IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. **2008 HCV 00715**

BETWEEN	**BRANCH DEVELOPMENTS LIMITED T/A IBEROSTAR ROSE HALL BEACH HOTEL**	**CLAIMANT**
AND	**THE BANK OF NOVA SCOTIA JAMAICA LIMITED**	**DEFENDANT**

IN CHAMBERS

Michael Hylton Q.C. Ms. Shanique Scott and Ms. Melissa McLeod instructed by Michael Hylton & Associates for the defendant

Mrs. Pamela Benka - Coker Q.C. instructed by Brian Moodie of Samuda & Johnson for the claimant

Heard: 27 February, 8 and 25 March 2013 and 24 January 2014

CIVIL PROCEDURE – APPLICATION TO STRIKE OUT – ORDER FOR SPECIFIC DISCLOSURE – NON COMPLIANCE WITH ORDER – UNLESS ORDER FOR FILING OF WITNESS STATEMENTS – WITNESS SUMMARIES FILED INSTEAD WITHIN THE TIME SPECIFIED – WITNESS STATEMENTS FILED AFTER DATE SPECIFIED – DISCREPANCIES BETWEEN WITNESS STATEMENTS AND WITNESS SUMMARIES – WHETHER UNLESS ORDER COMPLIED WITH – PREVIOUS BREACHES OF COURT ORDERS – WHETHER STRIKING OUT MOST APPROPRIATE SANCTION – RELEVANT CONSIDERATIONS – PREJUDICE – DELAY – CIVIL PROCEDURE RULES (CPR) 2002, RULES 26.3 (1)(a); 28.1 (4); 28.2; 28.4(1); 28.6; 28.7; 29.6(1); 29.6(2); 29.7(2) & 29.7(3).

McDONALD-BISHOP, J.

[1] This concerns an application brought by the Bank of Nova Scotia (Jamaica) Ltd., the defendant, for the court to invoke its case management powers contained in Part 26 of the Civil Procedure Rules, 2002 (the CPR), more particularly, the power to strike out a party's statement of case under rule 26.3(1) (a). The subject of the application is the statement of case of the claimant, Branch Developments Limited T/A Iberostar Rose Hall Beach Hotel.

[2] By a Notice of Application for Court Orders dated 17 January 2013, the defendant seeks orders that:

(1) The claim form and particulars of claim be struck out; and

(2) The claimant pays the costs of proceedings to the defendant.

[3] The application is based on the following grounds as detailed in it:

(1) Rule 26. 3 (1) (a) of the CPR provides that the court may strike out a statement of case if it appears to the court that there has been a failure to comply with an order or direction given by the court in the proceedings.

(2) The claimant has not complied with the orders made on 19 December 2012 at the pre-trial review for specific disclosure on or before 28 December 2012.

(3) The claimant has been repeatedly and consistently in default of the Rules and orders made by this Honourable Court. These include:

(a) failing to comply with the order for standard disclosure;

(b) failing to file witness statements by 31 October 2012 as directed by the case management orders;

(c) failing to file and serve a statement of facts and issues on or before 7 December 2012 as directed by the case management order;

(d) failing to file and serve a listing questionnaire on or before 7th December 2012 as directed by case management orders;

(e) filing witness summaries in circumstances where the order of the court dated 19 December 2012 contemplated signed witness statements; and

(f) Discrepancies between the witness statements and previously filed "witness summaries".

(4) As a result of the claimant's breaches and non-compliance, the defendant has not been able to properly prepare for trial and has been unfairly prejudiced.

[4] In support of the application, the defendant relies on the affidavit of Sundiata Gibbs, an associate in the firm of the defendant's attorneys-at-law, sworn to on 17January 2013 ("The Gibbs Affidavit").

[5] The claimant vigorously resists the application to strike out its statement of case and has relied in response on the affidavit of Brian Moodie, an associate in the firm of the claimant's attorneys-at law, sworn to on 14 February 2013 ("The Moodie Affidavit")

The Background

The parties

[6] The claimant is a registered company that carries on business as hoteliers in Jamaica under the name Iberostar Rose Hall Beach Hotel. The defendant carries on business of banking in Jamaica.

The claim

[7] The claimant commenced proceedings against the defendant by claim form dated 18 February 2008, alleging breach of contract and/or negligence arising from the customer/bank relationship that existed between them. The claimant averred that between 2004 and 2007, it opened four accounts at the defendant's Rose Hall, St. James branch. One of these accounts was a Jamaican dollar current account that was opened in 2004. It signed three Agreements (entitled Agreement re Operation of Account) with the defendant dated 20 September 2004, 12 August 2005 and 12 June 2007.

[8] It is alleged that between May and July 2007, the defendant paid several forged fraudulent cheques drawn on the Jamaican dollar current account and debited the said account with the value of those cheques. The employees who allegedly forged the cheques, on which payments were made, Carla Campbell and Janice Carruthers, were never authorized to sign cheques and so their specimen signatures were never submitted to the defendant as authorized persons to sign cheques on the account. The defendant was advised in writing by the claimants that the two employees "[are] authorized to confirm bank transfers..." The signatures that appeared on the cheques on which payments were made were the forged signatures of authorized officers whose specimen signatures were submitted to the defendant.

[9] The claimant claims that the defendant has breached its contract and acted negligently in debiting its account when none of the signatories authorized by it had signed those cheques and none of those persons had been contacted by the defendant although their specimen signatures were given to the defendant when the accounts were opened.

[10] It seeks, by way of relief, a declaration that the debiting of the account by the defendant was unauthorized; damages in the sum of $34,439,818.24 for breach of contract and/or negligence; interest and costs.

The defence

[11] In its Amended Defence filed 18 August 2008, the defendant denies liability for breach of contract and negligence as alleged. It admits that the claimant had furnished it with a list of persons who were authorized to sign on its behalf and that it was also advised that Carla Campbell and Janice Carruthers were authorized to confirm bank transfers on behalf of the claimant. It, however, avers that it had no grounds for believing that the cheques were fraudulently prepared or presented and the cheques appeared in all respects to have been drawn and issued by the claimant.

[12] The defendant further avers that the claimant is not entitled to the reliefs or any relief being sought as it is the claimant that has breached the contract between them. It is not liable for any loss allegedly suffered by the claimant and it will rely on the Agreements relating to the opening of the accounts for their full terms and effect in support of its case.

Chronology since case management conference

[13] After several interim processes, including the hearing of an application by the defendant for summary judgment, case management conference took place before Beckford, J on 13 April 2012. The usual case management orders were made by the learned judge. All orders were to be complied with by the parties within a time frame laid down by the court extending for a period from 29 June 2012 to 7 December 2012. Pre-trial review was fixed for 19 December 2012 and trial for 27 February 2013. The claimant failed to comply fully with the case management orders within the time stipulated.

[14] On 9 November 2012, an application for order for specific disclosure was filed and served by the defendant on the basis that it was evident from the claimant's statement of case and affidavit evidence that it had documents that it did not disclose.

[15] The defendant's attorneys-at-law, again, by letter dated 11 December 2012 wrote to the claimant's attorneys- at- law concerning the claimant's non-compliance with the case management orders and enquired whether the claimant still intended to pursue the claim. The claimant failed to comply.

[16] On 18 December 2012, being one day before the scheduled pre-trial review, the defendant filed an application to strike out the claim (the first application to strike out). It was on this same date that the claimant filed a listing questionnaire and a statement of facts and issues which were, by then, out of time. It also filed an application for relief from sanctions and extension of time within which to comply with certain orders.

[17] On the date of the pre-trial review, 19 December 2012, three applications were listed before McDonald, J. Those were the application for order for specific disclosure, the defendant's first application for striking out and the claimant's application for relief from sanction and extension of time. The court documents were not before the learned judge and the judge expressed reluctance to deal with the applications. The parties, however, before going into the judge's chambers had come to some agreement as to how the applications should be dealt with. They agreed the terms of the orders that would be made and these were dictated by Mr. Hylton, Q.C. to the learned judge who made the orders accordingly.

[18] It was within that context, that the orders were made on the defendant's application for specific disclosure and on the claimant's application for relief from sanction and extension of time. The defendant did not pursue its first application to strike out the claimant's case. The claimant's documents filed up to then were permitted to stand and all other orders in issue on the applications were to be complied with by the claimant on or before 28 December 2012. McDonald, J also made an "unless order" in respect of the filing of witness statements in terms that if the claimant should fail to comply with that order on or before 28 December 2012, its claim should stand struck out.

[19] The formal order signed by the learned judge was not expressed to have been made by or with the consent of the parties albeit that the parties were the ones who actually agreed to and settled the terms of it.

[20] Following on this, the claimant failed to comply with the orders made on the application for specific disclosure by the date specified (28 December 2012) and it failed within the time so specified to file an affidavit indicating it did not have the documents in keeping with the order. In relation to the order for the filing of witness statements, the claimant filed on the date specified witness summaries instead of witness statements.

[21] In the wake of all this, on 17 January, the defendant filed its second application to strike out the claim which is now the subject matter of these proceedings. In the defendant's view, the claimant had failed to comply with the orders made at pre-trial review, notwithstanding that the claimant had filed witness summaries within the time stipulated for filing of witness statements.

[22] On 18 January, one day after the application for striking out was filed, Mr. Moodie filed the affidavit on behalf of the claimant purportedly in compliance with the order that if the documents were not in its possession, an affidavit should be filed explaining that fact. The standing of that affidavit will be discussed in due course. Suffice it to say, for present purposes, that none of the documents specified for disclosure were disclosed and the affidavit that should have been filed in the absence of non-disclosure was filed out of time. There was thus no compliance with the orders made at pre-trial review with respect to specific disclosure. The only 'purported' compliance by the claimant was in relation to the filing and service of witness statements by the filing and service of witness summaries which forms the subject of discussion on the application.

[23] The claimant's conduct of the proceedings up to that point, coupled with the previous late compliance with the case management orders, spurred the defendant into action to apply for its statement of case to be struck out on the grounds as detailed. The application was not dealt with as there was no available date for a chambers hearing prior to the date scheduled for the trial to commence.

[24] The matter came before me for the trial to commence but both parties had outstanding interlocutory applications to be dealt with, the defendant's for striking out and the claimant's for permission for two of its three witnesses to give evidence by video link. The claimant could not proceed in the light of that difficulty while the defendant, although declaring its readiness for the trial to commence, sought to pursue its application for striking out. The trial had to be postponed to facilitate the hearing of the applications of the parties. Of necessity, and for practical reasons, the defendant's

application to strike out had to proceed first before any determination could be made on the claimant's application to permit video link evidence.

