IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. G 224 OF 2015

BETWEEN:

(1) WILLIAM RITTER

(2) GENEVA INSURANCE SPC LIMITED (IN VOLUNTARY LIQUIDATION)

Plaintiffs

AND

BUTTERFIELD BANK (CAYMAN) LIMITED

Defendant

Appearances: Ms. Sarah Dobbyn of Sinclairs for the Plaintiffs
Ms. Jane Hale of Appleby for the Defendant

Heard: 31 October 2016

Draft Judgment circulated: 12 December 2016

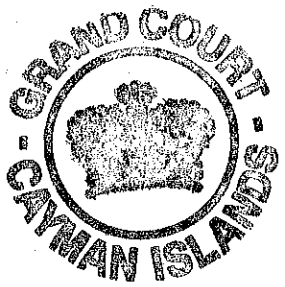
Final Judgment delivered: 15 December 2016

GRAND COURT - CAYMAN ISLANDS

JUDGMENT

The Application

1. The Second Plaintiff, Geneva Insurance SPC Ltd ("Geneva"), was incorporated in the Cayman Islands on 28 March 2000 with the sole purpose to act as a captive insurance company serving the insurance needs of medical professionals practising in the United States. The First Plaintiff, William Ritter ("Ritter"), is and was at all material times a director, sole shareholder and beneficial owner of Geneva. Ritter is also the sole voluntary liquidator of Geneva.



2. The Defendant is a bank ("the Bank") which was incorporated in the Cayman Islands on 22 November 1967, and holds a class A banking licence registered with the Cayman Islands Monetary Authority. The Bank provided banking services to Geneva between 2008 and 2011.

3. On 31 October 2016 I had before me the Plaintiffs' Summons dated 21 October 2016 applying for an adjournment of the trial scheduled to commence on 31 October 2016 and seeking leave to amend their Writ of Summons and Statement of Claim pursuant to GCR O.20, r.5.1. The Summons also contained consequential directions sought if the hearing was to be adjourned and if leave to amend was given. On 24 November 2016 the Plaintiffs filed an Order, signed by the parties' attorneys, containing the orders and directions made by me at the hearing on 31 October 2016. I need not replicate the content of that Order herein.

4. The Defendant did not oppose the application for leave to amend, as the circumstances at that stage left it with no option but to concede that an adjournment was inevitable. However, the Defendant opposes the Plaintiffs' submission that the costs of their applications be costs in the cause.

5. The Defendant seeks an order for the costs of, and occasioned by, the late amendments to the Statement of Claim and the costs of the application on the standard basis. The Defendant also seeks an order for the costs thrown away in relation to the adjourned trial on an indemnity basis, contending that the

"adjournment is completely unnecessary and has been engineered by the Plaintiffs by a refusal to exchange witness statements or provide a draft amended pleading in a timely manner, despite repeated chasing."

6. The hearing on 31 October 2016 became a case management hearing with the majority of the time being expended on the parties' arguments about costs. At the end of the hearing I ordered that the *"costs orders in relation to the Plaintiffs' application for leave to amend and the application for an adjournment of the trial are to be determined by the Court and delivered in its written reason."* I now provide my written reasons in this Judgment.

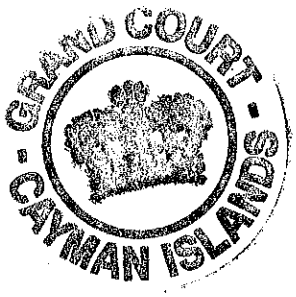
Application for Leave to Amend

7. Although the parties made passing reference to the case law in relation to amendment, they confirmed that they would not take issue to my referring to other cases which set out the long established and uncontroversial principles.

8. This Court has the power under GCR O.20, rr.5(1), 7 and 8 at any stage of the proceedings to allow an amendment of any originating process, pleading or any other document in the proceedings *"on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct."*

9. In other words, in principle, a party has the right to amend his pleadings to present his case as he wishes, provided it will not cause injustice to his opponent and in most cases such injustice will be prevented by a suitable order as to costs[1].

10. Thus in ***Clarapede & Co v Commercial Union Assocn*** (1883) 32 WR 262, CA, Brett MR stated:



> *"However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated in costs.*[2]"

11. In ***Cropper v Smith*** (1883) 26 Ch D 700, CA Bowen LJ said when he was exercising the said Court's power:

> *"...it is well established principle that the object of courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights..... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right."*

[1] My emphasis by underlining.
[2] My emphasis by underlining.

12. Although not binding on this Court, I find Wooding CJ's summary in the Trinidad and Tobago Court of Appeal in ***Baptiste v Supersad*** (1967) 12 WIR 140 to be helpful:

> *"The law is not a game of chance. It is I think the function and duty of the judge to see that justice is done so far as may be according to the merits. Accordingly, so long as the party is not denied the opportunity to deal fully with whatever issue may at any time be raised, whether in point of fact or law, and he is not prejudice in meeting an amendment adequately, or will not be deprived of any answer which would otherwise have been open to him such as, for instance, that the action is statute-barred, any proper amendment ought in my judgment to be allowed subject however, in appropriate cases, to an order for costs.*[3] *It is only thus that an action can be decided consistently with the rights of the parties and in accordance with the realities of the matter."*

13. Also in ***Guinness Mahon Cayman Trust Ltd v Washington International Bank and Trust Ltd*** (1987) CILR 447, Hull J said in the Cayman Grand Court:

> *"Generally speaking, amendments should be allowed for the purpose of determining the real question in controversy between the parties, or for correcting any defect or error in the proceedings, and so long as the applicant is not acting male fide and has not by his error done some injury to his opponent that cannot be compensated for by costs or otherwise*[4]*."*

14. Finally, Smellie CJ at paragraph 8 and 9 in the more recent case of ***Cayman Islands Civil Aviation Authority v Islands Air Limited*** [2003] 483 stated that:

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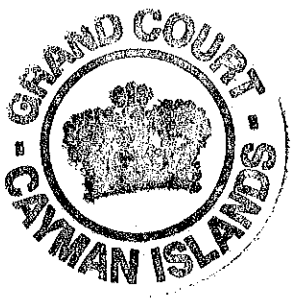
[3] My emphasis by underlining.
[4] My emphasis by underlining.



