REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No**. CV2010-01117**

BETWEEN

CRISTAL ROBERTS

First Claimant

ISAIAH JABARI EMMANUEL ROBERTS
(BY HIS NEXT OF KIN AND NEXT FRIEND RONALD ROBERTS)

Second Claimant

AND

DR SAMANTHA BHAGAN

First Claimant

MEDCORP LIMITED

Second Claimant

Before the Honourable Madame Justice Margaret Y Mohammed

Dated the 24th March, 2016

***Appearances*:**

Mr. L Murphy instructed by Mr. R Williams for the Claimants
Mr. J Walker instructed by Mrs. D Thompson for the First Defendant
Mr. I Benjamin instructed by Ms. Achong Low for the Second Defendant

REASONS

1. On the 26th February 2016 The Claimants filed an application seeking relief from sanctions "to adduce factual evidence to respond to the Defendants' Amended Defences" ("the application"). The application was filed at the pre-trial review stage.

2. The substantive claim was instituted on the 24th March 2010 whereby the Claimants claimed loss and damage in relation to birth injuries suffered by the Second Claimant on or about the 3rd June 2006. By consent on the 21st January 2013 the Defendants agreed to accept 90% liability for the Claimants' damages and in an application for interim payment filed by the Claimants on the 17th June 2014 they stated that the quantum of damages which they seek to be awarded is in the sum of $35,000,000 USD. At the hearing of the Assessment of Damages, some of the issues to be determined are: what care and treatment the Second Claimant reasonably requires as a result of his injuries, whether that care and treatment is available in Trinidad or not and the reasonable costs for providing the care and treatment.

3. The relevant procedural history of the claim is as follows:

24th March, 2010	Claim Form and Statement of Case filed
18th November 2010	Amended Statement of Case filed
28th September 2010	First Defendant's Defence filed
29th December 2010	Second Defendant's Defence filed
13th March 2012	Re-Amended Statement of Case filed
14th September 2012	Witness statements on liability filed
21st January 2013	Consent order on liability entered
31st October 2013	Order for filing of witness statements for Assessment of Damages
14th February 2014	Claimants witness statements on Assessment of Damages filed.
16th May 2014	Defendants witness statements on Assessment of Damages filed
30th July 2014	Application by the First Defendants to file Amended Defence
30th September 2014	Permission granted to the Defendants to file Amended Defence by the 7th October 2014 and the Claimants to file and serve Amended Reply by the 21st October 2014. Permission to the Claimants to make any applications to

	meet the Defendants pleaded case by the 21st October 2014
6th October 2014	Second Defendant's Amended Defence filed
7th October 2014	First Defendant's Re- Amended Defence filed
21st October 2014	Claimant's Amended Reply filed
24th November 2014	Permission to the parties to call expert witnesses in the 7 areas of expertise.
15th December 2014	Permission the parties to call expert witnesses in additional areas of expertise.
23rd January 2015	Claimants application to adduce Dr Bratt's report filed
5th March 2015	Order for interim payment by the First Defendant to the Second Claimant in the sum of $1,260,000.00
12th May 2015	Permission to file Joint Reports on or before 15th May, 2015
24th June 2015	Trial Date for Assessment of Damages fixed for May 2016
24th July 2015	Ruling from the Court of Appeal permitting Amended Defences to stand
2nd October 2015	Permission to the Claimants to substitute the life expectancy expert for the Second Claimant. Stay on any further updated reports. Refusal for the experts to give evidence via electronics means. Directions for filing of joint reports in 2 areas of expertise, directions for joint expert meetings and for submissions on disputed agenda items for joint experts meetings.
30th November 2015	Order that the Amended Reply stands. Permission to the Claimants to make an oral application to adduce further expert evidence refused. Permission refused for a joint meeting on Assistive Technology but directions given for written questions to be posed. Directions for- -The actuaries and economists and the Life Care Planners

	to meet with respect to questions that are not in dispute. -The Attorney at Law for the Claimant to report and the parties to indicate their position at the hearing of the 26th January, 2016 on the issue of the re-examination of the Second Claimant.
21st December 2015	Claimants application for payment out of interim payment sum and to substitute expert Ms Shalene Giles Life care planner with Ms S Callaghan
19th January 2016	Second Defendant's application for specific disclosure
26th January 2016	Ruling on disputed agenda items for experts meeting. Partial of payment out of Court granted and substitution of Life Care Planner refused.
1st February 2016	Applications by the Claimants for permission to adduce factual evidence and to rely upon reports from Economic Experts and Actuarial experts to respond to the Amended Defence
2nd February 2016	Deadlines set for the filing of joint reports for experts on Orthopaedics and Life Expectancy and Economists and Actuaries. Directions to the parties to notify the Court of their respective witnesses each party intends to call at the trial by the 22nd February, 2016. Parties to indicate which witnesses they intend to cross examine and the estimated length of cross examination for each witness.
10th February 2016	Order admitting hearsay statements of Duncan Fairgrieve. Specific disclosure by the Claimants and permission to withdraw Claimants application to adduce further factual evidence.
23rd February 2016	Court of Appeal permitted the payment out of entire interim payment and the substitution of Ms S Callaghan

25th February, 2016	The Claimants' Notice of Application to rely upon reports from Economic Actuaries experts to respond to the Amended Defences dismissed. Directions given for the calling of witnesses of fact and expert witnesses from the 2nd May to the 25th May 2016. Permission is granted to the Defendants to respond to the report of Ms. Callaghan on or before the 18th April, 2016. Directions for the parties to file and serve Notice of Evidential Objections on or before the 21st March, 2016 and to respond on or before the 1st April, 2016.

The first application

4. According to the application the Claimant seeks permission "to adduce further factual evidence to respond to the Amended Defences" by way of witness statements. The grounds in support of the application are: subsequent to the filing of the witness statements by the Claimants and Defendants on the 14th day of February 2014 and 16th May 2014 respectively the Defendants were granted permission to amend their respective Defences to allow for them to assert a positive case that the Second Claimant could receive the treatment and care he requires in Trinidad and Tobago ("the Trinidad case") and that treatment in the USA was therefore unnecessary. On the 24th July, 2015 the Court of Appeal ("the Court of Appeal order") affirmed the High Court's decision and accepted that the granting of permission for the Defendants to amend their Defences would raise the need for evidence on the part of the Claimants to respond to this new case. The Claimants are prejudiced by the amendments and they need to adduce *new* evidence to specifically rebut the positive case, and also to allow for evidence to permit the quantification of their case if the Defendants' amended positive case succeeds.

5. The Claimants grounds also stated that the evidence the Claimants seek to adduce is highly likely to be relevant to the issues before the Court and to be of assistance to the Court. It will not involve expenditure which will be disproportionate to the issues in the

case (both as to cost, importance or the complexity of this matter). If the new evidence is permitted it will allow the parties to be on an equal footing since the Defendants have adduced evidence from providers of services on Trinidad who assert that the Claimants can access treatment here. The balancing view of those who actually need to do so, plus their clinicians' factual experience, should be put to the Court. This can be done in time for trial and without unduly impacting on court resources. This is a case which has and will require management in any event. The new evidence will not catch the Defendants by ambush or surprise and leaves them with more than enough time to prepare to meet the evidence which can be challenged before the Judge by the Defendants by way of cross-examination. The failure to comply was not intentional and there is a good explanation for the delay. The Claimants have generally complied with all other relevant rules, practice directions, orders and directions. The failure to comply was due to no fault of either the Claimants or their attorneys. It is in the interests of the administration of justice that the application should be granted and the trial dates can be still and be met if the relief is granted.

6. The Claimants filed two affidavits in support of the relief from sanction application namely an affidavit by Mr Ricardo Williams ("the Williams affidavit") and an affidavit by Mr Ronald Roberts ("the Roberts affidavit"). The Second Defendant filed an affidavit of Ms Alyssa Achong Low and an affidavit of Wendy Del Pino in response to the application.

7. At the time of the filing of the application there were two categories of witness statements already filed by the Claimants. They have filed 15 witness statements by persons whom the parties referred to as the witnesses of fact. It is not inaccurate to state upon an examination of the said witness statements that all, if not the majority, of the witnesses of fact evidence concerns the challenges and difficulties encountered in Trinidad and Tobago in seeking to meet the needs of persons with cerebral palsy. The Claimants also have 15 experts in the 15 areas of expertise namely psychiatry, human resources, assistive technology, occupational therapy, speech and language therapy, physiotherapy, othorpaedics, educational psychology, life expectancy, housing, life care planning,

economics and actuarial science. Notably the joint reports by the experts in the following 5 fields of psychiatry, physiotherapy, speech and language therapy, educational psychology and occupational therapy were already filed, first joint meeting of the economics and actuarial scientists had already taken place and the joint reports by the experts in the areas of orthopaedics, life expectancy, economists and actuaries are due to be filed on the 23rd March 2016.

8. It was unclear from the application if the relief the Claimants are seeking is to adduce further evidence from witnesses of fact and/or expert evidence. The *grounds* of the application say that the evidence is *new* to rebut the Defendants positive Trinidad case. In the Williams affidavit he states the Claimants are seeking to *revisit* their evidence in light of the Court of Appeal order. He stated that:

> "3. It was however accepted that the granting of permission for the Defendants to amend their Defence would raise the need for evidence on the part of the Claimants to respond to this new case. At para 76 the Court found:
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> > *"There will no doubt also be some prejudice to the appellants if the permission to amend the defence is granted, because the appellants may have to gamer new evidence to specifically rebut this positive case, as opposed to merely proving the reasonableness of a case for permanent relocation and treatment, care and support in the USA."*
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> 4. The Court of Appeal was correct. The Claimants are prejudiced by the amendments. The Claimants do need to adduce new evidence to specifically rebut the positive case, and further (and the Court of Appeal would no doubt have foreseen) also to allow for evidence to permit the quantification of their case if the Defendants' amended positive case succeeds.
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> 5. This application deals with the factual evidence required.
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> 6. The Claimants, for the first time, now face a positive case as to the availability of treatment and the ability of Isaiah to access it in Trinidad and Tobago. To some extent, the requirements for treatment, care and support are now only becoming clear following (1) the finalization of joint statements and meetings which is both narrowing areas of dispute; and (2) reflecting the progress the experts have agreed Isaiah has been making in Florida.

