

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCMAP2024/0001

BETWEEN:

[1] ELECTRICAL ASSOCIATES LIMITED
[2] MARCELLINUS STEPHEN trading as MS STEPHEN TILING

Appellants

and

SUNROD PROPERTY INC.

Respondent

Before:

The Hon. Mr. Mario Michel
The Hon. Mr. Eddy D. Ventose
The Hon. Mr. Gerard St. C. Farara

Chief Justice [Ag.]
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Ms. Wauneen Louis-Harris for the Appellants
Ms. Vanessa Pinnock for the Respondent

2024: October 14;
December 10.

Interlocutory Appeal – Expert Report – Part 32 Civil Procedure Rules 2000 (CPR) – Application to strike out expert report on the basis that the report breached the provisions of CPR Part 32 – The court’s case management powers – Part 26 Civil Procedure Rules (Revised Edition) 2023 – Whether the learned trial judge erred in the exercise of her discretion by striking out the expert report – Whether the learned trial judge erred in not hearing the amendment application – Whether the learned trial judge erred in not allowing the appellants to amend the expert report

By claim form and statement of claim dated 11th October 2018, the appellants claimed against the respondent, damages for breach of contract for conducting electrical and tiling works for the completion of Harbor Club Hotel. The respondent filed a defence and counterclaim on 15th February 2019, denying any sums owed to the appellant, and asserted that the appellants were liable for breach of contract. The appellants filed their reply and defence to the counterclaim on 5th March 2019. The appellants applied for an extension of time to file an expert report, which was granted by the court on 13th March 2023. The respondent thereafter applied on 28th March 2023 for leave to appeal that decision, but this Court refused the application. The appellants filed their application to appoint an expert witness on 24th March 2023. On 4th May 2023, the court appointed Ms. Magaret Anne F. Antoine Charles as an expert witness, made orders as to the issues to be addressed in the expert report and gave directions for filing and the progression of the matter.

On 26th June 2023, the appellants filed the expert witness report of Ms. Magaret Anne. F. Antoine Charles (“the Expert”) (“the Expert Report”). On 7th August 2023, the respondent filed an application to strike out the Expert Report (“the Strike Out Application”) and on 22nd November 2023, the appellants filed an application seeking leave to amend the Expert Report (“the Amendment Application”). The Strike Out Application came on for hearing before the learned trial judge on 23rd November 2023 and after considering the submissions of the parties, she ordered that the Expert Report be struck out (the “Order”). The judge’s reasoning detailed in a nine-page Order, highlighted substantial breaches in relation to rules 32.2, 32.4, 32.13 and 32.14 of the Civil Procedure Rules 2000 (“CPR”). The judge found the Expert Report fundamentally flawed and stated that any attempt to fix the issues would require a complete rewrite and would have been unjust at that stage. Consequently, the Expert Report was struck out, and the Amendment Application was dismissed.

Being dissatisfied with the Order, the appellants have appealed to this Court by notice of appeal dated 18th June 2024. The appellants advanced four grounds of appeal. The issues that arise are whether the learned trial judge: 1) erred in the exercise of her discretion by striking out the Expert Report; 2) erred in not hearing the Amendment Application; and 3) erred in not allowing the appellants to amend the Expert Report.

Held: allowing the appeal against the decision of the learned trial judge, setting aside paragraph [2] of the Order, ordering that within 21 days of the date of this judgment, the Expert shall file and serve an amended Expert Report to comply with CPR Part 32, failing which the Expert Report shall stand struck out without further order of this Court, and ordering that the appellants shall have their costs in this Court to be assessed if not agreed within 21 days of the date of this judgment, that;

1. In striking out the Expert Report, the learned trial judge deprived herself of the opportunity to benefit from an expert report that is meant to assist the court in resolving the dispute between the parties. Striking out should not be the first step when there is a breach of CPR Part 32. The draconian response of striking out should only occur in certain circumstances. Where there is continuous non-compliance or there is a weak case, the court is open to striking out. Striking out should be considered particularly in cases where the impartiality of the expert is in question. Where the party is granted previous opportunities to remedy deficiencies

in expert reports, but failed to do so, the court would conclude that the justice of the case would require striking out. Accordingly, these circumstances did not arise in the instant case.

Barbara Campsell (also known as Barbara Daniel) v David Sookwa SLUHCVAP2014/0018 (delivered 19th February 2016, unreported) applied; **N.E.M (West Indies) Insurance Ltd. v Strisiver, Ashraph and Mhc (2000) Ltd.** TT 2013 CA 4 applied; **R (on the application of Good Law Project Ltd.) v Secretary of State for Health and Social Care** [2021] EWHC 2595 (TCC) applied.

2. Out of the nine (9) deficiencies identified by the learned trial judge at paragraph [16] of the Order, four (4) of them are not established and the other five (5) are not so “substantial” or “egregious” that they cannot be cured by allowing the appellants an opportunity to remedy the deficiencies to file and serve an amended Expert Report, with an appropriate unless order to require compliance. In any event, the court still retains the power on application by the other party to strike out any revised Expert Report if it still does not comply with any order made by the court. The nature of the five (5) deficiencies did not justify recourse to the draconian power of striking out. To the extent to which the learned trial judge relied on the four (4) alleged breaches in arriving at her decision to strike out the Expert Report, the learned trial judge, was influenced by irrelevant factors and considerations. As a result of the error or the degree of the error in principle, the learned judge’s decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.

Dana UK Axle Ltd v Freudenberg FST GmbH [2021] EWHC 1413 TCC applied; **Dufour and Others v Helenair Corporation Ltd and Others** (1996) 52 WIR 188 applied.