"8. It is now settled law in this jurisdiction that an amendment should always be allowed unless it would cause injustice to the other party or constitute a useless claim because no evidence would be available to support it. This principle applies at any time up to the time of trial (see the judgment of the Court of Appeal in Swiss Bank & Trust Corp. Ltd v. Iorgulescu).

9. Although that case was decided before the promulgation of the current Grand Court Rules in 1995 (the "GCR"), it was decided upon the basis of already-established authority and rules of court in England standing for over 100 years and from which the local equivalent, in O.20, was derived. Georges, J.A. cited a passage from Ketteman v. Hansel Properties Ltd[5] *which is the modern explanation by Lord Griffiths in the House of Lords of the principle (see 1994-95 CILR at 154):*

> *"The rule of conduct of the court in such a case [where an amendment is sought] is that, however negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs."*

The aim of the rule, as Georges, J.A. also noted, is to have all disputes between the parties settled on the merits in one trial."

15. I had regard to these long established and uncontentious principles when I considered the unopposed application for leave to amend the Writ of Summons and Statement of Claim. I also considered the comments of Mr. Andrew Bolton, a partner at the law firm representing the Defendant, which appear at paragraphs 47.1 - 47.4 & 48.1 to 48.4 of his affidavit sworn on 31 October 2016.

[5] [1987] A.C. 189, [1988] 1 All E.R. 38.

16. Accordingly, at the hearing, I granted leave to the Plaintiffs to amend their Statement of Claim as per the draft submitted[6]. I granted leave to the Defendant to amend its Defence in the form of the draft submitted as well such further amendments that became necessary to respond to the Plaintiffs' Amended Statement of Claim. I also granted leave to the Plaintiffs to file a Reply to the Amended Defence.

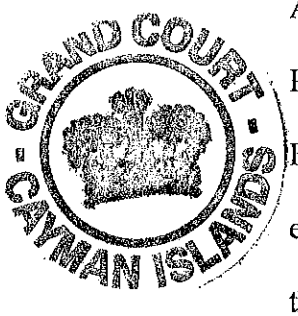
Costs

17. At the hearing the parties went to great length to take me through the detailed inter-partes correspondence relating to their case management. As a consequence, when determining the issue of costs, I feel compelled to look in detail at the procedural background as well as at the conduct of the parties.

18. The Plaintiffs initiated the proceedings by means of a Writ of Summons and Statement of Claim filed on 14 December 2015, in which they asserted at paragraph 8 that the Bank was "*liable to them for breach of contract, negligence and dishonest assistance in facilitating the fraud carried out by David K Self who at all material times was a Director and Company Secretary of Geneva.*"

19. On 22 December 2015 the Defendant served a request for documents pursuant to GCR O.24, r.10. The Plaintiffs agreed to the Defendant's request for an extension of time to file its Defence to 8 February 2016. The Defendant filed its

[6] One additional amendment was directed, namely that the pleading properly name Geneva as the 2nd Plaintiff and William Ritter as the 1st Plaintiff.



Acknowledgment on 29 December 2015, indicating an intention to defend. The Plaintiffs provided the documents sought by the Defendant on 8 January 2016. Following the Plaintiffs' agreement to the Defendant's request for a further extension of time, the Defence was filed on 22 February 2016. The Plaintiffs filed their reply on 15 April 2016, a date for filing which had been agreed by the parties.

20. On 9 May 2016 the Defendant sent the Plaintiffs a Listing Form with suggested directions including the filing of witness statements by 30 June 2016 and a timetable to a trial date on the first open date after 1 July 2016. Initial lists of documents were exchanged on 17 May 2016. The Plaintiffs wrote to the Defendant seeking further disclosure on 19 May 2016. On 24 May 2016 the Defendant replied stating that a new file of documents had been discovered and suggested that it therefore serve a supplemental list of documents on 10 June 2016, with the exchange of witness statements no later than 5 August 2016 and that the trial date be fixed for the first available date after 19 August 2016.

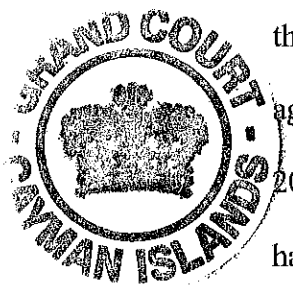
21. On 30 May 2016, the parties signed a draft consent order containing comprehensive directions to a trial date after 19 August 2016. The draft order provided for the exchange of witness statements on 5 August 2016. The Plaintiffs sent the order with a listing form to the Listing Officer on the following day. It does not appear that the draft order was ever placed before a judge for approval.

22. On 1 June 2016 the Defendant wrote to the Plaintiffs stating that the draft consent order needed to be amended as the latter's disclosure was deficient and because there was no provision about expert witnesses. The Defendant contended that an amendment might also be needed to delay the listing of the matter or to enable a later adjournment as it did not have all the dates to avoid for its witnesses, especially as there might be a need to call additional witnesses. With this in mind, on 1 June 2016, the Defendant sent an email to the Listing Officer seeking a postponement of the listing of the matter until the above issues had been resolved.

23. On 10 June 2016 the Defendant informed the Plaintiffs in writing that they were not ready to exchange the supplemental list of documents on that day, the due date set out in the unapproved draft consent order.

24. A revised consent order was sent by the Plaintiffs to the Defendant on 13 June 2016 in which they proposed the exchange of witness statements on 12 August 2016 and a trial being fixed for a date after 22 August 2016. On 17 June 2016 the Defendant replied by providing a revised draft consent order in which it suggested that the trial be listed for a date after 23 September 2016, with exchange of statements taking place on 12 August 2016.

