

**THE EASTERN CARIBBEAN SUPREME COURT  
IN THE COURT OF APPEAL**

**COMMONWEALTH OF DOMINICA**

**DOMHCVAP2024/0003**

**BETWEEN:**

**FOUED ISSA**

Appellant

and

**SORREL CONSULTING LTD.**

Respondent

**Before:**

The Hon. Mde. Vicki Ann Ellis  
The Hon. Mde. Petra Nicola Byer  
The Hon. Mr. Reginald T. A. Armour

Justice of Appeal  
Justice of Appeal  
Justice of Appeal [Ag.]

**Appearances:**

Mrs. Dawn Yearwood-Stewart holding papers for Mrs. Singoalla Blomqvist-Williams  
for the Appellant  
Mrs. Noelize Knight-Didier for the Respondent

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2026: January 13;  
July 2.

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*Contract – Consultancy agreement – Breach of contract – Construction and renovation works – Case management decision – Extension of time – Relief from sanctions – Witness statements – Court-appointed expert witness – Whether witness statement of engineer rejected as court-appointed expert could nevertheless be admitted as evidence of fact – Whether learned master erred in refusing extension of time and relief from sanctions – Whether witness of fact may give opinion evidence – Distinction between factual and expert evidence – Appellate restraint in reviewing case management decisions – CPR 26.1(k), CPR 26.8 and CPR 29.11 – Overriding objective*

The appellant is the owner and occupier of a residential property situated at St. Aroment, Goodwill in the Commonwealth of Dominica. By a consultancy contract dated 21<sup>st</sup> July 2014, the appellant retained the respondent, a civil and environmental engineering consulting firm, to provide consultancy services, engineering review and design, and supervision of

construction and renovation works to his residence. The appellant subsequently commenced proceedings against the respondent alleging breaches of the consultancy contract and claiming damages representing, among other things, the cost of remedial works, rental expenses, the cost of an engineer's report, imported doors and costs overruns. The respondent denied liability and maintained that it had performed its contractual obligations with the care and skill expected of a reasonably competent project manager and counterclaimed for outstanding fees.

At a case management conference held on 24<sup>th</sup> April 2023, the learned master directed the parties to file and exchange witness statements on or before 26<sup>th</sup> July 2023 and further ordered that no witness in respect of whom a witness statement or summary was not filed in compliance with the order would be permitted to give evidence at trial without the permission of the court. The learned master also gave directions for the hearing of separate applications by the parties for the appointment of an expert witness. The appellant nominated Mr. Vivian Trotter, a civil engineer who had previously inspected the property and prepared a report concerning the condition of the works. The respondent nominated Mr. Cecil Harris. Following a hearing of the competing applications and the filing of further evidence and submissions, the learned master appointed Mr. Harris as the court-appointed expert by order dated 6<sup>th</sup> October 2023. In doing so, the learned master expressed the view that Mr. Trotter's familiarity with the project and his previous involvement in the matter gave rise to concerns regarding his ability to divorce himself from opinions already formed and to provide an independent and unbiased expert opinion. The learned master therefore preferred Mr. Harris, who was unfamiliar with the project and the parties. The Expert Witness Order was not appealed.

Thereafter, on 8<sup>th</sup> December 2023, the appellant filed an application seeking an extension of time and relief from sanctions to admit a draft witness statement from Mr. Trotter as an ordinary witness of fact. The appellant contended that the application became necessary only after the court declined to appoint Mr. Trotter as the court-appointed expert and that, notwithstanding his qualifications as a civil engineer, Mr. Trotter had personally attended the property on several occasions, had observed the state and condition of the works and was capable of giving relevant factual evidence arising from matters within his personal knowledge. The appellant further contended that the respondent would suffer no prejudice if the statement was admitted since Mr. Trotter's involvement in the matter had long been known to all parties and his report had been disclosed from an early stage of the proceedings.

The respondent opposed the application. It contended that the proposed witness statement was in substance expert evidence, that it would compete with and undermine the evidence of the court-appointed expert, that permitting Mr. Trotter to testify after he had been rejected as the court-appointed expert would be contrary to the earlier ruling of the court and that the admission of the proposed evidence would be prejudicial to the proper administration of justice and amount to an abuse of process.

By order dated 25<sup>th</sup> January 2024, the learned master dismissed the application. The learned master accepted the respondent's submissions that the proposed evidence would be prejudicial to and would compete with the evidence of the court-appointed expert and

concluded that the observations contained within the draft witness statement could only properly be viewed as opinion evidence based upon expert assessment. Costs were awarded against the appellant.

Being dissatisfied with the learned master's order, the appellant appealed. The appellant contended that the learned master erred in failing to consider the nature of the claim and the factual issues arising therefrom; in failing to appreciate that notwithstanding his qualifications as a civil and structural engineer, Mr. Trotter had personally visited the property on several occasions and was capable of giving relevant evidence of fact arising from matters observed by him; in concluding that the proposed evidence could only amount to opinion evidence; in failing to identify those portions of the draft witness statement which were said to be objectionable; and in failing to consider whether any impermissible opinion evidence could simply be struck out rather than excluding the entirety of the proposed witness statement. The appellant further contended that the learned master failed properly to exercise her discretion in refusing the application for an extension of time and relief from sanctions. The respondent opposed the appeal and maintained that the proposed witness statement was in substance expert evidence, that it would compete with and undermine the evidence of the court-appointed expert and that permitting Mr. Trotter to testify after he had been rejected as the court-appointed expert would be prejudicial to the proper administration of justice and contrary to the court's earlier ruling.

Against that background, two issues arose for determination by the Court. The first was whether the learned master erred in the exercise of her discretion in refusing to grant the appellant an extension of time within which to file and rely upon the Trotter draft witness statement, including whether she failed properly to exercise her discretion to grant relief from sanctions. The second was whether, and in what circumstances, a witness of fact may be permitted to give opinion evidence.

**Held:** allowing the appeal; setting aside the order of the learned master dated 25<sup>th</sup> January 2024; granting the appellant's application for an extension of time and relief from sanctions; granting leave to the appellant to file and rely upon the witness statement of Mr. Vivian Trotter as a witness of fact *de bene esse*; and ordering costs to the appellant, that:

1. Although an appellate court will exercise considerable restraint before interfering with the exercise of a case management discretion, such restraint does not prevent appellate intervention where the court below has failed to take account of relevant considerations, has taken account of irrelevant considerations or has otherwise erred in principle in the exercise of its discretion. The learned master's decision on the Extension and Relief Application was a case management decision attracting appellate restraint. However, the learned master failed to consider a number of matters which were relevant to the exercise of her discretion, including the factors prescribed by CPR 26.8, the explanation advanced by the appellant for the delay, the effect which refusing relief would have on the appellant and the interests of the administration of justice. In those circumstances, the learned master's decision exceeded the generous ambit within which reasonable disagreement is possible and was plainly wrong.

**Michael Dufour and Others v Helenair Corporation Limited and Others** (1996) 52 WIR 188 applied; **Phonographic Performance Ltd v AEI Rediffusion Music Ltd** [1999] 1 WLR 1507 considered; **John Oliver Dyrud v Palmavon Jasamin Webster et al** AXAHCVP2021/0010 (delivered 27<sup>th</sup> April 2022, unreported) applied.

2. In determining whether to grant an extension of time and relief from sanctions, the learned master was required to consider the provisions of CPR 26.1(2)(k), CPR 26.8 and CPR 29.11 and to exercise her discretion in a manner consistent with the overriding objective. The learned master failed to consider whether the application had been made promptly, whether there was a good explanation for the delay, the prejudice to the parties, the effect which refusing relief would have on the appellant's entitlement to a fair trial, the interests of the administration of justice and the appellant's prospects of success. These were all matters which the learned master was obliged to consider in the exercise of her discretion.

**Carleen Pemberton v Mark Brantley** HCVAP2011/009 (delivered 14<sup>th</sup> October 2011, unreported) applied; **Joseph Hyacinth v Allan Joseph** GDAHCVP2015/0025 (delivered 20<sup>th</sup> June 2016, unreported) applied; **Westburg Anstalt v Profitstar Anstalt** BVIHCP2013/0020 (delivered 4<sup>th</sup> February 2014, unreported) considered.

3. On the evidence before the learned master, the delay in filing the application was not fatal. Whether time was calculated from the witness statement deadline or from the date of the Expert Witness Order, the delay was not inordinate. Further, the appellant's case was that he had awaited the court's determination of the expert witness issue before seeking to rely upon Mr. Trotter as a witness of fact. The proceedings had not progressed beyond an early stage of case management and had in fact been stayed pending mediation. In those circumstances, the admission of the witness statement would not cause irreparable prejudice to the respondent. Conversely, refusal of the application would deprive the appellant of a witness whom he regarded as central to the proof of his claim. The interests of justice therefore favoured the grant of relief.
4. The learned master approached the application on the erroneous basis that because Mr. Trotter had not been selected by the court to act as the court-appointed expert witness, he ought not thereafter to be permitted to give evidence as a witness of fact. The case at bar did not present a situation in which the appellant sought to circumvent the court's earlier ruling by reintroducing Mr. Trotter as an expert witness through the back door. Rather, the appellant sought to rely upon Mr. Trotter in relation to matters personally observed by him during site visits and inspections undertaken at the property. The concerns which informed the learned master's decision not to appoint Mr. Trotter as the court-appointed expert arose because of his previous involvement in the project and his familiarity with the works. Those same matters were, however, capable of rendering him a potentially important witness of fact. The refusal to appoint Mr. Trotter as the court-appointed expert did not determine whether he could properly give factual evidence at trial.

5. Although the general rule is that opinion evidence is inadmissible, a witness of fact is not rendered incapable of giving evidence merely because he possesses particular qualifications, expertise or experience. A factual witness who possesses expertise may, in appropriate circumstances, give evidence of matters personally observed by him and may offer opinions reasonably related to facts within his knowledge or comments arising from those facts within his area of competence. There is no rigid rule that a witness statement of fact cannot contain opinion evidence. What is objectionable is according such evidence the same status as expert evidence. The proper approach is generally to admit the evidence and leave issues of weight to be determined by the trial judge.

**Anthony Martin v Lime Dominica Ltd** DOMHCV2013/0407 (delivered 17<sup>th</sup> February 2020, unreported) applied; **Joseph W. Horsford v Geoffrey Croft** ANUHCVP2014/0006 (delivered 22<sup>nd</sup> October 2014, unreported) applied; **Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd (No. 6)** [2008] All ER (D) 04 applied; **Polypipe Ltd v Davidson** [2023] EWHC 1681 (Comm) followed.