7. Whilst the situation in Trinidad was a feature in some of the Claimants' statements, as the Court of Appeal noted, the hurdle is higher following permission to amend being granted.

8. The Claimants request that they be given the opportunity to revisit their evidence following the amendments. This is necessary in order to meet an amended case that, not only was it reasonable to take Isaiah to the USA, but that care, support and treatment could not (and still cannot) have been provided in Trinidad even if they had disregarded Dr Parag's advice to the contrary. The Claimants wish to assert this by evidence both as a matter of reasonable availability and of logistical practicality, from actual users of the health care system in Trinidad (both as parents of disabled children and as professionals)."

9. Based on the Williams affidavit it appears to me that the Claimants are seeking permission to adduce new evidence from both witnesses of fact and expert witnesses. In this regard the Roberts affidavit is instructive since paragraphs 52 to 59 confirm this position. He states:

"52. We truly believe that we should be given the opportunity to adduce further lay evidence that we could do justice for our son's future. We truly believe we should be given an opportunity to adduce further expert evidence. The defendants have argued that our present witness statements which we have initially submitted met their newly amended case. We do not agree with their position. We also should be given an opportunity to present economic, actuarial evidence, accommodation evidence via expert updating, costing specialist and new reports. In Trinidad same poses significant challenges because there are not many scholarly articles which an expert can use as a reference. Moreover the challenge of securing evidence under financial constraints.

53. Economic evidence is required to deal with future forecast of Trinidad economy so that the correct multipliers can be used for our damages calculation. If the Court is to be invited to consider a Trinidad case, then a discount rate calculation for the Trinidad will need to be done.

54. The actuarial evidence will be needed for the local scenario taking into consideration such factors as mortality etc. All of this is particularly important since the Trinidad's economy is based on Oil & Gas prices and, by virtue of the

TT case not having to be met until pleaded against us we have not advanced any evidence on a scenario for Trinidad & Tobago.

55. Accommodation evidence will be required since, if the court deems that Isaiah should stay in Trinidad a suitable accommodation meeting his special requirements are needed. Such a design is currently coated in the US, but we will need to have a similar costed house with the many accessories for his needs in Trinidad. This is required to meet the Trinidad case. We cannot reply on the defendants' exports in this case whose evidence is disputed. Moreover their housing design was not done by an architect although they instructed prominent Trinidad architect, Mr. Anthony Lewis, Mr. Lewis visited our home to prepare an expert report. However, his report has never been disclosed to us and what is presented before the courts as evidence is a quantity surveyor's estimate with which we are not in agreement. In this regard, the accommodation evidence becomes important in meeting the Trinidad & Tobago case advanced by the defendants. Gathering such new evidence requires time and the finding of funds to pay for it.

56. We also need to adduce clinical treatment evidence by way of witness statements since our present witness statements mostly shows the struggles of us and many other parents to get treatment for Cerebral Palsy in Trinidad and Tobago. We will require medical practitioners' evidence from Trinidad. We also need lay witness in terms of costs of care, costs of treatment, medical labour rates and the general costs of services in Trinidad.

57. Our Life Care plan will need to be updated accordingly to update new pricing and to meet the Trinidad Case. This will include the costs of medical supplies, equipment and treatment costed in TT. The defendants LCPs are disputed and it is based on their experts and not our various medical practitioners for CP. In some cases a significant amount of free services were utilized which are also in dispute. Therefore we can't rely on the defendants LCPs.

58. Insofar as updating so much has happened since of previous witness statement of J an 2014, which is two years old. Today Isaiah has gone from GMFCS IV (Gross Motor Function Classification System) to GMFCS III. This is remarkable progress. Our education with Cerebral Palsy has further been enlightened in CP in TT with respect to the medical circumstances and therefore we will like to update and amend our witness statements accordingly. Our spending in the US showing costs incurred needs to be updated. All of our

proposed new lay evidence is directly related to the defendants' late amendments and P263.

59. The above is necessary for us to meet the Trinidad case which came as result of the defendants' late amendments. Moreover we didn't anticipate the defendants' amendments in our previous statements nor did we expect that their applications would succeed."

10. Notwithstanding the lack of clarity in the grounds of the application on the type of new evidence relief now being sought by the Claimants at this stage to adduce, it is clear from the evidence in support of it that the Claimants are seeking permission to adduce new evidence from witnesses of fact and expert witnesses either from their existing experts or new experts.

11. With an appreciation of the relief sought in the application I will now address its merits. Rule 29.13 of the CPR provides that:

> "If a witness statement or witness summary is not served in respect of an intended witness within the time specified by the court then the witness may not be called unless the court permits."

12. The rule imposes a sanction on a party who wishes to call a witness where a witness statement was not filed within the specified time. It was not in dispute that the Claimants and Defendants filed and served witness statements for the Assessment of Damages on the 14th February 2014 and 16th May 2014 respectively and that the witness statements were filed before Rahim J on the 30th September 2014 gave the Defendants permission to amend their Defences to plead a positive Trinidad case.

13. The relief from sanction provision in the CPR is rule 26.7 which states:

> "26.7 (1) An application for relief from any sanction imposed for a failure to comply with any rule, court order or direction must be made promptly.
> (2) An application for relief must be supported by evidence.
> (3) The court may grant relief only if it is satisfied that –
> (a) the failure to comply was not intentional;

(b) there is a good explanation for the breach; and

(c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions.

(4) In considering whether to grant relief, the court must have regard to –

(a) the interests of the administration of justice;

(b) whether the failure to comply was due to the party or his attorney;

(c) whether the failure to comply has been or can be remedied within a reasonable time; and

(d) whether the trial date or any likely trial date can still be met if relief is granted.

(5) The court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown."

14. In **Rawti Roopnarine and anor v Harripersad Kissoo and others**[1] Mendonca JA observed:

> "15. The interpretation of the rule is not in doubt. An application for relief must be made promptly and must be supported by evidence. Rule 26.7 (3) establishes a threshold tests. In other words the three (3) conditions stipulated in that rule must all be satisfied before the court may grant relief. If any of the conditions are not satisfied the court cannot grant relief. If the conditions are satisfied, however, relief is not automatic but the court may grant relief and in considering whether to do so must have regard to the factors outlined in rule 26.7(4)(see Civil Appeal 65 of 2009 **Trincan Oil Limited and another v Chris Martin**)"

15. I will now consider each of the relevant factors.

Promptness

16. Counsel for the Claimants argued that in determining whether the application was made promptly the Court must look at all the circumstances of the case since it is case specific. He stated that the Court must consider the complexity of the case, the many applications

[1] Civil Appeal No 52 of 2012

(about 38 interlocutory applications) which were filed and the resources involved in determining promptitude. He also submitted that the Claimants realized that the substantive matter was complex after the amended Statement of Case was filed which was in 2012 and that given the history of the matter the application was made promptly.

17. Both Defendants adopted each other submissions in response. Counsel for the First Defendant submitted that in determining the promptness of the application the Court must examine the history of the matter after Rahim J gave permission to the Defendants to amend their Defences on the 30th September 2014 and not the date of the Court of Appeal order where Rahim J's decision was affirmed. In particular he submitted that the consequential directions Rahim J gave on the 30th September 2014 which were permission to the Claimants to file and serve a Reply and *"to make any application required to meet the Defendants pleaded case by 21st October 2014"* demonstrated that Rahim J contemplated that since he was giving permission to the Defendants to plead a Trinidad case, the witness statements were filed previous to the amendment and the Claimants may need to adduce additional evidence to meet the Defendants amended case.

18. Counsel further argued that the Claimants demonstrated that they fully understood the directions given by Rahim J on the 30th September 2014 and the opportunity afforded to them to make any application to adduce additional evidence since they filed their Reply on the 21st October 2014 where they responded to every matter concerning the Defendants Trinidad case since they pleaded who they were relying on to rebut and/ or meet the Trinidad case. More importantly they filed an application on the 23rd January 2015 to call Dr Bratt as an expert on the treatment and care available in Trinidad to persons with cerebral palsy ("the Bratt application"). The time between the Rahim J order of the 30th September 2014 and the Court of Appeal order (24th July 2015) did not prevent the Claimants from making the Bratt application. Therefore in considering the promptness of the application the Court must consider the history of the matter from the Rahim J order of the 30th September 2014 and not the Court of Appeal order and in this regard it has failed the test of promptness.

19. Counsel for the Second Defendant examined the history of the matter from the time of the application to amend the Defence and submitted that the grounds in the application failed to address promptness. He submitted that since June 2014 when the Defendants made their application to amend their Defences the Claimants had all the expert and factual evidence which the Defendants intended to rely on in support of their Trinidad case. There is no evidence in the first Williams affidavit or in the Roberts affidavit to indicate why the Claimants did not take any steps from October 2014, which was the date the Amended Defences was filed to the 26th February 2016 to seek to adduce further factual evidence and based on the Claimants submissions they were aware that the matter was complex since 2012.