25. The parties exchanged their Supplemental List of Documents on 21 June 2016 and thereafter, on 28 June 2016, the Plaintiffs sent a further draft consent order. The Defendant replied on 1 July 2016 suggesting that witness statements should



still be exchanged by 12 August 2016, expert evidence by 21 October 2016 and that the matter should be listed for a trial after 4 November 2016. The parties agreed to extend the deadline for the Defendant's further discovery to 15 July 2016. The Plaintiffs contended that this agreement was reached to avoid them having to make an application for specific discovery arising out of alleged deficiencies in the Defendant's discovery.

26. On 14 July 2016 the Plaintiffs sent an updated consent order to the Defendant. On 24 July 2016, in the absence of a substantive reply, the Plaintiffs again wrote and indicated that, if no agreement was reached by the end of the following day, a summons for directions would be issued. The order also contained directions in relation to expert evidence. The Defendant replied on 25 July 2016 suggesting that witness statements could be exchanged by 26 August 2016 and the matter be listed for trial after 24 October 2016.

27. On 27 July 2016 Quin J administratively approved the signed consent order which reflected the agreement reached between the parties. Quin J directed that:

(i) the consolidated master index of documents be agreed by the parties by 29 July 2016 listing all documents to be relied on by the parties at the trial;

(ii) the Plaintiffs were to provide the bundles to the Defendant by 5 August 2016;

(iii) the Defendant was to notify the Plaintiffs of its intention to adduce any expert evidence no later than 19 August 2016;

(iv) the Plaintiffs were to notify the Defendant of their intention to adduce any expert evidence in reply no later than 24 August 2016;

(v) the witness statements were to be exchanged by no later than 26 August 2016, or such later date as may be agreed between the parties;

(vi) the joint instructions to any experts are to be agreed no later than 9 September 2016;

(vii) any expert evidence is to be exchanged by no later than 14 October 2016; and

(viii) a three-day trial is to be listed on the first convenient and available date after 24 October 2016.

28. The Defendant contends that the procedural history prior to the date of the approved consent order is "*for the most part, irrelevant*" and what is of importance when considering the costs issue are the terms of the order and how the parties operated under it or complied with it. Although a party's compliance or non-compliance with the consent order and what bearing this has had on the adjournment on 31 October 2016 trial date is a significant consideration, it is important to also note that the Plaintiffs' conduct up to 27 July 2016 should not be criticised. In fact it was primarily the Defendant who had been unable to adhere to the timeframe for filings agreed by the parties. During the proceedings up to the approval of the consent order, the Plaintiffs sensitively took a flexible approach to the requests made by the Defendant by agreeing, on a number of occasions, to move the deadlines for filings. The procedural conduct of the Plaintiffs, and for

that matter also of the Defendant, throughout the proceedings is a factor to take into account, especially in a case where the Court is being asked by the latter to make an order for costs on an indemnity basis against the former, albeit for events that occurred after the approval of the consent order.

29. In light of the terms of the approved consent order, on 5 August 2016, the Plaintiffs contacted the Listing Officer seeking to have the trial listed on the first convenient date after 24 October 2016. On 8 August 2016, the parties confirmed with Listing that the proposed 31 October 2016 date for a three-day hearing was suitable.

30. In compliance with the consent order, on 19 August 2016, the Defendant informed the Plaintiffs that it would not be adducing expert evidence. The Defendant also stated that it sought an extension for exchanging witness statements from the ordered 26 August 2016 date to 14 October 2016, submitting that would not affect the trial date. In the letter the Defendant told the Plaintiffs that it would write again in the following week as instructions were being taken which could result in a significant narrowing of the issues for determination at the trial. The decision to open a dialogue to try to narrow the issues down was commendable, although it was rather belatedly raised and ideally in a matter of this age should have been considered, by both parties, prior to the approved consent order in July 2016. Regrettably the promised communication was not sent due to an accepted "*oversight*" and the letter containing the Defendant's proposals

was not sent until just under three weeks later, namely on 8 September 2016. Although the Defendant, having regard to the Overriding Objective, sought an extension from the agreed date in the consent order for the exchange of the witness statements due to what may be considered to be appropriate case management reasons, its failure to communicate, following its written request for the extension sent on 19 August 2016 and following the Plaintiffs' reply on 23 August 2016, until 7 September 2016 is open to criticism.

31. On 23 August 2016 the Plaintiffs again sensitively agreed to an extension for the exchange of witness statements, but only to 9 September 2016. Having not received a reply, on 7 September 2016 the Plaintiffs contacted the Defendant about the exchange of witness statements due 2 days later and received an out of office reply indicating that the attorney would be away until 12 September 2016. Again, the Plaintiffs should not be criticised for this approach.

32. On 8 September 2016 the Defendant notified the Plaintiffs that it needed to disclose *"a small number"* of further documents and wanted to serve a second supplemental list of documents by 16 September 2016. They also suggested that the exchange of witness statements be delayed until 7 October 2016 thereby enabling the Plaintiffs an opportunity to review the documents and correspondence which might narrow the issues for trial. The Defendant contended that gave ample time, as the suggested exchange would be three weeks prior to trial. Again, it is not the fault of the Plaintiffs that the Defendant wished to adduce

new documentary evidence within two months of the trial date, which would have the knock-on effect of delaying the exchange of witness statements. Although, the Defendant's proposals would not necessarily delay the trial date, they were not helpful to the structured case management of proceedings which had been put in place by the contents of the approved consent order.

