

THE EASTERN CARIBBEAN SUPREME COURT

ANGUILLA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. AXAHCV 2019/0001

BETWEEN:

B & F CO. LIMITED

GEOFFREY FIEGER

KATHLEEN J. FIEGER

Claimants

and

MALLIOUHANA-ANICO INSURANCE COMPANY LIMITED

Defendant

Appearances:

Mrs. Tana'ania Small-Davis QC, with her Ms. Tara Carter of Counsel
for the Claimants

Mr. Leslie Haynes QC, with him Mr. Kerith Kentish instructed by
Kentish & Associates
of Counsel for the Defendant

2021: December 10;
2023: March 31.

*Striking out – CPR 26.3 and 26.4 – Order for specific disclosure –
Application to strike out statement of case for noncompliance with order
for specific disclosure pursuant to CPR 28.13(2) – Whether party in default
– Court's approach to striking out statement of case for breach of an order
for specific disclosure – Whether there is any efficacy in making an unless
order pursuant to CPR 28.13(4) – Amendment to statement of case –
CPR 20.1(2) and (3) – Principles that should guide the court in granting an
application to amend – Expert evidence – CPR 32. – Whether expert
evidence relevant – Whether expert evidence tainted by lack of
independence and impartiality*

JUDGMENT

- [1] **INNOCENT, J:** There are several applications made by the parties for the court's consideration, all of which were filed on 14th October 2021 and were heard jointly with the consent of the parties.
- [2] The claimant applied for an order pursuant to CPR 26.3 striking out the defendant's amended defence and counterclaim consequent on the defendant's failure to comply with the court's order for specific disclosure made on 19th June 2020 and that judgment be entered for the claimants; and in the alternative, the claimants sought an unless order pursuant to CPR 26.4 that unless the defendant provided specific disclosure of the documents and/or classes of documents more particularly described in their notice of application within three days of the date of the court's order, that the defendant's defence and counterclaim be struck out and judgment entered for the claimants (the 'Strikeout Application').
- [3] The defendant filed an application to amend its defence and counterclaim (the 'Amendment Application') and an application for leave to deploy expert evidence at the trial pursuant to CPR 32.6 (the 'Expert Application'). By the same notice of application the defendant also sought leave to adduce and file further witness statements following specific disclosure.
- [4] The above-mentioned applications were filed consequent on the court's order of 16th September 2021 when the matter came on for pretrial review. At the pretrial review held on 16th September 2021, counsel appearing for the respective parties made certain representations to the court related to the manner in which the case had progressed since the filing of a notice of appeal by the defendant against a previous ruling given by the court. In particular, counsel appearing for the claimants complained that the defendant

has not complied fully with the court's previous order for specific disclosure.

[5] At the pretrial review the court ordered that the defendant shall comply fully with the court's order for specific disclosure on or before 23rd September 2021; that leave was granted to the claimant to file all necessary and requisite applications should the defendant fail to comply with the court's disclosure order. The court also ordered that the parties were at liberty to file all procedural applications on or before 14th October 2021. The pretrial review was also adjourned to 27th October 2021.

[6] At the hearing of the applications, it was agreed by counsel for the respective parties that the Strikeout Application should be heard first followed by the defendant's Amendment Application with the Expert Application proceeding next in line.

The Strikeout Application

[7] The main thrust of the claimant's application was ostensibly that the defendant had not complied with the court's order for specific disclosure made on 19th June 2020 having unsuccessfully appealed the same. In addition, the claimants complained that the defendant filed a List of Standard and Specific Disclosure on 11th August 2021 and provided the claimants' legal practitioners with copies on 6th September 2021. In short, the claimants are dissatisfied with the nature and extent of the defendant's attempts at standard and specific disclosure. Being so dissatisfied the claimants' legal practitioners wrote to the defendant's legal practitioners by letter dated 9th September 2021 setting out what they perceived to be inadequate disclosure and requested that the defendant make full disclosure in conformity with the court's order for specific disclosure.

- [8] Consequent on this request for specific disclosure, the defendant filed a Supplemental List of Documents as standard and specific disclosure on 23rd September 2021. The claimants contended that this supplemental disclosure was deficient and not in keeping with the spirit and ambit of the court's order for specific disclosure.
- [9] The claimants also contended that notwithstanding their letter of request for specific disclosure, the defendant's legal practitioner had failed to reply to the same and hence, in the circumstances, the defendant's failure to make the necessary disclosure, for all intents and purposes, can properly be regarded as willful, deliberate and contumacious.
- [10] The claimants relied on the provisions of CPR 26.3 which gives the court power to strike out a statement of case if it appears that there has been a failure to comply with a rule, practice direction, order or direction given by the court in any proceedings before it. The claimants also relied on the provisions of CPR 26.4¹ which gives the court the power to make an unless order for the failure to comply with a rule, practice direction or order where no sanction for noncompliance is expressly prescribed.
- [11] In a nutshell, the claimants' contended that the defendant was fully aware and has been fully aware of its duty to provide specific disclosure. Additionally, the defendant has, by its conduct in the course of the proceedings, shown an inclination to only grant selective disclosure when pressed to do so by the claimants. The claimants argued that the defendant must have made the necessary inquiries of other relevant persons and conducted searches to ascertain whether the documents to be disclosed are in

¹ cf CPR 28.13; 28.13(2) and (4).

their possession or control or the possession and control of other persons.

- [12] According to the claimants, an assessment of the disclosure already made by the defendant revealed that certain aspects of the defendant's case are unsustainable which leads to the ineluctable conclusion that the defendant has resisted disclosure because of the existence of documents that undermine its case.
- [13] This latter proposition appears to be the fulcrum of the claimants' argument in relation to the deficiencies which they identified in the disclosure already made by the defendant. It appears that the main complaint made by the claimant was in respect of the defendant's failure to disclose the documents specified at paragraph 1(a) of the order of 19th June 2020.
- [14] The claimants submitted that the court ought to take breaches of orders for disclosure, more so orders for specific disclosure, with the utmost seriousness since the result of such breaches and/or noncompliance bring the entire administration of justice into disrepute thereby preventing the court from fulfilling its mandate to deal with cases justly.
- [15] As expected, the strike out application was opposed by the defendant. The defendant contended that the defendant, having filed a list of standard and specific disclosure on 11th August 2021, the claimants failed to avail themselves of the procedure for inspection of documents as specified by the CPR. Therefore, according to the defendant, had the claimants engaged the process of inspection several of the claimants' complaints regarding specific disclosure would have been satisfied; and many of the deficiencies complained of would have been clarified.

- [16] The defendant also took the view that the claimants themselves have not complied with the court's disclosure order.²
- [17] Additionally, the defendant denied that it has defied the court's order and that the claimants have failed to demonstrate or provide any evidence demonstrable of the allegation that the defendant has by its conduct shown deliberate disobedience to the court's order for specific disclosure.
- [18] The defendant's position was that valiant attempts have been made to comply fully with the court's order; and that the claimants, in addition to their failure to inspect, had inadvertently or through lack of diligence or otherwise missed out on some of the documents that had been disclosed to them. This was painstakingly adverted to by counsel for the defendants, both in his written and oral submissions made to the court on the hearing of the applications.
- [19] Ultimately, the defendant contended that the sanction of striking out ought only to be applied sparingly; and that in all the circumstances of the present case was not warranted. Therefore, the defendant beseeched the court to strike out the claimants' application and award cost to the defendant.
- [20] The issues that arise for determination on the claimants' strike out application are: (1) whether the defendant failed to comply with the court's order for specific disclosure; (2) if so, whether the failure to comply was intentional; (3) whether the defendant has a good explanation for the failure to comply or its partial compliance; (4) the approach of the court to an application to strike out; and (5) whether there is any necessity or efficacy in making an unless order.

² At para 4 defendant's submissions

[21] The order for specific disclosure which has precipitated the present application is contained at paragraph 1 of the court's case management order dated 19th June 2020, which read:

"The defendant shall disclose to the claimants:

- (a) All correspondence with and between the defendant, the defendant's employees and/or agents by any other person with the defendant's reinsurers, loss adjusters and appraisers;
- (b) All photographs and site inspection notes taken by the defendants, their servants, employees and/or agents or by any other person on the instructions and/or directions of the defendant before or after the incident of loss and;
- (c) Any other relevant document that was discovered following disclosure on 31st July 2019."

[22] An order for specific disclosure is an order that a party must do one or more of the following things, namely, disclose documents or classes of documents specified in the order; carry out a search for documents to the extent stated in the order; disclose any document located as a result of that search.³

[23] The consequence of a party failing to comply with an order for disclosure is that the party who fails to give disclosure by the date ordered, or to permit inspection, may not rely on or produce at the trial any document not so disclosed or made available for inspection.⁴ A party seeking to enforce an order for specific disclosure may apply to the court for an order that the defaulting party's statement of case be struck out.⁵

[24] On an application made pursuant to CPR28.13(2), the court may order that unless the party in default complies with the order for

³ CPR 28.5 (1)

⁴ CPR 28.13(1)

⁵ CPR 28.13(2)

disclosure by a specific date that party's statement of case or some part of it be struck out.⁶

[25] In addition to any other power which the court may exercise under the CPR, the court may strike out a statement of case or part of a statement of case if it appears to the court that there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings.⁷

[26] The court has a general power under CPR 26.4(1) to strike out a statement of case and if a party has failed to comply with any of these rules or any court order in respect of which no sanction for non-compliance has been imposed, any other party may apply to the court for an unless order.

[27] In the present proceedings the court has been asked to grapple with the question of whether in the circumstances of the present case it can competently exercise its power to strike out the defendant's statement of case pursuant to CPR 28.13(2) or pursuant to its general powers under CPR 26.3(1)(a) or CPR 26.4(1); or whether there is any efficacy in making an unless order pursuant to CPR 28.13(4).

[28] The starting point of the defendant's submissions with respect to the claimants' application made pursuant to CPR 26.2 was that the court should exercise great restraint in making a striking out order particularly where there were other alternatives available to the court.

[29] In support of the foregoing argument the defendant relied on the case of **Real Time Systems Limited v Renwaw Investments**

⁶ CPR 28.13(4)

⁷ CPR 26.3(1)(a)

Limited⁸ for the proposition that whereas the court has an express discretion under CPR 26.2 whether to strike out (it “may strike out”), the court must consider any alternatives, and CPR 26.1(1)(w) enables it to “give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective”, which is to deal with cases justly. 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 course is to order the offending party to supply further details, or to serve an amended statement of case including such details, within a further specified period.⁹

- [30] The defendant also relied on the decision in **Bernadette Hector and another v Neville Joseph**¹⁰ where it was held that under the old rules courts proceeded cautiously in exercising the power to summarily strike out pleadings. Were it otherwise the unsuccessful litigant was wholly deprived of the right to a trial. Striking out is limited to plain and obvious cases where there was no point in having a trial. The CPR requires the court to actively manage cases. Such applications had to be kept within their proper limits, and were not meant to be used to dispense with the need for a trial where there were issues which should be considered at trial. Therefore, before a striking out application can be used to dispose of collateral issues, care should be taken to ensure that a party is not deprived of the right to trial on issues essential to its case.¹¹

- [31] The first issue for the court’s consideration is the question of whether there was noncompliance by the defendant to the order for specific disclosure. In determining this issue the court must pay

⁸ [2014] UKPC 6

⁹ *Infra* at paras [17] and [18]

¹⁰ [2004] ECSCJ No. 17

¹¹ *Infra* at para [9]

regard to both the affidavit evidence filed by the parties assessed by reference to the duty of disclosure imposed on the defendant under the CPR. However, prior to arriving at any conclusions regarding this issue it is necessary to formulate the approach that the court must follow in determining the claimants' application.

- [32] A party's duty to make disclosure is limited to documents which are or have been in control of that party.¹² A party has or has had control of a document if it is or was in the physical possession of the party; the party has or has had a right to inspect or take copies of it; or the party has or has had a right to possession of it.¹³
- [33] In the present case, the defendant held the view that they had complied fully with their duty of disclosure; and in any event, the claimant had failed to provide any or any cogent evidence apart from seeking to draw inferences, that either the defendant or its legal practitioners had breached their duty of disclosure. Contrary to the claimant's assertions, the defendant contended that it had done all that was reasonably necessary to comply with the order for disclosure.
- [34] Counsel for the claimants adverted the court's attention to the decision in **Byers and Ors v Samba Financial Group**¹⁴ which essentially sets out the approach that the court should adopt when hearing a strike out application on the grounds of noncompliance with an order for specific disclosure.
- [35] The following propositions can be distilled from the decision in **Byers v Samba**. In making a determination the court hearing such an application ought to direct its mind to several salient issues,

¹² CPR 28.2(1)

¹³ CPR 28.2(2)

¹⁴ [2020] EWCA 853

namely: (1) whether any of the issues arising in the case could be fairly tried without disclosure, particularly in the present case, issues raised in the defence and counterclaim; (2) whether a fair trial is still possible in the absence of full disclosure by the defendant; (3) whether the defence and counterclaim should be struck out and the defendant be debarred from defending the claim, or an unless order be made to that effect; (4) whether there can be a fair trial of certain issues in the claim in the absence of full specific disclosure by the defendant and if so whether the Court should permit the defendant to defend those issues and on what terms; (5) what are the main issues arising on the claim and or the defence for which disclosure has not been made, that is, what are the main issues to be determined at the trial; and (6) is the defendant's default so serious that the appropriate sanction is to strike out its defence and counterclaim and debar it from defending the claim, or is such a sanction disproportionate to the defendant's culpability and the harm caused by the breach.

- [36] An order striking out a defence and debarring a defendant from defending is the ultimate sanction that the court can impose for a breach of its order that does not amount to a contempt of court. It therefore must be a sanction of last resort and is likely only to be imposed for a serious and deliberate breach. The sanction must be necessary and proportionate in the circumstances. Therefore, the test in every case must be what is just and proportionate. What must be emphasised is the draconian nature of the strike out sanction and the flexibility of remedies available to the court to fashion a proportionate remedy. The court must be cognisant of the flexible remedies that the court has at its disposal to make the sanction fit the breach. If a breach, though serious, is excusable, an order striking out a party's case and debarring it from proceeding

further may well be disproportionate, at least if another sanction is sufficient to achieve the ends of justice notwithstanding the breach.¹⁵

[37] Ultimately, the test that the court should apply is whether the breach is so serious and inexcusable that an order striking out the defendant's case and preventing it from proceeding further would be disproportionate, at least if another sanction is sufficient to achieve the ends of justice notwithstanding the breach.

[38] It does not appear that the case law establishes that under the CPR an order striking out the whole of a claim or defence, as the case may be, is the standard or expected order in the case of a serious breach of a court's order. In many cases of serious breach such an order may be the only effective and proportionate sanction, but – at least where the breach is not contumacious – it would be surprising if this were a standard approach under the flexible approach mandated by the CPR.¹⁶

[39] The aforementioned approach runs contrary to that espoused by the claimants in their submissions to the court. It appeared that the claimants placed significant reliance on the fact that the court ought to exercise its discretion to strike out the defendant's defence and counterclaim as punishment or an appropriate sanction for what they deemed contumelious or contumacious conduct on the part of the defendant in failing to comply with the court's disclosure order.

[40] In the case of **Barbados Rediffusion Services Limited v Asha Mirchandi and Others**¹⁷ the appellate court had to determine the distinct issues of whether there had been a failure to comply with

¹⁵ Byers v Samba at para 120

¹⁶ Infra at para 122

¹⁷ CCJ Appeal No. CV 1 of 2005; 69 WIR 52; [2007] 3 LRC 296

the terms of an unless order; and if there was such a breach was the making of a strike out order a proper exercise of the judge's discretion. The critical question for the CCJ was whether on the evidential material before the court, the court was entitled to find that the defendant had failed to comply with the order for disclosure.

[41] The facts in the preceding case were that the respondents sued the appellant company for defamation. The parties were required to file lists of documents and verifying affidavits. The respondents were granted an order that the appellant's defence would be struck out if the appellant did not file a further and better list of documents and a verifying affidavit. The appellant filed a further list of documents and an affidavit. The judge ruled that the appellant failed to comply with the order and struck out the appellant's defence. The appellant appealed. The Court of Appeal of Barbados affirmed the strike-out order. The Caribbean Court of Justice, allowing the appellant's further appeal, held that the judge's order striking out the appellant's defence was wholly disproportionate and could not be justified as a matter of fairness to the respondents or to other litigants, or as an appropriate response to the defiance of an order of the court.¹⁸

[42] The CCJ found that the courts below had adopted and applied the erroneous approach to being based on what they described as 'the principle of contumelious breach'. According to this principle, if failure to comply with an 'unless' order is intentional or 'contumelious', then a strike-out order should issue. In order to avoid that consequence the party in default must satisfy the court that he was prevented by some extraneous circumstances, that is, something beyond his control, from complying with the order. The Court of Appeal had found that the appellant having not satisfied

¹⁸ At paras 29, 32, 33 – 43

them, that it was prevented from complying with the 'unless' order by any extraneous circumstance and, accordingly, they affirmed, the order striking out the amended defence. The reasoning of the Court of Appeal was summed-up in the following sentence: 'Since no satisfactory explanation or excuse was given by the [appellant] for a failure to comply with the order, such failure is therefore intentional and contumelious.'

- [43] The CCJ observed that judgments in the decided cases were replete with passages which emphasised the importance of securing obedience to the peremptory orders of the court and hold out little hope of reprieve for those defaulters who cannot demonstrate to the satisfaction of the court that their failure to comply was due to extraneous circumstances, and not to an intention to ignore or flout the order of the court. It appeared from the judgment that the CCJ deprecated the approach based on contumelious or contumacious conduct.
- [44] The CCJ found that the primary, if not, the only purpose for which the weapon of the strike-out order may properly be used, is to ensure the fairness of the trial and, therefore, the test which a judge should apply in determining whether to make such an order is whether, as a result of the breach of the rule or order which has been committed, a fair trial is no longer possible or, to put the matter more exactly, there is a real risk that a fair trial will not be possible. The CCJ held that a corollary of this approach, which conflicts sharply with the principle of contumelious breach, is that punishment is not a legitimate purpose to be served by the use of the strike-out order.
- [45] Therefore, the object of the court's power to strike out a party's case is not to punish the offender for his conduct but to secure the

fair trial of the action in accordance with the due process of the court. However, the deliberate and successful suppression of a material document is a serious abuse of the process of the court and may well merit the exclusion of the offender from all other participation in the trial. The reason is that it makes the fair trial of the action impossible to achieve and any judgment in favour of the offender unsafe.

[46] The CCJ took the view that a litigant is not to be deprived of his right to a proper trial as a penalty for his contempt or his defiance of the court, but only if his conduct has amounted to an abuse of a process of the court which would render any further proceedings unsatisfactory and prevent the court from doing justice. Before the court takes that serious step, it needs to be satisfied that there is a real risk of this happening.

[47] In its judgment the CCJ examined hypothetical cases of contumacious conduct, such as the deliberate suppression of a document, which might justify the striking out on the analogy of striking out for want of prosecution, even if a fair trial was still possible. However, the court also found that cases of contumacious conduct in relation to discovery must necessarily be extremely rare.

[48] The principle that emerged from the **Barbados Rediffusion** case was that the term 'contumelious' or 'contumacious' is commonly used in the authorities as applicable to conduct involving defiant disobedience to an order of the court - such as the deliberate suppression of a document, an act which might not involve, and was not expressly linked to disobedience to an order of the court. The CCJ held that the material before the trial judge must be sufficient to establish that there had been a failure to comply with the peremptory order and that, in any event, even if there had been non-compliance it had not been contumelious.

- [49] In the premises, the CCJ espoused the approach that an inquiry should be undertaken as to the degree of contumely involved in the default, the scale of the breach, what excuse there may or may not be for it, whether it can be remedied, how far the opposing party has been prejudiced by it, and any other matter relevant to the very wide discretion conferred on the court, to make whatever order the justice of the case may in its particular circumstances require. The court, in responding to a failure to comply with an unless order, should apply a good deal of flexibility in the exercise of its discretion and not be expected to apply rigidly a set of rules or follow some mechanical process. In other words, 'The court must not tick boxes on a form'.
- [50] The CCJ¹⁹ in considering the case law on the point referred to the application of the principle that a strike-out order may, and indeed should, be made whenever a party's failure to comply either with the rules or with an order of the court, has rendered a fair trial no longer possible. The court examined what may be considered as a 'fair trial' and recited a passage from the judgment of Chadwick LJ in **Arrow Nominees Inc v Blackledge**²⁰ where he said: that "... a fair trial is a trial which is conducted without an undue expenditure of time and money; and with a proper regard to the demands of other litigants upon the finite resources of the court. The court does not do justice to the other parties to the proceedings in question if it allows its process to be abused so that the real point in issue becomes subordinated to an investigation into the effect which the admittedly fraudulent conduct of one party in connection with the process of litigation has had on the fairness of the trial itself."²¹ Therefore, the question is whether in that case the trial should have

¹⁹ Infra at para [39]

²⁰ [2000] 2 BCLC 167

²¹ Infra at para 15

been allowed to run its course had to be determined by reference to whether that was fair to the innocent party as well as in the interest of the administration of justice generally.

[51] Having reviewed a compendium of authorities the CCJ found that the authorities demonstrated that, it remains good law that a striking-out order may in appropriate circumstances be made in response to and, in a sense, as a punishment for, the contumelious or contumacious or defiant breach of a peremptory order of the court. This, however, is subject to the proviso that a court which is called upon to make such an order on this ground, must approach the matter holistically and undertake the balancing exercise needed to ensure that proportionality is maintained and that the punishment fits the crime.²²

[52] The CCJ sought to identify some of the factors which a judge who is asked to make a strike-out order should take into account in conducting the balancing exercise to which reference has already been made, which obviously was not intended to be a comprehensive list of the factors to be considered.²³ These factors may be summarised as follows:

- (1) The discretion is a wide and flexible one, to be exercised 'as justice requires', A judge dealing with an application to strike out, should start off by reminding himself that to strike out a party's case and so deny him a hearing on the merits, is an extreme step not to be lightly taken. This is a consideration which should be taken into account by the judge who is asked to make an 'unless' order. He should not use the threat to strike out contained in such an order unless there is a real prospect that non-compliance with the order might warrant the imposition of such an extreme penalty.

²² At para 40

²³ at paras 44 – 48

- (2) Strike-out orders should be made either when that is necessary in order to achieve fairness or when it is necessary in order to maintain respect for the authority of the court's orders. In this context 'fairness' means fairness not only to the non-offending party but also to other litigants who are competing for the finite resources of the court.
- (3) If there is a real risk that a fair trial may not be possible as a result of one party's failure to comply with an order of the court, that is a situation which calls for an order striking out that party's case and giving judgment against him. One way in which such a situation may come about is if crucial documents, which are not disclosed within the time prescribed by an order for discovery, are subsequently lost or destroyed, albeit without fault on the part of the non-disclosing party. Another is where a party has been so fraudulent in relation to the discovery process, for example by forging or deliberately suppressing documents and lying about it, that it is impossible to place any reliance on what he has disclosed as being either authentic or complete, without a long and expensive inquiry.
- (4) The fact that a fair trial is still possible does not preclude a court from making a strike-out order. Defiant and persistent refusal to comply with an order of the court, can justify the making of a strike-out order. While the general purpose of the order in such circumstances may be described as punitive, it is to be seen not as retribution for some offence given to the court but as a necessary and to some extent symbolic response to a challenge to the court's authority, in circumstances in which failure to make such a response might encourage others to disobey court orders and tend to undermine the rule of law. This is the type of disobedience that may properly be categorised as contumelious or contumacious.
- (5) The previous conduct of the defaulting party will obviously be relevant, especially if it discloses a pattern of defiance. It is also relevant whether the non-compliance with the order was total or partial. There may be an exception made, however, when the other party has suffered no prejudice as a result of the non-compliance.

(6) The court called upon to exercise its power to strike out should also consider whether, having regard to the nature of the relief sought or to the issues raised on the pleadings, a default judgment can be regarded as a satisfactory and final resolution of the matters in dispute. Regard may have to be paid to the impact of the judgment not only on the party in default, but on other persons who may be affected by it.

[53] In setting out the above principles, the CCJ declined to endorse the approach which was adopted by the courts below in that case. This deprecated approach involved a two-step inquiry. The first step was to inquire whether there was non-compliance with an 'unless' order of the court. Non-compliance having been found, the second step was to consider whether the offending party had demonstrated that its non-compliance was due to some extraneous circumstance. The offending party having failed to do so, the issue of the strike-out order was regarded as automatic. What is required is a balancing exercise in which account is taken of all the relevant facts and circumstances of the case.

[54] Applying the principles set out in the abovementioned authority, the court disagrees with the claimants' stringent reliance on the imposition of the ultimate sanction of striking out as the only sanction which the court ought to impose on account of the alleged breach of the order for disclosure by the defendant. This emphasis on punishing the offending party to register the court's dissatisfaction and to vindicate any harm done to the authority of the court and the due administration of justice has been swept away by the sea change brought about by the advent of the CPR.

[55] This sweeping change has transformed the approach that the court will take in such circumstances. The court is now required to deal with such breaches of its orders with the object of imposing a

sanction that is proportionate to the breach while keeping in mind the fulfillment of the overriding objective of the CPR in dealing with cases justly in furtherance of the interest of the administration of justice. In applying this approach the court must bear in mind that not all compliance can amount to contumelious or contumacious conduct. Also, striking out is not an automatic consequence of non-compliance with a court's order.

[56] Therefore, the approach of the court should be that the court must have regard to the circumstances of the individual case and do what is necessary and proportionate to meet the seriousness of the breach of its order in a way that is consistent with the interests of justice and the overriding objective. The seriousness of the breach, the extent to which if at all it is excusable and the consequences of the breach will be very important factors, but the overriding criterion is the requirement for the sanction to be proportionate and just.

[57] In **Byers v Samba**, the court found that the breaches were deliberate. The court there held:

“It clearly would not be just to allow the Bank to defend any factual issue where it might have relevant documents that it should have disclosed. The risk of whether the Bank's documents might be relevant to such issues would clearly have to fall on the side of the Bank ... the Court can properly except certain issues from a debarring order if it is satisfied, first, that such issues can fairly be tried without the Bank's disclosure; second, that such an exception would be in the interests of justice and fair to both parties; third that the conduct of the Bank is not so inexcusable that a full debarring order is deserved and is proportionate, and fourth that making exceptions from the debarring order in that way does not undermine the authority of the Court. There must clearly also be some sensible purpose served by having a trial of certain issues only.”²⁴

²⁴ Infra at para 124

- [58] In **Byers v Samba** the court considered the effect of an order striking out the defendant's statement of case and whether such an order would be just and proportionate in all the circumstances of the case.²⁵
- [59] As in the case of **Byers v Samba**, the effect of the striking out application in this instance would mean that the claimant could enter judgment of the sum in excess of \$6,000,000.00 together with interest and costs notwithstanding that there are serious questions to be tried in relation to the extent of the claimants' loss and whether the defendant was entitled to avoid the policy of insurance.
- [60] Therefore, it is the court's considered view that if the court were to grant the strike out application there is the distinct likelihood that the claimants would receive a substantial windfall in the event that the amount of the judgment exceeded the amount they were entitled to receive as compensation under the policy of insurance. Additionally, it is in the interest of justice to consider that should the defendant succeed in its pleaded defence which entitled it to avoid the policy, then the claimants' case would fail.
- [61] In the present case it is clear that certain factual issues now cannot fairly be tried, but this should not preclude the trial of any issues of law or issues where there are no disputed facts that are potentially determinative of the claim, if that can be done without unfairness to the claimants. However, the court will be astute not to permit the trial of any issues where the claimants could have been advantaged by receiving the defendant's disclosure.
- [62] An important consideration is whether allowing certain issues to proceed to trial notwithstanding the serious and culpable breach of

²⁵ At paras 128-132

the defendant would undermine the authority of the court. The question that arises is whether the defendant might be seen as having flouted the court's authority and yet secured the chance to defend the claim in a more limited way. Doing justice between litigants, according to the law, depends on the court's orders being obeyed and its coercive powers being used where appropriate, otherwise its orders would regularly be flouted and injustice would result. The court's duty and mandate is to treat them all litigants equally; the courts' reputation for fairness and incorruptibility must be maintained. If the court were to permit a defendant inexcusably to act in breach of court rules or orders on the basis of spurious explanations for the same and as a result obtain a trial of certain favourable issues only, there would be a real risk of encouraging others to do the same. It is apparent that based on the claimants' submissions this was the posture which they implored the court to adopt.

[63] This point was specifically raised by the claimants in respect of what they perceived to be the willful refusal on the part of the defendant to disclose the correspondence between the defendant and its reinsurers. The claimants' arguments on this point suggested that the defendant was deliberately withholding disclosure of these documents primarily in an effort to undermine the claimants' case. The court understood the claimants to be saying that the exchanges which must be in existence between the defendant and its reinsurers is relevant to the issues on the basis upon which the defendant sought to avoid the policy and whether the defendant had secured sufficient reinsurance for the risk insured.

