



[2016] JMCC COMM 18

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**COMMERCIAL DIVISION**

**CLAIM NO. 2015CD00140**

<b>BETWEEN</b>	<b>ALGIX JAMAICA LIMITED</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>J WRAY &amp; NEPHEW LIMITED</b>	<b>DEFENDANT</b>

**IN CHAMBERS**

Paul Beswick, Gillian Mullings and Georgia Buckley instructed by Naylor and Mullings for the claimant

Michael Hylton QC, Kevin Powell and Melissa McLeod instructed by Hylton Powell for the defendant

June 1, July 14, 15 and 20, 2016

**CIVIL PROCEDURE – APPLICATION TO APPOINT EXPERT – APPLICATION FOR ORDER OF SPECIFIC DISCLOSURE**

**SYKES J**

[1] During the months of June and July 2016, the claimant and defendant have made a number of applications. Oral submissions were made in all except one which was done on paper. These reasons for judgment deal with all the applications.

[2] The case against the defendant is that it discharged trade effluent into the Black River and that discharge was in breach of the standards set by the National Environment and Planning Agency ('NEPA'). This discharge led to a reduction of oxygen in fish ponds operated by the claimant. This reduction in oxygen caused the death of the claimant's fish for which compensation is sought.

[3] The defendant has put up a robust defence to these allegations. As one would expect, expert witnesses have been appointed on both sides of the issue. The claimant wants more experts. The first part of these reasons for judgment deals with the claimant's application to appoint three additional experts. The second part deals with the defendant's application for specific disclosure.

[4] The claimant has applied to call geologists Mr Noel McKenzie and Mr Alwyn Anguin, as expert witnesses, in order 'to provide a full and detailed breakdown on the composition of soil and soil quality in the vicinity of the settling points and Appleton Estate sinkhole to aid analysis of the trade effluent released in the Black River.' The defendant opposes this on the ground that having regard to how the claimant has framed its case this is not necessary and would take the case in a wholly new direction and new lines of enquiry.

[5] The court has examined in some detail the initial pleadings and the amended pleadings of the claimant. The initial pleadings allege that the defendant operates a sugar production and rum distillery at Appleton Estate upstream from the claimant's farm where fish are bred and algae produced.

[6] The pleaded case also is that the defendant operates a waste water treatment and disposal facility at the estate. It is also said that the defendant is supposed to conduct its operations in a manner that meets the standards of the NEPA.

[7] The claimant's say that on February 27, 2015, the defendant discharged trade effluent in the Maggoty River and continues at paragraph 6:

*As a result, the claimant suffered a massive loss to its Barton Isles operations. The water in the fish ponds turned dark green, smelled*

*like rotten eggs and the dissolved oxygen level in the pond's (sic) fell to 2.2 and 1.8 milligrams per litre (which is below the standard required for the fish's survival) and the fish gathered at the surface of the ponds attempting to take oxygen from the atmosphere. Said fish began dying immediately. Hundreds of market-ready fish and brood stock died within days of the discharge. As such, Algix suffered a loss of millions of US dollars.*

[8] The next relevant paragraph is number 10 :

*That on March 28, 2015 Algix experienced a second wave of contamination at said Barton Isles facility wherein the defendant's Appleton Estate released trade effluent into the river system which included Black River, Maggoty River (sic) and Elim River. As a result of the said contamination, Algix's remaining brood stock was completely wiped out.*

[9] On the question of the pleading of causation the claimant states in paragraph 8 (presumably this was in relation to the February 27, 2015 allegation of discharge of trade effluent since it was pleaded without reference to the March 28, 2015 allegation):

*That tests of the water quality taken at the defendant's Appleton Estate discharge point revealed that the trade discharge in the river system did not meet the NEPA standards.*

[10] It appears that in relation to the March 28 allegation of discharge of trade effluent some tests were done. This led the claimant to say at paragraph 12:

*That NEPA's findings as well the (sic) claimant's own investigations by qualified personnel show that the claimant's (sic) operation of the waste water disposal facility at Appleton Estate is in breach of the statutory guidelines governing the disposal of trade effluent/waste disposal water within the island of Jamaica including but not limited to the NEPA guidelines.*

[11] And at paragraph 13:

*That defendant's (sic) disposal practices at its Appleton Estate facility led to the contamination of the natural waters feeding Algix (sic) fish and algae ponds.*

**[12]** The pleading then alleged nuisance and negligence in some detail. What is clear is that the claimant's case is based on the case theory that the defendant breached the NEPA guidelines and possibly others when it released trade effluent into the water ways in the area; that the contaminated water made its way to the claimant's fish ponds and this ultimately led to a reduction in oxygen levels from which the fish died. No one is saying that the fish ingested anything that led to their deaths. The fish were said to have died because of the lack of oxygen. More will be said about how this occurred.

**[13]** The defendant's response is multifaceted. In brief it says:

- (i) Its discharge could not have caused the deaths alleged because:
  - a. its operations are 6 miles upstream from the claimant's property;
  - b. it had a permit from NEPA that allowed it to discharge cane water wash into the Black River and its operations were in keeping with the permit;
  - c. the February 27 discharge of trade effluent was in keeping with its NEPA permit;
  - d. between the claimant's and defendant's operations there are other activities that are likely to have an impact on the river;
  - e. the March 28 discharge arose from a malfunctioning pump which caused overflow and dunder to enter an earth drain and after two days the contents of the earth drain emerged Elim Sheep Bridge;
  - f. it is required by NEPA to conduct tests of dissolved oxygen, pH, temperature and conductivity and to log the results of the test and except for February 25 and 26, the dissolved oxygen levels at the time the tests were done were in keeping with NEPA standards;

- g. the flow of the Black River would result in increase in dissolved oxygen;
- h. the dissolved oxygen levels in the water entering the claimant's property would have been at optimal levels.

**[14]** The defendant also raises the defence of contributory negligence.

**[15]** The pleadings were amended by both sides. The amended particulars of claim now alleges that the claimant's pond where the fish were kept by 'a series of production ponds known as standing ponds receive water by the periodic pumping of water from canals that receive water from the Black River' (para 2). This is contrast to the original particulars of claim that made the broad allegation that waters 'from the Black River, Elim River and Maggotty River run alongside the claimant's property' and the fish farm 'receives waters from said rivers (sic) which enter the property by flow-through fish and algae ponds leading to the claimant's fish breeding/algae producing ponds' (para 2).

**[16]** In respect of the February 27, 2015 allegation of discharge of trade effluent, the claimant now says that the trade effluent was discharged into the Black River (para 5). Initially it was pleaded that the discharge was in to the Maggotty River.

**[17]** In relation to the causation issue, at paragraph 5, the claimant alleges that on February 27, 2015 the defendant discharged trade effluent into the Black River. The consequence was massive loss of fish. Dissolved oxygen levels had dropped below what was necessary for the survival of the fish. The '[s]aid fish began dying immediately.' On this pleading the claimant is seeking make a direct connection between discharge on February 27, 2015 and the fish dying immediately. The court understands this to mean that the fish began dying on February 27 and continued to die.

**[18]** The pleading does not give the impression that there was an intermediate activity between the discharge and the lack of oxygen. The natural meaning of the pleading is that the trade effluent entered the river and that effluent itself directly led to the reduction of oxygen in the river. The court now understands that that is not the proper

understanding but rather that the trade effluent enabled other organisms to be able to consume oxygen and it is this increased oxygen consumption that led to reduced oxygen being available for the fish with the consequence that the fish died.

**[19]** In the same paragraph 5 the claimant adds that contact was made with NEPA and '[u]pon further analysis of the ungoing (sic) situation the nature of the contaminant in the ponds had the broad characteristics of effluent associated with sugar production.' The paragraph ends by alleging that thousands of 'market-ready Tilapia of Basa fry and thousands of fry and fingerlings in the hatchery died and continued to die over the next period of 3 days of the discharge.'

**[20]** At paragraph 8 the allegation is that on March 1, 2015 water samples were taken by Dr Andre Jones for tests and analysis and those tests revealed that the defendant's 'the trade effluent discharged into the river system did not meet the NEPA standards.' The court observes the allegation here does not make any reference to the Black River despite the amended pleading that made the direct allegation that the discharge was in the Black River. The references are now to the river system.

**[21]** In relation to the March 28, 2015 incident the claimant pleads that it experienced 'a second wave of contamination' and the result was that the remaining mature Basa broodstock was completely wiped out' (para 10).

**[22]** On the causation issue the claimant's case is that on March 30 and 31 water sampling was done at the defendant's discharge point and it was found that the defendant's operation 'of the waste water disposal facility at Appleton Estate is in breach of the statutory guidelines governing the disposal of trade effluent/waste water within the island of Jamaica including but not limited to the NEPA guidelines' (paras 10 and 11). This was said to be the conclusion of NEPA's and the claimant's own investigations.

**[23]** According to the claimant's case, some of the mature Basa broodstock must have survived the first discharge otherwise there could be no wiping out of the 'remaining mature Basa broodstock' on March 28, 2015. What caused this wiping out?

The pleadings do not specifically say. What has happened here in relation to the second alleged discharges is the pleading of discharge followed by death of the Basa broodstock and therefore, the argument goes, the second discharge must have been the cause of this wiping out.

[24] With immaterial amendments for present purposes the defendant's amended defence, in essence, remained the same.

### **The claimant's case theory**

[25] As noted much earlier in relation to the first pleading and now in relation the amended pleading the claimant seems to be alleging that there is a direct connection between discharged into the Black River and that discharge led to the fish dying 'immediately.' The case theory has been built on the idea that the defendant's effluent discharge was in breach of NEPA guidelines and other unidentified guidelines and the discharge entered the Black River, then flowed with the river into the claimant's fish ponds, and either before or while in those fish ponds decreased the oxygen available to the fish, hence their death.

[26] Under further enquiry from the court, it became clear that the claimant's case is not that the trade effluent in and of itself reduced the oxygen levels but rather the trade effluent caused other life forms in the river which uses oxygen to propagate and that propagation caused them to use more oxygen and that increased consumption reduced the amount of oxygen available to the fish which died.

[27] The court's understanding of the case theory is supported by affidavit of Dr Andre Jones which was heavily relied on before Batts J when the injunction sought by the claimant was granted. At paragraph 14 of the affidavit dated October 3, 2015, Dr Jones states:

*That I do verily believe that dunder (the main contaminant in the claimant's trade effluent) depletes the levels of dissolved oxygen in water which is fatal to fish farm operations. Dunder is an organic nutrient rich (sic) residue from rum manufacture. This nutrient rich (sic) residue is filled with yeast cells which stimulate increased*

*metabolic activity of different organisms in the river system and deplete oxygen levels in the water. Therefore, "fish would not have the required oxygen to survive," which is supported by low levels of dissolved oxygen.*

**[28]** Nothing in either the initial case or the amended case raised any issue of percolation through the limestone and then into the claimant's fish ponds. The claimant alleges that it and NEPA, separately, conducted tests by taking water samples from the defendant's facility and its facility and based on the findings of the experts the case for the claimant is that the contamination that led to the decrease in oxygen (because it enable other life forms to consume more oxygen thereby depriving the fish of sufficient oxygen) came from the defendant's property into the Black River and this led ultimately to the death of the fish.

**[29]** The claimant now states that this percolation through the limestone possibility only recently occurred to it having regard to the defendant's pleading that the effluent in the sinkhole went to the Elim River and not the Black River. The claimant now wants to call expert geologists to refute this defence and to prove that it is possible for the trade effluent to percolate through the limestone structure, into the Black River and cause sufficient reduction in oxygen in the claimant's ponds with the consequential death of the fish. It is clear that this is a new case theory raising a new possible way of contamination that had not been raised before.

**[30]** This possible case theory was said to arise from a book written in 1997 based on data collected in 1967/68. The claimant's say that it tried to get this evidence by asking to go on to the defendant's property but the defendant was uncooperative. Let this court say that the defendant was within its rights not to permit the claimant and others to come onto its property to do digging and drilling in order to prove this theory. The court wishes to say that every person who holds property including the claimant has the right to say not to persons who wish to enter and such persons cannot enter unless authorised by property owner or by law. No sinister inference can be drawn if a property owner exercises his legal right.



[31] Dr Jones says that he visited the claimant's fish farm on March 1, 2015 at approximately 0800hrs. He also says that he visited the defendant's property. He says that he collected samples at both places for testing which he carried out. His conclusion was that the trade effluent did not meet NEPA standards. At paragraph 12 he makes this clear unambiguous statement:

*Therefore it is clear that the water in the fish ponds was heavily depleted of oxygen which caused rapid death of fish after the February 28, 2015 contamination incident.*

[32] And at paragraph 13:

*That based on my finds, I do verily believe that the fish kill resulted from contaminants present in the feed water coming from Black River (sic) which originated from the trade effluent discharged by Appleton upstream.*

[33] In relation to the March 2015 allegation of discharge he states at paragraph 15:

*That on March 28, 2015 the claimant experienced a second wave of contamination at said Barton Isles facility. On this occasion, Appleton released trade effluent into the Black River and Elim River.*

[34] Paragraph 23 boldly asserts:

*Therefore, it is clear and I do verily believe that the NEPA report indicates that water flowing into Appleton is suitable for aquatic life but the water leaving as Appleton Estate trade effluent is not only unsuitable for aquatic life but in breach of the legal requirements.*

[35] At paragraph 28 there is this allegation:

*On the said map, Algix fish farm is located approximately 6 miles downstream from the Appleton discharge point. From the map, there are no facilities along stream that have the capability to affect the contamination level of water to the extent of a rum factory. I do verily believe that Appleton Estate is the only facility upstream from Algix fish farm which has the capability to affect water levels on such a large scale.*

**[36]** To remove all doubt as what the claimant's case theory was and is before this new-found understanding Dr Jones' states at paragraph 29:

*Based on my findings and NEPA's findings, I do verily believe that Appleton waste effluent did not meet NEPA standards following the contamination incidents on February 28 and March 28, 2015. I do verily believe that, (sic) the massive losses suffered by the claimant following the February 28 and March 28, 2015 contamination incidents were directly caused by high levels of deoxygenated water caused by the presence of Appleton trade effluent in Black River (sic) which directly feeds Algix fish farms.*

**[37]** For the absolute removal of doubt of the claimant's case theory Dr Jones says at paragraph 11:

*Based on my findings, I prepared a report and do verily believe that the waste water effluent that was discharged in the Black River from Appleton Estate is the same water that flows downstream and becomes the feeding water for the Algix fish ponds.*

**[38]** It is beyond question that the claimant's case theory is not dependent on any percolation theory. It is a plain and simple case of uncontaminated water flowing into Appleton, contaminated water leaving Appleton, contaminated water flowing in Algix, the contaminated water is deoxygenated because dunder-rich trade effluent causes organism to thrive with consequential reduction of oxygen available to the fish which then die for want of oxygen.

### **Decision on the application to call geological experts**

**[39]** Mr Hylton QC's primary objection is that this case theory is not the pleaded case of the claimant. The claimant's case, simply put, is that trade effluent in breach of NEPA and other guidelines was put into the Black River from the defendant's property and that discharge led to the death of the claimant's fish by reducing the oxygen available, and further that death began immediately.

**[40]** For this new case theory to be developed in time for trial there would need to be information of the rate of percolation through the limestone, what concentration levels

would be required for the effect to be produced at the claimant's fish ponds after the percolation has taken place, would the effluent degrade as it percolated and on and on. All this when the claimant's case is simply, effluent discharged, the discharge ultimately led to reduced oxygen and that reduced oxygen led to the fish suffocating because of the lack of oxygen.

**[41]** There is this added information. As noted earlier during the submissions and in response to questions from the court it became clear that the claimant's case is not based on a direct reduction of oxygen in the claimant's fish ponds but rather that the effluent itself caused other life forms to propagate and those life forms consumed more oxygen than they normally would have and it is this excessive consumption of oxygen that led to overall reduction of oxygen in the water that led to the fish dying from lack of oxygen.

**[42]** The claimant is quite confident that it can establish what has just been said. The trial is to take place commencing on September 26, 2016 for two weeks. According to Miss Mullings the two proposed experts are available and waiting to be given permission to enter the defendant's property. The court was assured that the expert reports would be ready in short order. It is now July 14, 2016. Not only would the expert report need to be prepared but fairness would demand that the defendant be given an opportunity to seek expert advice on this issue. The defendant would need to be advised on whether this proposed test is feasible, whether having regard to the antiquity of the text and the information on which the text is based whether that information is still reliable, whether the geological formation in the area is the same in 2016 as it was at the time of the text and at the time of 1967/68 data. If this application is granted a report would be produced and that report would detail the test actually done by the claimant's expert and thus it would need to know whether that test was reliable, its standing in the scientific community, whether there are better and more reliable tests and on and on. All this would mean that the defendant would need time to secure this expertise. Even if the defendant does not intend to call any expert witness it would need to have this information in order to determine whether any question would need to be asked of the claimant's experts and what those questions would be.

[43] Both sides have said that they wish the trial to commence on the stipulated date. The time is very short for all this to take place. This is an additional factor to be taken into account.

[44] The court does not see how this new case theory can be accommodated in time for the September 26 trial deadline. When the court suggested that the trial date be vacated the claimant was taken with the suggestion and neither was the defendant.

[45] Having regard to the pleaded case this new case theory is not necessary for the claimant to prove its case. As things presently stand the proposed expert evidence is not reasonably required to resolve the issues as they have been joined in the pleadings. In light of Dr Jones' expected testimony the exclusion of these geological experts does not harm the ability of the claimant to present its case on the issue of causation.

[46] The court refuses the application to call the geological experts on the ground that their evidence is not reasonably required to resolve the proceedings justly.

#### **Claimant's application to call other experts**

[47] The claimant has applied to call Mr Oswald Chinkoo and Mr Keith Jones. Both are employees of NEPA. It is said that they 'are needed to provide a full and detailed breakdown of water composition, water quality and analysis of the trade effluent released into the Black River.'

[48] Mr Maurice Reynolds who provided an affidavit in support of the appointment of these two persons stated that Mr Chinkoo was 'one of the collectors/analysts of the water samples taken from the Black River which were analysed and results shown in the findings of [NEPA]' (para 2 (b) of affidavit). Although different words are used the substance is the same in respect of Mr Jones (para 2 (d) of affidavit).

[49] Mr Hylton objects on two main grounds. Firstly, he objects to the witnesses being given expert status. Secondly, he says that there is no objection to the data produced from the samples collected by these persons.

[50] The court is of the view that these two persons do not need to be designated as experts if they wish to speak about their visits to the various sites, the samples they collected and what they did with them in terms of transportation, storage and the like. As the court understands the case so far there are competent experts already appointed who can speak to the significance of the findings from NEPA's report. One expert for the claimant, a Dr Andre Jones claims to have taken his own samples. Nothing is therefore to be gained by having these persons appointed as experts to give the same evidence already contained in a report which is not disputed and other persons have been appointed on application by the claimant and these persons can provide the proposed evidence.

[51] There is one other matter. The claimant was not able to secure the résumé of both proposed witnesses from them. The claimant resorted to a download from a social networking site known as LinkedIn. The court wishes to say that this evidence is not admissible for obvious reasons. It cannot be attributed to any of the proposed witnesses and no one has vouched for its authenticity.

[52] There is an application for an order compelling the two proposed witnesses to prepare expert reports and answering questions in relation to the reports. This was an ancillary order but in light of the court's decision that application is refused.

[53] The court refuses the application to appoint Messieurs Oswald Chinkoo and Keith Jones as experts because their designation as experts is not reasonably required to resolve the issues of fact between the parties. Other experts have been appointed who can deal with the scientific matters in issue between the parties.

#### **Should John Matthew be appointed as an expert?**

[54] Mr John Matthews is described as a man with an MBA with a concentration in Finance and Accounting/Accountant. According Mr Maurice Reynolds who provided affidavit support for the application to appoint Mr Matthews as an expert his expert assistance is needed to quantify the claimant's losses. It is said that he 'has worked for various large and reputable businesses in the field of financial analysis and forecasting'

which is said to incorporate 'creating and verifying financial projections among other things' (para 2 (a) of affidavit dated May 3, 2016).

**[55]** The summary attached to Mr Matthew's curriculum vitae states that he is a '[s]trategic financial and operations executive skilled at creating and leveraging operational efficiencies to deliver forward thinking, customer centric, strategic growth.' He says that he has expertise in 'manufacturing, technology and service industries primarily in B2B environment' as well 'building and growing highly effective teams that deliver results and using a balance of analytical skills and creative thinking with a bias for action.' Thereafter he lists what he regards as his key skills and then comes his professional experience.

**[56]** Examining the claimant's amended particulars of claim it will be seen that paragraph 30 lists what is described as the particulars of special damage as well as physical damage. Under special damages, the types of loss stated are:

- (a) loss of market ready Tilapia;
- (b) basa broodstock mature males;
- (c) basa broodstock mature females;
- (d) fish spawned between February 28 and March 28, 2015;
- (e) Tilapia sex reversed fry up to 30g;
- (f) Tilapia sex reversed fry up to 10g;

**[57]** Paragraph 33 states that the claimant has suffered economic loss of US\$49,575,262.40. It is pleaded that the 'economic loss was occasioned by physical damage done by the defendant to the waters of the Black River and to the aquatic life on the farm' (para 33). The claimant comes by this figure by seeking to project earnings into the years 2016, 2017 and 2018. The pleading do not make clear how this conclusion was arrived but submissions suggest that the basis of these projections is that there is a loss of profit based on the off spring current fish may have produced and

that the off spring might have earned had the parents not died. It is safe to say that if this is the basis of the claim that that type of loss is not recoverable.

[58] The relevant case to decide what damages are recoverable is **Spartan Steel Alloys v Martin** [1973] QB 27. The facts are helpful. The defendants dug up a road and while doing so damage an electrical cable that supplied power to the claimant's business with the result that there was power failure. When the power failure occurred, the claimant's whose factory operated twenty hours per day, were melting metal and the process required a constant supply of electricity so that the proper temperature could be maintained. The consequence was that the metal that was in the furnace at the time was not properly melted. The resulting metal was much decreased in value. The claimant sought to recover the physical damage, the loss of profit if that particular metal had been properly melted. There was a claim for loss of the four more melts that would have taken place had there not been the damage to the power supply cable. The trial judge permitted recovery for all three types of loss. On appeal the loss of profit for the other four melts was disallowed.

[59] The majority of the Court of Appeal of England and Wales held that the test for recovery is whether as a matter of policy, economic loss should be recovered. The Court of Appeal of Jamaica has also taken a restrictive view of recovery of what is called pure economic loss (**S & T Distributors Limited and another v CIBC Jamaica Ltd** SCCA No 112/04 (unreported) (delivered July 31, 2007)). Harrison P said at page 11 that the 'tort of negligence generally envisages a breach of duty owed causing personal or physical damage to the person to whom that duty is owed' and that '[e]conomic loss is more readily seen as arising in breach of contractual relationships.' Harris JA stated at pages 37 and 38 that the concept of a duty of care 'embraces the avoidance of injury to person or property and in the case of **Hedley Byrne v Heller & Partners** [1963] 2 All ER 576, the duty also extends to economic loss.' Her Ladyship noted that there are 'restrictions as to the extent to which a claimant may recover damage for financial loss' and further that the 'court is obliged to place restraint on liability for economic loss arising from a defendant's negligence.' Harris JA's analysis led to her conclusion that the 'authorities show that liability for economic loss is

restricted to loss suffered by a claimant, through negligent misstatement or advice, who relies on the accuracy of information, and advice, from a party who is in position (sic) to give such advice or information as show in [**Hedley Byrne and Smith v Eric**].’

[60] It is important to note that the Court of Appeal of Jamaica did not refer to **Spartan Steel** but nonetheless it is obvious that their Lordships’ approach was consistent with that case.

[61] The unambiguous legal position is that the damage done to the metal that was being melted was recoverable. The profit lost from that metal was recoverable but the loss of profit arising from the inability to carry out four more meltings was not. Reasoning by analogy, that would mean that in this case, what would be recoverable would be:

- (a) the damage (meaning death) to the fish that died;
- (b) loss of profit arising from the market-ready mature fish that died and not the immature fish unless it is being said that the claimant was also in the business of using the immature fish for trading or sale purposes without them being brought to maturity for sale as mature fish;
- (c) the unborn offspring of current fish and fish that may have been spawned in the future is not recoverable since this would be pure economic loss.

[62] Miss Georgia Buckley had submitted that in principle economic loss arising from damage to property and pure economic loss were recoverable and it would be decided by the trial judge in any particular case whether pure economic loss was recoverable in any given case. The court is constrained to disagree with this proposition since the Jamaican Court of Appeal has clearly indicated what the position is as far as Jamaica is concerned.

[63] It seems to this court that Mr John Matthews’ expertise was sought primarily to deal with the projection of losses which this court has now decided is not recoverable. In



paragraph 2a of Mr Maurice Reynold's affidavit the skill of Mr Matthews that was highlighted was he creates and verify financial projections. On this premise Mr Matthews' evidence is not reasonably required to resolve any issue before the court because this court has decided that as a matter of law pure economic loss is not recoverable.

**[64]** Proof of the losses that are recoverable do not require the expertise offered by Mr Matthews. The claimant ought to be able to say in relation to the allegation of damage to fish and loss of profit:

- (a) the quantity of mature and/or immature fish that died;
- (b) the cost of acquiring and replacing those fish;
- (c) the contracts that were to hand that could no longer be fulfilled because of the defendant's alleged breaches.

**[65]** The application to call Mr John Matthews is refused. This application was part of the application to call Messieurs Chinkoo and Jones and is to be treated as part of the same application.

### **Application for specific disclosure**

**[66]** The defendant is seeking an order for specific disclosure of information from the claimant. Miss Melissa McLeod provided affidavit evidence in support of the application. She stated that on March 11, 2016, Batts J made an order for standard disclosure to be given by April 22, 2016. On April 22 the claimant served the list of documents in compliance with Batts J's order. On May 5, 2016, the defendant's lawyers wrote to the claimant's lawyers to say that the list of documents were not in full compliance with the Civil Procedure Rules ('CPR'). The letter included a list of documents that the defendant wanted to see. The claimant's lawyers responded by saying that they were in the process of amending their disclosure form in order to address the issues in the May 5 letter. It closed by promising to deal with the missing items within the next two weeks. The defendant requested, in some instances, more legible copies of some documents

and, in other instances, disclosure of documents relevant to the proceedings. There was further communication between counsel for both sides and May 17, 2016, the defendant's lawyers said that they had instructions to apply for an order for specific disclosure if the parties were not able to agree on the disclosure of specific documents.

**[67]** The application was filed on May 25, 2016. The defendant alleges that on May 25 the claimant only provided one of the documents requested. It was amended. The amended application seeks specific disclosure of:

- (a) the certificate of analysis in relation to the collection of samples from the Algix Aquaculture Inlet on March 30, 2015 mentioned and referred to in the document entitled 'PMA Branch Report on Samples Collected, ALGIX Complaint of Poor Water Quality from the Black River, St Elizabeth on 30<sup>th</sup> March 2015, investigated on 30 & 31 March 2015' dated May 11, 2015;
- (b) the table of losses and table of economic losses as pleaded in the claimant's amended particulars of claim;
- (c) the sums claimed for 'trucking fresh water to the facility'. 'cleaning the contaminated water' and for 'expert time and report etc' as pleaded in the claimant's amended particulars of claim;
- (d) records showing the nature, number and type of fish, fry, fingerlings and/or broodstock imported, raised and/or purchased, and sold by the claimant over the period 2013/2016;
- (e) contracts and/or any form of agreements between the claimant and any third party for the claimant to supply fish, fry, fingerlings and/or broodstock and/or other related fish products entered into during the period 2013-2016;
- (f) the claimant's financial records, including but not limited to audited and unaudited financial statements such as profit & loss accounts, balance

sheets and statements of income and expenditure for and over the period 2013 – 2016.

