

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. CD-008 of 2004

BETWEEN	HDX 9000 INC.	CLAIMANT
A N D	PRICE WATERHOUSE (A Firm)	DEFENDANT

Maurice Manning and Anthony Levy for Claimant instructed by Ayana Thomas of Nunes, Scholefield, DeLeon and Company

Ransford Braham and Seyon Hanson for Defendant instructed by Livingston Alexander and Levy

Heard: October 11th, 12th, 17th, 18th, 19th, 24th, 25th, 26th, 30th, 2007 and August 3rd, 2010.

Cor: Rattray, J.

1. It is an unfortunate reality that many business relationships which at the start appear to have favourably promising financial possibilities, so often come to a calamitous end. In such a scenario, not unlike that of a marriage, the Court is resorted to in order to resolve the differences between the parties consequent upon the breakdown of that commercial arrangement. The matter before the Court is no exception.
2. In or about 1994, representatives of HDX 9000 Inc. (HDX) and Price Waterhouse (PW) held discussions with a view to their companies working together in order to introduce

ISO 9000 Certification to Jamaican businesses, utilising a change management methodology developed by HDX, which they had deployed in the United States of America. Not having had any previous exposure to this methodology, it was agreed, inter alia, that HDX would provide a team with the necessary expertise and PW, the manpower to work under the direction of the HDX personnel.

3. The first assignment that the parties embarked upon involved obtaining ISO certification for J. Wray and Nephew. It is not necessary at this stage to go into the details of that transaction, save to say that difficulties arose between the parties. As a consequence, this suit was filed by HDX against PW claiming an account, monies due and owing, damages for negligence and/or breach of contract, damages for misrepresentation and/or negligent misstatement and costs.
4. In the course of these proceedings each party filed Notices of Application for Court Orders requesting that the Statement of Case of the other be struck out. Subsequently, both amended their respective applications. After several days of hearing the Application filed by HDX, it was agreed that the parties would await the ruling on that Application before proceeding with that filed on behalf of PW.

5. The grounds on which HDX relied for the Order striking out PW's Defence and Counterclaim and for entering Judgment in its favour were:-
- (a) the failure of PW to comply with an Order of this Honourable Court made by and with the consent of the parties on the 14th February, 2000 by not filing and delivering to HDX;-
 - (i) a complete Affidavit of Documents making a full disclosure of documents within the time prescribed by the Court and by failing to disclose documents in its possession and referred to in the Report issued on the 10th April, 2007 by Stephen Holland, the expert appointed by the Court, and in the Witness Statements of Bobby Zachariah, Cassie Ramkerrysingh and Richard Downer, and related documents;
 - (ii) accurate and complete Further and Better Particulars within the time prescribed by the Court which failure, inter alia, prevented the report of the Court's Expert, Stephen Holland from being completed;
 - (b) the failure by PW to comply with this Order of the Court made by and with the consent of the parties has placed HDX at a disadvantage even up to the present time and such failure will prevent there being a fair trial of the issues.

(c) despite numerous requests by HDX since November, 1995 and by its Attorneys at Law, PW has refused to deliver the several documents HDX has identified as missing and listed in the Schedules exhibited in the Bundle of Documents attached to an Affidavit filed herein.

6. It is necessary to outline a chronology of the Orders as well as the responses made in this matter to fully appreciate the complaint of HDX, which led to the filing of this Application:-

(a) On the 29th June, 1999, an Order was made on Summons for Directions for:-

- (i) the Defendant (PW) to deliver to the Plaintiff (HDX) within forty-five (45) days, the Further and Better Particulars of their amended Defence specified in the document delivered therewith.
- (ii) the Defendant within forty-five (45) days to file and deliver to the Plaintiff an Affidavit of Documents limited to the documents relating to the issues raised in the Statement of Claim, Amended Defence and Counterclaim and Reply to Defence and Counterclaim.

The Defendant failed to comply with this Order.

