THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT

CLAIM NO. SKBHCV2012/0181

BETWEEN:

MURTLAND WATTERTON

Claimant

and

1. NIGEL SMITH
2. WYN AGGREGATE LTD.
3. HALCROW TRINIDAD AND TOBAGO
4. PROFESSIONAL TECHNOLOGIES (ANGUILLA) LTD.
5. THE CHIEF ENGINEER OF PUBLIC WORKS
6. THE ATTORNEY GENERAL OF SAINT KITTS AND NEVIS

Defendants

Appearances:

Ms. Marsha Henderson holding papers for Ms. Rosheeda Francis, Mr. Frank Clarkson and Mr. Joseph Seerant for the Claimant
Mr. Anthony Sylvester with Angelina Gracy Sookoo-Bobb and Ms. Renal Edwards for the Third Defendant
Mr. Delano Bart QC, with him, Ms. Miselle O'Brien for the Fourth Defendant
Ms. Simone Bullen Thompson, Solicitor General, for the Fifth and Sixth Defendants

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2018: November 9
November 15

JUDGMENT

[1] VENTOSE, J.: The Claimant filed on 10 May 2012 a claim form claiming EC$2,483,000.00 as a debt due and owing to him by the six Defendants. However, in the statement of claim the true nature of the claim emerges. The Claimant's claim is damages for negligence against the Defendants for injuries he sustained when a bridge allegedly designed by the Third, Fourth and Fifth Defendants collapsed and caused him injuries. The First defendant was the engineer on the project and the employee of the Fourth Defendant. He was not served with the claim form and has taken no part in the proceedings. The Second Defendant was a subcontractor and the Claimant's employer. There is an extant request by the Claimant filed on 5 July 2013 for entry of judgment in default of defence and acknowledgment of service against the Second Defendant.

[2] The Fourth and Sixth Defendants acknowledged service on 21 June 2012. The Fourth Defendant filed a defence on 5 July 2012. The Claimant agreed with the Fifth and Sixth Defendants for an extension of time to file its defence on or before 16 July 2012, which defence was duly filed on said date. The court gave the Claimant, on 26 July 2012, leave to serve the claim form on the First, Second and Third Defendants outside the jurisdiction. The Registrar signed the order on 1 November 2012. The Claimant applied on 1 March 2013 for an extension of time to serve the claim form on the First, Second and Third Defendants outside the jurisdiction. The Third Defendant acknowledged service on 7 May 2013. The Claimant and the Third Defendant agreed to an extension of time to file a defence by 17 June 2013, which was duly filed on the said date.

[3] The matter came up for case management conference on 17 July 2013 where the court gave the following trial directions: (1) standard disclosure by 23 September 2013; (2) the parties to file and exchange witness statements by 23 October 2013; (3) Claimant to call 8 witnesses, Third Defendant to call 8 witnesses, Fourth Defendant to call 6 witnesses and the Fifth and Sixth Defendants to call 10 witnesses; (4) Pre-trial review to be held on 29 November 2013; (5) Estimated length of trial to be 10 days; and (6) trial window in December 2013.

[4] The Fifth and Sixth Defendants applied with supporting affidavit on 2 October 2013 for an order pursuant to CPR 26.3(1) that the Claimant's statement of case be struck on the ground that the claim form was filed beyond the six month limitation period found in the Public Authorities Protection Act CAP 5.13 of the Laws of the Federation of Saint Christopher and Nevis and to amend its defence to include the limitation point. The Claimant filed on 18 October 2013 an affidavit in opposition to the application to strike out and to amend the defence.

[5] The Claimant, the Third, Fourth, Fifth and Sixth Defendants agreed on 23 October 2013 to extend the time to file and exchange witness statements to 20 November 2013. The Fourth Defendant applied with supporting affidavit on 22 November 2013 for an extension of time to file four (4) witness statements and relief from sanctions. The Claimant, the Third, Fifth and Sixth Defendants filed on 22 November 2013 a notice of no objection to the Fourth Defendant's application for an extension of time and relief from sanctions.

[6] The agreement of the parties seem contrary to CPR 26.7(3) which provides as follows:

> (3)If a rule, practice direction or order –
>
> (a) requires a party to do something by a specified date; and
>
> (b) specifies the consequences of failure to comply;
>
> the time for doing the act in question may not be extended by agreement between the parties. (emphasis added)

[7] Nothing now turns on this clear violation of the CPR.