3. There is no doubt that the decision of the learned trial judge in striking out the Expert Report was a case management decision. Although it has often been stated by this Court that an appellate court would not easily interfere with a case management decision of a judge or master, it is now settled law that it is inappropriate for an appellate court to interfere with a case management decision unless it was “plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree”. Under the court’s general case management powers in CPR 26.1, the court is granted the power under CPR 26.1(w) to make an unless order specifying the consequences of any failure to comply with any rule, practice direction, or order. Rather than striking out, in an appropriate case it is open to the court to require the party in breach to remedy the deficiencies by a specific date, failing which the expert report would be struck out. It will only be in the rarest of cases and for good reason would the court exclude expert evidence that is designed to assist it. Therefore, the learned trial judge ought to have given the appellants the opportunity to remedy the breaches rather than outrightly striking out the Expert Report.

Rules 26.1 and 26.1(w) of the **Civil Procedure Rules (Revised Edition) 2023**, applied; **Employers International et al v Boston Life and Annuity Company Ltd.** British Virgin Islands Civil Appeal No. 5 of 2007 (delivered 6th November 2008, unreported) applied; **Sergey Taruta v JSC VTB Bank** BVIHCP2021/0002, BVIHCP2021/0008, BVIHCP2021/0012 (delivered 2nd June 2021, unreported) applied; **Julian Svirsky et al v Arman Oyekenov et al** BVIHCP2022/0064 (delivered 12th February 2024, unreported) applied; **Real Time Systems v Renraw Investments Limited** [2014] UKPC 6 followed.

4. It is proper procedure for applications to be dealt with in the order that they are filed. The Strike out Application was filed on 7th August 2023 and the Amendment Application was filed on 22nd November 2023, one day before the hearing of the Strike out Application on 23rd November 2023. Given the timeliness for the respondent to have replied to the Amendment Application in accordance with CPR 11.12, it is patently clear that the Amendment Application could not have been heard on 23rd November 2023.

Rule 11.12 of the **Civil Procedure Rules (Revised Edition) 2023** applied; **St. Kitts Nevis Anguilla National Bank v Caribbean 6/49 Limited** Saint Christopher and Nevis Civil Appeal No. 6 of 2002 (delivered 31st March 2003, unreported) applied.

JUDGMENT

- [1] **VENTOSE JA:** There is an appeal against the decision of the learned trial judge striking out the report of the expert witness filed by the appellants in proceedings in the court below.

Background

- [2] The appellants filed a claim form and statement of claim on 11th October 2018 in which they claimed against the respondent, damages for breach of contract for conducting electrical and tiling works for the completion of Harbor Club Hotel, a project of Harbor Club Ltd. (previously the second defendant in the court below). The respondent filed a defence and counterclaim on 15th February 2019 in which it denied that there were any sums owing to the appellants and that it was the appellants who were liable to the respondent for breach of contract. The appellants filed their reply to the defence and their defence to the counterclaim on 5th March 2019.

[3] The appellants applied for an extension of time to file an expert report, and the application was granted by the court on 13th March 2023. The respondent applied on 28th March 2023 for leave to appeal that decision, but this Court refused leave to appeal on 19th April 2023. The appellants filed their application to appoint an expert witness on 24th March 2023 and on 4th May 2023 the court made the following orders:

- “1. Ms. Margaret Anne F. Antoine Charles, Quantity Surveyor, with expertise in Construction Management, is hereby appointed an expert witness for the purpose of these proceedings.
2. The Expert's Report will address the following matters:
 - (i) What was the role of the Quantity Surveyor within the context of the respective contracts between the parties, in relation to the Harbor Club Project ("the project"). Who employed the Quantity Surveyor and to whom was the Quantity Surveyor accountable. Did the Quantity Surveyor maintain records for the duration of the project and who is entitled to keep or have access to such records.
 - (ii) Did the first claimant execute electrical works to the value of the amount claimed, during the period December 2017 to February 2018, and whether such works were in conformity with the industry standard for electrical works of the kind to be undertaken by this claimant, under the respective contract.
 - (iii) Did the second claimant execute tiling works to the value of the amount claimed, during the period December 2016 to February 2018, and whether such works were in conformity with the industry standard for tiling works of the kind to be undertaken by this claimant, under the respective contract.
 - (iv) Based on the industry standard, was the defendant required to undertake corrective works in relation to the works undertaken by the respective claimants, and what was the value of any corrective works undertaken, in relation to each claimant.
 - (v) Were there any delays in meeting the contractual dates for completion under the respective contracts. If yes, by whom, and what was the cause and duration of such delays. Can such delay be quantified in monetary terms based on the respective contracts, and if not, what is the appropriate industry standard for doing so.

3. The Expert will provide her Report to the claimants within 45 days of the date of this order.
4. The claimants will file and serve the Report within 50 days of the date of this order.
5. The defendant is at liberty to file and serve written questions to the Expert, arising from the content of the Report, within 28 days of service.
6. The Expert will provide written answers to the claimants within 21 days of service thereof.
7. The claimants will file and serve the Expert's written answers within 7 days of receipt of same from the Expert.
8. The Expert shall attend trial for cross examination.
9. The claimants will be responsible equally for remuneration of the expert.
10. The claimants will file a joint timetable in preparation for pretrial review, by 15th September 2023.
11. The matter is adjourned to 26th September 2023 for pretrial review."

