IN THE GRAND COURT OF THE CAYMAN ISLANDS

Cause No. GC 2 of 2014

BETWEEN

KURT SCOTT

Plaintiff

-and-

CARIBBEAN UTILITIES COMPANY LIMITED

Defendant

IN CHAMBERS via Zoom

Appearances:	Mr. Jonathan Jones QC, instructed by Ms. Kim Grandage of KSG for the Plaintiff
	Dr. Harry Steinberg QC, instructed by Mr. James Austin-Smith and Mr. Gary Hendrikse of Campbells for the Defendant.
Before:	Hon. Madam Justice Marlene Carter (Actg.)
Heard:	13 September 2021
Draft Judgment circulated:	13 October 2021
Judgment Delivered:	20 October 2021

HEADNOTE

Civil Litigation– Personal Injury – Interim payment- further evidence of experts- instruction of a second expert by the same party on the same subject

JUDGMENT

1. By summons dated 15th June 2021 the Plaintiff seeks the following orders:

> "*1. That the Defendant be ordered to make an interim payment forthwith in the sum of US$500,000 or such sum as it deems appropriate to the Plaintiff pursuant to GCR Order 29 r. 10.*
> *2. Any further Order that the Court deem appropriate."*

2. The Defendant opposes the applications.

BACKGROUND

3. The Plaintiff's skeleton sets out a concise background to the instant application. For convenience, that summary is adopted here:

> *"The Plaintiff, Mr. Kurt Scott ("Mr. Scott") suffered catastrophic injuries in an explosion which occurred at his place of work. Mr. Scott was engulfed in a fireball produced by the explosion and knocked to the ground.*
>
> *...is indicative of the severity of his injuries. He was in intensive care for nearly 4 months and he had to undergo extensive treatments and surgery. During this time [he suffered] respiratory failure, respiratory distress and required intubation. He required prolonged ventilator assistance. He had a very stormy course and was lucky to survive. He would have suffered severe pain due to the injuries and the complications of surgery.*
>
> *Mr. Scott was then treated in the rehabilitation wing until 2 August 2011 whereupon he was transferred to the hospital's nursing home as an outpatient until December 2012. He was therefore heavily bandaged for 23 months. For a substantial part of this time, the Plaintiff's ears were blocked, his eyes were bandaged and he was unable to speak. This must have had a profound effect on Mr. Scott.*
>
> *[The Plaintiff's injuries. These are summarised below:*
>
> *a A severe psychiatric injury.*

i. *Chronic Severe Complex PTSD*

ii. *Major Depressive Disorder*

iii. *Post-Intensive Care Syndrome*

b. *35% second and third degree burns of the face, head, back, bilateral upper extremities and anterior abdomen.*

c. *Loss of his right eye with consequential effects on his vision.*

d. *Facial disfigurement, including extensive scarring and the loss of the helix and lobule of both ears.*

e. *Urinary difficulties.*

f. *Sexual dysfunction with erectile dysfunction.*

g *Respiratory problems due to an inhalation injury to his lungs. He developed bilateral pneumonia, atelectasis and a tension pneumothorax which reduced the capacity of his lungs.*

h. *Contractures and deformities in his middle fingers.*

i. *Chronic pain in his back, right eye area and hands.*

A. Application for Interim Payment

4. The Plaintiff has previously received an interim payment from the Defendant of US $500,000 in August 2016. He now seeks a further interim payment of US $500,000.

5. The application is made pursuant to GCR, Order 29 rule 11 which states:

> *"11. (1) If, on the hearing of an application under rule 10 in an action for damages, the Court is satisfied -*
>
> *(a) that the defendant against whom the order is sought (in this paragraph referred to as "the respondent") has admitted liability for the plaintiff's damages; or*
>
> *(b) that the plaintiff has obtained judgment against the respondent for damages to be assessed; or*
>
> *(c) that if the action proceeded to trial, the plaintiff would obtain*

judgment for substantial damages against the respondent or, where there are two or more defendants, against any of them,

the Court may, if it thinks fit and subject to paragraph (2), order the respondent to make an interim payment of such amount as it thinks just, not exceeding a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered by the plaintiff after taking into account any relevant contributory negligence and any set-off, cross-claim or counterclaim on which the respondent may be entitled to rely.

(2) No order shall be made under paragraph (1), in an action for personal injuries if it appears to the Court that the defendant is not a person falling within one of the following categories, namely -

(a) a person who is insured in respect of the plaintiff's claim;

(b) a public authority; or

(c) a person whose means and resources are such as to enable him to make the interim payment."

6. Counsel for the Plaintiff submits that on the instant application the requirements of Order 11 r (1) (a) and (c) are satisfied and the Court should exercise its discretion in favour of the application as the amount of the interim payment sought "*does not exceed a reasonable proportion of the damages... likely to be recovered by the Plaintiff*".

7. It is further submitted that Order 11 r 2 is not engaged because the Defendant is insured in respect of the Plaintiff's claim.

8. Counsel for the Plaintiff invited the Court to find that a *"reasonable proportion"* could be up to 90% of a conservative valuation of the amount to be recovered on the claim. The court was further invited to consider that the Defendant's filed and Counter Schedule of Damages could be used as the conservative valuation of the amount to be recovered in this case. The Plaintiff's written submissions to the Court, on this aspect of the application was as follows:

a) P only seeks an interim payment of US$ 500,000 which will make the total interim payments in this case to be US$1 million. The accident happened over 10 years ago.

b) The Counter Schedule accepts that P is entitled to CI$ 1,904,014 or US $2,293,993 using an exchange rate of 1 US$ = 0.83 CI$.

c) If the application for US$ 500,000 is granted, the total interim payments will

be less than 50% of the sum accepted by D (43.6%).

d) *This sum cannot therefore amount to more than a "reasonable proportion of the damages which in the opinion of the court are likely to be recovered by the Plaintiff."*

e) *There is therefore no need for the court to carry out a conservative assessment of the damages which P is likely to recover at trial. An interim payment of US$500,000 is justified even if D succeeds on every point in its Counter- Schedule."*[1]

9. Counsel for the Plaintiff argued that the Court's discretion to award an interim payment should not be linked to need or the provision of information. However, it was submitted, the Plaintiff does have a real need for the interim payment.

10. Counsel referred the Court to the affidavit of Kim Grandage (hereinafter 'the Grandage affidavit") filed in support of the summons at paragraphs 26 - 32 as follows:

"*26. The Plaintiff needs funds to cover his on-going expenses including rent, utilities, food, medical and travel expenses.*

27. He also requires the interim payment in order to progress the matter to Trial.

28. By way of summary the costs to Trial include Attorney's fees, Leading Counsel's fees, updated/additional expert evidence and attendance of numerous experts to give evidence at Trial.

29. An estimate of the costs and expenses needed to progress the case to Trial can be found at page 1 of the exhibit.

30. The Plaintiff has instructed Mr. Jonathan Jones QC to appear in the trial of this matter and believes this is proportionate given the issues and value of the claim, indeed the Defendant have also instructed Leading Counsel. Furthermore, there are a number of experts that will need to be called to give evidence at the Trial.

31. The Experts and the QC require payment of fees and out of pocket expenses and put simply there is no way to pay them without a further interim payment. This has the possibility of prejudicing the presentation of the claim made at trial if we cannot deal with the fees issue.

[1] See paragraph 22 of the Plaintiff's skeleton submissions

32. *We do not anticipate any further interim payment application will be needed before the Trial.*"

11. Counsel for the Plaintiff submitted that the amount that was sought was well within the ambit required to safeguard the Defendant since it was less than 50 percent of the sum that the Defendant accepts that the Plaintiff is entitled to. He stated that *"a reasonable proportion"* could be high provided the assessment upon which it was based was conservative.

The Defendant's Position

12. "*The Defendant does not oppose in principle the application for an interim payment but does not agree the sum sought by the Plaintiff*"[2].

13. The Defendant has offered to make an interim payment in the sum of US$ 250,000. The Defendant argues however, that any interim payment, whether US$ 250,000 offered or the US$ 500,000 sought by the Plaintiff, should only be paid/ordered upon the Plaintiff agreeing to have the matter listed for trial.

14. The Defendant argues that in the exercise of its discretion the Court must consider matters in two stages; firstly, whether to make the interim payment and secondly the appropriate amount. Counsel for the Defendant contended that the Court may consider all relevant factors including the conduct of the parties and the progress of the matter to date.

15. Counsel for the Defendant submitted that while, for the purposes of the present application, the Defendant conceded that there is no requirement for the Plaintiff to demonstrate a particular need, the absence of need may be a relevant factor for the Court at the second stage of its deliberation, in its consideration of the appropriate amount to be ordered as an interim payment.

16. The conduct to which the Defendant pointed was the role of the Plaintiff in the delaying of the matter coming on for trial.

[2] At paragraph 10, page 2 of the Defendant's skeleton argument.

17. On the second stage considerations, the Defendant submitted that the court should focus only on the value of what the Plaintiff has lost to date, that is the estimates for past loss and special damages. Counsel for the Defendant asked the Court to consider that the Counter Schedule of Damages allows for US$ 632,053 for such loss. The combined sum, that now offered by the Defendant and that already paid to the Plaintiff, would amount to US$ 750,000.

18. Counsel contends that the sum offered by the Defendant is "*more that the Plaintiff needs to prepare for trial*"; and "*a reasonable proportion of the damages*".

Conclusion

19. I am satisfied that an Interim Payment should be made. The Plaintiff has met the requirements for the Court to exercise its discretion pursuant to Order 29 r 11 (1) (a) and (c). Based on that finding, there is no other basis for any further limitation on the jurisdiction of this court to order an interim payment.[3] I am also satisfied that the Plaintiff does not have to demonstrate a specific need to trigger the Court's discretion to grant such payment.[4]

20. In *Stringman v McArdle,*[5] Butler-Sloss L.J. addressed the role of the Defendant on an application for an interim award. At page 1656 of the report, the Learned Judge noted that counsel for the Defendant had conceded before the Court that it was not the duty of a Defendant to argue the merits of the application for an interim award. She addressed the Defendant's arguments concerning extravagance and unsuitability:

> *"Such objections seem to me to exceed the limits of objection by a defendant in such proceedings."*

She stated further:

> *"Normally such objections to an interim award would be either technical, and paragraph (2) of the rule applies, or on the ground that either damages will not be awarded or the amount to be awarded would be insufficient for the interim award*

[3] See Schott Kem Ltd v Bentley [1991] 1 QB 61, per Neill L.J. at page 74
[4] Stringman (a minor) v McArdle [1994] 1 W.L.R. 1653
[5] [1994] 1 WLR 1653

sought. To object on the ground that the money is to be applied for the wrong purpose or is to be applied for too extravagant a purpose seems to me to go outside what one would expect the normal objections of counsel for the defendant to make."

21. While the objections of Counsel for the Defendant the instant case do not go as far as did those of the Defendant in *Stringman,* by the same principle as noted by Butler-Sloss L.J., arguments that the interim payment sought is more than the Plaintiff needs to prepare for trial or that the amount to be awarded should be limited because of the absence of a need demonstrated by the Plaintiff are of limited assistance to the Court.

22. In its assessment of a reasonable proportion of the damages likely to be recovered, the Court has considered the evidence of the need demonstrated by the Plaintiff. That need is not however determinate of the outcome of this application. I am mindful of the Defendant's argument that this Court should consider only past loss and special damages. I find that a necessary proportion for an interim payment at this stage of the claim should be in the amount of US$ 375,000.

B. Application for Further expert evidence

23. The Plaintiff sought further directions and orders from the Court relating to expert evidence. The Plaintiff seeks updated witness statements, schedule of loss and counter schedule of damages as well as permission to rely upon further expert evidence from:

a. A further psychiatrist
b. An ophthalmologist
c. Dr Robinson, Pulmonary Physician.
d. Dr Taub, Urologist
e. A neurologist/neuropsychologist
f. An expert in Immigration and the cost of Health Insurance.

24. The parties have to date instructed the experts as set out in the table below:

Expertise	Plaintiff	Defendant
Endocrinology	Dr Isaacs	Professor Bouloux
Pulmonary function	Dr Robinson	Joint

Plastic surgery	Dr Gibson	Joint
Ophthalmology	Dr Buznego	Joint
Urology	Dr Taub	Joint
Urology		Mr. Shah
Cardiovascular	Dr Jiminez	Joint
Burns	Dr Salisbury	
Psychiatry	Dr Quesada	
Forensic Psychiatry	Dr Kampers	Professor Greenberg

25. The following are the experts and/or further evidence for which the Plaintiff seeks further permission.

(1) The Plaintiff has previously instructed a psychiatrist who has produced 3 reports and a joint report with the Defendant's expert. The Plaintiff seeks the permission of the Court to rely on a second expert psychiatrist.

(2) The instructions of an ophthalmologist regarding the Plaintiff's eyesight. There is an issue whether the Plaintiff can drive and the Plaintiff contends that significant damages may depend on such assessment.

(3) Further evidence from the Respiratory/Pulmonary Physician based on his recommendations that the Plaintiff's lung function should be assessed. This is especially needed since the Plaintiff has learned that he might have inhaled asbestos and other dangerous chemicals during the explosion "*which caused his injuries*".

(4) Further evidence of the Urologist. The Plaintiff submits that after a meeting in April 2020 the experts have suggested various tests be carried out to assess the Plaintiff's bladder issues, and to address his erectile dysfunction. The Plaintiff wishes to have these tests and/or procedures completed and a re-assessment by Plaintiff's urologist Dr Taub.

(5) The Plaintiff submits that his medical records show that he suffered brain damage caused by the incident. The Plaintiff wishes to explore the extent of any such damages.

(6) An expert's evidence is sought on matters of immigration to the USA and the attendant costs of medical insurance if the Plaintiff is successful. The Plaintiff submits that but for the incident, he would have *remained working in the Cayman Islands and would have been provided with health insurance by his employers. Now, it is likely to be very expensive and this additional cost should be recovered as damages in the claim*".

26. In support of the application for further evidence counsel for the Plaintiff referred the court to the cases of *T v Imperial College Healthcare NHS Trust* [2020] EWHC 1147 and *Heismer v The*

Islamic Republic of Iran & Anor [2019] EWHC 2073. He submitted that the following were the relevant considerations on an application for further evidence:

a. *Whether there is good reason for the late application.*

b. *The significance of the new material*

c. *Considerations of prejudice to each party*

d. *The need to do justice to all the parties having regard to the overriding objective.*

e. *If this is not a very late application then the court's discretion is to be exercised simply in accordance with the overriding objective.*

27. Counsel also referred the Court to the case of *Knapman v Carbines* [2020] EWHC 3586 and submitted that the Plaintiff had satisfied the requirements mentioned therein to be permitted to call further expert evidence. These were:

a. *Such expert evidence is reasonably required to resolve an issue in the proceedings.*

b. *P has adopted a "cards on the table" approach and has not sought to obtain expert evidence in advance of the application.*

c. *A trial date has not been fixed and therefore will not need to be adjourned. It is therefore not a "very late application."*

28. The Defendant opposes the applications for further expert evidence. Counsel for the Defendant submitted that the Court must consider the Plaintiff's application for further evidence in the context of the progression of the matter to date and the need for it to be finally determined. Counsel referred to the fact that the application is made at a very late stage and with little notice. In this regard counsel noted that up to this point, three previous trial dates had been set and vacated. The two trial dates set in 2020 had been vacated due to the Covid-19 pandemic. However, the third trial date in February 2021, was vacated at the Pre-Trial Review stage, on the Plaintiff's oral application following an ex-parte hearing which took place immediately before the Pre-Trial Review.

29. The Defendant pointed to the seeming resistance by the Plaintiff to attend certain examinations to finalise expert reports. The Plaintiff's reluctance to attend upon Dr Shah, the Defendant's urologist expert, caused the Defendant to seek the Court's assistance, resulting in an 'unless' order being made to compel the Plaintiff's attendance upon Dr. Shah in 2020.

30. The Defendant also referred to the fact that a trial in November 2021 was contemplated by both parties, yet the Plaintiff waited until August 2021 to make the instant application for further expert evidence. The Defendant contends that -

> *"The main result of the order sought by the Plaintiff would be further delay. It would entail a batch of new reports, further meetings between these newly instructed experts and the existing experts, joint statements, and yet another Schedule of loss.*
>
> *It would almost inevitably frustrate any attempt to have this trial heard this year or even in the early part of next year."*

31. In addressing the Defendant's objections to the application for further expert evidence, the Plaintiff submits that the previous adjournments in March and September 2020 were due to the Covid-19 pandemic, and that the cause of the adjournment in January 2021 are not known to the Plaintiff's present attorneys. Counsel for the Plaintiff denies that the application was speculative or opportunistic.

The instruction of the second psychiatrist

32. Dr. Kampers, a consultant psychiatrist, produced three reports, detailing his findings on the psychiatric condition of the Plaintiff. These were produced between March 2014 and November 2019. These three reports were all consistent regarding the Plaintiff's diagnosis. Dr. Kampers found that the Plaintiff was suffering from –

a. Post-Intensive Care Syndrome
b. Post-Traumatic Stress Disorder
c. Major Depressive Disorder
d. Chronic Pain Syndrome

33. In his report dated 10 November 2019 Dr. Kampers confirmed this diagnosis and noted:

> *"In terms of his continued disability, I remain of the opinion that the chronicity of his symptoms continues to severely disable him and impact on all aspects of his daily living."*

34. This conclusion led to Dr. Kampers to find the Plaintiff unfit to work in any capacity.

35. The Plaintiff takes issue with the joint statement of Dr. Kampers and the Defendant's expert psychiatrist, Professor Greenberg. This joint statement, dated the 26th February 2020, was issued after discussion between the experts by telephone.

36. The experts' diagnosis at paragraph 1 of the joint statement was as follows:

> *"Both experts noted that whilst historically the Claimant had fulfilled. The diagnostic criteria for PTSD he does not do so now. Both experts felt that he still has some residual symptoms of PTSD but we note that residual PTSD is not a diagnosis. Dr. Kampers noted that, whilst the Claimant had presented to him as being relatively depressed, when he saw him most recently he had not had the opportunity to take into account the video surveillance footage mentioned in Professor Greenberg's report as it had not been provided to him. Neither was he aware that the Claimant was currently in a romantic relationship. Taking these factors into account, Dr. Kampers did not consider that the Claimant was severely depressed. Instead, he felt that the Claimant may have a mild to moderate depressive episode, or he may have an adjustment disorder caused by him coming to terms with the physical changes and psychological adjustment he had suffered as a result of the injury, as well as dealing with the stress of the ongoing legal claim. Dr. Kampers also felt that the Claimant had some anxiety symptoms.*

37. The experts addressed the Plaintiff's capacity to work at paragraph 14 of the joint statement:

> *"Both experts noted that the Claimant currently has some capacity for work and could be employed in low stress, relatively menial, work without too much difficulty although this would be below the nature of the work he bad been engaged in before the accident."*

38. The Plaintiff submits:

> *"37. ..that this change of mind by Dr Kampers cannot be satisfactorily explained or logically justified:*
>
> *a. The surveillance footage shows, inter alia, P walking slowly round a shopping centre, going to a gym and getting his hair cut. The court is invited to view the surveillance evidence in full so that the court can form a view as to whether Dr Kampers' change of mind can be justified.*

b. *Dr Kampers also states in the joint statement that he was not aware that the Plaintiff was in a romantic relationship (see paragraph 1). Again, it is unclear as to why this fact should lead Dr Kampers to conclude that he no longer has severe PTSD."*

39. The Plaintiff also submits that there is evidence that the Plaintiff's condition has worsened not improved in the form of the report for the Plaintiff's care expert. A second psychiatric expert is therefore sought because the Plaintiff now has need of a second opinion separate from Dr Kampers.

40. The Court was referred to the case of *Stallwood v David* [2007] RTR 11 [L/58] for guidance as to the test to be applied when a second expert opinion on the same subject by the same party is sought.

41. Counsel for the Plaintiff informed the court that no inquiries had been made of Dr Kampers regarding the reasons for his change of diagnosis/prognosis because it was felt that Dr Kampers' answers in the circumstances could be self-exculpatory. Further, it may not have been prudent to do so when the court may allow another expert to be engaged and there was also the possibility that seeking to do could have caused further delay. In any event, the Plaintiff subsequently found that the doctor may have refused to answer any questions until his outstanding invoices are paid.

42. The Plaintiff submits further that other factors support his application to instruct a second expert. These include the fact that this is a high value case, and it would be proportionate to do so, the Defendant would not suffer any prejudice as their expert could also provide an updated report and the evidence of deterioration necessitates an updated expert report in any event. Counsel argued that:

i. *If P is not entitled to call additional evidence, he would have an understandable sense of grievance judged objectively.*

ii. *If P was entitled to rely on this new evidence and it was accepted, D would not have an understandable sense of grievance when judged objectively. They would be disappointed, but the judge would have considered all the expert evidence and reached a carefully considered conclusion."*

The Defendant's position

43. The Defendant contended that the Plaintiff's reasons for seeking a second expert are not sound and represents only the dissatisfaction of the Plaintiff and his legal team with the conclusions of the expert. Counsel for the Defendant contends that this is not a good reason for the introduction of another expert.

44. Counsel for the Defendant submitted that Dr Kampers was very familiar with the Plaintiff's progress, that his conclusions are broadly supportive of the Plaintiff. Counsel offered that it would be more appropriate to make further inquiries of the expert in question regarding his change of opinion, that differences of opinions were an invariable feature of applications of this sort. Counsel for the Defendant questioned the necessity of the application which, in effect, was asking the court to permit another expert to explain why Dr. Kampers was wrong to change his mind.

Court's conclusions

45. In *Stallwood v David* the claimant issued proceedings for negligence because of two separate road traffic accidents. After the claims were consolidated the claimant and defendants instructed separate separate orthopaedic experts. The experts met and prepared a joint statement. The orthopaedic expert instructed by the claimant radically changed his view of the case at this meeting. The Claimant subsequently applied for permission to instruct a different orthopaedic surgeon. Permission was refused and the claimant appealed.

46. Teare J. referring to CPR 35 referred to several relevant factors to be considered on such an application in coming to a decision in that case:

a. *The mere fact that an expert had changed or modified his opinion following an experts' meeting could not by itself be a reason for permitting a party who was disappointed thereby to adduce evidence from another expert.*

b. *However, under Part 35.12(5) a party was not bound by the experts' agreement and, if a dissatisfied party could show that his expert had modified his opinion which could not properly or fairly support his revised opinion, Part 35 did not rule out granting permission to call a further expert, though such a case would be rare.*

c. *The court should consider whether, having regard to all the circumstances of the case and the overriding objective to deal with cases justly, further evidence was "reasonably required to resolve the proceedings."*

d. *The claimant, having made no inquiries of her expert about his changed opinion, was unable to show good reason for needing an additional expert.*[6]

47. On the facts of *Smallwood* the court did allow the third expert's evidence to be adduced. However, the court did so because of a special feature in that case of the "*the manner in which the judge had dealt with the claimant's application, which, judged objectively, would leave the claimant with an understandable sense of grievance if she was not permitted to rely on the additional expert evidence*". For the avoidance of doubt, I do not find that there are any such issues to be considered in this case.

48. The court should approach the application with the following as guidelines: the granting of permission for the instruction of a second expert by the same party on the same subject is rare; the Plaintiff must demonstrate good reason for needing an additional expert. The court should look to determine whether the further evidence sought was *"reasonably required to resolve the proceedings"*.

49. Applying those guidelines, in the instant case, the Plaintiff argues that Dr. Kampers' change of diagnosis and prognosis cannot be justified by his view of the Plaintiff on the CCTV footage, nor the fact of the Plaintiff being in a relationship. The Plaintiff was not interviewed by Dr. Kampers before his change of opinion. It is difficult for this court having viewed the surveillance to know what it was about the Plaintiff's actions that led to Dr. Kampers' change of mind. However, there is no basis upon which this court could find the Doctor's change of opinion was unjustified without more. This court is not qualified in the field of psychiatry to enable it to do so, and it is for this reason that the expert's explanation is required.

50. The crucial issue for this court is that no direct inquiries have yet been made of Dr. Kampers about his changed opinion. Without Dr. Kampers' full explanation, this court is unable to find that the Plaintiff has shown good reason for needing an additional expert. I do not agree with the Plaintiff's submission that no purpose could be achieved by asking Dr. Kampers about his change of mind because one could expect his answers to be self-exculpatory. This is an expert witness who has enjoyed the confidence of the Plaintiff up until the joint statement was released. There is nothing before me to cause me to doubt his professionalism.

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[6] These were usefully summarized in the Plaintiff's skeleton at paragraph 41.

51. The Plaintiff's application for an interim payment has now been granted. This court understands that part of those funds will go towards settling Dr. Kampers' outstanding bills and it would be prudent to have the requisite inquiries made. I am persuaded that the further evidence sought is reasonably required to resolve the proceedings. I do not consider that to seek to have Dr. Kampers explanation will result in any further delay more than would be occasioned if another psychiatrist, ignorant of the Plaintiff's case, is now instructed to undertake an examination of the Plaintiff and his history in order to assist the Court.

52. The application for permission to instruct a second psychiatric expert is refused.

The evidence of the ophthalmologist

53. The Plaintiff seeks to instruct an ophthalmologist, to obtain updated evidence regarding the Plaintiff's ability to drive. The Grandage affidavit at paragraph 57 states:

> "*The Plaintiff seeks updated evidence from an ophthalmologist specifically regarding the Plaintiff's ability to drive which remain[s] in contention. The Plaintiff feels that he is unable to drive due to difficulties with his remaining eyesight – the Plaintiff now only has one eye. The Defendant denies that the Plaintiff is unable to drive as a result of his injuries ... This matter should be investigated with expert evidence since significant damages depend on this – The Schedule of Loss claims additional travelling costs of CI$951,389.*"

54. The Defendant opposed the application for this updated evidence. Counsel for the Defendant argued that it was unclear why there was a need for a further report in circumstances where the Defendant has agreed the claim for ophthalmology costs as pleaded, in full.

55. Counsel for the Defendant referred to the report of the jointly instructed ophthalmologist Dr. Buznego of June 27, 2019. Dr. Buznego recorded that the Plaintiff has suffered absolute blindness in his right eye. Regarding the left eye, his report states: "*Fortunately, the left eye continues to have normal vision with only some mild ocular dryness, controlled with lubricating drops.*" Dr. Buznego's report makes no mention of the Plaintiff being unable to drive.

56. Counsel for the Defendant submitted that the Plaintiff has indicated that he would like to be able to drive and has taken steps to do so. The Court was referred to the Life Care Report on the Plaintiff dated February 2020, prepared by Gillian Conradie - Care Consultant and Brain Injury Case Manager, wherein she noted the following at page 11 of the report:

> "*Transport*
>
> *He [the Plaintiff] has a provisional driving licence and recently attempted the driving theory test but failed, attaining 41 rather than the 43 required as the baseline pass mark. He would like to be able to return to driving in the future.*"

57. It is unclear the nature of the difficulties that would cause the Plaintiff to "*feel that he is be unable to drive*" given that the joint expert's report states that he has normal vision in his left eye. Given this very bare statement, I am unable to find that this evidence is reasonably required in all the circumstances. The application for an updated report is denied.

Further evidence from the Respiratory/Pulmonary Physician

58. The Plaintiff submits that in reports provided by Dr Robinson, the jointly instructed expert in this field, in 2017 and 2019, he recommended that the Plaintiff undertake tests to assess his lung function. In addition, the Grandage affidavit at paragraph 60 states: "*...the Plaintiff has heard that he might have inhaled asbestos or other dangerous chemicals during the explosion. The Plaintiff's Attorneys want to investigate this.*"

59. A further report by Dr Robinson is opposed by the Defendant. The Defendant contends that since the tests were recommended by Dr. Robinson in 2017, the evidence of Dr. Robinson may have been superseded by the surveillance evidence which shows the Plaintiff walking more than 100 feet without difficulty.

60. In his report of 18th January 2017, Dr. Robinson noted: "*The remainder of our time was spent discussing his exercise capacity and limitations. By his description, he has a Medical Research Council (mMRC) score of 3. He has to stop to catch his breath after walking approximately 100 feet on level ground.*" It is this aspect of the Doctor's report to which Counsel for the Defendant

referred in his submission that the surveillance evidence may have superseded the recommendations of Dr. Robinson for lung function tests.

61. The Plaintiff has not presented evidence to this court to cause it to grant permission for Dr Robinson to provide further evidence. It is not at all clear what the Plaintiff may wish Dr. Robinson to opine upon given that the application is based primarily upon what appears at its highest to be only a suggestion that the Plaintiff might have been exposed to or inhaled asbestos or other dangerous chemicals during the explosion. The Plaintiff has not undertaken the lung function tests recommended by Dr. Robinson to this point. There is no evidence from any of the experts thus far engaged, including Dr Robinson, of any damage that may be attributable to such inhalation. Counsel for the Plaintiff may wish to consider the need for the renewal of such application once all the Plaintiff's medical records are in hand and have been fully considered. The court is not inclined to order a further report absent a firmer basis than now offered by the Plaintiff. The application for further evidence from Dr. Robinson is refused.

Further evidence of the Urologist.

62. The Plaintiff's expert urologist Dr. Taub has provided expert evidence on the cause and treatment of the Plaintiff's erectile dysfunction and urinary problems. Counsel for the Plaintiff has referred to a meeting in April 2020 when Dr. Taub and the Defendant's expert Mr. Shah met and subsequently suggested various tests be undertaken by the Plaintiff and recommended different forms of treatment in order to investigate these issues further. The Plaintiff wishes to have these tests and/or procedures completed and a re-assessment by the urologist Dr Taub.

63. On this aspect of the application, the Defendant points to the fact that these tests were recommended in February 2020 but never undertaken by the Plaintiff. Counsel for the Defendant submits that in any event Dr Taub and Dr. Shah have now agreed a factual statement, further underlying the futility of a further report.

64. The Joint report of Drs. Taub and Shah, dated 8th April 2020, details the Plaintiff's complaint for increased urinary frequency and urgency with post micturition dribbling. The suggestion of the experts was that the Plaintiff undergo a flow rate and ultrasound scan and then, depending upon the results, a cystoscopy and /or urodynamic studies, with a view to the doctors being able to better understand the Plaintiff's bladder dysfunction. The Doctors noted:

"7. *We agree that the working diagnosis is of an "overactive bladder". However, this would need to be confirmed by the testing described with urodynamic studies.*

8. *The condition of "overactive bladder" is a symptom complex. The symptoms are frequency, nocturia, urgency and urgency incontinence. There are a number of potential causes which include behavioral, idiopathic bladder instability, neuropathic and obstructive. This is why obstruction should be excluded.*

9. *Treatment would rest with the management according to his symptoms and additional test finding. It is difficult to attribute his symptoms of an overactive bladder to the accident unless he has developed a stricture."*

65. Regarding sexual function, the doctors determined:

"13. *We both agree that we cannot provide a physical explanation of his sexual dysfunction. It is more likely than not the problem is psychological in nature. We did discuss penile tumescence monitoring as means of a diagnosis, but we did not feel that this would necessarily help the situation since we believe the problem is psychological in nature.*

14. *We discussed the issue of psychosexual counselling and note that this has been mentioned as being necessary. Mr. Shah had suggested that perhaps 12 sessions may be sufficient, but we did agree during this telephone conversation that he may benefit from up to 50 psychosexual counselling episodes over a period of time perhaps a year or two."*

66. The Plaintiff has not given a full explanation for his failure to undertake the tests recommended in the joint report. However, it appears to this court that the tests may be necessary for the court to have a full picture of this area of the Plaintiff's claim. The Plaintiff should submit to the recommended tests to address his bladder concerns immediately. An updated joint expert report once those tests have been completed is ordered.

67. The conclusion of the Doctors is that the problem with sexual function was psychological in nature. The Plaintiff can take advantage of the Doctor's recommendations of counselling, the costs of same have been provided, as is that for the recommended oral medication for sexual function. There is at this point no need for further expert evidence in that regard.

The evidence of an expert neurologist/neuropsychologist

68. The Plaintiff's application for an expert neurologist/neuropsychologist is based on matters referred to in his medical records when he was first hospitalised following the incident. The Plaintiff submits that these records show that he may have suffered brain damage and he now wishes to explore the extent of any such damage.

69. The Grandage affidavit in support of this application refers to the need at paragraphs 50-56. It can be derived from this evidence that the Plaintiff has a suspicion of brain damage based on the possibility that he suffered a head injury during the incident or his brain may have been starved of oxygen while he was in intensive care during periods of respiratory compromise. At paragraph 54, it is noted that counsel has not seen any evidence of neurological assessment from the Plaintiff's medical records. Ms. Grandage acknowledges at paragraph 55 that:

> *"The experts instructed in the case so far do not state that the Plaintiff has suffered a head injury although it is not clear to me whether they have expressly considered it."*

70. Ms. Grandage also acknowledges that the instruction of a neurologist and neuropsychologist would be an expensive exercise and it would take some time to obtain this evidence. She has however indicated that it may be useful to ask a psychiatrist if there is any evidence that he suffered a brain injury.

71. The Defendant opposes the instruction of an expert neurologist/neuropsychologist. Counsel for the submitted that there is no evidence or suggestion that the Plaintiff has suffered a traumatic brain injury. He submitted that the medical notes being relied upon for such a suggestion are now more than ten years old. The Plaintiff, he stated, has been treated by several experts for over a ten-year period and there was no evidence during that time to suggest a brain injury. He argued that the basis upon which this expert was to be engaged was slim and should not be permitted.

72. The Plaintiff has not presented sufficient evidence to this court to permit the instruction of a neurologist/neuropsychologist. Counsel for the Plaintiff may wish to consider the need for the renewal of such application once all the Plaintiff's medical records are in hand and have been fully considered. It may also be prudent to first inquire of the Plaintiff's psychiatrist, as has been suggested, whether he has seen any evidence that the Plaintiff suffered a brain injury. The court is especially concerned that the instruction of an expert neurologist/neuropsychologist, which may

cause significant delay, should not be permitted without a firmer basis than now offered by the Plaintiff. The application for permission to instruct neurologist/neuropsychologist is not granted.

Expert in immigration and Health Insurance in the USA

73. The Plaintiff seeks permission to engage an expert in Immigration and the cost of Health Insurance in the USA. In the third witness statement of the Plaintiff dated 02 March 2020, the Plaintiff states at paragraph 10:

> *"I currently reside in Milton Keynes [UK] and have no immediate plans to move. My long-term plan is to return to my home in Cayman to be closer to my family and I ultimately intend to live in Florida in the USA, subject to being able to obtain an appropriate visa. Florida is close to Cayman and I have always enjoyed being there."*

74. Counsel for the Plaintiff states that the evidence sought is required to assess whether the Plaintiff's desire is possible and if so the cost of Health Insurance. It was submitted that if the accident had not occurred the Plaintiff would have remained working in the Cayman Islands and would have been provided with health insurance by his employers, the Defendant. If the Plaintiff moves to the USA health insurance will be very expensive and it can be recovered as damages in this claim.

75. The Defendant opposes this application. The fifth affidavit of Gary Hendrikse in response to the Plaintiff's summons, at paragraph 7 states: "*In 2016, the Plaintiff moved to the UK, where he currently resides. He has repeatedly told various experts, contrary to what Ms. Grandage now says in her affidavit about his plans to move to the USA, that he intends to stay in the UK.*" The Defendant contends that the suggestion that the Plaintiff may wish to live in the US seems to have been made to enhance his claim for medical costs and that in any event such evidence is unnecessary and undesirable.

76. The Plaintiff has not offered any support for the application. The Plaintiff's statement set out above at paragraph 72 does not appear to this court to be a statement of intent or a concrete assertion upon which to ground an application of this sort. The Plaintiff has presented no evidence upon which this court could find that he has any familial or other ties with Florida in the United States. Counsel for the Plaintiff has offered in his oral submissions to the court that he is aware that the Plaintiff

may have made inquiries about or through attorneys in the United States on the issue of US immigration, but he could not provide the court with any information other than that. There is insufficient basis for this court to assess the significance and therefore the need for expert evidence in this area. Accordingly, the application to instruct experts in immigration and health insurance coverage in the USA is refused.

77. In my determination of each of these individual aspects of the application for further expert evidence I have considered the cases of *T v Imperial College Healthcare NHS Trust* [2020] EWHC 1147; *Heismer v The Islamic Republic of Iran & Anor* [2019] EWHC 2073 and *Knapman v Carbines* [2020] EWHC 3586 referred to at paragraphs 26 and 27 herein regarding the exercise of the court's discretion to allow the application and permission for further expert evidence.

Updated witness statements, Schedule of Loss and Counter-Schedule

78. On the issue of an updated schedule of loss the Defendant states that such would be unreasonable in that the Plaintiff has had sufficient time to refine his claim. The Plaintiff's witness statement may need to be updated to give his current position since March 2020. I have allowed the application in part as it relates to an updated joint report from the expert urologists. To the extent that this updated joint report necessitates a change I will allow for an updated schedule of loss to be prepared by the Plaintiff with a resultant Counter Schedule to be prepared by the Defendant if it proves necessary.

79. Counsel for the Defendant in addressing the applications for further expert evidence expressed the following:

> *"The underlying expert evidence has not changed since March 2020. It is unclear why this application is being made now but it is difficult to resist the conclusion that the Plaintiff is intent on avoiding the resolution of his claim at trail in the near future."*

80. This court notes the comments in the joint statement of the psychiatrists:

> *"Both experts consider that the longstanding nature of the claim has affected his [the Plaintiff's] mental health, and quite possibly his desire to access mental healthcare, and that once the claim has ended then he is likely to be able to better*

focus on his future. We both consider that, given some time, whatever the outcome of the case his mental health is likely to improve."

81. With these comments in mind, I propose that a date be agreed for a directions hearing once the parties have had an opportunity to consider this Court's ruling on the instant applications.

Justice Marlene I. Carter
Acting Judge of the Grand Court