

(ALICO), to strike out the claim of the respondent, Ainsley Corbin, (Mr. Corbin) for breach of contract. The basis of ALICO's application before **Chandler J** was Mr. Corbin's failure to file and serve his witness statement in compliance with an order made by **Chandler J** in the High Court on 24 September 2012. ALICO's application was made pursuant to **Rule 26.3 (1)** of the **Civil Procedure Rules, 2008 (CPR)**.

- [2] At the commencement of the hearing of this appeal, ALICO made an application to adduce fresh evidence before this Court pursuant to **Rule 62.23** of **CPR**. That preliminary matter is also addressed in this appeal.

FACTUAL BACKGROUND

- [3] At the material time, ALICO was a company incorporated under the **Companies Act, Cap. 308** and carrying on the business of the provision of insurance. At that time, ALICO carried on its business at Cheapside, Bridgetown. ALICO's business and assets were subsequently acquired by Pan-American International Insurance Corporation.
- [4] Mr. Corbin was a special constable in the Royal Barbados Police Force (RBPF) who resided at Todds Land, St. George. His duties included foot patrol, beach patrol, driving, court orderly and other police duties. During the course of his employment in the RBPF, Mr. Corbin worked

variously at Central Police Station, District C and Oistins Police Station.

[5] Essential factual background to this case is found at paragraph 4 of Mr. Corbin's witness statement. There, he avers as follows:

“In or around the month of March 2002 ... I was approached by Ms. Cheryl King (Ms. King) who was representing [ALICO]. I had not previously contacted her or solicited her services. Rather the said Cheryl King approached me and solicited my business. At that time she provided certain information about the importance and benefits of having an insurance policy not only due to the nature of my job but also generally. The said policy was to cover not only my medical expenses including doctor's visits and medication but I was also entitled to a sum of \$1000.00 per month for a period of 24 months in the event that I was unable to work as a result of sickness and/or injury.”

[6] Essential factual background is also to be found at paragraph 6 of Mr. Corbin's witness statement. In that paragraph Mr. Corbin deposes that, on 26 April 2002, he met with Ms. King and signed an application form for a personal accident policy in the sum of \$50,000.00 with ALICO. He further deposes in that paragraph that he, at that time, paid a cash deposit in the sum of \$80.12, and was issued with a conditional receipt for the amount paid.

[7] Equally important factual background is Mr. Corbin's averment at paragraph 7 of his witness statement that:

“Prior to paying the first premium I was advised by the Defendant's agent the said Cheryl King, that upon the said cash payment I was to have full insurance coverage. In other words my insurance policy was now in force. The policy number was 7017338 and it was dated the 7th day of June 2002.”

Important also is Mr. Corbin's claim at paragraph 8 of his witness statement that, based on Ms. King's statements, he was of the belief that he was “fully and wholly insured”.

[8] On 6 May 2002, Ms. King submitted both Mr. Corbin's application form and deposit to the underwriting department at ALICO. The application form was approved and the policy was assigned 1 May 2002 as the effective date, namely, the date on which Mr. Corbin's personal accident policy came into effect.

[9] In the meantime, on 26 April 2002, the date on which, it will be remembered, he made the application to ALICO for the personal accident insurance policy, Mr. Corbin sustained personal injury whilst on police duty in Oistins. On 5 June 2002, Mr. Corbin submitted an accident benefits claim to ALICO claiming payment in respect of that injury.

[10] By letter dated 3 August 2002, ALICO indicated to Mr. Corbin that his disability arose prior to the effective date of the policy of 1 May 2002. As a result of that, ALICO informed Mr. Corbin that his disability was not covered under the policy and therefore his claim for payment could not be considered.

[11] Mr. Corbin disputed ALICO's refusal to honour his claim and sought recourse before the court.

PROCEDURAL BACKGROUND

[12] Mr. Corbin commenced legal proceedings in the High Court through his legal counsel, Mr. Michael Yearwood, by writ of summons filed on 26 April 2005 in which he sought, *inter alia*, "damages for breach of an insurance contract made on or about the 26th day of April, 2002". Almost three years later, on 28 February 2008, Mr. Corbin filed his statement of claim in respect of that writ of summons.

[13] On 23 June 2008, ALICO filed its defence through its legal counsel, Messrs. Clarke Gittens Farmer. On 19 March 2009, a summons for directions was taken out by Mr. Yearwood, and two years thereafter, the matter transitioned under the then new *CPR*.

[14] On 8 June 2011, a case management conference (the conference) was held before the Master of the High Court, **Mr. Keith Roberts** (the

- Master). At the conference, the parties were ordered *inter alia* to “file and serve on each other the Statements of Witnesses on whom they intend to rely on or before 15th August, 2011”. On 6 October 2011, a second conference was held and the Master extended the time for the parties to file and exchange witness statements to 27 January 2012.
- [15] By notice of application filed on 5 June 2012, ALICO applied pursuant to **Rule 27.8** for an order for an extension of the time to comply with the court’s orders made on 6 October 2011. ALICO also sought an order under **Rule 27.8 (4) (b)** that it be relieved from any sanction to which it had become liable.
- [16] On 24 September 2012, **Chandler J** granted the orders sought by ALICO, and extended the time for the parties to file and exchange witness statements to 3 March 2013. The learned judge also ordered *inter alia* that the matter be set down for pre-trial review during the month of June 2013.
- [17] On 25 January 2013, Messrs. Clarke Gittens Farmer filed a witness statement on behalf of ALICO.
- [18] By letter dated 4 March 2013, ALICO’s legal counsel wrote to Mr. Corbin’s legal counsel, Mr. Yearwood, informing him that they were in a position to exchange the witness statement and requested a

convenient date and time to do so. Mr. Yearwood never responded to this letter.

[19] By notice of application filed 13 June 2014, ALICO sought the following orders:

- “1. Pursuant to Rule 26.3 of the Supreme Court (Civil Procedure) Rules 2008 The Particulars of Claim in this matter filed on the 26th day of April 2005 be struck out and that this action be dismissed with costs on account of the Claimant’s failure to file and serve its Witness Statements in accordance with the Order made by The Honourable Justice William Chandler, Judge of the High Court on the 24th day of September 2012; and
2. The Claimant pays the Defendant’s wasted costs to date such costs to be agreed or taxed.”

An affidavit sworn to by Mr. Keith King, General Manager of the Barbados branch of Pan-American International Insurance Corporation (Mr. King), was also filed on that date in support of this application.

[20] ALICO submitted three grounds for the application as follows:

- “1. That the Claimant in breach of an Order dated the 24th day of September 2012 failed to file and serve its (*sic*) Witness Statements on the Defendant.
2. Pursuant to Part 26.3 (1) of the Civil Procedure Rules 2008 the Court may strike out a Statement of Case where it appears to the Court that there has been a failure to comply with an Order given by the Court in proceedings.

3. The Claimant has been improper, unreasonable and/or negligent in his conduct of prosecuting this matter.”

[21] ALICO’s application was set for hearing before **Chandler J** on 29 September 2014. Three days prior to the hearing of this application, on 26 September 2014, Mr. Corbin filed his witness statement. On the morning of the hearing of the application, ALICO handed to **Chandler J** submissions entitled “Defendant’s Application for Sanctions against the Claimant”.

[22] At the conclusion of the hearing, **Chandler J** made a decision not to strike out Mr. Corbin’s claim. Accordingly, he ordered as follows:

- “1. That the time limited for the Claimant to file and serve its (sic) Witness Statement be extended to September 29, 2014;
2. That the Statement filed on September 26, 2014 be allowed to stand as the statement of the Claimant;
3. That the Claimant pays the Defendant’s Cost of and occasioned by this Application to be assessed if not agreed by the adjourned date of hearing; and
4. That the matter be adjourned to **November 24, 2014.**”

[23] ALICO filed an application before this Court, titled Civil Application No. 17 of 2014, seeking an order that ALICO be at liberty to appeal the order of **Chandler J** dated 29 September 2014. On 27 November 2014,

this Court heard that application, granted the order sought and ordered that the costs of the application be costs in the appeal.

THE APPEAL

The Notice of Appeal

[24] On 12 December 2014, ALICO filed its notice of appeal, titled Civil Appeal No. 35 of 2014, seeking the following orders:

- “(a) An Order that clauses “1” and “2” of the Order of the Learned Judge dated September 29, 2014 be set aside, the Writ and Statement of Claim filed herein on the 26th day of April 2005 and the 28th day of February 2008 respectively be struck out and the action be dismissed;
- (b) An Order that all the Appellant/Defendant’s Costs of proceedings in the Court of Appeal be paid by the Respondent/Claimant to the Appellant/Defendant or such order as to Costs as may be just; and
- (c) Such further or other Orders as the Court of Appeal deem just.”

[25] The grounds of appeal submitted by ALICO are as follows:

- “(a) The Learned Judge erred in fact and in law in that he did not take into account relevant considerations and/or he has left out relevant considerations;
- (b) The Learned Judge erred in law in that he did not properly assess the evidence and/or did not draw the inferences which flowed naturally and logically from the evidence;

- (c) The Learned Judge erred in the exercise of his discretion in ordering that the time for the filing of the witness statement be extended;
- (d) The Learned Judge's decision exceeds the generous ambit within which reasonable disagreement is possible and is in fact erroneous;
- (e) That some other specific error, not hereinbefore mentioned and substantially affecting the merits of the case has been committed in the course of the proceedings in this case."

[26] Along with the notice of appeal, ALICO also filed written submissions through its legal counsel, Messrs. Clarke Gittens Farmer, in respect of the appeal.

Application to adduce fresh evidence

[27] On the morning of the hearing of the appeal, ALICO made an application to this Court pursuant to **Rule 62.23** of **CPR** seeking to adduce fresh evidence at the hearing of the appeal. The grounds of the application as stated in the affidavit in support sworn to by Mr. King and filed on 7 September 2015 are as follows:

- “(1) The evidence which the Appellant seeks permission to adduce, has now become relevant by virtue of the Witness Statement filed by the Respondent on September 26, 2014 after receiving the leave of the Court from which we now appeal;

- (2) The evidence which the Appellant seeks permission to adduce is pertinent to the issue of prejudice suffered by the Appellant and has an important influence on the result of the Appeal; prejudice being a significant ground to be taken into consideration by the Court of Appeal in coming to its determination;
- (3) The evidence which the Appellant seeks permission to adduce is credible;
- (4) An Order which gives permission to the Appellant to adduce the evidence which it seeks to adduce will further the overriding objective of the Supreme Court (Civil Procedure) Rules 2008 as it will enable the Court to deal with this matter justly.”

[28] The particular factual circumstances which necessitated ALICO’s application are deposed to at paragraphs 6-8 of Mr. King’s affidavit as follows:

- “6. At clauses 7 and 8 of the Witness Statement the Respondent indicates certain representations which were allegedly made to him by a then agent of the Appellant, Ms. Cheryl King. He further indicates, at clause 25 of the Witness Statement representations which were also made to him by a then Manager of the Appellant, Mr. Junior Rock. Both Ms. Cheryl King and Mr. Junior Rock are no longer employed by the Appellant.
7. Efforts were made by and on behalf of the Appellant to locate Ms. King to obtain her witness statement in this matter...

8. I am informed by the Attorneys-at-Law for the Appellant and verily believe the same to be true that they retained the services of a Process Server to locate Ms. King. However, the process server was unable to locate Ms. King at the addresses provided. The Appellant also tried to locate Ms. King by the use of telephone numbers and addresses kept on file. These efforts also proved futile. It is also of note that Ms. King ceased to be an agent of the Appellant since October 2002.”

[29] On 4 January 2016, Messrs. Clarke Gittens Farmer filed written submissions on behalf of the appellant in relation to its application to adduce fresh evidence.

[30] On or about 3 February 2016 the parties to the appeal, and this Court, were furnished with **Chandler J**'s written reasons for his decision made on 29 September 2014.

[31] On 5 February 2016, Messrs. Clarke Gittens Farmer filed submissions, supplemental to its submissions filed on 12 December 2014. On that same date, Mr. Yearwood filed written submissions on behalf of the respondent in response to ALICO's notice of appeal and application for leave to adduce fresh evidence.

[32] On 16 February 2016 and 3 May 2016, counsel made oral submissions before this Court, first in relation to ALICO's application to adduce fresh evidence and second, in relation to ALICO's substantive appeal.

The Court reserved its ruling in respect of both the appeal and the application.

ISSUES TO BE DETERMINED

[33] It is evident from the foregoing that there are two principal issues in this matter for this Court's determination. The first is the preliminary question as to whether this Court should grant leave to ALICO to adduce fresh evidence as set out in Mr. King's affidavit at the hearing of the appeal. This issue may be termed as the "fresh evidence issue".

The second is whether there was a proper exercise by **Chandler J** of his discretion in his decision not to strike out the respondent's case at the hearing of the application, and if no, how this Court should exercise an independent discretion of its own. This may be conveniently called the "striking out issue".

[34] Admittedly, these two issues are interlinked. Notwithstanding, we consider it convenient to deal with the fresh evidence issue prior to and separately from the striking out issue in our analysis and conclusions.

COURT'S ANALYSIS AND CONCLUSIONS

The Fresh Evidence Issue

[35] The law governing an application to adduce additional evidence before this Court is found in **Rule 62.23 (1)** of *CPR*. That sub-rule provides as follows:

“This rule applies to any application to the court to receive evidence in proceedings on an appeal additional to the evidence in the court below as in an appeal in which a new trial is sought on the ground of fresh evidence”.

[36] In **Marjorie Knox v John Deane et al Civil Appeal No. 6 of 2010** this Court, after detailed analysis, held that the three-pronged test espoused by Denning LJ in the English Court of Appeal case of **Ladd v Marshall [1954] 1 WLR 1480 (Ladd v Marshall)** in relation to the rule of practice in applications to adduce fresh evidence has been preserved by **Rule 62.23 (1)**. In **Ladd v Marshall** itself Denning LJ identified the prongs of the test at **p. 1491** as follows:

“[F]irst, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.”

[37] In the case before us, Mr. King deposed on behalf of ALICO that Ms. King, the ALICO's agent who Mr. Corbin in his witness statement alleged made certain representations to him, had left ALICO's employ 15 years before, in 2002. Mr. King further deposed that, after the filing of Mr. Corbin's witness statement, efforts were made to contact Ms. King which all proved futile. As a result of this, contended counsel for ALICO, ALICO satisfied the first prong of the **Ladd v Marshall** test, in that ALICO has shown that the additional evidence required from Ms. King's testimony could not have been obtained with reasonable diligence for use at the trial.

[38] Counsel for ALICO maintained that Mr. Corbin's witness statement revealed allegations about statements made by Ms. King to substantiate his cause of action which were not specifically pleaded anywhere in his originating documents. Thus, argued counsel, ALICO could only defend itself against such allegations by Ms. King's denial that such statements were made. Therefore, counsel insisted, Ms. King's evidence undoubtedly would have an important influence on the result of the case and so the second prong of the **Ladd v Marshall** test was satisfied.

[39] Finally, counsel argued that the affidavit evidence of Mr. King that he was informed by the attorneys-at-law for ALICO and verily believes that they retained the services of a process server to locate Ms. King and that Ms. King could not be found is sufficiently credible. Accordingly, contended counsel, the third prong of the **Ladd v Marshall** test was also satisfied.

[40] We agree with counsel that, for the reasons advanced by counsel, ALICO has satisfied all three prongs of the **Ladd v Marshall** test. Accordingly, leave is granted to ALICO to adduce additional evidence as set out in Mr. King's affidavit in the hearing of the appeal. In exercising our discretion under **Rule 62.23** to grant such leave, we have had regard to the overall circumstances and facts of this case and consider that our decision best gives effect to the overriding objective of **CPR** which seeks to deal with cases justly.

[41] We now turn to the striking out issue.

The Striking Out Issue

[42] ALICO's application for striking out Mr. Corbin's statement of case is made pursuant to **Rule 26.3 (1)** of **CPR**. This **Rule** provides:

“(1) In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case where it appears to the court that there has been a failure to comply with a rule or practice

direction or with an order or direction given by the court in the proceedings.”

[43] It is plain from the use of the word “may” in this **Rule** that the court’s power to strike out a party’s statement of case is discretionary: see **section 37 of Interpretation Act, Cap.1**. As such, it is imperative that this Court, in considering whether to interfere with the exercise of his discretion by the trial judge in this case, begin by reminding itself of the appellate function in a case involving the exercise of a discretionary power by a trial judge.

[44] In its recent decision of **Consumer Guarantee Insurance Co. Ltd. v Trident Insurance Company Ltd. Civil Appeal No. 9 of 2014 (Consumer Guarantee)**, this Court accepted the statement of law by Lord Woolf on the appellate function in respect of the exercise of a discretion by a trial judge in the English Court of Appeal decision of **Phonographic Performance Ltd v AEI Rediffusion Music Ltd [1999] 1 WLR 1507, 1523-D**. There, Lord Woolf stated as follows:

“Before the Court can interfere it must be shown that the judge has either erred in principle in his approach or has left out of account or has taken into account some feature that he should, or should not, have considered, or that his decision was wholly wrong because the Court is forced to the conclusion that he has not balanced the various factors fairly in the scale.”

[45] In **Consumer Guarantee** also, this Court noted that the Trinidad and Tobago Court of Appeal had also embraced that statement of the law in **Jetpak Services Ltd v BWIA International Airways Ltd (1998) 55 WIR 362**. There, de la Bastide CJ stated at **368**:

“It is only in the circumstances where the exercise of the judge’s discretion is based on a misunderstanding or misapplication of either the law or the evidence that an appellate court is entitled to set aside the exercise of the judge’s discretion and exercise an independent discretion of its own.”

[46] Accordingly, in determining whether this Court should interfere with the exercise by **Chandler J** of his **Rule 26.3 (1)** discretion, the question which we must address is whether the judge acted on a misunderstanding or misapplication of either the law or the evidence in the exercise of his discretion in refusing to strike out the respondent’s claim.

Has Chandler J acted on a misunderstanding or misapplication of either the law or the evidence?

[47] **Rule 26.3 (1)** expressly provides that the striking out power contained in it is a power which may be exercised wherever “there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings”. This implies that the striking out power in that **Rule** may be invoked generally for non-

compliance with any order of a court, including non-compliance with an order of the court to file a witness statement by a specified date.

[48] Unfortunately, the judge in this case did not expressly address the ambit of the **Rule 26.3 (1)** striking out power. Instead, the judge held at **paragraph [15]** of his judgment that:

“The provisions of the **CPR Part 29.11** provides that the only sanction against non-filing of the witness statement is that the Court may disallow the witness from giving evidence.”

In our view, this is an erroneous statement of the law.

[49] **Rule 29.11** reads as follows:

“Where a witness statement or witness summary is not served in respect of an intended witness within the time specified by the court, then the witness may not be called unless the court considers it just in the circumstances to give permission.”

We are in agreement with **Chandler J** that this **Rule** undoubtedly provides a particular sanction against non-compliance with orders in respect of the serving of witness statements within the time specified by the court. However, we do not agree with the judge that the sanction in **Rule 29.11** is the “only” sanction for non-compliance in **CPR**.

[50] Let us explain.

[51] **Rule 26.3 (1)** expressly provides that the **Rule 26.3 (1)** striking out sanction is “[i]n addition to any other power under these Rules”. This

phrase, in our judgment, irresistibly imports that, in addition to the *Rule 29.11* sanction, the *Rule 26.3 (1)* sanction is an available sanction for non-compliance with orders in respect of the serving of witness statements within the time specified by the court.

[52] To be sure, the issue expressly raised before the judge in ALICO's application was whether the *Rule 26.3 (1)* strike out sanction was available to ALICO. It was not whether the *Rule 29.11* sanction was available. Accordingly, we find that the judge erred in applying *Rule 29.11*, and not considering *Rule 26.3 (1)*, in exercising his discretion in favour of not granting the strike out order sought by ALICO.

[53] It is our judgment that, as a consequence of his failure to consider *Rule 26.3 (1)*, the judge did not take into account relevant considerations which he ought to have or to accord sufficient weight to those considerations in his balancing exercise of the facts and circumstances of this case. It is our further judgment that the judge therefore has "not balanced the various factors fairly in the scale" as he was bound to do by the authority of the Caribbean Court of Justice (CCJ) case of **Barbados Rediffusion Services Limited v Asha Mirchandani, Ram Mirchandani and McDonald Farms Ltd. CCJ Appeal No. CV 1 of 2005 (Barbados Rediffusion)**.

[54] Having regard to the foregoing, we would set aside the exercise of the judge's discretion and exercise an independent discretion of our own. This means that we are now required to consider afresh whether or not the **Rule 26.3 (1)** discretion should be exercised in favour of striking out the respondent's statement of claim. And so, we turn to this consideration.

*Whether or not the **Rule 26.3 (1)** discretion should be exercised by us in favour of striking out?*

[55] We have already set out the provision in **Rule 26.3 (1)** at **paragraph [42]** above. Under this rule, the court is vested with a power to strike out where there has been non-compliance of any order given by a court, including, as we have concluded at **paragraph [51]** above, a party's failure to file its witness statement. In approaching the exercise of the **Rule 26.3 (1)** strike out discretion, we deem it of fundamental importance to outline the governing principles which should guide us in the making or refusal of an order to strike out Mr. Corbin's case.

[56] The judgment of the CCJ in **Barbados Rediffusion**, delivered on 16 March 2006 by President de la Bastide J, provides binding authoritative guidance on the factors which must be considered in the exercise of the striking out discretion. The appeal in **Barbados Rediffusion** to the CCJ followed this Court's dismissal of the

appellant's appeal from an order of the trial judge in which the appellant's amended defence was struck out on the basis of its failure to comply with an unless order for the discovery of documents. The CCJ allowed the appeal of the appellant and granted an order substantially restoring the appellant's amended defence.

[57] After an extensive review of pre-CPR and post-CPR English case authority and this Court's decision in **Caribbean Broadcasting Corporation v Mirchandani and Ors (2000) 59 WIR 57**, the CCJ outlined, at **paragraphs [44] – [47]** of its decision, a list of the factors, stated by the CCJ to be non-exhaustive, which a judge should consider when asked to make a strike out order. We would summarise these factors as follows:

- (i) The judge's discretion is a wide and flexible one, to be exercised "as justice requires" in a particular case;
- (ii) The judge should start by reminding himself/herself that to strike out a party's case and so to deny him/her a hearing on the merits is an extreme step not to be taken lightly;
- (iii) Broadly speaking, strike out orders should be made in two circumstances. The first is when it is necessary in order to achieve fairness. The second is when it is necessary in order to maintain respect for the authority of the court's order.

- (iv) In relation to an order to achieve fairness, “fairness” means fairness not only to the non-offending party but also to other litigants who are competing for the finite resources of the court;
- (iv) If there is a real risk that a fair trial may not be possible as a result of one party’s failure to comply with an order of the court, then that is a situation which calls for an order striking out that party’s case and giving judgment against him;
- (vi) Even where a fair trial is possible, strike out orders should be made when it is necessary to maintain respect for the authority of the court’s orders;
- (vii) While strike out orders made in order to maintain respect for the authority of the court’s order may be described as punitive, strike out orders are not to be made as retribution for some offence given to the court but as a necessary and to some extent symbolic response to a challenge of the court’s authority, in circumstances in which failure to make such an order might encourage others to disobey court orders and tend to undermine the rule of law. This is the type of behaviour that may properly be categorised as contumelious or contumacious;
- (viii) The correct approach required is a balancing exercise taking into account all the relevant facts and circumstances of the case. It is not a box-ticking exercise;
- (ix) In determining whether a party fails to respect the authority of the court’s orders, an examination of the reason for the non-compliance is paramount;
- (viii) Whether there was a breach of an unless order;
- (xi) Whether the previous conduct of the defaulting party discloses a pattern of non-compliance;

- (xii) Whether the non-compliance with the order was total or partial; and
- (xiii) Whether the complying party has suffered prejudice as a result of the non-compliance.

[58] We are keenly aware that the CCJ judgment in **Barbados Rediffusion** was handed down before the introduction of *CPR* in Barbados. de la Bastide J adverted to that fact in propounding the striking out guidelines in that case. However, de la Bastide J emphasised at **paragraph [38]** of the judgment that the procedural changes effected by the English *CPR*, on which our *CPR* are based, “have not resulted in any change in the principles governing the making or refusal of orders the ultimate effect of which is to strike out a party’s case and cause judgment to be entered against him because of his failure to comply with a peremptory order of the court”.

[59] It is our firm judgment that the **Barbados Rediffusion** guidelines are fully applicable to the exercise of the striking out discretion in **Rule 26.3 (1)**. We are of this view because the factors identified in the **Barbados Rediffusion** guidelines are entirely conducive to the court, in approaching the striking out discretion in **Rule 26.3**, complying with the enjoinder in **Rule 1.1 (1)** of *CPR* that the court deal with cases justly as explicated by **Goodridge JA** in **Blackman (aka June Gill) v**

Gittens-Blackman and Gittens Grant Civil Application No. 6 of 2012 (Unreported). Indeed, the factors identified in the **Barbados Rediffusion** guidelines appear to us to encapsulate the objectives listed in **Rule 1.1 (2)**, namely, (a) ensuring that the parties are on an equal footing; (b) saving expense; (c) dealing with cases in ways which are proportionate; (d) ensuring that the case is dealt with expeditiously and fairly; and (e) allotting to the case an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.

[60] We would also add that, in **Cheryl Holder v Life of Barbados Civil Suit No. 701 of 2001 (Unreported)**, **Reifer J** expressed a similar view on the authority of the **Barbados Rediffusion** guidelines under **CPR**. In a characteristically incisive judgment, **Reifer J** cited **paragraph [45]** of **Barbados Rediffusion** which reads:

“Broadly speaking, strike out orders should be made either when that is necessary in order to achieve fairness or when it is necessary in order to maintain respect for the Court’s orders.”

At paragraph 38 of her judgment, **Reifer J** then opined as follows:

“While this decision was made prior to the implementation of our CPR, the statement noted above is still relevant and in keeping with the Overriding Objectives of the CPR.”

[61] We therefore turn to applying the **Barbados Rediffusion** guidelines to the case before us. In so doing, we examine the first of the two main factors identified in those guidelines to be considered in determining whether or not to grant a striking out order, namely, whether an order of striking out is necessary to achieve fairness. In approaching this determination, we consider it important to note that in the **Barbados Rediffusion** case, de la Bastide J propounded that, in answering the question whether an order of striking out was necessary to achieve fairness, the test is whether there is a real risk that a fair trial may not be possible as a result of one party's failure to comply with an order of the court. This question, it was also pointed out by de la Bastide J in that case, is a question of fact.

[62] So, is there factual evidence that the striking out order applied for by ALICO is necessary to achieve fairness in the sense that there is a real risk that a fair trial might not be possible as a result of Mr. Corbin's failure to comply with **Chandler J** order of 24 September 2012?

[63] To begin with, it is important to recall that the major plank of ALICO's application for the strike out order in the High Court is Mr. Corbin's failure to comply with **Chandler J**'s order to file his witness statement within the time specified in that order. The overwhelming evidence is

that he did not. **Chandler J**'s order was that Mr. Corbin file and serve his witness statement by 3 March 2013. It is only one year and 8 months later, on 26 September 2014, that Mr. Corbin filed his witness statement and this only after ALICO threatened to apply for striking out of his claim.

[64] There is therefore unambiguous evidence of Mr. Corbin's failure to comply with the court's order. That said, it emerges clearly from the **Barbados Rediffusion** guidelines that evidence of non-compliance alone is not enough to support a finding that there is a real risk that a fair trial would be impossible. Those guidelines require that, in addition, ALICO must adduce evidence to show that non-compliance created a real risk that a fair trial would be impossible.

[65] In our judgment, ALICO did not put forward any such evidence before **Chandler J**. In Mr. King's affidavit in support of the application before **Chandler J**, Mr. King deposed that Mr. Corbin's failure to comply with the order of **Chandler J** meant that potential witnesses had left the employ of ALICO and that the memories of witnesses may have failed or be failing. However, no evidence to support this submission was adduced in that affidavit. For example, as **Chandler J** noted, the affidavit did not state who the witnesses were, their ages,

their physical and mental states of health or any other circumstances which would impact their ability to recall events.

[66] The evidential vacuum which existed before **Chandler J** was filled by the fresh evidence received by this Court pursuant to ALICO's application under *Rule 62.23* additional to the evidence before **Chandler J**. In our view, that fresh evidence shows that Mr. Corbin's failure to comply with the order of **Chandler J** to file and serve his witness statement by 3 March 2013 and his filing and serving it just before the hearing of ALICO's application to strike out denied ALICO sufficient time to locate Ms. King whose evidence, after Mr. Corbin's witness statement was revealed, assumed pivotal importance in ALICO's defence of Mr. Corbin's claim.

[67] In our judgment, the fresh evidence received by us support the conclusion that, because ALICO was denied sufficient time to locate Ms. King, there is a real risk that a fair trial might not be possible as a result of Mr. Corbin's non-compliance with the order of **Chandler J**. Following the guidelines in **Barbados Rediffusion**, then, we hold that the facts and circumstances in this case call for an order striking out Mr. Corbin's case and giving judgment against him on the first factor in those guidelines.

[68] But, even if there was no real risk that a fair trial might be possible as a result of Mr. Corbin's non-compliance with the order of **Chandler J**, according to the **Barbados Rediffusion** guidelines, we would still have to consider the second of the two main factors, namely, whether an order of striking out was necessary in order to maintain respect for the authority of the court's order. We therefore turn to considering this factor.

