[2021] JMCC COMM. 1

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2018 CD 00566

BETWEEN	**GUARDIAN LIFE LIMITED**	**CLAIMANT**
AND	**CATHERINE ALLEN**	**DEFENDANT**

IN CHAMBERS BY VIDEO LINK

Mr Kevin Powell instructed by Hylton Powell, Attorneys-at-Law for the Claimant

Ms Terri-Ann Guyah and Ms Gina Chang instructed by Messrs. Ballantyne, Beswick and Company, Attorneys-at-Law for the Defendant

Heard: 3rd December 2020 and 12th January 2021

Civil Procedure- Application to amend statement of case – Principles to be applied – Application made after trial has commenced

LAING, J

Background

[1] The Claimant, Guardian Life limited is a company incorporated under the Companies Act of Jamaica with its registered offices at 12 Trafalgar Road, Kingston 5 in the parish of St Andrew which at all material times carried on business as an insurance underwriter.

[2] The Defendant, Catherine Allen is an Actuary who resides in the parish of St Andrew and was employed to the Claimant as Assistant Vice President and Actuary.

[3] On 15th August 2018 the Defendant was terminated by the Claimant by reason of redundancy. On the said date the Defendant's laptop computer ("the Laptop") which was assigned to her by the Claimant was retrieved from her.

[4] The Claimant retained PricewaterhouseCoopers (PwC) on 23rd August 2018 and later the Mintz Group LLC, to carry out a forensic examination on the Laptop to determine whether there had been any unauthorised disclosure of confidential information. On 11th October 2018, the Mintz Group produced a report of its findings in which it concluded that on numerous occasions the Defendant shared the Claimant's confidential information and documents with persons outside the company and who were not entitled to receive such information ("the Mintz Report").

[5] On 12th October 2018, without notice, the Claimant obtained search order permitting, *inter alia*, a search of the Defendant's residence for information related to the Claimant's business operations and employees ('the "Search Order"). The Claimant asserts that based on the findings of the Mintz Report the Defendant was terminated summarily and for cause by way of letter on 1st November 2018.

[6] Subsequent to the Mintz Report Guardian filed the claim herein ("the Claim"), the trial of which commenced on 25th November 2019. Following the adjournment of the trial on 27th November 2020, as a result of the Covid-19 pandemic the trial was not continued on the dates which were fixed for continuation, namely April 20th-21st 2010. The trial resumed on September 28th -30th 2020.

The Application

[7] On 29th September 2020 the Defendant filed a Notice of Application seeking permission to amend the Defence and Counterclaim ("the Application"). The grounds on which the Application was made are as follows:

> 1. *This application is being made pursuant to Part 20. CPR rule 20.4 (2) allows for the amendment of a statement of case after case management conference with the permission of the Court.*
>
> 2. *The Defence and Counterclaim were filed on the 28th November 2018 seeking damages for the search order (issued the 12th October 2018) and the infringement of rights which it caused however the Notice of Application to set aside the search order was filed on the 1st November 2018 seeking orders that the search order be set aside.*
>
> 3. *On the 20th September 2019, Simmons J (as she then was) refused to set aside the search order and found at paragraph 122 of her written judgment, that the investigation of the propriety of the application for the search order would be better suited for the conduct of the trial judge. The Court of Appeal upheld her judgment and agreed with her reasoning including the referral of the issue to the trial judge.*
>
> 4. *The amendment of the defence and counterclaim is therefore necessary to remit the issue to the trial judge per the ruling of Simmons J (as she then was).*

[8] It is convenient at the outset to reproduce the amendments which are being sought by the Defendant as follows:

> *21. The Search Order granted on October 12th, 2018 by Justice C. Edwards was granted improperly in circumstances where there existed no imminent risk of dissipation or destruction of the items which was being sought in the search order;*
>
> *22. There has been no demonstrable risk of dissipation or destruction of the items allegedly being held illicitly in the possession of the Defendant. The report produced to the Court in the Affidavit of Stacy Drescher dated October 12, 2018, and which was used as a basis to obtain the said search order in exparte proceedings, makes it clear that there was no evidence of any mass deletion. This is overwhelming evidence that there was no risk that the Defendant would destroy any evidence, nor was any other evidence been provided to the Court, that can reasonably be interpreted as an imminent risk of destruction of evidence as the requirements for such an Order dictates;*
>
> *23. The Defendant contends that the said documents/information could have been remedied by an Order of the Court or a simple letter of request.*
>
> *24. The Search Order was wholly unnecessary as the Defendant would have willingly complied with an Order of the Court or even a request for disclosure or the items the Search Order purported to unearth in circumstances where she would not want to be in disfavour with the Court given her concurrent Claim 2018 CD 00503 AND where the Claimant disclosed no evidence, in fulfilment of the*

criteria for a search Order, that the Applicant/Defendant would not have complied with such an order;

25. The Search Order as granted represented a flagrant violation of the Defendant's constitutional right to protection (i) from search of the person and property (ii) of private and family life, and home; and (iii) of correspondence. Particularly in circumstances where no provisions were made for the rights of unrelated third parties including but not limited to the Defendant's children and grandchildren, and whose personal private information now forms a part of the Court's public records and which said information has been and continues to be willfully and/or recklessly disseminated by agents of the Claimant.

26. The Claimant's attorneys-at-law neglected to direct the Court to the fact that the confidentiality clause of the Defendant's contract made explicit provision for disclosure in the course of her duties. The Claimant's attorneys-at-law misdirected the Court as to a term of the Defendant's contract which required express permission in the terms so alleged in circumstances where such a term does not exist and any such term or other limitations on the items in dispute were imposed after the August 15, 2018 termination of the Defendant and thereby did not impose any such obligation on her.

27. The Claimant's attorneys-at-law willfully and/or recklessly and/or negligently directed the Court to an inherently flawed and wholly improper Search Order that:-

(i) made provisions for multiple men to enter the home of an unmarried woman;

(ii) made provisions for any person present even if they were not the Defendant being the homeowner to permit the search

(iii) made provision for the search to be conducted anytime between 8:30am - 6:00pm extending into weekends with such hours being beyond the required usual business hours;

(iv) contains no explicit time periods for the terms of the Search Order so that invasion into the Defendant's privacy could continue in perpetuity due to the vague nature of the terms;

(v) made provisions for the Claimant's attorneys-at-law to have a supervisory capacity over the any Application or evidence the Defendant may wish to make or tender to the Court;

(vi) imposes a duty to keep the Order private and confidential on the Defendant but none on the Claimant

28. The Claimant's attorneys-at-law willfully and/or recklessly and/or maliciously and/or spitefully flagrantly disregarded the terms of the Order by breaching a number of its terms including but not limited to the term that the search only be conducted during the hours of 8:00am - 6:00pm whereby the search did not conclude until 3:30am in the early morning of Wednesday, October 17, 2018 having started in the afternoon on Tuesday, October 16, 2018.

29. As a result of the breaches of the Search Order, the manner in which it was carried out and the continued dissemination of her personal information by the Claimant and/or its agents, the Defendant is suffering from anxiety and depression

and has sustained significant losses of dignity, reputation and character in her home community of over twenty-seven (27) years, her unblemished actuarial career and her peers as well as the issue of the continued irreparable breach of constitutional rights and those of her immediate family.

30. It is in the interests of justice and basic human and constitutional rights that the search Order granted October 12th, 2018 by Justice C. Edwards be discharged and the other orders granted in the terms sought.