[8] The Claimant filed his witness statements on 25 and 26 November 2013 and on 28 November 2013 filed an application with sworn affidavit for an extension of time to file the witness statements and to deem the witness statements as properly filed and for relief from sanctions. The Claimant also filed on 28 November 2013 submissions in support of his affidavit in opposition to the application by the Fifth and Sixth Defendants to strike out the Claimant's statement of case and to amend their defence.

[9] The Third Defendant filed on 11 December 2013 an affidavit in opposition to the Claimant's application for an extension of time and relief from sanctions. The Fourth Defendant filed an affidavit on 30 January 2014 in respect of its late filing of the standard disclosure asking the court to deem the standard disclosure filed on 22 January 2014 as properly filed. The Fifth and Sixth Defendants filed on 1 November 2013 their submissions in support of their application to strike out the Claimant's statement of claim.

[10] On 23 January 2014, the court ordered the parties to file and exchange written submissions on the application to amend the defence of the Fifth and Sixth Defendants and the application to strike out the Claimant's statement of claim. By consent of the parties the court deemed the witness statements filed by the Fourth Defendant to be properly filed and be relieved from sanctions. On the same date, the court also ordered the parties to file and exchange written submissions in respect of the Claimant's application for an extension of time to file his witness statements.

[11] The Fourth Defendant on 21 June 2015 filed an application with sworn affidavit for an order that the Claimant's statement of case be dismissed. The basis for that application was that the Claimant had failed to file submissions in relation to its application for an extension of time to file his witness statements. It was submitted that the parties could not respond to submissions that had not been filed by the Claimant. The matter came on for hearing on 17 July 2015 where the court ordered the Claimant to file his submissions on or before 31 July 2015 and that the matter will be determined on written submissions. The Fourth Defendant filed its submissions in respect of its application to strike out the Claimant's statement of case.

[12] The matter came on for hearing on 2 October 2015 where the court indicated that it was not yet ready with the decision on submissions and the matter was adjourned to 30 October 2015 for decision. On 30 October 2015, the court dismissed the Fourth Defendant's application dated 21 June 2015. The court ordered the Claimant to file the submissions by 9 November 2015, failing which

the claim shall stand dismissed. The Claimant complied with the order of the court and filed his submissions by 9 November 2015. The Fifth and Sixth Defendants filed their draft amended defence on 23 December 2015. The matter came on for further hearing on 5 January 2016 when the court refused the application filed by the Claimant seeking an extension of time to file his witness statements and relief from sanctions, and granted the application by the Fifth and Sixth Defendants to amend their defence. The matter was then adjourned to 4 March 2016 for the parties to make oral submissions on the application by Fifth and Sixth Defendants to strike out the Claimant's statement of case.

[13] The Claimant on 19 February 2016 applied for leave to appeal the order of court refusing his application for an extension of time to file his witness statements and relief from sanctions. The court granted leave on 4 March 2016 and temporarily stayed the matter pending the filing of the notice of appeal. On 11 March 2016, the court also granted a stay of proceedings pending the outcome of the appeal filed by the Claimant. The court provided its reasons for its orders of 5 January 2016 in a judgment handed down on 26 April 2017. The Fifth and Sixth Defendants filed their amended defence on 21 June 2017.

[14] The matter came up for hearing before Master Actie on 17 October 2017 where the matter was adjourned to 30 January 2018 pending the outcome of the appeal. The master noted that since the matter was already at pre trial review stage, the trial judge should deal with any applications subsequent to pre-trial review.

[15] The Court of Appeal on 7 December 2017 confirmed the decision of the trial judge in relation to the application by the Fifth and Sixth Defendants to amend their defence; and it allowed the appeal in part by the Claimant in his application for an extension of time to file his witness statements and relief from sanctions by granting him relief from sanctions in relation to the witness statements of Dr. Wilkinson and Dr. Laws. The Claimant filed a reply to the amended defence of the Fifth and Sixth Defendants on 22 December 2017.

[16] Notwithstanding the order of Master Actie of 17 October 2017 the matter was again listed before Master Moise on 30 January 2018. At that hearing, the court

was informed that the Fifth and Sixth Defendants' application (dated 2 October 2013) to strike out the Claimant's statement of claim had not yet been heard. The matter was adjourned to 6 March 2018 to hear the application. The Claimant's attorneys-at-law were not present when the matter came up for hearing on 6 March 2018 and their local Counsel requested an adjournment on their behalf so they could appear via teleconference on the adjourned hearing date. The court expressed its dissatisfaction with the length of time it had taken for the application to be heard. The master then adjourned the matter for a final time to 19 April 2018. When the matter came on for hearing on 19 April 2018, Master Drysdale was of the view, like Master Actie, that since the matter was already at pre-trial review, it should be listed for hearing before the trial judge. The matter was then adjourned with the court office given the responsibility of notifying the parties of the date on which the application will be heard.