33. The Plaintiffs replied promptly on 8 September 2016 indicating that they consented to an extension, but to only 23 September 2016 for the exchange of witness statements. They rightly highlighted that this was a month more than had been agreed by the parties in the July consent order. The Plaintiffs also indicated that they were still in a position to exchange their witness statements on the next day, 9 September 2016, that being the date suggested by them in their letter of 23 August 2016. The Plaintiffs stated that the Defendant should provide the further documents by 12 September 2016. The Plaintiffs understandably indicated that they would need to see the additional documents to then be able to assess any proposals made by the Defendant to narrow the issues. At this stage the Plaintiffs were commendably trying to show a degree of flexibility towards the Defendant by extending deadlines set out in in the consent order which would not hinder the trial starting on time.

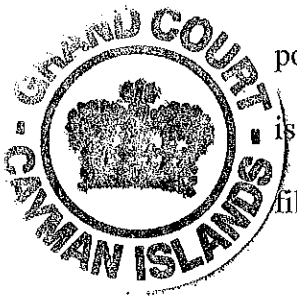
34. The Defendant replied on 9 September 2016 suggesting that, because Counsel with conduct of the matter was out of the jurisdiction until 12 September 2016, the second supplemental list of documents with copies of the same should be

provided by 14 September and the witness statements be exchanged by 30 September 2016.

35. Three days later, on 12 September 2016, the Plaintiffs replied seeking disclosure of the additional documents by 5pm and the exchange of witness statements no later than 23 September 2016. The Plaintiffs indicated that this would still leave sufficient time prior to the hearing if either party felt the need to file any statement in reply, namely by 14 October 2016. The Plaintiffs indicated that if the Defendant did not intend to exchange the statements by that date, then it should apply to the Court by Summons for a further extension of time. Again, the Plaintiffs cannot be criticised for making these proposals.

36. On 12 September 2016 the Defendant served a Second Supplemental List of Documents with the eleven relevant documents totalling thirty-four pages. This was within the time frame acceptable to the Plaintiffs.[7] Three of the documents were default judgments against Mr. Self from July 2012 which the Defendant had obtained after enquiries made at the Court. The eight remaining documents, which were emails, were discovered by the Defendant when proofing its witness statement and were admitted to be an "*inadvertent oversight*" which should have been disclosed earlier. The Defendant stated that, to prevent further dispute, it agreed that the Plaintiffs demand that the exchange of witness statements should take place by or on 23 September 2016, but it disagreed that any supplemental

[7] See details of Plaintiffs' written communication of 8 September 2016 set out in paragraph 33 above and reiterated in writing on 12 September 2016 (see paragraph 35 above) .



statements could be filed. The Defendant sought confirmation about the Plaintiffs' position concerning its without prejudice suggestion concerning limiting the issues by close on 15 September 2015, so that the witness statements could be filed by 23 September 2016.

37. Despite the extensions to the deadlines set out in the consent order caused by the request of the Defendant, on 12 September 2016 both parties appeared to be on track for the trial to commence on 31 October 2016. The only issue that required clarification was the Plaintiffs' position about the Defendant's proposals to narrow the issues for the hearing. The Plaintiffs were, of course, entitled to a reasonable period of time to consider the suggestions made as well as review the recently disclosed documentation. With this in mind, on 15 September 2016 the Plaintiffs' attorney wrote indicating that, as her client was unavailable until 20 September 2016, their position about the without prejudice letter could not be communicated. The Defendant replied saying that the without prejudice offers in the 8 September 2016 letter remained open only until 4pm on 20 September 2016. This was quite a tight deadline having regard to the fact that they were aware that the Plaintiff was away and therefore not apparently able to give proper instructions to counsel until the same day.

38. On 21 September 2016 the Defendant wrote to the Plaintiffs to further explore in some detail whether the issues for trial could be narrowed by suggesting that the trial focus only on its estoppel point/the estoppel defence. The Defendant

contended that every pleaded cause of action against the Defendant depended on the Plaintiffs successfully asserting fraud/forgery. If the Plaintiffs were estopped from making this assertion then their claim would be brought to an end. The Defendant wrote that if it did not succeed in the estoppel issue then it agreed to pay USD$529,191.72 (without admission of liability) being the full amount of the transfers claimed by the Plaintiffs. The Plaintiffs were entitled to have sufficient time to carefully review and give instructions on the contents of this important letter.

39. In a second letter sent on the same day the Defendant notified the Plaintiffs that it wished to amend its Defence to correct "*an error*", namely the date upon which it first became aware of the fraud/forgery namely from February 2012 to 27 August 2012. Although small, it is a significant amendment having regard to the issues arising from the Defendant's proposal to narrow the issues for determination at the trial. The Defendant said it was giving notice of the proposed amendment at that time because the 23 September 2016 deadline for the exchange of witness statements had still not been reached. The Defendant highlighted that there should be no issue with the amendment as the Plaintiffs, in their Reply, had not made any admissions as to when the Defendant may have become aware of the fraud/forgery. Although more latterly concentrating on narrowing the issues, the need for the amendment to correct an error in the Defence is something that the Defendant should have recognised prior to the consent order being perfected and

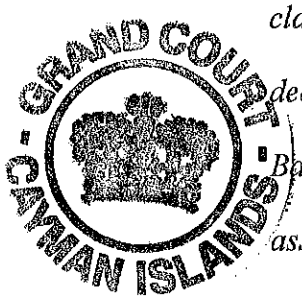
then submitted for the Quin J's approval. The Plaintiffs are, of course, not at fault for the Defendant's proposed amendment.

40. On 21 September 2016 the Plaintiffs emailed stating that, in preparation for the exchange of their witness statements due on 23 September, they noticed that an email exchange had been missing from their disclosure. A formal Second Supplemental List of Documents listing the emails was served. Although it is unfortunate that this disclosure was given just under six week before the trial, it would be unfair to penalise the Plaintiffs for this in light of the fact that the Defendant had similarly located and disclosed documents only nine days earlier.

41. The Plaintiffs wrote on 22 September 2016 indicating that they would need to amend their Reply whilst still not admitting the date of actual notice of the fraud, to aver that the Bank had either actual or constructive notice of the fraud by February 2012 at the latest.

42. On 23 September 2016 the Plaintiffs followed up with an email indicating that they agreed to narrow the issues to the estoppel defence, but would not withdraw their "*equitable claims of constructive notice/wilful blindness dishonest/knowing assistance in the fraud and constructive trust*" which they felt could also be determined as a part of the narrower hearing. The Plaintiffs also indicated that they "*intend to make very minor amendments to the Statement of Claim and the Reply, not to introduce any new facts or allegations, but to ensure it is clear in*

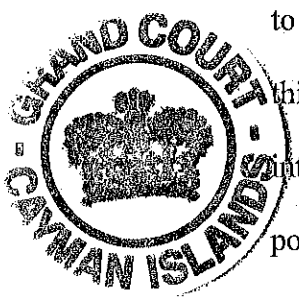
terms of its legal argument on the scope of the estoppel point that the allegations of constructive notice/wilful blindness also operate as a defence to any estoppel claim or rather to defeat the Bank's estoppel claim, booth by the Bank being deemed to have had timely notice of the fraud, and/or because the Defendant Bank does not come to equity with clean hands, and as constructive trustee in assisting the fraud, may not rely on estoppel." In the letter confirmation was sought from the Defendant by 30 September 2016 that it agreed the counter proposal concerning the narrowing of the issues for trial.



43. By email on 23 September 2016 the Plaintiffs confirmed that it would agree to a further extension of witness statements from that date to 26 or 27 September 2017. The Plaintiffs also proposed that it provide its Amended Statement of Claim by 27 September 2016.

44. On 26 September 2016 the Plaintiffs suggested that the Amended Statement of Claim could be sent on the following day and that the Amended Defence and Amended Reply could then follow. The Plaintiffs sought confirmation that the Defendant was in a position to also exchange witness statements on 26 or 27 September 2016. At the time of this email, despite the parties' (i) recent disclosure of additional documents; (ii) recent wish to make amendments to pleadings and (iii) voluntarily extending the times set out in the consent order for filing, it appeared that the trial could still commence on 31 October 2016. In light

of the views expressed in Plaintiffs' email of 23 September 2016[8], the substantial pre-trial dispute to be clarified and the area of case management concern appeared to be what issues were the Court going to be asked to determine at the trial. Until this date, save for the Plaintiffs belatedly disclosing some additional emails and intending to amend their Statement of Claim to clarify its position on the estoppel point, it was the conduct of the Defendant that required case management deadlines to be extended.



45. The Defendant promptly replied by email on 26 September 2016 indicating its intention to reply in detail to the Plaintiffs' letter of 23 September 2016 and suggested that the Statement of Claim not be amended until that had been sent. The Defendant also indicated that witness statements could be exchanged on 27 September 2016.

46. The Plaintiffs promptly replied to the Defendant's email in their second email sent that day in which they stated that they had accepted the offer to narrow the issues concerning the Bank's defence of the estoppel, but also set out the ambit of the issues caught by that defence. That said, it was clear that at this stage there was still not agreement between the parties about the issues to be determined. The Plaintiffs highlighted in the email that the deadline for exchange of witness statements had been 26 August 2016, extended to 9 September 2016 and then further extended to 23 September 2016. They said that their position always had been that the witness statement should address all issues in dispute between the

[8] See paragraph 42 above and the Plaintiffs' position concerning their equitable claims.

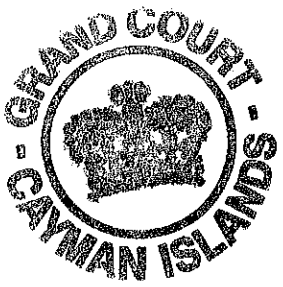
parties. The Plaintiffs pointed out that if the Defendant needed more time for the witness statement which would delay the timetable, and possibly risk the trial date taking place, then it should issue a time summons. The tone of the Plaintiffs in this letter concerning the exchange, coupled with the ongoing demand for immediate exchange, was questionable when one sees that on 6 October 2016 they stated in writing that it was *"self-evident"* that witness statements could not be exchanged until agreement had been reached about the issues to be dealt with at trial and until the pleadings had been amended.

47. Later on in the day the Defendants sent, as promised, a letter replying in detail to the Plaintiffs' 23 September letter and in it they again suggested that, although in a position to exchange on 27 September 2016, the exchange of witness statements be put on hold until the issues raised in the correspondence were resolved.[9]

48. If this matter had come before me on 26 September 2016, being cognisant of the content of the Plaintiffs' second email, of the Defendant's email and letter of the same date, the alarm bells would have started ringing about whether this trial was going to be in a position to commence on 31 September 2016. I say this because as a result of both parties commendable willingness to attempt to narrow the issues and the Defendant's suggestions in the most recent communications, there remained uncertainty about what issues the parties were asking the Court to determine. In addition to this there was now uncertainty about when the Amended Statement of Claim and the resulting further amended pleadings could be filed

[9] A position also adopted by the Plaintiffs on 6 October 2016.

and about when witness statements would be exchanged. If the matter had come before me on 26 October 2016 and if the trial was to commence on the scheduled date, I would have sought clarification about the issues to be determined and given clear directions with firm deadlines for the various filings and the exchange. Regrettably, in light of this state of affairs, neither party sought to bring this matter back before the Court for directions which may have enabled the upcoming 31 October 2016 hearing to have been effective.

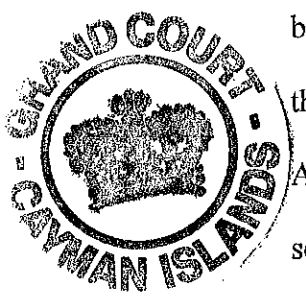


49. A further indication that there was still dispute about the issues to be determined came on 28 September 2016 when the Plaintiffs reiterated by email that they would not be withdrawing their equitable claims. In the email the Plaintiffs requested the exchange of the witness statements and clearly stated that a substantive response to the Defendant's 26 September 2016 letter would be sent out by them later that day or on the following day.

50. On 3 October 2016 the Defendant submitted written confirmation of both parties' agreement for the trial listing for 31 October 2016 to the Listing Officer. This was followed up by an email on 6 October 2016 seeking confirmation from the Listing Officer that the hearing was fixed for that date and requesting the identity of the assigned judge. [10]

51. On 4 October 2016 the Defendant emailed the Plaintiffs questioning why the promised reply to its letter of 26 September 2016 had not been forthcoming. The

[10] The Plaintiffs were copied in to both of these emails sent to Listing by the Defendant.



Defendant therein understandably[11] stated that it was awaiting that reply before being in a position to exchange its witness statement. As no reply was received, the Defendant sent a more detailed letter on 6 October 2016 enclosing its draft Amended Defence again suggesting how the issues should be narrowed and seeking a reply by close on 10 October 2016. The Defendant indicated that, in the absence of any consent, an application for leave to make the small amendment to the Defence would be made at the outset of the hearing on 31 October 2016. An email was also sent by the Defendant stating that the Plaintiffs' "*continued silence on the issue of exchange of evidence*" was "*now unacceptable.*" On 6 October the Defendant wrote to seek confirmation about the status of the trial bundles and pointed out the requirements set out at GCR O.35, r.10.

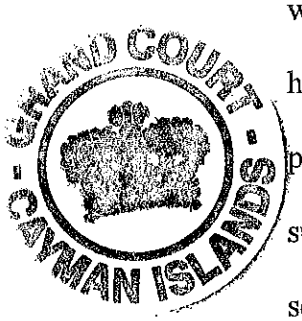
52. On 6 October 2016 the Plaintiffs sent an email attaching an unsigned letter in reply to the Defendant's letters of 26 September and 6 October 2016 from counsel as she was out of the office. Counsel confirmed that she had been on vacation since 26 September 2016, the dates having been fixed for some time to "*coincide with a time when the witness statements were supposed to have been exchanged and prior to any preparation for trial.*" The Plaintiffs indicated therein that "*the minor amendments we seek to make in the Statement of Claim (and in particular based on documents disclosed very late by the Defendant on 12 September 2016) are in particular to clarify the Plaintiff's allegations of constructive notice which mean that your client's estoppel defence must fail.*" The Plaintiffs conceded that it

[11] This is understandable, especially in light of the Plaintiffs' concession in its letter sent on 6 October 2016 to the Defendant in which they conceded that consensus need to be reached on the issues to be determined at trial before witness statements could be exchanged.

was *"self-evident"* that before witness statements could be exchanged the parties *"must reach consensus on which issues will be dealt with at trial"*[12] and *"finalise any amendments to the pleadings."* The Plaintiffs proposed that the Draft Amended Statement of Claim be served on 12 October 2016 and that, if consent was not forthcoming, a prompt application for leave would then be made. If consent to the proposed amendment was given, the Plaintiffs suggested that the Amended Defence and Amended Reply could be filed within 14 days, with witness statements being exchanged within 7 days or less after close of the Amended Pleadings. The Plaintiffs concluded that it seemed inevitable that the 31 October 2016 trial date could not be effective and that the hearing may instead be used for a case management conference.

53. It is at this stage of the proceedings that criticism can be made of the conduct of the Plaintiffs. On 28 September 2016 the Plaintiffs clearly stated in writing that they would be providing a substantive response in relation to the Defendant's letter of 26 September no later than 29 September 2016. With the trial date on the horizon, less than a month away, the promised reply was not forthcoming until 6 October 2016, the reason given being that counsel with conduct of the matter was on vacation. The Court was informed that the vacation dates had been fixed for some time based on the previous agreed timetabling by the parties. Be that as it may, on 28 September the Plaintiffs should have either ensured that a response could be sent by the indicated date of 29 September 2016, or made clear that it

[12] The Plaintiffs contended that the issues for determination should be the same as suggested by them in their latter of 23 September 2016.

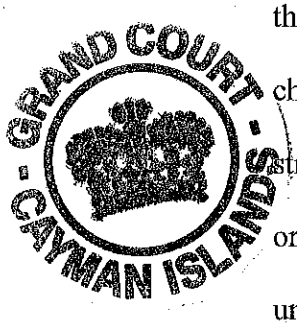


was unable to do so due to Counsel's absence. The loss of the work that could have been done during that week meant that there was still a significant number of pre-trial issues to be determined including, as it turned out, the proposed submission of an Amended Statement of Claim with a number of amendments, some of which were significant.

54. On 7 October 2016 the Defendant made it clear in a letter in reply that it did not agree with the trial date being vacated. With this in mind, the Defendant proposed that (i) witness statements be exchanged by/on 11 October 2016, (ii) the amendment to the Plaintiffs' Reply to the Amended Defence be provided by/on 12 October 2016;[13] (iii) any Amended Statement of Claim also be provided by/on 12 October 2016; (iv) the Defendant confirm whether it consented to the amendments by/on 13 October 2016; (v) any draft Amended Defence then be provided by/on 20 October 2016 with the Amended Reply being served by or on 20 October 2016; and (vi) any further witness evidence be served by/on 24 October 2016. In the letter the Defendant also contended that the Plaintiffs had not properly pleaded their equitable claims. It is evident from paragraph 7 that the parties had not reached agreement about the narrowing of the issues for determination at the trial. I note that the Defendant, by now seeking prompt exchange of witness statements, had changed its position about the appropriate time for exchange expressed in its letter of 23 September, as it then advocated that this should be delayed until the issues raised in the correspondence had been

[13] The same date proposed by the Plaintiffs in their letter of 6 October 2016.

resolved.[14] It is commendable that the Defendant was suggesting directions with the view of trying to save the now rapidly upcoming trial date. However, due to the frequent departure from the deadlines contained in those directions and the changing nature of the issues to be determined in the matter, it was clear that the structure given to the proceedings back in July 2016 under the consent directions order approved by Quin J had been lost and replaced with what turned out to be unrealistic last-minute suggestions.