33. ***WHEREFORE THE DEFENDANT HEREIN COUNTERCLAIMS AGAINST THE CLAIMANT FOR:-***

(xiii) An order that the Search Order granted October 12th, 2018 by Justice C. Edwards be discharged;

(xiv) An order that the Claimant's attorneys-at-law, the Supervising Attorney and the Computer Expert and any other person having care, custody and/or of the said information, be immediately ordered to return all items seized from the Defendant during the search of her home pursuant to the October 12, 2018 Search Order of Justice C. Edwards and destroy any and all copies and reproduction of such items;

(xv) An order that the Claimant, Mr. Eric Hosin, the Claimant's attorneys-at-law, the Supervising Attorney the Computer Expert and any other person(s) so identified by virtue of Order 4, be restrained from referring to relying on, sharing, divulging, communicating or from using any other method of dissemination, of any and all of the items, information, evidence, documents or such items as were accessed or become available as a result of the search of the Defendant's home pursuant to the October 12, 2018 Order of Justice C. Edwards.

(xvi) An order that all the documents exhibited to the Mintz Report or disclosed under the search order which speak to, refer to, identify the personal information of her any of her three children including but not limited to their health information, banking or financial arrangements and their children be destroyed and a certification to the Court that no copied exist be issued.

(xvii) An order that the Court direct that an Assessment of Damages hearing be fixed in keeping with the undertaking given by the Respondent/Claimant pursuant to the October 12, 2018 Order of Justice C. Edwards;

(Reproduced without underling)

[9] Ms Guyah highlighted the fact that the Defence and Counterclaim were originally filed on the 28th November 2018 and sought damages for the Search Order and for the infringement of rights which it caused. However, the Defendants notice of application which sought to set aside the Search Order was filed earlier on the 1st November 2018.

[10] At the commencement of the trial on 25th November 2019, I sought to ascertain from Mr Hylton QC, whether I would not have to resolve the issue of the alleged impropriety of the Search Order if it was that the Defendant is relying on that to ground her claims for breach of privacy and other reliefs. Mr Hylton expressed the view that the issue of the validity of the search was already settled having regard to the order of Simmons J.refusing to set aside the Search Order. Mr. Hylton at that stage had disagreed with the position advanced on behalf of the Defendant that Simmons J had refused the application to discharge the Search Order on the basis that the Search Order should be examined at the trial stage.

[11] Ms Guyah submitted that the debate as to the reason for Simmons J refusing the application was only finally settled in January 2020 when the written judgment of Simmons J was delivered. Counsel also posited that the Court of Appeal in its judgment which only became available in May 2020, also agreed with Simmons J that the issue of the validity of the Search Order is properly for the trial Judge.

[12] Ms Guyah explained that it was during the 2nd round of the trial in September 2020 when the Court asked about the relevance of questions concerning the validity of the Search Order, that the decision was taken to file the application herein. Counsel argued that the amendments all concern the Search Order and its genesis. These were issues explored in cross-examination by Captain Beswick and to which there was an objection by Counsel for the Claimant, which prompted the enquiry by the Court as to the relevance of these questions.

[13] Ms Guyah urged the Court to adopt the same approach to applications to amend statements of case as it did in the case of **Caricom Investments Limited et al v National Commercial Bank Jamaica Limited et al** [2019] JMCC Comm. 38. She argued that although the decision was overruled on appeal for other reasons, the Court of Appeal did not interfere with the learned Judge's analysis of the relevant factors to be considered.

[14] Ms Guyah urged the Court to accept that the proposed amendments to the counterclaim are not related to new matters and reflect the relief which was sought before Simmons J by the Notice of Application dated 1 November 2018. Furthermore, she opined that the trial Judge Laing J appreciated the relevance of the determination of the issue of the validity of the Search Order at the commencement of the trial but was advised, erroneously, that this was no longer a live issue. In any event, Captain Beswick cross-examined fairly extensively in relation to the Search Order and the Claimant cannot now reasonably argue that it is being taken by surprise.

[15] Counsel conceded that whereas the trial commenced over a year ago in November 2019 the Claimant has not yet closed its case and there is no risk of lost time or a delayed judgment since the next date for trial is over a month away. However, Counsel argued that the delay in the Defendant filing the application herein was largely as a result of the unfortunate delay in obtaining the judgments of Simmons J and the Court of Appeal. The delay was therefore due to circumstances which were outside the control of the Defendant and this is a factor which the Court should consider in attempting to give effect to the overriding objective.