[17] The matter then came up for hearing before me on 11 October 2018 on which day counsel holding papers for the Claimant's attorneys-at-law informed the court that the attorneys-at-law for the Claimant were not available and wished to have an adjournment of the hearing. The court adjourned the hearing to 25 October 2018 with costs, properly termed procedural default costs pursuant to CPR 26.7(4), to be paid by the Claimant's attorneys-at-law to the Third to Six Defendants. On the adjourned date, the court was informed that because of some technical difficulty a connection could not be made to hear the Claimant's attorneys-at-law who were to appear via teleconference from Barbados. The Fifth and Sixth Defendant withdrew their application to strike out the Claimant's statement of case, reserving the limitation issue for trial.

[18] This was the correct approach in light of the decision of the Court of Appeal in Maynard v St. Christopher and Nevis Solid Waste Management Corporation (SKBHCVAP2015/0006 dated 1 October 2015) where Chief Justice Dame Janice Pereira stated as follows:

> [30] Before concluding, I make this general observation in respect of the application as was made herein to strike out the claim. While I note the statement of Barrow JA [Ag.] in St. Kitts Nevis Anguilla National Bank

> Limited v Caribbean 6/49 Limited to the effect that the issuance of a claim after the expiration of a limitation period could amount to an abuse of process as contemplated under CPR 26.3, this certainly should not be taken as suggesting that in every claim where there is an assertion that the claim is statue barred this automatically translates being an abuse of process in respect of which the nuclear weapon of striking out should be deployed. It is well established that the resort to striking out is a draconian step, ordinarily of last resort and one which should be exercised with caution. Also, I entertain grave doubt as to whether such an application is appropriate where a defence of limitation is raised save in the clearest of cases. The question as to whether a claim is time barred can be in and of itself fact sensitive and thus not at all suitable for this approach but should be left for trial.

[19] At the hearing on 25 October 2018, Mr. Delano Bart Q.C. raised questions concerning the evidence that the Claimant was given permission by the Court of Appeal to rely on at trial, namely, the witness statements of Dr. Wilkinson and Dr. Laws. The court then ordered the parties to file submissions and authorities on whether the matter can proceed to trial since the Claimant has leave to call only two witnesses, namely, Dr. Wilkinson and Dr. Laws, by 6 November 2018. The pre-trial review was adjourned to 9 November 2018 for hearing.

[20] The Third, Fourth, Fifth and Sixth Defendants complied with the order of the court and submitted their submissions and authorities by 6 November 2018. The Claimant however did not comply with the order of the court to file submissions and authorities by 6 November 2018. The attorneys-at-law for the Claimant wrote the Registrar of the High Court on 6 November 2016 as follows:

> We write in relation the matter at caption and the date of hearing for Friday November 9 2018. We act through Ms. Marsha Henderson a local Attorney-at-Law in St. Kitts.
>
> We are respectfully requesting a brief adjournment in this matter to allow for time to complete our submissions and file in St. Kitts. We have been engaged in many other matters here in Barbados in the High Court and have been unable to give this matter our fullest attention.
>
> We regret the inconvenience to the court in this regard.
>
> Yours faithfully
>
> Signed

Joseph. H. Serrant. Esq.

Bsc. (Hon.) (Crim.Just) LEC, JD.

Attorney-at-Law

[21] The court at the hearing held on 9 November 2018 was informed by Counsel holding papers for the attorneys-at-law for the Claimant that they intend to concede the point in relation to which they were to file submissions and authorities by 6 November 2018. The Claimant did not however file a notice of discontinuance against the Third, Fourth, Fifth and Sixth Defendants. The court then ordered that unless the Claimant files a notice of discontinuance by 12 November 2018, the court would proceed to determine the matter on submissions filed to date and hand down its decision on 16 November 2016. The Claimant did not however file the notice of discontinuance by 12 November 2018 as ordered by the court 9 November 2018.

Establishing Negligence at Trial

[22] The main issue that arises for consideration is the manner in which the Claimant can establish negligence against the Third, Fourth, Fifth and Sixth Defendants at trial in light of the fact that he can only rely on the witness statements of Dr. Wilkinson and Dr. Laws.

[23] CPR 29.4(1) provides that:

> 29.4 (1) The court may order a party to serve on any other party a statement of the evidence of any witness upon which the first party intends to rely in relation to any issue of fact to be decided at the trial.

[24] In addition, CPR 29.11 states that:

> ### Consequence of failure to serve witness statement or summary
>
> 29.11 (1) If a witness statement or witness summary is not served in respect of an intended witness within the time specified by the court, the witness may not be called unless the court permits.
>
> (2) The court may not give permission at the trial unless the party asking for permission has a good reason for not previously seeking relief under rule 26.8.

[25] As stated above, the Court of Appeal allowed in part the Claimant's appeal against the order of the trial judge refusing his application for extension of time to serve his witness statements and relief from sanctions to the extent of permitting the Claimant to call two witnesses at trial, namely, Dr. Wilkinson and Dr. Laws. In other words, the Claimant must establish his action in negligence by relying only on the evidence of these two witnesses.

[26] The witness statement of Dr. Cameron Wilkinson was filed on 25 November 2013 in which, after setting out his qualifications, he avers that the Claimant presented in the emergency room of the Joseph N. France Hospital on 14 May 2008 with a history of falling off a bridge. He continues that the Claimant complained of severe lower back pains and weakness in the legs at the time of admission. The examination of the Claimant revealed the following: (1) marked tenderness and swelling over the lumbo sacral spine; (2) abrasions over lower extremity; (3) pain on the flexion and extension of the hips; and (4) a compression fracture of the anterior body of the L3 lumbar vertebra. As a result, Dr. Wilkinson notes that the Claimant had been followed as an outpatient since his initial visit and repeat x-rays showed that his fracture was healing well and he was ambulating with significantly less pains. The prognosis was that this was a serious injury as the Claimant might develop chronic back pains and osteo arthritis in the lumbar spine.

[27] In his witness statement dated 25 November 2013, Dr. Mervyn Laws avers that the Claimant is a 47-year-old construction worker whose history dated back to 14 May 2008. He continues that on that day the Claimant fell approximately 20 feet during the construction of a bridge at Golden Rock and was admitted to the Joseph N. France Hospital. He states that x-rays revealed that the Claimant suffered a compressed fracture of the third lumbar vertebra. He was managed conservatively and then discharged. MRI findings in January 2009 revealed a comminuted fracture of the third lumbar vertebra with loss of invertebral disc herniation at the level of lumbar 2 & 3, and degenerative changes from lumbar 2 to 5. Dr. Laws claims to have seen the Claimant on several occasions in 2010 and last saw him on 22 January 2011 and that the Claimant's main complaints were as

follows: (1) chronic back pains; (2) inability to sit, stand, or walk for long periods due to increased back symptoms; (3) burning sensations and cramps in both feet; (4) swelling of the feet when standing for prolonged periods; and (5) sexual dysfunction.

[28] Dr. Laws states that a physical examination of the Claimant revealed: (1) impairment in back function; (2) restriction in the degree of back flexion and straight-leg raising due to pain; (3) no abnormality of the Claimant's cardiac, respiratory or abdominal systems; and (4) no neurological deficit. He continues that blood and urine tests did not reveal any abnormality in liver and renal functions. Dr. Laws avers that the x-ray of 10 April 2010 confirmed the old fracture of Lumbar 3 with complete loss of lumbar lordosis, that is, straightening of the spine due to significant muscle spasm. The x-ray also confirmed that the Claimant's oedema (swelling of the feet) when standing for prolonged periods was most likely due to venous insufficiency secondary to the soft tissue contusions on the leg sustained during the fall.

[29] The Third Defendant submits that the practical difficulty of the Claimant not being allowed to give evidence at the trial is that the claim form cannot be introduced into evidence at the trial and the failure of the Claimant to adduce the factual evidence necessary to establish negligence will result in there being no case for the defendants to answer. The Third Defendant further submits that if the Claimant is unable to establish the facts to ground his negligence claim, that is, there was a duty owed to him by the Third Defendant in the construction of the bridge, that the Third Defendant breached that duty which resulted in him suffering injuries, there is no foundation to introduce the evidence of Dr. Wilkinson and Dr. Laws.

[30] The Fourth Defendant submits that the Claimant cannot lead evidence as to causation and liability in relation to the allegations made in the Claimant's statement of claim. It also submits that in the absence of essential evidence to prove his case, the Claimant is not able to present, let alone prove his case. The Fifth and Sixth Defendants state that that both Dr. Laws and Dr. Wilkinson mention the Claimant falling from a bridge but that this constitutes hearsay and is not

admissible to establish the facts necessary to found a case in negligence. They also submit that the information in the two witness statements is only relevant in that it informed the doctors of the Claimant's explanation for his medical complaint which is necessary before he is treated and that it does not constitute proof that the explanation is true.

[31] The Fifth and Sixth Defendants contend that the Claimant is required to prove his case on the balance of probabilities which means he must satisfy the court that the occurrence of the event as alleged was more likely than not. They further contend that the authorities clearly establish that the burden is on the Claimant to prove his case and he does so by leading direct evidence that gives rise to a finding of negligence or by leading sufficient evidence from which negligence may be inferred. The Fifth and Sixth Defendants submit that the Claimant cannot establish a duty of care or breach of that duty on the evidence available to him. In other words, the state of the Claimant's evidence is such that he is unable, by the evidence he has available to him, to establish a prima facie case of negligence for the Fifth and Sixth Defendants to answer.

[32] Saunders JA in an illuminating article entitled "Witness Statements and the New Civil Procedure rules: The OECS Experience" (20 March 2007) stated that:

> The general rule is that any fact which needs to be proved by the evidence of witnesses is to be proved at trial by their oral evidence given in public. This rule is however subject to any order of the court. Where at a case management conference therefore an order is made that witness statements are to be regarded as evidence-in-chief, the practice in the OECS has been that at trial, the witness nevertheless goes into the witness box and, having been sworn, states his name, occupation and address and then affirms the authenticity of his witness statement. The witness is then turned over for cross-examination. Judges have, however, tried matters where, at the pretrial conference, on the agreement of counsel that there was no need for a particular witness, or witnesses, to attend the trial, because their statements were not being challenged, an appropriate order was made to this effect. In such cases, the witness statements, though not having been made on oath, stood as evidence in the case and was accorded no less weight than other sworn evidence that was given at the trial.

[33] Is it possible for the Claimant on the two available witness statements to establish at trial that the Third to Fourth Defendants are liable in negligence for the injuries he sustained? In Ng Chun Pui v Lee Chuen Tat [1988] R.T.R. 298, the Privy Council stated (at 300-301) that:

> The burden of proving negligence rests throughout the case on the plaintiff. Where the plaintiff has suffered injuries as a result of an accident which ought not to have happened if the defendant had taken due care, it will often be possible for the plaintiff to discharge the burden of proof by inviting the court to draw the inference that on the balance of probabilities the defendant must have failed to exercise due care, even though the plaintiff does not know in what particular respects the failure occurred.

[34] It is well known that to establish negligence at trial the Claimant must show that: (1) the Third to Sixth Defendants owed him a duty of care; (2) the Third to Sixth Defendants were in breach of that duty; (3) the Claimant suffered damage, which was caused by that breach of duty; (4) that the damage was not too remote. It is impossible for the Claimant to establish any of these elements with only the witness statements of Dr. Wilkinson and Dr. Laws. I agree with the submissions of counsel for the Third to Sixth Defendants that the Claimant, based on the evidence available to him at trial, cannot establish on the balance of probabilities that the Third to Sixth Defendants are liable in negligence for the injuries he sustained.

Admissibility of the Witness Statements

[35] The Third Defendant states that the two witness statements are inadmissible because they failed to comply with either CPR 32 or section 163 of the Evidence Act CAP 3.12 of the Laws of Saint Christopher and Nevis. CPR 10.6(2) states as follows:

> (2) If the claimant has attached to the claim form or statement of claim a report from a medical practitioner on the personal injuries which the claimant is alleged to have suffered, the defendant must state in the defence –
>
> (a) whether all or any part of the medical report is agreed; and
>
> (b) if any part of the medical report is disputed, the nature of the dispute.

[36] In the case at bar, the Claimant did not attach the medical report of Dr. Wilkinson or Dr. Laws to his claim form in compliance with CPR 10.6(2).

[37] CPR 32 provides a comprehensive regime governing the use of expert reports in civil proceedings. CPR 32.3 states that the expert's overriding duty is to the court as follows:

> Expert's overriding duty to court
>
> 32.3 (1) It is the duty of an expert witness to help the court impartially on the matters relevant to his or her expertise.
>
> (2) This duty overrides any obligation to the person by whom he or she is instructed or paid.

[38] In addition, CPR 32 also sets out in general and specific terms the obligations of any expert to be used in such proceedings:

> Way in which expert's duty to court is to be carried out
>
> 32.4 (1) Expert evidence presented to the court must be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the demands of the litigation.
>
> (2) An expert witness must provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within the witness' expertise.
>
> (3) An expert witness must state the facts or assumptions upon which his or her opinion is based, and must consider and include any material fact which could detract from his or her conclusion.
>
> (4) An expert witness must state if a particular matter or issue falls outside his or her expertise.
>
> (5) If the opinion of an expert witness is not properly researched then this must be stated with an indication that the opinion is no more than a provisional one.
>
> (6) If an expert witness cannot assert that his or her report contains the truth, the whole truth and nothing but the truth without some qualification, that qualification must be stated in the report.
>
> (7) If after service of a report, an expert witness changes his or her opinion on a material matter, that change of opinion must be communicated to all parties.

[39] In **Josephine Gabriel and Company Limited v Dominica Brewery and Beverages Limited** (Civil Appeal No.10 of 2004 dated 7 July 2007), the Court of Appeal noted that there was a breach of CPR 32.14 which outlines the requirements for the content of an expert report, continuing that:

> [8] The reports for both experts did not contain a statement that the expert understood her or his duty to the court or that she or he had complied with that duty. There was no indication that either expert had included in her or his report all matters within her or his knowledge and area of expertise relevant to the issue. The instructions given to the experts were not disclosed.
>
> [9] The breaches of the rules that were committed in the presentation of the expert evidence were egregious. The parties were lucky to escape the consequences of such breaches. It would have been entirely appropriate, because it would have been proportionate to the scale of the violations, for the judge to refuse to receive the evidence of both expert witnesses.1 The administration of justice cannot countenance the conduct of litigation in such flagrant violation of rules specifically designed to protect the courts against the danger of deception by apparently credible expertise that conceals its true intent of promoting the interests of its purchaser. Expert evidence of that character will often be of limited, if any true, value. In this case it remains to be seen whether, and to what extent, the evidence of the experts really assisted the judge in arriving at his decision

[40] The Fifth and Sixth Defendants submit that both witness statements contain opinion evidence and that such evidence by the witnesses is not permitted as neither witness have been deemed an to be an expert pursuant to CPR 32.

[41] The Third Defendants also submit that the Claimant failed to comply with section 163 of the Evidence Act which provides that:

> 163. Admissibility of medical certificates and reports.
>
> (1) Notwithstanding any enactment or law, and subject to the conditions specified in subsection (2), the following documents are admissible in evidence before a court in civil and criminal proceedings
>
> (a) the certificate or report of a registered medical practitioner in respect of any of the following
>
> (i) the medical condition of a person;

(ii) the nature and extent of any injuries to that person, including the probable effects of the injuries;

(iii) the cause of the medical condition or of any of the injuries;

(iv) the nature of the instrument, if any, with which any of the injuries were caused;

(v) the degree of force that was used; and

(vi) any other significant aspects of the injuries; and

(b) a certificate or report of an analyst or consultant in the field of bacteriology, pathology, radiology or toxicology in respect of his examination or analysis of any matter.

(2) The conditions to which subsection (1) refers are that

(a) the document purports to be signed by the person who made it;

(b) the document contains a declaration by the person making it, declaring the facts set out therein to be true to the best of his knowledge and belief and the opinions expressed therein to be honestly held;

(c) before the hearing at which the document is to be tendered in evidence,

(i) a copy thereof is served by or on behalf of the party proposing to tender it on the other parties to the proceedings; and

(ii) none of the other parties to the proceedings have, within seven days from the service of the document, served on the party serving the document, a notice objecting to the document being tendered in evidence.

(3) Subsection (2) (c) does not apply if the parties to the proceedings agree, before or during the hearing, to the tendering of the document.

(4) Notwithstanding subsection (1), the court may, of its own motion or on application by any party to the proceedings, require a person who tendered a document in evidence under this section, to attend before the court and give evidence.

[42] The Court of Appeal in Bergan v Evans (SKBHCVAP2014/0021 dated 13 October 2016) had to consider whether a medical report filed pursuant to section 163 of the

Evidence Act should be struck out because of a failure to comply with the requirements of CPR 32. Chief Justice Dame Janice Pereira stated that:

> [18]. …The umbrella words of this section are instructive. It provides that a medical report which fulfills the parameters of subsection (1) and meets the conditions of subsection (2) is admissible in evidence irrespective of any other enactment or law. Ergo, such a medical report is admissible irrespective of Part 32 of the CPR.
>
> [20] .. .Section 163 of the Evidence Act, 2011 is a separate regime for the tendering into evidence of certain types of expert reports, including those of a registered medical practitioner. Part 32, on the other hand, applies to any kind of expert evidence which a party may be seeking to admit for the purpose of assisting the court. Thus, Part 32 is wider in scope than section 163. Most importantly however, as stated by the learned judge at paragraph 24, none of the provisions contained in section 163 offend the rules of procedure contained in CPR relating to expert evidence. In fact, the two regimes complement each other.
>
> [21] As pointed out by the learned judge at paragraph 22 of his judgment, section 163 is substantive law while CPR is subsidiary legislation. Additionally, as stated above, section 163 begins with the words 'Notwithstanding any enactment or law' and was therefore not intended to be subject to any other provision of substantive legislation, far less to subsidiary legislation. Accordingly, section 163 of the Evidence Act, 2011 is a standalone provision and a party seeking to admit a medical report into evidence therefore has the option of tendering the report pursuant to section 163 or pursuant to Part 32 of CPR.

[43] Given the conclusion at paragraph [28] above, it is not strictly necessary to decide on the admissibility of the two witness statements but if it were necessary to do so, I would agree with the submissions of counsel that both witness statements cannot be relied upon by the Claimant at trial for failure to comply with CPR 32. Section 163 of the Evidence Act does not arise since the two witness statements were not filed pursuant to that section.

Method of Disposition of the Matter

[44] The Third Defendants submit that the Claimant's failures mean that the claim can only be dispensed with: (1) if a written application is filed pursuant to CPR 26.2(i); (2) if a written application is made for judgment to be entered pursuant to CPR 29.11; or (3) upon the acceptance by the court of a no case submission by the

Third to Sixth Defendants after the Claimant's case is called at trial and no admissible evidence is received.

[45] The Fourth Defendant supports the view that if the matter is allowed to proceed to trial, it would be ripe for a successful no case submission in favour of the Fourth Defendant. It submits that the court should use its general powers of case management pursuant to CPR 26.1(2)(i) that gives the court the power to dismiss or give judgment on a claim after a decision on a preliminary issue. The Fourth Defendant also submits that the court should consider the overriding objective that is to enable the court to deal with cases justly, which includes saving expense. It contends that if the matter is allowed to proceed to trial, it will cause unnecessary expense, time and trouble; that the evidence on which the Claimant intends to rely, namely the two witness statements of Dr. Wilkinson and Dr. Laws, are already before the court and prima facie the Claimant cannot prove his case.

[46] The Fifth and Sixth Defendants submit that the court should consider the most appropriate manner in which to deal with this matter taking into consideration this new issue, the costs to the parties, the court's time and resources and the need to deal with matters in a manner that is proportionate to the importance of the issues raised. They further submit that the court should treat the issue of whether the trial can proceed given the state of the Claimant's evidence as a preliminary issue and that if the court finds that the case cannot proceed the court should give judgment for the Fifth and Sixth Defendants. This approach, The Fifth and Sixth Defendants contend, would save time and prevent unnecessary costs from being further incurred.

[47] I agree with the submission of Counsel for the Fourth, Fifth and Sixth Defendants that the court should treat the issue of whether the trial can proceed given the state of the Claimant's evidence as a preliminary issue. As a result of my finding above that the Claimant's case against the Third to Sixth Defendants cannot proceed in light of the evidence he is able to rely on at trial, the Claimant's statement of case against the Third to Sixth Defendants is struck off and judgment is entered for the Third to Six Defendants.

Notice of Discontinuance

[48] As mentioned above, the court at its hearing on 9 November 2018 was informed by Counsel holding papers for the Claimant's attorneys-at-law that she received correspondence from Counsel for the Claimant that they intend to concede the point on which the court had requested submissions to be filed by 6 November 2018. As noted previously, Counsel for the Claimant had failed to file submissions by the date ordered and had sent a letter to the Registrar seeking an adjournment. The contents of that letter are reproduced at paragraph [20] above. The court ordered Counsel for the Claimant to file a notice of discontinuance by 12 November 2018, failing which the Court will proceed to decide the matter on the submissions filed to date. Once again, the Claimant failed to obey the order of the court, filing the notice of discontinuance on 14 November 2018 as follows:

> TAKE NOTICE that the Claimant in the captioned suit hereby discontinues all proceedings in relation to the aforesaid claim against the 3rd, 4th, 5th and 6th Defendants.

[49] It is now 18 years since the CPR 2000 was deemed to have come into effect in each of the Member States and Territories of the Eastern Caribbean Supreme Court on 31 December 2000. A mere three years later in **Bernard v Attorney General of Grenada** (Civil Case No. 0084 of 1999 dated 6 April 2003), Barrow J (Ag.) observed that:

> [6] Non-compliance has continued to be commonplace under the new rules, in the daily experience of these courts. Case management orders are often flouted. The breadth of this practice may have given acceptability to it. In truth, that very acceptability stands as a reproach. Casual accommodation of non-compliance with orders is a violation of clear rules. It is a subversion of a fundamental objective of the rules which was precisely to put a stop to habitual non-compliance. The rules need to be obeyed, they need to be enforced.

[50] Fifteen years later and the words of Barrow J (Ag.) still ring true in this jurisdiction. The CPR is a complete code for the conduct of civil litigation in the countries and territories served by the Eastern Caribbean Supreme Court. It provides what should happen if counsel cannot meet a deadline set by the court or by the CPR. In some cases, there are sanctions for non-compliance. The CPR itself provides

under CPR 26.8 for relief from sanctions. There is very little that cannot be accommodated if there is compliance with the CPR. The culture of non-compliance with orders of the court and with the CPR as happened here must not be allowed to take root and develop into a culture of habitual non-compliance, to use Justice Barrow's phrase. Legal practitioners who subscribe to this habitual non-compliance are put on notice that the court will enforce the rules within the spirit of the overriding objective of the CPR in order to stamp out the residual culture of habitual non-compliance.

Wasted Costs Order

[51] The next issue that arises for consideration is whether the court should make a wasted costs order in this case. The jurisdiction to grant wasted costs order is found in CPR 64.8 which provides as follows:

> Wasted costs orders
>
> 64.8 (1) In any proceedings the court may by order –
>
> (a) direct the legal practitioner to pay; or
>
> (b) disallow as against the legal practitioner's client;
>
> the whole or part of any wasted costs.
>
> (2) In this rule –
>
> "wasted costs" means any costs incurred by a party –
>
> (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal practitioner or any employee of the legal practitioner; or
>
> (b) which, in the light of any act or omission occurring after they were incurred;
>
> the court considers it unreasonable to expect that party to pay.

[52] There has been no reported or unreported decision of the Eastern Caribbean Supreme Court dealing extensively with wasted costs orders. The leading authority in England and Wales is the decision of the Court of Appeal in Ridehalgh v Horsefield [1994] Ch 205, [1994] 3 All ER 848. It has been applied in many subsequent decisions of the Court of Appeal including: Re P (a Barrister), (wasted costs order) [2001] EWCA Crim 1728, [2002] 1 Cr App Rep

207; Re Wiseman Lee (Solicitors) (Wasted Costs Order) (No 5 of 2000) [2001] EWCA Crim 707; Dempsey v Johnstone [2003] EWCA Civ 1134; Persaud v Persaud [2003] EWCA Civ 394; and Hallam-Peel & Co v Southwark London Borough Council [2008] EWCA Civ 1120; and Gill v Humanware Europe plc [2010] EWCA Civ 799, [2010] ICR 1343.

[53] It was also approved by the House of Lords in Medcalf v Mardell [2002] UKHL 27, [2003] 1 AC 120, [2002] 3 All ER 721. Horesford confirmed that when considering a wasted costs order, the court should consider: (1) Has there been an improper, unreasonable or negligent act or omission by the legal practitioner? (2) As a result, had any costs been incurred by a party? (3) Should the court exercise its discretion to order the legal practitioner to meet the whole or any part of the relevant costs? Only if all three questions were answered in the affirmative should the court make a wasted costs order.

[54] Before making of a wasted costs order, this court must first be satisfied that the evidence before it, if unanswered, would be likely to lead to a wasted costs order being made. Secondly, the court will give the legal practitioner the opportunity to give reasons or show cause why the order should not be made. Thirdly, consider, in the light of any such evidence, whether to make the wasted costs order. Consequently, before any decision is made on whether the court should make a wasted costs order Counsel for the Claimant will be given an opportunity to show cause why such an order should not be made. This applies to all Counsel for the Claimant who have had conduct of this matter.

Disposition

[55] For the reasons explained above, I make the following orders:

(1) The Claimant's statement of case against the Third, Fourth, Fifth and Sixth Defendants is hereby struck off and judgment is entered for the Third, Fourth, Fifth and Sixth Defendants.

(2) Costs to the Third, Fourth, Fifth and Sixth Defendants to be assessed if not agreed within 21 days.

(3) If the parties fail to agree within the time period specified at paragraph (2), each of the Third, Fourth, Fifth and Sixth Defendants shall file and serve: (1) affidavits with respect to the quantum of costs that should be awarded to each of the Third, Fourth, Fifth and Sixth Defendants; and (2) submissions and authorities on the quantum of costs, within 14 days.

(4) The Claimant shall file an affidavit and submissions and authorities in response within 14 days of service.

(5) Counsel for the Claimant shall file an affidavit providing reasons or showing cause why a wasted costs order pursuant to CPR 64.8 should not be made directing Counsel for the Claimant to pay the whole or part of the wasted costs on or before 30 November 2018.

(6) The hearing on the assessment of costs is set for 18 January 2019.

Eddy D. Ventose
High Court Judge

By the Court

Registrar