(b) On the 14th February, 2000, on an Application to Strike Out the Defendant's Defence for failure to

obey the Order of the Court, by and with the consent of the parties it was ordered that ;-

- (i) the Defendant file and deliver within fourteen (14) days of the date hereof, the Further and Better Particulars ordered by the Master in Chambers on the 29th day of June, 1999.
- (ii) The Defendant file and deliver to the Plaintiff the Affidavit of Documents within thirty (30) days.
- (iii) In the event that the Defendant fails to comply with the above two (2) Orders, its Defence and Counterclaim shall be struck out with costs to the Plaintiff and the Plaintiff would be at liberty to enter a Final Judgment in Default of Defence.

The Further and Better Particulars were filed on the 24th February, 2000 and the Defendant's Affidavit of Documents filed on the 9th March, 2000.

(c) On the 16th September, 2005 at the Case Management Conference, it was ordered, inter alia, that;-

- (i) Standard Disclosure be made by Claimant and Defendant on or before 22nd November, 2005.
- (ii) Specific Disclosure by the Defendant of certain documents which were specifically

identified, to be made on or before 22nd November, 2005.

None of the Orders made at that Case Management Conference were carried out by the parties within the time prescribed.

- (d) On the 24th March, 2006, the time for compliance by the parties with the Orders made at Case Management Conference were extended including;-
 - (i) Time for Standard Disclosure extended to 23rd June, 2006
 - (iii) Time for Specific Disclosure extended to 23rd June, 2006

The Defendant filed the Lists of Document with respect to the Orders for Standard and Specific Disclosure of documents on the 23rd June, 2006

- (e) On the 12th day of May, 2006, the Court granted leave to the parties to call Stephen Holland as an Expert Witness and ordered that he prepare a report on the financial status of the project on or before the 6th October, 2006.
- (f) At the Pre Trial Review on the 29th November, 2006, the Court ordered, inter alia, that;-
 - (i) the time for the Claimant to comply with Orders made at the Case Management Conference be extended within the period outlined in the Order.

- (ii) if the Claimant failed to comply with the said Orders within the extended time frame granted, its Statement of Case will stand struck out and Judgment entered for the Defendant.
- (iv) the Claimant and Defendant provide all necessary documentation to the expert witness, Stephen Holland on or before 15th December, 2006.

Both parties filed the requisite documentation in accordance with the Order of the Court.

(g) At a further Pre Trial Review on the 20th December, 2006, it was ordered, inter alia, that;-

- (i) the Defendant file and serve Supplemental List of Documents on or before 20th February, 2007
- (ii) Expert Report of Stephen Holland to be filed and served on the parties on or before 30th April, 2007.

The Supplemental List of Documents was filed on the 20th February, 2007 by the Defendant.

7. Counsel for HDX, Mr. Maurice Manning submitted that it was clear from the conduct of PW that it had determined that it would not comply with the Orders of the Court to make full and complete disclosure of all documents in its possession. This is evidenced by the fact that;-

- (a) in the Affidavit of Documents sworn to by Bobby Zachariah on the 7th March, 2000 and filed on the 9th March, 2000, on behalf of PW, he stated that the only documents in PW's possession were those listed at numbers 1 to 297 of the said Affidavit. On the 23rd June, 2006, Everton McDonald, Territory Senior Manager of PW also made the same assertion in respect of the 297 items on the Lists of Documents under his signature filed on behalf of PW. By letter dated the 8th December, 2006 however, it was admitted by PW's Attorneys at law that they had located some of the documents which HDX had identified as being missing from PW's List of Documents, and copies of those documents were enclosed and forwarded in that correspondence.
- (b) by virtue of the Order of the Court made at a Pre Trial Review on the 20th December, 2006, PW filed another list of documents identifying 1096 documents and confirmed that "the list...contains all the documents that are within the possession of the Defendant that could be found and the Defendant does not know of the existence of additional documents."
- (c) PW has filed Witness Statements of Richard Downer, Bobby Zachariah and Carrie Ramkerrysingh which refer to documents not included in any of the List of Documents filed by

PW. A Schedule of further documents alleged to be missing from the PW's List of Documents was exhibited to the first Affidavit of Tim Palmer, the Chief Executive Officer of HDX.

- (d) lack of full disclosure of supporting documentation by Price Waterhouse to the Court appointed Expert Witness, Stephen Holland which has led him to present a Report which is incomplete.
- (e) As recent as the day this matter commenced, a Supplemental List of Documents was being filed by PW, referring to documents not previously mentioned in earlier disclosures.

8. Mr. Manning therefore submitted that what was revealed in Court through the Affidavit evidence was a pattern of non-disclosure or convenient selective disclosure of documents by PW. This in essence amounted to a systematic refusal to make meaningful efforts to search for documents. Counsel further submitted that the responses filed by PW were inadequate and not in compliance with the Consent Order made on the 14th February, 2000. He stated that the discovery by HDX of the failure of PW to make full discovery of documents became apparent on an examination of the Witness Statements filed on behalf of PW in 2006 and the Further List of Documents filed in February, 2007. Mr. Manning asserted that this failure to make full disclosure put PW in breach of the Court Order made by and with its Consent

on the 14th February, 2000 and therefore, the sanction provided in that Order takes effect, that is, that the Defence and Counterclaim be struck out.

9. Counsel also contended that PW, by not making full disclosure of documents in its possession, was in breach of the Court Orders made at the Case Management Conference on the 16th September, 2005, as well as at the Pre Trial Reviews on the 24th March, 2006 and 20th December, 2006. As such, he urged the Court to utilise its power under Rule 26.3 of the Civil Procedure Rules(CPR) to make an Order striking out the Statement of Case of the Defendant, on the basis that it has failed to comply with the Rules and Orders of the Court.
10. Mr. Manning further contended that in the circumstances of the present case, the conduct of Price Waterhouse was such that there is sufficient evidence to make a finding that PW calculatingly decided not to be compliant with Orders of the Court as regards discovery and only provided documents at its convenience. It also had the effect of forcing HDX to prepare for trial in a piecemeal and inefficient manner. Such conduct he argued affected the likelihood of there being a fair trial of the issues between the parties.
11. The burden was on PW, Mr. Manning claimed, to give an explanation for its failure to comply with the Orders of the Court made on the 29th June, 1999 and the 14th February, 2000 and to show that that failure was not deliberate nor

intentional, by providing the Court with a satisfactory explanation for non-compliance. No such explanation has come from PW, nor has any compelling reason been advanced to exempt the defaulter from the consequences of the failure to comply with a peremptory Order of the Court.

12. PW the other hand, through its Counsel Mr. Ransford Braham submitted that there has been no deliberate act on the part of PW to conceal and/or withhold documents, and that the evidence will show that his client made every effort to cooperate and to make full disclosure of the relevant documents in its possession. He highlighted the difficulties faced by PW, including the voluminous nature of the documents, the fact that employees directly involved in the project were no longer employed to PW or had migrated, making it more difficult to locate and obtain the relevant information. He also pointed out that in many instances, documents and/or information requested either were provided, never existed or were not in his client's possession. Wherever documentation was subsequently located, that information was disclosed to HDX thereby contradicting any allegation of a campaign of non-disclosure.
13. In support of his contention that the disclosures ordered were complied with and that his client was committed to making full disclosure, Mr. Braham referred to the Court Order made on the 14th February, 2000, extending the

time for compliance with the Order for discovery and the filing of Further and Better Particulars, originally made on the 29th June, 1999. The Further and Better Particulars were filed on the 24th February, 2000. Fourteen (14) folders containing the documents on that list were delivered on the 27th August, 2001. PW on the 23rd June, 2006, satisfied the terms of the Order by filing, inter alia, a List of Documents containing 297 items, which list mirrored the items mentioned in its Affidavit of Documents filed on the 9th March, 2000. A further List of Documents was filed on behalf of PW on the 20th February, 2007, in compliance with a Court Order made on the 20th December, 2006. On that List, which contained 1096 items, the authorised officer of PW, Mr. Everton McDonald, by way of clarification pointed out that:-

“In accordance with the Order of this Honourable Court we have listed each and every document in our possession as opposed to previous disclosures in which we grouped various classes of documents together. The list of documents which appears herein contains all the documents that are within the possession of the Defendant that could be found and the Defendant does not know of the existence of any additional documents.”