[64] The claimants say that it is more than passing strange that there would be no exchange of correspondence between the defendant

and its reinsurers concerning the claimants' insurance claim. This, they argued, was particularly the case in light of the defendant's manager having made the representation that the defendant was "chasing their reinsurers" when the claimants inquired about the progress of the claim. The claimants contend that disclosure of these exchanges would reveal the real reason why the defendants sought to avoid the policy and thereby permit the claimants to better formulate and fortify their claim against the defendant. The claimants are essentially asking the court to find that the defendant has something to hide and from which it can be inferred that it may either be detrimental to the defendant's case or beneficial to the claimant's case.

[65] The court in **Byers v Samba**, in answering the question whether the issues could be fairly tried without disclosure, considered that in such circumstances the harm that has been done to the prospects of a fair trial will have been sufficiently averted by preventing the defendant from defending issues, apart from those where it is clear that the claimants cannot be prejudiced by the defendant's default. This debarring must extend to preventing the defendant from seeking to participate in a challenge to the factual case of the claimants or the legal conclusions reached on the basis of their evidence.

[66] The court in **Byers v Samba** took the view that a sanction that only prevented the defendant from advancing its own case but allowed it to contest the claimants' case would not be sufficient to punish its serious and culpable breach. If there are issues that can fairly be tried notwithstanding the absence of disclosure from the defendant, and such issues would – if determined in the defendant's favour –

enable it to establish a defence, in whole or in part, to the claim, those issues should in principle be tried.²⁶

[67] The claimant's strike out application was supported by the fourth affidavit of Ms. Merla Smith ('Ms. Smith') filed on 14th October 2021. Ms. Smith alluded to the court's order of 19th June 2019 wherein the court ordered, among other things, that the defendant disclose all correspondence with and between the defendant, the defendant's employees and agents with the defendant's reinsurers, reinsurance agents, insurers, loss adjusters and appraisers.

[68] The claimants complained that based on the defendant's disclosure of documents on 11th August 2021, it was either clearly evident or fair to conclude that the defendant failed to comply with the court's disclosure order to the extent that there were gaps in the chain of correspondence between certain parties specified in the court's order coupled with an absence of any documentation between the defendant and its reinsurers and/or reinsurance agents. The claimants, by letter dated 15th September 2021, pointed out these deficiencies to the defendant's legal practitioner and sought further disclosure.²⁷

[69] The claimants also relied on an affidavit of Ms. Smith in support of their strike out application and in reply to the second affidavit of Ms. Hodge.²⁸ It appears from Ms. Smith's affidavit that the claimants adopted the position that notwithstanding the defendant's insistence that they had done all that was reasonably required in order to comply with their duty to make full disclosure, all additional disclosure made by the defendant was prompted by written requests from the claimants and court orders. Based on the

²⁶ Infra at para 131

²⁷ Exhibit MS10

²⁸ Sixth Affidavit of Merla Smith filed

foregoing observations the claimants contended that the defendant, by its pattern of conduct with respect to disclosure, casts serious doubt as to its adherence to its duty to make full and frank disclosure.²⁹

[70] The claimants further complained that the disclosure made by the defendant subsequent to its letter of request³⁰ was also insufficient and not in compliance with the court's order. Ms. Smith's affidavit listed the matters with respect to which disclosure was still outstanding and described the defendant's attempt at disclosure deficient.³¹

[71] Ms. Monica Hodge ('Ms. Hodge') in her affidavit in response to the claimants' application outlined in detail all efforts made by the defendant to comply with the order for specific disclosure.³² Essentially, the defendant complained that the claimants' request for specific disclosure and the effect of the present application, to which the defendant had emphatically denied were in its possession, is simply asking the defendant to prove a negative.

[72] With respect to the defendant's assertion that the reinsurers had not given an opinion on the (claimants') demand for settlement and that accordingly there was no correspondence to disclose, the claimants took the view that this assertion by the defendant was alarming and illogical, considering that the defendant's manager had by correspondence in December 2017, after the claimants had submitted their insurance claim, indicated that the defendant was "chasing the reinsurers".

²⁹ Infra at para 6

³⁰ Exhibits MS12 and MS13

³¹ At para 11

³² At paras 7-26

- [73] According to the claimants, it was more than passing strange that there was no correspondence between the defendant and its reinsurers particularly in light of the fact that the defendant voided the policy after having made the representation that they were “chasing the reinsurers”. In addition, the claimants made the point that the defendant has either failed or refused to disclose whether it had in fact submitted the claimants’ insurance claim and their Loss Adjuster’s Report to the reinsurers.³³
- [74] The claimants relied on the fact that the court had previously found on the application made by the claimants for specific disclosure that the correspondence exchanged between the defendant and its loss adjuster and reinsurer were relevant to matters in dispute in the proceedings.³⁴
- [75] Based on the foregoing premises, the claimants contended that the defendant had not fully complied with the order for specific disclosure and that it can reasonably be inferred that the defendant has been and continues to be selective about the material that it discloses and only intends to give disclosure when pressed to do so and have not given any reasonable explanation for its conduct. Therefore, the claimants held the view that the noncompliance was intentional and therefore ought to be met with the most condign consequences.
- [76] The defendant countered that the emails concerning Mr. Hobson’s engagement was disclosed and exhibited to Ms. Hodge’s affidavit.³⁵ Therefore, the defendant contended that in this regard the defendant has complied with the order for specific disclosure and

³³ Infra at para 6

³⁴ At para Judgment

³⁵ At para 31; Exhibit MH11

that the previous non-disclosure was entirely due to clerical error or oversight.

[77] The defendants also argued that they had given an account of all documents not within their possession.³⁶ The defendant submitted that, in the circumstances, the claimants are not entitled to the relief claimed since the defendant has not willfully or intentionally withheld any documents and have complied with their continuing duty to disclose.

[78] In the present case, the claimants are desirous of obtaining disclosure of the correspondence and exchanges between and with the defendant and its reinsurers. It appeared that the claimants have from very early in the present proceedings registered their apprehension of the defendant's ability to satisfy any judgment that the claimants are likely to obtain against it. This was one of the bases to which the claimants alluded to as necessitating an inquiry into the nature and extent of the reinsurance coverage.

[79] The claimants contend that this inquiry is necessary because should the claimants succeed on their claim there is the likelihood that the defendant's ability to satisfy any judgment would be dependent on the extent of their reinsurance coverage. The claimants further contend that the posture adopted by the defendant throughout the proceedings in resisting disclosure of any matter relative to reinsurance coverage has raised the claimants' suspicions regarding whether or not the defendant had taken out the requisite reinsurance coverage which was a material term of the contract of insurance and the basis upon which the claimants entered into the contract of insurance.

³⁶ At para 34 Hodge Affidavit

- [80] In reliance of this adverse inferences drawn from the defendant's conduct, the claimants have in the pleadings alleged that the defendant is in breach of its obligation to act with utmost good faith under the policy of insurance in failing to take out any or any sufficient reinsurance coverage which was a precondition to the claimants entering into the contract of insurance. In the premises, the claimants argued that the disclosure sought was vital to the claimants' ability to advance their entire case at the trial and to fully resolve this issue which is relevant to the claimants' case. The claimants therefore insisted that the disclosure sought, apart from being relevant to their case, would obviate the need for further litigation at the claimants' expense.
- [81] The claimants had advanced the same arguments on their previous application for specific disclosure; and it was on the foregoing basis that the court had previously made the order for specific disclosure against which the defendants had unsuccessfully appealed. At the hearing of the claimants' application for specific disclosure, the defendant vigorously resisted that application on the grounds that there was no privity of contract between the claimants and the defendant's reinsurers, and hence there was no legal basis upon which the claimants could have obtained an order for specific disclosure from a third party who was not a party to the litigation since the law as it relates to privity of contract could not be overridden by an order for specific disclosure in such circumstances.
- [82] The court, in its written judgment on the claimants' application for specific disclosure, held that the material was relevant and ought to be disclosed. The court gave its reasons at paragraphs [38] to [70] of its judgment.³⁷ In the circumstances, the posture adopted by the

³⁷ Judgment delivered 19th June 2020

defendant has the tendency of placing the court in the invidious position of having to consider recanting its previous position. The court in this instance is not inclined to discount the relevance of the evidence.

- [83] The court has considered in depth the question of the effect that the defendant's failure, or as the defendant has maintained, its inability to disclose the correspondence and exchanges between it and the reinsurers would have on the substantive trial in light of the current state of the pleadings.
- [84] Assuming that there is nondisclosure of the material specifically requested by the claimants, the issues regarding misrepresentation, the defendant's duty of good faith as it relates to reinsurance coverage, and what the claimants described as the ability to ascertain the real reason why the defendant has sought to avoid the policy of insurance, cannot be fairly, adequately or at all be determined at the trial. However, this challenge does not in any way detract from the more cogent question of whether the defendant can avoid the policy of insurance to be tried on the bases canvassed in the pleadings as they already stand.
- [85] The obvious expectation held by the claimants emanating from the court's previous judgment with respect to specific disclosure in this case, was that the issues of the absence of good faith on the part of the defendant brought about whether by failure to submit the claimants' claim to the reinsurers or by failing to take out adequate reinsurance could have been tried in the current proceedings without the need or recourse to satellite litigation or a multiplicity of proceedings.

- [86] In view of the foregoing, the court has also considered the question of whether there exist the likelihood that, should the claimants fail to succeed on the present claim, they can effectively bring subsequent proceedings in the event that it was later discovered that there had indeed been a breach by the defendant of its obligations under the contract of insurance. This would clearly put the claimants at a disadvantage in not being able to advance their entire case in one proceeding.
- [87] The court has assessed the reasons given by the defendant for not disclosing the correspondence with the reinsurers and has made the following observations. The court noted the defendant's previous vehement resistance to disclosure of this information from a very early stage of the proceedings, in one form or the other, but ostensibly on the ground of privity of contract. This fiery resistance has now fizzled down into the bare denial that this information has and has not been in the defendant's possession.
- [88] The claimants have in their submission suggested somewhat tangentially that it would seem inconceivable that the defendant, on receipt of the claimants' claim for recovery under the policy of insurance, did not communicate with its reinsurers or submit the claim to its reinsurers or, at the very least, have notified them of the claim. The claimant contended that this fact, coupled with the defendant's representation that they were "chasing the reinsurers", raises the irresistible inference that there must have been some communication between the defendant and its reinsurers concerning the claim.
- [89] It appears on the affidavit evidence presented by the defendant on this application that quite apart from the bare denial that the defendant has or has had this material in their possession, the

defendant has failed to provide any or any other cogent reason or explanation for the absence or nonexistence of any such communication and exchanges with its reinsurers relative to the claim. In the premises, the court holds a similar view as that held by the claimants that it can only be reasonably inferred that the defendants did not submit the claim for recovery under the policy of insurance to the reinsurers or that they did not take out the necessary reinsurance coverage as agreed at the time of negotiating the proposal for the insurance policy.

- [90] The court is inclined to accept as reasonable the claimants' assertion that given the defendant's pattern of conduct regarding the disclosure of this particular item of disclosure in the course of the proceedings, it is safe to assume that in the absence of any or any reasonable explanation or account for the same, that the defendant is withholding disclosure or, as the claimants have put it, "has something to hide".
- [91] Clearly, if the court accepts such an inference, the court is placed in the unenviable position of having to determine whether the claimants, having been placed at a serious disadvantage, can be compensated by an award of costs or whether the court should order specific disclosure in the form of an unless order with the ultimate sanction of striking out.
- [92] Therefore, the court must consider whether in light of the position adopted by the defendant in relation to the question of specific disclosure and the court's findings thereon, there is any efficacy in making an unless order or applying or exercising some other case management power which the court possesses in the alternative.

- [93] In the court's view, there does not appear to be any efficacy in making an unless order for disclosure to be given. The court having no other alternative than to accept with some reasonable reservation that the defendant has done all that it can do to comply with the court's order for specific disclosure, it would be onerous to require the defendant at this stage to simply prove a negative. The court has also taken into account that the defendant's duty of disclosure is a continuing one which continues up to and including the trial.
- [94] An unless order would effectually require the defendant's legal practitioners to embark on a complete review of documents, further exchanges between them and the reinsurers which would inevitably result in a delay in the matter going to trial. Certainly, such an order may very well require the claimants to make further amendments to their pleaded case and further applications for disclosure are quite likely. The orderly preparation for trial would be severely hampered and would also result in protracted case management and the rescheduling of the dates already fixed at case management particularly in relation to the filing of witness statements.
- [95] The matters in respect of which the claimants are adamantly seeking specific disclosure concern the allegation and/or suspicion that the defendant somehow has resisted the exchanges between itself and its reinsurers in an effort to avoid liability under the policy of insurance. This inference arises from the claimants' pleadings where they specifically refer to "chasing out reinsurers etc..." The claimants are adamant and maintain that such correspondence must exist in light of this statement. The claimants insist and maintain that this is critical to their case.
- [96] However, the court is not inclined to accept that this is critical to all of the issues to be resolved at the trial or that any issue which is

likely to determine the question of liability to adhere to or avoid the policy of insurance is not entirely dependent on the disclosure of these documents.

[97] In other words, the issues concerning liability and the defendant's entitlement to rescind the policy of insurance can be determined at the trial without the matters in respect of which the claimant seeks specific disclosure being disclosed. In other words, the material is only relevant to part of the claimants' case; and the trial can proceed on the other substantive issues without such disclosure being made.

[98] Therefore, applying the approach that the court has endorsed in this case and for the reasons stated in this judgment, the court declines exercising its power to strike out the defendant's case or, in the alternative, make an unless order in the terms sought by the claimants.

The Amendment Application

[99] In this application the defendant seeks to further amend its defence and counterclaim. The intended amendment is to plead in the alternative that the claimants' true loss under the policy of insurance was US\$691,546.54 as per the assessment conducted by the claimants' loss adjuster and not the sum of US\$5,000,000.00 as originally pleaded. In addition, the defendant also seeks to amend its counterclaim to plead fraud.

[100] In support of its application, the defendant relied on the following grounds more specifically set out in its notice of application.

[101] At first instance, the defendant submitted that if the court was inclined to refuse the application the defendant would be prejudiced

to the extent that it would be unable to fully make out its case in circumstances where the proposed amendment arose on the same factual basis already canvassed in the pleadings.

[102] The claimants' response to the foregoing argument was that the defendant would suffer no prejudice in light of its conduct during the interval prior to the hearing of the appeal and after the hearing of the appeal which resulted in the inability to reach any projected trial date and effectually to delay the likelihood of the matter coming to trial in the short term. The defendant also argued to the contrary that no trial date has been set.

[103] The defendant, in its written submissions, adopted the principled approach that a court, unless there are exceptional circumstances, should not permit a party to renew or reopen the same subject of litigation in respect of matters which might or could have been brought forward as part of its case earlier on in the proceedings.

[104] It was also the defendant's position that the claimant would not and/or was not likely to suffer any or any undue prejudice as a result of the amendment for which they cannot be compensated for by an award of costs.

[105] Ultimately, the defendant contended that the court, in deciding whether to grant the application should consider the overriding objective which requires that the court deal with matters justly and fairly in furtherance of the administration of justice. Additionally, that there should be finality to litigation and that the court should avoid the re-litigating issues in instances where fraud and collusion is alleged or where new factual matters have come to light which could not have been earlier discovered by reasonable diligence for use at an earlier stage of the proceedings.

[106] According to the defendant, the good administration of justice required that the parties bring forth their entire case to avoid the incidence of re-litigating issues. In the circumstances, they say, that this objective will be achieved by the defendant being granted leave to make the proposed amendments in order to bring finality to the issues joined between the parties on the claim for indemnity.

[107] On the other hand the claimants countered that the proposed amendment was unnecessary. They submitted that the defendant had already made a blanket denial that the claim exceeded US\$5,000,000.00 and that it was left up to the claimant to prove the extent of their loss. In the circumstances, they say that there is no necessity in making the proposed amendment to dispute that claim. The claimants described the amendments proposed by the defendant as an intention to plead that the claimants did not suffer losses amounting to or in excess of US\$5,000,000.00 and that the claim submitted to the defendant was grossly inflated.

[106] The court observed that it was indeed rather curious that the claimants would discount the relevance of the evidence of the defendant's loss adjusters when they had trenchantly sought to obtain disclosure of the same in their previous application for specific disclosure.

[107] In addition, the claimants argued that the proposed amendment did not particularise the allegation of fraud and that the defendant's bare averment of fraud couched in general terms was insufficient. Furthermore, they contended that the defendant's allegation of fraud bears no reference to any fact or any conduct on the part of the claimants that amounted to fraud.

- [108] The claimants also objected to the amendment application on the substantive basis that the defendant was unable to satisfy the requirements of CPR 20.1(2). According to the claimants, the issues raised on the defendant's pleadings refer to the contractual terms of the policy of insurance, the nature of the policy, the alleged misrepresentations made by the claimants when seeking insurance coverage, the duty of utmost good faith owed by the parties to each other, and whether the claim exceeded the policy limit.
- [109] The foregoing submission made by the claimants seems to suggest that the defendant is raising this issue in its defence and counterclaim for the first time whereas it was opened to them to plead this aspect of their case at an earlier stage of the proceedings.
- [110] Also, it appears that the claimants are suggesting that the question of fraud clearly does not arise on the facts of the case in relation to any matter upon which the defendant seeks to avoid the policy of insurance. The court understood the claimants' position to be that the defendant was seemingly attempting to inject a novel dynamic into the proceedings which had hitherto not been canvassed by them at any or at an earlier stage in their pleaded case or during the exchange of correspondence between the parties prior to the commencement of the litigation.
- [111] According the claimants, the defendant has failed to provide the court with any or any reasonable explanation regarding its failure to put forward its entire case at an earlier stage of the proceedings. Therefore, they submit that there is no basis upon which the court could exercise its discretion in assessing the promptitude with which the application was made after the defendant became aware of the need to make the application.

[112] In fine, the defendant held the view that they had satisfied all the requirements of CPR 20.1(3) which warranted the grant of the application to amend.³⁸

[113] In any event, the parties were generally agreed on the principle that the court' recognise the that upon an application to amend pleadings, the guiding principle is that an amendments shall generally be allowed where they are necessary to ensure that the real question in controversy between the parties is adjudicated, provided that such amendments can be made without causing injustice to the other party and the public interest and the effective administration of justice is not significantly harmed.³⁹

[114] The initial proposed amendment to the defendant's defence and counterclaim (the 'Re-amended Defence and Counterclaim') which was exhibited to the first affidavit of Carla Thomlinson filed 14th October 2021 and exhibited thereto as Exhibit CT1 read as follows:

"14.5 Without prejudice to the foregoing, or anything contained in this Defence, the Defendant states further and in the alternative that the Claimants did not suffer US\$5,000,000.00 in losses as a result of Hurricane Irma. The Claimants are therefore put to strict proof of the same. At trial, and without admission of liability, the Defendant will rely on the insurance claim adjusted by the Defendant's Loss Adjuster, Mr. David Hobson or McLaurens, who adjusted the Claimants' insurance claim at US\$691,546.84. The adjusted claim is attached hereto and marked "I". The Claimants are therefore not entitled to payment of US\$5,000,000.00 and the insurance claim is grossly overstated and fraudulent in breach of Condition 13 of the Policy which provides:

"If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the insured or any one acting on his behalf to obtain any benefit under this Policy [...] all benefit under this Policy shall be forfeited."

³⁸ See: at paras 6-27 of defendant's written submissions

³⁹ See: at para 10 affidavit of Monica Hodge 16th November 2021

[115] A subsequent draft Re-Amended Defence and Counterclaim was presented to the court exhibited to the second affidavit of Carla Thomlinson filed on 9th December 2021.⁴⁰ This second draft read:

“14.5 Without prejudice to the foregoing, or anything contained in this Defence, the Defendant states further and in the alternative that the Claimants did not suffer US\$5,000,000.00 or US\$6,478,622.86 in losses to the insured property, as a result of Hurricane Irma. The Claimants are therefore put to strict proof of the same. At trial, and without admission of liability, the Defendant will rely on the Claimants’ insurance claim prepared by their Loss Adjuster, Mr. Gary Schwartz of GS Adjustment Company, which was submitted to the Defendant and adjusted by the Defendant’s Loss Adjuster, Mr. David Hobson of McLarens, who adjusted the Claimants’ insurance claim at US\$691,546.84. The adjusted claim is attached hereto and marked “I”. The Claimants are therefore not entitled to payment of US\$5,000,000.00 under the insurance policy as they did not suffer losses of US\$6,478,622.86 or US\$5,000,000.00 in losses as a result of damage to their property from Hurricane Irma.

14.6 The Claimants’ insurance claim in the sum of US\$6,478,622.86 submitted to the Defendant for indemnity under the insurance policy is grossly overstated and excessive. The particulars of the gross overstatement and excessive nature of the Claimants’ insurance claim submitted to the Defendant are contained in the David Hobson/McLarens’s Loss Adjustment attached hereto as “I” which assessed the true loss to the First Claimant’s property as a result of Hurricane Irma at US\$691,546.84.

14.7 The Claimants’ insurance claim in the sum of US\$6,478,622.86 submitted to the Defendant for indemnity under the insurance policy is grossly overstated and excessive that the insurance claim itself amounts to fraud and a breach of Condition 23 of the Policy which provides:

“If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the insured or any one acting on his behalf to obtain any

⁴⁰ Exhibit CT 2

benefit under this Policy [...] all benefit under this Policy shall be forfeited.”

14.7.1 The particular of fraud is that the insurance claim submitted by the Claimants to the Defendant in the sum of US\$6,478,622.86 as losses sustained by Hurricane Irma is so overstated that it amounts to fraud. At trial, the Defendant will rely on the loss adjustment by McLarens/David Hobson attached hereto as “I” who adjusted the Claimants’ insurance claim from US\$6,478,622.86 down to US\$691,546.84 in losses. The Claimants’ insurance claim is therefore grossly overstated by Five Million Seven Hundred and Eighty-Seven Thousand and Seventy-Six Dollars United States Currency (US\$5,787,076.00) and is fraudulent.”

[116] The question that arises is whether the defendant’s proposed amendment conforms to the requirements of CPR 20.1(3) and whether the court should exercise its discretion in favour of granting the defendant’s application to amend its statement of case.

[117] CPR 20.1(3) provides that, the court, when considering an application made under CPR 20.1(2), must take the following factors into account, namely: (a) how promptly the applicant has applied to the court after becoming aware that the change was one which he or she wished to make; (b) the prejudice to the applicant if the application was refused; (c) the prejudice to the other parties if the change was permitted; (d) whether any prejudice to any other party can be compensated by the payment of costs and/or interests; (e) whether the trial date or any likely trial date can still be met if the application is granted; and (f) the administration of justice. These requirements are also reflected in the appropriate Practice Direction.⁴¹

[118] The manner in which the court exercising its discretion whether to grant leave to amend may be considered well-settled by a plethora of decisions emanating from this Court. The well-settled principle is

⁴¹ Direction 4.1 of Practice Direction No. 5 of 2011

that the court should be guided by the general principle that amendments should be made where they are necessary to ensure that the real question in controversy between the parties is determined, provided that such amendments can be made without causing injustice to the other party and can be compensated in costs. The amendment should be allowed regardless of how negligent or careless the omission from the statement of case may have been, and no matter how late the proposed amendment is.⁴²

[119] In exercising its discretion the court should also advert its mind to the dictates of the overriding objective of the rules which require, among other things, that in exercising that discretion the overriding objective, with its emphasis on enabling the court to deal with cases justly, is of the utmost importance, but the just disposal of a case is not reserved only for the party seeking amendment.

[120] The court must consider all parties and has to perform a balancing act as it seeks to strike a fair balance. The factors relevant to doing so depend on the facts of the case and as such cannot be exhaustively listed. However, they are likely to include the history as regards the amendment and an explanation as to why it is being made late; the prejudice which will be caused to the applicant if the amendment is refused; the prejudice which will be caused to the opposing party if the amendment is allowed; and whether the text of the amendment is satisfactory in terms of clarity and particularity.⁴³

[121] With respect to the claimants' arguments regarding the lack of promptitude and an absence of a reasonable explanation for the lateness on the defendant's part in making the application for amendment, has applied the principles set out in the decision of

⁴² Mark Brantley v Dwight C. Cozier [2019] ECSCJ No. 76

⁴³ Marinor Enterprises Limited and Another v First Caribbean International Bank (Barbados) Ltd [2016] ECSCJ No. 146

Marinor Enterprises Limited and another v FirstCaribbean International Bank (Barbados) Limited.⁴⁴

- [122] In the **Marinor Enterprises** case it was held that there is a heavy burden on a party making a very late application to amend. An explanation for the lateness is called for and the court must consider the consequences for the opposing party. Where an amendment imperils a trial date which has been fixed, this is a significant factor to put into the scale. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to weigh heavily against the grant of permission.
- [123] The defendant disputed the claimants' assertion that the defendant sought leave to make the application for the amendment at a late stage of the proceedings. The defendant attributed the relative timing of the application to the procedural history of the case.
- [124] The court has taken into account the explanation given by the defendant and finds the same to be reasonable having regard to the procedural history of the proceedings. On 19th June 2020, the court ordered, among other things, that the defendant make specific disclosure; leave was granted to the claimants to further amend its statement of case within 7 days of the court's order; the defendant was granted permission to amend its defence to the claimants' further amended statement of case 28 days after service of the claimants' further amended pleadings; and that witness statements were to be filed and served on or before 15th September 2020. Pretrial review was fixed for 29th September 2020.
- [125] The defendant appealed the order made for specific disclosure made on 19th June 2020. The defendant filed its application for

⁴⁴ Infra per Baptiste JA at para 7

leave to appeal and a stay of proceedings on 6th July 2020. The application was granted by a single judge of the Court of Appeal on 28th July 2020. The defendant filed its defence and counterclaim to the claimants' further amended statement of claim on 30th July 2020. The defendant filed its notice of appeal on 19th August 2020. The Court of Appeal dismissed the appeal on 27th July 2021.

[126] The defendant filed a list of standard and specific disclosure on 11th August 2021. On 9th September 2021, the claimants' legal practitioner wrote to the defendant's legal practitioner seeking further disclosure and highlighting what they perceived to be deficiencies in the disclosure already made. The matter was listed for pretrial review on 16th September 2021.

[127] On 15th September 2021 the claimants filed an application for an extension of time to 6th October 2020 to file witness statements. It appears that the parties had by this time already filed witness statements under seal, albeit after 15th September 2020. Therefore, it appears that the witness statements were already filed prior to the full completion of the process of disclosure.

[128] In the circumstances, it is clear that any disclosure ordered and made at this stage of the proceedings may necessitate further amendments to the pleadings of the respective parties together with the need to file additional or supplemental witness statements. To hold otherwise may very well result in the parties being prevented from advancing their entire case on what may be regarded as relevant evidence.

[129] At the hearing on 16th September 2021, the claimants complained about what they perceived to be the defendant's failure to fully comply with the court's order for disclosure made on 19th June 2020.

On 16th September 2021, the court ordered that the defendant shall fully comply with the court's order for disclosure made on 19th June 2020 on or before 23rd September 2021. There was no sanction for non-compliance attached to this part of the order. On even date the court also granted permission to the claimant to file all necessary applications relative to the defendant's failure to comply with the court's order. In addition, the parties were granted permission to file all necessary procedural applications on or before 14th October 2021. On 23rd September 2021, the defendant filed a supplemental list of standard and specific disclosure. The matter came on for pretrial review on 27th October 2021. On 27th October 2021 the hearing of the parties' respective applications were adjourned to 10th December 2021.

[130] In view of the foregoing chronology of events, it is difficult for the court to subscribe to the view that the defendant have made the amendment application at a late stage of the proceedings which amounted to inordinate delay. There was obviously a change in the landscape of the proceedings brought about by the result of the defendant's appeal which, in any event, would have required the defendant to reassess and re-examine its case. Whatever the merits of the defendant having appealed the order for disclosure are, is clearly of no moment to this Court. In any event, the defendant had filed a further amended defence and counterclaim in response to the claimants' further amended statement of claim and defence to counterclaim on 30th July 2020.

[131] In considering the question of prejudice to the parties, the court has taken guidance from and applied the principled approach that in considering the competing arguments of prejudice to parties to an application for amendment, the prejudice to the amending party in not being able to advance its amended case is a relevant factor, but

is only one of the factors to be taken into account by the court in reaching a conclusion. Moreover, when, the prejudice is as a result of the amending party's own making, such a consideration is much less important in the court's balancing exercise.

[132] On the question of whether any prejudice suffered by the other party can be alleviated by an award of costs the court will not merely discount prejudice to a party on the basis that the party could be compensated in costs. The court is enjoined to consider the holistic effect of the disruption. This assessment includes the impact of the disruption on the parties, as well as on efficient case management and the administration of justice.

[133] In the present case, if the amendment is not granted this will inevitably result in the defendant not being able to put forward its entire case. Therefore, the defendant would be confined to advancing its case on a limited basis which may very well result in all matters in dispute between the parties not being fully ventilated at the trial.

[134] However, it appears that the only prejudice which the claimants are likely to suffer is in respect of the costs incurred in having to amend their pleaded case to answer that of the defendant. This admittedly would result in the duplication of costs and effort on the part of the claimants.

[135] The court has thoroughly considered the claimant's complaint that the proposed amendment to the defendant's pleadings in part would result in a completely new defence or the defendant advancing an entirely new defence completely different to the defendant's pleaded defence. It appears that the claimant's complaint was specifically targeted at the defendant's reliance on

fraud as a ground for avoiding the policy of insurance for the very first time and at a very late stage in the proceedings.

[136] In the court's view, it was opened to the defendant at the very commencement of the proceedings to rely on such a defence. Furthermore, it was opened to the defendant to have included in its pleadings this allegation of fraud bearing in mind that they had the loss adjuster's assessment in their possession at the material time and have only lately disclosed the same after much resistance. In addition, the court agrees with the claimants' argument that the allegation of fraud contained in the proposed amendment has not been adequately or at all particularised.

[137] However, although the proposed amendment to the defendant's case does not involve the putting forward an entirely new defence in respect of the amplification of matters such as misrepresentation by the claimants of the value of the claim, the court feels that the other matters in respect of which the amendment is sought permits the granting of the amendment. The court has formed the view that an amendment partially in the terms of the proposed amendment is necessary in light of the issues to be resolved at the trial.

[138] Therefore, the court will permit the defendant to amend its case but only to the limited extent as described by the court. In other words, and for the avoidance of doubt, the defendant will be permitted to amend its claim in the terms of the second draft present excluding any averment as it relates to any allegation of fraud as against the claimants.

The Expert Application

[139] The defendant's application was made pursuant to CPR 32.6 for the grant of permission to deploy expert evidence in respect of two

witnesses namely Mr. David Hobson ('Mr. Hobson'), a Loss Adjuster and Mr. Mark Hood ('Mr. Hood'), a Quantity Surveyor. The grant of this application would of course necessitate, as a consequence, the preparation and filing of expert reports and additional witness statements.

[140] Pursuant to the court's disclosure order of 19th June 2020, wherein the court ordered, inter alia, that the defendant disclose all correspondence with its loss adjusters and appraisers, the defendants disclosed the first report of the loss adjuster dated 6th December 2017 and the loss adjuster's adjustment on the insurance claim which it is alleged assessed the claimants' actual loss at US\$691,546.84 and was accompanied by site inspection notes and photographs taken by the loss adjuster.

[141] However, the claimants opposed the application on the ground that the defendant had initially not disclosed this evidence prior to the court's order for specific disclosure and had not pleaded the matters in respect of which the proposed evidence referred as part of its case. Instead, the defendant sought to challenge the order for specific disclosure on appeal.

[142] The defendant has also sought leave to amend its pleadings, without prejudice to the other defences raised, to reflect the claimants' actual loss in the sum of US\$691,546.84 and not the sum of US\$5,000,000.00 claimed. The defendant held the position that the claimants have as yet not substantiated their loss in the sum of US\$5,000,000.00.

[143] Therefore, the defendant contended that the proposed expert evidence is relevant to the question of the quantum of loss actually suffered by the claimants. Also, the expert evidence is related to

the adjustments made to the claimants' insurance claim by the defendant's Loss Adjusters. Additionally, the expert evidence related to the defendant's case that the insurance claim submitted by the claimants was grossly exaggerated and fraudulent.

[144] On the other hand, the claimants challenged the foregoing as amounting to any basis upon which the court should permit the defendant to amend its pleadings at this stage of the proceedings. According to the claimants, these matters having been in the knowledge and possession of the defendants even prior to the order for specific disclosure, and the defendant being obligated to make disclosure of the same, were obliged to bring their pleadings into conformity with these matters even without the order for specific disclosure, which they failed to do.

[145] It was argued on the defendant's behalf that the court was entitled to make the order on the basis that the evidence was relevant and that the order for specific disclosure was made after the time for filing the witness statements. They argued further that the witness statements have been filed under seal and that the parties by mutual agreement have not yet exchanged witness statements. Accordingly, they say that the claimants are not likely to incur any prejudice should the court grant the orders.

[146] On the contrary, the claimants were of the view that the intended expert evidence lacked independence and impartiality because Mr. Hood was the Quantity Surveyor appointed by Mr. Hobson and that in all the circumstances of the case the proposed experts were agents of the defendant.

[147] The defendant argued to the contrary that the claimants have presented not a scintilla of evidence from which can even be

inferred that the proposed expert evidence is tainted in any respect by an absence of independence or impartiality.⁴⁵

[148] The claimants also insisted that the deployment of the expert evidence at this stage of the proceedings was otiose and at the very least irrelevant. According to the claimants, it would be impossible to conduct any assessment of the value of the loss sustained by the claimants in respect of the property insured and for an expert to render an opinion on the merits of the claim or the loss adjuster's appraisal as the property has since been repaired by the claimants.

[149] The claimant also contended that any grant of permission to the defendant to deploy the expert evidence and to file additional witness statements in respect thereof will only contribute to further delay in the matter proceeding to trial.

[150] In the court's view, the following questions are to be determined, namely: (1) whether the intended expert evidence was relevant; (2) whether the intended expert evidence meets the requirement of being independent and impartial; (3) whether the defendant can rely on the intended expert evidence the same not having formed part of its pleaded case and not having been disclosed at an earlier stage of the proceedings; (4) whether there is any prejudice likely to be suffered by the claimants if the application was granted.

[151] Expert evidence must be restricted to that which is reasonably required to resolve the proceedings justly.⁴⁶ The present proceedings concern a claim for indemnity under a policy of insurance. One of the issues arising in the present claim is the quantum of loss suffered by the claimants; the defendant having

⁴⁵ At para 15-16 third affidavit of Monica Hodge

⁴⁶ CPR 32.2

denied the amount of loss actually sustained by the claimant. The claimants have sought to substantiate their claim on the basis of the expert evidence of their Quantity Surveyor. The defendant's Loss Adjuster and Quantity Surveyor have adjusted the loss claimed by the claimant with the result that the amount claimed by the claimant was significantly reduced. Separate and apart from denying liability under the policy, the defendant has taken the position as evidenced by its proposed amended statement of case that the amount claimed as indemnity by the claimants was grossly exaggerated and amounted to fraud which provided the defendant another basis upon which to avoid the policy coverage.

[152] In the premises, in order to resolve the issue in dispute between the parties regarding the actual loss sustained by the claimants and whether the amount claimed was grossly in excess of the actual loss suffered by the claimants and which entitled the defendant to avoid the policy of insurance on the basis of the avoidance clause in the policy of insurance, the expert evidence is necessary and relevant.

[153] The proposed expert evidence is also relevant and necessary to permit the defendant to put forward its entire case. If the defendant was prevented from so doing it would be severely prejudiced and the court could not be said to be fulfilling the overriding objective of dealing with cases fairly and justly. Also, if the defendant was prohibited from adducing the expert evidence at the trial, the court would not have available much needed assistance in resolving what is indeed a pertinent issue at the trial.

[154] The court does not subscribe to the point raised by the claimants that the expert evidence is no longer relevant because the claimants have since reinstated the insured property. There still

remains the issue of whether the costs of reinstatement or repairs to the insured property can be challenged by expert evidence. For all intents and purposes, one of the salient issues to be determined at the trial, quite separate and apart from the defendant's entitlement to avoid the policy, is the question of the extent of the loss recoverable under the policy of insurance.

[155] In addition, the expert evidence is also relevant to the question of misrepresentation and lack of good faith raised in the defendant's pleaded case in respect of the value of the property stated by the claimants in the insurance proposal. The court is incapable of resolving these issues without the assistance of expert evidence.

[156] It is noteworthy that the claimants seek to recover a sum in excess of \$5,000,000.00 in their pleaded case. The amount claimed has not been amended or varied to reflect the costs of reinstatement or repairs to the subject property. What is now in issue is whether the claimants can still maintain their claim for the previous amount stated in their pleadings. Also, the claimants have not disclosed any estimates or the actual sums expended in effecting the repairs to the property.

[157] In any event, the court is of the view that the loss adjuster's report, the quantity surveyor's report and the adjustment to the claimants' claim for compensation under the policy of insurance would by their very nature disclose the extent of the damage to the property and the costs of repairs which presumably were undertaken by the claimants notwithstanding that their initial intended purpose being the assessment and valuation of the claim submitted by the claimants. In any event, assuming that the claimants were to amend their claim to reflect the costs of repairs, expert evidence would still be required to value the extent of the repairs undertaken.

[158] It is evident from the claimants' previous application for specific disclosure wherein they sought an order for disclosure of the exchanges between the defendant, its loss adjusters and photocopies of photographs taken on-site that they recognised the relevance of the evidence to the issue to be determined on the claim. It is surprising that the claimants would now make a complete turnaround on this issue.

[159] The claimants have argued that the defendant has not provided any cogent reasons why the application to adduce expert evidence was not made at an earlier stage of the proceedings. The court accepts that the defendant would have had knowledge of the matters pertaining to the intended expert evidence at an earlier stage of the proceedings, at the very least, even prior to the filing of the claim. It is clear that the defendant did not advert to the proposed expert evidence in its initial pleaded case. In fact, it appears that the defendant's initial pleadings only sought to canvass the issue of the defendant's liability under the policy of insurance and did not interrogate the question of the quantum of the loss claimed by the claimant save for a bare denial of the same. In addition, it is evident that the defendant only disclosed the evidence related to the assessments made by its Loss Adjuster and Quantity Surveyor only after the court had granted the defendant's application for specific disclosure. This evidence did not form part of the standard disclosure initially made by the defendant.

[160] The general rule is that the court's permission to deploy expert evidence is to be given at a case management conference.⁴⁷ However, the rules do not preclude, and a judge has a discretion to grant such permission at any stage of the litigation where he is

⁴⁷ CPR 32.6(2)

satisfied that there are cogent and persuasive reasons for doing so in the interest of justice.⁴⁸

[161] 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.⁴⁹ An expert witness must provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within the witness' expertise.⁵⁰ An expert witness is not, strictly speaking, the witness of any particular party to the proceedings, but is an independent witness required to provide an unbiased opinion on a specific matter or question in issue in order to assist the court in its determination of the issues before it.

[162] Mr. David Hobson ('Mr. Hobson') is the Director of McLarens (Trinidad and Tobago) Limited ('McLarens'), an establishment which has over 30 years' experience in the field of loss adjustment. Mr. Hobson's curriculum vitae, which was annexed as an exhibit to the defendant's application, highlighted what can be described as vast experience in the area of insurance claims adjustment particularly those claims precipitated by natural disasters or catastrophic events in the region. The exhibited curriculum vitae also chronicled Mr. Hobson's professional qualifications and experience as a reputable claims adjuster spanning a period in excess of 30 years. Mr. Mark E. Hood ('Mr. Hood') is a Quantity Surveyor and a member of the Royal Institute of Chartered Surveyors, among many of his other relevant qualifications.

⁴⁸ Kouly Construction & Engineering Limited v Edmond Mansoor [2021] ECSCJ No. 527 per Farara JA (Ag) at para 49

⁴⁹ CPR 32.4(1)

⁵⁰ CPR 32.4(2)

[163] Based on the foregoing, the court is satisfied that the provisions of CPR 36.6(3) has been complied with in respect of both Mr. Hobson and Mr. Hood. There appeared to be no challenge to the qualifications of those to intended experts or their respective competence to give the relevant expert evidence.

[164] In the court's view, the claimants' challenge to the independence and impartiality of the proposed expert witnesses seems farfetched. The mere fact that the intended expert witnesses were engaged by the defendant does not ipso facto extend to the inference that the intended expert evidence was or was likely to be tainted in any respect by the absence of independence or impartiality.

[165] The single ground upon which the claimants sought to challenge Mr. Hobson's and Mr. Hood's independence and impartiality was that Mr. Hood was appointed by Mr. Hobson and accordingly they were both the defendant's agents. It is true that both Mr. Hobson and Mr. Hood played an active part in assessing the claimants' insurance claim. This fact has been disclosed to the claimants. However, the court does not accept that they are "strictly speaking" agents of the defendants. There simply is no evidence that there exist a conflict of interest or lack of independence or that any of the proposed expert witnesses are, or have been influenced by the demands of the litigation, or have or have had any interest in the subject matter or outcome of the litigation.⁵¹

[166] What then is the precise nature of the test to be applied in deciding whether the evidence of an expert should be excluded before trial on the grounds of lack of independence and impartiality? It seems that the court should address its mind to the question that if there

⁵¹ Kouly Construction v Mansoor at para 49; South Asia Energy Limited v Hycabex-American Energy Inc [2018] ECSCJ No. 93 at paras 21-25; Toth v Jarman [2006] 4 All ER 1276 at paras [100] – [102]

was real doubt as to whether or not expert evidence ought to be admitted, the issue should be determined in favour of admissibility. A close personal relationship and a close professional relationship with a party did not mean as a matter of law, or even as a matter of fact, that the proposed expert was incapable of fulfilling the functions of an expert witness.⁵²

[167] The following principles for the exercise of the court's discretion can be distilled from the case law:⁵³ Firstly, it is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings. Secondly, the existence of such an interest, whether as an employee of one of the parties or otherwise, does not automatically render the evidence of the proposed expert inadmissible. It is the nature and extent of the interest or connection which matters, not the mere fact of the interest or connection. Thirdly, where the expert has an interest of one kind or another in the outcome of the case, the question of whether he should be permitted to give evidence should be determined as soon as possible in the course of case management. Fourthly, the decision as to whether an expert should be permitted to give evidence in such circumstances is a matter of fact and degree. The test of apparent bias is not relevant to the question of whether or not an expert witness should be permitted to give evidence.

[168] Therefore, it is not the existence of an interest or connection with the litigation or a party thereto, but the nature and extent of that interest or connection which determines whether an expert witness should be precluded from giving evidence. Hence, once such an interest or connection is ascertained a decision must be made

⁵² Liverpool Roman Catholic Archdiocese Trustees Incorporated [2001] Lloyd's Rep 518

⁵³ Armchair Passenger Transport Limited v Helical Bar Plc and another [2003] EWHC 367 (QB)

promptly as a matter of case management as to whether the expert's evidence is precluded or not.

[169] In the premises, the questions which the court has to determine are whether (a) the person has relevant expertise; and he or she is aware of their primary duty to the court if they give expert evidence, and willing and able, despite the interest or connection with the litigation or a party thereto, to carry out that duty. The court must weigh the alternative choices that are available if the expert's evidence is excluded, having regard to the overriding objective of the CPR. If the expert has an interest which is not sufficient to preclude him from giving evidence the interest may nevertheless affect the weight of his evidence.

[170] For the forgoing reasons the court sees no impediment to granting the defendant's application to adduce and deploy the expert evidence at the trial. Therefore, the defendant's application to deploy the expert evidence of Mr. Hobson and Mr. Hood at the trial is granted.

Conclusions

[171] The court has found that the defendant's conduct regarding disclosure has not met the threshold of amounting to intentional or deliberate disobedience to the court's order for disclosure warranting the nuclear sanction of striking out either pursuant to CPR 26.3 or CPR 28.13(2). Additionally, the court is satisfied with the explanation given by the defendant in respect of those documents not disclosed and that the defendant has made a diligent attempt at complying with the order for disclosure. To that extent, the court does not find that the defendant has acted otherwise than in conformity with its duty of disclosure. Therefore,

the court cannot regard the defendant's conduct as contumelious or contumacious as the claimants contend.

[172] An order striking out the defendant's case would be wholly disproportionate in the circumstances of the case and would not be in furtherance of the overriding objective of the CPR. Moreover, the exercise of such a draconian power would be emblematic of the court's failure to exercise its duty to effectively management cases by putting matters right where there has been procedural errors and oversight so that there can be an efficient and fair disposition of the matters in dispute between litigants.

[173] The court is also of the view that an unless order would serve no meaningful purpose in light of the decision regarding the claimants' application to strike out. The defendant's overall conduct in relation to disclosure can be adequately dealt with by an order as it relates to costs in the proceedings. Therefore, the court declines to make an unless order pursuant to the provisions of CPR 26.4 or 28.13(4). The court has also formed the view that the trial can proceed in relation to the substantive issues already raised on the pleadings and intended pleadings in light of the disclosure already made.

[174] With respect to the defendant's application to amend its pleadings, the court formed the view that the timing of the application was attributable substantially to the chronology of events preceding and following the decision of the Court Appeal on 27th July 2022 and the vagaries of litigation. Accordingly, the court did not consider the delay in making the application significant that it warranted a dismissal of the application. The court having considered the provisions of CPR 20.1(2) found that the defendant would be prejudiced if the application were refused, in that it would be prevented in putting forward its entire case; that any prejudice to

the claimant in permitting the amendment can be compensated for by an award of costs; the fact that no trial date or any likely trial date has been set; and that it was in keeping with the administration of justice to permit the defendant to make the amendment so that all matters in dispute between the parties can be fully ventilated at the trial.

[175] In granting the application for the amendment the court found that the allegation of fraud contained therein was an attempt by the defendant to advance its case on an entirely new basis than that advanced on the pleadings as they already stood. Also, the allegation of fraud was not sufficiently particularised apart from the allusion to the claimants having submitted an inflated claim under the policy of insurance. Therefore, the defendant cannot be permitted to amend their case on this basis as it will result in prejudice to the claimants in that they will have difficulty in answering such a claim in light of the terms of the proposed amendment.

[176] The court also found that the defendant should be permitted to deploy the proposed expert evidence at the trial. This evidence is relevant to issues likely to arise at the trial. The court was not satisfied that the proposed expert evidence was tainted with an absence of independence and impartiality on the basis that the intended expert witnesses were agents of the claimants. There was no evidence presented to the court that the intended experts had any interest or connection to the proceedings or its outcome that would render their evidence open to challenge on account of lack of independence and impartiality. Furthermore, there appeared to be no challenge to the qualifications of these intended experts to give the expert evidence.

[177] The present applications come after the time for filing witness statements had passed. However, in light of the stay granted by the Court of Appeal that date had obviously lost its relevance; this is coupled with the fact that the parties have not yet exchanged witness statements. Therefore, the prejudice to either party would be minimal at the very least. It follows that given the orders that the court has made in this judgment that there will be the obvious need to file further witness statements and amended pleadings to canvass those matters that did not arise previously.

[178] It is indeed unfortunate for the purpose of efficient case management that the defendant had not disclosed the matters relating to the adjustment of the claimants' insurance claim earlier on in the proceedings. This would have enabled them to address these issues in amended pleadings and their witness statements at an earlier stage of the proceedings. To this extent, the delay in the matter must fall entirely at the feet of the defendant and therefore, the brunt of any costs order made by the court in this instance must be borne by the defendant. Although the defendant has enjoyed a large measure of success on the present applications, the court is of the view that the court has ample justification for departing from the general rule that the successful party should pay the costs of the unsuccessful party.

Order

[179] In the circumstances, and for the reasons which the court has given in this judgment, the court makes the following orders:

1. The claimants' application to strike out the defendant's case is dismissed.
2. Leave is granted to the defendant to file and serve its further amended defence and counterclaim in accordance with the

court's judgment herein within 14 days of the date of this judgment.

3. The claimants shall file and serve their further amended statement of case and defence to the defendant's further amended defence and counterclaim within 14 days after service of the defendant's amended pleadings.
4. Leave is granted to the defendant to adduce expert evidence in the form of a report by Mr. David Hobson and Mr. Mark E. Hood in accordance with the provisions of CPR 32.
5. The defendant shall file and serve the expert reports of Mr. David Hobson and Mr. Mark E. Hood on the claimants within 21 days of the date of this order.
6. The claimants shall be at liberty to put written questions to the expert witnesses appointed by this order within twenty-eight (28) days after service of the expert reports in accordance with CPR 32.8.
7. The parties are at liberty to file all additional witness statements within 90 days of the date of this order.
8. The matter shall be set down for pretrial review on a date to be fixed by the court office.
9. The defendant shall pay the costs of the present applications to the claimants to be assessed if not agreed within 21 days of the date of this order.

Shawn Innocent
High Court Judge

By the Court

Registrar