The submissions on behalf of the Claimant

[16] Mr. Powell on behalf of the Claimant acknowledged that Rule 20.4 (2) does not state the factors the court should consider when deciding whether to exercise the discretion given under that rule and the Courts' approach has been to consider all the circumstances of the case and to apply the overriding objective. Counsel commended the case of **Albert Simpson v Island Resources Limited** Claim No. 2005 HCV 01010 delivered 24th of April 2007 for the Court's consideration. I find that the approach in this case is similar to that taken by this Court in **Caricom** (Supra).

[17] It was submitted by the Claimant that issues relating to the discharge of the Search Order that are the subject of the proposed amendments have already been

determined by this Honourable Court and the Court of Appeal. Counsel submitted that the proposed amendments to paragraphs 21 to 30 of the Defence and Counterclaim and the grounds of the Defendant's application to discharge the Search Order filed on 1st November 2018 are practically verbatim. Counsel argued that since the Defendant's application was dismissed by Simmons J and the Court of Appeal, the Defendant cannot properly and should not be permitted to try to re-litigate these issues before this Honourable Court as they are now *res judicata.*

[18] Mr. Powell sought to rely on a number of authorities including **Water Sports Enterprises Limited v Michael Drakulich** (unreported) Court of Appeal, Jamaica Supreme Court Civil Appeal No. 98/2000 delivered April 3, 2003 and the 1st instance decision of Sykes J (as he then was) **Olint Corp. Limited v National Commercial Bank of Jamaica Limited** Claim No 2008 HCV 00118. He submitted that the authorities establish that an undertaking to pay damages is given to the Court and does not give rise to a cause of action. Counsel posited that the Defendant does not have a cause of action arising from the grant of the Search Order but only has a right to apply to the Court for an inquiry as to damages. This decision as to whether the Court should grant an inquiry as to damages, will only be considered where the claimant fails at the trial.

[19] It was also argued by Mr. Powell that there is a risk of prejudice to the Claimant if the amendments are allowed. Counsel indicated that the trial commenced over a year ago and so far, there have been eight days of trial. He argued that the proposed amendments are allegations made against the Claimant's Attorneys-at-Law directly in respect of the execution of the Search Order and the witness now giving evidence would not be able to give evidence in respect of the execution of the Search Order. It is therefore likely that this would lead to the need for the Claimant to call further witnesses, thereby extending the length of the trial.

The Court's analysis

[20] I have been influenced in my analysis by the approach adopted in the cases dealing with Anton Pillar orders to which I refer, primarily because the underlying factual matrix in those cases is similar to this case and in my view requires a slightly more nuanced approached than is called for in the cases involving injunctions.

[21] At the outset, there are a number of observations which are necessary in respect of the judgment of Simmons J since her ladyship's conclusions are material to this application. The first, is that the learned Judge, in my view quite correctly, determined that an important consideration was the timing of the application before her. It was therefore relevant that the execution of the Search Order had already begun and that whereas this was not a bar to its discharge, the Court's approach to the matter at the stage of execution differs from that taken prior to execution.

[22] Simmons J cited with approval the case of **WEA Records Ltd v Visions Channel 4 Ltd** [1983] 1 WLR 721, in which the English Court of Appeal considered an appeal by defendants against whom an Anton Piller order had been made and successfully executed. At pages 727 to 728 Sir John Donaldson MR said:

> *"If it were now clear that the defendants had suffered any injustice by the making of the order, taking account of all relevant evidence including the affidavits of the personal defendants and the fruits of the search, the defendants would have their remedy in the counter-undertakings as to damages. But this is a matter to be investigated by the High Court judge who is seised of the matter, and only when he has reached a decision can this court be concerned."*