6. Questions concerning the admissibility, veracity, relevance and weight of the evidence contained in the Trotter draft witness statement were matters which ought properly to have been left to the trial judge. Paragraphs of the draft witness statement referred to site visits undertaken by Mr. Trotter, observations made by him concerning the condition and completeness of the works, and matters arising from documents reviewed and conversations held in connection with the project. Whether those matters were admissible, whether they constituted factual evidence, whether they amounted to impermissible expert evidence and what weight ought to be attached to them were all matters falling within the province of the trial judge and not the case management court.
7. The learned master erred in principle by elevating the reasons which informed her earlier Expert Witness Order into an exclusionary rule preventing the admission of the Trotter draft witness statement. In doing so, she wrongly treated the fact that Mr. Trotter had not been appointed as the court expert as determinative of the admissibility of his proposed evidence as a witness of fact. The learned master thereby intruded upon the proper role of the trial judge and failed to have regard to the authorities governing the admissibility and treatment of opinion evidence given by factual witnesses.
8. The respondent's submission that the Extension and Relief Application amounted to an abuse of process could not be sustained. The circumstances of the appellant first seeking to have Mr. Trotter appointed as an expert witness and thereafter seeking leave to rely upon him as a witness of fact did not amount to an abuse of process known to the law and did not represent an affront to the administration of justice. The appellant's conduct did not involve an attempt to relitigate a matter already determined nor did it constitute a misuse of the court's procedures.

**Henderson v Henderson** (1843) 3 Hare 100 considered; **Panayiotou & others v Sony Music Entertainment (UK) Ltd** [1994] 1 All ER 755 distinguished; **Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corporation** [1981] 1 All ER 289 distinguished.

9. Having regard to the nature of the appellant's pleaded case, the admitted existence of the consultancy contract, the relevance of Mr. Trotter's observations to the issues arising from the pleadings, the stage reached in the proceedings, the absence of irremediable prejudice to the respondent and the overriding objective, the learned master's refusal to extend time and to grant relief from sanctions was plainly wrong. The appellant was therefore entitled to an extension of time to file and rely upon the Trotter draft witness statement and the same ought to be admitted into evidence *de bene esse*, subject always to the trial judge's control over questions of admissibility, relevance and weight.

## **JUDGMENT**

- [1] **ARMOUR JA [AG.]:** This is an interlocutory appeal filed by the appellant on 24<sup>th</sup> June 2024 against a case management order of a master of the high court dated 25<sup>th</sup> January 2024 ("the Appealed Order"). By the Appealed Order the learned master dismissed the appellant's application filed on 8<sup>th</sup> December 2023 (as claimant in the court below) for an extension of time and for relief from sanctions to admit the evidence of Mr. Vivian Trotter, Civil Engineer, as an ordinary witness of fact and, ordered costs against the appellant. I shall refer to this application as "the Extension and Relief Application".<sup>1</sup>

### **Background**

- [2] The appellant is the owner and occupier of a property at St. Aroment, Goodwill in the parish of Saint George, Dominica ("the appellant's home"). The respondent is a civil and environmental engineering consulting firm. By contract dated 21<sup>st</sup> July 2014, the appellant retained the respondent to provide consultancy services (drafting and engineering review/design), and supervision of construction and renovation works of the appellant's home, under which the respondent agreed to supervise and manage the renovation of the same ("the Consultancy Contract").

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<sup>1</sup>Appeal Bundle filed on 24<sup>th</sup> June 2024, at page 79.

The renovation was to be done by a contractor, Oliver Joseph under a construction works contract with a start date of 5<sup>th</sup> June 2015 (“the Construction Works Contract”).

- [3] The appellant filed a claim in the high court on 2<sup>nd</sup> December 2021 (subsequently amended) against the respondent for breach of the Consultancy Contract. The appellant claimed, *inter alia*, the following:

“The Claimant’s claim is for \$183,731.23 being damages for breach of Agreement for Consultancy Services and Supervision for the Remodelling of the Claimant’s Residence between the Defendant and the Claimant dated July 21<sup>st</sup>, 2014, which sum represents firstly, the cost of remedial works which had to be undertaken by the Claimant due to the Defendant’s failure to ensure that renovation and extension works to the Claimant’s residence, pursuant to construction contract between the Claimant and contractor, Oliver Joseph, were completed within the time stipulated under (sic) afore-mentioned contract between the Claimant and the said contractor, Oliver Joseph; secondly, rental from 6<sup>th</sup> February 2016 to 1<sup>st</sup> October 2017, thirdly, cost of the engineer’s report, fourthly, cost of two imported green heart doors and seven glass doors and lastly, cost overruns.”<sup>2</sup>

- [4] In his amended statement of claim the appellant pleaded that the respondent’s contractual obligations were to supervise the construction and renovation works to be undertaken and effected by the contractor to the appellant’s residential home by a stipulated start and completion date, which supervision included a) ensuring prompt mobilization, b) adherence by the contractor to a construction plan/schedule; c) verifying the contractor’s purchasing schedules and, d) with the defendant’s undertaking to obtain the appellant’s approval for any variations.<sup>3</sup> The respondent in its defence and counterclaim, admits<sup>4</sup> the Consultancy Contract and that the contractor was to be supervised by the respondent, pursuant to the contractor’s contract with the appellant but, in the main denied that it had breached its duties under the Consultancy Contract and joined issue as to the interpretation

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<sup>2</sup>Amended Statement of Claim filed on 7<sup>th</sup> February 2022.

<sup>3</sup>Ibid.

<sup>4</sup> Appeal Bundle filed on 24<sup>th</sup> June 2024, at page 108; Defence and Counterclaim filed on 13<sup>th</sup> September 2022, at paragraph 1.

of the terms of the Consultancy Contract in the events which are alleged to have given rise to the appellant claiming breach of that contract and damages. The respondent averred that its overall contractual duty was to consult with and advise the appellant, that it carried out this duty throughout the Consultancy Contract and altogether acted with the care and skill to be expected of a reasonably competent project manager of the works. By its counterclaim, the respondent claimed for, inter alia, payment of alleged outstanding invoices.<sup>5</sup> The appellant joined issue by its reply and defence to counterclaim filed on 19<sup>th</sup> October 2024.<sup>6</sup>

- [5] The matter came up for case management before the learned master on 24<sup>th</sup> April 2023. By order dated 24<sup>th</sup> April 2023 and entered on 8<sup>th</sup> May 2023 (hereinafter “the 8<sup>th</sup> May Order”), the learned Master gave a number of orders and directions. Among other orders and directions, the learned master ordered as validly filed an amended claim which the appellant had filed without leave on 7<sup>th</sup> February 2023; the parties were directed to file and exchange their witness statements on or before 26<sup>th</sup> July 2023. Order No. 4 of the 8<sup>th</sup> May Order is relevant and reads as follows:

“The parties are to file and exchange their witness statements (or summaries) [5 for the claimant and 6 for the defendant exclusive of expert witnesses] to stand as evidence in chief at the trial of this claim on or before 26<sup>th</sup> July, 2023; no witness in respect of whom a witness statement or summary is not filed in compliance with this order will be permitted to give evidence at the trial of this claim without permission of the Court;”

Directions were also given in the 8<sup>th</sup> May Order for the parties’ separately filed applications for the appointment of an expert witness to be listed for hearing on 13<sup>th</sup> June 2023, before the learned master.

- [6] On 13<sup>th</sup> June 2023, the learned master commenced but did not complete the hearing of the applications to appoint an expert witness. She gave further directions for the filing of affidavits and legal submissions, with the parties agreeing for the court, thereafter, to deliver its expert witness decision on the papers.

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<sup>5</sup> Appeal Bundle filed on 24<sup>th</sup> June 2024, at page 114.

<sup>6</sup> Ibid, at page 116.

By order dated 6<sup>th</sup> October 2023 and entered on 13<sup>th</sup> October 2023,<sup>7</sup> (from the choice offered by the parties, with the appellant nominating Engineer Mr. Vivian Trotter, and the respondent nominating Engineer, Mr. Cecil Harris), the court appointed Mr. Cecil Harris as the Court appointed expert by order of that date (the “Expert Witness Order”). The record of the learned master’s Oral Reasons<sup>8</sup> for her decision were, materially, as follows:

“9. Having heard the parties, and having read all the documents in full, I am of the considered view that the preferred expert witness should be Mr. Cecile (sic) Harris. I make this decision based on the affidavit evidence of the claimant which attests to Mr. Trotter’s familiarity with the matter and the considerable length of time he has worked on this matter and his in-depth knowledge. This admission gives me doubt that Mr. Trotter may be unable to divorce himself from previously held opinions on the matter, having already formed them, and having held them for some time. Further, if Mr. Trotter was to be selected he would be unable to certify at the end of his report that he had not in fact received instructions from any other source [**Yates Associated Construction Ltd v Blue Sand Investments Limited, Court of Appeal, 2016**] which would greatly affect the credibility of his report and the weight the court could attach to it.

“10. While I do not question the qualifications of either expert, I prefer Mr. Cecile (sic) Harris because he is in fact unfamiliar with the project and the parties and more likely to render an unbiased opinion for the court in all the circumstances.”<sup>9</sup> (emphasis supplied)

[7] By the terms of that Expert Witness Order the learned master gave consequential directions and orders, inter alia, to guide the expert witness process, including granting leave for written questions to the Court appointed witness and liberty to apply to cross examine the Court Expert. The Expert Witness Order was not appealed.

[8] Subsequently, on 8<sup>th</sup> December 2023, the appellant/applicant filed the Extension and Relief Application, given that this application was made out of time on the

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<sup>7</sup> Respondent’s Supplementary Bundle filed on 26<sup>th</sup> August 2025, at pages 89-90.

<sup>8</sup> Respondent’s Supplementary Bundle filed on 26<sup>th</sup> August 2025, at pages 86-88.

<sup>9</sup> Ibid at page 87.

schedule fixed by the 8<sup>th</sup> May Order. By that Extension and Relief Application the appellant sought leave to admit the draft witness statement of Mr. Vivian Trotter as an ordinary witness of fact (“the Trotter draft witness statement”). As will be referred to and discussed later herein, the Extension and Relief Application was supported by two affidavits, of which one was by the appellant/applicant attorney’s Legal Clerk, Ms. Josian St. Ville who deposed to the record of the 8<sup>th</sup> May Order. She deposed further that counsel for the appellant/applicant had explained to the court the basis on which the application was being made out of time to call Vivian Trotter as an ordinary witness of fact. This deposed explanation was that the application was filed out of time “because the Claimant was awaiting the decision of the court which would inform on whether he could appear as an expert witness or an ordinary witness”<sup>10</sup> and, that the respondent/defendant is not prejudiced as the Trotter draft witness statement was already previously disclosed to the court. The respondent filed its notice of opposition to this application on 16<sup>th</sup> January 2024.<sup>11</sup>

- [9] By order dated 25<sup>th</sup> January 2024 (the “Appealed Order”), the learned master dismissed the Extension and Relief application and ordered costs to the respondent in the sum of \$500.00, to be paid forthwith.<sup>12</sup> This is the only part of the Appealed Order which is appealed from by the notice of appeal filed on 24<sup>th</sup> June 2024. The learned master recited her reasons for her dismissal in the recitals to the Appealed Order. These reasons were, in summary, that she accepted and agreed<sup>13</sup> with the respondent’s submissions that (a) the Extension and Relief Application would, if granted, be prejudicial to and seek to compete with the expert witness already appointed by the court;<sup>14</sup> (b) the evidence of Mr. Vivian Trotter who had been rejected by the court as an expert, if admitted, could only be viewed in light of an assessment by an expert, as the aspect of the observations which he sought to make could only be opinion evidence based on his expert opinion, in spite of

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<sup>10</sup> Appeal Bundle filed on 24<sup>th</sup> June 2024, at page 83.

<sup>11</sup> Ibid, at page 92.

<sup>12</sup> Appeal Bundle filed on 24<sup>th</sup> June 2024, at pages 5-8.

<sup>13</sup> Ibid

<sup>14</sup> Ibid, recital no. 1.

counsel for the appellant's concession that she would expunge his previous expert report and other aspects of the statement that might be offensive.<sup>15</sup>

- [10] This Court notes that this appeal is limited to the order dismissing the Extension and Relief Application which disallowed an extension of time for the Trotter draft witness statement being admitted into evidence as an ordinary witness statement of fact. The respondent filed its notice of opposition thereto on 24<sup>th</sup> July 2025. No appeal is brought against the further orders made on 25<sup>th</sup> January 2025, inter alia directing the parties to attend mediation, staying the proceedings pending mediation and, the adjournment of the proceedings to 12<sup>th</sup> March 2024 for the parties to report further to the learned master on the outcome of the mediation ("the Further Orders").

### **The Appeal**

- [11] The appellant has advanced five grounds of appeal, as follows:
- "(a) The learned master erred in fact by failing to consider the facts of the case and the nature of the claim before the Court, which entails construction work done on the Applicant's property and the breach of an Agreement pertaining to said construction work.
  - (b) The learned master erred in fact by failing to consider that the said witness, Vivian Trotter is a Civil and Structural Engineer and despite his occupation and expertise, at the relevant time he did visit the Applicant's property on several occasions and was involved in the construction process at the relevant time.
  - (c) The learned master erred in fact and in law in paragraph 3 of the Order by stating the said witness's statement "...*could only* [sic] *opinion evidence*." She failed to consider that the said witness, can give statements as to facts in his witness statement and before the Court and any statement of opinion made can be challenged.
  - (d) The learned master erred in law by failing to give reasons and or highlight the parts of the draft witness statement that can be considered opinion evidence that may be prejudicial to the Court.
  - (e) The learned master erred in law by failing to elect the option of striking out any opinion evidence that may be prejudicial."<sup>16</sup>

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<sup>15</sup> Ibid, recital no. 2.

<sup>16</sup> Appeal Bundle filed on 24<sup>th</sup> June 2024, at page 2.

### **Appellant's Submissions**

- [12] The appellant submitted that the court erred in the case management exercise of its discretion in failing critically to examine the evidence before dismissing the Extension and Relief Application and, disallowing Mr. Trotter's evidence in its entirety; in failing to give reasons for her decision other than wrongly refusing to extend time for the admission of his witness statement on the limited issue of him impermissibly giving opinion evidence.
- [13] Further, in disallowing Mr. Trotter's evidence on the basis that it constituted opinion evidence, the court erred in failing to recognize that a witness of fact can give opinion evidence which he is qualified to provide and that the court may benefit from the expertise of an engineer. The objective is to put forward the facts and to have witnesses respond to questions posed by both the claimant and the defendant in the lower court to move the process forward.
- [14] The appellant also submitted that Mr. Vivian Trotter had been engaged in the matter for the past five years and that the respondent was aware of his report as it was previously filed with the Statement of Claim. The fact that Mr. Trotter was retained by the appellant to provide a report is not sufficient to disqualify him.
- [15] The appellant relied on the case of **Anthony Martin v Lime Dominica Ltd.**<sup>17</sup> That was a case in which a pre-trial application to strike out witness statements on the ground that the evidence was expert/opinion evidence was denied. Stephenson J accepted that as a general rule opinion evidence being given by a witness of fact is inadmissible but held a) that opinion evidence may be admissible if adduced through a properly qualified expert on matters which fall within his or her particular area of expertise; and b) matters pertaining to admissibility of evidence are best resolved at the substantive hearing or trial of the claim.

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<sup>17</sup> DOMHCV2013/0407 (delivered 17<sup>th</sup> February 2020, unreported).

- [16] The appellant also relied on **Helical Bar plc v Armchair Passenger Transport Ltd**,<sup>18</sup> which was a challenge to a case management decision of the judge to exclude the evidence of one Mr. McLean as an expert, because he (Mr. McLean) had been previously employed as chief executive officer of a company which was involved in the action. One of the issues in that case was the reasonableness of car hire rates and whether the expert evidence of Mr. McLean on such car hire rates should be excluded because of an alleged close relationship with a party associated with the defendant, thereby rendering Mr. McLean not independent. The appellant contended that there was inadequate material to justify that exclusionary decision, with the respondent contending that the decision was entirely justified upon the evidence. The court reviewed the case law dealing with admissibility and conflicts of interest. Relying on this case the appellant submitted that the learned master's case management discretion notwithstanding, the admissibility and/or weight to be given to the evidence of a witness of fact whose evidence is challenged as having a connection with a party will normally depend on the nature and extent of the connection and interest alleged and that this is a matter to be explored at the trial itself.
- [17] The appellant submitted further that Mr. Trotter inspected the site before litigation, observed defects contemporaneously and prepared the report on which the claim was filed. It was submitted that the outcome of excluding the evidence of Mr. Vivian Trotter offends the overriding objective and the appellant's right to a fair hearing as Mr. Trotter is the only witness capable of speaking to the original condition of the works.
- [18] Counsel for the appellant submitted that the principles of appellate interference are well settled. Counsel relied on **Phonographic Performance Ltd v AEI Rediffusion Music Ltd**,<sup>19</sup> that the court may intervene where the decision-maker erred in principle, failed to take into account relevant matters, took into account irrelevant

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<sup>18</sup> [2003] All ER (D) 436 (Feb).

<sup>19</sup> [1999] 1 WLR 1507.

matters, or reached a conclusion that is plainly wrong. Each of those errors are present in this case, submitted counsel for the appellant.

- [19] Counsel for the appellant further addressed the learned master's reference to the court's prior refusal of Mr. Trotter as the court's expert. Counsel submitted that there is no rule under the **Eastern Caribbean Supreme Court Civil Procedure Rules 2000** ("the CPR") Part 33 or otherwise that prevents a technically qualified person, who has first-hand knowledge, from giving factual evidence merely because he also possesses expertise. In this regard the appellant's counsel also referred to the case of **Joseph W. Horsford v Geoffrey Croft**,<sup>20</sup> relying on part of the ratio of that decision:

"1. A witness statement should contain the evidence which a person would be allowed to give orally. Legal arguments or opinion evidence (except from someone who is qualified to provide that evidence), or irrelevant evidence should not be included in a witness statement. Any matters of information or belief which are admissible must state the source of any such matters of information or belief..."

- [20] Counsel for the appellant further submitted that even if parts of the draft statement contained opinion, the court could have limited the evidence, struck out objectionable passages or confined the witness strictly to factual observations. The learned master did not consider or apply any of these options. In the circumstances, counsel submitted that the total exclusion was the most drastic response and was wholly disproportionate.

### **Respondent's Submissions**

- [21] The respondent contended that the learned master was correct in arriving at the decision appealed against; that this decision was the correct exercise of the court's discretion, jurisdiction and power and fulfilled the overriding objective of the CPR.

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<sup>20</sup> ANUHCVP2014/0006 (delivered 22<sup>nd</sup> October 2014, unreported), at page 2.

- [22] The respondent referred to the settled principle stated in **Michael Dufour and Others v Helenair Corporation Limited and Others**<sup>21</sup> that an appellate court will not interfere with the exercise of a trial judge's discretion unless it is shown that the judge erred in principle by failing to take into account relevant considerations, by giving them too little or too much weight, or by taking into account irrelevant considerations, and that such error caused the decision to fall outside the generous ambit within which reasonable disagreement is possible, rendering it plainly wrong. The respondent submitted, further, that the threshold for appellate interference is even higher in respect of case management decisions, as affirmed in **John Oliver Dyrud v Palmavon Jasamin Webster et al.**<sup>22</sup> That is to say, appellate courts must exercise exceptional restraint when reviewing case management orders, having regard to the overriding objective of the CPR, including proportionality, expedition, equality of arms, economy, and the efficient allocation of judicial resources. The respondent submitted that considerable deference is owed to the first instance judge, who is presumed to possess a more thorough knowledge of the proceedings, having managed the matter over time.
- [23] The respondent submitted that the learned master considered both parties' arguments, the notice of application, draft witness statement and notice of opposition and was fully aware of the history of the case; that the learned master accurately summarized the respondent's arguments and expressly agreed with them, dismissing the application. It was contended that this provided sufficient reasoning, as the respondent's arguments were set out in full in its notice of opposition. The appellant's assertion that the decision rested solely on Mr. Trotter being limited to opinion evidence is incorrect; that the master's reasoning was that Mr. Trotter's evidence 'would be prejudicial to and seek to compete with the expert witness already appointed by the court.'<sup>23</sup> It was contended that allowing the Trotter

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<sup>21</sup> (1996) 52 WIR 188.

<sup>22</sup> AXAHCVP2021/0010 (delivered 27<sup>th</sup> April 2022, unreported).

<sup>23</sup> Appealed Order, recital no. 2

draft witness statement as presented would have prejudiced the court's prior decision and accordingly constitute an abuse of process.

[24] It was further submitted that although the application was for an extension of time, the court was entitled and obliged, having the Trotter draft witness statement before it and in light of the history of the case and prior decisions on expert evidence, to consider the proposed evidence and reach the decision which it did. The court was not confined to the factors in CPR 26.8 alone and, in any event, its decision was grounded in a principal factor under that rule, namely the interests of the administration of justice.

[25] The respondent submitted further that the court has an inherent jurisdiction to control the evidence to be adduced at trial. This inherent jurisdiction is reflected in written format or exercised in conjunction with the CPR, including Parts 29 and 26. In particular, the court may direct the issues on which evidence is required and the manner of proof, strike out inadmissible, irrelevant or oppressive material from witness statements, take any step or make any order to further the overriding objective, and exercise these powers on application or of its own initiative, provided affected parties are given a reasonable opportunity to make representations.

[26] The learned master had before her the proposed Trotter draft witness statement and concluded that the observations therein were based entirely on his expert opinion. The respondent therefore disagreed that the learned master could have selectively struck out opinion evidence, as this would have left, at most, only paragraphs 1 and 2. Having found the statement to be wholly grounded in the witness' expertise, the court was obliged to exclude it in its entirety. The court could not permit inadmissible evidence merely because the application otherwise satisfied the criteria for relief from sanctions. The respondent contended that while it may be argued that paragraphs 7 to 9 are not opinion evidence, they are nonetheless advanced on the basis of the witness' expertise and his review of documents and site visits in his capacity as an engineer, as he stated at paragraph 6. The

respondent submitted further that all of the evidence was therefore coloured by his expertise, as reflected in the master's finding that it 'could only be viewed in light of an assessment by an expert'<sup>24</sup> and that, in any event, absent such expertise, paragraphs 7 to 9 would be hearsay and properly excluded.

[27] The respondent further contended that even if parts of Mr. Trotter's statement were factual, the master was entitled to exclude the statement in its entirety, as it would have been prejudicial and competing with the court-appointed expert. Allowing it would blur the distinction between factual and expert evidence, undermine the court's earlier directions regarding the selection of the expert and amount to an abuse of process.

[28] The respondent cited comparative authority under the **United Kingdom's Civil Procedure Rules CPR 32.1** which states that the court may exclude evidence that is otherwise admissible. The respondent submitted that this reflects the court's case management powers and the overriding objective and is applicable in Eastern Caribbean jurisdictions even if not expressly stated in CPR 29.1. The power to control evidence derives from the court's inherent jurisdiction, not from the CPR, which merely regulates its exercise. As stated in **Panayiotou and others v Sony Music Entertainment (UK) Ltd**,<sup>25</sup> such powers are inherent in the court's function as a court of justice. In **Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corpn**,<sup>26</sup> Lord Diplock affirmed that the high court's power to dismiss proceedings for want of prosecution is an aspect of its inherent jurisdiction to control its own process to prevent injustice. That power flows from the court's constitutional function as a court of justice and is necessary to ensure that its procedures are not misused in a manner that undermines its ability to reach a just determination. Where the continuation of proceedings would involve a substantial

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<sup>24</sup> Ibid, recital no. 3.

<sup>25</sup> [1994] 1 All ER 755.

<sup>26</sup> [1981] 1 All ER 289 at 295.

risk that justice cannot be done, dismissal is a proper exercise of the court's inherent jurisdiction.

[29] The respondent submitted that these principles applied to the present case, that the court had an inherent jurisdiction to disallow any action that would amount to an abuse of the administration of justice. Having already rejected Mr. Vivian Trotter as an expert witness, it would have been an affront to due process to permit him to give evidence as a factual witness on matters he expressly stated he became privy to when he visited the site on 20<sup>th</sup> February 2017 to 'assess the works to be undertaken to complete the project'.<sup>27</sup> In those circumstances, there was no need for the court to consider the remaining factors under CPR 26.8. The issues before the court went beyond an application for extension of time or relief from sanctions and required the court to exercise its discretion to control the evidence and protect its processes. In any event, the affront to the administration of justice was so significant that it outweighed all the other factors under CPR 26.8.

[30] The respondent also submitted that in the event that this Court concludes that the learned master erred by failing to confine her analysis to the factors under CPR 26.8 and thereby arrived at a decision that was plainly wrong, the Court of Appeal must exercise its discretion afresh. The Court may likewise do so where insufficient reasons were provided by the court below for its decision. While it is accepted that factors (c) to (g) do not adversely affect the application's prospects, the seriousness of the failures under factors (a), (b) and (h) outweigh those considerations. As to factor (h), the requirement of promptness, the application was not made promptly. A delay of approximately four and a half months after the relevant deadline, it was submitted, was, in any view, excessive. Even if time was to run only from the date on which the court declined to permit Mr. Trotter to act as an expert witness, a delay of two months had ensued, and no explanation had been advanced for that delay.

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<sup>27</sup> Trotter draft witness statement, at paragraph 3.

[31] In relation to factor (a), it was submitted that the effect of granting relief on the parties, the prejudice to the respondent significantly outweighs any benefit to the appellant. Mr. Trotter was retained solely by the appellant, undertook his site visit and assessments based exclusively on the appellant's input, and was rejected by the court as an independent expert witness. To permit such a witness, with relevant expertise, to give evidence as to his assessment of the works would be highly prejudicial to the respondent, particularly where his evidence would potentially compete with that of the court-appointed expert.

[32] Further, the proposed evidence offers no real benefit to the appellant, as it is irrelevant to the issue for determination. The claim concerns an alleged failure by the respondent in its capacity as project manager. Evidence as to the completeness of the works at a particular point in time is relevant, if at all, to a claim against the contractor, and does not assist the court in determining whether the respondent discharged its duties as project manager because the respondent did not carry out the works.

### **Issues**

[33] Based on the aforementioned, the following issues arise for determination by this Court:

- (1) Whether the learned master erred in the exercise of her discretion in refusing to grant an extension of time for the filing of the Trotter draft witness statement, including failing to exercise her discretion to grant to the appellant relief from sanctions to allow the said witness statement to be filed?
- (2) Whether and in what circumstances may a witness of fact be permitted to give opinion evidence?

### **Analysis and Discussion**

[34] In its consideration of the issues in this matter, this Court is guided by the settled law as to the circumstances in which an appellate court will interfere with the

decision of a lower court which has exercised a judicial discretion. That settled law is acknowledged across jurisdictions. The appellant relied on **Phonographic Performance Ltd v AEI Rediffusion Music Ltd**, a 1999 decision of the Court of Appeal of the United Kingdom. In this jurisdiction, our courts are guided by the 1996 locus classicus decision of **Michael Dufour and others v Helenair Corporation Limited and others** that an appeal against a judgment given by a court below, in the exercise of a judicial discretion, will not be allowed unless:

“the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error in principle the trial judge’s decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong” per Sir Vincent Floissac, CJ.<sup>28</sup>

[35] The Court was reminded by the respondent and takes into consideration that the decision appealed from is one decided at the case management stage. In that regard, in giving consideration to the application of these settled principles of law, I am mindful of the deference to be accorded to the court below and the degree of restraint to be exercised by an appellate court, as cautioned by Farara JA [Ag.] in the decision of **John Oliver Dyrud v Palmavon Jasamin Webster**<sup>29</sup> as follows:

“With respect to appeals against case management orders, the level of appellate restraint is even greater. Put differently, an appellate court will be very slow to overturn on appeal, orders made or directions given by a first instance judge for the proper and efficient management of the case or proceedings. This cautionary approach to appellate restraint when reviewing case management orders and directions, is underpinned by a number of bedrock principles. They include, but are not limited to, the court’s overriding objective to deal with cases justly. This entails ensuring, so far as is practicable, that the parties are on an equal footing, to save expense, dealing with cases in a proportionate way, ensuring that proceedings are dealt with expeditiously, and allotting an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases. These guiding principles, which embody the court’s overriding objective, are to be applied or given effect to by a court or judge when interpreting a rule or exercising a discretion given to it by a

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<sup>28</sup> Ibid at 191.

<sup>29</sup> AXAHCVP2021/0011 (delivered 27<sup>th</sup> April 2022, unreported) at paragraph 44.

rule. They are of particular importance when the court is exercising its case management powers pursuant to CPR 25 and 26. Another cogent reason for appellate restraint when considering appeals from case management orders, is that great deference must be given to the first instance judge who has or may have had charge of the case for a substantial period, and is presumed to have a more in depth or thorough knowledge and understanding of the proceedings and of the issues, legal and factual, to be decided at a trial.”

[36] In this context the Court was also referred to its 2014 decision in **Horsford v Croft** in which it was there concerned, inter alia, with whether a witness statement contained inadmissible evidence. In allowing that appeal this Court held, among other things, that a witness statement should contain the evidence which a person would be allowed to give orally but that legal arguments or opinion evidence except from someone who is qualified to provide that evidence or irrelevant evidence should not be included in a witness statement. In the Court’s reasoning, Blenman JA (as she then was) expressed the view that:

“[38] It is noteworthy that the issue of whether or not a case management judge should deal with the question of admissibility of evidence at a preliminary hearing was addressed in **Stroude v Beazer Homes Limited...**”

Accordingly, the Court of Appeal went on to hold, in **Horsford v Croft**, that:

“Disputes about the admissibility of evidence in civil proceedings are best left to be resolved by the judge at the substantive hearing of the application or at the trial of the action.”<sup>30</sup> (emphasis supplied).

[37] Both the Court of Appeal decisions of **Horsford v Croft** (2014) and **Dryud v Webster & Anor** (2022) applied the acknowledged settled principles governing the exercise of appellate restraint in reviewing decisions of lower courts, as discussed, dating back to the seminal 1996 decision of **Dufour v Helenair Corporation**. Ultimately, I am of the view that a proper consideration of the *ratio decidendi* in each of those two decisions, with respect to appellate deference or restraint is that each decision was concerned with the appropriate balance and proportionate application of the overriding objective, to do justice as between the parties on the particular

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<sup>30</sup> ANUHCVP2014/0006 (delivered 22<sup>nd</sup> October 2014, unreported) Blenman JA at ratio 5.

matter before the Court of Appeal. I accept the dictum of Farara JA [Ag.] in **John Oliver Dryud v Webster & Anor** but not, as submitted by the respondent, to introduce a *higher degree* of appellate restraint in reviewing case management decisions. Rather, I accept that dictum to be emphasizing the care and deference which an appellate court should apply in its review of case management decisions, particularly where the case management judge may have had charge of the case for a substantive period with a thorough in-depth appreciation of the proceedings and issues at that level. Accordingly, the **Dufour v Helen Air Corporation** line of authority of settled principles will apply to the exercise of discretion which this Court will exercise in its evaluation of the appealed order of the learned master, particularly given that the order is just that, an order accompanied by oral reasons and not a reasoned judgment.

#### **Issue No. 1**

- [38] I turn to consider Issue No. 1, namely, whether the learned master erred in the exercise of her discretion in refusing to grant an extension of time for the filing of the Trotter draft witness statement, including failing to exercise her discretion to grant to the appellant relief from sanctions to allow the said witness statement to be filed. In considering this issue, grounds of appeal (a) and (b) can conveniently be taken together.
- [39] By way of preliminary remarks, I make the following observations. Firstly, with respect to the pleaded case of both the appellant and the respondent, I accept that it is not for this Court at this stage and on an appeal such as this to make any determination with respect to the merits of the claim and/or defence/counterclaim, that being the province of a trial judge. Nevertheless, in considering an extension of time to admit the Trotter draft witness statement into evidence (including the admissibility considerations to be addressed under Issue No. 2), one would expect the learned master's decision to have taken into account the filed pleadings and issues arising therefrom with reference to the terms of the admitted consultancy contract, some of which terms were expressly addressed on the pleadings (see

paragraph [4] above). Secondly, the court takes cognizance of the paucity and ambiguity of the evidence and submissions which are on record of what was placed before the learned master by the appellant/applicant in respect of the promptitude and any reasons for the delay in the filing of the Extension and Relief Application, to assist her in the exercise of her discretion. This brings me to my third comment, that a court (be it the lower court or this court) must always seek to give effect to the overriding objective to deal with cases justly when interpreting the CPR or exercising any powers under the rules.

[40] The court has a wide discretion under CPR 26.1(k) to extend the time for complying with any rule, practice direction, order or direction of the court, even if the time for compliance has passed. Whilst the rule itself does not prescribe the matters that a court should take into consideration, there is case law from this jurisdiction which assists the court's exercise of its discretion and which I consider to be particularly helpful. The judgments of this Court in **Carleen Pemberton v Mark Brantley**<sup>31</sup> and **Joseph Hyacinth v Allan Joseph**<sup>32</sup> are instructive, as is the general application to the CPR of the canon of statutory interpretation known as purposive construction, referred to and applied in **Westburg Anstalt v Profitstar Anstalt**.<sup>33</sup>

[41] **Carleen Pemberton v Mark Brantley** involved an application (dated 10<sup>th</sup> August 2011) to extend time to validate the filing of a Notice of Appeal on the 22<sup>nd</sup> June 2011, where the Notice of Appeal was out of time by 42 days, having been filed without any application for an extension of time. Ultimately, the application for an extension of time was dismissed and, the filed Notice of Appeal was held to be invalid and struck out. The reasoning of Pereira CJ (as she then was), with reference to the application of the principles and the flexible approach which guides the exercise of the court's discretionary power, is instructive:

"[12] This discretionary power, although a very broad one, cannot be exercised in a vacuum or on a whim, but must be exercised judicially in

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<sup>31</sup> HCVAP2011/009 (delivered 14<sup>th</sup> October 2011, unreported).

<sup>32</sup> GDAHCVAP2015/0025 (delivered 20<sup>th</sup> June 2016, unreported).

<sup>33</sup> BVIHCMAP2013/0020 (delivered 4<sup>th</sup> February 2014, unreported).

accordance with well established principles. Overall, in the exercise of the discretion the court must seek to give effect to the overriding objective which is to ensure that justice is done as between parties.

[13] Much depends on the nature of the failure, the consequential effect, weighing the prejudice, and of course the length of the delay, and whether there is any good reason for it which makes it excusable. This is by no means an exhaustive list of all the factors which may have to be considered in the exercise...”.<sup>34</sup> (all emphasis supplied).

- [42] The decision of Webster JA [Ag.] in **Joseph Hyacinth v Allan Joseph** is equally instructive. This decision involved a delay of 20 months between the date of the judge’s order striking out the defence and the filing of the applicant’s application for an extension of time to apply for leave to appeal against that strike out order. That 20-month delay was acknowledged by the court as being an inordinately long delay. The reason for the delay was a reliance by the applicant on attorney error where the applicant, a fisherman who spent long periods of time at sea, claimed to have thought that the appeal had been filed by his attorney. Webster JA [Ag.], whilst acknowledging that the appellant was a fisherman who spent long periods of time at sea, nevertheless found that he, the appellant, had shown little interest in defending himself; that it behooved him to make inquiries over the 20 months as to the progress of his appeal, which he claimed he had given instructions to his attorney to file. Webster JA [Ag.] found the appellant/applicant’s reasons for the delay in applying for an extension of time to be insufficient to justify the long delay in applying. This notwithstanding, in granting the application, the court went on to take into consideration the relative weight of prejudice as between the parties, if an extension were to be granted or refused, and found that the defendant would not suffer any prejudice from an extension that cannot be compensated in damages and costs if the time for applying for the extension is granted, even in a case of inordinate delay with no proper explanation for that delay. In the Court guiding itself on the exercise of its discretion in addressing the factors before it in dealing with the application to extend time, Webster JA [Ag.] recognized that the Court should

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<sup>34</sup> HCVAP2011/009 (delivered 14<sup>th</sup> October 2011, unreported), at paragraphs 12 to 13.

consider each case on its own facts, deal with them justly and, in accordance with the overriding objective. I am guided by his dictum as follows:

“The principle that the court has a wide discretion to grant an extension of time to appeal when the applicant has good prospects of succeeding on appeal, even though he or she is guilty of inordinate delay without a good explanation, is firmly a part of the law and practice in the Eastern Caribbean and I would apply it in this case. The applicant has good prospects of succeeding on the appeal and the respondent will not suffer substantial prejudice if the time for applying for permission to appeal is extended. I would therefore allow this appeal with the usual costs consequences.”<sup>35</sup> (emphasis supplied)

Webster JA [Ag.] expressly referred to and relied on the flexible approach to these extension applications exemplified in **Carlene Pemberton v Mark Brantley**.

[43] In **Carlene Pemberton v Mark Brantley** and in **Joseph Hyacinth v Allan Joseph**, the application under consideration was for an extension of time to appeal. In the case before this Court, what is under consideration is an extension of time to file a witness statement in preparation for trial, with the importance of the Trotter draft witness statement having been argued by the appellant as fundamental to the appellant’s prospect of success at trial.

[44] In the application of that wide discretion, it is permissible, where appropriate, to apply a purposive construction of the CPR in the application of the rules, to serve the overriding objective of doing justice as between the parties: **Westburg Anstalt v Profitstar Anstalt**.

[45] The learned master had before her the Extension and Relief Application in which the appellant/applicant set out four (4) grounds, as follows:

“(1) On the 8<sup>th</sup> day of May 2023, the court order (sic) inter alia that witness statements in this matter were to be filed and exchanged on or before the 26<sup>th</sup> day of July 2023. Leave was also granted to the Claimant to file any response to the Defendant’s application to appoint an expert by 4<sup>th</sup> May 2024 (sic) and the Claimant was to file his application to

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<sup>35</sup>GDAHCVAP2015/0025 (delivered 20<sup>th</sup> June 2016, unreported), at paragraph 27.

appoint an expert by the 4<sup>th</sup> of May 2023. Those orders were complied with regarding the expert witnesses.

- (2) The Claimant explained to the court that as the court was to decide on which expert it would accept the claimant would like the opportunity to call Vivian Trotter as an ordinary witness in the event that he was not called as an expert witness.
- (3) The Defendant's Solicitor inform (sic) that she would not oppose the application in (sic) the 12<sup>th</sup> September 2023. The court gave a decision allowing the Defendant to call his expert; hence the Claimant makes this application for an extension of time and to allow Vivian Trotter's witness statement to be filed out of time and relief from sanctions because the Claimant was awaiting the decision of the court which would inform on whether he could appear as an expert witness or an ordinary witness.
- (4) The Defendant is not prejudiced by this application as it was already disclosed to the court."<sup>36</sup>

[46] On the hearing of that Extension and Relief Application, the following were before the learned master:

- (a) the pleadings;
- (b) the said application, with the grounds as set out;
- (c) two (2) affidavits in support thereof -
  - (i) that of Legal Clerk Ms. Josian St. Ville ("the St. Ville affidavit"), sworn and filed on 8<sup>th</sup> December 2023; and
  - (ii) that of Clerk Laurel Karen George ("the George supplemental affidavit"), filed 15<sup>th</sup> January 2024, to which was exhibited the Trotter draft witness statement;
- (d) the respondent's notice of opposition filed on 16<sup>th</sup> January 2024; and
- (e) the submissions of the parties.

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<sup>36</sup> Appeal Bundle filed on 24<sup>th</sup> June 2024, pages 79-81.

[47] In support of the grounds spelt out in the Extension and Relief Application, the St. Ville affidavit referred to the record of the 8<sup>th</sup> of May Order and deposed that counsel for the appellant had explained to the court the basis on which the application was then being made to call Vivian Trotter as a witness of fact. The St. Ville affidavit deposed that counsel for the appellant/applicant explained that, given that Vivian Trotter had not been called as an expert witness, the application was accordingly filed out of time 'because the claimant was awaiting the decision of the court which would inform on whether he could appear as an expert witness or an ordinary witness' and that, the defendant is not prejudiced as the Trotter draft witness statement was already previously disclosed to the court. By the George supplemental affidavit, the Trotter draft witness statement was exhibited before the learned master.

[48] It will be recalled that the learned master had charge of the case management of the proceedings in the court below, from the 24<sup>th</sup> of April 2023 when she made the order subsequently entered on the 8<sup>th</sup> of May 2023 (referred to throughout this judgment as the 8<sup>th</sup> May Order), continuing through the 6<sup>th</sup> of October 2023, when she made the order entered on the 13<sup>th</sup> of October 2023 and lastly, having heard the Extension and Relief Application, resulting in the order made on the 25<sup>th</sup> and entered on the 26<sup>th</sup> of January 2024, which is the Appealed Order. By the 25<sup>th</sup> of January 2024, from the record which was before her one would expect the learned master to have had an appreciation of the references to and the fact of the existence of the Trotter expert report (albeit not in evidence), the references to and the existence and relevance of the Trotter draft witness statement referred to in the appellant's pleaded case and exhibited in evidence before her and, the reasons stated by and on behalf of the appellant for not having filed that statement by 26<sup>th</sup> July 2023. There is, on the record, the learned master's earlier acknowledgement in her oral reasons of 12<sup>th</sup> September 2023<sup>37</sup> for making the Expert Witness Order, that Mr. Trotter had some knowledge of the condition and extent of the works

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<sup>37</sup> Respondent's Supplementary Bundle filed on 26<sup>th</sup> August 2025, at page 87.

accomplished at the appellant's home by the respondent under the consultancy contract.

- [49] The reasons given by the learned master for the exercise of her case management powers under the CPR and, the exercise of her discretion to refuse an extension of time and not to grant to the appellant any relief from sanction on the application before her, are set out in the recitals to the Appealed Order ("the recital reasons").
- [50] On Issue No. 1, with reference to the recital reasons – *ex facie* the appealed order – on the issue of an extension of time to enable the filing of the Trotter draft witness statement, the learned master does not appear to have given any consideration to CPR Part 26.1(2)(k) and (y) or Part 29.11. Nor does the learned master appear to have had regard to the provisions of CPR Part 26.8(2)(b),(c),(d),(e)(f)(g) and (h) which are there to guide the exercise of her discretion in her consideration of granting to the appellant, or not, of any relief from sanctions. She makes reference to 'prejudice' [arguably a factor under Part 26.8 (2)(a) – which I address under Issue No. 2] and potential conflicting opinion. Otherwise, *ex facie* the learned master makes no reference to, nor appears to give any consideration to any material before her relevant to the factors for consideration thereunder.
- [51] Nor did the learned master appear to have given any consideration to the principles guiding the exercise of her discretion as articulated in **Carleen Pemberton v Mark Brantley** and/or **Joseph Hyacinth v Allan Joseph** with reference to the appellant's prospects of success at trial, to the nature of the failure to file the application, the consequential effect, (other than her references to expert and opinion evidence – Issue No. 2) to weighing any prejudice, the length of the delay (inordinate or otherwise), whether there is any good reason which makes the delay excusable or not, nor such explanation as was advanced on behalf of the appellant for the late filing of the application as set out in his grounds and/or, as deposed in the St. Ville affidavit.

- [52] Accordingly, on Issue No. 1, *ex facie* the recital reasons I am of the view that in the exercise of her discretion whether or not to grant an extension of time to, and/or the consideration of any relief from sanctions for the appellant, for failure to have filed the Extension of Time and Relief application before 8<sup>th</sup> December 2023, the learned master erred in principle in failing to consider [a] whether the application was made promptly or not, [b] whether there was a good explanation for any failure such as there was, or not; [c] whether and what if any prejudice might result to the appellant; [d] the effect which refusing the relief would have on the appellant's entitlement to a fair trial, [e] the interests of the administration of justice, and [f] prospects of success.
- [53] In the result, on Issue No. 1, I find that as a result of these errors, the learned master's decision exceeded the generous ambit within which reasonable disagreement is possible, was therefore blatantly wrong and accordingly should be set aside. For those reasons, I am of the view that the appellant is entitled to succeed on his first two grounds of appeal and I so hold.
- [54] It therefore falls to this Court to evaluate the Extension of Time and Relief application afresh, so as to evaluate the application and determine whether, in the exercise of this Court's discretion and on principle, consistent with the overriding objective, the same ought to be granted or refused.
- [55] Both on the evidence and submissions of the appellant, the appellant's case as submitted to the learned master was that he, the appellant, understood that he would await the learned master's determination as to which of the two experts separately contended for would be appointed, before the making of an application for Mr. Trotter to be a witness of fact. There is no record of any objection from the respondent with reference to the existence of Order No. 4 (in the 8<sup>th</sup> May Order) earlier referred to at paragraph [5] above, by which the learned master guarded the failure of the parties to file their witness statements of fact with a sanction, in terms

comparable to CPR 29.11 (1).<sup>38</sup> Further, nothing before this court in the appeal bundles points to any evidence denying the fact of the explanation and submissions offered to the learned master on behalf of the appellant, as deposed in the St. Ville affidavit. The Court takes cognizance of the following statement appearing in paragraph 13 of the Chronology Filed on behalf of the respondent<sup>39</sup> (“the Respondent’s Chronology”):

“13. Subsequently, two months later on the 8<sup>th</sup> of December, 2023, the Appellant filed its Notice of Application for leave to file a witness statement for the same Vivian Trotter out of time and for relief from sanctions (AB-79 to 84). The Appellant indicated that they wished to call Vivian Trotter as a witness of fact. The Respondent’s counsel indicated that she did not object in principle to this but requested to first see the draft witness statement before making a determination, in light of the Court’s rejection of Mr. Trotter as an expert witness.” (emphasis supplied)

Save for the reservation to ‘to first see the draft witness statement’ nothing in that statement in the Respondent’s Chronology refers to Order No. 4 or CPR 29.11, or contradicts, or puts in issue the evidence deposed in the St. Ville affidavit<sup>40</sup> that the appellant’s counsel had explained to the learned master that he would like the opportunity to call Vivian Trotter as an ordinary witness of fact in the event that the said Trotter was not determined by the court to be an expert witness.

[56] No objection was taken by the respondent before this Court on the lack of promptitude or absence of good reason for delay on the part of the appellant with reference either to Order No. 4 or CPR 29.11. Rather, as already noted at paragraph [30] above, the respondent’s submission on delay relies, simpliciter, on the period of approximately four and a half months after the 26<sup>th</sup> July 2023 deadline as being excessive or, alternatively, that even if time was to run only from the date on which the court declined to permit Mr. Trotter to act as an expert witness, a delay of two

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<sup>38</sup> CPR 29.11(1) If a witness statement or witness summary is not served in respect of an intended witness within the time specified by the court, the witness may not be called unless the court permits. (2) The court may not give permission at the trial unless the party asking for permission has a good reason for not previously seeking relief under rule 26.8.

<sup>39</sup> Respondent’s Chronology filed on 18<sup>th</sup> August 2025.

<sup>40</sup> Appeal Bundle filed on 24<sup>th</sup> June 2024, at page 83.

months is said to have ensued and that, no explanation had been advanced for that delay.

[57] My review of the material which was before the learned master reveals (as already noted), that the evidence of explanation for the period of delay by the appellant was not sufficiently particularized and the material placed by both parties was ambiguous. Reckoning time from the direction given in the 8<sup>th</sup> May Order, namely from 26<sup>th</sup> July 2023 to 8<sup>th</sup> December 2023, the respondent submitted that this resulting period of four and one half months constituted an excessive delay. On the other hand, having regard to the appellant's evidence and submissions in support of the application for an extension of time and relief from sanctions, the period between the Expert Witness Order dated 13<sup>th</sup> October 2023 and the filing of the Extension and Relief Application on 8<sup>th</sup> December 2023 amounts to approximately one month and three weeks ("the later delay"). With reference to the later delay, the Court notes that in neither the stated grounds set out by the appellant nor the St. Ville and George supplemental affidavits does the appellant provide an explicit explanation for this later delay in filing the Extension and Relief Application.

[58] I have noted ground 4 of the appeal in which the appellant contends that: "The Defendant is not prejudiced by this application as it was already disclosed to the Court".<sup>41</sup> An application for an extension of time allows the court to "take any other step, give any other direction, or make any other order for the purpose of managing the case and furthering the overriding objective."<sup>42</sup>

[59] In applying the exercise of the court's discretion for granting relief from sanctions, CPR 26.8(2) introduces factors (a) through to (h) which the court 'must have regard to' (my emphasis). In considering whether to grant relief, or not, I am of the view that evidence relevant to one factor is capable of assisting the court's consideration of another factor. In my view this construction is permissible on a purposive

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<sup>41</sup> Appeal Bundle filed on 24<sup>th</sup> June 2024, at pages 2 and 83.

<sup>42</sup> CPR 26.2(y).

interpretation of CPR 1.2, 26.2(k) and (y), 26.8(1) and (2), consistent with the interests of the administration of justice and, the exercise of the court's discretion in furthering the overriding objective to enable the court to deal with cases justly.<sup>43</sup> Accordingly, I consider and take into account the question of prejudice<sup>44</sup> as a relevant consideration on the question of delay. I will consider that next.

[60] As already acknowledged, in support of the Extension and Relief Application the supplemental George affidavit exhibits the Trotter draft witness statement. Paragraph 3 of the Trotter draft witness statement refers to a 'report' prepared by Vivian Trotter, but which is not exhibited. Further, the amended statement of claim claims 'Cost of the engineer's report \$5,600', with a report having been originally pleaded in the original statement of claim but deleted by amendment. In the Respondent's Chronology, the respondent also refers to the report of Mr. Vivian Trotter attached to the original Statement of Claim but removed on amendment.<sup>45</sup> Whilst the contents of that report are not in evidence before the Court (nor was it, before the learned master) it is a reasonable inference that the fact of its existence was known to the respondent/defendant from the very filing of the claim. Accordingly, having regard to the overriding objective, on the question of prejudice I am of the view that bearing in mind the case of the appellant as pleaded, under CPR 26.8(2)(a), in weighing the effect which the granting of relief or not would have on each party, the greater prejudice would be to the appellant in refusing the extension on the ground of delay. Insofar as there can be said to be prejudice to the respondent in granting the extension, a substantial part of the question of prejudice is addressed under Issue No. 2 and, the considerations which I take into account under that head apply here equally, under CPR 26.8 (2)(a).

[61] I remind myself of the salutary statement of principle of Webster JA [Ag.] in **Joseph Hyacinth v Allan Joseph** that the court has a wide discretion to grant an extension of time, notwithstanding inordinate delay which is not the case here.

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<sup>43</sup> Westburg Anstalt v Profitstar Anstalt BVIHMAP2013/0020 (delivered 4<sup>th</sup> February 2014, unreported).

<sup>44</sup> CPR 26.8(2)(a).

<sup>45</sup> Respondent's Chronology filed on 18<sup>th</sup> August 2025, at paragraphs 5 and 6.

[62] For consideration in the exercise of that wide discretion, the appellant's prospects of success at trial is a relevant consideration. Whether one takes the period of delay to be four and one half months (with ambiguity) or, one month and three weeks (with no explanation) I am satisfied that the Trotter draft witness statement bears significant relevance on the pleaded case of the parties and has the potential, if admitted, to improve the appellant's prospects at trial; conversely, on the question of prejudice, to exclude it would be of immeasurable negative significance to the appellant's case. I weigh in consideration as well that on the order of the learned master these proceedings are stayed in the court below. Accordingly, if this Court were now to grant an extension of time permitting the admission of Mr. Trotter's draft witness statement, no irreparable prejudice would be occasioned to the respondent. The proceedings have been stayed and have not advanced beyond the case management stage reached on 8<sup>th</sup> December 2023. In those circumstances, the respondent would have sufficient time to consider and respond to the evidence prior to trial.

[63] I turn now to the application of the **Carleen Pemberton v Mark Brantley** and **Joseph Hyacinth v Allan Joseph** principles. In this case, as to the nature of the failure of the appellant to file the Extension and Relief Application, on the material which was before the learned master the nature of the failure was that of failing to meet a filing deadline. I have already addressed and weighed in consideration the application of the CPR and in particular CPR 26.8 to the period of delay, at worst a period of four and one half months (with ambiguity) or, one month and three weeks (with no explanation) but certainly not an inordinate delay. The consequential effect of the appellant being refused leave to file the Trotter witness statement of fact is significant. The appellant submitted<sup>46</sup> that significant prejudice as being substantial, offending the overriding objective and denying the appellant a fair hearing. On the learned master's own appreciation of the statements in the Trotter draft witness statement (referred to in her Oral Reasons for Decision), the appellant stood to be

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<sup>46</sup> Appellant's Speaking Notes at paragraphs F.25 to 29.

deprived of a material witness of fact in proof of his pleaded case. Is the period of delay, such as it is, in all the circumstances fatal, or should the Court exercise its general power to rectify matters, consistent with the overriding objective to deal with cases justly?

[64] I am of the view that in all of the circumstances, including the contents of the Trotter draft witness statement and, having regard to the pleaded case, which will be addressed more fully under Issue No. 2, it is an appropriate exercise of discretion by this Court to hold, and I so hold, that the period of delay in the filing of the Trotter draft witness statement is not fatal. In this regard I take the following into consideration a) the nature of the appellant's pleaded case, including the fact of the admitted consultancy contract being addressed in the interest of a fair trial and the interest of the administration of justice, will require that the appellant be afforded a fair opportunity to adduce evidence consistent with his case as pleaded; (b) the Trotter draft witness statement avers that he visited the appellant's home site and that he can and is competent to speak to the fact and quality of the work accomplished on that site which, subject to the considerations addressed under Issue No. 2 can be said to be relevant to the chances of the appellant succeeding at trial; (c) the case below is still at an early stage of case management and, in point of fact has been stayed pending mediation; the respondent cannot be said to be prejudiced by the admission of the Trotter draft witness statement at this stage and indeed, the existence of the potential for evidence of Vivian Trotter was clearly pleaded by the appellant at an early stage of the filing of his claim; (d) I have already addressed the fact of the paucity and ambiguity of the evidence and record of submissions explaining the period of delay.

[65] In all of the circumstances and for the reasons articulated above, I hold further that the appellant is entitled to succeed on his Extension and Relief Application under his first two grounds of appeal and to be allowed an appropriate extension of time to file the Draft Trotter Witness Statement.

## Issue No. 2

- [66] The second issue arising on the facts of this case is whether and in what circumstances may a witness of fact be permitted to give opinion evidence. In considering this issue, grounds of appeal (c), (d) and (e) may be taken together, viz Ground [c], that the draft Trotter witness statement could only be opinion evidence and thus wholly inadmissible; Ground [d], in dismissing the application the learned master failed to give reasons other than that of prejudice; and Ground [e] the learned master erred in the disproportionate exercise of total exclusion rather than opting for the selective strike out of prejudicial material.
- [67] It is accepted that the general rule is that opinion evidence is inadmissible. That general rule notwithstanding, the case from this jurisdiction of **Anthony Martin v Lime Dominica Ltd** referred to by the appellant is useful for the proper application of that general rule at the pre-trial stage. In that case, a pre-trial application to strike out witness statements on the ground that the evidence was expert/opinion evidence was denied. Stephenson J accepted the general rule that opinion evidence being given by a witness of fact is inadmissible but, at the pre-trial stage on the facts of that case, refused to grant the strike out application with respect to the evidence of the impugned witnesses. Stephenson J held a) that a person who is not an expert can give his opinion but that his evidence must be given in such a way so as to convey to the court relevant facts as perceived by him; and b) citing both **Horsford v Croft** and **Stroude v Beazer Homes Limited**, that matters pertaining to admissibility of evidence are best resolved at the substantive hearing or trial of the claim, as the trial judge is expected to be better informed about the case and also that preliminary hearings on such matters can cause unnecessary costs and delay.
- [68] The decision in **Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd (No 6)**<sup>47</sup> is instructive on this issue of opinion evidence by an expert. One of the issues that fell to be determined there was whether the opinion evidence of an

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<sup>47</sup> [2008] All ER (D) 04.

engineer called as a factual witness was admissible. In that case, the following finding of Jackson J is particularly relevant to the facts in this appeal and which finding is not overturned by the limited appeal<sup>48</sup> from Jackson J's judgment. The learned Judge determined that:

"672. ...an engineer who is giving factual evidence may also proffer (a) statements of opinion which are reasonably related to the facts within his knowledge and (b) relevant comments based upon his own experience".<sup>49</sup>

[69] More recently, the English High Court decision of **Polypipe Ltd. v Davidson**<sup>50</sup> applied the decision of **Multiplex**. In deciding case management applications coming before him, Hodge J dismissed the defendant's application to strike out a witness statement of one of the claimant's intended witnesses, Mr. Steven Wilson, who had previously prepared a draft report as an expert. In the main, defendant's counsel submitted that Mr. Wilson's witness statement was a version of a previously intended expert report and that it plainly contained opinion in the nature of an expert's report which should not be permitted. The claimant's counsel accepted that parts of Mr. Wilson's witness statement did offer opinion evidence but, no more than was permissible in any witness statement from a witness of fact or instances of such expressions of opinion falling within this scope permitted in the **Multiplex** case. The claimant's counsel accepted that those statements of opinion should not be given the same status as formal expert evidence under CPR 35.4 but that it would be a matter for the trial judge to determine the weight to be given to those expressions of opinion. The court held that Mr. Wilson's former status as an expert did not prevent him from giving factual evidence or from expressing opinions that were permissible in the course of doing so. The Wilson witness statement contained a mix of factual matters and permissible opinions on those facts, derived from either direct or hearsay knowledge, as well as permissible commentary on matters arising from those facts within his particular expertise. Hodge J concluded:

"45 ...I have read, and been taken by both counsel through, the witness statement in detail...having read the passages in question, I am satisfied

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<sup>48</sup> See *Cleveland Bridge UK Ltd and another v Multiplex Constructions (UK) Ltd* [2010] EWCA Civ 139.

<sup>49</sup> *Ibid*, at paragraph 672.

<sup>50</sup> [2023] EWHC 1681 (Comm).

that they are all admissible and should not be struck out. The weight to be given to them is entirely a matter for the trial judge." <sup>51</sup> (Emphasis supplied)

[70] In arriving at his decision in **Polypipe Ltd. v Davidson** in refusing to strike out the claimant's witness statement, Hodge J applied the following five (5) broad principles, distilled as guidelines from the authorities:

- "(1) There is no rigid rule that a factual witness statement cannot contain opinion evidence. The rules about witness statements are not rigid statutes;
- (2) The object of excluding expert opinion evidence is to avoid commentary by a witness of fact on matters of which that witness has no direct knowledge and on which he can give no direct evidence. However, when a factual witness does have direct knowledge, and cannot properly be characterized as a third party, then it may be appropriate for a witness who possesses a particular expertise to give that evidence...;
- (3) It can be helpful to the court to hear evidence of opinion from a suitably qualified expert factual witness...;
- (4) Opinion evidence in a factual witness statement was not in itself inherently objectionable. What was objectionable was trying to accord to it the same status as expert evidence. The appropriate approach [is therefore] was to treat it with the weight that was due to it, bearing in mind all the circumstances attending such evidence;
- (5) Even if some evidence were to be held to be inadmissible or contrary to the Practice Direction, the court nevertheless had a broad discretion. In the majority of cases, the nuclear option of striking out the whole of a witness statement would be wholly disproportionate. Any strikeout should be limited to any offending paragraphs., Alternatively, and as in *Multiplex*, the appropriate approach would be to deal with it as going to the weight of the evidence..." <sup>52</sup>

[71] The issues on appeal before this Court, in particular with reference to grounds of appeal [c], [d] and [e] and, the principles underpinning a review of a case management order, ought not to be determined without some reference to and appreciation of the case which is pleaded by the appellant/claimant and the

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<sup>51</sup> Ibid, at paragraph 45.

<sup>52</sup> Polypipe Ltd. v Davidson [2023] EWHC 1681 (Comm), at paragraphs 31 to 32.

respondent/defendant in the court below and, with reference to the Trotter draft witness statement.