20. In **Rawti Roopnarine and anor v Harripersad Kissoo and others** Mendonca JA described the approach a Court should take in determining the issue of promptness. At paragraph 21 Mendonca JA stated :

> "21. I will first consider the issue of promptness. Whether an application for relief is made promptly depends on the facts of each case. What is prompt in one situation may not be so considered in other circumstances. Promptness is therefore influenced by the context and facts of each case (see Civil Appeal 91 of 2009, **Trincan Oil Limited v Keith Schnake**.)
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> 28….the application for relief was therefore made long before the trial date and in circumstances where it could cause no prejudice to the parties nor delay in the trial. Such considerations are relevant and form an essential part of the context in which promptness must be considered."

21. What are the relevant facts that influence the context of this case in relation to the promptness of the application? Although Counsel for the Claimants submitted that they first became aware that the substantive matter was complex in 2012 when the amended the Statement of Case was filed, in my view that date is not relevant since the nature of the Defendants Defence changed when they were granted permission on the 30th September 2014 to specifically plead a Trinidad case and the Amended Defences were actually filed on the 6th and 7th October 2014. Therefore by October 2014 the Claimants were aware that

they had to meet a Trinidad case. In my view the promptness of the application must be considered from the 21st October 2014.

22. What evidence did the Claimants have to rely on in October 2014 to meet the Trinidad case? Although the Williams affidavit and the Roberts affidavit do not assist in this regard, the Court records show that there were witness statements for witnesses of fact from David Berahzer (deceased), Maria Berahzer, Rosene Honson, Crystal Jones, Judith Kiss, Sherry Lalla, Ann Marie Mc Intosh, Phillip Metivier, Dr Rajindra Parag, Christopher Pilgrim, Lauren Rebel, Cristal Roberts, Ronald Roberts, Ron Simon, and Michael Tilleman. The extensive expert reports which the Claimants relied on were annexed to both their Re-Amended Statement of Case and the Amended Reply. The reports were from Dr Irene Broadley-Westerduin, Irene (Educational Psychologist), Kathleen Coombes (Speech and Language Pathology), Christopher Daykin (Actuary), Dr Charles Essex (Neurodevelopmental Paediatrician- Life expectancy) , Gene Farmer (Architect and Construction), Susan Filson (Physiotherapy), Shelene Giles (Life Care Planner), Nicholas Holland-Smith (Occupational Therapy), Dr Gerard Hutchinson (Psychiatrist), Dr JohnLlewellyn, (Economist),Rachel Moore (Assistive Technology) Maggie Sargent (Amount of Care), Dr Tim Teologis (Orthopaedic Surgeon) and Warner, Ulric (HR Consultant).

23. What did the Claimants do to adduce further factual evidence to meet the Defendants Trinidad case after the 7th October 2014? Based on the procedural history the Claimants took 3 steps. They filed their Amended Reply on the 21st October 2014. In it they set out that they are relying on additional reports obtained since March 2012 which they annexed at Paragraphs 5, 6, 8, 9, 10, 11, 12, 13, 14, 16 and 20. In paragraph 6 they set out the reason the Second Claimant would require further surgery to his left and right feet. In paragraph 7, they expressly pleaded that the Second Claimant's proper care can only reasonably be provided in the USA. In paragraph 9 it is the first time that they pleaded the Second Claimant's life expectancy and relied on the medical reports. In paragraph 11, the Claimants introduced for the first time the reasons why the Second Claimant's therapeutic needs cannot be met in Trinidad and Tobago with the additional reports they seek to rely

on to support their position. The position was also the same concerning the Second Claimant's need for lifetime care. In paragraph 13 the Second Claimant gave an extensive pleading on the basis for the claim for the costs of modification to the Second Claimant's home and introduced in his pleading the medical reports upon which he relies to prove his claim for conductive education and developmental life skills.

24. At paragraphs 15 and 16, the Second Claimant pleaded the approach the Court should apply in determining the multiplier and, more importantly, he stated an appropriate multiplier and the reports upon which he relied, which he annexed for the first time. He also denied that he can receive care and/or treatment in Trinidad and Tobago for the reasons set out in the preceding paragraphs of the Amended Reply.

25. Indeed Counsel for the Claimants demonstrated that they were aware of the Defendants positive Trinidad case and the need by the Claimants to meet it by admissions made before the Court of Appeal in a procedural appeal in this matter where the Court considered issues surrounding the calling of certain experts to give evidence at the assessment of damages[2]. Mendonca JA who delivered the judgment of the Court stated:

> "79. The Judge noted that the claimants in their amended reply pleaded that they intend to move to the USA. In the amended reply the claimants have indeed pleaded that the second claimant's proper care and needs can only reasonably be provided for in the USA and that the costs of obtaining alternative accommodation in the USA and altering it as necessary, is appropriate to be awarded. In those circumstances the Judge was of the view that the evidence of Werthers and Farmer did in fact support the pleaded case of the claimant.
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> 80. The defendants submitted that such a plea should be contained in the statement of case and not in the reply. I think that the defendants are correct in that regard. Rule 8.6(1) of the CPR provides that the claimant must include on a claim form or in his statement of case a short statement of all the facts on which he relies. A reply is used to respond to any matter raised in the defence which was not and should not have been dealt with in the statement case. So quite clearly in this case the statement of case and not the reply should contain a short statement of the facts in relation to the claimants relocating to the USA insofar as it forms part of the claim on behalf of the claimants. Counsel for the claimants did not appear to take issue with that. He conceded that a reply is no substitute for a statement of case but did point out that those elements in the reply would be

[2] Cristal Roberts and anor v Dr Samantha Bhagan and anor, Civ App P 345 of 2014

relevant to the positive case pleaded by the defendants in their amended defences that reasonable care and support can be provided to the second claimant in this jurisdiction without the necessity for moving to the USA. He however submitted that there is no need to resort to the amended reply to make the defendants' argument as there were sufficient facts set out in the amended statement of case. Counsel in this regard referred to the life care plan of the claimants prepared by Ms. Giles which is annexed to the statement of case." (emphasis mine")

26. The Claimants also appealed the Rahim J order of the 30th September 2014 and they filed the Bratt application. The latter two steps were confirmed by paragraphs 43 to 46 of the Roberts affidavit which stated:

"43.We unsuccessfully resisted the application (Defendants amendments) before Justice Rahim. His decision granting this amendment was given in September 2014. We appealed to the CoA, but although we were upheld on our interpretation of the CPR, the appeal was ultimately unsuccessful (judgment of P 263). In P 263 judgment was given by the Honourable Justice Jamadar JA on the 24th July 2015. The judgment P263 was at the end of 2014-2015 Law Term.

44. It is to be stated that Lead counsel in our written (Claimants) submissions at the hearing of P263 in December 2014, made it clear that if defendants' amendment were to succeed the Claimants would need to make an application and succeed in order to answer the new case advanced by the defendants.

45. Based on P263 and the defendants getting such a late amendment, after exchanged witness statements and expert evidence, I do verily believe that we are entitled to adduce evidence as per the judgement of P263. This was stated as a reasonable consequence by Honorable Jamadar JA in his judgment. As stated by Honorable Justice Jamadar JA *"the Claimants will need to garner new evidence"*.

46. We tried at one stage with Dr. Bratt's report, a seasoned paediatrician practicing in Trinidad & Tobago for the last 37 years. This was an immediate response to the defendants' late amendments with application. We did this since we took the view that we needed medical practitioner's evidence on the Trinidad circumstances. His report filed in the courts in January 2015 was to adduce expert evidence on the paediatric situation in Trinidad for Cerebral Palsy patients. But his report was fiercely resisted by both defendants and accepted by the court in November 2015 as not meeting the threshold requirements for an expert report.

> His qualifications, experience and other things such as hearsay and others were cited as reasons for not meeting the threshold requirements. This was the only expert evidence advanced by us supporting our claim for treatment in US (emphasis mine)."

27. In a judgment by this Court delivered on the 30th November 2015 in this matter I summarized the grounds in support of the Bratt application at paragraph 45 as:

> "45.The reasons in support of the Dr Bratt expert application were summed up in its grounds and repeated by Mr. Williams in his affidavit filed in support. They were: that on the 30th September 2014 Rahim J directed that the Claimants make any applications required to meet the Defendants' pleaded case by 21st October 2014; the Claimants were unable to instruct an expert between 30th September 2014 and 21st October 2014 since they were preparing an Amended Reply to the amended Defence and other applications in this matter before the Court of Appeal; they encountered difficulty in procuring the services of a qualified and experienced expert to deal with issues of available care, treatment and educational facilities in Trinidad and Tobago; the Claimants were able to instruct Dr Bratt on 11th November 2014; due to Dr Bratt's professional commitments he was only able to complete his report ("the Bratt report") in January 2015; a formal application was made to the court at the CMC for "Expert Evidence" on the 24th November 2014 but this was postponed for other interlocutory applications and that Dr Bratt is an experienced, qualified Consultant Pediatrician practicing in Trinidad and Tobago for many years who is well placed to provide the Court with expert assistance and input on issues of availability of care, treatment and educational facilities in Trinidad and Tobago and that his evidence would assist the Court in determining the issue of whether it is reasonable for Isaiah to seek his care and treatment in the USA or Trinidad and Tobago.

28. However despite the pending appeal and after the Rahim J order of the 30th September 2014 permitting the Defendants Amended Defences the Claimants (and the Defendants) were granted permission by Rahim J on the 24th November 2014 and the 15th December 2014 to call expert witnesses in the fields of psychiatry, human resources, assistive technology, occupational therapy, speech and language therapy, physiotherapy, othorpaedics, educational psychology, life expectancy, housing, life care planning, economics and actuarial science. During this time the Claimants were aware that based

on the Rahim J order of the 30th September 2014 they had to meet the Defendants positive Trinidad case. With this knowledge did the Claimants instruct their experts to consider the Trinidad case? There was no evidence from the Williams affidavit or the Roberts affidavit on this burning question. At best, based on paragraph 46 of the Roberts affidavit as set out previously, they pinned their hopes that they would have been successful on the appeal of Rahim J's order of the 30th September 2014.

29. Having not been successful on the appeal the Claimants were aware by the end of July 2015 that the Amended Defences which they had replied to would stand. More importantly based on the procedural history the Claimants were aware that at a hearing on 24th June 2015 based on a request by Dr Powers QC lead Counsel for the Claimants, that the Court had fixed the trial for the entire month of May 2016 so that all the experts and witnesses of fact would have adequate advance notice of the trial. At paragraph 6 of the Williams affidavit it is stated that it was upon the ruling of the Court of Appeal in July 2015 that *"The Claimants, for the first time, now face a positive case as to the availability of treatment and the ability of Isaiah to access it in Trinidad and Tobago"*. In my view that is not entirely accurate since the first time they were aware that they had to meet such a case was in September 2014 when Rahim J gave the Defendants permission to amend the Defences and all the Court of Appeal order of the July 2015 did was confirm to the Claimants that even if they were hoping that they did not have to meet such a case, they now had to prepare for meeting such a case since the order of Rahim J was affirmed.

30. Again upon receipt of the July 2015 order what steps did the Claimants take to adduce the further factual evidence which they now seek to do? Certainly by July 2015 the Claimants were aware that their witness statements for their witnesses of fact were filed before the Defendants were permitted to plead a positive Trinidad case and that the reports of their experts were also all filed before July 2015. There is no evidence in the Williams affidavit to assist with the steps taken by the Claimants. At paragraphs 47 and 51 of the Roberts affidavit he attempts to explain the reasons for not filing the application as :

> "47. We previously did not invest too much finance on further evidence because there were always several intense costly and litigious matters before the

courts and it made sense for us to utilize financial resources prudently. Litigious matters included Interim Payment Applications, P345 & P347, Justice Rahim's Recusal due to relationship connections with the 1st Defendant, Disagreement on Expert Agendas, Disagreement on similar experts meetings, Strike Out Applications, Amended Reply and other unforeseen circumstances. All of the litigious matters had case management implications and as such stymied the case from properly moving forward. These matters were heavily engaging the courts such that a decision on Dr. Bratt's report was eventually given by Honorable Madame Justice Margaret Mohammed on 30th November 2015 as well as others. This is more than one year since we promptly and openly disclosed our intention to the court on Dr. Bratt's evidence. This disclosure was made in November 2014.

48. It is so difficult for Claimants to advance a clinical negligence claim and this was a blow to our case, but we need and must be given the opportunity to meet the case now advanced by the defendants. Such an amendment means additional financial expenditure for us and we were hoping for further interim award by Justice Rahim. This too became a subject of an appeal for us in P29. It takes time to adduce such evidence especially in Trinidad. You basically, have to look, beg and find and hope you can get someone willing to give evidence. This is not an easy process and it takes substantial time. Unlike in the UK, where the medico legal aspects of law are in the mature and well established stages, and in which it is possible to obtain well experienced and registered Experts, this is simply not true of the local scenario. Indeed persons who were approached, even for the liability aspect indicated they feared backlash upon themselves and their families.

49. My unequivocal position is that, had the defendants not waited until the last minute to make an amendment we truly would have been in a much better place with respect to our evidential position. This has prejudice our case as recognized by P263.

50. Moreover had they amended when they should we would have invested our resources to meet both cases which is care in Trinidad and care in the United States.

51.Since the initial amendment by the defendants there have been several issues such as two other CoA applications P345 and 347, P29, P30 a judge recusal due to a relationship connection with the 1st Defendant's husband, a delayed interim application for more money, an amended reply, strike out applications, our expert application of Dr. Bratt, meeting of experts and a host of meeting of agenda issues

for experts, query on a defendant's expert qualifications, loss of our experts due to unforeseen circumstances, another failed mediation (this time the team met in London on the 14th Dec. 2015) all of which have engaged my legal team and the courts for many months. Needless to say everything was hotly litigated by the defendants."

31. It appears that the Claimants are seeking to attribute the fault for them not having made the application earlier on the part of the Defendants who have opposed the applications filed by the Claimants during the period 24th July 2015 to 26th February 2016. What were the applications filed during that period? According to the procedural history the Claimants filed 4 applications and the Defendants filed 2. In addition, the Court also had to consider the outstanding applications to strike out the Amended Reply, the Bratt application, to determine if there should be a joint meeting on Assistive Technology, the disputed agenda items for the joint meeting in certain areas of expertise and the admissibility of Mr. Duncan Fairgrieve's hearsay statements.

32. After July 2015 this matter came up before the Court in preparation for the Trial scheduled for May 2016 on the following occasions 2nd October 2015, 30th November 2015, 26th January 2016, 2nd February 2016, 10th February 2016 and 25th February 2016.

33. On the 2nd October 2015 the Court permitted the Claimants to substitute Dr Charles Essex for Dr Richard Miles as the life expectancy expert for the Second Claimant but refused permission to rely on the updated report of Dr Charles Essex dated May, 2015. The Court also granted a stay on any further updated reports without the permission of the Court and the request for the experts to give evidence via electronic means was refused at that stage. The Court gave directions for the parties to agree the mechanics for the experts in Life Care Planning to meet, for the speech and language pathology joint report and the occupational therapy joint report to be filed on or before 29th October, 2015. Directions were also given for the parties are to agree on questions to be put to the experts who have not met and in default of agreement; the questions are to be submitted to the Court for approval on or before the 3rd November, 2015. The Court directed that the joint meeting of the Economist and the Actuaries to take place on or before the 5th January, 2016.The Court adjourned to the 30th November, 2015 for the ruling of the Defendants application

to strike out the Amended Reply, the Bratt application and to also give its ruling on whether there should be a joint meeting for Assistive Technology to include Ms Jeanine Sabga-Aboud, Robyn Edwards and Rachael Moore.

34. During the hearing of the 2nd October 2015, Counsel for the Claimants Mr McDonald made an oral application to adduce further evidence. The Claimants referred to this in paragraphs 61 and 62 of the Roberts affidavit where he states:

> "61. Mr. Brent McDonald our junior, advocate on October 2nd 2015 via or applications made a request to adduce further evidence. This was the first CMC in the new law term that was after the P263 judgment of 24th July 2015, before Madame Justice Margaret Mohammed. In a previous CMC, when the matter of Dr. Charles Essex replacing Dr, Milles was being heard, Madame Justice Margaret Mohammed had indicated to the parties that there would be no new reports or updating of reports without the Court's permission. This instruction was made since we attempted to substitute Dr. Miles for Dr. Essex's. We wanted to advance Dr Essex's most recent assessment of Isaiah which made in May 2015. Previously Dr. Richard Miles had indicated to us his license would expire and he wouldn't be renewing same. His previous report was in August 2013 required updating as stated by him. He revealed this fact when we told him that trial date was lost due to the recusal; of the Honorable Justice Rahim. This required us to substitute promptly Dr. Miles with Dr. Essex since Dr Miles' qualifications would have expired by the time the new trial date came around. Dr. Essex's updated report of May 2015 was resisted by the defendants and so his previous old report of August 2013 was accepted by the court.
>
> 62. Based on Mr. Mc Donald's oral application on 2nd October 2015, on the 30th November 2015, Madame Justice Margaret Mohammed made a decision which stated that the Claimants should make a formal application to adduce further evidence. Subsequently there were so many matters engaging the courts and my legal team: Round Table Meeting, meeting of experts and Agenda issues, eventually Ms Shelene Giles withdrawal, application for interim, among other things"

35. On the 30th November 2015 the Court refused a joint meeting on experts in the field of Assistive Technology (AT) but gave directions for written questions to be posed by the Defendants to the Claimants expert on AT. The Courts also dismissed the Defendants

application to strike out the Claimants Amended Rely; the Bratt application and the Claimants oral application to adduce further expert evidence. My reasons for refusing the oral application to adduced further expert evidence as stated at paragraph 65 and 66 of the written judgment were:

> "65.Before I leave this matter, I must address the oral application made by Counsel for the Claimants for the Court to permit them to file an additional report in the event the Bratt expert application was unsuccessful.
>
> 66.I refuse such permission on the basis that given the circumstances of this matter it is only fair to the Defendants that such application should be in formal written application where the grounds are properly set out and where the Defendants would be given an opportunity to present their position".[3]

36. Therefore by the 30th November 2015 the Claimants were well aware that if they still intended to adduce additional evidence they had to make a formal application. Notably there was no appeal of any aspect of the order made on the 30th November 2015, in particular of the Court's refusal of the Claimants oral application to be permitted to adduce further factual evidence. Why did the Claimants not appeal the Court's refusal to permit an oral application to adduce further factual evidence? There is no explanation given in the Williams affidavit and the Roberts affidavit.

37. Between the periods of 30th November 2015 to the end of January 2016 no such application was filed by the Claimants. During this period the only applications which were filed by the Claimants concerned an application for the payment out of the sum of $1,260,000.00 and interest which was deposited by the First Defendant based on the interim payment order. The other application which was filed was an application to substitute Ms Shalene Giles with Ms S Callaghan as the Claimants expert in Life Care Planning. If the nature of the relief which is sought in the first application was so important to the Claimants why did they not immediately make a formal application seeking permission to adduce the evidence which they now say is so crucial to them being

[3] CV 2010-01117 Cristal Roberts and anor v Dr Samantha Bhagan and anor decision of Mohammed J dated 30th November 2015

able to meet the Defendants positive Trinidad case which the Court of Appeal permitted since July 2015? The Claimants answer is that they were busy dealing with other contentious applications which the Defendants were vigorously opposing.

38. When the matter came up on the 26th January 2016 the Court made certain orders on the disputed items for the outstanding joint meeting of experts; dismissed the Shalene Giles application and only permitted the payment out of a certain sum of money. The last two orders were appealed by the Claimants and on the 23rd February 2016 the Court of Appeal allowed their appeals.

39. On the 19th January, 2016 the Second Defendant filed an application for specific disclosure and the Claimants filed two applications on the 1st February 2016. In one application the Claimants sought the Courts permission to adduce factual evidence to respond to the Defendants Amended Defences and to rely upon reports from economists and actuaries to respond to the Amended Defences.

40. On the 2nd February 2016 the matter came up before the Court. The Court heard the parties on the admissibility of the hearsay statements by Mr Duncan Fargrieves and adjourned to the 10th February for the ruling. The Court also gave directions for the parties to file affidavits in response to the applications filed on the 19th January 2016 and the two applications filed the 1st February 2016; for the filing of joint reports in the areas of orthopaedics, life expectancy, economists and actuarial science; for the parties to indicate to the Court by 22nd February 2016 the witnesses they intend to call at the Assessment of Damages and the estimated length of time for cross-examination. Notably at this hearing the Court adjourned the Claimants application filed on the 1st February 2016 to rely on further factual evidence (which was almost identical in terms and evidence to the first application) to consider if they wished to file further evidence on the identity of the witnesses and the nature of the evidence. This was not done and instead on the 2nd February 2016 the Claimants filed a further affidavit of Ronald Roberts which was almost identical to the Roberts affidavit.

41. On the 10th February 2016 the Court admitted the hearsay statements of Mr Fairgrieves. The Court gave certain directions pursuant to the Second Defendants for specific disclosure and permission was granted to the Claimants to withdraw the application filed on 1st February, 2016 to adduce factual evidence to respond to the Defendants Amended Defences and adjourned the matter to the 25th February, 2016 for the ruling of the Claimants application filed on 1st February, 2016 to rely upon reports from economic and actuarial experts to respond to the Amended Defences.

42. On the 25th February 2016 the Court dismissed the Claimants application to adduce further evidence from the economists and actuaries and extensive direction on the scheduling of the cross-examination of the parties 23 witnesses of fact (15 for the Claimants, 5 for the First Defendant and 3 for the Second Defendant) and the cross-examination of the 24 experts in the 13 areas of expertise. The Court also ordered that procedure known as "hot tubbing" would be used for the experts in the fields of economics and actuarial science. There are about 5 such witnesses.

43. During the period 24th July 2015 to 26th February 2016 the Claimants made two attempts to adduce further factual evidence to address the Amended Defences. The oral application made by Mr McDonald which was dismissed on the 30th November 2015 and similar application which was filed on the 1st February 2016 and withdrawn on the 10th February 2016 without submissions being made. In the first case the Claimants did not appeal the Court's refusal to permit an oral application. Neither did they immediately file a formal written application given the importance of this evidence to the Claimants. In the second instance when a formal application was filed they did not pursue it. If indeed as the Claimants submitted that July 2015 was the critical date which the Court must consider in determining the promptness of the relief from sanction, then based on the actions by the Claimants they did not treat the need to adduce any further evidence (factual or expert) until after they had seen the joint reports of the experts (paragraph 6 of the first Williams affidavit) and after the time was allocated for the cross-examination of the witnesses on the 25th February 2016

44. In the circumstances, I agree with the Defendants that given the history of the matter the Claimants were aware since October 2014 that they had to meet a positive Trinidad case and they waited until 16 months after that time to now seek relief from sanctions. The Claimants actions demonstrated that they were aware of it as borne out by their Amended Reply; the Claimants appealed the Rahim J order of the 30th September 2014 and they filed the Bratt application. Therefore it is not accurate as the Claimants suggest that they first became aware of the Defendants Trinidad case in July 2015. Given the history of the matter from October 2014 to 26th February 2016 the application was not made promptly.

45. Even if the Claimants date of 24th July 2015 is used as the date the Claimants was first certain that they had to meet the Trinidad case there is still a delay of 7 months from July 2015 to February 2016. During this time the Claimants did not appeal the Court's refusal to adduce further expert evidence and they withdrew a formal written application which was filed on the 1st February 2016. In my view, the Claimants have failed to provide any reasons except to blame the Defendants, to account for the delay for making the first application.

46. Therefore I am not satisfied that the application was made promptly given the context of this case for the aforesaid reasons. Having concluded that the application was not made promptly I can dismiss it at this stage on the basis that it has failed to meet the first test in the threshold requirement with is cumulative. However in the event that I am wrong, I will address the other threshold requirements.

Intentionality

47. It was argued on behalf of the Claimants that their failure to make the application previously was not intentional.

48. Both Counsel for the Defendants submitted that based on the Claimants evidence and the applications they filed in the matter it was intentional on the part of the Claimants not to make the application to adduce further evidence. In particular they submitted that based on paragraphs 7, 11 and other parts of the Amended Reply where the Claimants address

the Amended Defence pleading of the Trinidad case, the Claimants pleaded their position and set out the lay and expert witnesses who they intend to rely on to prove their case and to meet the Trinidad case. In addition paragraph 46 of the Roberts affidavit confirmed the Claimants position that they were relying on Dr Bratt's evidence which was filed in January 2015 to meet the Trinidad case.

49. In **Trincan Oil Ltd v Keith Schanke** [4]Jamadar JA described intentionality as :

> "41. In my opinion, to establish intentionality for the purpose of Part 26.7 (3) (a) what must be demonstrated is a deliberate positive intention not to comply with a rule. This intention can be inferred from the circumstances surrounding the non-compliance. However, where as in this case there is an explanation given for the failure to comply with a rule which, though it may not be a 'good explanation', if it is nevertheless one that is consistent with an intention to appeal, then the requirements of Part 26.7 (3) (a) will more than likely be satisfied.

50. In **AG v Miguel Regis**[5] Chief Justice Archie stated that the determination of whether the failure was intention is *"fact driven and depends on the circumstances of each case, and so also is within the ambit of judicial discretion".*

51. Did the Claimants deliberately not comply with the Rahim J order of the 30th September 2014 and waited until the 26th February 2016 to file the application? The time for the Claimants to file an application to seek to adduce further factual evidence to meet the Defendants' Trinidad case was the 21st October 2014 which was set by the Rahim J order of the 30th September 2014. They made no such application before that date. They filed the Bratt application on the 23rd January 2015. According to paragraph 46 of the Roberts affidavit the reason for filing the Dr Bratt application was to:

> "46. We tried at one stage with Dr. Bratt's report, a seasoned paediatrician practicing in Trinidad & Tobago for the last 37 years. This was an immediate response to the defendants' late amendments with application. We did this since we took the view that we needed medical practitioner's evidence on the Trinidad

[4] Civ Appeal 91 of 2009
[5] Civ Appeal 29 of 2011

circumstances. His report filed in the courts in January 2015 was to adduce expert evidence on the paediatric situation in Trinidad for Cerebral Palsy patients. But his report was fiercely resisted by both defendants and accepted by the court in November 2015 as not meeting the threshold requirements for an expert report. His qualifications, experience and other things such as hearsay and others were cited as reasons for not meeting the threshold requirements. This was the only expert evidence advanced by us supporting our claim for treatment in US."

52. Based on paragraph 46 of the Roberts affidavit the Claimants decided after the Rahim J order of the 30th September 2014, that they would rely on the evidence of Dr Bratt to meet the Defendant's Trinidad case. Paragraphs 6 to 8 of the Williams affidavit confirm that they waited to vigorously pursue the application after they saw the joint statements. In paragraphs 52 to 59 of the Roberts affidavit also confirms that position.

53. Therefore, the Claimants did not file any application before the 21st October 2014 to demonstrate their intention to adduce further factual evidence to meet the Defendants Amended Defence. As I stated earlier their Counsel made an oral application on the 2nd October 2015 which was refused on the 30th November 2015 but they did not appeal the refusal neither did they immediately file a formal application. They filed a formal application on the 1st February 2016 but it was not pursued and withdrawn on the 10th February 2016. There was no explanation in the Williams affidavit nor in the Roberts affidavit stating why an appeal of the refusal in November 2015 was not pursued and why a similar application filed on the 1st February 2016 withdrawn.

54. In my view based on the Claimants evidence in support of the application, they never intended to comply with the Rahim J order of the 30th September 2014 to file any application to adduce additional/ further evidence to meet the Defendants Trinidad case as permitted in the Amended Defences before the 21st October 2014. They pinned their hopes on the Bratt application which failed. Based on paragraphs 6 to 8 of the first Williams affidavit they waited until they saw the joint statements of the experts which have already been filed to see where their evidence was lacking or had fallen short and then they decided to pursue the application vigorously. Further paragraphs 52 to 59 of the Roberts affidavit demonstrates that one of the reasons they have intentionally made the

application at this stage is to update their evidence to the exclusion of the Defendants and not only to be able to adduce factual evidence to meet the Defendants Defences.

55. In the circumstances I have concluded that by the Claimants conduct after the 30th September 2014 they did not intend to comply with the Rahim J order of that date.

Good Explanation

56. Counsel for the Claimants submitted that the explanation for the Claimants delay in making the application can be found at paragraph 46 of the Roberts affidavit. In this regard he was of the view that the explanation was good.

57. Neither Counsel for the Defendants shared his view. Indeed Counsel for the Second Defendant submitted that there was no explanation proffered by the Claimants to say why the application was not filed before. In his view paragraphs 45 to 48 of the Roberts affidavit is a narrative but it is void of any explanation.

58. Paragraphs 44 to 48 of the Roberts affidavit states:

> "44. It is to be stated that Lead counsel in our written (Claimants) submissions at the hearing of P263 in December 2014, made it clear that if defendants' amendment were to succeed the Claimants would need to make an application and succeed in order to answer the new case advanced by the defendants.
>
> 45. Based on P263 and the defendants getting such a late amendment, after exchanged witness statements and expert evidence, I do verily believe that we are entitled to adduce evidence as per the judgement of P263. This was stated as a reasonable consequence by Honorable Jamadar JA in his judgment. As stated by Honorable Justice Jamadar JA *"the Claimants will need to garner new evidence"*.
>
> 46. We tried at one stage with Dr. Bratt's report, a seasoned paediatrician practicing in Trinidad & Tobago for the last 37 years. This was an immediate response to the defendants' late amendments with application. We did this since we took the view that we needed medical practitioner's evidence on the Trinidad circumstances. His report filed in the courts in January 2015 was to adduce expert evidence on the paediatric situation in Trinidad for Cerebral Palsy patients. But

his report was fiercely resisted by both defendants and accepted by the court in November 2015 as not meeting the threshold requirements for an expert report. His qualifications, experience and other things such as hearsay and others were cited as reasons for not meeting the threshold requirements. This was the only expert evidence advanced by us supporting our claim for treatment in US.

47. We previously did not invest too much finance on further evidence because there were always several intense costly and litigious matters before the courts and it made sense for us to utilize financial resources prudently. Litigious matters included Interim Payment Applications, P345 & P347, Justice Rahim's Recusal due to relationship connections with the 1st Defendant, Disagreement on Expert Agendas, Disagreement on similar experts meetings, Strike Out Applications, Amended Reply and other unforeseen circumstances. All of the litigious matters had case management implications and as such stymied the case from properly moving forward. These matters were heavily engaging the courts such that a decision on Dr. Bratt's report was eventually given by Honorable Madame Justice Margaret Mohammed on 30th November 2015 as well as others. This is more than one year since we promptly and openly disclosed our intention to the court on Dr. Bratt's evidence. This disclosure was made in November 2014.

48. It is so difficult for Claimants to advance a clinical negligence claim and this was a blow to our case, but we need and must be given the opportunity to meet the case now advanced by the defendants. Such an amendment means additional financial expenditure for us and we were hoping for further interim award by Justice Rahim. This too became a subject of an appeal for us in P29. It takes time to adduce such evidence especially in Trinidad. You basically, have to look, beg and find and hope you can get someone willing to give evidence. This is not an easy process and it takes substantial time. Unlike in the UK, where the medico legal aspects of law are in the mature and well established stages, and in which it is possible to obtain well experienced and registered Experts, this is simply not true of the local scenario. Indeed persons who were approached, even for the liability aspect indicated they feared backlash upon themselves and their families."

59. However paragraphs 63 and 64 of the Roberts affidavit states the reasons that the application could not be made earlier was because:

"63. This written application could not be made earlier due to the flow of the case with so many immediate matters and now the new such P29 and P30. Issues

faced were Ms. Shelene Giles having to withdraw from this case due to health reasons after being involved for the last 5 years, failed application to secure funding for more evidence, failed Bratt Report application and preparation of Round Table discussions (which failed) and the disclosure application for medical records, all engaged my legal team. My expectation is that if the Court of Appeal granted the defendants an amendment with the assumption that there were settlement talks when there was not any, we should have the opportunity to adduce further evidence since there was an only one settlement discussion on December 14th 2015 in London, England. The discussion failed due to diverging views on quantum.

64. Doing anything in December is always tough. But on the 21st December 2015 an application was promptly made for Ms. Giles our Life Care Planner to be replaced with Ms. Callaghan due to Ms. Giles voluntarily withdrawal due to her health reasons. This application was resisted by the defendants and is now before the COA (P30).

60. In the grounds of the application the reason for the delay was stated to be set out in the Williams affidavit. At paragraphs 3-8 of the Williams affidavit it states:

"3. It was however accepted that the granting of permission for the Defendants to amend their Defence would raise the need for evidence on the part of the Claimants to respond to this new case. At para 76 the Court found:

"There will no doubt also be some prejudice to the appellants if the permission to amend the defence is granted, because the appellants may have to gamer new evidence to specifically rebut this positive case, as opposed to merely proving the reasonableness of a case for permanent relocation and treatment, care and support in the USA."

4. The Court of Appeal was correct. The Claimants are prejudiced by the amendments. The Claimants do need to adduce new evidence to specifically rebut the positive case, and further (and the Court of Appeal would no doubt have foreseen) also to allow for evidence to permit the quantification of their case if the Defendants' amended positive case succeeds.

5. This application deals with the factual evidence required.

6. The Claimants, for the first time, now face a positive case as to the availability of treatment and the ability of Isaiah to access it in Trinidad and Tobago. To some extent, the requirements for treatment, care and support are now only becoming clear following (1) the finalization of joint statements and meetings which is both narrowing areas of dispute; and (2) reflecting the progress the experts have agreed Isaiah has been making in Florida.

7. Whilst the situation in Trinidad was a feature in some of the Claimants' statements, as the Court of Appeal noted, the hurdle is higher following permission to amend being granted.

8. The Claimants request that they be given the opportunity to revisit their evidence following the amendments. This is necessary in order to meet an amended case that, not only was it reasonable to take Isaiah to the USA, but that care, support and treatment could not (and still cannot) have been provided in Trinidad even if they had disregarded Dr Parag's advice to the contrary. The Claimants wish to assert this by evidence both as a matter of reasonable availability and of logistical practicality, from actual users of the health care system in Trinidad (both as parents of disabled children and as professionals)."

61. Further at paragraphs 11 to 17 of the Williams affidavit it is stated:

"11. From July 2015 when the Court of Appeal Judgement of P263 was given, the Claimants have been subjected to two further appeals P345 and 347 which decision was given in October 2015. The Claimants thought it best not to proceed with decision was given.

12. The case was also re-assigned to the Honorable Madame Justice Mohammed.

13. Contentious issues arose related to specific experts and their agendas and meetings took considerable time to prepare and organize.

14. There was contention between the parties with respect to Civ Appeals P345 and P347. Further to this a number of Applications, with each taking up considerable amount of time and effort. Therefore, there were hearings

to deal with the Claimants' Amended Reply, the Defendants' Striking out Applications, Application to substitute Dr. Richard Miles, Applications to reply on the expert evidence of Dr. Bratt, and Application for payment out of court.

15. Further to this there was an on-going round table discussion process which look approximately, approximately eight (8) months to organize and to agree on details, which finally culminated in London UK in December 2015. In addition to the withdrawal of two of the Claimants' experts.

16. In recent time, Application to substitute Shelene Giles, issues relating to hearsay evidence of Duncan Fairgrieve, Second Defendant's Application for Specific Disclosure, two Civil Appeals P029 and P030.

17. The personal circumstances of the First Claimant's father passing on the 25th December 2015 also has to be taken into account."

62. In **Dr Keith Rowley v Anand Ramlogan**[6] Rajnauth-Lee JA described a good explanation as:

> "24. An explanation that connotes real or substantial fault on the part of the person seeking relief cannot amount to a good explanation for the breach. Further, a good explanation does not mean the complete absence of fault: see Mendonca JA in **Rawti Roopnarine and another v Harripersad Kissoo and others** Civil Appeal No 52 of 2012, paragraph 33. What is required is a good explanation not an infallible one. Mendonca JA went on to observe that when considering the explanation for the breach, it must not be subjected to such scrutiny as to require a standard of perfection."

63. Based on the evidence in the Williams affidavit and the Roberts affidavit it appears to me that the reason the Claimants did not pursue the application previously was because they were relying on the report attached to the Bratt application ("the Bratt report") to meet this case and since this was struck out by the Court and they now want another opportunity some 2 months before the trial to be permitted to do so. More than that the Claimants also want to use this opportunity if relief is granted to update the existing evidence if paragraphs 52 to 59 of the Roberts affidavit are accurate. This is against a background

[6] Civ Appeal P215 of 2014

where the Claimants case as pleaded in the Re-Amended Statement of Case and the Amended Reply that the Second Claimants treatment and care is only reasonable in the USA and they were fully aware since July 2015 they had to meet the Defendants positive Trinidad case.

64. In my view the Claimants reasons do not constitute "a good explanation". The Claimants had an opportunity to place the evidence to meet the Defendants case. They used it by filing the Bratt application which they acknowledged. They failed with the Bratt application and they did not appeal and now they are seeking to get their second bite of the cherry. Further the Claimants already have 21 witnesses of fact who will give evidence on the availability of treatment in Trinidad and Tobago to persons with cerebral palsy and one of the witnesses is Dr Rajindra Parag, Consultant in pediatrics and neurology who attended to the Second Claimant since February 2007 to 28th December 2013 when he last saw him.

General compliance

65. It was not disputed by the parties that the Claimant has generally complied with the relevant rules, practice directions, orders and directions.

66. In my view the Claimant failed to satisfy the threshold requirements under Part 26.7 (1) and (3) on the basis that the application was not made promptly, the failure to comply was intentional and there was no good explanation for the breach. For these reasons the application can be dismissed. However for completeness I will still examine the requirements under 26.7 (4).

67. In **Rawti Roopnarine v Harripersad Kissoo and ors** Mendonca JA described the approach a Court should take when considering Part 26.7 (4). At paragraph 43 he stated:

> "Rule 26.7 (4) sets out four (4) factors to which the Court must have regard in deciding whether relief should be granted. The Court should consciously go through the list of factors to be considered. I, however, do not think that list is meant to be exhaustive and the Court should ask itself if there are any other

relevant circumstances that need to be taken into account. Having done so the Court has to engage in a balancing exercise taking into account all the circumstances and determine whether it is in accordance with the overriding objective that relief should be granted."

Administration of Justice

68. Counsel for the Claimants argued that it is in the interest of the administration of justice to grant the Claimants the relief sought in the application since it allows them to place their best case.

69. Counsel for the Second Defendant submitted (and adopted by Counsel for the First Defendant) that the application subverts the administration of justice since the Claimants are telling the Court that they want the Court's permission to adduce further factual evidence to meet the Defendants Amended Defences but they are not prepared to state who the witnesses are, how many witnesses and what the proposed witnesses intend to say. He also argued that in a previous similar application which was filed on the 1st February 2016 and withdrawn on the 10th February 2016 the Court asked the Claimants who the proposed witnesses were and how many there are, if the Claimants are prepared to submit a bare outline of the evidence the proposed witnesses intend to give and on that occasion as in this case the Claimants have refused to provide any such information to the Court. He further argued that if the Court permitted the Claimants to adopt such an approach it would take the administration of the civil justice in this jurisdiction to the pre CPR days where on the day of the trial parties conducted disclosure in the Courtroom, where parties attended the trial without any knowing who the witnesses were and what was the nature of evidence to be led and authorities were handed up during oral closing submissions without any advance notice. He also submitted that the decision to adopt the approach in the application was taken by the Claimants and their attorneys led by Dr Powers QC.

70. To fully appreciate the impact if relief is granted as requested in the application it is necessary to appreciate exactly what is the nature of the order the Claimants are asking the Court to make. While they have stated in the application that the seek *" an order granting*

permission to adduce further factual evidence to respond to the Defendants amended Defences by way of witness statements" it is difficult to envisage how this can be achieved given the evidence at paragraph 10 of the Williams affidavit which states:

> "10. The Claimants submit that it should not be a condition precedent of permission to adduce factual evidence on services and care in Trinidad for them to identify the witnesses on which they rely:
>
> a. Objections to witnesses of facts' evidence on evidential grounds will be the subject of a separate hearing;
>
> b. Parties should not be required to provide advance notice of the evidence from witnesses of fact. For example, the Defendants were not required to identify its witnesses whom they wish to call to prove their case prior to the granting of permission;
>
> c. Should the Defendants claim the timing of the application prejudices them, this can be dealt with by imposing a timetable allowing for swift disclosure of such evidence by the Second Claimant well in advance of the trial in May 2016."

71. Paragraphs 65 to 68 of the Roberts affidavit confirm the position where he states:

> "65.We are presently seeking such new evidence. It is neither necessary nor appropriate to reveal identities of such persons in advance of disclosure of their evidence. Such identification of witnesses was never a requirement of the court for lay evidence for defendants nor the Claimants in the past. We are also seeing the local context and I verily believe it to be strategically detrimental to place names of those we seek to rely upon. We have experienced strange evidence issues with advancing this claim and have learnt from other Claimants advancing clinical negligence claims: pressure appears to be brought upon witnesses not to testify against defendant in medical negligence claims. We submit that an order be made accordingly similar to that in October 2013 or March 2012 or July 2012 or January 2014 or March 2014.
>
> 66. I humbly request that the names of our experts and or potential lay witness at this stage not be required to be divulged to the court since our experience in this matter has shown great reluctance on parties once giving evidence. There is

strange occurrence with locals giving evidence for Claimants and we would wish to safeguard our position. Just recently a father was crying for his wife who died due to a C Section, his cries was due to evidential circumstances as a Claimant in Trinidad trying to get redress via the courts. The defendants cannot be prejudiced by not knowing the names of witnesses ahead of their statements being filed and served.

67. Additionally placing names on such applications for evidence restricts us in the case of some unforeseen circumstances such as unavailability, affordability or something. Such a requirement for an approach in adducing further evidence will only create circulatory applications which only results in more costs and wasted time. There can be no prejudice to the defendants if the Court imposes a date by which the statements are to be served."

72. If I understand the Claimants aforesaid evidence correctly, they are seeking relief to adduce additional/ new evidence 2 months before the trial. They are saying to the Court that they are not required to indicate who are the persons to give the proposed evidence, and the nature of the proposed evidence because they said they have encountered great difficulty in getting persons to give evidence in this matter. Consistent with the Claimants position is the notable absence of the identity of the proposed witnesses and a draft of the gist of their proposed evidence. This is against a backdrop where the Claimants have gotten at least 15 witnesses of fact to file witness statements on their behalf, one of which includes Dr Rajindra Parag consultant in pediatrics and neurology in Trinidad and they have at least 15 experts in 15 fields of various expertise to prepare reports in support of their case.

73. Much has been said about the administration of justice in civil matters this jurisdiction. The early CPR case of **Trincan Oil Limited v Chris Martin** [7] a decision delivered by Jamadar JA in May 2009 made the following observation on the reason for the inclusion for the relief from sanction provision in the CPR in the context of the administration of justice :

"16. Dick Greenslade, the draftsman of the rules, explained the philosophy underlying his proposed rule for relief from sanctions as follows:

[7] Civ Appeal No 65 of 2009

I therefore propose that there be a system whereby the defaulter could apply for relief. There would be a 'threshold' test – the court would grant relief only if it is satisfied that –

- the party in default has acted promptly in applying for relief; and
- the breach of the rule was not intentional; and
- there is a good explanation for the breach; and
- the party in default has generally complied with all other relevant rules and orders.

No relief would be granted if the threshold test were not surmounted. However, passing the threshold test would not be sufficient in itself, it would only give the court a discretion to grant relief. In exercising its discretion the court should take into account

- whether the breach was due to the party or his attorney;
- whether the breach has been or can be remedied within a reasonable time;
- whether the trial date can still be met if relief is granted.

While I do not propose that the rule should specifically say so I would hope that the judiciary's view would be that only in exceptional circumstances should relief be granted if this would entail vacating the trial date.

17. Clearly this philosophy was adopted as Rule 26.7 follows the proposal except that a fourth factor was added to the matters to be taken into account if the 'threshold' test was surmounted: consideration of "the interests of the administration of justice".

18. The changes that appear in Rule 26.7 arose out of the recognition that in Trinidad and Tobago the prevailing civil litigation culture under the RSC, 1975 was one that led to an abuse of the general discretion granted to judges to grant relief from sanctions. The changes introduced in Rule 26.7 were intended to bring about a fundamental shift in the way civil litigation is conducted in Trinidad and Tobago. The belief is that once new normative standards are set and upheld, then over time parties and attorneys will become aware of them and

will adapt their behaviour accordingly, thus effecting the desired change in culture.

19.Simply put, in the context of compliance with rules, orders and directions, the *'laissez–faire'* approach of the past where non-compliance was normative and was fatal to the good administration of justice can no longer be tolerated"

74. One year later in **Trincan Oil Ltd v Keith Schnake**[8] Jamadar JA described the need for the strict approach taken by the Courts in 2010, some 5 years after the introduction of the CPR as:

38…….The timelines in the CPR, 1998 are fair and are to be strictly complied with. The failure to do so without good reason and/or to act promptly to remedy any default can have serious consequences, especially at this time in Trinidad and Tobago when the civil litigation system is suffering the consequences of a laissez-faire approach to the conduct of civil litigation which is undermining public trust and confidence in the administration of justice.[48]

55. The overriding objective may be thought of as describing the purpose and intention of the CPR, 1998 – which is to facilitate dealing with cases justly. However, this concept of dealing with cases justly, in a modern civil litigation system which involves a non-bifurcated docket system and an obligation on individual judicial officers to effectively manage over one thousand cases in a single docket and to deal with <u>all</u> cases effectively and efficiently, demands that generally one considers not simply individual cases but also the integrity and efficiency of the entire civil litigation system. In the court of appeal, though the circumstances are different, the integrity of the entire civil justice system remains an important consideration.

56. This case is, sadly, not an exceptional one, but is rather only too typical of what the culture of civil litigation in Trinidad and Tobago is and has been for far too long. It is hoped that with a sufficiently sustained insistence on 'strict' compliance with the rules for conducting litigation an overall change in the existing culture will be established. When this change is evident the Rules Committee may consider reviewing the strictures of Part 26.7 given the current approach, but until such time this is the manner in which Part 26.7 CPR, 1998 will be applied. Though the core interpretation of the text, faithful to

[8] Civ Appeal No 91 of 2009

legislative intent, its language, structure and context is likely to remain unchanged, its application over time can change as circumstances change. The interpretation of the law is also historically and culturally contextual and as such is an unfolding process. In this way the law is responsive to changes in society.