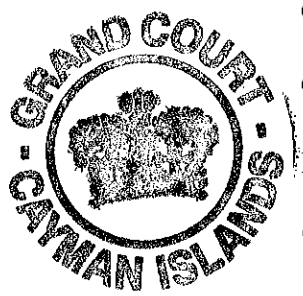


55. On 10 October 2016 the Defendant served a third supplemental list of 19 documents relating to the constructive notice assertion raised by the Plaintiffs. The Plaintiffs state that the documents ran to 64 pages. It appears that, save for one document, they were all emails. The Defendant stated that the documents were located and disclosed prior to any formal amendments to the pleadings being made as a further review of the documents was carried out due to the amendment to the Defence, the Plaintiff's indication about the possible amendment to their Reply and in anticipation of a "*new assertion*" that the Bank had constructive notice of the fraud on the Geneva account pre-August 2012.

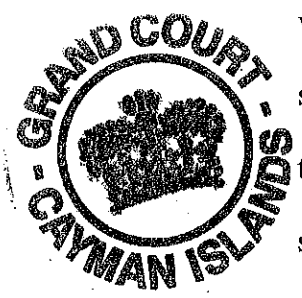
56. The Defendant emailed on 11 October 2016 to seek confirmation that the Plaintiffs would be in a position to exchange the witness statement "*on the current issues*" later that day[15].

[14] Although the Defendant was now also suggesting that the then still unresolved issues could be dealt with in a later exchange of additional witness statements.
[15] As suggested in the Defendant's letter of 7 October 2016 which had not been replied to.

57. There then followed a flurry of activity between the attorneys on 12 October 2016. The Plaintiffs understandably reiterated that they were not willing to exchange witness statements until they had time to review and take instructions on the recently served documents. They opined that, although there could be an expedited exchange of amended pleadings and witness statements, a postponement of the final hearing was "*inevitable.*" The Plaintiffs stated that the criticisms of any postponement being made by the Defendant were unjustified, especially as it had not met the first extended deadline for the filing of witness statements and it also had just introduced new documentary evidence. The Plaintiffs sought confirmation that the Defendant agreed that the Plaintiffs' equitable claims should form part of the narrow issues for consideration at the trial.



58. The Defendant sent an email in reply on 12 October 2016 reconfirming that it did not agree to vacate the hearing date and was continuing to prepare for the final hearing on 31 October 2016. The Defendant confirmed that it was still ready to exchange witness statements and it was also ready to comply with the timetable it had proposed in writing on 7 October 2016. The Defendant now confirmed that it agreed that, apart from its estoppel defence, an issue for consideration by the Court at trial was the Plaintiffs' dishonest assistance claim. It said that it still could not confirm its position on the other proposed equitable claim(s) until it had been served with a copy of the Draft Amended Statement of Claim. The Defendant laid the blame of the current unsatisfactory state of the proceedings at



the door of the Plaintiffs, especially as the Plaintiffs' counsel had gone on vacation without leaving adequate cover so close to the hearing date. There is some merit in that statement, but in reality there never should or would have been the need for such concentrated late activity if the parties had narrowed the issues sooner and ensured more timely compliance with the terms of the consent order approved by Quin J. Both parties are to blame for the situation that has arisen.

59. The Plaintiffs replied on 12 October reiterating that they had been ready to exchange witness statements on 26 August 2016 and on 9 September 2016. This of course should be placed in the context of including the Plaintiffs' concession, and the Defendant's initial view, that witness statements should only be exchanged when the decision about what issues were to be dealt with at the trial had been resolved. The Plaintiffs commented that the delays had been caused by the Defendant, especially by the recent filing of additional documents (albeit ones relating to the amended pleadings) and as a consequence they would not be ready for trial on 31 October 2016.

60. The Defendant replied on the same day reiterating that it opposed the postponement of the trial. The Plaintiffs were informed that, if they sought to vacate the hearing then, they would have to make a formal application to the Court and that the application would be opposed and the inter-partes correspondence shown to the Court on the question of costs. The Defendant suggested that witness statements be exchanged on that day, and if needed, further

statements could be later submitted to address matters raised in the proposed amended pleadings.

61. The Plaintiffs responded almost immediately by email stating "*prior to the formal listing of this matter in the past week that we were of the view the hearing could not proceed on 31 October 2016 and had expected both parties to notify the listing officer of this fact.*" It appears that the Listing Officer had issued a notice of hearing for 31 October 2016, but was not aware that the Plaintiffs had written to the Defendant on the same date advocating that the hearing could not proceed. However, the 31 October date had been given to the parties a good while back, so the date of the actual written notice is of little consequence. The Plaintiffs also stated in the email that they would not exchange witness statements or enter into any further debate with the Defendant until they had had a chance to review and give instructions on the documents in the Defendant's Third Supplemental List of Documents.

62. By email on 13 October 2016 the Defendant requested details about when the draft amended statement of claim would be received in light of the earlier representation by the Plaintiffs that it was to have been sent on the previous day. The Defendant validly questioned why, with the trial date looming, there was such an ongoing delay, as the Plaintiffs had known for three weeks that they intended to amend that pleading. As no reply was received a further email was sent on the afternoon of 14 October 2016 and another on the afternoon of 17

October 2016. The Defendant reiterated that if an adjournment was still sought, in light of the Plaintiffs' previously proposed timetable in which they said they would provide the Amended Statement of Claim by 12 October, then there would be costs implications.

63. The Plaintiffs eventually replied on 18 October stating that instructions had been given in relation to the additional documentation disclosed by the Defendant on 11 October 2016. They indicated that they would notify the Defendant when they were ready to exchange the witness statement and the amended pleading. They criticised the Defendant for failing to comply with the deadlines in the June consent order and that the historical conduct of the Defendant's attorneys in this matter would be brought to the attention of the Court when the issue of costs was raised and when the application to vacate the hearing date was made.

64. On 19th October 2016 the Defendant replied pointing out that, as the parties agreed that they should explore whether they could narrow the issues for determination, they had all agreed to extend the date for the exchange of witness statements to 27 September 2016 and that they had been in a position to exchange on that date. The Defendant failed to mention that, until very recently, the parties had also agreed that the witness statements should not be exchanged until there was an agreement about what the narrowed down issues for determination at trial were. The Defendant highlighted that the matter had not progressed because the Plaintiffs' attorney had been out of the country from 27 September 2016. To this

could be added the delay in providing the Amended Statement of Claim. The Defendant was right to highlight this, but is only one of a number of historical factors and one of the instances of poor case management practices adopted by the parties that led to the uncommendable situation so close to the trial date. The Defendant reiterated that they were still preparing for the trial scheduled to commence on 31 October 2016 and that if the Plaintiffs did not provide the amended pleadings and agreement to exchange the witness statements by 3pm on that day an application for unless orders would be made.

65. The Defendant wrote again on 20 October and expressed the view that the Plaintiffs were "*engineering an adjournment of the trial*" by refusing to exchange witness evidence and failing to provide the draft amended pleadings. The Defendant felt that the matter should still proceed but stated that if the Plaintiffs did not agree to exchange witness statements by 4pm on 21 October 2016 an adjournment would become necessary as otherwise they would be prejudiced.

66. At 1:57 pm on 21 October 2016 the Plaintiffs wrote to the Listing Officer with an accompanying summons seeking an adjournment, new directions and leave for the parties to amend their pleadings. They suggested that this be heard on 31 October 2016 and that the last two days of the hearing could be vacated.

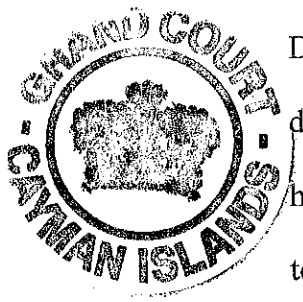
67. The Defendant, upon receiving a copy of the Plaintiffs' Summons, sent a letter on 21 October 2016 to them outlining their concern about the lack of supporting

evidence supporting the application made. They made clear that they would not agree to an order for costs to be costs in cause and indicated that they would be seeking an order for indemnity costs "*by reason of your failure to exchange witness evidence to engineer an adjournment, which is the only reason this matter is not ready for trial....*"

68. The Plaintiffs served the affidavit of Brigitte Tomascik in support of the Summons on 25 October 2016. On 26 October 2016 they served the draft Amended Statement of Claim. There were amendments to 17 paragraphs and 10 new paragraphs with 18 new sub paragraphs included. Some went beyond simply 'tidying up' the pleading and will necessitate carefully considered amendments to the Defendant's Defence. These far exceed the characterisation of proposed very minor amendments mentioned by the Plaintiffs in their email sent a month earlier on 23 September 2016.

Conclusion

69. Having conducted the above full review of the events leading up to the unfortunate adjournment of the trial in this matter it is clear that the Plaintiffs' inaction in early October as well as the very late exchange of their proposed amended statement of claim contributed to the same. If this is looked at in isolation then there would have been a good possibility that an order for costs thrown away in relation to the adjourned trial would have been made against them. However, I cannot disregard the fact that until September 2016 the



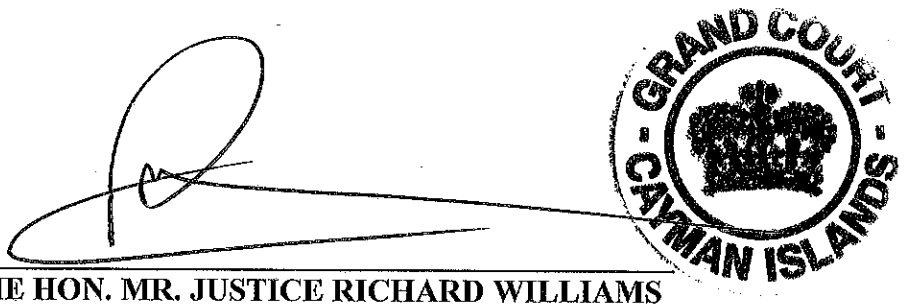
Plaintiffs had clearly been the party driving these proceedings and it was the Defendant, at least until August 2016, who had difficulty acting within agreed deadlines. The decision to try to attempt to narrow down the issues for trial should have been taken earlier in the proceedings. The drawn out inability of the parties to agree the narrowed issues for trial in a timely manner and the resultant changing position taken by the parties, in particular relating to the appropriate time to exchange witness statements and file any amended pleadings, greatly contributed to the uncertainly that prevailed and to the breakdown in structured directions. Due to the above and my other concerns about each party's conduct which I relayed earlier in the judgment, I find that both parties contributed to the state of affairs leading to, and which resulted in, the trial having to be adjourned. When I reach this conclusion I am cognisant that for the month of October 2016 the Defendant valiantly made suggestions about suitable directions in an attempt to keep the trial date. Regrettably, due to the state of the pleadings and the uncertainty about the late raised issues, they were unable to save the hearing as the proposals were to a degree unrealistic due to the proximity to trial.

70. Accordingly I make no order for costs thrown away in relation to the adjourned trial.

71. I have carefully considered the Defendant's application for an order for costs of and occasioned by the amendments to the Statement of Claim. Having regard to the nature of the amendments and the quantity of them I am satisfied that the

normal order is appropriate. Accordingly, I order that the Plaintiffs pay the Defendant's costs occasioned by the amendments to the Statement of Claim on the standard basis.

72. Having regard to my observations about the parties' conduct in this matter and the nature of my above conclusions on the applications of costs, I make no order for costs in relation the costs of this costs hearing.



THE HON. MR. JUSTICE RICHARD WILLIAMS
JUDGE OF THE GRAND COURT