[69] Here we note that, according to **Barbados Rediffusion** at **paragraph [46]**, a strike out order for the purpose of maintaining respect for the authority of the court's order is to be seen, not "as retribution for some offence given to the court but as a necessary and to some extent but as symbolic response to a challenge of the court's authority for some offence in circumstances in which failure to make such a response might encourage others to disobey court orders and tend to undermine the rule of law. This is the type of disobedience that may properly be categorised as "contumelious or contumacious". The real question therefore is whether Mr. Corbin's failure to comply with **Chandler J's** order was a defiant and persistent refusal such as may be classified as "contumelious or contumacious".

[70] The undisputed evidence is that Mr. Corbin failed to comply with **Chandler J**'s order made on 24 September 2012 extending the time to file and serve his witness statement to 3 March 2013. It was, as already noted, only one year and 8 months later, on 26 September 2014, that Mr. Corbin filed his witness statement, and this, only after ALICO threatened to apply for striking out of his claim. The reason given for this non-compliance with the order of **Chandler J** was "Mr. Yearwood's [Mr. Corbin's lawyer's] involvement in the Alexandra School Inquiry and the relocation of his office, which impacted heavily upon his [Mr. Yearwood's] work output".

[71] We agree with Mr. Ramon Alleyne, counsel for ALICO that this non-compliance was inexcusable. However, it was not of a nature that can be categorised as "contumelious or contumacious". But, according to the **Barbados Rediffusion** guidelines, we are to have regard to the previous conduct of Mr. Corbin. It is this conduct which colours the character of Mr. Corbin's failure to comply with **Chandler J**'s order.

[72] Viewed in light of his previous conduct, Mr. Corbin's failure to comply with court orders to file and serve witness statements and related documents in this case can only be described as stubborn and persistent. On 8 June 2011, **Master Roberts** ordered that Mr. Corbin file and serve

his witness statements on or before 15 August 2011. Mr. Corbin did not comply with this order. Neither did he comply with the Master's order to file and serve on the other side a list of documents on or before 6 July 2011. He filed the list five months later on 22 November 2011. **Master Roberts** ordered an extension of the time for filing the witness statement to 27 January 2012 with which order Mr. Corbin also did not comply. It is our view that this history of disobedience of court orders, though not contumelious, may properly be categorised as contumacious.

[73] The **Barbados Rediffusion** guidelines adjure that even where failure to obey court orders can be viewed as contumacious, a court is still required to conduct a balancing exercise in which account is taken of all the relevant circumstances of the case. In our view, one relevant circumstance is that the orders with which Mr. Corbin did not comply were not unless orders "framed in peremptory terms which make it clear to the party to whom it is directed, that he is being given a last chance". Another is that, as we have already concluded, ALICO has suffered prejudice as a result of Mr. Corbin's non-compliance. Another is that Mr. Corbin's non-compliance was total and not partial. Yet another is that, even though the reason given by Mr. Corbin for his non-

compliance may explain his non-compliance with the order of **Chandler J**, it certainly does not explain his persistent disobedience of the orders of **Master Roberts**. A final is the new civil litigation culture of expeditious disposal of cases which has been introduced by **CPR**.

[74] In undertaking a balancing exercise of these relevant circumstances, this Court finds that an order of striking out Mr. Corbin's claim is necessary in order to maintain respect for the authority of court orders. We have reached that conclusion in the teeth of the CCJ's admonition at **paragraph [44]** of **Barbados Rediffusion** that "to strike out a party's case and so deny him a hearing on the merits, is an extreme step not to be lightly taken".

[75] In sum, it is our judgment that a striking out order is warranted in this case on either or both of the two circumstances identified in **Barbados Rediffusion**. It is necessary in order to achieve fairness. It is also necessary in order to maintain respect for the authority of court orders.

DISPOSAL

[76] For all the reasons hereinbefore stated we allow the appeal of the appellant. Accordingly, it is ordered as follows:

- (i) that clauses 1 and 2 of the order of **Chandler J** dated 29 September 2014 are set aside;

- (ii) the writ of summons and statement of claim filed on 26 August 2005 and the 28 February 2008 respectively are struck out and the action is dismissed;
- (iii) the appellant will have its costs of proceedings in this Court to be assessed if not agreed.

Chief Justice

Justice of Appeal

Justice of Appeal