[4] On 26th June 2023, the appellants filed the expert witness report of Ms. Margaret Anne F. Antoine Charles (the "Expert") (the "Expert Report"). The respondent on 7th August 2023 filed an application to strike out the Expert Report (the "Strike Out Application") and on 22nd November 2023, the appellants filed an application seeking leave to amend the Expert Report (the "Amendment Application").

The decision in the court below

[5] The Strike Out Application came on for hearing before the learned trial judge on 23rd November 2023, and after considering the submissions of the parties she ordered that the Expert Report be struck out. It is to be noted that the order relating to the Strike Out Application on its face bears the date of 21st December 2023. However, it was clear from the transcript of proceedings before the learned trial judge that the

hearing took place on 23rd November 2023. The learned trial judge did not deliver a written judgment on the Strike Out Application. Instead, she made a detailed order running nine pages with full recitals giving the background to the application, the submissions of the parties, her findings and a postscript, which were then followed by the actual orders. The entire document is referred to in this judgment as the “Order”. The critical reasoning of the learned trial judge is found in paragraphs 15-17 and 20-23 of the Order which states as follows:

- “15. The Court has examined the report against the backdrop of the rules stated above, which are couched in mandatory language, and the relevant legal authorities on the subject. The breaches are substantial in several respects, in relation to rules 32.2, 32.4, 32.13 and 32.14.
16. In this regard the Court notes the following:
 - (1) The report contained no information on matters relating to sub-rules 32.4 (3) (5) and (6);
 - (2) It was not addressed to the Court as required by rule 32.13;
 - (3) The expert did not give any details of her qualifications as required by rule 32.14(1)(a) and merely stated that she is a qualified quantity surveyor and construction manager;
 - (4) The report does not provide details of literature or other material which the expert used in compiling the report, contrary to Rule 32.14(1)(b);
 - (5) The statement at the end of the report does not state that the expert understands her duty to the court as required by sub-rules 32.14(2)(a) and (b);
 - (6) The expert did not annex to the report any written, supplemental or oral instructions received from the claimant or claimant's counsel, contrary to sub-rule 32.14(3); and
 - (7) The Chief Inspector's Certificate of approval referred to in the report was not a disclosed document and was not provided to the defendants at the time of service of the report as required by sub-rule 32.14(4).
17. The claimants rely [*sic*] on rule 26.9 which deals with the court's general powers to rectify matters and submits [*sic*] that these are procedural flaws which may be put right by the Court.
20. Although the legal authorities also pellucidly state that in appropriate circumstances the opportunity may be given to remedy procedural errors, this applies in circumstances where a report is substantially compliant, and needs to be cured of procedural errors,

for completeness. However, this is not the case here. The absence of such vital information conveys that the report has not complied substantially with the requirements of Part 32 in circumstances where the expert has a duty to assist the court on all relevant matters, to resolve the proceedings fairly. The breaches are egregious and cannot merely be treated as procedural flaws, which can be put right by the Court. Additionally, the report can be of no use to the Court in its current form, unless it is significantly altered. Any attempt to remedy these breaches would mean that the report would have to be redone. It would be unjust at this stage of the proceedings to provide the claimants with a further opportunity to return to the drawing board to present a complete and compliant report.

21. It has been said concerning non-compliance with the rules in relation to expert evidence that *"the court has little sympathy with any litigant who simply ignores the rules in this way. Endless opportunities for compliance are not in accordance with the overriding objective. These requirements are not optional extras, only to be complied with by a litigant and their expert if the court states in a specific case that they are to apply. They apply in all cases."*
22. Consequently, the Court concludes that the report is incurably bad and will be struck out.

Postscript

23. The Court notes that on 22nd November 2023 (the day before the application to strike out the expert report was to be ventilated) the claimants filed a fresh application for leave to amend the expert report and to disclose a Certificate dated 18th September 2018 (the Certificate), to form part of the evidence in the claim. Having determined that the report should be struck out, that application will of necessity fall away. (internal references omitted)"

The Appeal

- [6] The appellants, being dissatisfied with the order striking out the Expert Report, have appealed to this Court. The four grounds of appeal as outlined in the notice of appeal filed on 18th June 2024 are as follows:

- (1) The learned judge erred in striking out the Expert Report of Margaret Anne Charles filed on 26th June 2023.

- (2) The learned judge erred in failing and/or refusing to hear the Notice of Application of the appellants herein which was filed on the 22nd day of November 2023.
- (3) The learned judge erred in failing and or refusing to allow the appellants to amend the Expert Report.
- (4) The learned judge erred in failing to decide that it was logical to hear the notice of application filed herein by the appellants on the 22nd November 2023 prior to the notice of application of the respondent to strike out the report of the Expert.

[7] The issues that arise are whether the learned trial judge: (1) erred in the exercise of her discretion by striking out the Expert Report; (2) erred in not hearing the Amendment Application; and (3) erred in not allowing the appellants to amend the Expert Report. I will examine the second issue first and then thereafter examine together the first and third issues.

Part 32 – Expert Evidence

[8] Part 32 of the **Civil Procedure Rules 2000 (“CPR”)** pursuant to which the application to call the Expert was made governs this issue. CPR 32.2 states that expert evidence must be restricted to that which is reasonably required to resolve the proceedings justly. The expert’s overriding duty to the court involves: (1) the duty of an expert witness to help the court impartially on the matters relevant to his or her expertise; and (2) this duty overrides any obligation to the person by whom he or she is instructed or paid (CPR 32.3(1)). CPR 32.4(2) outlines the following ways in which the expert duty to the court is to be carried out; (1) expert evidence presented to the court must be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the demands of the litigation; (2) an expert witness must provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within the witness’ expertise; (3) an expert witness must state the facts or assumptions upon which his or her opinion is based,

and must consider and include any material fact which could detract from his or her conclusion; (4) an expert witness must state if a particular matter or issue falls outside his or her expertise; (5) if the opinion of an expert witness is not properly researched then this must be stated with an indication that the opinion is no more than a provisional one; (6) if an expert witness cannot assert that his or her report contains the truth, the whole truth and nothing but the truth without some qualification, that qualification must be stated in the report; and (7) if after service of a report, an expert witness changes his or her opinion on a material matter, that change of opinion must be communicated to all parties.

- [9] An expert may apply to the court for directions (CPR 32.5) and the court has the power to restrict expert evidence (CPR 32.6), including the requirements that a party may not call an expert witness or put in the report of an expert witness without the court's permission (CPR 32.6 (1)) and the general rule is that the court's permission is to be given at a case management conference (CPR 32.6 (2)). Unless the court directs otherwise, expert evidence is to be given in a written report and must not include hearsay evidence (CPR 32.7). CPR 32.8 permits a party to put questions to an expert instructed by another party about his or her report. The court may direct expert evidence to be given by a single expert (CPR 32.9) in which case each party may give instructions to that expert (CPR 32.11). Any expert appointed by the court who gives oral evidence may be cross-examined by any party (CPR 32.10). In some circumstances the court may direct a party to provide an expert report (CPR 32.12).
- [10] CPR 32.13 states that an expert witness must address his or her report to the court and not to any person from whom the expert witness has received instructions. CPR 32.14 outlines the requirements for the content of the expert report, and includes: (1) giving details of (a) the expert witness' qualifications and (b) any literature or other material which the expert witness has used in making the report (CPR 32.14(1)(a) and (b)); (2) a statement placed at the end of an expert witness' report that the expert witness (a) understands his or her duty to the court as set out in rules 32.3 and 32.4 and (b) has complied with that duty (CPR 32.14(2)(a) and (b)); (3) copies of all

instructions howsoever provided to the expert witness must be attached to the expert report (CPR 32.14(3)); and (4) if a report refers to photographs, plans, calculations, survey reports or other similar documents, these must be provided to the opposite party at the same time as the service of the report (CPR 32.14(4)).

- [11] CPR 32.15 makes provision for the meeting of experts where more than one is appointed. CPR 32.16(1) states that a party who fails to comply with a direction to disclose an expert witness' report may not use the report at the trial or call the expert witness unless the court gives permission and CPR 32.16(1) states that the court may not give permission at the trial unless the party asking for permission can show that it was not reasonably practicable to have applied for relief at an earlier stage.

- [12] In **Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd (No 3)**¹, Fraser J stated that:

“[237] The principles that govern expert evidence must be carefully adhered to, both by the experts themselves, and the legal advisers who instruct them. If experts are unaware of these principles, they must have them explained to them by their instructing solicitors. This applies regardless of the amounts at stake in any particular case and is a foundation stone of expert evidence. There is a lengthy practice direction to CPR Pt 35, Practice Direction 35. Every expert should read it.”

- [13] In **National Justice Compania Naviera SA v Prudential Assurance Co. Ltd., The Ikarian Reefer**,² a case decided before the United Kingdom Civil Procedure Rules (the “UKCPR”) came into effect in 1998, Cresswell J stated at pp 565-566 as follows:

“B. The Duties and Responsibilities of Expert Witnesses

The duties and responsibilities of expert witnesses in civil cases include the following:

1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation (*Whitehouse v Jordan*, [1981] 1 W.L.R. 246 at 256, per Lord Wilberforce).

¹ [2018] EWHC 1577 (TCC).

² [1993] 2 Lloyd's Rep 68.

2. An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise (see *Polivitte Ltd. v. Commercial Union Assurance Co. Plc*, [1987] 1 Lloyd's Rep 379 at p 386 per Mr Justice Garland and *Re J*, [1990] FCR 193 per Mr Justice Cazalet). An expert witness in the High Court should never assume the role of an advocate.
3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (*Re J* sup).
4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one (*Re J* sup). In cases where an expert witness, who has prepared a report, could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report (*Derby & Co Ltd and Others v. Weldon and Others*, *The Times*, Nov 9, 1990 per Lord Justice Staughton).
6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.
7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports (see 15.5 of the Guide to Commercial Court Practice)."

[14] The appellants cite the decision of **Dana UK Axle Ltd. v Freudenberg FST GmbH**³ where Joanna Smith J had to decide whether a party's technical expert evidence should be excluded during the course of a trial for failing to comply with the terms of a PTR order and UKCPR Part 35, the Practice Direction to UKCPR 35 and the Guidance for the Instruction of Experts in Civil Claims 2014 (the "2014 Guidance") in respect of the instruction of and interaction with its experts. In granting the defendant relief from sanctions because of the late filing of the defendant's expert evidence, the

³ [2021] EWHC 1413 (TCC).

court, on the urging of the claimant who identified various defects in the defendant's expert report, granted the defendant permission to rely on the three technical expert reports on the condition that revised expert reports comply with UKCPR Part 35 and the 2014 Guidance by: (i) providing full details of all materials provided to the experts by the defendant's solicitors and/or by the defendant itself (Para 1.1 of the PTR Order); (ii) disclosing all documents (including photographs) produced by or provided to each expert during any site visit, including any notes taken by the expert of information provided to the expert/seen by the expert during any such visit (including notes of statements from operators or other staff etc.) (Para 1.2 of the PTR Order); and (iii) identifying the source and details of the data and other information relied on in support of each proposition/opinion (Para 1.3 of the PTR Order).

- [15] While the decision of Joanna Smith J did not deal directly with the order at the pre-trial review, it is clear that O'Farrell J, the judge who made the PTR order, allowed the defendant an opportunity not only to file the expert reports out of time, which was not objected to by the claimant, but gave the defendant an opportunity to remedy the defects identified by the claimant when the revised expert reports were actually filed. As such, faced with non-compliance with the PTR order which had directed the defendant to remedy the identified breaches of UKCPR Part 35 found in the PTR order, it was unsurprising that Joanna Smith J held at paragraph [61] that she was satisfied that the defendant acted in breach of the letter and spirit of paragraphs 1.1–1.3 of the PTR Order when the revised reports did not remedy the identified defects and that these breaches are all serious and unexplained. She therefore concluded that:

“[64] For present purposes it is my judgment that the Court cannot condone the actions of FST and its multiple breaches of the PTR Order by permitting it to rely on its technical expert reports. FST's failures to meet the conditions imposed by the PTR Order mean that it does not have the court's permission to rely on those reports and I am not prepared to give it that permission.”

- [16] Joanna Smith J then proceeded at paragraph [65] to deal with the other serious breaches on the part of the defendant of UKCPR 35 and the 2014 Guidance although

noting that in light of her decision in relation to the PTR Order, it was not strictly necessary for her to address this aspect. After examining the evidence of: (1) a free flow exchange of information between the experts and the defendant's employees and in-house technical specialists, through extensive email exchanges, numerous telephone and video conferences and at site visits, apparently with no, or very little, oversight from the solicitors for the defendant (at paragraph [72]); (2) the date of the emails disclosed in the disclosure in May 2020 that the flow of information continued during the period between the joint expert meetings on 13th and 30th October 2020 and the signing of the experts' joint statement which took place between 9th and 14th December 2020 (at paragraph [74]); and (3) two experts attended site visits without informing the claimant's experts and without giving them an opportunity to have access to the same information (at paragraph [81]), she concluded that the conduct of all three experts had (at the very least) called into question the independence of their reports and the extent to which they have provided objective and unbiased opinions in those reports (at paragraph [84]). Consequently, Joanna Smith J held at paragraph [87] that the breaches of UKCPR 35, its Practice Direction and the 2014 Guidance would be sufficient in themselves to justify the refusal of permission by the court to the defendants to rely on its technical expert reports.

The Amendment Application

- [17] In respect of grounds 2-4, the appellants submit that it was logically proper to hear the Amendment Application before the Strike Out Application. This submission has no merit. The Amendment Application was filed on 22nd November 2023, one day before the hearing of the Strike Out Application on 23rd November 2023. Given the timeliness for the respondent to have replied to the Amendment Application in accordance with Rule 11.12 in **Civil Procedure Rules (Revised Edition) 2023 ("CPR 2023")**, it is patently clear that the Amendment Application could not have been heard on 23rd November 2023. I agree with the respondent's submission that the appellants' reliance on the decision of this Court in **St. Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited**⁴ is misplaced. **Caribbean 6/49**

⁴ Saint Christopher and Nevis Civil Appeal No. 6 of 2002 (delivered 31st March 2003, unreported).

concerned whether an application to strike out has the effect of stopping time from running in respect of the period for filing a defence. Additionally, the decision of this Court in **Caribbean 6/49** makes clear that it is proper procedure for applications to be dealt with in the order that they are filed. The learned trial judge did not err in not hearing the Amendment Application.

The Strike Out Application

[18] The learned trial judge observed at paragraph [10] of the Order that an application to strike out an expert report can be made at any stage in the proceedings, including after the report has been filed and before trial. To that observation I would add that such an application may be made during the trial itself as occurred in the **Dana** case. The learned trial judge continued that a court should refrain from striking out an expert report at the preliminary stage of proceedings, except in the clearest of cases, citing a decision of the Court of Appeal in Trinidad and Tobago in **N.E.M. (West Indies) Insurance Ltd v Strisiver, Ashraph and Mhc (2000) Ltd**⁵ that, in such circumstances, a court must be satisfied that the expert has so failed in his or her duty that the report can be of no assistance to the court in relation to any matter within the expertise of the witness. This statement from the **N.E.M.** decision makes the point too broadly. It must be read in the context of the finding (at paragraph [16]) of the Court of Appeal after examining the contents of the expert report that the expert had actively taken up the cause of his clients to such an extent that his expert report lacked impartiality and objectivity.

[19] The question for the Court of Appeal of Trinidad and Tobago in **N.E.M.** was whether the lack of impartiality and objectivity had so coloured or tainted the report that it should not be admitted at all. The Court of Appeal noted at paragraph [17] that the view of the master in the court below was that the objections to the report should be left to the trial judge after cross-examination and submissions as to weight. The Court of Appeal stated at paragraph [20] that: (1) the discretion to exclude the report at a preliminary stage should not be exercised except in the clearest of cases; (2) the

⁵ TT 2013 CA 4.

court must be satisfied that the expert has so failed in his duty that his report can be of no assistance to the court in relation to any matter within the expertise of the witness; and (3) it was left in no doubt that this was such a case and the report should be excluded at that stage. Consequently, it concluded that the master erred in concluding that complaints of partiality of the expert could be dealt with by the trial judge during the course of the trial.

[20] The issue in **N.E.M.** related to the impartiality of the expert which would have an impact on all his or her evidence. It is not every breach of a duty, or breaches of duties found in Part 32 by an expert that would lead to their expert report being struck out by the court. That enquiry is fact specific and is not related to the subject matter of the report itself. The impartiality of the Expert is not an issue for consideration in this appeal. The decision and reasoning of the Court of Appeal of Trinidad and Tobago in **N.E.M.** relied upon by the learned judge could not have been of any great relevance to the issue she had to decide.

[21] As quoted at paragraph [5] above, the learned trial judge at paragraph [16] of the Order outlined the specific breaches of the CPR Part 32 that were contained in the Expert Report. I will deal with each one seriatim.

Statement of facts or assumptions

[22] The learned trial judge noted at paragraph [16(1)] that the Expert Report contained no information on matters relating to CPR 32.4(3), which provides that an expert witness must state the facts or assumptions upon which his or her opinion is based and must consider and include any material fact which could detract from his or her conclusion. The learned trial judge does not point to which part of the Expert Report that is based on facts or assumptions in circumstances where this is not expressly stated in the Expert Report. This alleged breach has not therefore been established.

Improperly researched report

- [23] The learned trial judge noted at paragraph [16(1)] that the Expert Report contained no information on matters relating to CPR 32.4(5), which provides that if the opinion of an expert witness is not properly researched then this must be stated with an indication that the opinion is no more than a provisional one. There is no indication in the Order of the learned trial judge which aspects of the Expert Report were not properly researched that would require any such statement to be made by the Expert. Consequently, this alleged breach has not been established.

The whole truth and nothing but the truth

- [24] The learned trial judge noted at paragraph [16(1)] that the Expert Report contained no information on matters relating to CPR 32.4(6), which provides that if an expert witness cannot assert that his or her report contains the truth, the whole truth and nothing but the truth without some qualification, that qualification must be stated in the report. It is true that the Expert Report does not contain the words as required by CPR 32.4(6) but merely states on the last page of the report that “I state that the information contained in my report is to the best of my knowledge and belief to be true and correct”. However, this is not the same thing as saying that the Expert cannot assert that his or her report contains the truth, the whole truth and nothing but the truth without some qualification. On this basis, this breach has not been established.

Expert report to be addressed to the court

- [25] The learned trial judge noted at paragraph [16(2)] that the Expert Report was not addressed to the court as required by CPR 32.13, which provides that an expert witness must address his or her report to the court and not to any person from whom the expert witness has received instructions. This requirement was not complied with by the Expert. However, it must be noted that the mischief is really in the second part of CPR 32.13 which requires that the report must not be addressed to any person from whom the expert witness has received its instructions. This buttresses the point made in CPR 32.3(1) that it is the duty of an expert witness to help the court impartially on the matters relevant to his or her expertise and that this duty overrides

any obligation to the person by whom he or she is instructed or paid (CPR 32.3(2)). It is correct that this breach was established but it is one that can easily be remedied.

Qualifications of expert

- [26] The learned trial judge stated at paragraph [16(3)] of the Order that the Expert did not give any details of her qualifications as required by CPR 32.14(1)(a) and merely stated that she is a qualified quantity surveyor and construction manager. CPR 32.14(1)(a) states that an expert witness' report must give details of the expert witness' qualifications. It cannot be doubted that this was not complied with by the Expert. If Part 32 required expert reports to be filed without the permission of the court and it is only when filed could the court assess the qualifications of that expert to determine whether they have the qualifications required of the expert required to resolve the matter in dispute between the parties, then a failure to include details of his or her qualification would have greater significance. No doubt the learned trial judge would have appointed the Expert based partly on her qualifications which would have been part of the application for her appointment as an expert and her experience. The requirements of Part 32 no doubt must always be complied with. However, in this instance, the failure to provide evidence of her qualifications could easily have been remedied by filing an amended Expert Report.

Details of literature or material used

- [27] The learned trial judge stated at paragraph [16(4)] of the Order that the Expert Report does not provide details of literature or other material which the Expert used in compiling the report, contrary to CPR 32.14(1)(b), which provides that that an expert report must give details of any literature or other material which the expert witness has used in making the report. To breach CPR 32.14(1)(b), it must be plain on the face of the expert report that the expert has used literature or other material in making the report and has failed to give the details of any of them. The learned trial judge did not identify where in the Expert Report that literature or other material was used by the Expert but that their details were not given. This breach has not been established.

Statement of duty to court

- [28] The learned trial judge stated at paragraph [16(5)] of the Order that the statement at the end of the Expert Report does not state that the Expert understands her duty to the court as required by CPR 32.14(2)(a) and (b). CPR 32.14(2) states that at the end of an expert witness' report there must be a statement that the expert witness: (i) understands his or her duty to the court as set out in rules 32.3 and 32.4 (sub-rule (a)); and (ii) has complied with that duty (sub-rule (b)). The Expert did not comply with these requirements when completing the Expert Report and this failure was established.

Instructions to expert

- [29] The learned trial judge stated at paragraph [16(6)] of the Order that the Expert did not annex to the Expert Report any written, supplemental or oral instructions received from the claimant or claimant's counsel, contrary to CPR 32.14(3). CPR 32.14(3) states that there must also be attached to an expert witness' report copies of – (a) all written instructions given to the expert witness; (b) any supplemental instructions given to the expert witness since the original instructions were given; and (c) a note of any oral instruction given to the expert witness, and the expert must certify that no other instruction than those disclosed have been received by him or her from the party instructing the expert, the party's legal practitioner or any other person acting on behalf of the party. The Expert did not comply with this requirement, and it cannot be questioned that this breach was established.
- [30] In **Dana**, one of the questions the defendant's solicitors sent to the experts after the expert report was filed was designed to identify documents provided to the experts by way of instructions including any documents by which information was provided to them in respect of matters in dispute and which had not already been disclosed by them. Joanna Smith J observed at paragraph [35] that it is essential for the court to understand what information and instructions had been provided to each side's experts, not least so that it can be clear as to whether the experts were operating based on the same information and thus on a level playing field. The need for

disclosure of the instructions in CPR 32.14(3) is also to allow for transparency in all communications and instructions from the legal practitioners to the experts. Without that disclosure the court cannot determine the nature and extent of instructions given to the expert to assess the extent to which the opinion of the expert is based on any general or specific instructions given to him or her.

- [31] In this appeal, the Expert failed to include the instructions as required by CPR 32.14(3) and this breach is clearly established. However, an order requiring the Expert to amend the Expert Report to comply with CPR 32.14(3) could have remedied this breach.

Chief Inspector's Certificate

- [32] The learned trial judge stated at paragraph [16(7)] of the Order that the Chief Inspector's Certificate of approval referred to in the Expert Report was not a disclosed document and was not provided to the defendants at the time of service of the Expert Report as required by CPR 32.14(4). CPR 32.14(4) states that if a report refers to photographs, plans, calculations, survey reports or other similar documents, these must be provided to the opposite party at the same time as the service of the report. The Chief Inspector's Certificate was not a disclosed document, and the appellants conceded at the hearing of the appeal that the Expert should not have referred to this document in her Expert Report. Submitting an amended Expert Report to exclude reliance on the Chief Inspector's Certificate could have remedied this breach.

Conclusions

- [33] The learned trial judge noted at paragraph [15] of the Order that the breaches identified in paragraph [16] were "substantial in several respects", and at paragraph 20 stated that the breaches were "egregious and cannot merely be treated as procedural flaws" that can be put right by the court. She continued that:

"... Additionally, the report can be of no use to the Court in its current form, unless it is significantly altered. Any attempt to remedy these breaches would mean that the report would have to be redone. It would be unjust at this stage of the proceedings to provide the claimants with a further

opportunity to return to the drawing board to present a complete and compliant report.”

- [34] The learned trial judge then cites the following highlighted section from paragraph [38] in the decision of Fraser J in **R (on the application of Good Law Project Ltd) v Secretary of State for Health and Social Care**:⁶

“38. Fourthly, **the court has little sympathy with any litigant who simply ignores the rules in this way. Endless opportunities for compliance are not in accordance with the overriding objective. These requirements are not optional extras, only to be complied with by a litigant and their expert if the court states in a specific case that they are to apply. They apply in all cases.** They are already contained in CPR Part 35, the accompanying Practice Direction and the Guidance for the Instruction of Experts in Civil Claims 2014. They have also been emphasised in a number of previous decisions. The court has already given the Secretary of State one opportunity to put things right. Fifthly, the Secretary of State is represented by professional legal advisers and the GLD, and there is no good reason to grant such a litigant a third opportunity to comply with the rules.”

- [35] For reasons which I will explore later, the learned trial judge took the highlighted passage out of context. In **Good Law Project**, the court noted at paragraph [22] that two expert reports, the July report and the August report, did not comply with UKCPR Part 35 and both failed to comply with the principles that underpin the deployment of expert evidence in court proceedings. The attempt by the defendant to get a third attempt to achieve compliance with UKCPR Part 35 was rejected by Fraser J at paragraph [37] for the following reasons: (1) the court had expressly identified the need for discussions and information to be identified in the expert report; (2) no reason at all has been provided for the failure of the August report to remedy these deficiencies, or why the approach used had been adopted; and (3) the substantive hearing of the matter was fast approaching. He continued that if the “third report” approach were to be adopted, it would mean the application would have been considered on no fewer than three separate occasions and that this was disproportionate. Fraser J also noted that if permission was to be given for the third iteration of the report, the claimant would be entitled to have time to consider it, and

⁶ [2021] EWHC 2595 (TCC).

to instruct and adduce their own expert evidence, and that there was simply insufficient time available for these different steps.

[36] It was in this context that Fraser J made the fourth reason that was found in paragraph [38] of his judgment that was quoted in part by the learned trial judge at paragraph [21] of the Order. It was made in the context where the court had granted the defendant two previous opportunities to remedy the deficiencies and the two reports resubmitted, the July report and the August report, also failed to remedy the need for discussions and information to be identified in the expert report. Unsurprisingly, Fraser J had no sympathy with a third application to submit a “third report”.

[37] No doubt the decision of the learned trial judge in striking out the Expert Report was a case management decision. It has often been stated by this Court that an appellate court would not easily interfere with a case management decision of a judge or master: **Employers International et al v Boston Life and Annuity Company Ltd.**⁷ In **Sergey Taruta v JSC VTB Bank**,⁸ this Court stated as follows:

“The Court’s approach to challenges to case management decisions:

[12]. ... This Court has repeatedly said that case management decisions are the province of the trial judge and should be accorded the highest respect by appellate courts. The basic principles have been set out and repeated in many decisions of this Court and for convenience we will repeat what was said in *Shallan Overseas Limited v Primefuels Investments Limited* and others–

“It is now settled law that an appellate court should not interfere with the case management decision by a trial judge unless the decision was plainly wrong. This Court acknowledged this principle in *Aquaduct Limited* and another v *Faelesseje* and another where Baptiste JA noted at paragraph [21]–

“In ordering as she did, the learned judge was in essence making a case management decision. A case management decision is peculiarly that of the

⁷ British Virgin Islands Civil Appeal No. 5 of 2007 (delivered 4th July 2007, unreported).

⁸ BVIHCP2021/0002, BVIHCP2021/0008, BVIHCP2021/0012 (delivered 2nd June 2021, unreported).

first instance judge. As Lady Justice King stated in *Re U (children)*:

‘It has always been the case that a case management decision is peculiarly that of the first instance judge and the Court of Appeal will be slow to interfere with such a determination.’

Baptiste JA also relied on the Supreme Court decision of *HRH Prince Abdulaziz v Apex Global Management Ltd* and another where Lord Neuberger made a similar pronouncement, emphasising that it is inappropriate for an appellate court to interfere with a case management decision unless it was “plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree.”

[38] In a similar vein, this Court has also stated that the draconian response of striking out a party’s statement of case and denying him a trial on the merits of his case should not be the first step when that party breaches any of the Rules of the CPR 2000, unless there is repeated non-compliance or his case is weak: **Barbara Campsell (also known as Barbara Daniel) v David Sookwa**.⁹ The same principle would apply to an application to strike out an expert report of a party, because striking out should not be the first step when there is a breach of Part 32 unless that breach is such that the impartiality of the expert is questioned (as was the case in **N.E.M.**) or there is repeated non-compliance (as was the case in the **Good Law Project**) or for any other good reason. Otherwise, there are tools in the arsenal of case management powers of a judge to deal with such a situation. This Court in **Julian Svirsky et al v Arman Oyekenov et al**¹⁰ recently considered the scope of unless orders although in the context of an application to strike out a party’s statement of case under CPR 26.4. In **Real Time Systems Limited v Renraw Investments Limited**,¹¹ the Privy Council stated that:

“17. ... There is no reason why the court, faced with an application to strike out, should not conclude that the justice of the particular case militates against this nuclear option, and that the appropriate

⁹ SLUHCVP2014/0018 (delivered 19th February 2016, unreported).

¹⁰ BVIHCMAP2022/0064 (delivered 12th February 2024, unreported).

¹¹ [2014] UKPC 6.

course is to order the claimant to supply further details, or to serve an amended statement of case including such details, within a further specified period. Having regard to rule 26.6, the court would quite probably also feel it appropriate to specify the consequences (which might include striking out) if the details or amendment were not duly forthcoming within that period.”

[39] The same principle can arguably apply here. Under the court's general case management powers in CPR 26.1, the court is granted the power under CPR 26.1(w) to make an “unless order” specifying the consequences of any failure to comply with any rule, practice direction, or order. No doubt in granting the application to file the Expert Report, the court accepted at paragraph [5] that “undoubtedly, there exists a reliable body of knowledge or experience to guide or underpin the areas in which the expert evidence is required”. Additionally, it is the duty of an expert witness to help the court impartially on the matters relevant to his or her expertise. The purpose of the expert report is to assist the court in resolving the issue or issues on which the expertise is required. To this end, it will only be in the rarest of cases and for good reason would the court exclude expert evidence that is designed to assist it. Rather than striking out, in an appropriate case it is open to the court to require the party in breach to remedy the deficiencies by a specific date, failing which the expert report would be struck out.

[40] In **Dana**, it was noted that O’Farrell J had given the defendant an opportunity to remedy the defects identified by the claimant when the revised expert reports were filed. It was the failure by the defendant to comply with the stipulation in the PTR order in the revised expert report and the finding that the experts were not impartial that led Joanna Smith J to strike out the resubmitted expert reports. Similarly, in **Good Law Project**, the court had granted the defendant two opportunities to remedy the deficiencies in the expert reports but when the defendant resubmitted the report, the July report and the August report, both failed to remedy the need for discussions and information to be identified in the expert report. It was for that reason that Fraser J did not accede to a third application to resubmit a “third report”.

[41] Out of the nine (9) deficiencies identified by the learned trial judge at paragraph [16] of the Order and discussed at paragraphs [22]-[30] above, four (4) of them are not established and the other five (5) are not so “substantial” or “egregious” that they cannot be cured by allowing the appellants an opportunity to remedy the deficiencies to file and serve an amended Expert Report, with an appropriate unless order to require compliance. In any event, the court still retains the power on application by the other party to strike out any revised Expert Report if it still does not comply with any order made by the court as was the case in **Dana**. In striking out the Expert Report the learned trial judge deprived herself of the opportunity to benefit from an expert report that is meant to assist the court in resolving the dispute between the parties.

[42] The nature of the five (5) deficiencies identified above did not justify recourse to the draconian power of striking out. To the extent to which the learned trial judge relied on the four (4) alleged breaches in arriving at her decision to strike out the Expert Report, the learned trial judge (to borrow the language of this Court in **Dufour and Others v Helenair Corporation Ltd and Others**)¹² was influenced by irrelevant factors and considerations and that as a result of the error or the degree of the error in principle, the learned trial judge’s decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong. In exercising the discretion afresh, I would dismiss the Strike Out Application and order the appellants to remedy the failure to comply with CPR Part 32 failing which the Expert Report shall stand struck out without further order.

Disposition

[43] Accordingly, I would allow the appeal against the decision of the learned trial judge, set aside paragraph [2] of the Order, and order that within 21 days of the date of this judgment, the Expert shall file and serve an amended Expert Report to comply with CPR Part 32, failing which the Expert Report shall stand struck out without further

¹² (1996) 52 WIR 188.

order of this Court. The appellants shall have its costs in this Court to be assessed if not agreed within 21 days of the date of this judgment.

[44] I am grateful for the assistance provided by learned counsel.

I concur.
Mario Michel
Chief Justice [Ag.]

I concur.
Gerard St. C. Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar