IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 105 OF 2014 (DDJ)

BETWEEN:

(1) ARNAGE HOLDINGS LIMITED

(2) BROOKLANDS HOLDINGS LIMITED

(3) EAST FARTHING HOLDINGS LIMITED

(4) MS KATIA RABELLO

(5) MR FERNANDO TOLEDO

Plaintiffs

AND

WALKERS (A FIRM)

Defendant

Appearances:	Mr. Alex Potts QC of Conyers Dill & Pearman on behalf of the Fifth Plaintiff Mr Mark Simpson QC instructed by Appleby on behalf of the Defendant
Before:	The Hon. Justice David Doyle
Heard:	16 November 2021
Decisions:	16 November 2021
Draft Reasons Circulated:	18 January 2022
Reasons Delivered:	25 January 2022

HEADNOTE

The importance of strict compliance with Court orders - the overriding duty of attorneys to the court and the importance of the overriding objective - unless orders and case management orders - the undesirability of parties and attorneys attempting to litigate matters informally via emails with the court and the necessity for formal applications in proper form to be filed with the court

REASONS FOR DECISIONS

Introduction

1. This is a troubling case. It involves a party (Fernando Toledo, "Mr Toledo" or the "Fifth Plaintiff") who, without adequate explanation, has failed to fully and properly comply with a court order.

2. I apologise for the length of time taken to produce these reasons but, in view of the seriousness of the position, I thought it best to let the dust from the vigorous exchanges with the attorneys on 16 November 2021 settle and to give myself the luxury of some time for reflection before finalising the reasons for the decisions I made on that day. I did not want my thought process to be adversely impacted by the natural concern a court has when its orders are not complied with and when a party fails to comply with a specific direction from the court in a judgment to co-operate with the other side and to assist the court in accordance with the overriding objective of dealing with cases justly. This judgment provides the reasons for the decisions I made on 16 November 2021. It also sets out the importance of strict compliance with courts orders, the overriding duty of attorneys to the court and the importance of the overriding objective. It highlights the undesirability of parties attempting to litigate matters informally via emails with the court and the necessity for formal applications in proper form to be filed with the court.

3. On 16 November 2021 I heard submissions from attorneys representing the Fifth Plaintiff and the Defendant in respect of two main matters:

   (1) Proposed directions for the trial that had been set to begin at 10 am on 3 October 2022 with twelve weeks of valuable court time allocated; and

   (2) The Fifth Plaintiff's summons for a stay, or an adjournment, or an extension of time.

4. I dismissed the summons for a stay or an adjournment. I granted a short extension of time for the Fifth Plaintiff to provide discovery and inspection by 4pm on 30 November 2021. I declined to make an "unless order". I made directions towards the trial of the Fifth Plaintiff's claim against the Defendant. My reasons for doing so are as follows:

The Judgment of 5 May 2021

5. On 5 May 2021, following a hearing on 19 April 2021, I delivered a judgment in these proceedings (the "May 2021 Judgment") deciding that certain issues should not, as requested by the Plaintiffs, be heard at a separate trial in advance of other issues. I stated:

> "95. I do however agree with Mr Chapman for the Claimants when he emphasises that these protracted proceedings must be progressed. It was apparent from the hearing and the documents filed in advance of the hearing that the issues had been refined since the filing of the pleadings and both sides sensibly agreed that substituted pleadings would be helpful. I therefore order that the Plaintiffs are to file and serve a substituted pleading of their claim (maximum of 40 pages) before 4pm on 7 June 2021 and Walkers are to file and serve a substituted defence (maximum of 30 pages) by 4pm on 9 July 2021.
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> 96. I also order that the parties are to provide their discovery by list by 4pm on 16 July 2021 and that inspection is to be given by 4pm on 30 July 2021.
>
> 97. I require the attorneys for the parties to co-operate with each other to file, if possible on an agreed basis and if not then separately, by 4pm on 13 September 2021 a detailed and meaningful draft of proposed further directions to a main trial of all disputed issues in 2022.
>
> 98. I have provided that significant amount of time to enable the parties to complete the necessary work and to co-operate with each other in the production of the draft directions and other agreed documentation to assist the court. The attorneys have been living with this case far longer than I have and I rely upon them to consider how best the court will be assisted in determining what should be included in the draft directions and any other accompanying and consequent documentation.
>
> 99. Furthermore as these proceedings progress, from my present perspective the court would certainly be assisted with an updated agreed case memorandum with the agreed facts and legal issues being outlined and the areas of disagreement being highlighted, an updated chronology and dramatis personae, the names of the witnesses and the areas their evidence is intended to cover, the proposed time allocation for the evidence and the proposed estimates of time for the opening and closing addresses by the attorneys for the parties.
>
> 100. It is unfortunately necessary to remind the parties and their attorneys that they have a duty to assist the court in achieving the overriding objective and I expect them to do just that. The parties and the experienced attorneys engaged on each side of this protracted dispute (no doubt at great expense) must realise that the time for costly and time-consuming interlocutory skirmishing has passed and now is the time to focus on progressing these long outstanding proceedings to a manageable trial in 2022."

The Order of 10 May 2021

6. On 10 May 2021 the following Order was made:

UPON the Plaintiffs' Summons dated 4 February 2021 seeking an order that the issues as to (i) whether the Plaintiffs (or any of them) were clients of the Defendant; (ii) whether the Defendant owed duties to the Plaintiffs (or any of them) and, if so, which duties; and (iii) whether the Defendant breached any such duty and, if so, in what respect(s) be tried as preliminary issues (Preliminary Issues Summons);

IT IS ORDERED THAT:

Preliminary Issues Summons

1. The Preliminary Issues Summons is dismissed.

Pleadings

2. The Plaintiffs are to file and serve a substituted pleading of their claim (maximum of 40 pages) before 4pm on 28 June 2021.

3. The Defendant is to file and serve a substituted defence (maximum of 30 pages) by 4pm on 20 August 2021.

Discovery

4. The parties are to provide their discovery by list by 4pm on 16 July 2021.

5. Inspection is to be given by 4pm on 30 July 2021.

Further directions for trial

6. A case management conference is to be listed before Honourable Justice Doyle for the first available date after 27 September 2021.

7. The parties shall file a detailed and meaningful draft of proposed further directions to a main trial of all disputed issues by 4 p.m. on 13 September 2021.

(the "May 2021 Order")

The CMC and trial dates

7. There followed protracted email correspondence with court administration and the attorneys in respect of availability culminating in an email from court administration on 30 July 2021 11:40 confirming that the case management conference had been set for 10 a.m. on 16 November 2021 and that the trial remain listed for 10 a.m. on 3 October 2022 for the duration of 12 weeks. The attorneys were expressly reminded that under the Order made on 10 May 2021 inspection was to be given by 4 p.m. on 30 July 2021 and that the parties were to file a detailed draft of proposed further directions to a main trial of all disputed issues by 4 p.m. on 13 September 2021.

The Order of 30 September 2021

8. On 30 September 2021 the following Order was made by consent:

UPON the parties having agreed to consent to an order in the following terms.

IT IS HEREBY ORDERED BY CONSENT THAT:

1. Paragraph 4 and 5 of the Order dated 10 May 2021 are hereby varied such that the deadlines for the parties to provide their discovery by list and inspection are extended to 4pm on 22 October 2021.

2. Paragraph 7 of the Order dated 10 May 2021 is hereby varied such that the deadline for the parties to file a detailed and meaningful draft of proposed further directions to a main trial of all disputed issues is extended to 4pm 5 November 2021.

3. Costs be costs in the cause.

(the "September 2021 Consent Order")

9. The Court was informed that, without reference to the court, the dates for discovery by list (16 July 2021) and inspection (30 July 2021) had been varied by agreement between the parties first to 31 August 2021 and then to 30 September 2021. On 28 September 2021 the parties sought a further extension to 22 October 2021 (for both discovery and inspection). On 30 September 2021 my Personal Assistant on my instructions responded as follows:

> "Further to your email of Tuesday 28th September 2021, Justice Doyle is concerned about further slippage and notes that the parties wish to vary the Order... He is minded to approve the variations suggested but requires the attorneys to file an agreed draft Consent Order for his approval. There should be no further slippage."

<u>The Court of Appeal's Certificate of Order dated 4 October 2021</u>

10. A Certificate of the Order of the Court of Appeal of the Cayman Islands dated 4 October 2021 at paragraph 2 provided that by no later than 45 days from the date of the Certificate of Order the First, Second, Third and Fourth Respondents/Plaintiffs are jointly and severally liable to give security for the costs of the Appellant/Defendant of the proceedings incurred to 30 April 2021 in the sum of US$4.25 million ("Security") by way of payment into court or a guarantee provided by a first-class bank.

11. Paragraph 3 of the Certificate of Order provided:

> "All further proceedings in respect of the claims of the First, Second, Third and Fourth Respondents be stayed (a) until the Security is given as aforesaid, and (b) without further order in the event that the Security is not provided as aforesaid, save as set out in paragraph 4 hereof below, and save also that there be liberty to apply in respect of the consequences of the Order."

12. Paragraph 4 exempted from the stay any application by the First, Second, Third and Fourth Respondents for leave to appeal to the Privy Council provided such was filed within 21 days.

13. There was no stay of the proceedings in respect of the Fifth Plaintiff.

14. This Order was brought to my attention by way of an email to my Personal Assistant dated 14 October 2021 from Appleby the attorneys acting for the Defendant.

The Court of Appeal's Certificate of Order dated 2 November 2021

15. By Certificate of Order of the Court of Appeal dated 2 November 2021 an application for leave to appeal to the Judicial Committee of the Privy Council was dismissed. The reasons were as follows:

> "The application raises no point of great general and/or public importance which ought to be reviewed by the Privy Council; on the contrary, the issues raised are entirely *ad casum* [relating to the case]; the complaint of stifling is made for the first time and runs contrary to what was accepted on the appeal to the Court (see paragraph 31 of the Court's judgment); the views of the Chief Justice on the right to summary judgment and merits of the claim cannot survive the Court's appeal decision; the complaint of interference with the Chief Justice's discretion is therefore unarguable; and the complaint about the quantum of security is entirely one off and personal to the individual case."

The Summons

16. The summons dated 4 November 2021 was signed by "Conyers Dill and Pearman LLP Attorneys for the Plaintiffs" and sought a stay of the proceedings between the Fifth Plaintiff and the Defendant or further or alternatively a general adjournment of the case management conference or further or alternatively a general extension of time.

The Fifth Plaintiff's position in his affidavit in support sworn on 4 November 2021

17. In his affidavit in support sworn on 4 November 2021 the Fifth Plaintiff at paragraph 6 apologised for what he describes as his "inadvertent failure to meet the 22 October 2021 discovery deadline." The word 'inadvertent' means "without intention; accidentally"; "done by accident, without being intended". I will come to a review of some of the main submissions provided to the court later in this judgment. In brief, Mr Potts submitted that:

> "the alleged or partial non-compliance with the order is inadvertent because, as I have said, the bulk of the documents to be discovered by list had already been discovered".

Mr Potts submitted that strict compliance with the letter of the order is "not a binary issue" adding that the Fifth Plaintiff "has already in these proceedings discovered pretty much everything available to the Fifth Plaintiff" (oral submissions of Mr Potts).

18. The Fifth Plaintiff referred to the stay issue before the Court of Appeal and his communications with my Personal Assistant and his attempts to obtain a stay via email communications. The Fifth Plaintiff at paragraph 26 of his affidavit said that on 22 October 2021 "the Plaintiffs retained some hope that the Court might have determined that the circumstances warranted the stay, but in the alternative requesting a one-week extension of time."

19. The Fifth Plaintiff at paragraph 25 of his affidavit said that the Plaintiffs' position is that "there is no sensible reason for the parties to go through the discovery process ..." There was of course a very "sensible reason". The May 2021 Order required the Fifth Plaintiff to provide discovery and inspection. He was required by court order "to go through the discovery process." It is no justification for a failure to fully and properly comply with a court order for the failing party to say he did not think it "sensible" to comply with the order. Such a thought process, left unchecked, would inevitably lead to parties choosing whether and when and to what extent to comply with court orders.

<u>The Fifth Plaintiff's position in his skeleton argument dated 10 November 2021</u>

20. The Fifth Plaintiff at paragraphs 4, 5 and 6 in his skeleton argument states:

> "4. For the avoidance of doubt, the Fifth Plaintiff sincerely apologises to the Court if the Court has been left with the impression, through the unsatisfactory (and incomplete) medium of correspondence between the parties and the Court Registry, that the Fifth Plaintiff has acted in breach of any procedural directions or Court Orders, whether with respect to discovery, or preparations for the CMC hearing scheduled for 16 November 2021.
>
> 5. Although the Fifth Plaintiff reserves his position as to the nature, extent and context of any alleged breach (if such an assertion is made by the Defendant), pending an opportunity for fuller, oral submissions on his behalf, it has certainly not been the Fifth Plaintiff's intention to act in breach of any procedural directions or Court Orders, as is explained in his Sixth Affidavit.
>
> 6. On the contrary, the Fifth Plaintiff's original goal and intention was to have his request or application for a stay, adjournment, and extension of time dealt with by the Court in advance of the expiry of any relevant deadline (including the discovery deadline of 22 October 2021), and at reasonable and proportionate cost (having regard to limited available resources), whether in correspondence, on the papers, by agreement, or

otherwise. The Court is referred, in this respect, to paragraphs 16 to 27 of the Fifth Plaintiff's Sixth Affidavit, and the correspondence exhibited thereto."

Various communications

21. The court has been bombarded with various email communications from the attorneys acting for the parties, some necessary but some quite unnecessary and inappropriate.

22. By email dated 14 October 2021 from Appleby (the attorneys for the Defendant/Appellant) the court was provided with an update "on recent events in the Court of Appeal" and provided with copies of the Certificate dated 4 October 2021.

23. On 19 October 2021 Appleby referred to the Court of Appeal's further direction (contained in an email dated 18 October 2021):

> "We decline to alter the Order of the Court of Appeal for reasons not previously put before the Court. What should happen vis-à-vis Mr Toledo and/or the CMC or other directions currently in place at the trial court level is a matter for the Judge of the trial court. Prima facie, in accordance with the Order of the Court of Appeal, the proceedings should continue so far as Mr Toledo is concerned, but not otherwise. If, however, on Mr Toledo's application to Mr Justice Doyle, Mr Toledo should be excused by the Judge from performance in accordance with current directions, or if, on any application to the Judge, he considers that his current directions ought to be maintained, then the Court of Appeal is willing to consider amending its Order, at the request of the Judge; but not otherwise."

24. There followed correspondence from Appleby and Conyers, which the court should not have been bothered with, raising various issues in respect of a stay culminating in my Personal Assistant responding by email on 22 October 2021 4:40pm as follows:

> "Please be aware that His Lordship is not minded to deal with these issues by way of correspondence. If any party has any application to make it should be made in proper form and such application will be listed for directions and subsequent hearing. Orders, of course, should be complied with unless or until stayed or varied."

25. On 26 October 2021 Appleby inappropriately wrote to my Personal Assistant seeking the court's guidance on whether it should provide unilateral inspection or whether they should wait until Conyers confirm that they are ready to give mutual inspection. On my instructions my Personal

Assistant responded during the luncheon adjournment referring to my presence in court on other matters that morning and making it plain that: "...it is not for [the judge] to give attorneys "guidance" via emails. You take whatever action, if any, you consider appropriate."

26. On 27 October 2021 Appleby wrote to Conyers enclosing draft directions for Mr Toledo's claim requesting their comments by close of business on 1 November 2021 and added:

> "In relation to expert evidence, please confirm whether Mr Toledo intends to make an application for leave to call such evidence, if so, stating the discipline or disciplines of the relevant expert(s) and identifying the precise issue or issues to which that evidence is said to be relevant."

27. Appleby helpfully and in accordance with the overriding objective and their duty to assist the court sent the following additional documents to Conyers for discussion and agreement on the following dates:

Draft hearing bundle index	29 October 2021
Draft list of issues	3 November 2021
Draft procedural and substantive chronologies	4 November 2021
Draft case memorandum	4 November 2021

28. Conyers did not reply substantively to any of these communications and simply indicated that they were taking instructions. It is worthy of comment that the Fifth Plaintiff was able to provide Conyers with instructions to file the summons and his affidavit in support but was seemingly unable to instruct them to take steps to comply with the order and to co-operate with Appleby and to assist the court by way of filing proposed directions to trial (as specifically required by the May 2021 Order) and otherwise. The failure of the Fifth Plaintiff to assist the court is unsatisfactory and worthy of judicial criticism. I do not make that comment lightly.

29. By letter dated 3 November 2021 from Appleby to Mr Potts and Roisin Liddy-Murphy at Conyers it was indicated that the Fifth Plaintiff had still not given disclosure or inspection and was in continuing breach of the Order and Appleby asked whether the Fifth Plaintiff would agree to consent to the following order and if not why not:

"Disclosure

4. Unless the Fifth Plaintiff provides disclosure and inspection by 4pm 23 November 2021 his claim will be dismissed without further order and he shall pay the Defendant's costs of the claim."

30. Mr Potts responded on 3 November 2021 referring to this threat of an unless order adding:

> "I am working on the assumption that you and your client intend to approach matters in the conventional way by way of a summons containing a formal application supported by evidence (allowing for an orderly exchange of responsive evidence and submissions/authorities): clearly we and our client will not be in a position to agree to an unless order of the sort that you have proposed for agreement."

31. Appleby responded on 4 November 2021 stating:

> "We do not agree that such an application is necessarily pursuant to GCR o.24 r.20(1). We think it is incumbent on Mr Toledo to seek an extension of time for compliance, in response to which we would be entitled to invite the court to make an unless order. However, in order to avoid any further dispute on the point we will be issuing a Summons today, returnable at the CMC and with a time estimate of 45 minutes, and will serve affidavit evidence in support shortly..."

32. By email dated 5 November 2021 3:49 p.m. Appleby attached the Defendant's proposed directions stated to be in compliance with paragraph 7 of the Order of 10 May 2021 as varied.

33. The fields of expertise of any expert evidence were left blank as the Fifth Plaintiff had not indicated the relevant areas, if any, in respect of which he wished to adduce expert evidence. It was only part way through the hearing that Mr Potts stated that the Fifth Plaintiff would not by relying on any expert evidence at trial. This belated notification of the Fifth Plaintiff's position in respect of expert evidence was unsatisfactory. His position on the various matters raised by the attorneys acting for the Defendant should have been made clear well in advance of the hearing.