[23] My learned sister Judge Simmons J also referred to **Lock International Plc v Beswick and Others** [1989] 1 WLR 1268 and Hoffman J at 1285 where he said the following:

> *Why discharge the order now?*
>
> *It is unusual to entertain an interlocutory application for the discharge of an executed Anton Piller order. Normally, the only consequence of discharge is to enable the defendant to enforce the cross-undertaking in damages and that is a decision which can wait until the trial: see* ***Booker McConnell Plc. v. Plascow*** *[1985] R.P.C. 425, 435 and* ***Dormeuil Freres S.A. v. Nicolian International (Textiles) Ltd.*** *[1988] 1 W.L.R. 1362. In this case, however, I think that justice requires that the order should be discharged now. First, the question of non-disclosure was not concerned with the merits of the plaintiff's case and will not need to be investigated at the trial. Since it will have to be decided separately, it*

> *might as well be decided now. Secondly, the question of whether the order should have been made in the first place did not involve an investigation of conflicting evidence. Thirdly, whether or not the plaintiff is right in saying that Hollis Industries* ***Plc****. will pay off its borrowing and emerge solvent, I see no reason why the defendants should have to take any risk. They should be able to enforce the cross-undertaking now. Fourthly, the plaintiff's solicitors have all the defendants' confidential documents and the plaintiff's employees have full access to them. In my view all copies of the defendants' documents should be returned to them so that discovery can proceed in the ordinary way and the defendants have the opportunity, if so advised, to claim that access to certain documents should be restricted. Fifthly, the parties are in competition with each other. At present the plaintiff's salesmen are able to tell customers that they are suing the defendants for misuse of confidential information and have already obtained an order which is generally made only when there is clear evidence of dishonesty. Mr. Silber said that the plaintiff had instructed its salesmen not to say anything about the Anton Piller order. But I think it would be unsatisfactory to deal with the matter by requiring the plaintiff not to disclose the fact that it has obtained an order which is a matter of public record. In my view the court should discharge the order to make it clear that no prima facie case of dishonesty has been shown.*

[24] It appears that Simmons J concluded that the appropriate remedy for the Defendant would be to have the Court enforce the undertaking as to damages at the appropriate time and accordingly the learned Judge arrived at the following conclusion:

> *[122] GLL having given its undertaking to comply with any order that the court may make in respect of damages is bound to do so if the court finds that the search order ought not to have been made. Such a determination is more suited for the tribunal of fact which will have the benefit of a fulsome consideration of all the evidence both orally and documentary. There are a great number of emails in this matter which no doubt the parties will try to explain. The nature of the documents disclosed and the consequences and/or likely consequences of their disclosure will also need to be explored and a determination made.*
>
> *[123] Having considered the submissions, I am not satisfied that the search order was improperly made and ought to be discharged.*

[25] Admittedly, paragraph 123 of the judgment taken by itself might lead one to conclude that the learned Judge had made definitive finding on the issue of whether the Search Order was improperly made. However, when read in conjunction with paragraph 122 it is patently clear that the learned Judge was reserving the issue of whether the Search Order was improperly made to the trial Judge who would have the benefit of all the oral and documentary evidence. Accordingly, I do not accept the submissions on behalf of the Claimant that this issue is *res judicata*, it having been already decided by Simmons J.

[26] In **Caricom** (supra), the Court was attracted to the factors identified in the Eastern Caribbean Supreme Court Civil Procedure Rules (ECSC CPR) Rule 20.1 which provides as follows:

> *"Changes to statement of case*
>
> *20.1 – (1) A statement of case may be amended once, without the court's permission, at any time prior to the date fixed by the court for the first case management conference.*
>
> *(2) The court may give permission to amend a statement of case at a case management conference or at any time on an application to the court.*
>
> *(3) When considering an application to amend a statement of case pursuant to Rule 20.1(2), the factors to which the court must have regard are –*
>
> *(a) how promptly the applicant has applied to the court after becoming aware that the change was one which he or she wished to make;*
>
> *(b) the prejudice to the applicant if the application were refused;*
>
> *(c) the prejudice to the other parties if the change were permitted;*
>
> *(d) whether any prejudice to any other party can be compensated by the payment of costs and or interest;*
>
> *(e) whether the trial date or any likely trial date can still be met if the application is granted; and*
>
> *(f) the administration of justice."*