Issues

[25] The broad issues for determination may be stated to be as follows: (i) whether the claimant failed to comply with (a) the orders for specific disclosure and (b) the filing of witness statements and (ii) whether, the non-compliance, if found, when viewed against the background of its previous non-compliance with the case management orders, warrants the ultimate sanction of striking out of its statement of case.

[26] In resolving these broad questions, the application is considered within the context of the several planks of the defendant's case as delineated within the application. Each will be discussed in turn in an effort to see whether the application should succeed when the relevant law is ultimately applied to the facts found to be established to my satisfaction. In providing the framework within which my analysis of the contention of the parties has taken place, I have started with a distillation of the some of the general principles of the applicable law governing this question of striking out for non - compliance with court orders. These principles, and other specific ones to be discussed during the course of my discussion on the subject, have guided my deliberations and influenced my conclusions in this matter.

The Law

[27] Rule 26. 3 (1) (a) of the CPR reads:

> *"26. 3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court -*
>
> *(a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;"*

[28] This rule (like its counterpart in the 1998 UK Rules, rule 3.4 (2 (c)) does grant the court an unqualified discretion to strike out a statement of case for non-compliance with an order of the court. Albeit that the court's discretion under the rule seems unfettered, it

must be exercised subject to the overriding objective set out in r.1.1 of the CPR which, in essence, is the duty of the court to deal with the case justly.

[29] Striking out of a party's case is the most severe sanction that may be imposed for non-compliance with the orders of the court under the court's coercive powers. It is draconian and so the power to do so must not be hurriedly exercised as it has the effect of depriving a person access to the courts which could result in a denial of justice. Therefore, the authorities have established that it is reserved for the most serious and repeated breaches or defaults. The ultimate question should, therefore, be whether striking out will produce a just result having regard to all that the achievement of the overriding objective entails.

[30] In the leading case on the approach to be taken in dealing with the question of striking out under the CPR, **Biguzzi v. Rank Leisure plc** [1999] 1 W.L.R. [1999] 1926, some useful guidance was laid down by Lord Woolf, MR in his customary illuminating style. In fact, both parties have cited portions of his Lordship's dicta to support the case they seek to advance. The guidelines extracted from **Biguzzi v Rank Leisure plc** do warrant repetition and so at the risk of doing some injustice to the coherence of his Lordship's dicta, I chose, for expediency and ease of reference, to outline the main planks of his judgment in the terms following.

(1) Under the CPR the keeping of time limits laid down by the CPR, or by the court itself, is very important and, in fact, is more important than it was under the old rules. The court has an unqualified discretion under the rule to strike out a case where a litigant failed to comply with a rule. The fact that a judge has the power does not necessarily mean that in applying the overriding objective, the initial approach will be to strike out the statement of case.

(2) The court has broader powers under the rules than before. So in many cases, there would be alternatives to the draconian step of striking out the claim that would make clear that the court would not tolerate delay but would also, in accord with the overriding objective, enable the case to be dealt with justly.

(3) Under the court's duty to manage cases, delays such as have occurred in the past, should no longer happen. The court's management powers should ensure that this does not occur.

(4) If the court exercises those powers with circumspection, it is also essential that parties do not disregard timetables laid down. If they do so, then the court must make sure that the default does not go unmarked. If the court were to ignore delays which occur, then undoubtedly there will be a return to the previous culture of regarding time limits as being unimportant.

(5) There are alternate powers which the courts have which they can exercise to make it clear that the courts will not tolerate delays other than striking out cases. In a great many situations those other powers will be the appropriate ones to adopt because they produce a more just result. In considering whether a result is just, the courts are not confined to considering the relative positions of the parties. They have to take into account the effect of what has happened in the administration of justice generally. That involves taking into account the effect of the court's ability to hear other cases if such defaults are allowed to occur. It will also involve taking into account the need for the courts to show by their conduct that they will not tolerate the parties not complying with dates.

(6) Some alternatives to a striking out of the claim which may be more appropriate are costs orders; ordering a party to pay money into court; awarding interest at a higher or lower rate. A greater advantage of making one or other of these orders as the proper method of dealing with a default of the party is that they are much less likely to result in appeals such as this which in themselves generate huge disproportionate expense.

(7) Judges have to be trusted to exercise their wide discretion fairly and justly in all the circumstances, while recognizing their responsibility to litigants in general not to allow the same defaults to occur as had occurred in the past.

[31] The learned writers of Blackstone's at para. 46.4 have, however, cautioned that **Biguzzi v Rank Leisure plc** must not be understood as promoting an unduly lenient approach to the imposition of sanctions. According to them, there will be a number of cases where there has been serious default where immediate striking out is appropriate.

The overriding purpose of the rules, they opined, is to impress upon litigants the importance of observing time limits in order to reduce the incidence of delay in proceedings.

[32] The Jamaica Court of Appeal has reaffirmed this principle, time and time again, and as Smith J.A. put it in **McNaughty v Wright** SCCA No. 20/2005 delivered 25 May 2005:

> *"[Nonetheless], I am constrained to repeat what the Court of Appeal has said ad nauseum namely that orders or requirements as to time are made to be complied with and are not to be lightly ignored. No court should be astute to find excuses for such failure since obedience to the orders of the Court and compliance with the rules of the court are the foundation for achieving the overriding objective of enabling the court to deal with cases justly."*

[33] A rather powerful persuasive authority on the approach to be taken to the question of striking out, is also to be found in the judgment of the Caribbean Court of Justice (CCJ) in **Barbados Rediffusion Service Ltd v Asha Mirchandani and Others (No 2)** (2006) 69 WIR 52. This case was brought to my attention by my brother Sykes, J (to whom I am grateful) who cited it in his unreported judgment **Quest Security Services Limited v Steve Khemlani and Others [2013] JMSC Civ 83.**

[34] Their Lordships of the CCJ, through the words of its then President, his Lordship Justice de la Bastide, explored in a thorough and all - embracing way the lines of authority on this issue of striking out within the context of non-compliance with an unless order. The following principles have been distilled for present purposes and summarized in point form for ease of reference and not out of any disrespect to their Lordship's formulation.

(1) Broadly speaking, 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.

(2) 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.

(3) With regard to the use of strike-out orders as a response to disobedience of court orders, the view of Millett J expressed in the *Logicrose* case (1988) *The Times* (London), 5 March, that such disobedience can never justify the making of a strike-out order is not accepted. The view that is preferred is that expressed by Arden LJ in the *Stolzenberg* case (unreported) that the fact that a fair trial is still possible does not preclude a court from making a strike-out order.

(4) It is accepted with some qualifications the principle expounded and applied in cases such as *Tolley v Morris* [1979] 2 All ER 561, *Hytec Information Systems Ltd v Coventry City Council* [1997] 1 WLR 1666 and *Re Jokai Tea Holdings Ltd* [1993] 1 All ER 630, that defiant and persistent refusal to comply with an order of the court, can justify the making of a strike-out order.

(5) While the general purpose of a strike- out order in such circumstances may be described as punitive, it is to be seen not as retribution for some offence 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.

(6) What is required is a balancing exercise in which account is taken of all the relevant facts and circumstances of the case. For one thing, it must be recognised that, even within the range of conduct that may be described as contumelious, there are different degrees of defiance which

cannot be assessed without examining the reason for the non-compliance.

(7) The fact that what has been breached is an 'unless' order has a special significance, as such an order is framed in peremptory terms which makes it clear to the party to whom it is directed, that he is being given a last chance.

(8) 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.

(9) Normally it will not assist the party in default to show that the non-compliance was due to the fault of his lawyer since the consequences of the lawyer's acts or omissions are as a rule visited on his client. There may be an exception made, however, when the other party has suffered no prejudice as a result of the non-compliance.

(10) Other factors which, depending on the context, have been held to be relevant include such matters as whether the party at fault is suing or being sued in a representative capacity and 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.

(11) 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.

[35] Their Lordships, however, applied the necessary rider that:

> *"We would like to emphasize again that what has been offered above is not intended to be a complete catalogue of the matters to be considered but represents a general guide to the approach to be adopted and a sample of the factors which have been held in decided cases to be relevant to the balancing exercise."*

[36] There is hardly much more for me to add to the authoritative judicial pronouncements on the subject. I will simply say in the light of all the authorities that there can be no doubt that the court must guard the legitimacy of its authority jealously. The message must be made clear that its orders are, indeed, meant to be obeyed. The rules and orders of the court must be perpetually effectual in ensuring the smooth

administration of the civil justice system and the attainment of a just result in all cases. A culture of compliance is integral to the whole process. At the same time, however, scrupulous steps must be taken to ensure that no one is denied access to justice, undeservedly, in circumstances that could amount to a breach of their fundamental rights to a fair trial enshrined in the Constitution.

[37] Stuart Sime in his text **Civil Procedure 15th edition**, at paragraph 28.18 noted:

> *"Courts considering striking out have to pay attention to the fact that they may be denying the claimant of access to the court, which has particular importance under art 6 of the European Convention on Human Rights (**Woodhouse v Consignia plc** [2002 1 WLR 2558)."*

[38] It becomes evident that when a judge is confronted with the question as to whether to strike out or not to strike out a party's case, he or she must embark on a balancing exercise of great proportions. I now turn to that exercise having been guided by the various principles of law, some expressed herein while others are simply borne in mind. The parties have made detailed and quite helpful submissions on the subject that I do appreciate and which have also served to guide my deliberations.

[39] I now present my analysis of the circumstances giving rise to the application in an effort to see whether in the end, striking out of the claimant's statement of case should be the natural and inevitable result.

Prior and repeated breach of the court orders

The defendant's submissions

[40] The defendant contends that the statement of case of the claimant should be struck out due to repeated breaches of the court's order. Speaking through Mr. Hylton Q.C., the defendant reminded the court of the new approach to the CPR that has been emphasized by the appellate courts in Jamaica and England and Wales as evidenced by dicta in such cases as **McNaughty v Wright** and **UCB Corporate Services Ltd v Halifax (SW) Ltd** [1999] The Times, 23 December (UK.). It then made the following submissions.

[41] The cases reveal that compliance with time limits is now regarded as being more important than under the old rules and so where there has been a history of delay, and several different orders have been breached, there will come a point when the court will say it is right to apply the ultimate sanction of striking out. (**Blackstone's Civil Practice paragraph 46.2. paragraph 46.12.**). These principles apply equally to the present case.

[42] The claimant has, repeatedly, failed to comply with several of the orders of the court and it would not be an exaggeration to say that it has acted in complete disregard of the court's orders. It is appropriate to strike out its case in these circumstances.

[43] Furthermore, the assertion in the Moodie Affidavit that the orders made at pre-trial review on 19 December 2012 extending the time for compliance were made by consent and so by consenting the defendant waived any objection to the claimant's non-compliance with the case management orders, is misconceived. It is misconceived, firstly, because the orders made at the pre-trial review were not consent orders within the meaning of the rules because they were not expressed as being by consent even though the parties did agree to those orders being made and did suggest the terms of the orders to the judge. Secondly, there is an important difference between an order of the court which is made with the consent of the parties, and a settlement agreement between the parties which is evidenced by an order of the court, and thirdly, to be a true consent order, there must be consideration passing from each side and the claimant had provided no consideration for there to be a "consent order". See R. 42.7(5) of the CPR; **Michael and Richard Causewell v Dwight and Lynne Clacken** SCCA 129/2002, delivered on February 18, 2004; unreported); **Blackstone,** paragraph 61.8.

[44] The defendant does not only rely on the non-compliance prior to the order at the pre-trial review giving an extension of time. The claimant did not comply after this order. The non-compliance at the case management stage is cited to illustrate a pattern of non-compliance on the part of the claimant, and the defendant cannot be taken to have waived the right to rely on it in the context of continued breach.

[45] The imposition of the earlier cost sanction against the claimant for non compliance with the case management orders does not preclude the imposition of a further sanction in circumstances where the claimant persists in breaching other rules. The claimant's continued disregard for the court's order, even after having been previously sanctioned, supports the defendant's case that a more stringent remedy of striking out needs to be applied at this instance.

The claimant's response

[46] The claimant's response to the arguments of the defendant was voiced by Mrs. Benka-Coker, Q.C. and summarized as follows. The claimant admits that it was late in complying with all case management orders but that by the time the pre-trial review was held, it had complied with all the orders save and except the service of witness statements. In the affidavit in support of the application for relief from sanction and extension of time, it had informed of the difficulties in getting witness statements from its two main witnesses who, since the filing of the claim, resigned from the claimant's employment and returned to Spain.

[47] The defendant has not filed an affidavit in response or alleges that the Moodie Affidavit is not a true reflection of what transpired at the pre-trial review. It therefore accepts the affidavit. As such, there is no dispute that the learned judge before whom the applications were listed did not have the applications before her and was not afforded an opportunity to read them. The Moodie Affidavit also indicates that the judge was initially hesitant to deal with the applications which she had not seen, but was convinced by both counsel that they had reached common agreement as to the orders they wished endorsed on the court's record which arose from discussions outside chambers prior to the commencement of the pre-trial review.

[48] In the circumstances, those orders must be taken to have been made by consent since the judge did not have the applications before her and therefore could not have adjudicated on them. The absence of the words "by consent" on the formal orders must

be taken to have been an oversight by defence counsel who prepared them and sent them for the judge's signature.

[49] The court has already dealt with the issue of late compliance by the claimant with the case management orders and the appropriate sanctions were already applied/agreed in relation to all the case management orders, that is, the claimant has to pay the defendant's costs on the application as a result of the non-compliance. Having so provided the court then made orders remedying the default and granted an extension of time to serve witness statements. Striking out is, therefore, not warranted. (**Biguzzi v Rank Leisure** relied on.)

Discussion

[50] It is clear from an examination of the background of the case, and as conceded by the claimant, that the claimant has had a history of non-compliance with the orders of the court commencing with the case management orders of April 2012. The claimant was penalized at pre-trial review for those non-compliance by the imposition of a cost sanction and the making of an unless order. I accept that the imposition of those sanctions by McDonald, J did not arise from an independent and objective assessment of the matter by the learned judge but rather as the product of agreement between the parties arrived at before they entered the judge's chambers.

[51] The debate that raged on between the parties as to whether or not the order made was a consent order is, in my view, totally unnecessary. This is so because whatever name was ascribed to the order or whether it was expressed, in form, to be by consent or otherwise, it cannot be denied that the terms were the product of an agreement arrived at between the parties and dictated to the learned judge in the absence of the relevant documents. As a matter of substance, therefore, the order was arrived at by consent of the parties and the terms reflected their consensus as to how the applications should have been disposed of on that day.

[52] From the debate between the parties, I have extracted the material question on this issue as being, what is the implication for the instant proceedings of the consent of the defendant to the sanctions imposed on the claimant for non-compliance with the case management orders. As far as I understand it, the defendant is not raising the previous non-compliance to say that punishment should again be inflicted for them but rather that they form part of the history that should be taken into account in determining the sanction to be imposed for the subsequent non- compliance with the orders at pre-trial review (if any is found).

[53] The history of a party's compliance with the rules or orders of the courts is always an important consideration for the court in dealing with issue of the imposition of sanction or the relief from sanction under the CPR. There has been no waiver on the part of the defendant to complain about the claimant's subsequent breaches simply because it had previously consented to the claimant obtaining relief from sanction and extension of time.

[54] The claimant's previous pattern of non-compliance that has been thrown in the mix by the defendant is taken as a factor that should be weighed in the equation in the determination of the question whether its statement of case should be struck out. Having said that, therefore, I will make it clear that I have not viewed the previous non-compliance with the case management orders, standing by itself, as a basis for striking out. It will, however, be a relevant consideration in the ultimate analysis as to whether striking out of the claimant's statement of case is the most appropriate sanction to be imposed at this time in all the circumstances.

[55] I think it safe to say, at this juncture, that the core issues around which the instant application revolves and which now arise for enquiry relate to the orders made at the pre-trial review for specific disclosure and the filing of witness statements. The question of whether or not a consent order was made at the pre-trial review is totally irrelevant to this enquiry as to whether those orders were breached and the results that should flow from any breach so found.

Order for specific disclosure

[56] The order made at pre-trial review for specific disclosure reads:

> *"On or before December 28, 2012, the claimant must comply with the following orders:*
>
> 1. *The claimant must disclose and deliver for inspection the "fraudulent invoices" mentioned at paragraph 20 in the Affidavit of Mr. Francisco Mestres filed on July 17, 2009.*
> 2. *The claimant disclose and deliver for inspection the contracts of employment and job description of Janice Carruthers and Carla Campbell.*
> 3. *The claimant disclose and deliver any internal memoranda in relation to the allegedly forged cheques and the prosecutions described in the Particulars of Claim.*
> 4. *In relation to documents that the Claimant does not have, the Claimant must file an affidavit indicating same."*

On 28 December, 2012, the claimant failed to comply with those orders.

Defendant's contention

[57] The submissions of the defendant on this limb started out on the premise that rule 28.14 (2) of the CPR provides that *"a party seeking to enforce an order for disclosure may apply to the court for an order that the other party's statement of case or some part of it be struck out."*

[58] Mr. Hylton Q.C. argued that based on the chronology of events, beginning with the case management orders and ending with the filing of the defendant's affidavit of 18 January 2013, the remedy of striking out the claim for failing to properly make disclosure within the time limits is appropriate in the circumstances. He pointed out that it was the claimant's failure to give standard disclosure that resulted in the application being made for specific disclosure at the pre-trial review. It would not have been necessary for an order for specific disclosure to be made if the claimant had properly complied with its duty of standard disclosure in the first place. The documents referred to in the specific

disclosure order should have already been disclosed by the claimant in accordance with the case management order for standard disclosure because the claimant has had the right to possession of these documents and therefore had a duty to disclose them pursuant to rule 28.2 (2) (b) of the CPR.

[59] According to Mr. Hylton, Q.C., it does not matter that the claimant no longer has the documents or could not have located them as indicated in the affidavit filed on 18 January 2013. Prejudice to the defendant arises from non-disclosure of the existence of the documents, regardless of whether the documents are available for inspection.

[60] He maintained further that even apart from the fact that the claimant's allegation is not credible, the claimant had ignored the court's order regarding specific disclosure and only sought to comply after the defendant's application to strike out. The claimant has failed to take the matter of disclosure seriously and therefore ought not to be allowed to continue its claim. (Reference was made to the dictum of Sykes J, in **Roxborough v Nangaravi** et al on this point).

Claimant's response

[61] The claimant's response, through Mrs. Benka – Coker, Q.C. was as follows: The chronology provided by the defendant as it relates to specific disclosure is not entirely accurate. The claimant had actually referred to issues relevant to the order for standard disclosure and such portions of the chronology have nothing to do with specific disclosure.

[62] The claimant does concede that on the face of the formal order, the claimant would be in default for not filing that affidavit by 28 December 2012. However, the affidavit filed on 18 January 2013 provides a compelling reason for this court to exercise its discretion on this issue in favour of the claimant.

[63] Additionally, as there was nothing to disclose, the defendant cannot be said to have suffered prejudice or any disadvantage by the filing of the affidavit on 18 January

2013. In that respect, it is not accurate to say (as the defendant has done) that the claimant has failed to disclose anything; the more accurate statement would be that the claimant does not have the documents which were the subject of the order for specific disclosure. There is no basis for striking out on this basis.(Reliance was also placed on the unreported judgment of Sykes, J in **Roxborough v Nangaravi et al.)**

Discussion

[64] The examination of this aspect of the defendant's cases is undertaken under two separate headings: first, whether there was non-compliance with the order for specific disclosure; and secondly, if there was non-compliance, whether striking out of the case is warranted for that reason.

Whether there was non-compliance

[65] The evidence shows that the deadline for compliance had passed and that the claimant failed to disclose any of the documents specified in the order and also failed to file the affidavit required if it had none of the documents in its possession. On 18 January 2013, the claimant filed its affidavit. The affidavit was thus out of time and no order was made extending time for compliance or any relief from sanction was applied for.

[66] The late filing of this affidavit in such circumstances stands as non-compliance with the order (albeit late corrnpliance). The fact that the affidavit might have disclosed "compelling reason" does not change the fact that there has been total non-compliance with the order for specific disclosure. The reason for failure to comply in time, is not material on this question as to whether there was, in fact, compliance. It is more relevant to the issue as to what sanctions should be imposed for the non-compliance since any explanation given by the party should be given due consideration.