34. By email dated 5 November 2021 4:06 p.m. from my Personal Assistant to the attorneys for the parties paragraph 7 of the Order of 10 May 2021 was referenced in respect of draft directions to a main trial and the following added:

> "The court notes receipt of the same from the attorneys acting for the Defendant and awaits the same from the 5th Plaintiff by return."

Such was never forthcoming.

35. By email dated 5 November 2021 4:19 p.m. the attorneys for the parties were informed as follows:

> "Further to the summons dated 4 November 2021 filed by Conyers, Dill & Pearman LLP, attorneys for the Fifth Plaintiff, this court has listed the summons for mention at the hearing on 16 November 2021."

36. By email dated 8 November 2021 9:04 a.m. my Personal Assistant communicated with the attorneys for the parties as follows:

> "The attorneys for the 5th Plaintiff and the Defendant should liaise with each other and co-operate together to assist the court to ensure that the previous court orders are complied with.
>
> If it is intended to adduce expert evidence please specify the field(s) of expertise which is presently blank at bracketed paragraph 4a of the draft Order.
>
> Please also specify the names of all witnesses and estimated duration of each witness who will be giving evidence and the days on which the witnesses will be giving evidence at the trial."

37. By email dated 8 November 2021 9:17 a.m. Mr Potts asked for clarification that the court had been made aware that their client the Fifth Plaintiff had issued a summons for "a stay, an adjournment and an extension of time."

38. My Personal Assistant responded by email on 8 November 2021 9:48 a.m. as follows:

> "I can confirm that the court is aware and was aware when I was instructed to send the previous emails that a summons had been filed. We have previously notified you that the summons is listed for mention on 16 November 2021."

39. As it transpired the attorneys were in a position for the summons to be heard on 16 November 2021 and skeleton arguments were filed in advance and I heard submissions on 16 November 2021. I thank the attorneys for their cooperation and assistance in that respect.

40. At 3:10pm on 9 November 2021 Conyers wrote to Appleby stating that the hearing bundle index (which had been sent to them on 29 October 2021) was agreed "subject to the following qualification that the Defendant's Case Memorandum, draft list of issue, draft Chronology and draft Directions, are not yet agreed documents, and should be clearly marked as such (i.e. not agreed by the Fifth Plaintiff)". No suggested amendments were provided by Conyers. At the hearing on 16 November 2021 the outstanding documents were still not agreed and the Fifth Plaintiff through Conyers had not suggested any amendments. Suffice to say the Fifth Plaintiff was not taking action to assist the court despite the contents of paragraph 100 of May 2021 Judgment. At the hearing Mr Potts did make submissions on the draft directions without any notice to Mr Simpson. Mr Potts stated they would not be adducing expert evidence and only needed a 3 week trial.

41. At 1:30pm on 9 November 2021 Appleby wrote to Conyers helpfully enclosing a provisional witness list and draft timetable. There is no response to this communication or to the issue of expert evidence from Conyers in the core bundle filed with the court.

42. Appleby's communication to Conyers on 9 November 2021 was justifiably finished with the following words:

> "Your client's complete lack of engagement to date, in relation to preparation for the CMC, is wholly unsatisfactory ..."

43. Conyers' communication to Appleby on 9 November 2021 in respect of the draft hearing bundle index and the suggested pre-reading list and the suggested hearing time estimate for the hearing on 16 November 2021 finished with the following words:

> "We do not propose to debate issues unnecessarily in correspondence, however, or to repeat ourselves, since we anticipate it to be more productive to address the Court in evidence and submissions at the appropriate time, having regard to our client's Summons and the applications contained within it."

44. On 11 November 2021 my Personal Assistant emailed the attorneys as follows:

> "Justice Doyle thanks the attorneys for the provision of the skeleton arguments and bundles. His Lordship has asked me to notify the attorneys that the summons dated 4 November 2021 will be heard on 16 November 2021 and if unsuccessful the court will proceed to make directions towards the hearing of the Fifth Plaintiff's claims."

45. I need to say something about the unhelpful barrage of emails received by the court in respect of this matter. The parties and their attorneys should not attempt to litigate matters informally via emails to the court. The function of the court is to decide issues properly placed before it having considered the relevant law, evidence and arguments. In respect of an application for a stay this would normally be by way of a summons supported by evidence. The court would be provided with written skeleton arguments and authorities and a paginated bundle prior to the oral hearing at which the application would be properly heard with the parties being given an opportunity to make oral submissions. Exceptionally and normally with the consent of all parties the court may decide issues "on the papers" without the need for an oral hearing (see B.1.1 of the Financial Services Division Guide).

46. B1.1(d) of the Guide provides that: "Only in the most exceptional cases will the Court dispose of an application on the papers in the absence of the consent of the defendant/respondent (if any) to the Court doing so. If an application is likely to be opposed the Court will usually require an oral hearing, in which case the applicant should file and serve a summons in the usual way." Wisely in this case once the Fifth Plaintiff had eventually filed his application in the proper form of a summons he did not ask for it to be dealt with "on the papers."

47. It is worth reiterating the pertinent comments of Parker J in *Global –IP Cayman* (FSD unreported judgment dated 15 July 2020) at paragraph 8:

> "…There has also been a lot of correspondence between the parties involving the court, or at least copied to the court both before and after the hearing. I would remind the attorneys to all parties that this is not appropriate. The court does not sit as a running arbiter between parties preparing for hearings, or indeed after hearings have been concluded. I would remind the attorneys to also follow the principles behind the Overriding Objective to conduct litigation efficiently and economically and on a reasonable basis. At times in this litigation this has manifestly not been evident."

48. Parties and attorneys considering writing to the court for directions or guidance or determinations should pay heed to those important reminders and to the contents of this judgment. If having read such they still choose to email the court inappropriately they should not be surprised if judicial criticism, adverse/wasted costs orders and other sanctions follow.

49. Ironically Mr Potts himself made a point about the correct procedure to adopt and the necessity for applications to be in proper form when on 3 November 2021 he emailed Appleby referring to

applications by "the conventional way, by way of a summons containing a formal application supported by evidence (allowing for an orderly exchange of responsive evidence and submissions/authorities)" and yet it was Mr Potts who made an informal application for a stay by way of email in the first instance. It should not have been made informally by email. It should have been made by way of a summons well before the time for compliance with the May 2021 Order had expired. Moreover Appleby were wrong to seek guidance from the court as to whether they should provide unilateral inspection. One need only look at *Attorney "A" v Attorney General of the Cayman Islands* (CICA judgment 27 October 2021), albeit in a very different context to the context of the case presently before me, to see the unfortunate consequences when proper procedures are not followed. There should be no improper approaches to judges for guidance. A judge does not exist as part of one party's legal team to give guidance to it. An independent and impartial judge exists to decide relevant legal issues properly placed before the judge by the parties in accordance with the appropriate procedures. There should be no inappropriate communications by email for non-agreed and highly contentious stays. Mr Potts recognised that it was wrong to apply by email but tried to excuse it by saying lots of attorneys do it and the other side asked for email guidance in this case. I have endeavoured in this judgment to make my position plain in respect of inappropriate email communications with the court seeking "guidance" or determinations from the court.

50. I deprecate the seemingly increasing tendency of attorneys to attempt to litigate through emails to the court. Such inappropriate practice must stop. Mr Potts himself recognised the unsatisfactory conduct of the attorneys in this case in their attempts to obtain "guidance" and determinations from the court via informal emails without each side being given an opportunity to be heard which would be a significant breach of basic principles of natural justice and fundamental principles of fairness. Justice must not only be done it must openly and manifestly be seen to be done - not behind the public scenes by emails but in open court. Mr Potts referred to "a somewhat unsatisfactory trend that surfaced not only in this case but in the Cayman Islands generally regarding the manner in which the parties correspond with the court and the court registry…as your Lordship has no doubt detected in the case, hence your directions that an application be made formally [to] your Lordship, in that things get lost in translation or in expression. And if one party writes to the court the other party feels compelled to respond..."

51. After those comments during the hearing on 16 November 2021 I put the following to Mr Potts:

"But you accept, don't you, that if there is to be an application for a stay, the proper procedures have to be undertaken and the proper formal application has to be filed? It is not satisfactory to be seeking a stay with email communications; you accept that don't you? Or are you trying to say that there is an established convention in the Cayman Islands that applications for a stay can be made by email communications?"

Mr Potts responded:

"......The application is properly made formally."

Mr Potts stated that "what has unfortunately happened in this case, and both sets of lawyers have succumbed to the temptation in this case, is that parties have corresponded with the court registry, both parties have corresponded at different stages with respect to different procedural matters and frankly, in all cases what should actually happen is matters should be dealt with by way of summons and hearings of applications with the benefit of evidence and submissions...[otherwise] matters do descend into something of an incomplete and inaccurate correspondence thread which doesn't give anybody the full picture...."

52. Mr Potts was right to acknowledge that it was inappropriate of him to seek a stay in this case by way of email communications. It is of concern to the court that the formal application for the stay was presented after the time for compliance with the May 2021 Order. At the risk of stating the obvious, the mere filing of an application for a stay of an order does not render the order ineffective. Mr Potts fully accepted that "the application could have been made a little bit more quickly". If parties are unable to comply with case management directions they must make the appropriate application to the Grand Court before the time for the compliance has expired.

53. Moreover I wish to emphasise that the court should not normally be bothered or burdened with voluminous inter-partes correspondence leading to nowhere (See Grand Court Practice Direction No 2 of 2014). Concise position statements will normally suffice. The task of a busy court is to focus on formal pleadings and applications, relevant and focused evidence properly presented (See Williams J in *F v M*; unreported Grand Court judgment 20 August 2021), the law, relevant written and oral submissions and come to judicial determinations of the relevant issues. This core judicial task will rarely be assisted by way of sight of voluminous inter-partes correspondence. Valuable

and scarce court time should not be wasted on having to plough through voluminous inter-partes communications much of which, as it frequently transpires, is unhelpful in determining the legal issues in the case. To dump into the lap of the court voluminous inter-partes correspondence is a lazy and inefficient way of bringing matters to the attention of the court. Furthermore, dealing with such correspondence frequently and unnecessarily takes up the valuable and limited time of court administration whose primary task is to assist and support the judiciary. Members of court administration should be left to focus on their core duties including processing documents properly filed, listing hearings for determination by members of the judiciary and ensuring that court judgments and orders are duly issued. They should not have to spend their time acting as a mailbox for inappropriate emails from attorneys.

54. Whilst on the subject of communications with the court administration I have also detected, albeit in rare cases and not in this one, a tendency of some attorneys when emailing court administration not to copy in all other parties. Except in genuine ex parte/without notice or public interest immunity matters and perhaps some other entirely exceptional cases, when parties seek to communicate with court administration they should copy in all other parties. Lord Hoffmann in *Dr Anneliese Diedrichs-Shurland v Talanga-Stiftung* [2006] UKPC 58 at paragraph 32 described letter communications by one party to the court with no copy to the other parties as "grossly improper." See also my judgments in *R v Parton* 2009 MLR 370 and *Lime Petroleum plc (in liquidation)* 2017 MLR 89.

55. I turn now to refer to some of the main submissions made in respect summons.

Submissions

56. I take into account all the submissions put before the court by Alex Potts QC for the Fifth Plaintiff and Mark Simpson QC for the Defendant. Those detailed written and oral submissions form part of the court record and I do not set them all out in detail in this judgment.

The Fifth Plaintiff's main submissions in support of the summons

57. Mr Potts submitted that the Fifth Plaintiff whose claims against the Defendant are said to be, (a) pursued jointly and severally with the claims of the First to Fourth Plaintiffs and/or (b) whose claims overlap inextricably with the claims of the First to Fourth Plaintiffs, would be significantly

prejudiced if he were forced to pursue his claims against the Defendant in isolation, and such course would be:

(a) inconsistent with the Grand Court Rules (reference to Order 15 rules 4(1) and (2) and 5(1)) and relevant case law (reference to *Lewis v. Daily Telegraph (No 2)* [1964] 2 QB 601 at 617 and 620 and *Re Ingenious Litigation* [2020] EWHC 236 (Ch) at paragraph 11); and

(b) duplicative and wasteful (for the Fifth Plaintiff, First to Fourth Plaintiffs, the Defendant and the Court), resulting in the First to the Fourth Plaintiffs' claims being scheduled to be tried on a different procedural timetable to the Fifth Plaintiff's claims, potentially at a different trial, potentially with different outcomes, and potentially at unreasonable and disproportionate cost for all parties concerned.

58. Mr Potts referred to the pleadings and stressed that the First to Fourth Plaintiffs' claims and the Fifth Plaintiff's claim are pursued (a) on a joint and several basis, and/or (b) on an overlapping basis, legally, factually and evidentially.

59. Mr Potts submitted that it was apparent that the Defendant's grounds of defence are asserted against all of the Plaintiffs jointly and/or on an overlapping basis.

60. Mr Potts submitted that the Fifth Plaintiff would be significantly prejudiced if he were forced to pursue his claims against the Defendant in isolation from the First to Fourth Plaintiffs and such a course would be inconsistent with the Grand Court Rules and relevant case law. Mr Potts added that it would be duplicative and wasteful (in circumstances where he says it would be very difficult, if not impossible, to see how the Fifth Plaintiff's claims could be separated out from the claims of the Plaintiffs).

61. Mr Potts referred to *Lewis v Daily Telegraph (No 2)* [1964] QB 601 (said to be cited with approval in *Kirkconnell v. Cook-Bodden* 1996 CILR 326 per Smellie J (as he then was) at page 336) and submitted that it was trite law that in a claim brought by two or more plaintiffs, the plaintiffs must act together to present a joint case throughout the proceedings and also at the trial unless the court specifically orders otherwise.

62. Mr Potts referred in particular in the comments of Pearson LJ in *Lewis* at page 617:

> "The plaintiff company's action and the plaintiff Lewis's action manifestly ought to be tried together, in order that the one issue or sets of issues may be tried once and for all and not tried twice over by different tribunals with possibly different results."

63. And at 620 Pearson LJ:

> "… they must act together. I cannot allow one of several plaintiffs to act separately from and inconsistently with the others."

At the sake of stating the obvious, Pearson LJ was not dealing with the situation where an appeal court had stayed some but not all plaintiffs' claims.

64. Mr Potts submitted that a stay, an adjournment and/or an extension of time with respect to the pursuit of the Fifth Plaintiff's claims is most appropriate until such time as the stay of the First to Fourth Plaintiffs' claims is lifted and all the Plaintiffs' claims can proceed forwards, and eventually be tried, together.

65. Mr Potts submitted that the Fifth Plaintiff's approach would be most consistent with the overriding objective having regard to the relative prejudice, or potential prejudice to each of the parties and having regard to all the other relevant considerations for the court.

66. Mr Potts submitted that the Defendant's apparent insistence that the Fifth Plaintiff's claim should be tried in isolation from, or in advance of, the claims of the First to Fourth Plaintiffs is unreasonable.

The Defendant's main submissions in opposition to the summons

67. Mr Simpson submitted that Mr Toledo's approach to directions, disclosure, his summons and the CMC generally has been "wholly unsatisfactory and has demonstrated a wilful disrespect of Orders of the Court."

68. Mr Simpson submitted that the stay application is based on the false premise that it is likely that the First to Fourth Plaintiffs will obtain leave to appeal to the Privy Council in respect of an

application not yet lodged. Mr Simpson added that even if there was some realistic prospect of leave being granted in the future that would be no reason to grant Mr Toledo a stay at this stage.

69. Mr Simpson submitted that if a stay is granted then there would be a real risk to the trial that is currently fixed to commence on 3 October 2022.

70. Mr Simpson indicated that a decision on any leave application should be determined by around mid-March 2022. The difficulty is that if (as anticipated by the Defendant) leave is not granted at that point, it may not be possible to retain the trial date with respect to Mr Toledo if nothing has been done to advance the claim between the CMC and that point.

71. The Defendant is not proposing separate trials take place as against Mr Toledo and as against the other Plaintiffs. It is merely suggesting that the work which Mr Toledo will inevitably have to do in advancing his claim in due course, is done now rather than later, in order to give all parties the best chance of preserving the trial dates.

72. The Defendant is simply seeking to ensure that these long running proceedings are resolved as soon as possible.

73. The Defendant accepts that the issues which arise in Mr Toledo's claim are almost identical to those which arise on the First to Fourth Plaintiffs' claims and consequently no tailoring was necessary in respect of discovery.

74. Mr Simpson submitted that there could be no prejudice to Mr Toledo in having his claim progress pending the mooted appeal of the First to Fourth Plaintiffs. If leave is refused, then no time will have been lost in progressing his own claim. In the unlikely event that leave is granted, and the proceedings are then stayed for the hearing of that appeal, the work done by Mr Toledo will be work that will have helped to progress his claim pending the decision on leave (which work would have been required to have been undertaken at some point in any event.)

75. The Defendant has already made arrangements in relation to the resourcing of the trial in October to December 2022. The potential prejudice to the Defendant if the trial were to be adjourned as a result of the granting of the proposed stay is therefore very significant.

76. Mr Toledo has provided no good reason for the breach of his obligations to provide discovery. He seems to consider that it is open to him to pick and choose how and when, and indeed whether, to comply with Orders of the Court. If an extension of time is given for discovery and inspection it should be on the "unless basis" i.e. if not complied with his claim is dismissed.

77. Having outlined some of the main submissions put before the court I wish at this point to stress some important points of law relevant to the matters before the court.

The importance of strict compliance with court orders

78. The importance of strict compliance with court orders cannot be overstressed.

79. Sir James Munby in *W (a child)* [2013] EWCA Civ 117 at paragraph 51 stated:

> "Orders, including introductory orders, must be obeyed and complied with to the letter and on time."

80. At paragraph 53 Sir James Munby added that:

> "A person who finds himself unable to comply timeously with his obligation under an order should apply for an extension of time before the time for compliance has expired."

81. In *Howell v. Department of Health and Social Security* 2009 MLR 526 as Second Deemster in the Isle of Man I stated:

> "[10] The courts in compact jurisdictions strive to do their best with limited resources. It is of paramount importance that the parties to legal proceedings use those limited resources efficiently and comply with court orders. The efficiency of the courts in this jurisdiction no doubt has an effect on the economic and general health of the community. Fairness and efficiency in legal proceedings are too important simply to be left to the parties to legal proceedings. Courts must impose strict timetables upon the parties to legal proceedings and should ensure that such timetables are adhered to and where, without good reason, they are not the parties and their advisers should not expect sympathy or further indulgence from the courts. If they do not receive what they perceive to be justice, then they will only have themselves to blame for their inefficient use of court resources and for their failure, without reasonable excuse, to comply with court orders."

82. In *R v. Glover, Glover & Prietnel* 2005-06 MLR 463 (25 August 2006; Court of General Gaol Delivery Isle of Man) I stated at paragraph 62:-

> "Advocates should not treat court orders including case management directions as simply pieces of paper which can be ignored or compliance with them delayed to suit their convenience. Orders and directions … should be strictly complied with. Serious consequences can follow if they are not. The efficient and fair administration of justice depends on advocates and the parties complying strictly with court orders. Everyone… involved in a case should ensure that court orders including case management directions are strictly complied with on a timely basis and that the case is ready for hearing and proceeds accordingly. Late preparation and late applications are to be discouraged. They involve delay. They waste time and costs and they cause inconvenience. There are few reasonable excuses for late preparation … It is not reasonable to say "I did not comply with the court order because I was too busy, or I was only a few days late or other matters took priority". Compliance with court orders should take priority."

83. Deemster Christie in *Lewin v Braddan Parish Commissioners* 2014 MLR Note 3 (High Court Isle of Man) stated:

> "91…Orders of the Court must be complied with strictly and within the time periods specified. This is not merely an administrative issue. Non-compliance by one party can cause prejudice to the other party but it can also affect other litigants. It is not for any given party to decide, unilaterally, whether it will comply with a Court Order and, if so, when. The overriding objective provides that cases must be dealt with fairly and justly …"

84. Romer LJ in *Hadkinson v. Hadkinson* [1952] P 285, 288 in a passage endorsed by the Privy Council in *Isaacs v. Robertson* [1985] AC 97, 101 stated:

> "It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged."

85. It is not for any party to decide unilaterally whether he will comply with a court order and if so when and to what extent.

86. In *MA Lloyd & Sons Limited v. PPC International Limited* [2014] EWCA 41 (QB) there was reference at paragraph 1 of the judgment to the case being "yet another example of a litigant treating an order of this court as if compliance were an optional indulgence."

87. Christopher Clarke J in *JSC BTA Bank v Ablyazov* [2010] EWHC 2218(QB), in the context of an application for an unless order, reiterated the obvious but important point at paragraph 39 that:

> "….the court expects its orders to be obeyed by those who are subject to them"

88. There is very substantial public interest in seeing that court orders are obeyed. The whole foundation of the rule of law would collapse if court orders ceased to be obeyed.

89. It is also well established that orders are valid unless and until varied, stayed, set aside or otherwise discharged.

90. Lord Reed, with whom the other Justices agreed, at paragraph 44 of his judgment given on 20 October 2021 in *R (on the application of Majera (formerly SM (Rwanda)) v. Secretary of State for the Home Department* [2021] UKSC 46 referred to case law dating back to 1846 and stated:-

> "It is a well established principle of our constitutional law that a court order must be obeyed unless and until it has been set aside or varied by the court (or, conceivably, overruled by legislation)."

91. At paragraph 45 Lord Reed referred to the "legal duty to obey a court order which has not been set aside" as "a rule of law, not merely a matter of good practice". The principle is "fundamental to the rule of law."

92. At paragraph 49 Lord Reed dealing with issues in respect of orders by the First-tier Tribunal, referred to the rationale of the rule being "based on the importance of the authority of court orders to maintenance of the rule of law: a consideration which applies to orders made by courts of limited jurisdiction as well as those made by courts possessing unlimited jurisdiction."

93. Lord Reed at paragraph 54 referred to the comments of Lord Dyson MR in *Rochdale Metropolitan Borough Council v. KW (No 2)* [2015] EWCA Civ 1054 at paragraph 22:

> "An order of any court is binding until it is set aside or varied. This is consistent with principles of finality and certainly which are necessary for the administration of justice… Such an order would still be binding even if there were doubts as to the court's jurisdiction to make the order …"

94. Lord Reed at paragraph 55 referred to the reference by Singh LJ in *R v. Kirby (John Martin)* [2019] EWCA Crim 321 at paragraph 13 to " a long-standing principle of our law that there is an obligation to obey an apparently valid order of a court unless and until that order is set aside. This is a crucial feature of a civilised society which has respect for the rule of law..."

95. Stressing the importance of this fundamental principle of obedience to and compliance with court orders Lord Phillips sitting in the Judicial Committee of the Privy Council in *Mossell (Jamaica)(t/a Digicel) v. Office of Utilities Regulations* [2010] UKPC 1 at paragraph 43 of his judgment referred to *Isaacs v. Robertson* [1985] AC 97 and stated that it is well established that orders of the courts "must always be obeyed, whatever their defects, until set aside."

96. Lord Neuberger in *PricewaterhouseCoopers v Saad Investments Company Limited* [2014] UKPC 35 at paragraph 25 referred to Lord Diplock's advice in *Isaacs v Robertson* "an order made by a court of unlimited jurisdiction...must be obeyed unless and until it is set aside by the court." Lord Neuberger referred to "a number of cases in which judges have held that they cannot "go behind" a winding up order, ie that it must be treated as valid and effective, albeit until it is set aside or in some way stayed..."

97. Gross LJ in *Bank Mellat v Her Majesty's Treasury* [2019] EWCA Civ 449 at paragraph 94 referred to a threat by a bank that if "push came to shove" it would not comply with the order (if upheld). Gross LJ described such a threat as "deeply unattractive" adding:

> "This Court does not contemplate that its orders would not be obeyed and is unmoved by this indication on behalf of the bank. How that matter would be dealt with if the order is disobeyed will be resolved if and when necessary. But, as already emphasised, there is no need for it to come to that."

98. David Richards LJ in *Gibbs v Lakeside Developments Limited* [2018] EWCA Civ 2874 at paragraph 13 referred to authorities including textbook writers which "are unanimous in setting out the effect of an order that has been set aside." At paragraph 14 there is reference to authority in 1760 in the effect that "Till the judgment is set aside, or reversed, it is conclusive, as to the subject matter of it, to all intents and purposes." At paragraph 17 there is a reference to authority in 2014 to the effect that "the general principle is that a court order... is valid and enforceable until it is set aside." At paragraph 18 it is stressed that "an order of the court is binding and effective until set aside" and some of the reasons for this important principle are touched upon.

99. James McNeill, the President of the Jersey Court of Appeal, in *Camilla de Bourbon des Deux Siciles v BNP Paribas Jersey Trust Corporation Limited* [2020] JCA 017 at paragraph 39 stated:

> "There was an absolute rule that orders must be obeyed."

100. Further afield in Singapore Aedit Abdullah J in *Re Zetta Pte Ltd* [2018] SGHC 16 at paragraph 25 also made the obvious point:

> "Orders issued by a court are to be complied with."

101. There fundamental common law principles are well established in the Cayman Islands.

102. Grand Court Practice Circular No 1 of 2014 issued by the Chief Justice on 29 January 2014 at paragraph 1 stated:

> "Practitioners and those who appear before the Grand Court are reminded that orders, including interlocutory orders, must be complied with to the letter and on time."

103. The Chief Justice added:

> "6. Accordingly, persons who appear before the Grand Court are expected to comply with their plain and unqualified obligation to comply with the terms of a Court order made against or in respect of them, unless or until it is discharged. This obligation applies to all forms of orders including interlocutory case management directions.
>
> 7. If parties are unable to comply with the terms of an order, they are not entitled to agree a variation of the order without obtaining the Court's approval, and therefore must make the appropriate application to the Grand Court before the time for compliance has expired."

<u>The overriding duty of attorneys to the court</u>

104. During my exchanges with Mr Potts in respect of the failures of the Fifth Plaintiff to file proposed directions to trial pursuant to the express terms of the May 2021 Order and to engage with the Defendant's attorneys in this respect as specified at paragraphs 97 and 100 of the May 2021

Judgment I referred to the duties of attorneys as officers of the court to assist the court. The transcript confirms that Mr Potts responded as follows:

> "Well, my Lord, with the greatest respect, I'm an advocate for the client, the Fifth Plaintiff and I'm approaching matters in accordance with my instructions and your Lordship might take the view that advocates should behave in one way or another, I take on board your Lordship's comments, I will reflect on that, no doubt my firm will reflect on that, but for present purposes all I can say is my instructions were to approach the matters today in the way I have done and I would hope your Lordship would take that into account."

105. It appeared from this exchange, perhaps in the heat of the moment, that Mr Potts was impermissibly elevating his undoubted duty to his client above his paramount and overriding duty to the court.

106. It is a mistake for attorneys to assume that they are the mere mouth pieces of their clients and they should simply do what their clients instruct them to do. Attorneys owe an overriding duty to the court. If any authority is required for those obvious statements in respect of professional conduct one need look no further than the words of Lords Denning and Hoffmann. Lord Denning in *Rondel v. Worsley* [1966] 3 WLR 950 at 962 spoke of the attorney's paramount duty to the court stating:

> "… It is a mistake to suppose that he is the mouthpiece of his client to say what he wants, or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice …"

Lord Hoffmann in *Arthur J S Hall v. Simons* [2002] 1 AC 615 at 686 stated:

> "Lawyers conducting litigation owe a divided loyalty. They have a duty to their clients, but they may not win by whatever means. They also owe a duty to the Court and the administration of justice…. Sometimes the performance of these duties to the court may annoy the client…"

107. Consider also Justice DA Ipp *Lawyers' Duties to The Court* (1998) 114 LQR 63. Justice DA Ipp stated that: "…duties owed by lawyers to the court are legal duties imposed by the general law" and emphasized that "The role of lawyers has always been essential to the achievement of justice under the adversarial system." (at page 63). Justice Ipp at page 65 classifies the principal duties under four broad categories:

1. The general duty of disclosure to the court;
2. The general duty not to abuse the court process;
3. The general duty not to corrupt the administration of justice and
4. The general duty to conduct cases efficiently and expeditiously

Justice Ipp citing amongst other authorities Lord Wright in *Myers v Elman* [1940] AC 282 comments that "the essence of these duties is the requirement for lawyers (within the context of an adversarial system) to act professionally with scrupulous fairness and integrity, and to the court in promoting the cause of justice." Lord Reid in *Rondel v Worsley* [1969] 1 AC 191 at 227 when dealing with the duties of a barrister to the court noted that counsel "as an officer of the court concerned in the administration of justice…has an overriding duty to the court…" Justice Ipp at page 66 stated in common law jurisdictions where there is no distinction between barristers and solicitors "both are regarded as officers of the court, and both owe like duties."

108. Attorneys should never lose sight of their overriding duty to the court to assist the court in the administration of justice. I appreciate that clients are often difficult and demanding and seek to put attorneys under pressure in an endeavour to achieve their objectives. Clients sometimes fail to provide instructions and place attorneys in difficult positions. Clients sometimes provide attorneys with improper instructions. Clients sometimes fail to pay invoices. Attorneys must stand up to difficult clients and not succumb to their unreasonable or improper demands. Attorneys should rise above these difficulties and always be mindful of their serious, onerous and overriding duties to the court.

109. Geoffrey Ma, the former Chief Justice of Hong Kong, made the point well in his judgment in *Wing Fair Construction Company Limited (in compulsory liquidation) v. Yip Kwong Robert* (HKCFA 8 December 2011) at paragraph 32(3):

> "It will be through active case management by the courts, supported by the duty on the parties and their legal representatives to assist, that the just resolution of disputes will be achieved."

The importance of overriding objective

110. Paragraph 1.1 of the preamble to the Grand Court Rules provides that the overriding objective of the Rules is to enable the Court to deal with every cause or matter in a just, expeditious and economical way.

Paragraph 3 headed "Duty of the parties" provides:

> "The parties are obliged to help the court to further the overriding objective. In applying the Rules to give effect to the overriding objective the Court may take into account a party's failure to help in this respect."

B4.3 of the Financial Services Division Guide refers to the overriding objective and the need for matters to proceed expeditiously and effectively. It provides that: "The parties legal representatives are expected to co-operate with each other and with the Court in achieving these objectives."

111. The transcript records Mr Potts' submission on the overriding objective and lack of co-operation by the Fifth Plaintiff as follows:

> "Now, even if your Lordship were to say, well, you would have liked to [have] seen more co-operation, by reference to the overriding objective, it is important to point out the overriding objective is part of a preamble to the rules but not a rule itself…"

112. For my part I wish to make it crystal clear (as I endeavoured to do at paragraphs 97 – 100 of the May 2021 Judgment) that parties and their attorneys are under a duty to assist the court in achieving the overriding objective of dealing with cases justly and should co-operate with each other to assist the court in that respect. If a client expressly instructs an attorney not to do so then an attorney on the receiving end of such unwise and improper instructions must seriously consider his professional position and whether he can properly continue to act for the client.

113. The overriding objective and the requirement that the parties and their attorneys assist the court in achieving it are absolutely crucial to the fair, efficient and expeditious administration of justice. The importance of the overriding objective and the duty of the parties to help the court to further the overriding objective is clear from section A4 of the Financial Services Division Guide. Parker

J in *Global – I P Cayman* (15 July 2020) at paragraph 8 referred to the overriding objective and the necessity for attorneys to follow the principles behind it.

114. The overriding objective has recently been applied at appellate level in the Cayman Islands. Birt JA (with whom Morrison JA and Moses JA agreed) in *Scully Royalty Ltd v MFC 2017 II Ltd* (CICA judgment delivered 30 December 2021), in the context of considering an application to adduce evidence on the appeal which was not before the judge, recognised at appellate level the significance and importance of the overriding objective and referred at paragraph 35 to the considerable changes since a case decided in 2000, "in the way parties are expected to conduct litigation." At paragraph 36 Birt JA referred to the concept of the overriding objection being introduced into the Grand Court Rules 2003:

> "Pursuant to paragraph 2.1 of the preamble to the Rules, the Grand Court must seek to give effect to the overriding objective when exercising any discretion. In my view, this Court should similarly seek to give effect to the overriding objective."

115. The central importance of the overriding objective in civil legal proceedings in this jurisdiction, has been well emphasized at appellate level by Birt JA and parties and attorneys should note this in respect of their future conduct of civil proceedings in this jurisdiction.

116. The overriding objective plays a key role in the administration of justice on the Cayman Islands. The parties and their attorneys as officers of the court must actively assist the court in achieving the overriding objective.

117. Having outlined the importance of compliance with court orders, the overriding duty of the attorneys to the court and the importance of the overriding objective I now turn to the position of unless orders.

Unless Orders

118. Order 24 rule 20 (1) of the Grand Court Rules provides that where the Court has made an order for discovery against any party and such party fails to comply, the Court "may make such order as it thinks just, including, in particular, an order that the action be dismissed." Order 24 rule 20 (2) refers to committal for failing to comply with an order and Order 24 rule 20 (3) refers to service on a party's attorney being sufficient to found an application for committal of the party disobeying the

order but the party may show cause in answer to the application that he had no notice or knowledge of the order.

119. *Zuckerman on Civil Procedure: Principles of Practice* 4th Ed. at paragraph 11.115 adds:

> "...it has been observed that unless orders should not be made lightly, and are reserved for situations where some problem has arisen or is likely to arise, as where a party has intentionally failed to perform process obligations or there is reason to fear future un-cooperative conduct"

120. *Zuckerman* at paragraph 11.118 adds:

> "Before making an unless order the court will have carefully considered all the circumstances and the appropriateness of the consequences. Given the seriousness of consequences of failure to comply with an unless order, it is essential that the court should give the parties an opportunity to be heard before making the order, even where it makes the order of its own initiative."

121. The English Supreme Court Practice 1999 at pages 482 – 483 provides a commentary in respect of English Order 24 rule 16(1) which provides in respect of a failure to comply with a discovery order that the Court may make such order as it thinks just, including, in particular, an order that the action be dismissed. The commentary includes the following statements:

> "The exclusion from any further part in the proceedings of a party who deliberately disobeys a pre-emptory order of the Court as to discovery is appropriate where there is a real risk that the default will render the trial of the action impossible and any judgment in favour of the defaulter unsafe. Once the order for discovery has been complied with, even if compliance is after the time stipulated in the order, the defaulter will not be excluded from the proceedings unless the circumstances are exceptional and there remains a real risk that justice cannot be done..."

122. Towards the end of the hearing Mr Potts (unfortunately without any advance notice to Mr Simpson or the court) referred to various authorities on unless orders namely *Hytec Information Systems Ltd v. Coventry City Council* [1997] 1 WLR 1666 and *Marcan Shipping (London) Ltd v. Kefalas and another* [2007] 1 WLR 1864.

123. Mr Simpson had in the undated skeleton argument of the Defendant filed shortly in advance of the hearing devoted some 6 paragraphs (75 – 80) on the topic of "THE UNLESS ORDER" but relied on no authorities in support of his submission that an unless order was appropriate.

124. It was unfortunate that the attorneys did not bring the relevant authorities to the attention of the court prior to the hearing but as it transpired I was able to take a short adjournment to consider them. As Lords Denning and Hoffmann made clear in the authorities I have cited attorneys must produce all the relevant authorities, whether for or against their case. See also *Copeland v Smith* [2001] WLR 1371; [2000] 1 ALL ER 457.

125. Henderson J applied *Hytec* in *Ebanks v. Brooks* 2004 – 05 CILR Note 28 (Grand Court 2 March 2005). The short case note reads as follows:

> "When considering the application of a defaulting party to set aside a stay imposed following non-compliance with an "unless order," the following principles are to be applied:
>
> (1) an "unless order' is an order of last resort, made only if there is a history of failure to comply with previous orders;
>
> (2) it is the party's last chance to put his case in order and failure to do so will ordinarily result in the sanction being imposed;
>
> (3) the sanction is a weapon which the administration of justice requires to be deployed unless the most compelling reason is advanced to excuse his failure;
>
> (4) if a party deliberately flouts the order he can expect no mercy;
>
> (5) failure to comply may be excused only if the court is satisfied that it was due to something beyond the party's control;
>
> (6) the judge is to decide whether or not to exercise his judicial discretion to excuse the failure based on the facts and circumstances of the individual case and service to justice; and
>
> (7) due regard is to be given to the procedural inefficiencies suffered by the injured party, caused by delay and wasted costs, which it is of considerable importance to minimize by reason of the public interest in the administration of justice. Any injustice to the defaulting party, though never to be ignored, is substantially less important."

126. Richards J in *Cedrus Investments Limited v. Abidin* 2019 (1) CILR 39 considered *Hytec* and *Ebanks v. Brooks* noting at paragraph 83 the comments of Ward LJ in *Hytec* at 1674-1675:

> "An unless order is an order of last resort. It is not made unless there is a history of failure to comply with other orders. It is the party's last chance to put his case in order."

127. At paragraph 84 having noted that each case is dependent on its own facts Richards J added:

> "The learned judge agreed with the judge at first instance who had considered the contumacious conduct of counsel and the fact that there had been four separate orders of the court, none of which had been properly complied with."

128. In *Cedrus* (which involved an application for relief from sanction imposed by an unless order), counsel submitted that there had been "a single breach of an unless order, there being no previous history" (paragraph 96). At paragraph 97 Richards J referred to the following observation in *Woodrow v Chalk Catering Ltd* [1999] C.L.Y. 569:

> "A single failure to comply with an order could be said to constitute a history of failure to comply but such a short history is not characteristic of the cases in which the principles in this area of the law have developed. It is repeated failures which have normally given rise to the concern expressed by the court. The concept of giving a party "a last chance" would not normally be associated with giving a party a second chance."

129. Chief Justice Smellie in *Caribbean Islands Development Ltd (in official liquidation) v First Caribbean International Bank (Cayman) Limited* (FSD; in chambers 16 September 2014; judgment signed 8 October 2014) considered the position where an unless order had been made in the context of security for costs and the plaintiff sought an order retrospectively to vary the security order and an extension of time to provide security for costs. Chief Justice Smellie referred to *Ebanks v Brooks* and *Hytec* at paragraph 53 of his judgment.

130. Ward LJ in *Hytec* at page 1675 stated that "Ordinarily the court should not distinguish between the litigant himself and his advisers … The basis of the rule is that orders of the court must be observed and the court is entitled to expect that its officers and counsel who appear before it are more observant of their duty even than the litigant himself."

131. Moore-Bick L.J. in *Marcan Shipping* at paragraph 36 stated that before making conditional orders particularly for the dismissal of claims "the judge should consider carefully whether the sanction being imposed is appropriate in all the circumstances of the case … a conditional order … dismissing the claim … is one of the most powerful weapons in the court's case management armoury and should not be deployed unless its consequences can be justified."

132. I had these authorities in mind when considering whether or not to grant an unless order consequent upon the Fifth Plaintiff's continuing failure to provide discovery by list and inspection and to provide detailed draft directions to trial as required by the May 2021 Order.

Reasons for Decisions

133. I now set out the brief reasons for the decisions I made on 16 November 2021.

Reasons for dismissing the application for a stay or an adjournment

134. Whilst I accept that it is normally desirable in a case including multiple plaintiffs for all claims, where possible, to be presented and progressed at the same time the authorities Mr Potts refers to have limited application in a case where the claims of some but not all of the plaintiffs have been stayed by a court order.

135. The two main options facing the court on 16 November 2021 were firstly to stay or adjourn the proceedings (which commenced in 2014) for an indefinite amount of time to wait and see if the First to Fourth Plaintiffs were successful in respect of an application to the Privy Council for permission to appeal (and as at the hearing on 16 November such application had not even been filed) and if successful then await the outcome of the hearing of the appeal. There is of course no guarantee that the First to Fourth Plaintiffs will be successful before the Privy Council (on the permission application or if granted on the merits). The second main option was to press on in the meantime making directions towards the trial of the Fifth Plaintiff's claim. In the exercise of my judicial discretion taking into account all relevant factors including the potential prejudice to the parties I much preferred the latter option. The work the Fifth Plaintiff was required to do towards the hearing of his claim would have to be done in any event. Moreover I was unpersuaded by Mr Potts' generalised references to potential prejudice to the Fifth Plaintiff arising from the pleadings and issues in respect of evidence and documentation. I was concerned over prejudice to the Defendant if a stay was granted. There would be inevitable further lengthy delay. Very serious allegations have been hanging over the head of the professional Defendant for very many years now. The proceedings must be discontinued or determined. An indefinite stay is not the appropriate answer to the present circumstances.

136. Mr Simpson submitted that the position of the First to Fourth Plaintiffs is that whatever the outcome of any appeal they are not going to put up the security which has been ordered. I note in their Submissions on Ancillary Matters dated 16 August 2021 in the Court of Appeal, the Plaintiffs at paragraph 9 state that they believe "there to be no prospect of them being able to raise sufficient sums to fund either the ordered security of US$4.25m or any further security based on the latest demand." It would appear therefore that if the application for leave to appeal to the Privy Council is unsuccessful, or if leave is granted but the appeal is unsuccessful that the First to Fourth Plaintiffs will not be putting up the security as ordered.

137. Mr Simpson submitted that the Defendant was concerned that the Plaintiffs were trying to delay the hearing of Mr Toledo's claim and to try and set up a potential adjournment of the October trial, foreshadowed in Conyers' letter dated 20 October 2021 in the hope that the Defendant will choose to settle against Mr Toledo rather than continue these expensive proceedings unsecured against him as to costs and delay matters to an indeterminate date in the future much to the prejudice of the Defendant. I have to say I found considerable force in Mr Simpson's submissions that the court should retain the October 2022 trial dates.

138. To grant the stay or an adjournment would in effect have amounted to the vacation of the trial dates commencing in October 2022. These dates were set by agreement as long ago as 30 July 2021. Courts are rightly slow to vacate trial dates. Mr Potts belatedly part way through the hearing submitted that if it was only the proceedings involving the Fifth Plaintiff alone that were proceeding then a much shorter trial could be held earlier in 2022. Mr Simpson described this belated suggestion as "Mr Toledo's tactical change of position." Mr Toledo had previously indicated that if leave to appeal the security for costs order was refused locally it would be renewed before the Privy Council and "the trial window could not be held" (Conyers' letter to my Personal Assistant dated 20 October 2021). In any event the surprising suggestion of an earlier trial date assumes availability of witnesses, counsel, court accommodation and my availability. The judicial calendar for 2022 is already filling up and the safest course of action was to keep the trial dates commencing October 2022. If the time estimate for that trial can be reduced then so be it. I leave the parties to cooperate in that respect and to assist the court (as they are duty bound to do) in making best use of valuable and limited court time. It was unfortunate that Mr Potts had not, prior to coming into court, raised these issues with Mr Simpson but he may only on the day of the hearing or shortly before it have received instructions in respect of them. I agreed with Mr Simpson that in the particular circumstances of this case the most prudent course of action, at this stage, would be to

utilise the trial dates already set. If the application for special leave is successful before the Privy Council the position can be revisited in due course, if need be.

139. Balancing the relevant factors brought to the attention of the court (including potential prejudice to the parties) I concluded that the balance came down in favour of keeping the existing October trial dates and refusing the application for a stay or an adjournment.

Reasons for deciding not to make an Unless Order

140. I was troubled by the Fifth Plaintiff's failures in respect of the May 2021 Order. The Fifth Plaintiff conceded that he did not as required by the May 2021 Order provide discovery by list and inspection before 4pm on 22 October 2021.

141. Mr Potts stated: "The position is that at 22 October the Fifth Plaintiff in isolation has not produced a list, but it is explained by the procedural history…"

142. Mr Potts drew attention to the correspondence in particular a letter dated 17 September 2021 from Appleby which stated that their client's position is that the parties "need not list nor provide inspection of those documents that have been filed in the proceedings to date." Without any reference to the court, Conyers agreed that approach to discovery by letter dated 20 September 2021.

143. Appleby considered that the same approach should apply to all documents exchanged, served or filed during the course of the "Set Aside Application proceedings" to which Conyers agreed, again without any reference to the court. There was no application to vary the May 2021 Order which required discovery in the conventional way by lists and inspection.

144. Mr Toledo in his sixth affidavit sworn on 4 March 2021 at paragraph 36 stated that "the parties have already agreed that evidence already filed in the proceedings need not be re-listed or re-produced for the purposes of discovery. I have already provided virtually all of my substantive evidence in extensive prior filings of five affidavits and hundreds of pages of exhibits." At paragraph 39 Mr Toledo refers to his "inadvertent failure to comply with the order relating to discovery by the deadline…I have already provided through my affidavit evidence to date almost all material documents relating to my claims." At paragraph 27 Mr Toledo "humbly" asked "for relief for my non-compliance." At paragraph 6 Mr Toledo had apologized "to the Court for the

circumstances which have resulted in my inadvertent failure to meet the 22 October 2021 discovery deadline."

145. Mr Potts on behalf of the Fifth Plaintiff says in effect that his client had substantially complied with his discovery obligations and there was no need to provide a list or inspection as required by the May 2021 Order because he had agreed with the Defendant that the documentation he had provided to the Defendant from the commencement of the proceedings would be treated as his discovery and there was little else to discover. Frankly that is simply not good enough. The May 2021 Order, like all court orders, needed to be strictly complied with. If it was agreed that discovery lists and inspection would not be provided then the parties should have applied to the court for a variation of the May 2021 Order. The court may or may not have agreed to grant a variation. At the very least the parties should have notified the court of any agreement between themselves which impacted on the May 2021 Order. I note the reference in Order 24 rule 1 (2) of the Grand Court Rules to the ability of the parties to agree to dispense with or limit the discovery of documents which they would otherwise be required to make to each other. In this case however an order for discovery by lists and inspection had been made and if it was not to be complied with an application to vary it should have been made before the date of compliance had passed.

146. Moreover the Fifth Plaintiff did not as required by the May 2021 Order file "a detailed and meaningful draft of proposed further directions to a main trial of all disputed issues by 4pm on 5 November 2021". Mr Potts says that the summons for a stay or adjournment was in effect the Fifth Plaintiff's proposed further directions. That, of course, assumes that the summons would be granted. The Fifth Plaintiff should have provided detailed and meaningful draft further directions for trial which would be relevant if his summons for a stay or an adjournment was unsuccessful.

147. Despite the unsatisfactory conduct of the Fifth Plaintiff in respect of compliance with the May 2021 Order I was not persuaded that it was appropriate to grant an unless order. I was however unimpressed with the failure of the Fifth Plaintiff to fully and properly comply with the May 2021 Order (paragraphs 4 and 5 in respect of discovery by list and inspection and paragraph 7 parties to file detailed and meaningful draft of proposed further directions to a main trial of all disputed issues) and with his failure to take on board the judicial comments and directions contained in the May 2021 Judgment (see especially paragraphs 96 – 100 set out above). I specifically asked Mr Potts whether discovery and inspection had been completed and the transcript records his accurate response: "It hasn't".

148. In respect of the admitted failure to provide discovery by list and inspection Mr Potts persistently argued in effect that it was not necessary to comply with paragraphs 4 and 5 of the May 2021 Order because the parties had agreed that this was not necessary as the bulk of documents had already been made available. "leaving only a small residual category of documents to be the subject of any listing exercise" (oral submission of Mr Potts). An agreement between the parties would not, of course, as I have already sought to make clear, absolve the Fifth Plaintiff from his obligation to comply with the May 2021 Order unless and until it was varied, stayed or set aside.

149. Mr Potts referred to the correspondence with Appleby on the discovery exercise and, in his oral submissions powerfully stressed that in September 2021 "nobody was saying to anybody that there was some historic non-compliance, some deliberate non-compliance, some lack of cooperation or anything of the sort so as to justify anybody saying that there will be prejudice or drama attaching to threats of an "unless" order." In the context of the Fifth Plaintiff's opposition to the imposition of an unless order that was a persuasive point.

150. Less persuasive was the submission of Mr Potts in respect of paragraph 7 of the May 2021 Order. Mr Potts submitted that paragraph 7 of the May 2021 Order "didn't require the Plaintiff individually, the Fifth Plaintiff to comply with it." Mr Potts submitted in effect that as the order required all the Plaintiffs to "collectively" provide the draft directions to a trial of all Plaintiffs the fact that the Court of Appeal had stayed proceedings in respect of the First to Fourth Plaintiffs meant that the Fifth Plaintiff did not need to comply with the May 2021 Order and if he did his summons for a stay or adjournment or further time was sufficient to comply with the requirement contained in paragraph 7 which provided that:

> "The parties shall file a detailed and meaningful draft of proposed further directions to a main trial of all disputed issues" originally by 4pm on 13 September 2021 and later varied by a consent order to "4pm on 5 November 2021".

151. The May 2021 Order made no reference to the word "collectively". It required the "parties" to file a draft of proposed further directions to trial. The Fifth Plaintiff is and was a party. He was required to comply with the May 2021 Order. Mr Potts submitted that they did not "file a set of proposed directions to trial because those directions contemplated that there will be a trial of all the Plaintiffs' claims and there has been no severance or deconsolidation of the Fifth Plaintiff's claim from the other Plaintiffs' claims." What the Fifth Plaintiff has failed to properly acknowledge was that the

Court of Appeal did not grant a stay in respect of his claim and the May 2021 Order was required to be complied with insofar as it concerned him. It required the Fifth Plaintiff to make important filings with the court. Suffice to say the submissions of Mr Potts did not persuade me that there had been full and proper compliance by the Fifth Plaintiff with paragraph 7 of the 10 May 2021 Order as varied by September 2021 Consent Order.

152. At paragraph 100 of the May 2021 Judgment I had stated:

> "It is unfortunately necessary to remind the parties and their attorneys that they have a duty to assist the court in achieving the overriding objective and I expect them to do just that."

153. At paragraph 98 I referred to the "significant amount of time" I had provided the parties to provide their discovery by list by 4pm on 16 July 2021 and inspection to be given by 4pm on 30 July 2021. At paragraph 97 I expressly stated that I required the attorneys for the parties to co-operate with each other to file by 4pm on 13 September 2021 "a detailed and meaningful draft of proposed further directions to a main trial of all disputed issues in 2022." At paragraph 98 I stated that I had provided that "significant amount of time to enable the parties to complete the necessary work and to co-operate with each other in the production of the draft directions and other agreed documentation to assist the court." At paragraph 99 I referred to areas where the court would be assisted.

154. It can be seen from the email exchanges between Conyers and Appleby that the Fifth Plaintiff had failed to meaningfully co-operate or assist the court. All Conyers appear to have been instructed to do is to present the summons and supporting affidavit and to agree the index for the hearing bundle. The Fifth Plaintiff did not properly assist the court in respect of the advance submission of draft directions towards trial as required by the May 2021 Order. The attitude and lack of action of the Fifth Plaintiff flies in the face of paragraphs 97 – 100 of the May 2021 Judgment.

155. Despite the unsatisfactory position that the court had been placed in by the Fifth Plaintiff in respect of lack of full and proper compliance with the May 2021 Order I was not persuaded that there was a significant history of deliberate failures to comply with previous orders. I also took into account the Fifth Plaintiff's evidence that in effect he hoped the court would grant a stay by email, that the parties had in effect agreed that formal lists of discovery were largely unnecessary and he had already provided most of the discovery. Albeit reluctantly I was persuaded that I should give the

Fifth Plaintiff a further chance to put his house in order in respect of discovery and inspection and I gave him further time to do that. I did not as at 16 November 2021 think it would be appropriate or proportionate to make an unless order in the particular circumstances which were before the court on 16 November 2021.

Reasons for decision in respect of no expert evidence

156. I should also record that Mr Potts had no objection to a paragraph being inserted into the order that the Fifth Plaintiff may not adduce any expert evidence at trial in view of his position that he would not be relying on any expert evidence. The following is an extract from the transcript of the hearing:

> "My Lord, I will deal with the expert evidence point. I don't object to your Lordship's proposed paragraph in light of my indications...."

That part of the order was made with the consent of Mr Potts on behalf of the Fifth Claimant. I felt it appropriate to include such order to prevent the Fifth Claimant from attempting to change his position in respect of expert evidence as such would have the potential of derailing the trial. The Order was made in accordance with the overriding objective.

No judicial criticism against Mr Potts

157. For the avoidance of any doubt I make it clear that I make no criticism of the professional conduct of Mr Potts in the challenging situation that confronted him. I should acknowledge that Mr Potts only recently became involved in this case in difficult circumstances. Moreover it is plain that Mr Potts did not benefit from full and proper instructions from his client. It was however unfortunate that the application for a stay was initially attempted by an informal email communication, that the authorities on "unless orders" and that the Fifth Plaintiff's position on expert evidence and length of trial had not been made available in advance of the hearing. It may well be that Mr Potts only received instructions on these matters on or very shortly before the day of the hearing. These are relatively minor concerns in the grand scale of this weighty litigation. In fairness, now that the dust has settled, I should acknowledge that, in the finest traditions of the Bar, Mr Potts was endeavouring to do his best for his client in difficult circumstances and at short notice and I do not criticise him for that. The fault in respect of the failure to fully and properly comply with the May 2021 Order lies at the door of the Fifth Plaintiff.

Ancillary applications

158. Any ancillary applications (such as the costs of the Fifth Plaintiff's failed application) should be filed and served within 21 days of the date of the delivery of this judgment, together with concise written submissions in support. Any written submissions in opposition should be filed within 14 days of service of the relevant application. Subject to contrary order, I shall deal with such applications on the papers without the need for a further oral hearing. I keep a mind open to persuasion on costs but note that the Fifth Plaintiff was unsuccessful in respect of the main relief requested namely a stay or a general adjournment and the unsuccessful party would normally be expected to pay the costs. I await any applications and written submissions on costs.

Postscript

159. I record that the Fifth Plaintiff gave notice on 30 November 2021 pursuant to Order 67 rule 4 of the Grand Court Rules of his intention to act in person.

160. The Fifth Defendant filed a 3-page document entitled "Fifth Plaintiff's List of Documents" dated 30 November 2021 together with an unentitled 16 page attachment and an additional 2 page attachment entitled "Index to Hard Copy Documents".

David Doyle

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT