at 562].*

Stroud's Judicial Dictionary of Words and Phrases, 8th Edition 2017, Vol 2, page 1571:

> *LACHES. "Laches, or lasches, is an old French word for slacknessse or negligence, or not doing" (Co. Litt. 380B; see also Co. Litt. 246B;*

Termes de la Ley; Cowel); that definition was cited and applied by North J., Partridge v. Partridge [1894] 1 Ch. 351.

"Laches is a neglect to do something which by law a man is obliged to do" (per Ellenborough C.J., Sebag v. Abitbol, 4 M. & S. 463).

Mozley and Whiteley's Law Dictionary, 10th Edition 1988, page 260:

Laches. Slackness or negligence. In general, it means neglect in a person to assert his rights, or long and unreasonable acquiescence in the assertion of adverse rights. This neglect or acquiescence will often have the effect of barring a person from the remedy which he might have had if he had resorted to it in proper time. Thus, under the Limitation Act 1980, the time is specified within which various classes of actions respectively mentioned in it may be brought. Independently of this statute, a court of equity will often refuse relief to a plaintiff who has been guilty of unreasonable delay in seeking it.

The Law Lexicon by P. Ramanatha Aiyar, 1995, page 698:

"Laches, or lasches, is an old French word for slackness or negligence, or not doing" (Co. Litt. 380b, Terms de la Ley).

"Laches" in law is a neglect to do something which by law a man is obliged to do" (per Ellenborough, C.J., Sebag v. Abitbol, 4 M. & S. 463). In a general sense it means a neglect to do what in the law should have been done for an unreasonable or unexplained length of time under circumstances permitting diligence.

Laches to bar the plaintiff's right must amount to waiver, abandonment, or acquiescence and to raise a presumption of any of these, the evidence of conduct must be plain and unambiguous. (32 Bom. 234 and 33 Cal. 633, Ref. 95 I.C. 636=1926 Nag. 416)

> *What would be laches in one case might not constitute such in another. The question is one addressed to the sound discretion of the court, depending upon all the facts of the particular case.*

It must be emphasised that mere delay, however prolonged, does not *per se* amount to laches. In other words, laches cannot be determined solely by reference to the length of time taken to make the application. The relevant question is not how many months or years have elapsed since the application ought to have been made—for instance, in this case, how much time has passed since the case was first fixed for pre-trial conference to move for an amendment of the answer—but whether the delay is unreasonable and unjustifiable in the context of the particular case. As Mark Fernando J. observed in *Lulu Balakumar v. Balasingham Balakumar* [1997] BLR 22, "*the circumstances of the particular case, the reason for the delay, and impact of the delay on the other party, must all be taken into account*." Similarly, Sharvananda J. (as he then was), in *Biso Menika v. Cyril de Alwis* [1982] 1 Sri LR 368 at 379, stated: "*What is reasonable time and what will constitute delay will depend upon the facts of each particular case*." Where the delay is satisfactorily explained, relief ought not to be refused on the ground of laches.

Negligence v. Mistake

It follows that a party will not be able to explain the delay to the satisfaction of the Court if he has been negligent, careless, imprudent, failed to exercise due diligence, or displayed similar conduct. It need hardly be emphasised that the term "party" extends to and includes his Attorney-at-Law.

In *Packiyanathan v. Singarajah* [1991] 2 Sri LR 205, a strong Bench of this Court comprising Mark Fernando J., Amarasinghe J. and Kulatunga J. held at 213 that "*where the default has resulted from the negligence of the Attorney-at-Law in which event the principle is that the negligence of the Attorney-at-Law is the negligence of the client and the client must suffer for it*."

In this context, I must refer to the Supreme Court Rules of 1988, made under Article 136(1)(g) of the Constitution concerning the conduct and etiquette of Attorneys-at-Law, and published in Gazette Extraordinary No. 535/7 dated 07.12.1988, which remain in force to date.

Rule 10 thereof reads as follows:

> *An Attorney-at-Law shall not accept any professional matter unless he can attend to it with due diligence.*

Rule 15 reads as follows:

> *On accepting any professional matter from a client or on behalf of any client, it shall be the duty of an Attorney-at-Law to exercise his skill with due diligence to the best of his ability and care in the best interests of his client in such manner as he may decide and he should do so without regard to any unpleasant consequences either to himself or to any other person. Furthermore he should at all times so act with due regard to his duty to Court, Tribunal or any Institution established for the Administration of Justice before which he appears and to his fellow Attorneys-at-Law opposed to him.*

Lord Griffiths, sitting in the House of Lords—the highest Appellate Court in the United Kingdom prior to the establishment of the Supreme Court in 2009—observed in *Ketteman v. Hansel Properties* [1987] AC 189:

> *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 upon their*

> *own heads rather than by allowing an amendment at a very late stage of the proceedings.*

Nonetheless, I must hasten to add that to err is human—whether made by the client or the Attorney-at-Law—and mistakes may occur despite the exercise of due diligence and meticulousness. Depending on the particular facts and circumstances of the case, a mistake may, though not as a matter of course, be excused if the other requisite conditions are met. This, however, does not extend to instances of negligence, carelessness, or similar lapses.

As Millett L.J. in *Gale v. Superdrug Stores PLC* [1996] 1 WLR 1089 at 1098E stated:

> *The administration of justice is a human activity, and accordingly cannot be made immune from error. When a litigant or his advisor makes a mistake, justice requires that he be allowed to put it right even if this causes delay and expense, provided that it can be done without injustice to the other party*.

This principle was explained in *Packiyanathan v. Singarajah* (supra) as follows at page 213:

> *However, it is necessary to make a distinction between mistake or inadvertence of an Attorney-at-Law or party and negligence. A mere mistake can generally be excused; but not negligence, especially continuing negligence. The decision will depend upon the facts and circumstances of each case; and where the conduct of Counsel is involved the Court will, in granting relief, ensure that its order will not condone or in any manner encourage the neglect of professional duties expected of Attorneys-at-Law.*

However, not every error can be categorised as a mistake. A mistake is an unintentional act or omission made in good faith, arising from an honest misunderstanding or misapprehension of fact. Negligence, on the

other hand, denotes a failure to exercise due diligence or the standard of care that a reasonably prudent person would exercise under similar circumstances, resulting in foreseeable harm. In other words, foreseeable harm cannot be justified on the basis of mistake.

Foreseeable harm

In the case of *Gunasekera v. Latiff* (supra), Ranaraja J. referring to the observation made by Amarasinghe J. in *Ranaweera v. Jinadasa* (S.C. Appeal 41/91) that "*No postponements must be granted, or absence excused, except upon emergencies; occurring after the fixing of the date, which could not have been anticipated or avoided with reasonable diligence, and which cannot otherwise be provided for*", stated at page 236 that "*The provisions of section 93(2) of the Civil Procedure Code are intended to be used when amendments to pleadings are necessitated by unforeseen circumstances.*"

> *The principle laid down in Ranaweera's case when applied to the facts of the present case would clearly deny the petitioners the right to plead absence of laches. They will be hard put to satisfy any court that they were taken by surprise or the error could not have been discovered earlier with reasonable diligence. The petitioners conduct points to one conclusion alone. That is, they have acted without due diligence. The delay on their part to detect the error deprives them of the right to amend their answer at the time they applied to do so. <u>The provisions of section 93(2) of the Civil Procedure Code are intended to be used when amendments to pleadings are necessitated by unforeseen circumstances</u>. They should not be applied in circumstances as disclosed in the present case.*

This dictum of Ranaraja J. that "*the provisions of section 93(2) of the Civil Procedure Code are intended to be used when amendments to pleadings are necessitated by unforeseen circumstances*" has been consistently followed in later cases including but not limited to *Colombo Shipping Co.*

Ltd v. Chirayu Clothing (pvt) Ltd. [1995] 2 Sri LR 97, *Avudiappan v. Indian Overseas Bank* [1995] 2 Sri LR 131, *Ceylon Insurance Co. Ltd. v. Nanayakkara* [1999] 3 Sri LR 50, *Paramalingam v. Sirisena* [2001] 2 Sri LR 239, *Thenuwara v. Simo Nona* [2005] 2 Sri LR 309, *Rushantha Perera v. Wijesekera* [2005] 3 Sri LR 105, *Nimalraj v. Tharmarajah* [2005] 3 Sri LR 309, *Kanagaraj v. Alankara* [2010] 1 Sri LR 185). I am in respectful agreement with that view.

In *Kuruppuarachchi v. Andreas* (supra) at page 13, G.P.S. De Silva C.J. concluded:

> *Turning now to the averments in the amended answer, it is clear that the defendant was well aware of the fact that the plaintiff was living in adultery at the time the answer was filed, but she has chosen not to rely on that ground in her answer. After the second date of trial, she is seeking to amend the answer by including a cause of action based on adultery. In these circumstances, the conclusion of the Court of Appeal, that the defendant is guilty of laches and that the amended answer has to be rejected in terms of section 93(2) (as amended) must be affirmed.*

In reference to the submission of counsel for the defendant that the defendant refrained from pleading adultery in her answer as she wished to preserve the marriage in the interest of the children, the Chief Justice, at page 14, observed:

> *Her intentions were no doubt laudable and deserving of sympathy, but if such a plea is admissible the purpose of the amendment would, to a great extent, be defeated.*

The law is now settled that the provisions of section 93(2) of the Civil Procedure Code are intended to address amendments to pleadings after the day first fixed for pre-trial conference of the action, arising from unforeseen circumstances.

In *Archlane Ltd v. Johnson Controls Ltd* [2012] EWHC B12 (TCC), the High Court of Justice of England and Wales refused permission for an amendment ten weeks before the trial, *inter alia*, on the ground that there was no reason why the relevant evidence could not have been obtained, and the application to amend made, at an earlier stage. Edwards-Stuart J. observed that the fact that the defendant was the author of its own misfortune was a relevant factor in deciding whether to grant the amendment:

> *because to the extent that the First Defendant will suffer prejudice by the refusal of this amendment, which I accept is a clear possibility, it seems to me clear also that it is very substantially the author of that prejudice. The reality is that nothing has changed since the original incident and there appears to be nothing that has been discovered now that could not have been discovered three years ago.*

Finally, I must emphasise that when an application for amendment of pleadings is made after the day first fixed for pre-trial conference of the action, in addition to fulfilling the conditions set out in section 93(2), the party seeking the amendment must also satisfy the general requirements applicable to an application made before the day first fixed for pre-trial conference of the action. For instance, amendments made: (a) *mala fide*, with the sole intention of prolonging the proceedings; (b) to introduce entirely new causes of action and positions, thereby altering the fundamental character of the action; (c) that would defeat a plea of prescription; and (d) that would result in grave prejudice to the opposing party, shall not be permitted. (*Gunasekera v. Abdul Latiff* (supra) at 234)

Role of the Judge

The overarching purpose of pleadings is to present the case of each party with clarity, thereby affording the opposing party an opportunity to respond appropriately and enabling the Court to ascertain the precise

matters in dispute, with a view to securing their resolution, whether by settlement or through trial.

Odgers' Principles of Pleadings and Practice, 18th Edition (1963), page 74-75 states:

> *The function of pleadings then is to ascertain with precision the matters on which the parties differ and the points on which they agree; and thus to arrive at certain clear issues on which both parties desire a judicial decision. In order to attain this object, it is necessary that the pleadings interchanged between the parties should be conducted according to certain fixed rules. The main purpose of these rules is to compel each party to state clearly and intelligibly the material facts on which he relies, omitting everything immaterial, and then to insist on his opponent frankly admitting or explicitly denying every material matter alleged against him. By this method they must speedily arrive at an issue. Neither party need disclose in his pleading the evidence by which he proposes to establish his case at the trial. But each must give his opponent a sufficient outline of his case.*

Every pleading must, *inter alia*, concisely state the material facts in summary form and must not contain evidence or legal argument. If a pleading is unduly prolix, it becomes difficult for both the opposite party and the Court to identify the real issues in dispute. In such circumstances, the Court is empowered, under sections 46 and 77 of the Civil Procedure Code, to return the pleading for amendment or to reject it altogether, if the amendment is not effected within the time fixed by the Court.