[27] In that case I concluded at paragraph 21 as follows:

> *I am of the view that the approach suggested by the ECSC CPR 20.1 (3) is sensible and in keeping with the applicable authorities to which I have referred which call for the Court having "flexibility, in exercising its discretion whether or not to grant permission to amend", or "a multi dimensional" approach. I will therefore undertake my analysis in keeping with those considerations. For the avoidance of any doubt, I wish to expressly state that I so do with the full recognition that the ECSC CPR are rules applicable to another jurisdiction and have no legislative effect as far as this Court is concerned. I am therefore not under any mis-apprehension that the ECSC governs my discretion.*

(a) Promptness

[28] In this application the issue of promptness is relevant but cannot be considered in the abstract. It has to be considered in the context of the timing of the decisions of Simmons J and the Court of Appeal. The judgment of Simmons J had implications for the Defendant's strategy. The fact that the Defendant was constrained to await that decision and filed its application to amend after receiving it and after receiving the result of the appeal from that judgment, lends support to the Defendant's argument that its application to amend was prompt in all the circumstances.

When is the appropriate time for the hearing of the issue of whether the Search Order ought to have been made?

[29] I had two concerns related to the validity of the Search Order. The first, was disclosed at the commencement of the trial, which is, whether the issue of the validity of the Search Order remained one for the Court's consideration. The second, arose after the judgment of Simmons J and the Court of Appeal became available and that was, what is the proper course to be adopted for the examination of that issue? Should it be concluded within the confines of the trial? Or explored in a subsequent hearing. I think the following passage from the judgement of Kerr LJ in **Booker McConnell plc v Plascow** [1985] RPC 425 at page 435 is well worth reproducing because it addresses the two main concerns which I had in the manner as follows:

> *However, there remains the question at what stage of the action this should be done. If the sole reason for seeking a retrospective discharge of the order is to enforce the cross-undertaking as to damages, then I can see no ground for any immediate application.* ***Any issues as to the validity of the order or as to the consequences of its invalidity should generally be left to be dealt with at the trial of the action.*** *If the action is settled, then any disputes concerning the order are likely to be settled as well. But exceptional cases can arise if a defendant is in some way affected in his reputation or otherwise by the fact that the order remains apparently valid in the interim.* ***Fields v Watts*** *was such a case, and I have already indicated that the article in The Grocer and the pending inquiry by the Monopolies and Mergers Commission in my view also justified an immediate application in the present case. Mr Hoffmann suggested in this regard that it would have been sufficient for this purpose if the learned judge had been invited to make some statement in open court to the effect that the defendants were contesting the validity of the ex parte order and that this remained to be determined. But I cannot accept that this would have been sufficient in the circumstances of this case. I think that, exceptionally, the second and third defendants were justified in seeking to have the order discharged at once, but without in any way condoning the*

> *subsequent course of the proceedings to which I have already referred. (**emphasis supplied**).*

[30] Having considered the various authorities referred to herein, I am fortified in my conclusion that once the setting aside of the Search Order was refused by Simmons J, for the reasons the learned Judge gave, the issue of the validity of the Search Order remains is to be explored wholly within the context of the trial, since her decision was not overturned by the Court of Appeal. As seen in the quote above, in **Booker** (supra) Kerr LJ rejected the suggestion that it would have been sufficient to place the issue in dispute if the learned Judge had been invited to make some statement in open court to the effect that the defendants were contesting the validity of the *ex parte* order and that this remained to be determined. Kerr LJ found that in that case it was appropriate for the defendant to have made an application to set aside the order. I do accept that there may be cases where it may be sufficient simply to have an acknowledgment by the parties that the validity of a Search Order is in issue without the necessity for pleadings. I do not consider it necessary for me to make any findings as to whether this was an appropriate case for the Defendant to have made the application to set aside the Search Order. I find that at this trial stage, the validity of the Search Order is in issue. I am also convinced that, rather than declaring for the benefit of the parties that the issue of the validity of the Search Order is a live issue for the Court's determination, it is more prudent for me to allow the Defendant to amend her Defence and Counterclaim to expressly identify this as a clear issue in dispute between the parties which will assist in framing the parameters of the evidence in respect of this issue.

[31] In the English Court of Appeal case of **Cheltenham & Gloucester Building Society (formerly Portsmouth Building Society) v Ricketts and Others** [1993] 1 WLR 1545 at page 1551, Neill LJ identified the applicable principles governing cross-undertakings as to damages as follows:

> *"From the authorities the following guidance can be extracted as to the enforcement of a cross-undertaking in damages.*

> *(1) Save in special cases an undertaking as to damages is the price which the person asking for an interlocutory injunction has to pay for its grant. The court cannot compel an applicant to give an undertaking but it can refuse to grant an injunction unless he does. (2) The undertaking, though described as an undertaking as to damages, does not found any cause of action. It does, however, enable the party enjoined to apply to the court for compensation if it is subsequently established that the interlocutory injunction should not have been granted. (3) The undertaking is not given to the enjoined but to the court. (4) In a case where it is determined that the injunction should not have been granted the undertaking is likely to be enforced, though the court retains a discretion not to do so. (5) The time at which the court should determine whether or not the interlocutory injunction should have been granted will vary from case to case. It is important to underline the fact that the question whether the undertaking should be enforced is a separate question from the question whether the injunction should be discharged or continued. (6) In many cases injunctions will remain in being until the trial and in such cases the propriety of its original grant and the question of the enforcement of the undertaking will not be considered before the conclusion of the trial. Even then, as Lloyd L.J. pointed out in* ***Financiera Avenida v. Shiblaq****, The Times, 14 January 1991; Court of Appeal (Civil Division) Transcript No. 973 of 1990 the court may occasionally wish to postpone the question of enforcement to a later date…"*

[32] If the issue of the propriety of the grant of the Search Order is included in the Counterclaim (although strictly speaking as the authorities indicated it is an undertaking to the Court), at the conclusion of the trial the Court having heard all the evidence, will have the benefit of that information and will then be perfectly placed to decide whether the Search Order should not have been granted and if so, whether the undertaking should be enforced and an enquiry as to damages held.

(b) Prejudice to the Claimant

[33] Mr Powell has submitted that the granting of the Search Order cannot form the basis of any cause of action and consequently the proposed amendments are unnecessary and should not be permitted since the only remedy available to the Defendant is the cross undertaking in damages.

Is the Defendant's only remedy to enforce the cross undertaking in damages?

[34] As Hoffman J stated in **Lock** (supra) which has been quoted above, "Normally, the only consequence of discharge is to enable the defendant to enforce the cross-undertaking in damages and that is a decision which can wait until the trial:" In my view this is a tacit acknowledgment that there may be other consequences arising

from the discharge of a Search Order which may require a remedy. These might include consequential orders such as the return of documents. In **Lock**, the Court held that the defendants' documents should be returned to them so that discovery can proceed and the defendants could determine whether they should argue that access to certain documents should be restricted. This was in the context of an order made before the trial but there is no reason why an order for the return of documents should not be made at the end of the trial on entirely different bases, which might include the need for the defendant to have control of its documentary property taken as part of the search. Interestingly, in **Booker** [1985] R.P.C. 425 (supra) at page 431, Kerr LJ mentioned in passing that the relief claimed in the writ, was for various injunctions and delivery of all the confidential documents against all three defendants, as well as damages for breach of confidence, conspiracy and other matters which Kerr LJ stated did not arise at that stage. The learned Judge did not opine as to whether these claims were impermissible.