- [72] I have already referred to the pleadings. See paragraph [4] above. The consultancy contract is pleaded. There is no dispute over its existence, that contract having been admitted on the pleadings. It will be for the trial judge to interpret the consultancy contract, including the meaning of the terms thereof, to ascertain the scope of the works contracted for by the respondent and obligations owed thereunder to the appellant. These are matters of contractual interpretation.
- [73] It will also be for the trial judge, having ascertained the scope of the contracted work and with reference to the pleaded case and facts in issue, to receive and evaluate the evidence of the parties as to whether or not, under that consultancy contract, the respondent failed to perform the supervisory works for which it was contracted.
- [74] With respect to the proposed Trotter draft witness statement, consistent with the authorities referred to in paragraphs [65] to [68] above, the pleadings and the facts in issue arising therefrom, in my view, it will be for the trial judge to ascertain the admissibility, veracity, materiality and weight to be afforded to that evidence, including 'observations', said to have been recorded by Mr. Vivian Trotter and relying on his qualifications as an engineer. Paragraphs 3 and 4 of the Trotter draft witness statement describe Mr. Trotter's site visits and list observed items said to be incomplete, including plumbing works, doors, electrical installations, finishes, and painting. Paragraph 5 refers to cost and time overruns, and paragraph 6 makes clear that the comments are based on site visits, documents provided, and conversations with the employer.
- [75] Consistent with the authorities, I am of the view that the evidence and observations which Mr. Trotter speaks to in the Trotter draft witness statement are matters which ought to fall to a trial judge to consider and evaluate for admissibility, veracity, relevance and weight, to determine whether it is competent for Mr. Trotter to speak

to or not as being objectionable, either as 'expert evidence' or, on the basis that they are prejudicial and impermissible, as seeking to compete with whatever expert evidence will be given by the court appointed expert, Mr. Harris. I do not accept, as submitted by the respondent, that allowing the Extension and Relief Application at the case management stage and thereby admitting into evidence the Trotter draft witness statement would amount to the continuation of proceedings involving such substantial risk that justice cannot be done; that the court's inherent jurisdiction comes into play to refuse to admit into evidence the Trotter draft witness statement in order to safeguard against an abuse of the administration of justice or as representing an affront to due process. This submission overreaches (as will be addressed later) and ignores the outer limits of case management as prescribed in CPR 29.1. Part 29 is not to be interpreted to deny the proper role and function of the trial judge in controlling evidence at trial. Mr. Trotter's evidence is properly to be led before the trial judge for its relevance to the case as pleaded, to facts in issue and tested before the trial judge for admissibility, relevance and weight, consistent with the guiding principles laid down in **Polypipe** and that line of cases, that is, of **Martin v Lime**, **Horsford v Croft**, and **Multiplex** (for ease of reference I refer to this line of authority on the admissible value to be afforded to opinion evidence as "the **Polypipe** line of authority").

- [76] In addition to her failure in the exercise of her judicial discretion to take into consideration the principles discussed under Issue No. 1, I am of the view that the learned master also erred in principle and in the exercise of her judicial discretion by failing to take into account the salient considerations informed by the **Polypipe** line of authority, as they apply to and inform the approach to be taken to the Trotter draft witness statement. She was wrongly influenced by and gave too much weight to the perceived 'prejudice' of the Trotter draft witness statement competing with the court appointed expert witness. That rendered her refusal to extend the time to admit the Trotter draft witness statement and therefore its total exclusion as wholly erroneous. The respondent's submissions seek to support this exclusionary decision of the learned master articulated in the recitals to the Appealed Order. The

respondent places much reliance on the justifiability of the learned master refusing the Extension and Relief Application and refusing to allow the Trotter draft witness statement into evidence. See in this regard paragraphs [23] to [32] above. On the **Polypipe** line of authority those submissions cannot be accepted. In fact, the **Polypipe** line of authority demonstrates, in my view, that the learned master erred fundamentally by impermissibly and wrongly elevating her reasons for her earlier issue of the Expert Witness Order into an exclusionary rule to refuse the Extension and Relief Application, thereby intruding wrongly on the proper role of the trial judge.

[77] The learned master led herself into further error, given that the Vivian Trotter Report was not itself in evidence, to find as she did as a reason for refusing the Extension and Relief Application that:

“This report contains essentially an appraisal and assessment of the works done on the Claimant’s property. The nature of such a report is such that it could only have been prepared by an expert ... and is no doubt expert evidence.”<sup>53</sup> (emphasis supplied)

[78] Having regard to the applicable law, including the **Polypipe** line of authority, I am of the clear view that the learned master erred in principle in the exercise of her discretion. She failed to take into account that a factual witness with particular qualifications which may amount to expert qualifications is capable of giving evidence of fact, and may, permissibly, comment on that evidence of fact by offering opinion within his competency.

[79] There is a further point that it is appropriate to deal with at this juncture. This is the respondent’s submission that the bringing of the Extension and Relief Application amounted to an abuse of process. The respondent has sought to extrapolate that abuse of process submission out of the court’s inherent jurisdiction to control its own process so as to prevent injustice, examined in two cases cited by the respondent, namely **Panayiotou & Ors v Sony Music Entertainment (UK) Ltd** and **Bremer Vulcan Und Maschinenfabrik v South India Shipping Corporation**

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<sup>53</sup> Appeal Bundle filed on 24<sup>th</sup> June 2024, at page 92.

**Ltd.** That abuse of process submission is a misapplication of the concept of abuse of the court's process, which has its origins in the old case of **Henderson v Henderson**,<sup>54</sup> in which Sir James Wigram V-C stated:

"... where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward the whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of (sic) matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case."<sup>55</sup>

[80] The circumstances that the appellant (a) initially relied upon Mr. Vivian Trotter's draft witness statement in support of a discrete application to have him accepted as an expert witness and, following the court's refusal of that application and the appointment of Mr. Cecil Harris as the court expert, (b) subsequently sought leave to adduce Mr. Trotter's draft witness statement as factual evidence, in the circumstances outlined in the St. Ville affidavit, do not amount to an abuse of process recognised by law. Nor do they constitute the kind of affront to the administration of justice contended for by the respondent. I dismiss that submission without more.

[81] Therefore, applying the settled principles exemplified in **Dufour v Helenair**, this Court is satisfied that the decision of the learned master in refusing to extend the time to admit the Trotter draft witness statement and thereby excluding the same as being opinion evidence and, as being prejudicial to the court was erroneous as being plainly and blatantly a wrongful exercise of her discretion. Having regard to the **Polypipe** line of authority, in dismissing the Extension and Relief Application and thereby wholly excluding the Trotter draft witness statement, the learned master fell into egregious error, usurped the role and function of the trial judge, and denied the appellant a potential material witness of fact in proof of his case as pleaded.

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<sup>54</sup> (1843) 3 Hare 100.

<sup>55</sup> Ibid, at page 319.

- [82] As a result of those errors identified in the discussion of Issues No.1 and No. 2, the learned master's decision to refuse to extend the time for the appellant to file and to rely on the Trotter draft witness statement at trial exceeded the generous ambit within which reasonable disagreement is possible and was clearly and blatantly wrong. Accordingly, I hold that the learned master was wrong to have refused the Extension and Relief Application.
- [83] On Issue No. 2, the appellant accordingly succeeds on grounds [c], [d] and [e].
- [84] What was before the court was an application to extend time for the filing of a draft witness statement, which it is incumbent on the court to consider under its general case management powers. The power to extend time and to provide for relief from sanctions is provided for in CPR 26 (2)(k) and (y) and CPR 26.8, respectively. I have already addressed those general case management powers and the applicable discretionary considerations, and, the facts and evidence of the Extension and Relief Application and the affidavit evidence which allows a court to give consideration to extend the time for compliance. I have also had regard to the guiding principles in the cases considered under Issue No. 1. I adopt these without repeating them.
- [85] Further, I am persuaded that the five broad principles distilled in **Polypipe Limited** are apposite and are to be applied by the trial judge on the evidence brought by both parties. I turn therefore to the application of those principles. Firstly, I accept that there is no rigid rule that a factual witness statement cannot contain opinion evidence. Secondly, in this case Mr. Vivian Trotter, the witness of fact whose witness statement the appellant applied for an extension of time to rely on, is by profession an engineer. In his Amended Statement of Claim<sup>56</sup> the appellant pleaded that he had retained Mr. Trotter to prepare a report of the outstanding work and cost overrun and, in the Trotter draft witness statement Mr. Trotter has referred to visits

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<sup>56</sup> Amended Statement of Claim filed on 7<sup>th</sup> February 2022.

which he made to the worksite and his observations.<sup>57</sup> These are matters in respect of which he can give factual evidence. Thirdly, in admitting this evidence, it will be for the trial judge as the judge of fact to determine what weight to accord with such evidence. Fourthly, if he admits such evidence, the value and relevance of Mr. Trotter's evidence in that regard, including any opinion offered by Mr. Trotter with reference to the renovation works which the respondent was to supervise and measure, as he set out at paragraph four of his draft witness statement is evidence on which Mr. Trotter, subject to the overriding control of the trial judge, can give direct evidence to assist. That evidence is not to be regarded as in itself expert evidence so as to be objectionable; it will be for the trial judge to treat that evidence with the appropriate weight, bearing in mind all of the circumstances attending the totality of the evidence in respect of the supervisory management project which the respondent undertook or failed to undertake. Fifthly, it will be for the trial judge to take control of the giving of the evidence of Mr. Trotter, as to the weight to be given to his evidence, in evaluating such evidence as will be brought on behalf of the appellant and, measured and evaluated in relation to the expert evaluation of Mr. Cecil Harris, the court appointed expert.

[86] In the result this appeal is also allowed on Issue No. 2, with respect to grounds of appeal [c], [d] and [e].

[87] I therefore order that the time be extended to allow the appellant to file the Trotter draft witness statement out of time and that the same be admitted into evidence *de bene esse*.

### **Disposition**

[88] For the reasons stated above, I make the following orders:

- (1) The appeal against the decision of the learned master dated 25<sup>th</sup> January 2024 is allowed.

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<sup>57</sup> Trotter draft witness statement at paragraphs 3 and 4, Appeal Bundle filed on 24<sup>th</sup> June 2024 at page 86.

- (2) The decision of the learned master in the court below is set aside.
- (3) The application for extension of time is granted and the appellant is granted leave to file the Witness Statement of Vivian Trotter, *de benne* esse, out of time within 14 days of the date of this order, that is by 17<sup>th</sup> July 2026.
- (4) The respondent is to pay costs of the appeal to the appellant within 21 days of the date of this order, failing which the costs ought to be assessed in accordance with the provisions of the CPR.

### **Postscript**

[89] Mediation of the dispute between the parties has already been ordered, with the Further Orders not appealed. The Court has not had the benefit of a report from the parties in respect of any progress made (or not) on mediation nor in respect of the Further Orders. The parties' attention is drawn to Chapter 37 of the judgment of Jackson J in the **Multiplex** decision and to recommendations made by him.

It is noteworthy, and the parties' attention is drawn to the fact that one of those Further Orders made was the staying of the proceedings in the court below, pending mediation.

I concur.  
**Vicki Ann Ellis**  
Justice of Appeal

I concur.  
**Petra Nicola Byer**  
Justice of Appeal

**By the Court**

**Chief Registrar**