The refusal of an amendment to pleadings does not bring the matter to a close. What is of primary importance is not the pleadings themselves, but the proper identification of the issues in dispute between the parties.

In terms of section 79B(a) of the Civil Procedure Code, the parties are required to tender their proposed admissions and issues of fact and law in writing to the registry of the Court, not less than thirty days before the date first fixed for the pre-trial conference, and after giving notice thereof to all other parties with proof of service. Once the issues are settled, the pleadings recede into the background. In terms of section 142F, it is the duty of the Court—not the Attorneys-at-Law—to determine the issues at the pre-trial conference by considering the pleadings, proposed admissions and issues of the parties, interrogatories, documents, agreements between the parties, and any reports submitted to Court.

Although it has always been the law that the duty of framing issues rests with the District Judge, in practice, difficulties were frequently encountered by Judges in identifying the issues at trial. However, with the introduction of comprehensive provisions for pre-trial conference under the Civil Procedure Code (Amendment) Act, No. 29 of 2023, such difficulties can no longer serve as a valid excuse. As I observed in *Sanjeewa Fernando v. Perera and Another* (2024/25 BLR 265 at 274):

> *In terms of section 142A of the Civil Procedure Code, the main purpose of a pre-trial conference is to facilitate a settlement between the parties. The pre-trial conference is not another procedural step in a civil case such as filing the answer or calling the case in open Court to fix a date for trial. It is also a mistake to assume that the purpose of a pre-trial conference is to lay a solid foundation for a full-blown trial. In terms of section 142A(2), it is the peremptory duty of each District Judge conducting the pre-trial conference to make every effort to persuade the parties to reach a settlement of the dispute. A Judge conducting a pre-trial conference must actively take part in the process, rather than being a passive observer or umpire. Settlement is the norm and fixing the case for trial is the exception. The Judge shall fix the case for trial, if, and only if, all settlement efforts fail. In the event the case is fixed for trial, the Judge must limit the trial to the real issue or issues between the*

> *parties, as identified by the Judge himself. In accordance with section 142F, the Judge shall determine the issue or issues by considering the pleadings, proposed admissions and issues of the parties, interrogatories, documents, agreements of the parties, and reports, if any, submitted to the Court during the pre-trial conference. Although the Judge may, of course, seek the assistance of lawyers, the Judge cannot delegate this judicial function to them.*

There is one further matter I wish to address concerning the amendment of pleadings in the context of the provisions relating to the pre-trial conference. It may be contended that a party who failed to make an application to amend the pleadings before the day first fixed for pre-trial conference of the action may nevertheless seek such amendment under section 142H(a)(i) at the pre-trial conference. This position is untenable. Section 142H(a)(i) cannot override section 93(2), which is couched in mandatory terms. The provisions of a statute must be interpreted and applied harmoniously, as a cohesive whole, in order to give effect to the purpose and intent of the legislature.

Global trends

When compared with other common law jurisdictions, it is evident that Sri Lanka adopts a more stringent approach to the amendment of pleadings. However, recent global trends indicate a gradual shift in the same direction.

The traditional view of the English Courts, which was followed in our jurisdiction in a bygone era, is encapsulated in the oft-quoted dictum of Bowen L.J. in *Cropper v. Smith* (1884) 26 Ch.D. 700 at 710–711, where he observed:

> *it is a well established principle that the object of courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights .... I know of no kind of error or mistake*

> *which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace.... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right.*

In contrast, recent decisions of the Courts in England reflect a stricter approach to amendment of pleadings, rejecting applications not only on the grounds of prejudice or injustice to the opposing party but also on broader considerations of procedural discipline, effective case management, and the overall efficiency of the justice system.

In England, the modern approach finds clear reflection in the decision of the Court of Appeal in *Worldwide Corporation Ltd v. GPT Ltd* [1998] EWCA Civ 1894, where Lord Bingham L.C.J., Peter Gibson L.J., and Waller L.J., after examining a series of authorities, emphasised the importance of overall justice over individual justice. The Court held that the interests of all Court users must be safeguarded, underscoring that when cases stagnate unnecessarily without timely resolution, the overall efficacy of the judicial process is compromised.

> *[I]n previous eras it was more readily assumed that if the amending party paid his opponent the costs of an adjournment that was sufficient compensation to that opponent. In the modern era it is more readily recognised that in truth the payment of the costs of an adjournment may well not adequately compensate someone who is desirous of being rid of a piece of litigation which has been hanging over his head for some time, and may not adequately compensate him for being totally (and we are afraid there are no better words for it) "mucked around" at the last moment. Furthermore, the courts*

> *are now much more conscious that in assessing the justice of a particular case the disruption caused to other litigants by last minute adjournments and last minute applications have also to be brought into the scales.*

Every sore in litigation cannot be healed by costs. Trial judges must be afforded the discretion to manage their trial roll effectively.

> *The appreciation of the injustice to other litigants and the damage to parties in trials being delayed which cannot adequately be compensated by an order for costs has led the court to a more interventionist approach in the management of trials, and has furthermore led to appellate courts being very reluctant to interfere with decisions of judges who with all those interests in mind have taken decisions at interlocutory stages.*

Consequently, in refusing the plaintiffs' applications to amend their points of claim and to furnish additional particulars for their quantum meruit claim (a principle permitting recovery for work or services rendered in the absence of a formal contract) Waller L.J. held:

> *Where a party has had many months to consider how he wants to put his case and where it is not by virtue of some new factor appearing from some disclosure only recently made, why, one asks rhetorically, should he be entitled to cause the trial to be delayed so far as his opponent is concerned and why should he be entitled to cause inconvenience to other litigants? The only answer which can be given and which, Mr Brodie has suggested, applies in the instant case is that without the amendment a serious injustice may be done because the new case is the only way the case can be argued, and it raises the true issue between the parties which justice requires should be decided.*
>
> *We accept that at the end of the day a balance has to be struck. The court is concerned with doing justice, but justice to all litigants, and*

> *thus where a last minute amendment is sought with the consequences indicated, the onus will be a heavy one on the amending party to show the strength of the new case and why justice both to him, his opponent and other litigants requires him to be able to pursue it.*

While the above judgment was decided before the enforcement of the Civil Procedure Rules in 1998, its alignment with the Rules and its overriding objective was recognised by Rix L.J. in *Savings & Investment Bank Ltd v. Fincken* [2003] EWCA Civ 1630 at paragraph 79 as follows:

> *As a postscript I would add that, although decided prior to the introduction of the CPR and concerned with an egregious application to change direction in the course of trial itself, the judgment of this court in Worldwide Corporation Ltd v. GPT Limited contains a full compendium of citation of authorities as at that date which emphasises that, even before the CPR, the older view that amendments should be allowed as of right if they could be compensated in costs without injustice had made way for a view which paid greater regard to all the circumstances which are now summed up in the overriding objective.*

Notable decisions which have followed suit include *Swain-Mason v. Mills & Reeve LLP* [2011] EWCA Civ 14 and *Nesbit Law Group LLP v. Acasta European Insurance Co Ltd* [2018] EWCA Civ 268.

In *MGN Pension Trustees Limited v. Invesco Asset Management Ltd & Others* [1993] Lexis Citation 3019, the Court of Appeal in England refused leave to appeal against a decision by the trial Judge who disallowed an amendment to the pleadings. Henry L.J. observed:

> *In a case such as this the trial judges' task is not only judicial but also managerial. The managerial responsibility is considerable, with the overall costs budget in millions. Consequently, that function is very important in an age where litigation of all sorts at every level*

> *is too expensive because unnecessarily long. So judges are not only entitled but encouraged to be pro-active in their trial management and interlocutory appeals are consequently discouraged.*

Likewise, the High Court of Australia, in the seminal case of *AON Risk Services Australia Ltd v. Australian National University* (2009) 239 CLR 175, departed from the previously liberal approach to late amendments of pleadings and adopted a more restrictive stance. In that case, the plaintiff sought an adjournment on the third day of trial to file an amended statement of claim, thereby expanding its claim against the defendant, its insurance broker, for fire damage. In considering the factors relevant to the exercise of judicial discretion in permitting belated amendments, the Court emphasised the necessity of providing a cogent explanation for any delay in seeking an amendment, stating as follows:

> *The importance attached by r 21 to the factor of delay will require that, in most cases where it is present, a party should explain it. Not only will they need to show that their application is brought in good faith, but they will also need to bring the circumstances giving rise to the amendment to the court's attention, so that they may be weighed against the effects of any delay and the objectives of the Rules.*

Despite the absence of specific statutory provisions in Australia expressly recognising the need for expedition in Court procedure relating to amendments, it was stressed that judicial practice has evolved to address concerns of undue delay and inefficiency, guided by considerations of the public interest:

> *The Judicature Act Rules (Judicature Act 1873 (UK) amended by the Supreme Court of Judicature Act 1875 (UK)) and their Australian offspring did not in terms make reference to the public interest in the expeditious dispatch of the business of the courts. The way in which proceedings progress has been left to the parties. This may be seen as an aspect of the adversarial system which is a dominant part of*

the common law inheritance of Judicature Act procedure. In this respect, however, the adversarial system has been qualified by changing practices in the courts directed to the reduction of costs and delay and the realisation that the courts are concerned not only with justice between the parties, which remains their priority, but also with the public interest in the proper and efficient use of public resources.

The Judicature Acts and associated Rules of Court are reflected in rr 501 and 502 of the ACT (Australian Capital Territory) Rules. The ACT Rules, like their precursors, confer the discretion to give leave to amend and impose the duty to make amendments for the purpose of deciding the real issues in, and avoiding multiplicity of, proceedings. The discretion is exercised in the context of the common law adversarial system as qualified by changing practice. But that is not a system which today permits disregard of undue delay. Undue delay can undermine confidence in the rule of law. To that extent its avoidance, based upon a proper regard for the interests of the parties, transcends those interests. Another factor which relates to the interests of the parties but transcends them is the waste of public resources and the inefficiency occasioned by the need to revisit interlocutory processes, vacate trial dates, or adjourn trials either because of non-compliance with court timetables or, as in this case, because of a late and deliberate tactical change by one party in the direction of its conduct of the litigation. These are matters which, even under the Australian versions of the Judicature Act system, unaffected by the sequelae of the civil procedure reforms of 1998 in the United Kingdom, are to be regarded as both relevant and mandatory considerations in the exercise of the discretion conferred by rules such as r 502.

This transition in judicial approach in Australia, aimed at addressing delays and costs in the litigation process, was recognised as early as 2000 by the Australian Law Reform Commission in its report *Managing*

Justice: A Review of the Federal Civil Justice System, Report No. 89 at [6.3].

Comparatively, the law in South Africa reflects a markedly accommodative attitude regarding amendments to pleadings. The Court has the discretion to grant leave to amend any pleading or document at any stage before judgment, notwithstanding any contrary provisions in the Rules, subject to the Court's power to impose terms as it deems fit, including those related to costs or other matters.

In spite of this, the Court in *Randa v. Radopile Projects CC* 2012 (6) SA 128 (GSJ), in deviating from the previous approach, laid the groundwork for the development of a more balanced exercise of the Court's jurisdiction in allowing late amendment of pleadings by taking into account the reasons for delay, the conduct of the litigants, and any injustice incapable of being compensated for by costs.

