[2014] JMSC Civ. 147

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011 HCV 01482

BETWEEN	**JEAN BLACKSTOCK**	**CLAIMANT**
A N D	**DIGICEL (JAMAICA) LTD**	**DEFENDANT**

Jacqueline Samuels-Brown QC, and Suzan Phillips, instructed by Jacqueline Samuels-Brown QC, for the claimant

Alexander Williams and Christian Tavares-Finson, instructed by G. Gawaine Forbes of Usim, Williams and Company for the defendant

HEARD: May 12, 13 and 14, 2014 and September 16, 2014

IN OPEN COURT

EVIDENTIARY RULING AND RULING ON AN ASPECT OF THE DEFENDANT'S DEFENCE AND RULING ON THE DEFENDANT'S LIST OF DOCUMENTS, DISCLOSURE, HEARSAY, AGREED DOCUMENTS, EVIDENCE ACT, LIST OF DOCUMENTS, RULES 28.1, 28.2, 28.4 AND 28.14 OF THE CIVIL PROCEDURE RULES (CPR), SETTING OUT CASE, RULES 10.5 (3), (4) AND (5) OF THE CPR

Anderson, J

[1] These rulings are being made and are made in writing as promised, in response to submissions made before this court, by the respective parties' counsel, during a trial which is presently ongoing and which, at this stage is only now at the stage wherein the claimant is presently providing to this court, her evidence under cross-examination.

[2] In this claim, the claimant has alleged that she was wrongfully dismissed by the defendant and also, has alleged that she was unlawfully deprived of the value of her share options in the defendant as at April, 2007, since the defendant had, contrary to

that which she has also alleged, was an agreement between herself and the defendant, cashed out her share options in the defendant, as at October, 2005. As at that time, the claimant was paid the sum of US$567,000.00 – as being the then market value of her share options. There exists no dispute between the parties, either as to the month and year when such payment was made, or as to what such payment was made for, or as to the quantum of the said payment.

[3] It is though, also the claimant's contention, as has been specifically averred by her in paragraph 18 of her particulars of claim, that – '*In or about April 2007, the defendant company exercised its rights to cash in the share options of all participating employees. At this said date the claimant's share options would have been valued at US$3,300,000.00 and the claimant accordingly claims US$2,733,000.00, being the difference between the amount paid to her in October 2005 and the amount paid, to other employees in April 2007*.'

[4] This court had enquired of the claimant's counsel, during the course of her submissions to the court, on the matters in respect of which these reasons for ruling pertain, why it was that the claimant had decided to make claim for the value of her shares as at April, 2007. This court enquired as to same, because, it is the legal position of defence counsel, that said month and year are apparently arbitrary and bear no relevance whatsoever to this particular case, except to the extent that the same is the month and year chosen by the claimant as being the month and year when her share options should have been valued and cashed out.

[5] Interestingly enough, it is part and parcel of the claimant's case, that the agreement as between herself and the defendant, was that the claimant's participation in the defendant's share option scheme would have been extended beyond her separation from the company and that said extension did in fact take place. See in that regard, paragraph 15 of the claimant's particulars of claim. The claimant, it should be noted also, resigned from the defendant, allegedly due to her having been forced to do so as a consequence of the sexual harassment which she claims that she had to

undergo, at the instance of the then Chief Executive Officer of the defendant – Mr. Seamus Lynch, this between 2002 and 2004. The claimant has therefore, also contended that she was 'constructively dismissed' by the defendant and that the said dismissal was wrongful and has claimed damages for same. The claimant resigned from the defendant in or about March of 2004.

[6] In evidence before this court as given thus far, the claimant has given evidence, during cross-examination, in response to a suggestion which was made to her by defence counsel, that being that no representation was made to her by Denis O'Brien- the then Chairman of Digicel, or by Leslie Buckley, the then Vice-Chairman of Digicel, that her share options would be maintained indefinitely. In response to that suggestion, the claimant's answer was, 'No, I, disagree with qualification.' Accordingly, it is this court's understanding at this time, that essentially, the claimant's evidence is that in respect of the share option agreement which the claimant had entered into with the defendant, whilst she was employed by the defendant, it was agreed as between herself and Digicel, that said option would have remained available to her indefinitely and certainly, would not have been cashed out at a time which was not mutually agreed to, as between herself and Digicel. There is also though, evidence which has been led from the claimant, once again during cross-examination, that under the terms of the share option agreement, which agreement was entered into evidence as an exhibit, following upon the parties having accepted same as an agreed document, that the Board of Directors of Digicel was the plan administrator and that the decision of the plan administrator was to be final and binding upon all persons concerned therein.

[7] In response to this court's queries of the claimant's counsel, as to why the claimant chose to claim for the value of her shares in the defendant's share option plan, as of April, 2007, this court was informed by attorney Samuels-Brown, QC, that that date was a choice which the claimant chose to make and that it was open to this court, at the close of the claimant's case, to reject that date as being the appropriate date at which the claimant's shares in the defendant, should be valued. This court also asked of the claimant's counsel, whether or not it would not have been more appropriate for

the claimant to have sought to recover for (if she could have so recovered) the value of her shares in the month when this claim was filed, less the sum from her share values, earlier paid out to her, after her shares were cashed out. This court was, in response thereto, informed by attorney Samuels-Brown, QC, that said date was another option that had been available to the claimant, but she (the claimant), had chosen to exercise the option of claiming for the value of her shares at April, 2007, since that was when, according to the claimant, the defendant had cashed out the shares of other employees at similar job levels within Digicel, as a result of which, she (the claimant) was informed by those employees (the names of whom have not at all, as yet, been provided to this court by the claimant, either in her statement of case, or in her evidence), that the value of her shares in Digicel, as at April, 2007, was US$3,300,000.00. This is therefore the reason why the claimant is, in this claim, claiming that she has lost the sum of US$2,733,000.00, since that sum is the difference between the cash value of the shares which she received in October 2005, when the shares were cashed out (US$567,000.00) and what the shares were allegedly valued at in April, 2007 (US$3,300,000.00).

[8] It is also of importance to note at this juncture, that according to the share option plan rules, an expert was required to be appointed by the plan administrator – this being Digicel's Board of Directors, to determine the share value of Digicel and that share value was to have been determined 'as of the date the plan administrator exercises its right hereunder' – the 'hereunder' being in reference to paragraph 14 of the rules of the share option plan, which enable the plan administrator to, at any time, in its sole discretion, exercise their right to cancel a share option, in whole or in part, in consideration for a cash payment per cancelled option share.

[9] The claimant has filed no expert report in respect of this claim, nor has the claimant requested any information from the defendant, as is permissible under Part 34 of the CPR, as to the value per share of Digicel's shares, as at April of 2007. Additionally, the claimant intends to call no witness other than herself to testify in support of her claim. Furthermore, the claimant has led no evidence thus far and it has

not all been disclosed in the claimant's particulars of claim, how many shares the claimant had in the defendant, either in October, 2005, or in April, 2007, or for that matter, at any other time.

[10] All of the aforementioned background information is of critical importance if one is to fully understand, the respective matters which now await this court's ruling, these being matters in respect of which, submissions were made orally, by the respective parties' counsel. Those respective matters are specified in paragraphs 11 to 14, 30 and 31 of these reasons for rulings.

[11] The claimant has contended that the defendant's defence at paragraph 18 is deficient and not in keeping with the relevant rules of court and should be struck out. In particular, the claimant's counsel – Mrs. Samuels-Brown, QC, has contended that the averment as made in that paragraph of the defence, runs afoul of **rule 10.5 (3) and (5) of the Civil Proceduure Rules (hereinafter referred to as 'the CPR')**.

[12] Paragraph 18 of the defendant's defence, constitutes the defendant's response to paragraph 18 of the claimant's particulars of claim, the wording of which was earlier quoted in paragraph 18 of these reasons for rulings. In that paragraph, the defendant has stated as follows –

> *'In answer to paragraph 18 of the particulars of claim, while the defendant admits that in April 2007 it did exercise its right to cancel the share options of all of its employees paragraph 18 is otherwise not admitted. The defendant puts the claimant to strict proof of the other allegations contained herein, particularly the alleged value of the claimant's share options and further states that the plan did not entitle the defendant to a calculation of the values of her share options an April 2007 valuation.'*

[13] This court has pointed out to counsel for the defendant – attorney Alexander Williams, that there exists an error in that paragraph of the defence, this insofar as that paragraph refers to the plan as not having entitled 'the defendant' (highlighted only for emphasis) '*to a calculation of, the values of her share options …*' Clearly, the reference

to ‘defendant’ at that point in that paragraph, should instead have been a reference to ‘the claimant.’ This court will treat with that paragraph of the defence, with that understanding, since undoubtedly, there could hardly be any prejudice occasioned to the claimant by this court doing so, bearing in mind that defence counsel – attorney Alexander Williams, accepts same as being an error and can, at any stage of the trial, apply for that paragraph to be amended to that extent, in which event, it seems highly probable that leave to so amend, would be granted by this court.

[14] The claimant is contending that what has been stated by the defendant in paragraph 18 of its defence, offends against **rules 10.5 (3), (4) and (5) of the CPR**. Firstly, on this point, it is readily recognizable, from the wording of **rule 10.5 (4)**, that it has no applicability whatsoever, to the present situation as regards paragraph 18 of the defendant’s defence.

[15] One only needs to carefully consider the wording of rule 10.5 (4) to recognize this. That wording is as follows –

> *‘Where the defendant denies any of the allegations in the claim form or particulars of claim – (a) the defendant must state the reasons for doing so and (b) if the defendant intends to prove a different version of events from that given by the claimant, the defendant’s own version must be set out in the defence.’*

That which has been averred by the defendant in paragraph 18 of its defence, does not in any way, constitute a **denial** of anything that has been averred by the claimant in paragraph 18 of her particulars of claim. A distinction must always be drawn by legal practitioners in particular, between a denial and ‘a non-admission,’ or in other words, a ‘refusal to admit.’ Certainly, **rule 10.5 of the CPR** has clearly drawn that distinction. It was not alleged in paragraph 18 of the claimant’s particulars of claim, or in any other paragraph of that document, that the claimant was entitled, when her share option was cashed out, to have had same valued as at April, 2007. Thus, in the defence, at paragraph 18, the defendant’s averment that the plan did not entitle the claimant to a calculation of the values of her share options as an April, 2007, valuation, clearly was

not an averment which ought to be understood by anyone as amounting to a denial in law, of any of that which was averred, by the claimant in paragraph 18 of her particulars of claim.

[16] It is instead, proferred, undoubtedly, as the reason for the defendant's resistance to certain averments made by the claimant in paragraph 18 of her particulars of claim. As **rule 10.5 (5) of the CPR** requires –

> *'Where, in relation to any allegation in the claim form or particulars of claim, the defendant does not – (a) admit it or (b) deny it and put forward a different version of events, the defendant must state the reasons for resisting the allegation.'*

Clearly, the defendant has not fully complied with **rule 10.5 (5) of the CPR**, insofar as its averments in paragraph 18 of its defence are concerned.

[17] **Rule 10.5 (3) of the CPR** provides that:

> *'In the defence the defendant must say – (a) which (if any) of the allegations in the claim form or particulars of claim are admitted; (b) which (if any) are denied; and (c) which (if any) are neither admitted nor denied, because the defendant does not know whether they are true, but which the defendant wishes the claimant to prove.'*

[18] There is no doubt that paragraph 18 of the defendant's defence, is only in partial compliance with **rule 10.5 (3) (c) of the CPR**. The same is only in partial compliance therewith, insofar as in that paragraph, the defence is making it clear that the claimant's assertion as to the value of her share options in Digicel as at April, 2007, being US$3,300,000.00, is neither being admitted nor denied and that the claimant is being put to proof thereof. The defendant may very well be entitled to put the claimant to proof of that assertion as to her share values as at that particular date. That though, would and could only be so, if the defendant was not aware of said values, or in other words, if the defendant did not have, as at the date when the defence was filed, knowledge of same. This is why, if the defendant puts the claimant to proof of an allegation, as the very wording of **rule 10.5 (3) (c) of the CPR** makes clear, it can only

be that this is being done because the defendant does not know whether or not the said allegation is true.

[19] If, on the other hand, the defendant accepts the allegation, then the defendant must admit same. If the defendant expressly denies the allegation, the defendant must not only so state, but, must state the reason (s) for that denial and furthermore, if the defendant intends to prove a different version of events from that given by the claimant, the defendant's own version must be set out in the defence. **Rule 10.5 (4) 0f the CPR** would be applicable in such a circumstance. Furthermore, if, after having filed the defence, the defendant were to become knowledgeable of information which it did not know of prior to the defence having been filed, it would then be incumbent on the defendant to file an amended defence, if that which is stated in the defence, needs to be corrected and such amended defence may then contain admissions or denials which were not previously made.

[20] All of this is part and parcel of the process of full disclosure, so that an opposing party cannot be taken by surprise at trial, as each party will, at trial, know with a fair degree of precision, what is the case of the other side, which has to be met. This is also the reason why, as a general rule, it is the litigant in person who is to sign to the defence, just as the particulars of claim and is also, to certify same as being truthful to the best of that litigant's knowledge, information and belief.

[21] In respect of the matter now at hand, the defendant has not, in its defence, as it ought to have, in paragraph 18 thereof, as a means of properly requiring the claimant to be put to proof of her assertion that in April of 2007, her share interest in the defendant was valued at US$3,300,000.00, stated that it does not know whether said value is true or not. This would have been the only reason which could properly be relied on by the defendant if the defendant properly wished to put the claimant to proof of that allegation. **Rules 10.5 (3) and 10.5 (5) of the CPR** have been expressed in mandatory terms, but the question must be answered – Does the failure to fully comply therewith, render paragraph 18 of the defence entirely invalid, such that said paragraph should be struck

out of the defence? The claimant's counsel has asked this court to do just that. This court though, will not accede to that request, as this court does not believe the same to be one which is firmly grounded in law.

[22] **Rule 26.3 of the CPR** makes clear the powers of the court, on an application to strike out part of a statement of case. The term 'statement of case' has been defined in the CPR, as referring, *inter alia*, to the defence. Whilst **rule 26.3 (1) (a)** does entitle this court, in the exercise of its discretion, to strike out part of a statement of case, if it appears to the court that there has been a failure to comply with 'a rule' (this no doubt referring to a rule of court), clearly, this court must always consider any application to strike out part of a statement of case, extremely carefully, taking into account the overall interests of justice to the opposing litigants, before deciding one way or the other as to same.

[23] Striking out, in general, should only be utilized by the court, as a last resort, particularly in circumstances wherein, by means of amendment of the relevant portion of the offending party's statement of case, the offending portion of that party's statement of case, can appropriately be rectified without any injustice to the other side and without any irreparable prejudice to the opposing party. To this court's mind, the circumstances of and the extent of non-compliance with **rules 10.5 (3) (c) and 10.5 (5) of the CPR** by the defendant, are such that an amendment of that paragraph should be permitted by the court, so that the defendant can, by means of such amendment, ensure that the requirements of those rules of court are met, with respect to that paragraph of the defence. In addition, by means of that amendment, the defence can also correct the wrong reference to the 'defendant' in that paragraph – as has already been noted by this court, in these reasons for rulings.

[24] **Rule 26.9 read along with rule 20.4 of the CPR**, entitles this court to permit such amendments to be made at this stage. **Rule 20.4 of the CPR** sets out the power of this court to permit amendments to be made to a party's statement of case, whilst **rule 26.9** permits this court to rectify any procedural error, such as, for instance, a

failure to comply with a rule of court and the consequence of such failure to comply, has not been specified in any rule of court. This court can, in such a circumstance, make an order to put matters right and can do so, on or without an application by a party.

[25] It may be considered by someone who reads the wording of **rules 10.5 (3) (c) and 10.5 (5) of the CPR** that since such wording has been framed in mandatory terms, with the use of the word 'must,' the terms of that rule of court shall be applied in such a way by this court, that if there has been a failure to comply with same, then such failure renders that which has been done, a nullity, such that the same has to be struck out by this court. If though, that were so, in all cases, then why is it that the provisions of **rule 26.3 of the CPR**, which addresses the power of this court, in appropriate circumstances, to strike out part of a statement of case, are set out in discretionary terms? Clearly, the failure to comply with a rule of court in the drafting by a party of that party's statement of case, should not automatically result in such party's statement of case, or for that matter, any offending portion of that party's statement of case, being struck out by the court. If it were otherwise, then the provisions of **rule 26.3 (1) (a) of the CPR** would have been framed in mandatory terms. That though, is not in fact what has been done. As such, this court can utilize the provisions of **rule 26.9 (3) of the CPR** and make whatever order (s) it thinks fit, so as to bring the offending party's statement of case into full compliance with the relevant rules of court.

[26] Although **rule 10.5 (3) (c) of the CPR** therefore, has been framed in seemingly mandatory terms, the effect of non-compliance therewith, must always be viewed by this court and applied in the context of the rules of court in their entirety. In other words, there can be no 'hard and fast rule' that in respect of rules of court wherein the word 'must' is used, the failure to comply therewith, renders that which has been done, a nullity. Jamaica's highest court, the Privy Council, has often applied this approach to the interpretation of mandatory terms such as 'shall' and 'must' when used in statutes. See: **Wang v Commissioner of Inland Revenue** – [1994] 1 WLR 1286 (PC) and **Charles (Herbert) v Judicial and Legal Service Commission and another** – [2002] 61 WIR 471. Our Court of Appeal has also adopted the same approach in at least one

case. See: **HB Ramsay and Associates Ltd. and Caledonia Hardware Ltd**. **and Harold B. Ramsay and Janet Ramsay and Jamaica Redevelopment Foundation Inc. and The Workers Bank – Supreme Court Civil Appeal No. 88 of 2012**, esp. at paragraph 10 of that judgment. This is also an approach which had been applied in Trinidad and Tobago, by that nation's Court of Appeal. See: **Mathews (Charles) v The State** – [2000] 60 WIR 390. The same has also been the approach applied in New Zealand. See: **New Zealand Institute of Agriculture Science Inc. v Ellesmere County** – [1976] 1 NZLR 630.

[27] Adopting that approach, it is clear to this court, that it is now open to this court to make such orders as warranted, 'to put matters right.' (As per the wording used in **rule 28.9 (3) of the CPR**). That is exactly what this court will do, after these reasons for rulings have been provided to the parties.

[28] As part and parcel of this court's efforts to, 'put matters right,' this court has noted that paragraph 17 of the defence is also partially defective, insofar as in that paragraph, the only statement is – *'Paragraph 17 is denied.'* Clearly, this is an incomplete averment to make as part and parcel of a party's defence, since the said averment is inconsistent with the requirements of **rule 10.5 (4) (a) of the CPR,** as no reason for the denial has been given by the defendant. In addition, in respect of that paragraph of the defence, this court has noted that it is apparent that the defendant has, at least in evidence thus far, cross–examined the claimant in such a manner as to clearly suggest that they wish to put forward a different version of events in response to that which has been averred by the claimant in paragraph 17 of her particulars of claim, this being that – *'thereafter negotiations have proceeded relative to the outstanding amounts claimed by the claimant as well as for the loss of the claimant's employment termination.'* As such, it was not only incumbent on the defendant, in its defence, to have given a reason or reasons for their denial of the claimant's averment at paragraph 17 of the particulars of claim, in accordance with the requirements of **rule 10.5 (4) (a) of the CPR**, but also, to set out the defendant's version of the events, in specific response to that particular averment of the claimant – this in accordance with **rule 10.5 (4) (b) of the CPR**.

[29] As such, if an application were to be made to this court, to rectify both paragraph 17 and 18 of the defence, this court can and should, 'put matters right' and should not strike out either such paragraph of the defence. Such harsh action in circumstances such as these, not only does not follow as a matter of course, but also, would not be warranted and would not, at all, enure to the best interests of justice. This court has, adopted the approach as suggested by England's Court of Appeal in: **Biguzzi v Rank Leisure plc** [1999] 1WLR 1126, in making its decision as to whether to strike out paragraph 18 of the defendant's defence.

The defendant's list of documents

[30] The claimant's counsel has also contended that the defendant ought to have disclosed the value of its shares as at April, 2007, since the defendant would have had knowledge of same. Mrs. Samuels-Brown, QC though, did not make any submission to this court, as to what should be the consequence which should ensue, if this court were to be of the view that there had been non-disclosure of same, in circumstances wherein such ought to have been disclosed. It was the submission of the claimant's counsel that disclosure of the value of the defendant's shares as at April, 2007, ought to have been made in the defendant's list of documents.

[31] In response to the claimant's counsel's contentions/submissions on this point, the defence counsel contended simply, that it has at all times been the defendant's position, as reflected in the existing wording of paragraph 18 of the defence, that the value of the defendant's shares as at April, 2007, is of no relevance whatsoever, for the purposes of this claim, since the claimant cannot and has not been able to provide to this court any basis whatsoever, or, perhaps even more pointedly, any basis arising out of the relevant share option agreement, for the claimant to be seeking to recover the value of her shares in the defendant, as at April, 2007. As such, the defendant's counsel contends that since same is, in their view, irrelevant to this claim, there exists and existed, no duty on the defendant to disclose same.

[32] This court must carefully consider and apply the applicable rules of court in deciding firstly, on whether or not the defendant had/has a duty to disclose the value of its shares in April of 2007 and also, in deciding on what, if anything, should be the consequence of non-disclosure, if this court were to conclude that such disclosure was required in law.

[33] The first point of law to be carefully noted by all in that regard, is that the duty of disclosure is a continuous one. It is thus, a duty which continues until the conclusion of court processes in the Supreme Court, pertaining to a claim. See **rule 28.13 of the CPR**. This is why this court must look at whether the defendant had or has a duty to disclose.

[34] What then, is the duty of a party to disclose? A party has a duty to disclose certain documents that either are in, or have, at any time prior, been in that party's possession. A party does not have a duty to disclose information, if that information is not recorded in a 'document' (this being a term which is defined by **rule 28.1 (2) of the CPR**), unless of course, this court were to make an order required a party to provide information requested in accordance with the provisions of **Part 34 of the CPR**. Thus, it is this court's present view, that pursuant to **Part 34 of the CPR**, it was open to the claimant to have sought information from the defendant, as to the value of her shares in the defendant as at April, 2007, if those shares had not been cashed out, at the defendant's Board of Directors' sole option, prior to then. That is information about a matter which is in dispute in these proceedings, since the defendant has put the claimant to strict proof thereof. Such a court order would, to this court's mind at this time, have been necessary to dispose fairly of this claim. As such, if the claimant had requested that information and the defendant had not provided the same, it seems quite likely that if thereafter, an application had been made to this court, by the claimant, for an order that such information be provided by the defendant, such an order may very well have been made. As far as this court is aware though, the claimant never exercised that option.

[35] The term 'document' is defined in the **CPR** as meaning, 'anything on or in which information of any description is recorded.' 'Copy' in relation to a 'document,' means '*anything onto which information in the document has been copied, by whatsoever means and whether directly or indirectly*.' Thus, as clearly stated in **Blackstone's Civil Practice, 2006**, in reference to identical wording used in England's rules of court, the definition of 'documents' thus is not, at all, confined to paper, but includes electronic documents such as audio and video cassettes, electronic mail correspondence messages on mobile telephones, word-processed documents and databases. In addition, as is stated in the said edition of that text, '*the definition covers documents that are stored on servers and back-up systems and electronic documents that have been 'deleted.' It may even extend to additional information stored and associated with electronic documents, known as, 'metadata.'*

[36] **Rule 28.1 (3) of the CPR** provides that a party 'discloses' a document by revealing that the document exists or has existed. Thus, a party's duty to disclose documents is limited to documents which are, or have been, in the control of that party. A party either has or had control of a document, if that document is or was in the possession of that party, or that party has or had a right to possession of it, or that party has or has had a right to inspect or take copies of it. See: **Rule 28.2 (1) and (2) of the CPR**. Thus, if a document is due to be disclosed, it does not matter that the party who should disclose same, no longer has possession of that document, or even that said party never actually had physical possession of same. If that party no longer has 'control' of a document, but that document is to be disclosed, then it will be the duty of that party in his/her or their list of documents to state that such document is no longer in that party's control and what has happened to that document and where, to the best of that party's knowledge, information and belief, that document then is located. See: **Rule 28.8 (4) of the CPR**.

[37] All of the aforementioned rules of court are of importance, in terms of this court's consideration as to whether the defendant has breached its duty of disclosure and that is why this court has addressed said rules in great detail in these reasons. There are

though, insofar as the duty of disclosure is concerned, the most important rules of all, these being those which require that where the court orders either standard or specific disclosure, the party who is to so disclose will be required either as regards documents generally (in respect of an order for standard disclosure) or as regards specific documents (in respect of an order for specific disclosure), to disclose only documents which are 'directly relevant.' In that respect see **rules 28.4 (1) and 28.6 (1) and (5) of the CPR**.

[38] This therefore next leads this court to the conclusion that the defence has submitted to this court that they were/are under no duty to disclose in respect of the share value of the defendant as at April of 2007, because such information is not relevant, bearing in mind that the choice by the claimant, for her shares to be valued as at that date, is solely based on the exercise of her independent discretion, as distinct from being based on the share option agreement.

[39] Regrettably for the defendant though, that particular submission as was made to this court by defence counsel, has revealed a fundamental misunderstanding on their part, of the duty of disclosure. This is regrettable for the defendant, because, if an attorney fails to properly explain to his client the duty of disclosure, the adverse consequences in respect of the claim, will of course, not fall upon the shoulders of the attorney, but instead, upon that attorney's client, who is a party to the claim. Thus, as was stated long ago in the case – **Woods v Martins Bank Ltd.** – [1959] 1QB 55, at p. 60 –

> '*It cannot be too clearly understood that solicitors owe a duty to the court, as officers of the court, carefully to go through the documents disclosed by their client to make sure, as far as possible, that no relevant documents have been omitted from their clients' affidavit (or list of documents).'*

[40] Our rules of court define what documents are 'directly relevant' and are therefore, required to be disclosed, in accordance with any court order for standard disclosure, such as was made in respect of this claim. According to our rules of court, a document

is ‘directly relevant’ only if: the party with control of the document intends to rely on it; or it tends to adversely affect that party’s case; or it tends to support another party’s case. See: **Rule 28.1 (4) of the CPR**.

[41] As such, even though the defendant does not believe that the claimant is at all entitled to recover any more than she has already gained from the defendant, arising from her share options in the defendant having been cashed out, allegedly pursuant to the provisions of the share option plan agreement, in this claim, the claimant’s claim is premised on the contrary. Ultimately therefore, it is this court that will have to decide on whether or not the claimant’s claim has been proven and this court can only do so, after having heard evidence from the respective parties. As such, since it is both in the claimant’s particulars of claim and in her witness statement, that her shares in the defendant, as at April, 2007, would have been valued at US$3,300,000.00 million, there can hardly be any doubt that if the defendant either has, or has had ‘control’ of any document which reveals information as to the share value of the defendant’s shares as at April of 2007, such a document would ‘tend to support’ the claimant’s case. As such, that document would have to be disclosed and, it must be stated although it is undoubtedly ‘late in the day’ for such to hereafter be done, it can still be done hereafter, by means of the filing of a supplemental list of documents. Such a document would tend to support the claimant’s case, since it is the claimant’s case that she is entitled to recover the difference between what she was paid when her shares in the defendant were cashed out in October, 2005 and what her shares in the defendant would have been worth, as at April, 2007. This does not mean that such a document, if it either exists or has existed in the defendant’s ‘control,’ will assist in enabling the claimant’s claim to be successful. It does not even mean that it will enable the claimant to prove her assertion that if her shares in the defendant, had not earlier been cashed out by the defendant, then as at April, 2007, the same would have been worth US$3,300,000.00 million. In fact, any such document, if it exists or has existed, in the defendant’s ‘control,’ may in fact only serve to prove something quite to the contrary – in terms of the value of the claimant’s shares as at April, 2007. Such a document though, would nonetheless have to have been, or at the very least, prior to the trial going too much

further, have to be disclosed by the defendant, since it would, '*tend to support the claimant's case.'*

[42] All of the aforementioned though, is premised on such a document either existing or having existed in the defendant's 'control.' This court does not know, at present, as a matter of certainty, whether or not this is so. Accordingly, this court does not presently know whether or not the defendant has breached this court's earlier order for the defendant to make 'standard disclosure.'

[43] This court though, has noted with interest, that it was not at all the defendant's contention in response to the claimant's submissions on the disclosure point, via their respective counsel, that such a document either does not exist, or has never existed in the defendant's 'control.' Instead, the defence counsel solely rested his submission on this point, on the basis that disclosure of same was not relevant. Furthermore, this court has noted that in paragraph 18 of its defence, the defendant has accepted that in April of 2007, it did exercise its right to cancel the share options of all of its employees, which in turn, as this court presently understands it, would mean that the defendant accepts that in April of 2007, it would have cashed out the shares of all of its employees, who then had shares in the defendant as part and parcel of the defendant's shares options plan. As such, it seems at least, highly likely to this court, that since, by virtue of that share options plan, the defendant's managing directors are the managers of that plan and are the parties to whom that plan entrusts the responsibility of hiring an appropriate expert to value the defendant's shares at any particular moment in time, such as no doubt, would have had to have been done when those employees 'shares were cashed out in April of 2007, then the company would likely, either have, or have had 'control' of a 'document' in which information pertaining to the value of the defendant's shares as at April, 2007, would be/have been stored/contained.

[44] If such be the case, then such disclosure must be made. In order to facilitate same being done within a limited time-frame hereafter therefore, this court should make an order for specific disclosure and since such disclosure ought to have been made

much earlier, this court would be obliged to schedule no longer than two weeks, within which such supplemental list of documents, pursuant to this court's order for specific disclosure, is to be made. Additionally, it is highly likely that this court would make such order, an unless order, in an effort to ensure that there is compliance therewith and in turn, significantly reducing the risk of further trial delay.

[45] The importance of an order for specific disclosure in circumstances such as these, is that by means of an order for specific disclosure, this court can order the defendant to carry out a search for any document that discloses the value of the shares of the defendant, as at April of 2007, which either is now in, or was at anytime prior to now, in the defendant's control and disclose any 'directly relevant' document located by means of that search, which falls within the ambit of the documents) which this court has identified as being the one (s) in respect of which specific disclosure is to be made. See: **Rules 28.6 (1) (b), (4) and (5) of the CPR** in that regard.

[46] There is though, at least one other option which this court may exercise, in present circumstances, if this court, were to properly be of the view that the defendant has failed to comply with the order for standard disclosure which was made by this court. This though, is not an option which can, at all, properly be exercised by this court, in circumstances wherein, as now obtains in this case, this court is by no means assured in its mind, albeit that it harbours some ground for reasonably believing, that, any 'document' exists or has existed in the defendant's control, which is 'directly relevant' to this claim, but which has not in fact been disclosed, due to an intention not to disclose, this as distinct from inadvertent non-disclosure.

[47] That one other option is referred to in **rule 28.14 of the CPR** and it is the option of striking out the defendant's statement of case, which if done, would result in this court awarding judgment to the claimant. An application for such an order to be made by this court though, has not been made to this court by the claimant and perhaps wisely not so, since, whilst such application can be made without notice, it must be supported by evidence on affidavit that the other party has not complied with an earlier order for

disclosure. That evidence obviously, would need to be compelling, if it is to properly lead this court, to make such an order. Suspicion of failure to comply is one thing. Proof, of failure to comply, by means of evidence under oath, is quite another. As such, this court views it as wise of the claimant, not to have made any such application to this court. In any event, last-minute applications to strike out for breach of orders, particularly applications made without notice and scheduled for hearing on the day of trial, are to be discouraged by this court. See: **Whittaker v Soper** [2001] EWCA Civ. 1462.

[48] In view of the particular circumstances of this particular situation, this court will order that there be specific disclosure by means of a search which is to be conducted by the defendant for information contained in, or on, or previously contained in or on any 'document' which is or has been in the defendant's 'control,' as to the value of the types of shares held by the claimant in the defendant, up until October, 2005 as at April of 2007. Unless the defendant shall have complied with this order, by means of the filing of a supplemental list of documents, by or before September 30, 2014, then the defendant's statement of case shall stand as struck out without the need for further court order.

[49] As regards the defect in paragraph 18 of the defence, the defendant shall be required to amend that paragraph so as to bring same into full compliance with **rule 10.5 (3) of the CPR** and shall file and serve that amended defence, by or before September 30, 2014. If the defendant fails to amend same as so ordered, or fails to file and serve such amended defence within the time as so ordered, then, paragraph 18 of the defendant's defence shall stand as struck out.

[50] This court also hereby permits the defendant, as part and parcel of its requirement to amend paragraph 18 of its defence, to amend the word 'defendant' as presently contained within the penultimate line of that paragraph, by deleting that word – 'defendant' and replacing same, with the word – 'claimant.' If the defendant chooses to

exercise this option, then such amendment shall be filed and served by or before September 30, 2014.

[51] The costs of and pertaining to any amendments of and related to paragraph 18 of the defendant's defence, in accordance with this court's orders and the costs of and pertaining to any further disclosure by the defendant, are reserved, pending this court hearing from the parties' counsel, in that regard.

[52] There remains only one other issue to be addressed and that concerns an issue as to whether or not certain evidence which has been provided to this court by the claimant, ought to be excluded from this court's considerations, for the purposes of its rendering of judgment on this claim, at a later stage.

[53] That issue has arisen as a consequence of the following: Firstly, it is set out in paragraph 20 of the claimant's witness statement and was admitted into evidence without there having been any objection thereto, from the defence, the following evidence – '*less than two years later in April of 2007 the defendant cashed in the shares of all participating employees. My share options at that time would have been valued at US$3,300,000.00.'*

[54] Secondly, this court has recorded as part of the evidence given by the claimant while she was undergoing cross – examination by defence counsel, the following –

Q. 'What was the valuation of the shares of Digicel in April of 2007?'

A. 'US$3,300,000.00.'

Q. 'How do you know that your share options would have been valued at US$3,300,000.00 in April of 2007?'

A. 'I was advised by my former colleagues who had remained in the company, of the amount of US$3,300,000.00.'

[55] Immediately after having heard and taken into account all of the evidence as quoted in paragraphs 53 and 54 above, this court had, in the claimant's absence from the court – room, raised with the parties' counsel, whether the evidence of the witness'

last two answers (quoted in paragraph 54 above), as well as the evidence given by the claimant in paragraph 20 of her witness statement, can properly be taken into account by the court in adjudicating on this case.

[56] Unsurprisingly, the defence has contended that such evidence should not be taken into account by this court, for the purpose of adjudicating on this claim, whereas, the claimant has contended to the contrary.

[57] The defence has contended that the claimant's evidence as to the value of her shares in Digicel in April of 2007, is hearsay evidence and therefore inadmissible. It is hearsay evidence, they contend, since, not only is that evidence being relied on for the purpose of proving the truth of its contents, but also, it is not information which has been provided to this court based on the claimant's personal knowledge, except to the extent that such 'knowledge' has been derived from information provided to her by other persons – these being persons who were employees of Digicel at least up until when their shares in Digicel were cashed out.

[58] The claimant's counsel, in response to the defence counsel's contentions in that regard, has contended that in Exhibit 4, which is an agreed document, it was made clear that the value of the claimant's shares 'as at the 2007 bond issue' was US$3,300,000.00 and that, '*in about April 2007 our client was advised that the share of other local directors had been cancelled and cashed in at a value of US$3,300,000.00.'* These quoted statements are contained in Exhibit 4, which was admitted into evidence at trial, as an agreed document and is a document dated November 25, 2010, which is addressed to Mr. Tom Tavares Finson, attorney-at-law for the defendant at that time and which is under the hand of Mr. Garth McBean QC, attorney-at-law for the claimant at that time.

[59] With that being an agreed document that has not been taken issue with, by the defence, it is the claimant's position, that such evidence as has been provided to this

court, in oral evidence as well as in paragraph 20 of the claimant's witness statement, is admissible for the purpose of proving the truth of such evidence.

[60] In rejoinder, the lead defence counsel – Mr. Williams, has simply but none the less forcefully, contended that an agreed document does not mean that the defence accepts as true, all that has been asserted in those documents.

[61] The classic definition of hearsay can be derived from the *oft- cited* case: **Subramaniam v DPP** – [1956] 1 WLR 956, at p. 969 and is as follows –

> *'Evidence of a statement made to a witness … may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence not the truth of the statement, but the fact that it was made.'*

[62] Applying that definition, it is beyond doubt as far as this court is concerned, that the claimant's evidence as objected to, is hearsay evidence, since it is being relied on for the purpose of proving it to be true, that the claimant's shares in the defendant as at April of 2007, was $3,300,000.00. That evidence of course, will hereafter, be of academic interest only, since, based on this court's orders as regards disclosure by the defendant, it will be for the defendant to disclose, what the value of the claimant's shares in the defendant up until October of 2005, was, as at April of 2007.

[63] It is though, important for this court to note its view, that although a document may be entered into evidence as an agreed document, this does not and cannot mean that the contents of that agreed document shall be taken as admissible for all purposes whatsoever.

[64] It is indeed the law that in civil cases, parties to a claim can agree to permit hearsay evidence to be adduced – and that as it is hearsay evidence, it would be being adduced for the purpose of proving the truth of its contents. Whilst that is so though, unlike as in England, wherein, the hearsay rule in civil cases was absolutely abolished

by statute passed into law there, in their **Civil Evidence Act** [1995], that is not so in Jamaica, albeit that for my part, I strongly recommend that in future, the Jamaican government and parliament should also abolish that rule in civil cases.

[65] In the circumstances, one must pay careful regard to the provisions of **Jamaica's Evidence Act**, in determining the circumstances in which, and/or the extent to which, hearsay evidence may lawfully be admitted in civil cases before this nation's courts.

[66] **Section 31 E (1) of the Evidence Act**, addresses that issue. That section of the **Evidence Act** makes it clear that it is in accordance with that section and subject also to **section 31 G of the Evidence Act** (the contents of which (**S.31 G**) are not relevant for present purposes), that hearsay evidence will be admissible in civil cases.

[67] **Section 31 E** provides that subject to **subsection (6)**, the party intending to tender such statement in evidence shall, at least twenty-one days before the hearing at which the statement is to be tendered, notify every other party to the proceeding as to the statement to be tendered, and as to the person who made the statement. **Section 31 E (6)** provides that –

> '*The court may, where it thinks appropriate having regard to the circumstances of any particular case, dispense with the requirements for notification, as specified in subsection (2).'*

[68] In civil cases, in circumstances wherein parties have agreed that various documents are to be admitted into evidence, it would seem to this court, that it would be absurd to insist that there be such notification of intention to rely on hearsay evidence, as is generally required by **Section 31 E (1) of the Evidence Act**. As such, in circumstances such as the present, this court would undoubtedly have dispensed with the notification requirement.

[69] Clearly, where parties agree on documents being admitted into evidence, the party who wishes to rely on any of those documents, would and should be considered as intending to rely on all of those documents for all purposes whatsoever, unless that

party, during the course of having, through counsel (as would typically be the case), sought agreement as to those documents being adduced into evidence, had specifically suggested otherwise.

[70] On the other hand though, since evidence can be admitted either as hearsay, or as original evidence, it is clearly open to a party to agree to admit a document as original evidence, but not as hearsay evidence. If the document is admitted, by agreement, as original evidence, its contents will only go towards proving that any statement in the document has been made by a particular person or entity, whereas, if it is admitted as hearsay evidence, it contents will go towards proving the truth of what was said.

[71] How is a party to go about objecting to the contents of a document being admitted as hearsay evidence? **Section 31 E (3) of the Evidence Act**, addresses this issue. That sub-section provides that, '*subject to sub-section (4), every party so notified shall have the right to require that the person who made the statement be called as a witness.'* **Sub-section (4**) goes on to provide that the party intending to tender the statement in evidence shall not be obliged to call, as a witness, the person who made the statement if for example, it is proved to the court's satisfaction that such person is dead, or cannot be found after all reasonable steps have been taken to find him, or is unfit, by reason of his bodily or mental condition, to attend as a witness.

[72] It is important to note that **Section 31 E (3) of the Evidence Act** does not, as is generally required in circumstances wherein a party intends to rely on hearsay evidence, generally require a party who requires that the person who made the statement be called as a witness, to give any notification to the opposing party that it will be required for the person who made the statement to be called as a witness. The reason for this difference in approach in those respects would likely be that hearsay evidence in general, is not admissible in civil proceedings and it is only in exceptional circumstances that the same will be admitted. Accordingly, no notification would be

required to be given by a party who objects to same being admitted, whereas, it would be required to be given by a party who wishes to rely on same.

[73] Accordingly, an objection to the admission of a document at trial, as hearsay evidence, can be made at the trial itself, although, this is certainly not the preferable approach and may lead to an unnecessary adjournment of the trial and costs being awarded against the party who did not object in a timely way, in circumstances wherein that party could reasonably have been expected to have done so, timeously.

[74] In the present case, Mr. Williams, as lead counsel for the defendant, has made objection to the relevant document for present purposes, being admitted as hearsay evidence. It is my considered opinion that Mr. Williams' client is entitled to make that objection at this stage, notwithstanding that the same is an agreed document and notwithstanding that the defendant has certainly not acted timeously, in having made that objection.

[75] It should be noted that it should be clear to everyone, that **Section 31 E (3),** in giving the right to a party opposing the admission into evidence of a document, as hearsay, to require that the person who made the statement be called as a witness, is, in other words, giving the party who is so opposed, the right to object to the admission of that hearsay evidence. That is why it is the maker of the statement who would be required to be called upon to provide oral testimony to the court, since this would then, typically, overcome any hearsay objection.

[76] In the case at hand though, the situation is somewhat unusual, in that the document which is sought to be admitted, although having set out therein, the purported value of the claimant's shares in the defendant at a particular time, is, it should be noted, a document under the hand of the claimant's then attorney – Mr. Garth McBean QC, and presumably, that value would have been derived by him, based on his instructions from his client at that time. Of course too, it is clear from her oral evidence as provided to the court while she was undergoing cross – examination, that the

claimant has derived her information as to the value of her shares in the defendant at the relevant time, from other former employees of the defendant. It seems clear to this court, at this time therefore, that Mr. McBean QC's statement in a document, as to the value of the claimant's shares, is in itself hearsay evidence, albeit that it is contained in a document. Even if therefore, that document were to be admitted by this court, for the purpose of proving the truth of its contents, that document would carry little if any weight at all in proving the value of those shares at any time. It is, of course, even in circumstances wherein hearsay evidence is admitted trial, entirely for the trial court to determine what weight, if any, is to be given to such evidence.

[77] Clearly, the party that can best 'speak to' the value of the claimant's shares in the defendant at any material time, is the defendant, as they undoubtedly must have, or have had some record (s) in that regard. As such, the court orders earlier made with respect to disclosure etcetera, should ultimately resolve any lacuna in the provision of definitive information to the court in that regard.

[78] This court will therefore not, for the purpose of rendering its judgment upon this trial, take into account any evidence given by the claimant as to the value of her shares in the defendant at any material time. That is hearsay evidence and is inadmissible as evidence. Consistently with that, this court now orders that paragraph 20 of the claimant's witness statement is struck out, in accordance with this court's discretion to do so, which is set out in **rule 29.5 (2) of the CPR**.

[79] In the final analysis, what is most important to note about this particular aspect of this court's rulings, is that documents which are admitted into evidence by agreement between the parties to a claim, are not automatically thereby also to be taken as admitted for the purpose of proving the truth of their contents. As such, hearsay evidence contained in any such document can still, properly be objected to, albeit, preferably timeously so and if objected to, it is only if the maker of any such document is thereafter called upon to give and is able to give evidence as to what has been set out as the contents of that document, that such oral evidence can be taken as going

towards proof of the truth thereof. Finally, it should also be borne in mind, that this is also why it has been provided in **Section 31 E (7) of the Evidence Act**, that –

> *'Where the party intending to tender a statement in evidence has called, as a witness in the proceedings, the person who made the statement, the statement shall be admissible only with the leave of the court.'*

It is thus, the oral evidence that takes pre-eminence, as evidence, in such circumstances, since, if the person who made the statement is indeed called as a witness, the document made by that person, would typically not be admitted as evidence nor would it be sought to be admitted as evidence for any purpose, other than perhaps, if it constitutes a prior inconsistent statement and the court thus allows it, or any portion of it, to be admitted into evidence, pursuant to **Section 17 of the Evidence Act**, for the purpose of impeaching the credit of the witness who has been providing oral testimony to the court.

....
Hon. K. Anderson, J.