14. On the 11th October, 2007 a Supplemental List of Documents was filed on behalf of PW disclosing twenty one (21) documents. These were recently brought to its

attention firstly, after carrying out investigations in the United States of America concerning a company referred to in the Witness Statement of the Chief Executive Officer of HDX, filed in June, 2007, secondly, by a former employee of HDX through documents received in October, 2007, and thirdly, by one of its witnesses who resides in Trinidad and who was in Jamaica in September, 2007. Mr. Braham contended that the actions of PW did not demonstrate an intention to suppress documents, but rather showed a continued willingness to disclose everything they had once it came to its attention.

15. Mr. Braham further contended that over seven (7) years had passed between the date of the Order on Summons for Directions, the “unless” Order granted on the 14th February, 2000, and the hearing of this Application. In light of that delay, he urged the Court to find that HDX ought not to be permitted to rely on either of those Orders as basis for striking out the Defendant’s Statement of Case. Such a step he submitted would be contrary to the overriding objective of the Civil Procedure Rules, of enabling the Court to deal with matters justly.

16. Counsel argued that with respect to both the Further and Better Particulars and the Affidavit of Documents filed in 2000, in light of the seven (7) year passage of time, it would be reasonable and appropriate for PW to have assumed that HDX was satisfied with the information received. Counsel further argued that if the documents

received were believed to have been insufficient, an Application reflecting this dissatisfaction ought to have been filed promptly, raising that complaint and not several years later. The proper course of action ought to have been an Application for further discovery or for further and better particulars and not an Application to strike out.

17. Another point raised by Mr. Braham was that no reliance ought to be placed on the Order on Summons for Directions of the 29th June, 1999 or the “unless” Order granted by the Court on the 14th February, 2000, to ground a Striking Out Order for the following reasons;-

- (i) the Further and Better Particulars and the Affidavit Documents ordered by the Court were filed within the time extended;
- (ii) Subsequent Orders of the Court for discovery made on the 16th September, 2005, the 24th March, 2006 and the 20th December, 2006, would have superseded those orders

Counsel asserted that there was no “unless” Order that is extant, as subsequent to the grant of the peremptory Order in February, 2000, other Orders relating to discovery and the filing of Further and Better Particulars were made and carried out within the times prescribed. That Order therefore was, to use an unforensic term, ‘spent’. He went on to state that even where a party had failed to comply with a Court Order, the Court ought to be careful in acceding to a request to strike out the

Statement of Case of a party in default in the absence of a peremptory Order.

18. It was further advanced on behalf of PW, that where a party seeks to strike out the pleadings of the other party for an alleged breach of an “unless” Order, the Court is unlikely to do so unless it is established that the Order is precise and unequivocal in its terms, so that the party being ordered to comply is fully aware of what is required. Counsel referred to the Order on Summons for Directions where it was ordered that:-

“The Defendant within forty-five (45) days file and deliver to the Plaintiff an Affidavit of documents limited to the document relating to the issues raised in the Statement of Claim, Amended Defence and Counterclaim and Reply to Defence and Counterclaim.”

PW he stated, did in fact file an Affidavit of Documents, which it considered related to the issues raised in those pleadings.

19. Similarly, as regards the Order for Further and Better Particulars covered by that same Order of the Court, which required the Defendant to “provide full details” of the matters pleaded or to “List the documents that the Defendant says it fully intends to provide”, PW has provided, in its estimation, the full details and has listed the documents in accordance with the Order. There is a lack of specificity it was argued, in the Order being relied on. If HDX was dissatisfied with the details or the

documents provided, that does not mean that there had been a breach of the Court Order. A further Order ought to have been sought for further or specific discovery of documents which it claimed were in existence, or a further request for particulars made, instead of an Application to strike out.