[35] Although the proposed amendments raise issues such as a breach of the Defendant’s constitutional rights, when one examines the prayer, it discloses that the Defendant is seeking an order for the enforcement of the undertaking as to damages. The other reliefs sought are in the nature of consequential orders and (without an extensive analysis) these appear to be in the category of orders of the kind which this Court has the authority to grant. The Court at this stage ought not to use this issue of what are the precise remedies to which the Defendant may ultimately be entitled, as an important consideration in refusing the Application, since this will require detailed analysis and consideration. There is an obvious benefit to the Court at the trial hearing all the evidence which may be relevant to the issue of the grant of the Search Order and to have evidence which may be material to any related relief to which the Defendant may be able to successfully assert an entitlement.

(c) Prejudice to the Claimant

[36] In **Caricom** (supra) at paragraph 26 the Court expressed the following opinion which in my view remains apt:

> *Having evaluated the authorities it is clear that slightly different considerations ought to be brought to bear when applying the overriding objective depending on the stage of the proceedings at which the application for an amendment is being made. Each case will of course turn on the precise nature of the amendment which is being sought, but it is not difficult to contemplate situations where the risk of prejudice to the other side will be greater due to the fact that the amendment is being sought at a more advanced stage of the proceedings. It is safe to conclude that as a general principle, all other things being equal, the later the application, the greater will be the risk of prejudice to the other party.*

There is no dispute as to what comprises the material recovered as the result of the Search Order. What may require additional treatment is the evidence of the precise course of events leading up to the granting of the Search Order. I appreciate that there is some merit in Mr Powell's submissions that if the Defendant wishes to pursue further the course of events surrounding the execution of the Search Order, that may necessitate the calling of additional witnesses, but this is an issue which I think can be appropriately managed.

(d) Whether any prejudice to any other party can be compensated by the payment of costs and or interest

[37] The Claimant may also have to recalibrate its trial strategy and if necessary will be permitted to call additional witnesses before it closes its case, but this ought not to be unduly burdensome. Nevertheless, any prejudice to the Claimant occasioned by the Proposed Amendment can be compensated by the payment of costs.

(e) whether the trial date or any likely trial date can still be met if the application is granted

[38] It appears to me that the next scheduled trial dates in February 2021 can be met with sensible timelines for filings and this is not a factor which has influenced me to a significant degree.

(f) The administration of justice and the overriding objective

[39] Leaving the issue of whether the Search Order ought to have been granted to be determined after the trial in a separate hearing would lead to a substantial waste of judicial time. I am influenced in my decision by the fact that Capt. Beswick appears to have approached the trial so far with the issue of the validity of the Search Order as an element of the Defendant's case and the Court has been liberal in allowing Counsel a fair degree of latitude in this regard. As a consequence, there has already been extensive cross-examination, particularly of Mrs. Bassanta Henry in relation to the events leading up to the grant of the Search Order by the Court. This included cross-examination related to the affidavit she gave in support of the application for the Search Order and the bases for her opinions expressed therein, for example her conclusions as to the Defendant's ability to satisfy its undertaking as to damages.

[40] Allowing the amendments will facilitate an efficient use of the Court's time and allow all the matters in dispute between the parties to be fully and transparently ventilated. In an effort to do justice between the parties the Court is constrained to admit that the Defendant's application may have been delayed by the timing of the judgements of the Supreme Court and the Court of Appeal, which were not as prompt as would have been ideal given the exigencies of this case. The Court should strive to ensure that litigants are not disadvantaged in circumstances like these and if matters can be made right by permitting amendments after all the relevant factors are considered in the round, then the overriding objective is achieved by granting the application to amend.

Conclusion and disposition

[41] Having taken a "multi dimensional" approach which I believe is reflected in the analysis herein, I find that the Defendant's Application should be granted. I will make appropriate case management and other consequential orders after hearing additional submissions from the parties as to what orders in their view may be necessary.