- (g) any permits and/or licences granted to the claimant and any applications for any permits and/or licences by the claimant for the import and/or export of fish, fry, fingerlings and/or broodstock;
- (h) any permits and/or licences and any applications for any permits and/or licences relation to the extraction of water from the Black River and/or the discharge of effluence from the claimant's fish farm
- (i) any document showing the volumes of each of the ponds on the claimant's farm and/or the water surface area for the ponds and estimate of their typical/average depth;
- (j) the records of the inflow volumes to the claimant's farm per unit volume ( $\text{m}^3 \text{d}^{-1}$ ) and the flow rate data for the period 2013-2015;
- (k) any documents containing the claimant's water quality monitoring data and trade effluent data for the period 2013 – 2015;
- (l) any document showing details of the analytical methods used to generate the monitoring data requested above, including but not limited to the identity of the laboratory doing the analyses and any quality control data that show that the methods used give true and adequate precise results.

**[68]** On June 17, 2016 the claimant provided a supplemental list of documents. Presumably this was the amendment promised by the claimant's lawyers. The defendant says that this latest disclosure is still inadequate because there is no disclosure of (b) to (f) in the immediately preceding paragraph.

**[69]** The defendant's lawyers say that in relation to each of the items listed at (b) to (h) in paragraph 67 the claimant's response was as follows

- (b) expected week after next;
- (c) by Tuesday;
- (d) by Tuesday;
- (e) week after next'
- (f) not sure;
- (g) by Tuesday;
- (h) by Tuesday;
- (i) the claimant is gathering the data as far as available and will advise by next week Tuesday.

**[70]** The claimant promised to say whether the claimant had received any licences or permits for extraction of water from the Black River 'by Tuesday.' The expression 'by Tuesday' meant Tuesday, June 22, 2016 and the expression 'week after next' meant July 1, 2016. To date these promises have not been met and therefore the defendant's say, an order for specific disclosure is appropriate.

**[71]** The claimant says that it is making every effort to disclose all documents in its possession relating to this matter. It also says that the documents are disclosed as they become available.

**[72]** The claimant makes that point that it has disclosed the documents that are in its possession and is still searching through its archives in order to locate other material that should be disclosed. There is the statement that the claimant has provided the defendant with boxes of documents and documents via compact discs and thumb drive.

**[73]** The claimant concludes its submissions by saying that it has substantially disclosed all material and are awaiting further documents which will be disclosed as they become available.

**[74]** The court observes that what has been stated as the claimant's position comes from the written submissions of the claimant's attorneys at law. There was no reference to any affidavit evidence. The court interprets this to mean that the claimant does not deny the specific instances of non-disclosure pointed out by the defendant. Also the written submissions did not say whether the disclosure made so far included the specific items alleged by the defendant not to have been disclosed. In light of the lack of specificity on the claimant's part and the specific assertions of non-disclosure made by the defendant, the court will conclude that Miss McCloud's affidavit is accurate.

**[75]** Under Part 28 of the CPR once the order for standard disclosure is made the party to whom it is addressed is under a duty to disclose documents which are or have been under that party's control (rule 28.2). The documents that must be disclosed are those 'directly relevant' to the matters in question in the proceedings' (rule 28.4 (1)). When giving standard disclosure a party is required to make 'a reasonable search for documents that are directly relevant to the matters in question' (rule 28.5 (1)).

**[76]** Part 28 also makes provision for specific disclosure. Rule 28.7 indicates the criteria for ordering specific disclosure. The 'court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs' (rule 28.7 (1)). The court must have regard to '(a) the likely benefit of specific disclosure; (b) the likely cost of specific disclosure; and (c) whether it is satisfied that the financial resources of the party against whom the order would be made are likely to be sufficient to enable that party to comply with any such order' (rule 28.7 (2)).

**[77]** In this case, the claimant is not suggesting that it has any financial difficulty meeting the specific disclosure request. There is no material to suggest that meeting a specific disclosure order would be difficult financially. It is not being said that the documents are not to be disclosed. Let it not be forgotten that in the amended particulars of claim has more details than the original particulars of claim. In the original particulars of claim the claimant stated that its economic loss was US\$23m. This was how matters stood on December 4, 2015.

**[78]** By February 26, 2016 when the amended particulars of claim was filed the unit value of each type of fish lost was stated. This information generated what was called 'Particulars of Special Damage/physical damage at farm (sic)' which indicated that the sum being claimed was US\$3,975,040.00. There was pleaded the sum of JAD\$2,300,000.00 for trucking fresh water to the facility. The claimant pleaded that it spent JAD\$1,400,000.00 for cleaning the contaminated water. There is a claim for fees of JAD\$1,200,000.00 for retaining experts to 'detect the source of damage, damage quantification, providing general legal advice on the issues arising' (para 30 of amended particulars of claim). There is even a table of economic losses which bears the grand total of US\$49,575,262.40.

**[79]** The claimant's pleadings do not identify it as a company registered in Jamaica but having regard to its name the court is prepared to assume that it is a registered company. Unless told otherwise this court will assume that it is operating lawfully which means that it has a TRN, a GCT number, makes GCT returns and tax returns and is fully compliant with other government regulations governing its operations. This means that it ought to have been keeping records or was in fact keeping records. By February 2016 the claimant was able to make a special damage claim, something it did not do in the original particulars of claim. The inference is that in February 2016 the claimant had sufficient records to quantify its special damage. Having regard to the law relating to proof of special damages it is extremely unlikely that the claimant is relying on the 'hand cart man' approach to the proof of the special damages.

**[80]** In the special damages portion of the claim the claimant is seeking recovery for damage done to market ready fish, mature females, mature males, fish spawned in a particular period and the like. The defendant is seeking disclosure in respect of the sums claimed for trucking water, cleaning the facility and the expert. The defendant is seeking disclosure in respect of nature, number and type of fish, the contracts and/or agreements between the claimant and third parties for the supply of fish, fry, fingerlings, broodstock and other related fish products. In other words, the defendant is seeking an order for specific disclosure of documents that formed the basis of the special damages pleading which were pleaded from February 2016.

**[81]** The certificate of analysis is relevant to the issue in dispute, namely, whether the alleged discharge of trade effluent contributed to the death of the fish.

**[82]** The claimant produced an extensive table of losses and table of economic losses. It is not unreasonable to seek specific disclosure of the documents that influenced the compilation of the table. They are clearly relevant to the quantum of damages.

**[83]** The documents related to the trucking of fresh water to the facility and the cleaning of contaminated water and for experts are obviously relevant to the quantification of special damages.

**[84]** The contracts or agreements between the claimant and third parties are relevant to determine the alleged economic loss suffered by the claimant.

**[85]** The defendant is also seeking specific disclosure of various financial records such as profit and loss accounts, balance sheets and statements of income and expenditure for the period 2013 – 2016. The reason for this is plain. The balance sheet shows the financial picture of the company at a particular date. Where the company has been in operation for some time as the claimant has been the 2013 balance sheet would show what the position of the company was in 2012. Included in the balance sheet are assets and liabilities. On the asset side of the balance sheet there would be inventory and other assets which in this case would mean fish and fish related products. The balance sheet would also show the value given to the assets. The accounts receivable, that is money owed to the claimant, would also be shown. Having regard to the claimant's business, one could deduce the value of sales done by the claimant. This kind of information would enable the defendant to test the accuracy of the claimant's claim for special damages for the loss of fish.

**[86]** The income statement gives information about the making and selling activities of a business over a period of time. It tells what was sold, what was the cost of producing the goods or service sold, the cost of selling and general expenses for the period. When

all the arithmetic is done what is left is the income for the period in question. The basic equation is sales – (costs and expenses equals) income.

**[87]** The defendant is seeking disclosure of permits and licences relating to import/export of fish and related products. This is relevant to the damages allegedly suffered by the claimant.

**[88]** The documents relation to licences for extracting water from the Black River and discharging effluent are relevant.

**[89]** The documentation for the volume and depth of the ponds are relevant to the question of how much oxygen would be in the water at the material time and what the concentration of trade effluent would need to be for the effect contended for by the claimant to occur. Also there is a context over whether the water would oxygenated en route from the defendant's property down to the claimant's ponds.

**[90]** It is the view of this court that the criteria for special disclosure have been met. The information sought is necessary to dispose of the claim fairly because huge sums are being claimed and the information sought would place the defendant and the court of trial in a position to assess the strength of the claims. The likely benefits are self-evidence. The defendant and the court of trial would be able to see whether there is a proper basis for the losses claimed. There is no evidence from which it can be inferred that the claimant's financial resources are such that it would have difficulty obeying the order.

**[91]** The order for specific disclosure is granted. It has been noted before that the trial is to start on September 26, 2016. The claimant asserts that it is in substantial compliance with the order of Batts J. This is disputed by the defendant. At this point the court need not resolve this dispute. What the court will say is that the claimant must comply with the specific disclosure order not later than midday Friday, August 19, 2016. The sanction specified in rule 28.14 (1) applies to this order.

**[92]** Costs of the various applications to be costs in the claim.