IN THE SUPREME COURT
TURKS AND CAICOS ISLANDS

ACTION NO. CL-57/18

BETWEEN:

EVANGELISTA MESA **PLAINTIFF**

AND

(1) MARTINEZ LEONTE VEGA

(2) STANLEY HAROLD WILLIAMS **DEFENDANTS**

DECISION

Before: **The Hon. Mr. Justice Anthony S. Gruchot**

Appearances: **Ms Chloe McMillan of F Chambers for the Plaintiff**
Mr. Clayton Greene of Stanfield Greene for the 2nd Defendant
No appearance by the 1st Defendant

Hearing Date: **26th October 2022**
Venue: **Court 5, Graceway Plaza, Providenciales.**
To be Handed Down: **24th January 2023 at 3:30 p.m.**

Introduction

1. There are 2 matters before the Court. The 1st is the Plaintiff's hearing for the assessment of damages (against the 2nd Defendant) pursuant to a Notice filed on 14th

September 2022. This follows an Order dated 6th September 2022 [purportedly] striking out the 2nd Defendant's defence and entering judgment on liability against the 2nd Defendant ('the September Order') for non-compliance with an unless order made on 10th August 2022 ('the August Order').

2. The 2nd is on the 2nd Defendant's summons filed on 17th October 2022 to set aside the September Order ('the Application').

3. It is clear that if the Application is successful then the Plaintiff's hearing cannot proceed.

4. There was no appearance by the 1st Defendant, he not having been served with either application.

5. The underlying claim is in respect of personal injury suffered by the Plaintiff and arises from a road traffic accident which took place on 4th March 2017 in which the Plaintiff was a passenger in the 1st Defendant's car which was involved in a collision with a vehicle being driven by the 2nd Defendant.

History of the Claim

6. The writ and statement of claim were filed on 31st May 2018 through the Plaintiff's then attorney G. C. Clarke and Associates, naming Leonte Martinez Vega and Heritage Insurance Company (Caribbean) Ltd. as defendants.

7. An amended writ and statement of claim was filed on 1st July 2019. The amendment consisted of minor amendments to the statement of claim, a correction to the name of the 1st Defendant and a substitution of the 2nd Defendant from Heritage Insurance Company (Caribbean) Ltd. to the 2nd Defendant. This change of defendant does not appear to have been by application to the Court in accordance with Ord. 15 r. 6 but the parties have proceeded in any event and no issue has been taken.

8. The 1st Defendant filed his defence on 11th July 2019 through his attorneys, Griffiths & Partners. The 2nd Defendant filed his defence on 9th September 2019 through his then attorneys, Wilson & Associates.

9. On 8th December 2019 a directions order was made by consent, which order was not complied with by any of the parties.

10. On 11th September 2020 a notice of change of attorney was filed on behalf of the Plaintiff placing F Chambers on record as acting for her.

11. On 20th January 2021 a further summons for directions was filed, returnable on 16th April 2021. No order appears to have been made on that summons and it is unclear if that hearing was effective.

12. On 8th February 2021 the Plaintiff filed a notice of intention to proceed.

13. A directions order was filed by the Plaintiff on 21st April 2021 but it is does not appear that order was ever perfected.

14. On 23rd June 2021 a directions order was made by consent timetabling the matter to be set down for trial by 30th November 2021. It was also ordered that the matter be tried together with CL-25/20, this being a claim by the 1st Defendant against the 2nd Defendant arising at of the same accident.

15. On 13th July 2021 a notice of change of attorney was filed on behalf of the 2nd Defendant placing Stanfield Greene on record.

16. On 16th March 2022 there was a further directions hearing at which the Court was advised by Mr. Fulford of F Chambers that although there was no appearance by the 2nd Defendant or his attorney, Stanfield Greene were on record as acting for the 2nd Defendant, (to which see paragraph 20 below). Directions were again given and it was ordered that the trial be set down by 16th May 2022 ('the March Order').

17. On 29th March 2022 a notice of motion was filed by Wilson and Associates to come off record. That notice was withdrawn on 5th April 2022 and a summons seeking the same relief was filed the same day. On 8th April 2022 it was ordered that the 2nd Defendant's attorneys, Wilson and Associates, had ceased to act. This application was unnecessary given the notice of change of 13th July 2021, but it appears that the notice of change was never served and notwithstanding the representations made by Mr Fulford to the Court, detailed above, F Chambers continued to correspond with Wilson & Associates rather than Stanfield Greene.

18. On 12th April 2022 the Order of 8th April 2022 was served on Griffiths & Partners and also on Garland & Co., the latter clearly in error.

19. On 31st May 2022 the Plaintiff filed a 'notice of objection' to the 1st and 2nd Defendants' reliance on evidence at trial pursuant to O.38 r. 2A (10), presumably due to non-compliance with the March Order. The purpose of this is unclear and there is no provision in the Rules for such a notice.

20. On 21st June 2022 the Plaintiff filed a summons to strike out the 2nd Defendant's Defence and seeking judgment on liability, for non-compliance with the March Order. That application was served on the 2nd Defendant personally, the Plaintiff seemingly taking the view he was unrepresented, notwithstanding Stanfield Greene having requested F Chambers to pass on his apologies for non-attendance at the hearing on 16th March 2022, which apology is noted in the minutes of the hearing and the filing of the Notice of Change of Attorney (referred to at paragraph 15 above). F Chambers therefore knew Stanfield Greene was acting on behalf of the 2nd Defendant.

21. The application came before the Court on 10th August 2022, Stanfield Greene appearing on behalf of the 2nd Defendant, and the 1st Defendant not having been served with the application. The Court made the following order:

"1. *Unless the 2nd Defendant complies with the Court Order dated 16 March 2022 by 24 August 2022, the 2nd Defendant's Statement of Defence filed on 9 September 2019 be struck out and judgment on liability be entered against the 2nd Defendant and damages to be assessed in respect of the Plaintiff's unliquidated claim for damages.*

2. Costs of the Summons to be borne by the 2nd Defendant."

22. The March Order required the following:

    a. Exchange of lists of documents by 4:00 p.m. on 30th March 2022;

    b. Witness statements to be served on all other parties by 21st April 2022.

    There was also provision for expert evidence but I am told neither party now intends to rely on such evidence.

23. Reasons for making the August Order were handed down on 29th August 2022.

24. I have set out the history of this matter in light of the criticism leveled by the Plaintiff to the alleged dilatory approach to the progress of this case by the 2nd Defendant. It is from the above, beyond peradventure that the progress of this matter has been far from ideal.

The Application

25. The matter has come before the Court following an alleged breach of the August Order and entry of the September Order, the August Order being peremptory in nature. Stanfield Greene was in attendance at the hearing in August and a draft of the August Order was filed with the Registry on 22nd August 2022 and perfected that day. I am told by Ms. McMillan that the draft was sent to Mr. Greene for approval but that no response was received. This, she says, is the reason for the delay in filing the Order to be perfected. I note that the wording of the order is set out in the judgment.

26. The Application is supported by an affidavit of Iris Dorothea Malcolm, personal assistant to Mr. Greene, together with an exhibit of a bundle of documents. The affidavit sets out the reasons for the [suggested] non-compliance with the August Order which can briefly summarised:

    a. The Order gave 14 days (by 24th August 2022) for the service by the 2nd Defendant of a list of documents and any witness statements ('the Documents')

    b. Mr. Greene spoke with the 2nd Defendant on 20th August 2022 and was told by him that he was leaving the Islands for his work but that he would be back on 24th August 2022 in time to comply with the Order, instructions having already been given such that statement(s) and the list of documents could be prepared.

c. On 23rd August 2022 Mr. Greene sent a WhatsApp message to Mr. Fulford of F Chambers, to update him of the position. Mr. Greene received no reply and, he says, thought all was well.

d. The 2nd Defendant attended at Mr. Greene's office on 24th August 2022 in order to finalise his witness statement and to swear an affidavit in support of his list of documents, as to which see paragraph 50 below.

e. A payment voucher was requested from the Registry at 2:51 p.m. on 24th August 2022 in respect of filing fees, followed by chasing phone calls to the Registry in respect of the same.

f. The Treasury Voucher was received at 3:49 p.m. and a bank transfer actioned. The Treasury Voucher and proof of payment was sent to Treasury at 4:01 p.m.

g. The receipted payment voucher was not issued by the Treasury until 10:51 a.m. on 25th August 2022.

h. At 4:07 p.m. on 24th August 2022, when it became apparent that the Documents were not going to be filed that day, Mr. Greene sent an email to Mr. Fulford attaching executed but unfiled Documents and explained the reason why the Documents could not be filed that day. That email was also copied to the Registrar.

i. The Documents were filed with the Court at 12:36 p.m. on 25th August 2022 once the receipted Treasury voucher had been made available and sealed copies sent to Mr. Fulford by email at 1:43 p.m. on that day.

27. What then followed was that Mr. Fulford sent a letter dated 25th August 2022 to Mr. Greene by email that day asserting that the August Order had not been complied with and refusing to accept the Documents. Mr. Fulford asserted that the strike out provisions of the August Order were automatic on default and that judgment had therefore been entered against the 2nd Defendant. A copy of that letter was not included in Ms Malcolm's exhibit. Mr. Greene said that the reason for that was because it contained 'without prejudice' proposals. The Court requested that it be provided with a suitably redacted copy.[1]

28. Mr. Greene then wrote to Mr. Fulford on 26th August 2022 having received a notice of hearing for 29th August 2022, setting out the above chronology and inviting the Plaintiff to re-consider her position if the hearing was in relation to the witness statement and list of documents and additionally taking issue that they had not been served with any summons. In the event that the hearing was not in connection with those documents it sought clarity.

29. No response was received, however, it transpired that the hearing on 29th August

[1] See paragraph 46 below.

2022 was simply the handing down of the written reasons referred to at paragraph 23 above.

30. On 2nd September 2022 F Chambers wrote to the Court with a draft Order in the following terms:

> *" 1. The 2nd Defendant's Statement of Defence filed on 9th September 2019 be struck out and judgment on liability is entered against the 2nd Defendant.*
>
> *2. Damages to assessed in respect of the Plaintiff's unliquidated claim for damages"*

31. That letter and draft order were not copied to Stanfield Greene and the contents were in conflict with the assertions made by Mr. Fulford at paragraph 27 above, to which I refer at paragraph 46 below. The Registrar perfected the order the same day.

32. On 14th September 2022 the Plaintiff filed the application for the hearing for assessment of damages and on 17th October 2022 the 2nd Defendant filed the application to set aside the September Order.

Discussion

33. It is common ground that the Court has jurisdiction to extend the time where an 'unless order' has been made and not complied with. See the White Book O.3 r.5 – note 3/5/9; also, *Samuels -v- Linzi Dresses Ltd*[2].

34. Mr. Greene suggests that the Plaintiff is seeking to gain unfair advantage by refusing to accept the service of the documents, filing the Order of 2nd September 2022 without any notice and moving forward with assessment of damages. He asserts that the documents were served at 4:07 p.m. on 24th August 2022 and at worst they were then just 7 minutes late (or at the worst 17 hours if it is deemed that service was therefore 9:00 a.m. the next day). He makes the point that F Chambers' office would have been still open at 4:07 p.m.

35. Mr. Greene asserts that if the September Order is set aside there is no prejudice to the Plaintiff and that it is still possible to have a fair trial of the matter. He submits that it was open to the Plaintiff to agree the setting aside of the September Order, that the Plaintiff should have reconsidered her position following his letter of 26th August 2022 and, the refusal in the circumstances was unreasonable.

36. He further submits that it was unconscionable of the Plaintiff, in light of that letter, to then go to the Court and have the September Order entered, some 8 days after service of the documents and further submits that it was improper for the Plaintiff to engage with the Court without at the very least copying the Defendants such that representations could be made. Moreover, he suggests that the Plaintiff's conduct was calculated to mislead the Registrar by not drawing to her attention to the fact

[2] [1980] 1 All ER 803

that the Documents had been served. These submissions appear to disregard the automatic effect of the consequences for failing to comply with an unless order which are discussed at paragraph 45 *et seq*. below.

37. In support of the Application Mr. Greene referred me to *Logicrose Ltd. -v- Southend Football Club Ltd.*[3] in which the court held:

> *"that although the deliberate disobedience to a peremptory order for discovery was a contempt which might be punished with a fine or imprisonment, the court ought not to punish the offender's contempt by excluding him from any further part in the proceedings and by giving judgment against him. Once a missing document had been produced, an action would be dismissed or the defence struck out only in the most exceptional circumstances and only if, in spite of the document's production, there was still a real risk that justice could not be done."*

He emphasised that the August Order had been complied with before the draft September Order was submitted.

38. Mr. Greene submits that there is a duty on counsel to be transparent with the Court and takes issue that F Chambers' letter of 2nd September 2022 makes no reference to the fact that the documents had both been sent to the Plaintiff and had been filed with the Court before that letter was sent. He submits that if the Court had been aware of this it may well have not sealed the September Order. I have some difficulty with that submission as the Court must have been aware that the Documents had been filed. In any event, for the reasons set out in paragraphs 45 to 47 below if there had been non-compliance with the August Order no further order was required.

39. Mr. Greene further asserts that the action taken by Mr. Fulford in particular was deliberate to gain an unfair tactical advantage, particularly by not replying to his letter of 26th August 2022, refusing to accept receipt of the Documents and going straight to the Court without notice. He contends that the necessity of having to argue this matter is a waste of the Court's time and is incurring unnecessary costs.

40. He suggests that what has occurred is a technical breach of the Order, not in any way contumelious and that the Court should set aside the September Order and order costs against Mr. Fulford personally, submitting that it is his unconscionable conduct which has given rise to the hearing; that Mr. Fulford should have not proceeded as he did and having done so, forcing the 2nd Defendant into having to make this application, he should have consented to the same. He contends that costs which have been incurred by Mr. Fulford's conduct should not be borne by the Plaintiff, who was being advised by him.

41. Ms McMillan contends that there has been unconscionable delay throughout by the 2nd Defendant and that the Plaintiff has had to seek the assistance of the Court a

[3] (1998) The Times March 5th

number of times in order to progress the matter, leading firstly to the peremptory order and then default of the same. She appears to overlook that this matter was commenced in May 2018, against a wrong party and that the Plaintiff had to serve a Notice of Intention to Proceed in March 2021, following a delay of over 12 months by the Plaintiff in moving the matter forward.

42. In her written submissions, Ms McMillan takes issue that the application is wrongfully made pursuant to Ord. 17 and as such the application is not properly grounded, albeit, she did not advance that argument in her oral argument. Ms McMillan is correct in that Ord. 17 deals with the rules governing interpleaders, however, the only reference to Ord. 17 appears in the title to Ms Malcom's affidavit in support. The summons makes no reference as to what provision under which the Application is made.

43. The relief sought in the summons was:

> *"for an order that the Judgment entered herein in this action, and all subsequent proceedings, be set aside or revoked."*

44. The form of the Application was clearly lacking in substance; however, it is clear from the way the case has been argued that the relief sought was the setting aside of the September Order and an extension of time to comply with the August Order pursuant to Ord. 3 r.5, which Ms McMillan herself sets out in her written submissions; alternatively, relief from sanctions, which amounts to the same thing.

45. Ms McMillan submits that the effect of the August Order, being an 'unless' order is automatic on default. I concur. She referred me to *Marcan Shipping (London) Ltd v Kefalas and another*[4] in which the Court of Appeal held:

> *"The sanction embodied in an 'unless' order took effect without the need for any further order if the party to whom it was addressed failed to comply with it in any material respect."*

46. Mr. Fulford's letter of 25th August 2022, rejecting acceptance of the sealed Documents stated:

> *"The terms of the Order are clear and automatic and do not permit us to accept any documents from you filed after the deadline August 24, 2022 for exchange of same. For avoidance of doubt,* ***unfiled*** *draft documents are not compliant with the Court Order.*
>
> *In accordance with the said paragraph 1 of the Court Order, your client's Statement of Defence filed on 9th September 2019 is struck out automatically, and judgment is entered against your client."* (Emphasis in the original)

[4] [2007] 3 All ER 365

47. The wording of the September Order (set out at paragraph 30 above) is inconsistent with the position adopted in Mr. Fulford's letter and Ms McMillan's submissions. Following ***Marcan***, if there had been non-compliance with the August Order, the September Order, only required judgment to be entered in an amount to be assessed. The provisions relating to strike-out were otiose.

48. Ms McMillian adopted the position that the August Order required **filed copies** of both the list of documents and any witness statements to be served **by 4:00 p.m.** on 24th August 2022 and that the 2nd Defendant was in default as unfiled copies had been served after 4:00 p.m. The corollary of that submission is that the August Order required the 2nd Defendant to do 2 things a) file the documents with the Court and b) serve filed copies by 4:00 p.m. on 24th August 2022.

49. The August Order is predicated on the March Order which provided *inter alia*:

> *"(1) There shall be discovery by exchange of lists of documents by 4:00 p.m. 30th March 2022 …*
>
> *(2) Where any party intends to place reliance at trial on:*
>
> *…*
>
> *(ii) Any other oral evidence, he shall, by 21st April, 2022, serve on the other parties written statements of all such oral evidence which he intends to adduce."*

50. Neither the March Order or the August Order required filed copies of the Documents to be served. Indeed, when asked by the Court, Ms McMillan was unaware of any requirement to file lists of documents and the Court is unaware of any such requirement unless the list is required to be verified by affidavit. The March Order had no such requirement and no subsequent notice was served on the 2nd Defendant pursuant to Ord. 24 r.2(7)[5].

51. Ord. 38 r.2A deals with the exchange of witness statements. Nothing in that rule requires the filing of statements with the Court.

52. With respect to the time by which the documents had to be served, it is only the list of documents which had a time specified in the March Order, which time had already passed when the August Order was made.

53. It is not disputed that the documents were sent unfiled at 4:07 p.m. on 24th August 2022. The August Order did not specify any time on 24th August by which the documents were required to be served.

54. Ms McMillan adopted the position that as the documents were not served until after 4:00 p.m. it was deemed that they were not served until the next day. No authority was provided for this submission but Mr. Greene did not argue otherwise.

[5] Requiring the List of Documents to be verified by affidavit.

55. Ms McMillian doggedly resisted the application, suggesting that the Application was for the set aside of the September Order and did not seek an extension of time to comply with the August Order and/or seek relief from sanctions and accordingly there was no proper application before the Court. She also submitted that:

> *"The time limits ordered by the Court are to be enforced and are not merely targets to be attempted. The 2nd Defendant was at all times aware of the deadline, and therefore, a submission of a receipt to the Treasury at the eleventh hour on the deadline date shows an ignorance for compliance with the Court Order. Moreover, the Plaintiff is under no obligation to accept unfiled documents after the deadline in the hopes that the same would be filed soon thereafter."*

56. Ms McMillan referred me to *Finnegan -v- Parkside Heath Authority*[6] from which she quoted the following passage, setting it out as follows:

> *"The court was acutely aware of the growing jurisprudence in relation to the failure to observe procedural requirements. There was a need for clarification as to the likely approach of the court in the future to non-compliance with the requirements as to time contained in the rules or directions of the court."*
>
> *"Lord Woolf, Master of the Rolls and Sir Richard Scott, Vice-Chancellor, had approved the following guidance as to the future approach which litigants could expect the court to adopt to the failure to adhere to time limits contained in the rules or directions of the court:*
> 1. *Time requirements laid down by the rules and directions given by the court were not merely targets to be attempted; they were rules to be observed;*
> 2. *At the same time the overriding principle was that justice must be done.*
> 3. *Litigants were entitled to have their cases resolved with reasonable expedition. The non-compliance with time limits could cause prejudice to one or more of the parties to the litigation."*
>
> *"In considering whether to grant an extension of time to a party who was in default, the court would look at all the circumstances of the case including the considerations identified above.'"*

57. The above is not in fact the decision *Finnegan* albeit it was cited and the court approved that approach. In *Finnegan*, the Court of Appeal (Hirst and Mantel LJJ) were considering the development of the approach of the courts with respect to applications to extend time under 0.3 r.5 and reviewed the decisions in a number of 'guideline' cases.

58. The quotation cited by Ms McMillan was contained in the judgment of Millet LJ in *The*

[6] {1998] 1 ALL ER 595

Mortgage Corporation Ltd v Sandoes (an unlimited company) and Others[7] but is significantly incomplete. In that passage Millet LJ sets out **10 points of guidance** "*as to the future approach which litigants can expect the court to adopt to the failure to adhere to time limits* contained *in the rules or directions of the court"* given by the Master of the Rolls and the Vice Chancellor, as Head of Civil Justice, **rather than the 4** set out above.

59. The principles set out in the guidance at points 4 to 9 are:

> *"4. In addition the vacation or adjournment of the date of trial prejudices other litigants and disrupts the administration of justice.*
>
> *5. Extensions of time which involve the vacation or adjournment of trial dates should therefore be granted only as a last resort.*
>
> *6. Where time limits have not been complied with the parties should co-operate in reaching an agreement as to new time limits which will not involve the date of trial being postponed.*
>
> *7. If they reach such an agreement they can ordinarily expect the court to give effect to that agreement at the trial and it is not necessary to make a separate application solely for this purpose.*
>
> *8. The court will not look with favour on a party who seeks only to take tactical advantage from the failure of another party to comply with time limits.*
>
> *9. In the absence of an agreement as to a new timetable, an application should be made promptly to the court for directions.*

The final paragraph of the quote at paragraph 56 in in fact principle 10, but not identified as such.

60. What Ms McMillan omitted is significant and put an entirely different perspective on principle 10. Given that these omitted principles do not assist the Plaintiff, the Court is left with a view that their omission may have been deliberate in the hope the Court would not review the full report.

61. Ms. McMillan could point to no prejudice to the Plaintiff caused, on her case, by the late service of the Documents save for the submission that the Plaintiff is prejudiced by the delay to progress the claim, as to which see paragraph 41 above.

Analysis

62. The Defendant's application, properly put, and as argued, is to a) set aside the September Order, entered as a result of an [alleged] breach of the August Order in consequence of its peremptory effect and if granted; b) to be granted an extension of

[7] 141 SJ LB 30, The Times 27 December 1996

time to comply; alternatively relief from sanctions.

63. Careful consideration should be given to the drafting of any peremptory order, given the serious consequences which could follow in the event the order is not complied with. See the dicta of Shaw LJ in *Van Houten -v- Foodsafe Ltd*[8].

64. Ord. 42 r.2 provides:

> *"(1) Subject to paragraph (2), a judgment or order which requires a person to do an act* ***must specify the time*** *after service of the judgment or order, or* ***some other time****, within which the act is to be done."* (My emphasis)

65. Note 42/2/3 provides:

"*... Accordingly, an 'unless' order should be worded either:*

> *(a) 'Unless within [14] days of service of the order the defendant serves his list of documents, the defence be struck out and judgment entered for the plaintiff with costs (or as may be)'. This wording must be used if the affected party is not present or represented.*
>
> *or (b) unless by (4:00 p.m. on Friday 13th June 1986) [continues as above]. This is the clearest form but is suitable only where the affected party is present or represented so has notice of the order."*

66. The above provides for 2 differing terms of compliance. The first is that the 'unless' order may specify a precise time by which an act must be done, the example at (b) above or, a (more general) date as in example (a) above. Failure to draft in compliance with (a) or (b) above renders the order bad and it and any judgment made in reliance of it, liable to be set aside, as does the failure to specify a starting point in the case of a subsection (a) order[9].

67. The August Order is set out at paragraph 21 above. It required the 2nd Defendant to comply with the March Order by 24th August 2022 (a subsection (b) type order but absent any specific time provision). Ms McMillan has taken this to mean, as it seems did Mr. Greene, that this meant compliance had to be by 4:00 p.m. on 24th August 2022. In my view there is no basis for this conclusion.

68. Ord. 65 r. 7 provides:

> *"Any document (other than a writ of summons or other originating process) service of which is effected under rule 2 or under rule 5(1)(a) between four o'clock on a Friday and midnight on the following Sunday or after 4 in the afternoon on any other weekday shall,* ***for the purposes of computing any***

[8] (1980) 124 S.J 277, CA.
[9] See Note 3/5/11 and *Van Houten -v- Foodsafe*

***period of time after service of that document**, be deemed to have been served on the Monday following that Friday or on the following day that other weekday, as the case may be." (My emphasis)*

69. Note 65/7/2 gives the effect of the rule:

> *"**This rule does not prescribe the hours between which service must be effected** but its effect is to postpone to the next available day the time for computing the period **after** the service of any document within the rule…" (My emphasis)*

70. What is clear from the above is that service of documents after 4:00 p.m. does not mean that the documents will be deemed to have been served on the following day but rather that the calculation of time after the service of the document will not start to run until the following day.

71. In <u>*Venables -v- MGN Ltd*</u>[10] the master had made an order "*that unless the defendant complied with [a] consent order [to provide specific discovery] by 4:30 p.m. on 31 July 1997 the defence would be struck out.*" The defendant's solicitors were unable to comply until the afternoon on 31st July. At approximately 4:10 p.m. they attempted to serve the discovery by fax. The plaintiff's solicitors' fax machine had been switched off to allow for engineer to work. When this came to light, they went on to deliver the documents by hand but were unable to do so until some minutes after 4:30 p.m.

72. The defendant took out a summons to extend time for compliance with the unless order for some 5 to 10 minutes. The judge refused the application.

73. As part of the argument both at 1st instance and on appeal was an issue as to whether service by fax after 4:00 p.m. meant that service was deemed to be effected the following business day. That argument was prefaced not on any general rule that documents must be served before 4:00 p.m. but upon Ord. 65 r.5 (2B) which provides:

> *"Where the fax is transmitted on a business day before 4:00 p.m. it shall, unless the contrary is shown, be deemed to be served on that day, and, in any other case, on the business day next following."*

74. The plaintiff in <u>*Venables*</u> argued that because of the above rule, even if the fax had been operational, service by fax after 4:00 p.m. would have been ineffective to comply with the unless order. This argument was rejected by both courts on the basis that service by fax was clearly open to the defendant and the time was set by the unless order. The question was whether the unless order would have been complied with and both courts held that it would.

[10] [1998] All ER (d) 669

75. In my judgment the wording of Ord. 65 r.5 (2B) is not of universal effect as to fixing 'a closing time' for service as it is specific to fax communication. As I have noted above, I was not directed to any rule or authority that service had to be before 4:00 p.m. The wording of Ord. 65 r.7 in clear in that service after 4:00 p.m. deems service to have taken effect on the next business day "*for the purposes of computing any period of time after service of that document*" and the title to that provision "*Effect of service after certain hours*" in my view anticipates that service can be effected after 4:00 p.m.

76. The August Order stated that the 2nd Defendant must comply with the 16th March 2022 Order by 24th August 2022. It did not specify any specific time on that day. Accordingly, in my judgment sending the Documents at 4:07 p.m. was not in breach of the August Order but complied with it.

77. The question which then arises is whether the service of unfiled documents was sufficient. In my judgment it was. As I have set out above, I am of the view that neither lists of documents nor witness statements need to be filed with the court unless the court so orders and neither the March Order or the August Order required the Documents to be filed. Indeed, I would go as far to say that such documents should not be filed. The Registry does not need to burdened with unnecessary filings.

78. In support, in respect of lists of documents Ord. 24 r. 2(1) provides:

> "*Subject to the provisions of this rule and of rule 4, the parties to an action between whom pleadings are closed must make discovery* ***by exchanging lists of documents*** *and, accordingly, each party must, within 14 days after pleadings in the action are deemed to be closed as between him and any other party,* ***make and serve on that party*** *a list of the documents which are or have been in his possession, custody or power relating to any matter in question between them in the action*." (My emphasis)
>
> And Ord. 24 r.3(1)
>
> "Subject to the provisions of this rule and of rules 4 and 8 the Court may order any party to a cause or matter (whether begun by writ, originating summons or otherwise) **to make and serve on any other party** a list of the documents which are or have been in his possession, custody or power relating to any matter in question in the cause or matter, and may at the same time or subsequently also order him **to make and file an affidavit** verifying such a list and to serve a copy thereof on the other party. (My emphasis)

79. In respect of witness statements Ord. 38 r.2A (2) provides:

> "*At the summons for directions in an action commenced by writ the Court shall direct every party* ***to serve on the other parties****, within 14 weeks (or such other period as the court may specify), of the hearing of the summons and on*

such terms as the court may specify, written statements of the oral evidence which the parties intend to adduce on any issues of fact to be decided at the trial." (My emphasis)

80. Note 38/2A/1 give the effect of the rule:

> "*This rule empowers the High Court to direct any party at any stage of the proceedings* ***to serve on the other parties*** *the written statements of the oral evidence which that party intends to lead on any issues of fact to be decided at the trial*." (My emphasis)

81. I hold that the 2nd Defendant complied with the August Order and I find that the September Order was entered in error.

82. I therefore order that the September Order be set aside. No further order is required on the Application.

83. With respect to the Plaintiff's hearing for the assessment of damages, clearly this cannot proceed given that I am setting aside the September Order. That said, as I observed at the hearing of this matter it is patently clear that the Plaintiff's case is in no way ready for such an assessment to take place and the hearing could not have proceeded in any event.

84. There remains 1 further issue. Mr. Greene urges me to make a costs order against Mr. Fulford personally. The reasons for this are set out at paragraphs 34 to 40 above. Mr. Fulford was not in attendance at the hearing and has not therefore had the opportunity to address the Court. I refer to Ord. 62 r.11(4) which provides that if the Court is considering making a costs order against a legal representative the that representative must be given an opportunity to be heard. Also, in light of the decision herein I would wish to hear from Mr. Greene as to whether he considers that such an application is to be pursued.

Disposition

85. The Registrar's Order of 6th September 2022 is set aside.

86. I will hear counsel on the issue of costs.

24th January 2023

The Hon. Justice Anthony S. Gruchot
Judge