[67] However, since the point is raised within this context, I will go further to look at the claimant's attempt to explain the reason for failure to comply. The first thing I would

point out is that the claimant's reliance on that affidavit to explain its position is not without hurdles. The affidavit, as already indicated, was filed out of time and so with no application having been made by the claimant for it to stand as if filed within time, the affidavit stands to be rejected by the court for non-compliance with the order. If not permitted to stand, then its contents would have to be ignored and the effect of that would be that the claimant, having failed to comply with the court's order, has provided no reason for doing so. Its action would have to be judged on the basis of an unexplained and inexcusable breach of the order of the court for the filing of the affidavit.

[68] Even if the affidavit were allowed to stand, I have formed the view on examining its contents (it having been referred to and sought to be relied on at the hearing) that the effect of it on the claimant's case would have been the same. Mr. Moodie in it had raised a matter that I would simply describe as a serious family emergency occurring on 26 December 2012 as the reason for the delay in complying with the order relating to the affidavit.

[69] However, that occurrence, while regrettable and enough to be such as to evoke an appreciable measure of sympathy for Mr. Moodie, cannot be taken as a sufficiently good reason for failure to comply with the deadline set by the court. This occurrence relied on occurred after six clear days had elapsed since the order had been made. That six day period did provide a window of opportunity for counsel to communicate with the claimant concerning the order of the court. This could be done by the use of electronic technology- e-mail to be exact- as this is shown to have been the way in which counsel eventually communicated with the claimant on 18 January advising of the order for specific disclosure. Clearly, it required nothing more than an e-mail message.

[70] Apart from this clear period of six days, there was a period during the time Mr. Moodie was out of office which would have been between 27 December and 15 January. During this time, instructions could have been given to another member of Mr.

Moodie's firm to deal with the matter. It is my view that if the deadline was taken seriously, that would have been a prudent course to adopt. There is, however, no attempt at any suggestion that no one else was available to assist Mr. Moodie.

[71] I do take judicial notice of the fact that there would have been intervening holidays during that period when the offices might have been closed, but the court cannot ignore the convenience of the use of technology in modern life even outside normal working hours. Nothing obviously was done during that period which would have been a period of twenty one days or so.

[72] The evidence reveals that Mr. Moodi,e upon resuming work on 16 January, did nothing about filing the affidavit until 18 January which would have been after the defendant's application for striking out was filed and served. By then, it was three days less one month since the order for specific disclosure was made. The claimant was notified of the order for specific disclosure by e-mail on that same day. The recorded time of the message shows that within two minutes the claimant's representative replied. The affidavit was filed that same day. This points strongly to the fact that the claimant could have complied with the order within a very short time if steps were taken to do so. Evidently, it could have been done in a day.

[73] I conclude from all this that the family emergency Mr. Moodie had to deal with cannot be taken as an acceptable excuse for the failure of the claimant to comply with the order. It was no real impediment to the process of counsel communicating with the claimant to obtain the information necessary to comply with the order for filing of the affidavit.

[74] I find, in the end, that even though counsel for the claimant had agreed with the time fixed for compliance, he did not move with the alacrity the order demanded to have the claimant comply with the orders. The reason advanced for his failure to do so is not an acceptable one. I must say too that even though the claimant, itself, did not fail to

act, it must be visited with the sins of its counsel. I see nothing to make an exception to that principle.

[75] So, the fact that the affidavit itself is out of time, compounded by the fact that it discloses no good reason for it to not to have been filed within time, has impelled me to conclude that it ought not to stand. It leads me to reject the argument of Mrs. Benka-Coker, Q.C. that it contains compelling reason for the failure of the claimant to comply with the orders of the court. I find then that there was no compliance by the claimant with the orders made on pre-trial review with respect to specific disclosure.

Whether statement of case should be struck out for non-disclosure

[76] The issue now to be examined is whether the non-compliance with the order for specific disclosure provides a proper basis for striking out of the claimant's statement of case.

[77] I commence my analysis of this issue by an examination of the type, nature and import of the documents to which the order relates because this will have a bearing on the question whether failure to disclose them warrants the sanction of striking out of the claimant's entire statement of case. In the end, the impact of the non-disclosure on the proceedings and, in particular, on the case for the defendant, must be a paramount consideration in determining what sanction should be imposed.

[78] The defendant maintained that the application for specific disclosure was rendered necessary because the claimant's compliance with the order for standard disclosure made at the case management conference was flawed. Its argument is simply that the disclosure of documents that was being sought by an order for specific disclosure pertains to documents in relation to which a duty to disclose would have arisen upon Beckford, J's order for standard disclosure made at the case management conference.

[79] Mr. Hylton's Q.C. contention is that the documents should have been disclosed pursuant to the order for standard disclosure because the claimant has had the right to possession of these documents and, therefore, had a duty to disclose them pursuant to rule 28.2 (2) (b) of the CPR. This rule speaks to the fact that disclosure is limited to, *inter alia*, documents that the party has or had a right to possession of.

[80] The claimant has disclosed none of the documents specified in the order. It sought to file this affidavit which from the mere fact of filing gives rise to the inescapable inference that the claimant is saying it does not have the documents requested. The Moodie Affidavit filed in response to the application for striking out, in fact, indicates that the claimant is saying that it does not have those documents in its possession. There is nothing properly before the court from the claimant itself explaining why it is that these documents are not in its possession or why it is that it has no right to them. I arrive at this position because I have not allowed the affidavit filed out of time to stand. The affidavit evidence of Mr. Moodie simply saying they are not documents in possession of the claimant is not enough. The rules require that reasonable search be undertaken upon an order for disclosure, there is nothing to indicate whether that was done in compliance with the rules (See rule 28.5).

[81] Be that as it may, there is no evidence placed before me to say that the claimant has or has had the documents in question or that it had a right to possession of them. In fact, from the terms of the order at paragraph 4, it would seem that when the order was made, it was not definitively known that the documents did exist and were or had been in the possession of the claimant.

[82] Whether the documents do exist in reality or not is a question of credibility of the claimant and I cannot embark on an investigation of that issue of fact in these proceedings, particularly, when no evidence is given to the contrary by the defendant and there is nothing from anywhere else to indicate otherwise. It is not a matter that I can resolve at this interlocutory stage by conducting a mini trial. The highest we can go,

which the defendant has done, is to say that some of these documents (especially, in my view, the contracts of service of the employees in question) ought to exist and be under the control of the claimant or that they are documents to which it would have a right to possession. All we know is that they have not been disclosed.

[83] I must consider the effect of the claimant's failure (or inability as it would say) to disclose the documents specified in the light of the claim by the defendant to be prejudiced in the preparation of its case by non-disclosure of such documents. Prejudice is a material consideration in every case.

[84] I have noted that no point has been taken by the claimant in these proceedings (and rightly so given that it consented to the order) about whether the application for specific disclosure was properly made and the orders properly granted. I have raised the point, however, because in the end, although the claimant consented to disclose such documents, it turned out none was disclosed and the argument of the defendant is that he claimant had a duty to disclose them on the order for standard disclosure. The extent of the claimant's duty to disclose the documents in question must be considered in the context of determining the extent and effect of the failure to comply.

[85] Surprisingly, the claimant has brushed aside the defendant's reliance on the order for standard disclosure and the chronology relating thereto as being irrelevant on this issue of specific disclosure. I do not find it to be so. I think that this issue concerning the claimant's asserted duty to disclose such documents upon an order for standard disclosure must assume significance in the context of its failure to comply and in treating with the question whether striking out would be justified.

[86] The question as to whether the claimant had a duty to disclose the documents pursuant to rule 28.2 (2) (b), as asserted by the defendant, emerges for evaluation as a rather fundamental issue in my determination of the sanction to impose for non-compliance.

[87] Rule 28.2 (1) stipulates that the duty of a party to give disclosure is limited to documents which are or have been in the control of that party.

[88] Rule 28.2 (2) then states:

> *"For this purpose a party has or has had control of a document if*
> *(a) it is or was in the physical possession of that party;*
> *(b) that party has or has a right to possession of it; or*
> *(c) that party has or has had a right to inspect or take copies of it."*

[89] Rule 28.1 (3) provides that a party discloses a document by revealing that the document exists or had existed.

[90] The fact that the documents ordered to be disclosed are documents which the claimant would have a right to possession of or to copies of them might be hard to counter by the claimant and so on that limb it could well be argued that they would fall within the class of documents in relation to which the duty to disclose would arise. The duty would be fulfilled with disclosure which would be to show that the documents exist. If they do not exist, then there can be no fulfilment of the duty to disclose.

[91] I will point out though that even if one acts on the premise that the documents in question are those to which the duty of disclosure applies, the enquiry could not end there in the context of an allegation of non-compliance with an order for standard disclosure. One has to pay regard to rule 28.4 (1) which states:

> *"Where a party is required by any direction of the court to give standard disclosure,* ***that party must disclose all documents which are directly relevant*** *to the matters in question in the proceedings." (Emphasis mine)*

[92] From the wording of this rule, the mandatory duty to disclose upon an order of standard disclosure arises not simply with respect to documents in relation to which a duty arises but, more so, in relation to documents that are directly relevant to the matters in question in the proceedings. Rule 28(2)(b), on which the defendant relies, does not say that there is an automatic right to disclose such documents upon an order

for standard disclosure. The rule merely provides that such documents fall within the class of documents to which disclosure is limited. A party would be obliged to disclose such documents on standard disclosure once they exist and are directly relevant to a matter in question in the proceedings.

[93] According to rule 28.1 (4):

> *"For the purposes of this Part a document is directly relevant only if-*
>
> *(a) the party with control of the document intends to rely on it;*
>
> *(b) it tends to adversely affect that party's case; or*
>
> *(c) it tends to support another party's case."*

[94] It means then, that to be in a strong position to argue that the claimant had a mandatory duty to make disclosure of the documents in question upon the order for standard disclosure made at case management conference, the defendant must show that the documents in question fall within rule 28.1 (4) that is to say that they are directly relevant within the meaning of rule 28.1 (4). So, the documents must not only have been merely relevant or might be relevant to the preparation of the defendant's case (as it asserts) but *directly relevant to a matter in dispute in the proceedings.* (Emphasis added.)

[95] It should be noted too that under rule 28.6 which deals with specific disclosure, it is stated at rule 28. 6 (5) that "*an order for specific disclosure may require disclosure only of documents which are directly relevant to one or more matters in issue in the proceedings.*" Here again, the concept of direct relevance of the documents in question assumes significance for the purposes of determining the ambit of the duty to disclose on an order for specific disclosure. It is not taken to mean, however, that only documents directly relevant should be the subject of specific disclosure but the court has discretion to limit specific disclosure to only such documents. The issue of direct relevance of the documents, in this context however, relate to the argument of the

defendant that they should have been disclosed from the outset on the order for standard disclosure.