The case involved a monetary claim by the respondent in terms of a building dispute, wherein the appellant later sought to amend his plea and counterclaim in order to *inter alia* increase the quantum of damages. Bava A.J., having regard to the absence of a satisfactory explanation for the delay and the appellant's negligent conduct in contributing to the undue protraction of proceedings, refused to grant leave to amend. In articulating the rationale behind this approach, Willis J. highlighted the increasing inconvenience caused by delays associated with amendments:

> *It has long been my conviction that the commencement of a trial is the fulcrum upon which the courts' stance in respect of applications for amendments to pleadings should be balanced. The further away the parties are from the commencement of the trial, the easier it should be for a litigant to obtain an amendment and, conversely, the deeper the parties are into trial and the nearer they may be to obtaining judgment, the more difficult it ought to be.*

I am fortified in this conviction by reference to Halsbury's Laws of England (4th Edition (Reissue) Volume 36 (1) paragraph [1]) in which it is stated that the function of pleadings is to

> *enable the parties to decide in advance of the trial what evidence will be needed. From the pleadings the appropriate method of trial can be determined.*

Furthermore, as litigants approach a trial and, even more so, once a trial commences, costs increase exponentially; there are not infrequently considerable logistical difficulties in securing the timeous attendance of witnesses at court. As the trial progresses, the court hearing the matter will have begun to form impressions of witnesses and develop a sense the direction in which the wind may be blowing. These factors mitigate against the more relaxed or 'liberal' attitude that may prevail before trial.

These developments across jurisdictions reflect a growing recognition that belated applications for amendment of pleadings can undermine timely justice and burden the system. The emphasis is increasingly on balancing individual fairness with the effective functioning of the justice system, reinforcing the principle that access to justice includes not only the right to be heard, but also the right to timely resolution.

Applicability of the law to the facts of the case

At the material time to this appeal, amendment Act No. 8 of 2017 was in operation.

It is undisputed that the 1st and 2nd defendants made the application to amend the pleadings on the day first fixed for the pre-trial of the action. Therefore, the applicable provision is section 93(2), not section 93(1).

By examining the written submissions filed before the District Court, it is evident that the 1st and 2nd defendants advanced two main arguments

before the District Court in support of their application to amend the pleadings.

Firstly, they contended that since the case was not fixed for trial, section 93(1) was applicable. This contention is manifestly erroneous, as section 93(1) cannot be invoked when an application for amendment is made on or after the date first fixed for pre-trial.

Secondly, they argued that there is a conflict of interest between the 1st and the 2nd defendants, and that unless they are permitted to file separate answers clearly articulating their respective positions, a grave injustice would be caused to them.

The purported "conflict of interest" and "grave injustice" were foreseeable at the time the 1st and 2nd defendants chose to file a joint answer, joint admissions and issues, and a joint list of witnesses and documents, at three separate occasions after deliberations. In any event, if they had really intended to amend the joint answer and file separate answers, they ought to have made the application for amendment of pleadings before the date the case was first fixed for the pre-trial, not on the date the case was taken up for pre-trial.

The High Court did not appreciate both the law and the facts of the case. It appears that the High Court proceeded on the basis that the amendments would not surprise the plaintiff and therefore could be permitted. I am surprised that the High Court did not consider the applicability of section 93(2) of the Civil Procedure Code at all.

I unhesitatingly answer the question of law on which leave to appeal was granted in the affirmative. Accordingly, the judgment of the High Court dated 09.01.2020 is set aside, and the judgment of the District Court dated 28.11.2018 is restored. The appeal is allowed with costs.

As agreed, the parties in SC/APPEAL/101/2020 will abide by this judgment.

Judge of the Supreme Court

Kumudini Wickremasinghe, J.
I agree.

Judge of the Supreme Court

Sobhitha Rajakaruna, J.
I agree.

Judge of the Supreme Court