20. Mr. Braham also referred to the First Affidavit of Timothy Palmer, which exhibited bundles that listed in some detail documents allegedly missing from the Standard Disclosure or Specific Disclosure of the Defendant, as well as undisclosed cheques. Counsel submitted that the exercise undertaken by HDX involved the Claimant combing through PW's Witness Statements and other disclosed documents in an attempt to show that it had failed to make full disclosure. He further submitted that that was nothing more than a fishing expedition, which was not permitted by the Rules of Court.
21. Counsel maintained that at all times his client, although faced with several difficulties, made full disclosure of documents in its possession. Where other documents were subsequently discovered, those were also disclosed, and at no time was there any deliberate attempt to suppress or conceal documents from the Claimant or the Expert appointed by the Court, or to refuse to comply with any Order of the Court.
22. Counsel also maintained that his client provided the Court appointed Expert all relevant documentation in its

possession or under its control, in accordance with the Court Order of the 29th November, 2006. It could not produce documents it did not have. Having complied, Mr. Braham contended that any assertion that the actions of his client prevented Mr. Holland from completing his report, thereby jeopardising the chances of a fair trial being held of the issues between the parties, was without merit. In any event according to its Counsel, there is no evidence that PW deliberately declined or failed to provide documents to the Expert.

23. A central issue in the Application before the Court is the issue of disclosure of documents. A party's duty to disclose documents ordered by the Court is limited to documents which are or have been in its control, [Rule 28.2(1) CPR] which are directly relevant to the matters in question in the proceedings. [Rule 28.4(1) CPR].

24. Rule 28.2(2) of the CPR provides that;-

“...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 had a right to possession of it; or

(c) that party has or has had a right to inspect or take copies of it.”

By virtue of Rule 28.1(4)-

“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."

25. The obligation of a party to disclose relates to any document which exists or has existed, which it intends to rely on or which may adversely affect its case or support another's case, which document is or was in its possession, or with which it has or has had a right to possess or to inspect or to take copies of. "Control" then is not limited to physical possession of the document, and the duty to disclose applies even where it is being held by someone else or if it no longer exists, so long as it is directly relevant to the proceedings.

26. The question is whether the mention of a document in a pleading or Witness Statement automatically imposes the element of control of that document on the party making that reference. I would think that the circumstances of the particular case would have to be carefully examined to ascertain whether any of the factors which amount to "control" have been satisfied. Where a party contends that another has failed to comply with an Order for disclosure, the burden is on the party raising the complaint to prove that the party allegedly in breach has 'control' of the undisclosed document and that that document is directly relevant to the matter in issue in the proceedings. The

mere mention of a document in a pleading or Witness Statement, which was not disclosed in a List of Documents, does not, in and of itself, and without more, mean that that party is in breach of the Court Order. What the concerned party is entitled to is the right to inspect and copy that document pursuant to Rule 28.17 of the CPR, or in the alternative, to make an Application for Specific Disclosure, but not to an Order striking out the other party's Statement of Case.

27. One of the main Orders on which HDX relied in its Application to Strike Out PW's Statement of Case was the "unless" Consent Order of the 14th February, 2000, which imposed the sanction of the striking out the Defence and Counterclaim, in the event that PW failed within the time specified in the Order to comply with the provisions thereof. The learned authors of Blackstone's Civil Practice, 2006, when dealing with the rationale behind the imposition of sanctions by the Court stated at page 531;-

"So that the court can ensure that its case management directions and orders are complied with, and to retain control over the conduct of litigation, it needs to be armed with suitable coercive powers. These are provided in the CPR in the form of sanctions. The most draconian sanction that may be imposed is striking out. Rule 3.4(2)(c) [almost identical to Rule 26.3 (1)(a) of the Jamaican Civil Procedure Rules] provides that the court may strike out the whole or part of a statement of case if it appears that there has been a failure to comply with a rule, practice direction or

court order. Striking out the whole of a party's statement of case ought to be reserved for the most serious, or repeated breaches or defaults."

28. The underlying principle clearly is that Court Orders must be obeyed. The flouting of a peremptory or "unless" order by a litigant who deliberately, intentionally and without reasonable excuse disobeys such an order, brings to an abrupt end that party's right to participate any further in those legal proceedings. Such orders are not lightly made. However, each case has to be decided on its own facts with the Court attempting to achieve justice for the parties in pursuance of its overriding objective.
29. One of the issues this Court has to consider and resolve is whether, at the time this Application was made by HDX, the Consent Order of the 14th February, 2000 was still valid. That Order mandated PW to file and deliver the Further and Better Particulars by the 28th February, 2000 and the Affidavit of Documents by the 14th March, 2000. Both sets of documents were filed within that time frame, the Particulars on the 24th February, 2000, and the Affidavit of Documents on the 9th March, 2000. Despite the several Interlocutory Orders made in respect of the parties, that was the only peremptory Order made against PW. Subsequent to that Order being made, on the 16th September, 2005, Orders for Standard and Specific

Disclosure were made pertaining to both parties. The time for compliance with those Orders was extended by Order of the Court made on the 24th March, 2006, and on the 23rd June, 2006, full disclosure made. On the 29th November, 2006, PW was ordered to provide documents and/or certain information to HDX, which Order was complied with on the 20th February, 2007. At no time between February, 2000 and February, 2007 was any issue raised by HDX relative to the Order of 14th February, 2000.

30. I am of the view that by the filing by PW of the Further and Better Particulars and Affidavit of Documents within the time prescribed by the Order, it had satisfied the terms thereof and that that Order was no longer extant. If I am wrong in that regard, I am satisfied that the subsequent Orders for discovery, made without objection, superseded the Order of the 14th February, 2000. As such, HDX cannot place reliance on that Order to support a claim to strike out the pleadings of PW. Additionally, an Application to Strike Out a Party's Statement of Case for failure to comply with an Order of the Court, particularly in discovery matters, ought to be made promptly. If not, the party making disclosure may well believe that the other had no objection in respect of the documents disclosed, in light of the years that had passed since compliance with the Order for disclosure.

31. Counsel Mr. Manning relied heavily on the case of **Arrow Nominees Inc and Another v Blackledge and Others** [2000] EWCA Civ200. In that case, an entirely false picture of the transaction between the parties was presented due to forged documents prepared and relied on by one of the litigants. Despite the gravity of the admitted offence, the Court was not prepared to strike out the offender's case, even where he was guilty of conduct amounting to a fraud on the Court, if it could be shown that despite his conduct, a fair trial of the issues was still possible. Eventually the Court found, on the facts of that case, that the conduct of the party in question and the effect of his actions was such that there was a substantial risk that a fair trial on the issues was not possible. However, the dicta of Mr. Justice Millett in the case of **Logicrose Limited v Southend United Football Club Limited** (unreported Times, 5th March, 1988) is instructive when he said;-

“But I do not think that it would be right to drive a litigant from the judgment seat without a determination of the issues as a punishment for his conduct, however deplorable, unless there was a real risk that that conduct would render the further conduct of proceedings unsatisfactory. The Court must always guard itself against the temptation of allowing its indignation to lead to a miscarriage of justice.”

The circumstances of the present case are not comparable with the far more serious and admitted fraudulent actions of the litigant in the **Arrow Case**.

32. HDX in submissions filed on its behalf in support of its allegations that PW engaged in deliberate conduct designed to suppress material information, relied on;-

(a) what it described as the failure of PW to fully and promptly comply with the terms of the Consent Order made on the 14th February, 2000, by knowingly filing an Affidavit of Documents which was grossly incomplete.

(b) the piecemeal disclosure by PW since disclosure was ordered.

(c) the Expert Report of Stephen Holland dated the 10th April, 2007, in which he stated that his work to get a true picture of the status of the project was hampered by incomplete documentation.

(d) the Witness Statements of PW's witnesses which referred to documents not included in the Affidavit of Documents filed on the 9th March, 2000, nor in the two(2) Lists Of Documents filed on the 23rd June, 2006.

33. This conclusion was arrived at in part by a detailed and minute examination by HDX of subsequent disclosures and Affidavits filed by PW. It is also supported, according to HDX, by the calculated decision of PW not to allow HDX or its auditors access to the records of PW, as

stated by Richard Downer in a facsimile transmission of the 9th January, 1996, addressed to Isaac Fattal of HDX. It should be noted that at that date, no litigation had commenced between the parties and the further comment by Richard Downer was to enquire what information was requested so that PW could supply same. It is difficult then to accept this allegation as proof of a settled determination by PW that it would not supply information ordered by the Court.

34. It is interesting to observe that throughout the Witness Statements of Timothy Palmer, his evidence is replete with references to documents disclosed by PW. He also asserted in his Witness Statement, after mentioning a specific document, that there were about ten (10) other documents not disclosed by PW. The mere fact of saying so does not make it so, and one would have thought that a prompt application for specific disclosure would have followed the alleged omission.

35. I do not find on the evidence that there had been any deliberate or calculated intention on the part of the Defendant to conceal or suppress or withhold documents or information in this matter. It is not in dispute that the amount of documents involved in this case are voluminous, and with the change of personnel employed to PW, and with some of its key participants residing outside the jurisdiction, the lateness in the disclosure of documents does not necessarily imply dishonesty. The

duty of disclosure of documents is a continuous one which exists until the proceedings are concluded. Where a party at a late stage in the proceedings locates documents relevant to the matter before the Court, that party is duty bound to bring it to the attention of the other side. [Rule 28.13(1) & (2) CPR]. I am not attempting in any way to excuse PW for not making enquiries at an earlier phase of the proceedings for the documents which subsequently may have been unearthed. It ought to have consulted Richard Downer and Bobby Zachariah, as well as Carrie Ramkerrysingh when it initially consulted Carlton Hibbert, in order that early full disclosure could have been obtained.

36. I am not satisfied that the work of the Expert, Stephen Holland was stymied by his failure to obtain all the requested information from PW. Findings were made in favour of and against both parties, based on the information available to him. There is more than one comment by him which shows insufficiency of the information provided by HDX. In his report he stated;-

“The time record submitted by HDX is of uncertain provenance as it is not supported by detailed time sheets, suggests excessive time worked by contractor Williford.”

Despite any shortcomings in the material provided by the parties to Mr. Holland, he was still able to prepare his Expert Report and answer questions put to him by both

parties. I find therefore that a fair trial of the issues in this matter is still possible.

37. With respect to the complaint by HDX concerning missing documents referred to or mentioned in Witness Statements filed on behalf of PW, it appears from a perusal of the first of five (5) affidavits filed by Timothy Palmer in this matter, that he or the company representatives carefully examined the Witness Statements filed by Price Waterhouse. Based on this examination, seven (7) pages of queries raised were identified arising from one Witness Statement as outstanding disclosure issues, which PW allegedly concealed. These queries reflect assumptions made by HDX from which it concluded that certain documents must have existed. Not having seen those documents pursuant to disclosure made by PW, it was further assumed and a conclusion arrived at that those documents had been deliberately omitted from disclosure process.

38. In the case of **Morgans (a Firm) v John Lees Needham** (1999) L.S.G. 41, when dealing with disclosure of documents, Stuart-Smith L.J. opined:-

“... it is not appropriate, where in answer to an unless order a party has provided a list of documents which he says are those which are or have been in his possession, to trawl through the list and allege with an enormous degree of affidavit evidence that he has failed to comply with it because some documents,

which the other party alleges he has, have not been listed;... The use of extensive affidavits in this case to try and show noncompliance with the unless orders through omission of certain detailed calculations, or reference to other documents not disclosed, in my judgment was fundamentally unsound.”

This is the approach which seems to have been taken by HDX in this case. I respectfully accept and adopt the above-cited observations of Lord Justice Stuart-Smith. I too am of the view that the practice of utilising numerous and detailed Affidavits, after combing through pleadings and documents filed, in an attempt to prove nondisclosure or noncompliance by the other party, is “fundamentally unsound”.

39. Having carefully considered the submissions of Counsel for both parties, I am not satisfied that the concerns raised by HDX in this Application and the evidence provided in support is sufficient to warrant an Order striking out the Statement of Case of PW and for Judgment to be entered in favour of HDX. This Application is therefore refused with costs to the Defendant to be taxed if not agreed.