[96] The question that now immediately emerges for contemplation is whether the documents in question are directly relevant to the matters in issue so as to have given rise to a mandatory duty to disclose them upon the order for standard disclosure. I have noted that the defendant has not relied on any aspect of rule 28. 1 (4) and 28. 4 (1).

[97] Apart from the defendant making the assertion that the documents were relevant or likely to be directly relevant, no effort was made to demonstrate, through evidence or arguments, the sense in which they would be directly relevant. In other words, there is nothing on the claimant's statement of case to show it intends to rely on the documents in question and the defendant has not alleged that that is so and, therefore, on that basis the documents would not be directly relevant within the meaning of rule 28.1 (4) (a). Similarly, the defendant has not asserted or shown that the documents would tend to adversely affect the claimant's case or that they tend to support its (the defendant's) case rendering them directly relevant under rules 28.1 (4) (b) and 28.1 (4) (c), respectively.

[98] I find in all the circumstances that the direct relevance of the documents ordered to be disclosed is not sufficiently established before me with any conviction and so it is highly questionable whether the claimant was under a mandatory duty to disclose the documents in question upon the order for standard disclosure. However, since the defendant insists that they should have been disclosed and that the order for specific disclosure should have been complied with, I have examined the circumstances pertaining to specific disclosure before arriving at a definitive conclusion on the matter as to the effect of the failure to comply.

[99] I now turn to the order made for such documents to be disclosed on the order for specific disclosure. The order for specific disclosure was a product of the parties' agreement upon the application brought by the defendant. The claimant, having been

served with the application for specific disclosure, had raised no issue with it. There is however, no express provision under the rules that the parties may (orally, in writing, or otherwise) consent to an order for specific disclosure. The issue as to whether they could properly consent was not the subject of examination in the case so I will refrain from embarking on any discussion of that. Suffice it to say that the rules provide that the court may order specific disclosure but in doing so, it is incumbent on the court to consider several specified matters.

[100] Rule 28.7 states:

> *"When deciding whether to make an order for specific disclosure, the court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs. It must have regard to-*
>
> *(a) the likely benefits of specific disclosure;*
>
> *(b) the likely cost of specific disclosure; and*
>
> *(c) whether it is satisfied that the financial resources of the party against whom the order would be made are likely to be sufficient to enable that party to comply with any such order."*

[101] In this case, the application was devoid of any such judicial scrutiny and finding with regards to these matters because the learned judge did not have the application before her. So, there has been no prior judicial consideration as to whether the specific disclosure of those documents was necessary in order to fairly dispose of the claim or to save costs. An order merely made on the dictates of the parties by virtue of their concurrence does not stand as being indicative of the court's satisfaction that specific disclosure was justified.

[102] In the 2010 White Book at paragraph 31.12.2, it is said that:

> *"The rationale for the discretion of the court to order specific disclosure is that the overriding objective obliges the parties to give access to those documents which will assist the other's case:* ***Commissioner's of Inland Revenue v.***

Exeter City AFC Ltd *2004 B.C.C. 519. The court has a discretion whether it makes this order..."*

[103] Given that there was no prior judicial consideration of the application before the order was made to determine whether access to the documents would assist the defendant's case, I form the view that it is open to me now to examine the degree of importance of the documents not disclosed in my determination whether striking out of the claimant's case should result from its failure to produce such documents.

[104] It is my considered view that the fact that the claimant consented to the order should not preclude me from carrying out my own enquiry to see whether the order was required for fair disposal of the matters in issue between the parties. This is particularly necessary because the defendant has raised the issue that it is prejudiced in the preparation of its case without the disclosure of these documents. The question must be whether they are necessary for the fair disposal of the claim. Fairness is one of the most pertinent considerations in determining how to treat with non- compliance and sanctions.

[105] It goes without saying that the importance of the documents depends on their degree of relevance to the proceedings. In the absence of the defendant demonstrating to my satisfaction, or at all, how the documents requested are directly relevant, or indeed relevant, I have taken it upon myself to look at the pleadings, the parties' statements of facts and issues and the documents requested, in order to assess their value and importance to the case.

[106] I have been guided by the extracts from the 2010 White Book para.31.12. 2 that the relevance of documents is analyzed by reference to the pleadings and the factual issues in dispute on the pleadings: **Harrods Ltd v The Times Newspaper Ltd** [2006] EWCA Civ 294; [2006] All E.R.(D)302. (Feb) [12] and that where a claim is likely to turn on particular documents there is a stronger case for an order to be made. **Chantery Vellacott v Convergence Group plc** February 6, 2006 Ch.D Rimer,J..."

[107] I have begun my enquiry with the fraudulent invoices. I have observed that the fraudulent invoices of which the defendant speaks were initially mentioned in an affidavit filed by the claimant in opposition to the application for summary judgment. When all the pleadings are considered, it is clear to me that the gravamen of the claim against the defendant relates to alleged forged cheques that were honoured by it and not anything to do materially with fraudulent invoices. The claimant has not spoken to the existence of such documents on its statement of case as documents it intends to rely on in relation to any matter in question in the proceedings. So such a document would not be directly relevant on that limb.

[108] For them to be otherwise directly relevant, the court must be satisfied that they would support the defendant's case or would be adverse to the claimant's case. In considering that, I find that there is no material on the pleadings and on the parties' statements of case from which I could draw such a conclusion and the defendant has not attempted to make that clear to me. The defendant has not pointed out to me how its case is affected by the absence of fraudulent invoices and its inability to view them. There is no likely or proven effect of any such non-disclosure on the defendant's case or the claimant's case, for that matter.

[109] In the circumstances, I find that even though the claimant might have agreed to the order to be made for it to disclose fraudulent invoices, there is really nothing to convince me that the failure is such as to affect the fair disposal of the claim as contended by the defendant. In the scheme of things, I conclude that the failure to comply with the order for specific disclosure with respect to fraudulent invoices would not, standing on its own, constitute a gross breach likely to prejudice the defendant's case and would warrant striking out.

[110] I now will examine the order as it relates to the contracts of service and job description of the two employees allegedly implicated in the forgery of the cheques, Carla Campbell and Janice Carruthers. The defendant's argument, basically, is that such documents should exist as they are such that one would expect the claimant to

have as employer. These are, indeed, documents that one would expect the claimant to have above all the others. Somehow, it has produced none and no explanation for that has come forth.

[111] I must also admit that of all the documents requested, these seem to be the ones more closely connected to the issues at hand. These persons, however, have been accepted by the defendant as being employees of the claimant. Their role in the operations of the claimant has been detailed as well as their connection to the bank as persons authorized to confirm bank transfers by the claimants. They were clearly placed in a position of trust. While I do see a connection of these persons to the case between the parties, the defendant has also failed to demonstrate in its application or by submissions, how it is that the duty of disclosure arises in relation to the contracts of employment and job descriptions of Janice Carruthers and Carla Campbell.

[112] Nowhere in the statement of case of the claimant is there any mention of documents containing the contract of service and job description of the employees. Furthermore, the claimant has said nothing from which it can be deduced that it intends to rely on documentary evidence pertaining to the contracts of service or job description of the employees in question over and above that they were not authorized to sign cheques to be drawn on the account which is a fact accepted by the defendant.

[113] While the defendant has averred that it is relying on the Agreement between itself and the claimant to say it is not in breach of the contract, it has stated nothing to insinuate that any issue in relation to that Agreement would turn on the contract of service or the job description of these persons, over and above what has emerged on the statement of case. If at all such documents (or the information it is hoped they contain) would be directly relevant or merely relevant to the defence, then the defendant failed to bring those things to my attention.

[114] I conclude, then, that documentary evidence of the contracts of service and job description of the employees in question which are requested, while not, seemingly, totally irrelevant to the matters in dispute, are not proved to be crucial in the resolution of the matters in question between the parties so that their non-disclosure would be to the disadvantage of the defendant and to the corresponding advantage of the claimant thereby affecting the fair disposal of the issues between the parties.

[115] I would say however, that the rules have not left the defendant without a remedy in some regards because rule 28.14 (1) provides, in part, that a party who fails to give disclosure when ordered so to do may not rely at the trial on any document not disclosed. It means the claimant could be barred from relying on any such documents if later on it should seek to do so. This provision is a built in mechanism within the rules to ensure fairness in the proceedings.

[116] The defendant seeks, finally under this head, order for specific disclosure of *any* internal memoranda in relation to the alleged forged cheques and the prosecutions described in the particulars of claim. The fact that the word "any" is used in the application itself conveys the impression that there was no prior indication to the defendant of any such documents existing. So, the application and the subsequent order would have been made on the premise that if they do exist, then they should be disclosed because they are documents which would have been in the possession of the claimant or to which the claimant would have had a right to possession. The claimant produced none.

[117] There is thus nothing to say definitively then that such documents existed and are or were under the control of the claimant or that it has a right to them because the claimant in its particulars of claim made no reference to any internal memoranda pertaining to the alleged forgery and the prosecutions. So, from the claimant's statement of case, there is nothing to say that any such documents would be directly relevant in the sense that it intends to rely on them or that they are relevant for any other reason.

[118] Again, in relation to these documents, the defendant failed to go further to demonstrate for my benefit how, if at all, and the extent to which, such documents would have been relevant, even remotely, to its case and above all else to a matter in question in the proceedings. The empty assertion that the documents are relevant to it in the preparation of its case is not enough, in my view. There is nothing on which I can conclude comfortably that any internal memoranda as requested would be directly relevant within the meaning of the rule for the mandatory duty of disclosure to have arisen in relation to them on the order for standard disclosure or that they are necessary for a fair disposal of the issues between the parties or to save costs as is necessary for specific disclosure.

[119] I would summarize my views by stating that the defendant, in requesting specific disclosure of the documents on the ground that they should have been disclosed on the order for standard disclosure, has failed to satisfy me that the claimant had a duty to disclose them on the order for standard disclosure as being documents that are directly relevant to the matters in dispute in the proceedings in the manner defined by the rules.

[120] This does not mean, and should not be taken too mean, however, that the claimant was right in failing to comply with the order for specific disclosure. I have conducted my enquiry as to relevance of the documents in order to determine whether they are, and the extent to which, they are necessary for the preparation of the defendant's case and the fair disposal of the proceedings on a whole. The importance of the documents goes to the issue of the gravity of the breach and the sanction that should flow from it. All this I consider to be necessary in determining the question whether striking out should be viewed as the most appropriate sanction.

[121] Having conducted my enquiry by looking at the nature of the non-compliance on the part of the claimant, against the backdrop of the relevance of the documents to have been disclosed, I conclude that the breach on the part of the claimant was not gross or

egregious. It does not appear to me that the non-disclosure would have a material and marked effect on the fairness of the trial of the issues between the parties. This could well lead one to form the view that the failure to make specific disclosure of the documents in question, would not, standing on its own, be so serious a breach as to justify striking out.

[122] I must hasten to say, however, that I am mindful that the fact that a fair disposal of the case might still be possible on this ground is not determinative of the issue as to whether the claim should be struck out. It is just one of the factors to be taken into account and weighed in the balance in coming to a proper determination. I still have to go on to consider other alleged non-compliance on the part of the claimant so that everything can be assessed globally and the cumulative effect on the proceedings evaluated. I now proceed to look at the other matters in dispute in order to ultimately determine whether the claim should be struck out bearing in mind this failure to comply with the order for specific disclosure.

Orders for filing of witness statements

Defendant's submissions

[123] The defendant's contention on the point as to the failure of the claimant to file witness statements in compliance with the pre-trial review order is summarized thus: The order of McDonald, J extending time for the claimant to file witness statements to 28 December 2012 was an unless order and so on that date when the claimant filed and served three witness summaries and not witness statements, it was in breach of the unless order. Therefore, the sanction of striking out automatically applies once it has not been complied with by the date specified. Furthermore, rule 26.4 (7) of the CPR states that where the defaulting party fails to comply with the terms of any "unless order" made by the court that party's statement of case shall be struck out.

[124] An unless order requiring the filing of a witness statement can be distinguished from the first order to file the witness statement made at case management. Rule 29.6 (1) allows for the filing of a summary instead of a statement in the latter case, not in

circumstances where the claimant has already failed to file a witness statement and received an unless order to force compliance. In this context the claimant was strictly required to comply with the terms of the unless order, failing which the sanction should apply. Given the gravity of an unless order the court should not be quick to accept the excuse for failure to comply by the claimant. **See Forrester v Holiday Inn** Claim No. CL 1997/F-138 delivered November 21, 2004 (unreported judgment of Sykes, J) and **Reid and Abdalla v Pinchas et al** Claim No. C.L. 2002/R 031 delivered February 27, 2009 (unreported judgment of Sykes, J in which **Hytec Information Systems v Coventry City Council** [1997] 1 W.L.R 1666 cited).

Claimant's response

[125] The claimant's response is that as expressly provided for by rule 29.6(1) of the CPR, it had filed and served witness summaries on 28 December 2012 which was within the time specified for the service of the witness statements. It did so because it was not able to obtain witness statements by that date. The court cannot oust the clear and unambiguous provisions of Rule 29.6 and so the defendant's assertion that the claimant was in default of the court's order by filing witness summaries has no merit in law.

[126] Mrs. Benka-Coker maintained that even if the court had stipulated "statements", there could be no failure to comply with rule 29.6 (1) by the filing of witness summaries. The claimant was therefore in full compliance with the requirement to serve a witness statement or summary by the date agreed by the parties and stipulated by the court. (**See RBTT Bank Jamaica Limited v. Y.P. Seaton and Others** SCCA # 107 of 2007 decided 19 December 2008.)

Discussion

[127] There is no question that the order of McDonald, J was, in terms and effect, an unless order or a peremptory order. The sanction would automatically apply on non-compliance with the deadline. What is clear from the order is that McDonald, J merely extended the time within which the case management order as to filing of witness statements should have been complied with and attached a sanction to force

compliance. It was the same order for the claimant to file witness statements made at the case management conference to which an unless order was applied when the time for compliance with it was extended. If that order was not complied with by the date set, then striking out would automatically apply. So, this distinction made by the defendant as to two separate orders for the purposes of the filing of witness summaries in lieu of witness statements is, in my humble view, without merit.

[128] Rule 29.6 (1), on which the claimant relies, provides that a party who is required to serve a witness statement but is not able to obtain one, may serve a witness summary instead. Rule 29.6(2) provides that that party must certify on the witness summary the reason why a witness statement could not be obtained. The remainder of the rule makes provisions concerning, *inter alia,* what a witness summary is, what it should contain and when it should be served. The contention of the defendant is not that the witness summaries provided are not in conformity with the rules. The argument is that the claimant was not entitled to file witness summaries on the unless order but rather to comply strictly with the terms of the order for filing of witness statements and nothing else.

[129] I reject those arguments made on behalf of the defendant and do agree with the claimant's position that it was entitled to avail itself of the provisions, and indeed, the protection, of rule 29. 6 (1). The claimant's reliance on **RBTT v YP Seaton and Others** is not, at all, misplaced as the defendant would want me to say. Despite Queen's Counsel for the defence most intellectual effort to draw a distinction between the two cases for me to hold that RBTT is unhelpful, I find that I cannot be persuaded to that view. The dictum of Cooke J.A., in so far as it relates to the interplay between rule 29. 4 (witness statements) and rule 29.6 (witness summaries) is rather instructive and accords with my own view of the subject, the factual differences between that case and the present notwithstanding.

[130] In **RBTT v YP Seaton and Others,** Sykes, J had made an unless order for the service of witness statement following certain difficulties being experienced by the

claimant with a particular witness. Prior to the date set for compliance, the claimant prepared a witness summary for that witness and made an application for the learned judge to, *inter alia*, vary the order for filing of witness statement and to permit the witness summary to stand as the difficulties persisted in obtaining a witness statement from that witness. Sykes, J refused the application thereby disallowing the witness summary to stand.

[131] The learned judge made no reference to the provisions of rule 29. 6 (1) but focused attention predominantly on rule 29.4 concerning witness statements and the inability of the claimant to secure the signature of the witness for a witness statement. He also took into account previous breaches by the parties and the wasting of judicial time.

[132] The Court of Appeal, led by Panton, P, held that Sykes, J fell into error by refusing the application (which in effect would include disallowing the witness summary to stand) in the light of rule 29. 6 (1) which all learned judges agreed was applicable.

[133] Cooke J.A., although refusing to be definitive on the subject as to whether the unless order could have been satisfied by the service of a witness summary without the need for an application to be made before the court to do so, made some important observations that accord with my own view. He stated, in part, at paragraph 12:

> *"I find it curious that the learned judge in para. 36 of his judgment appears to have considered 29.6 (3) of the C.P.R. as the foundation of his analysis which was to follow "relating to witness statements" In fact Part 29.6 pertains to witness summaries...rather than to witness statements. It is my view that the most important aspect of part 29.6 is 29.6 (1) which authorizes the use of a witness summary. This Rule, 29.6 (1) does not need the intervention of the court before a party serves a "witness summary instead" of a witness statement. Rule 29.6 (1) pertains to a party who is "required to serve a witness statement". There are no words of qualification in respect of the word "required". It would seem to me, therefore that a party is "required to serve" a witness*

statement within the specific time limit, when such an obligation is imposed on the party. I am inclined to the view that the "unless" order of Sykes, J in para.3 of the formal order dated 26th April, 2007 was a requirement within 29.6 (1) (a) of the CPR. If this is correct the "unless order" could have been satisfied by the appellant serving the witness summary of Senior- in which case the application for court orders would have been quite unnecessary. However, as there were no submissions on this issue, despite my inclination I am somewhat reluctant to be definitive. What is clear is that the learned judge did not take into consideration Rule 29.6(1)."

[134] At paragraph 15 the learned judge continued:

> *"Rule 29.6(1) permits a party to utilize a witness summary if such a party is not able to obtain a witness statement. In coming to this view the learned trial judge appears to have neglected this Rule... More importantly, the approach of the learned judge would preclude the appellant from the benefit of a provision provided for it by the CPR. "*

[135] Although Cooke, J.A. refused to be definitive, I believe he posited a correct view of the law in the light of the terms of rule 29.6 (1). In fact Panton, P, without any qualification, declared that rule 29.6 (1) was applicable and this declaration was made albeit that the filing of the witness statement was subject to an unless order. I share that view that the fact that there is an unless order for the filing of a witness statement does not preclude the application of rule 29.6 (1) for the filing of witness summary.

[136] On the clear words of the rule, the option to file a witness summary is left open to a party who is required by the court to file a witness statement but for whatever reason is finding it difficult to obtain that statement for filing as ordered. Once the requirement arises to do so and it cannot be obtained within the time, then resort may be had to rule 29.6 (1) to file a summary instead. There is nothing to suggest that the court's input is required at that point and there is no qualification with respect to situations where the order is expressed in terms of an unless order or otherwise.

[137] In my view, the rule is open for any party to resort to where any order (be at case management conference or otherwise, or be it an unless order or otherwise) is made for witness statements to be filed and such an order cannot be complied with within the time specified because the statement cannot be obtained. There is no such restriction that can be read into the rule distinguishing between first instance order for witness statements and subsequent or unless orders for the filing of witness statement. Even more importantly in this case, it was the case management order that was still in place and for which an extension of time was granted. The only thing different made on the order at pre-trial review was that an automatic sanction for non - compliance was to operate, if the claimant should have failed to comply within the time specified. So in this case, once the order was made at case management conference for witness statements to be filed and the time was extended to do so, then if witness summaries could have been filed upon the first order, then it follows that they could have been filed upon the same order being extended.

[138] I am being definitive in my conclusion, in the absence of any authority put before me to the contrary, that notwithstanding that an unless order was made for witness statements to be filed, It was open to the claimant to seek refuge under the provisions of rule 29.6 (1) to file witness summaries, which it did. I would hold that there was full compliance with that order when the claimant filed the witness summaries in question. The unless order was, therefore, of no effect in the face of such compliance. The defendant's argument for striking out on this ground, inevitably, fails.

Discrepancies between witness summaries and statements

[139] Connected to this issue of non-compliance by the defendant with the orders for the filing of witness statement is the complaint by the defendant that the three witness statements filed are all different in fundamental respects from the witness summaries that were previously filed. Having noted these differences (omissions and additions), Mr. Hylton Q.C, submitted that the differences in the witness statements are critical and that, therefore, what was before the court on 28 December 2012 in the form of

summaries is different from what is now before the court in the form of witness statements. He contended that since the witness statements are different from the summaries in material respects, the witness summaries that were filed on time cannot save the claimant from the striking out of the claim for non-compliance with the unless order for filing witness statements.

[140] I do find myself in agreement with the response of Mrs. Benka-Coker, Q.C., that this argument, with all due respect, has no basis in law to commend it. I share her view that the court has no jurisdiction at this stage of the proceedings to compare a witness summary against a witness statement. I must point out that the rules define a witness statement and a witness summary and they are two different documents intended to be utilized in distinct ways in the proceedings. The statement is the document of the intended witness, the summary is not. Therefore, the makers of the documents are different.

[141] In short, there is no requirement in the rules, as far as I can see, for the witness summary to accord with the witness statement in every respect. The rules made clear what are required for a witness summary and what are required for a witness statement. There is no complaint that the summary is not in accordance with the rules. There is no part of the rules that empowers a judge to strike out part or all of a witness statement because it does not accord with a witness summary previously filed. Furthermore, neither the summaries nor statements are yet evidence in the proceedings.

[142] I will go further to make the point that issues of discrepancies, inconsistencies and any other form of contradictions on witness statements, if any, are not considerations for the court at this stage. Those are matters for the trial judge to deal with in deciding whether to allow the statement to stand or the witness to be called or the weight to be given to the evidence contained in such statements. Indeed, the matters raised by the defendant as to differences in the witness statements could enure to its benefit at trial by providing it with added ammunition to attack the credibility of the

witnesses and to destroy the claimant's case during the course of cross-examination. I find that this argument based on discrepancies and omissions is premature at best.

[143] Accordingly, I find no attraction to the proposition that the differences noted between the witness statements and the witness summaries have served to nullify the summaries filed in lieu of the witness statements so that the effect would be the automatic operation of the unless order. I still maintain that there was full compliance with the order for the filing of witness statements through the filing of witness summaries instead and as such, the unless order was rendered inoperable on 28 December 2012.

Prejudice to the defendant

[144] In its strident effort to have the claimant's case struck out, the defendant further advanced, that there has been substantial prejudice to it as a result of the claimant's non-compliance. It identified several grounds on which it is contending this prejudice arises and submitted that the cumulative effect of the claimant's conduct is substantial and irremediable prejudice to it.

[145] I do accept that in determining whether to strike out the statement of case, part of the relevant circumstances to be considered include any prejudice suffered by the parties in the proceedings or other parties seeking to access the courts for redress. I have examined each averment of the defendant as to prejudice against this background.

The defendant filing witness statements before the claimant

[146] One of the contentions of the defendant on the ground of prejudice is that the claimant has gained an unfair advantage that cannot be remedied by filing its witness statements after the defendant had already done so in accordance with the case management orders. According to the submissions, there was no exchange of witness statements at the time specified by the court and the reason for the order for simultaneous exchange of witness statements is obvious in that neither party should be able to craft its witness statements having seen the other side's statements.

[147] To this contention the claimant, by way of response, invoked the provisions of rule 29.7 of the CPR. That rule, basically, provides for when a party (the first party) is able and prepared to comply with an order to serve witness statements; and the other party fails to make reasonable arrangement to exchange its statement. In relation to the first party, it is provided in rule 29.7 (2):

> *"The first party may comply with the requirements of this Part by-*
>
> *(a) filing the witness statement in a sealed envelope at the registry by the date directed; and*
>
> *(b) giving notice to all other parties that the witness statements have been filed."*

Rule 29.7 (3) then provides:

> (3) The statements filed pursuant to paragraph 2 must not be disclosed to any other party until that party certifies that witness statements or summaries in respect of all witnesses upon whose evidence that party intends to rely have been served."

[148] It was submitted on behalf of the claimant that the defendant could have availed itself of the protection afforded by that rule and so by not doing so it, on its own accord, had given up the protection afforded by the provision.

[149] I agree with that submission and would hold that the defendant cannot elect to throw away its shield given for its own protection only to turn around to say it is placed in an unfair position because it was not protected. It elected to expose its witness statements under circumstances when it did not have to do so. That election cannot be used against the claimant. The defendant must be barred from complaining about the result of its own action.

[150] Even more, and on a closely related issue, it could well be argued that the defendant had waived any right it had to complain about late service of witness statements because it had, in fact, acquiesced in the claimant doing so. This would arise from the fact that at the pre-trial review, it had agreed to the extension of time

granted to the claimant to file its witness statements being fully mindful that the time for simultaneous exchange had passed and that it had filed and served its statements in the manner it had done. The defendant could have raised the objection to the claimant serving its witness statements after the time for exchange had passed on the grounds of prejudice, then, as it is doing now but rather, it kept quiet and agreed to the terms of the order extending time.

[151] Furthermore, the defendant could, in agreeing to the extension of time, had asked the court to permit it to file supplemental witness statements, if that was seen as necessary to counter things that might emerge on the claimant's statements. It did not do so. Also It could have sought permission then for amplification at trial (and can still do so if the matter was to proceed to trial) to negate any prejudicial effect it sees arising from late service of the claimant' statements. That too was not done. I cannot see any irremediable and substantial prejudice to the defendant that has arisen, or could arise, by the later service of witness statements by the claimant.

[152] I have arrived at this position too not only because of the defendant's conduct at pre-trial review that amounts to acquiescence on the issue but also based on the fact that the defendant has not assisted me by demonstrating how it is that the claimant has gained an unfair advantage to the extent that it has been, or is likely to be, irremediably prejudiced. Simply put, I cannot discern any irremediable prejudice, as alleged, in all the circumstances and the defendant has not assisted me. This argument of prejudice from the claimant's late filing of the witness statements as a basis for striking out is rejected.

Prejudice as a result of claimant's failure to disclose

[153] The defendant has contended also that the claimant's failure to comply with the disclosure orders has caused it not to have had the benefit of all the relevant documents in preparation of its case while the claimant, on the other hand, has obtained another unfair advantage in that the defendant has fully complied with all orders. I have already dealt extensively with this aspect of the defendant's complaint when I looked at the claimant's non-compliance with the order for specific disclosure.

[154] I have already found that although there has been non - disclosure on the part of the claimant pursuant to the order for specific disclosure, I have found that the breach was not so weighty and serious so as to affect the potency of the defendant's case or to affect any matter in question between the parties to the advantage of the claimant. Given that I am not satisfied that the documents were proved sufficiently, or at all by the defendant, to be directly relevant to the issues in question between them, and having found that they do not affect the fair disposal of the claim, I find no irremediable and substantial prejudice to the defendant as a result of the non-compliance with that order. This argument from the defendant does not provide a compellable case for striking out, standing on its own.

Different case to answer

[155] The defendant contended that it is prejudiced because it now has a substantially different case to answer after receiving the witness statements than it would have had to answer based on the witness summaries. Also, the fact of the changes made in the witness statements from what was previously stated in the witness summaries is also a basis to strike out the claim because of its impact on the fairness of the trial and the prejudice to the defendant's case. The alterations made are significant and this amounts to conduct that put the fairness of the proceedings in jeopardy (See **Arrow Nominees Inc. v Blackledge** Blackstones, para.46.12.)

[156] Again, while the defendant has made this assertion, no effort has been made to bring home to me, by way of evidence/ facts/ submissions, or otherwise, that the defendant now faces a substantially different case to answer. I hope I am not faulted for failure to see the nexus between the discrepancies/ omissions and the case the defendant would seek to advance at trial.

[157] At any rate, the defendant has a right to seek permission for amplification of its own evidence at trial to deal with any new matter that has arisen since the filing of its statements or to comment on the evidence of the claimant. After all, its witnesses will be

called after the witnesses for the claimant. It would then be afforded the opportunity to answer to new matters raised in the claimant's witness' evidence. The useful tool of cross-examination still exists and can be utilized to reveal the conflicts in the case being presented by the claimant and to discredit its case. With all these devices at its disposal that could be engaged in the trial process, the defendant has not persuaded me to the viewpoint that it cannot obtain a fair trial because of the discrepancies/omissions it is complaining about and that it will be irremediably prejudiced.

[158] I will go a bit further to state too that the law permits the court to give regard to explanations given, if any, for conflicts in the evidence of witnesses. There might be reasonable and innocent explanations for such perceived conflicts which the claimant, through its witnesses, should be given an opportunity to present. The witnesses are not yet called. The evidence is not yet presented. It would be unfair for me to perform the role of a trial judge or tribunal of fact at this stage of the proceedings in determining what to accept and what to reject and what is true from what is not true.

[159] The complaint of the defendant does not raise any matters pertaining to the witness statements that would empower the court under the rules to strike out such statement or the claimant's entire statement of case as a result. So, if the claimant has substantially departed from its pleadings, in any way, or if the statement of case has internal inconsistencies, those are issues that can be raised at trial as going to the credibility/ reliability of the claimant's case. At the end of the day, it will be a question for the trial judge in such circumstances to determine whether he or she will permit the statement to stand as the witness's evidence- in- chief and what weight to be accorded to any evidence given.

[160] I do agree with the views of Mrs. Benka-Coker Q.C. that any objection on this issue is premature. I find that to be so because, in my view, the matters raised for consideration do fall within the purview of the trial judge who will be the arbiter of the law as well as the facts and as such the person to determine what weight to be accorded to the evidence presented in the light of all the circumstances properly raised

before him or her. In my view, the defendant is not without remedy. The substantial and irremediable prejudice alleged is not established.

Delay

[161] The final argument of the defendant under this head of prejudice is this: the events that led to these proceedings took place between May 2007 and July 2007 and so almost six years have already passed. There are disputed questions of fact. The claimant's breaches and the resulting adjournment will significantly prejudice the defendant. The question now is whether striking out is warranted on the ground of delay.

[162] In considering this aspect of the defendant's complaint, I note that case law is replete with instances where delay has been seen as being a wholesale disregard of the court's processes so as to amount to an abuse of process and a basis for striking out. It is said, however, that delay, even a long delay cannot, by itself, be categorized as an abuse of process without there being some additional factor which transforms the delay into an abuse of process: **Icebird Ltd.v Winegardner** [2009] UKPC 24. See also **UCB Corporate Services Ltd. Halifax (SW) Ltd.** relied on by the defendant.

[163] Latham LJ in **Purefactor Ltd v Simmons & Simmons** (reported in the 2010 White Book at para. 3.4.4) made the point that:

> *"Were delay to have occasioned prejudice short of an inability of the court to deal fairly with the case, then there would be, or may be, scope for the use of other forms of sanction. But where the conclusion that is reached is that the prejudice has resulted in an inability of the court to deal fairly with the case, there can only be one answer and one sanction that is for the proceedings to be struck out."*

[164] The defendant, apart from stating that the matter is delayed, has not placed before me any evidence to show that the cause of the delay is attributable, wholly or substantially, to the conduct of the claimant. While the claimant has been clearly tardy in complying with the case management and pre-trial review orders, nevertheless, by the

date of trial, all these orders were complied with, except for one with which it tried to comply, albeit late. That delay had no real effect on the progress of the case. Essentially then, there has been no failure on the part of the claimant to meet the date fixed for trial as a result of failure to comply with the orders of the court made up to pre-trial review.

[165] The defendant has raised the issue of delay that will result from the adjournment of the trial. I am mindful that every adjournment of a case bears some element of prejudice, if not only to the litigants involved but also to others competing for the scare resources of the court and who are standing in line waiting to access its machinery. That fact, I cannot ignore and it must be weighed in the balance.

[166] I have considered all that has been urged on me from both sides and I have assessed the progress of the case and the conduct of the claimant from case management conference to the date of trial- a window of time of ten months or so. I have looked at the circumstances prevailing at the date of trial to include the fact that applications were pending that could not have been facilitated within the court's schedule in time for trial. Having done so, I do not see any marked, substantial and inordinate delay on the part of the claimant to comply with the orders of the court that translates to an abuse of the process. It has been tardy and, seemingly, negligent in abiding with the time lines set by the court while the defendant had been compliant.

[167] I find, however, that any prejudice to the defendant as a result of the delay, which there must be, even if slight, would be short of an inability of the court to deal fairly with the case. There is nothing to suggest possibility of crucial witnesses for the defence becoming unavailable or memory of eye-witnesses being likely to be affected by lapse of time since the primary defence of the defendant is based on documents and records. The witnesses for the claimant do not reside within this jurisdiction and are actually said to be in Europe which presents a little difficulty for the claimant.

[168] I do believe that cases must, of course, be dealt with expeditiously but they must also be dealt with fairly. I have to balance the right of the defendant to have its matter

resolved in a timely manner but I also have to allow the claimant to exercise the right to have its case determined on the merits and not be driven from the judgment seat without a fair and reasonable opportunity afforded it to do so. To strike out the claim on the mere basis of the time it is taking to be disposed of would not be just when the delay is not solely or substantially attributable to the claimant and there is no substantial, inordinate or inexcusable delay in the claimants' conduct of the proceedings for the period under consideration on this application.

Whether statement of case should be struck out

[169] Of course, the defendant is not relying on any one matter in asking for the claimant's statement of case to be struck out. It is the cumulative effect of the claimant's failure to comply with the orders that matters. As it is now, there is only one order that the claimant failed to comply with following the pre-trial review order which, as I have found, relates to specific disclosure. I have looked at the prejudicial effect of that on the defendant and as I have concluded, there is no substantial degree of prejudice resulting from that that would warrant striking out, without more. Also, the failure to do so has caused no real delay in the progress of the case and does not seem likely to affect the fair disposal of the claim.

[170] However, the fact still remains that the claimant had failed to comply with the order of the court for specific disclosure within time. This was after it failed to comply within time with the orders made at case management conference and was sanctioned. The claimant has established a pattern of tardiness in preparing its case and in complying with the court orders which cannot go unpunished. It cannot be overlooked because the claimant only sought to act on the final orders when the defendant took steps to strike out its case.

[171] How do I approach the conduct of the claimant is the pressing question to be addressed. Do I look back at the history of tardiness and non-compliance and penalize it or do I look at where we are now and assess its conduct to this point? From the dicta

of the Court of Appeal in **RBTT v YP Seaton (Cooke, J.A.)**, it seems to me that I would be on safe ground to ask two pertinent questions: (i) what is the status of the litigation at this time of consideration of the application for court orders; and (ii) what is it that is being asked of the court in this application?

[172] Panton P, in the same case, made the point that Sykes, J, in his approach to the application before him, had focused unduly on the history of the appellant's s conduct to guide his decision. The learned President remarked:

> *"The learned judge ought to have been looking ahead, not backward. A trial date having been fixed, the focus ought to be on facilitating the trial. The situation will be certainly different if the trial date arrives and the applicant is unable to proceed"*

[173] Now in this case, the trial date had arrived but the inability of the claimant to proceed was not substantially due to non-compliance with the court orders about which the defendant is complaining. It was partly due to the outstanding applications from both sides which the system could not have facilitated before the date fixed for trial but even more, it was due in part to the inability of the claimant to proceed due to its witnesses being outside the jurisdiction. Its pending application for permission for evidence to be given by video link is connected to that fact.

[174] I have looked at all the circumstances within the ambit of the rules and the case law. The claimant has been plagued by late compliance with the orders of the court. This conduct cannot be condoned. Consideration is given to the fact that costs sanction had already been imposed for a prior breach. The question now is: have we arrived at that stage in the proceedings when the court should say enough is enough? Having considered that question, I find that I am unable to say so in all the circumstances.

[175] I totally agree that the orders for disclosure must be strictly obeyed and the court must not treat disobedience of its orders lightly but I am not persuaded to the viewpoint

that striking out the claimant's statement of case is proportionate to the wrong identified in these circumstances. The punishment must fit the crime. I am, indeed, attracted to the views expressed by one writer in an article entitled "*Relief from Sanctions and the Overriding Objective*", Civil Justice Quarterly (CJQ) 2005 24 January when he opined:

> *"At the most basic level, proportionality requires that the measures adopted by the court must bear a reasonable correlation to the seriousness of the default. The court's response must therefore not inflict any greater disadvantage on the defaulting party than is justified by the nature of the default and the reasons for it. It would be clearly disproportionate and unjust if the most trivial instance of non-compliance were to lead to a dismissal of one's case… Proportionality requires that the extent of sacrifice of rectitude of decision in any given case reflects the systemic seriousness of the default in that case."*

Conclusion

[176] Taking into account the claimant's prior non-compliance, I do not interpret the conduct to be a deliberate and intentional disobedience which amounts to total disregard for the orders of the court that could be viewed as contumelious. I have taken into account the nature, substance and effect of the particular non-compliance for which the claimant is guilty. It is not in my view a gross and serious breach even when viewed in the context of its previous records. It is said on one authority that where the breach of an order is not a gross breach, striking out is likely to be an unjust outcome especially where it is not suggested that the claim has no prospect of success**: Carlco Ltd v Chief Constable of Dyfield** [2002] EWCA Civ 1754.

[177] There is no suggestion before me that the claim does not have any prospect of success. The claimant, therefore, has a viable claim that ought to be determined on the merits. The prejudice to the claimant in not having its case determined on the merits on account of the breach which is identified in this case would, in my estimation, far exceed the prejudice to the defendant who can still have the issues fairly ventilated despite the non-disclosure of the documents requested.

[178] I would, therefore, dismiss the application to strike out the claimant's claim but declare that the claimant ought to be held liable for failure to comply with the order for specific disclosure made at the pre-trial review.

[179] While the claimant might not have succeeded in obtaining an order striking out the claim it has not failed to establish a case that warrants a sanction for the non-compliance. Having considered the various options available as alternate sanctions, I find that a costs order could serve the ends of justice in this case for the non-compliance. Up to the time, the defendant filed its application, the claimant had not complied with the order for specific disclosure. The attempt at compliance was feverishly undertaken after the defendant had filed its application. The defendant had every right to pursue its application to strike out, that is to say, it was not unreasonable to do so. The defendant has always been compliant.

[180] Having taken into account the principles governing the question of costs as prescribed in Parts 64 and 65 of the CPR, I would order that the claimant do pay the costs of the application. It would be unjust to ask the defendant to pay the costs of the application which has been prompted by the claimant's breaches of the orders of the court and on which the defendant has succeeded in part.

[181] I also find that had the claimant complied properly as it should have done and in the timely manner required by the rules and orders of the court, the defendant would not have had to pursue its application to completion. The opportunity was given to it to do so when the claimant was unable to meet the trial because of the unavailability of its main witnesses. The claimant was not ready to proceed, even if the defendant had been ready. The adjournment, directly and/or indirectly is attributable to the claimant because if it had complied properly with the pre-trial review orders, there would have been no need for the defendant to have filed an application to strike out which had to be heard. The claimant is, substantially, if not wholly, responsible for the loss of the trial date. Having considered all the circumstances, I conclude that the claimant should also bear the costs of the adjourned trial.

[182] As part of the sanctions, I am minded to order that the claimant do pay interest on the costs of the application at 6% per annum from the date of the application until the date judgment reserved and from the date of judgment until payment to reinforce the point that the court will not sit and allow its orders and rules to be flouted, particularly when relief from sanctions had already been granted. I will, however, permit counsel for the parties to have an input in the imposition of this term since the issue was never explored during the course of the hearing.

[183] In imposing the sanction, I am mindful that the claimant could still be barred at the trial from relying on the documents it failed to disclose or from adducing any evidence contained in them to the detriment of the defendant, unless they are subsequently disclosed. The defendant reserves that right and is at liberty to make such application at the trial if the circumstances should arise. The issue as to whether the claimant should be permitted to rely on documents not disclosed is one for the trial judge and so I would not venture to make any order touching and concerning that issue.

Order

[184] The orders of the court shall be as follows.

(1) The defendant's Notice of Application for Court Orders filed on 17 January 2013 for striking out of the claimant's claim and particulars of claim is dismissed.

(2) By way of sanction
   (i) The claimant shall pay the defendant's costs of the application and of the adjournment of the trial, such costs to be agreed or taxed.

   (ii) The court is minded to award interest on the costs of the application at 6% per annum to be calculated for the period from 17 January 2013 to 25 March 2013 and from 24 January 2014 until payment and the parties are at liberty to prepare and file written submissions on this aspect of the order on or before 21, February, 2014.

(3) Trial of the claim is fixed for 9- 12 March, 2015 for four (4) days.

(4) The defendant's attorneys-at-law to comply with paragraph. 5 of the order of McDonald, J made on pre-trial review on 19 December 2012 on or before 10 February 2015.

(5) The parties' attorneys-at-law to comply with paragraph 6 of the said order of McDonald, J on or before 16 February 2015.

(6) Liberty to apply.