75. In **Keron Mathews v AG of Trinidad and Tobago**[9] a decision of the Judicial Committee Lord Dyson endorsed the Court of Appeal's philosophical approach to the creation of a new litigation culture by the CPR when he stated at paragraph

> "The Board is conscious of the overriding objective and the Court's obligation to give effect to it when it interprets the meaning of nay rule. The jurisprudence developed by the Court of Appeal emphasizes the fact that the overriding objective of dealing with cases justly includes dealing with cases in ways which are proportionate and dealing with cases expeditiously. It also makes the point that an element of discretion is inherent in the preconditions specified in rule 26.7(3). The Board is alive to these considerations and fully respects the views of the Court of Appeal which have been expressed most clearly and cogently in the cases to which reference has earlier been made. The Board certainly has no wish to impede the Court's commendable desire to encourage a new litigation culture or to undermine the steps that it is taking to rid Trinidad and Tobago of the "cancerous *laissez-faire* approach to civil litigation."[10]

76. The philosophy of the new litigation culture was stated in **Universal Projects Limited v Attorney General of Trinidad and Tobago**[11] Jamadar JA:

> "What therefore appears from this analysis is that a fundamental principle underpinning the CPR, 1998 is that the rules of court are to be followed and court orders are to be complied with. When sanctions are imposed, that signals that non-compliance has serious consequences and there will be no relief unless the strictures of Part 26.7, CPR, 1998 are also complied with. In Trinidad and Tobago, at this time, this approach to civil litigation is considered vital to the creation of an efficient and effective civil justice system. Until there is a real change in the culture in which civil litigation is conducted in Trinidad and Tobago

[9] [2011]UKPC 38
[10] Supra at para 19
[11] Civ Appeal 104 of 2009

it is unlikely that Part 26.7 will be applied differently. There will always be 'hard cases'. Making exceptions in such cases often only creates 'bad law'."[12]

77. Again in 2011 in **AG v Miguel Regis**[13] the Chief Justice Archie referred to previous decisions by the Court of Appeal and noted that:

> "32. The aforesaid decisions of the Court of Appeal on Part 26.7 reflect the exercise of the indigenous court's interpretative function as it develops a local jurisprudence relevant to existing needs and circumstances. While it is acknowledged that other jurisdictions and other cultures may adopt different approaches to similar problems, it is hoped that regard will be paid to the experiences and insights of local judges to know what best suits the needs of local society as they seek, in the exercise of their independent sovereignty and constitutional mandate, to interpret and apply the laws of Trinidad and Tobago in ways that are purposeful for their people.
>
> 33. In the foreword to the CPR 1998 Chief Justice Sharma also commented that:
>
> > "The CPR brings with them a new litigation culture – a paradigm shift in the administration of civil justice."
>
> 34. This "new litigation culture" will not be created without a certain measure of resistance and denial. Clearly no system is perfect. However, it is for the Rules Committee of Trinidad and Tobago, the Judges of the Supreme Court of Trinidad and Tobago and for the Parliament of the Republic of Trinidad and Tobago, acting in consultation with the Law Association of Trinidad and Tobago and all other stakeholders to determine what is best for Trinidad and Tobago. Effecting sustainable change in culture is notoriously challenging. First the need to effect the relevant change must be identified and accepted. The will to do so must follow. Then the implementation of that change must be pursued and sustained for long enough for it to become 'embedded'. And this must all be undertaken in a spirit of collaborative openness and receptivity with a willingness to review, reconsider and change when that is necessary. This has been the approach taken in relation to the CPR, 1998."

[12] Supra para 112
[13] Civ Appeal 79 of 2011

78. Mendonca JA in June 2012 in **Rawti Roopnarine v Harripersad Kisso** stated at paragraph 44 that:

> "…The administration of justice is not assisted when orders are not obeyed and it is burdened with applications for relief from sanctions or extensions of time."

79. What is the paradigm shift meant to be brought about by the CPR the Court of Appeal was speaking about in the aforesaid authorities? Obviously compliance with orders and rules of the Court. The types of order and rules to be complied with are: the rules of pleading where each party is required to properly state the case to be met so that the other party is aware from an early stage in the proceedings the issues to be resolved and the case to be met; disclosure and inspection of documents to be relied on at the trial; filing of witness statements so that parties are aware of the nature of the evidence in chief to be relied on ; by having the evidence in chief in witness statements evidential objections can be dealt with at the pre-trial view which would also save substantial time at the trial. Assistance by the parties in furthering the overriding objective of the CPR of keeping the parties on an equal footing, saving expense, dealing with the case expeditiously, allocating an appropriate share of the Courts resources to each case while taking into account the need to allot resources to other cases. In managing cases the Court must be mindful to ensure that steps are not taken to undermine the integrity and efficiency of the administration of the civil justice system.

80. How will allowing the Claimants 2 months before the trial to revisit their evidence , present new evidence and call witnesses who will only be identified at the start of the trial when both the Court and the Defendants will first be made aware of the nature of their evidence impact on the administration of the civil justice system?

81. In my view it will obviously impact on the time allotted for the trial. In the instant matter the Claimant has filed 15 witness statements as their factual witnesses and reports from at least 15 experts in 15 areas of expertise. At hearing of the 25th February 2016 the Court scheduled the witnesses of fact and the experts for both the Claimants and Defendants to

give evidence on every consecutive day during the month of May 2016. The order made was as follows:

> "2. The Claimants' to call their witnesses of fact on the 2nd May, 2016 at 9:30 a.m. in Courtroom POS 20, 3rd May, 2016 at 9:30 a.m. in Courtroom POS 10 and 4th May, 2016 at 9:30 a.m. in Courtroom POS 15 at the Hall of Justice, Knox Street, Port of Spain. On the said days the Claimants' witnesses of fact will be cross examined by Counsel for the Defendants. Counsel for the Claimants' to indicate via E-mail to the Judicial Support Officer to the Court and copied to the Parties the order of lay witnesses to be called on those days on or before the 10th March, 2016.
>
> 3. The First Defendant to call her witnesses of fact on the 5th May, 2016 at 9:30 am in Courtroom POS 15 at the Hall of Justice, Knox Street, Port of Spain.
>
> 4. The Second Defendant to call it's witnesses of fact on the 6th May, 2016 at 9:30 am in Courtroom POS 15 at the Hall of Justice, Knox Street, Port of Spain.
>
> 5. On the 9th May, 2016 at 9:30 a.m. in Courtroom POS 10 at the Hall of Justice, Knox Street, Port of Spain the Court will hear the experts in the fields of Psychiatry, the H.R. Consultant and Assistive Technology.
>
> 6. On the 10th May, 2016 at 9:30 a.m. in Courtroom POS 15 at the Hall of Justice, Knox Street, Port of Spain the Court will hear the experts in the field of Occupational Therapy.
>
> 7. On the 11th May, 2016 at 9:30 a.m. in Courtroom POS 15 at the Hall of Justice, Knox Street, Port of Spain the Court will hear the experts in the field of Speech and Language and Physiotherapy.
>
> 8. On the 12th May, 2016 at 9:30 a.m. in Courtroom POS 15 at the Hall of Justice, Knox Street, Port of Spain the Court will hear the experts in the field of Orthopedics and Educational Psychologists.
>
> 9. On the 16th May, 2016 at 9:30 a.m. in Courtroom POS 20 at the Hall of Justice, Knox Street, Port of Spain the Court will hear the experts in the field of Life Expectancy and Housing.
>
> 10. On the 17th May, 2016 at 9:30 a.m. in Courtroom POS 10 at the Hall of Justice, Knox Street, Port of Spain the Court will hear the experts in the field of Housing.
>
> 11. On the 18th, 19th and 20th May, 2016 at 9:30 a.m. in Courtroom POS 25 at the Hall of Justice, Knox Street, Port of Spain the Court will hear the experts in the field of Life Care Planning and Ms. Maggie Sargeant.
>
> 12. On the 23rd May, 2016 at 9:30 a.m. in Courtroom POS 20 and the 24th May, 2016 at 9:30 a.m. in Courtroom POS 15 at the Hall of Justice, Knox

Street, Port of Spain the procedure known as "Hot Tubbing" will be used for the experts in the fields of Economics and Actuarial Science.

13. On the morning of the 23rd May, 2016 Court will hear the evidence of Mr. George Sheppard.
14. On the 25th May, 2016 at 9:30 a.m. in Courtroom POS 15 at the Hall of Justice, Knox Street, Port of Spain the Court will hear the evidence of Duncan Fairgrieve.
15. Schedule A and B attached to this Order which forms part of the Order states the time allotted by the Court for the cross examination of the aforesaid witnesses."

82. Notably the scheduling hearing took place the day before the application was filed and Counsel for the Claimants did not indicate that the Court should set aside some time to deal with additional witnesses since they intended to make it. In my view Counsel for the Claimants must have been aware that they intended to file the application at the time of the hearing of the 25th February 2016 when the scheduling of witnesses took place. However he chose to remain silent and not to assist the court in furthering the overriding objective by indicating his intention to file the application.

83. On the 25th February 2016, the Court also gave direction for evidential objections to be submitted in writing by the 21st March 2016 and responses by the 1st April 2016 with the Court delivering its ruling on the 22nd April 2016. If the Claimant is permitted to call new or updated evidence it would mean additional time would have to be allocated at the trial to take their evidence in chief and to deal with evidential objections in circumstances where there is no other available time in the month of May 2016.

84. It would also mean that a substantial amount of the Court's resources which have been used thus far in case managing this matter in preparation for trial would have been wasted since the Court would have to allocate additional time sometime in the 2017 to conclude the trial. The trial was scheduled for May 2016 in June 2015. Due to the Court allocating the entire month of May 2016 for the trial, this has impacted on the Court scheduling of trials in other matters which have been allocated trial dates from June to December 2016. Therefore there are no available trial dates in 2016 for this Court to allocate to the trial of this matter. It is not in dispute that there is a substantial volume of documents to be

perused by the Court and Counsel for the parties in preparation for the trial. There are at least 23 witness statements filed and several expert witnesses on 15 areas of expertise namely: economics and actuarial science, life care planning, life expectancy, orthopaedics, educational psychology, physiotherapy, psychiatry, occupational therapy, speech and language therapy, assistive technology, architecture and construction, housing /accommodation. Joint reports have been filed in educational psychology, physiotherapy, psychiatry, occupational therapy and speech and language therapy. Altogether there are 54 witnesses to be cross-examined, 23 lay witnesses and 31 experts. This is a matter which has already used considerable resources of the Court in preparation for trial on liability which culminated with a consent order on the 21st January 2013. Subsequently, the Court has spent 2 ½ years case managing the matter in preparation for the trial of the Assessment of Damages. There have been several contentious application which include an application for the Amendment of the Defences which was appealed to the Court of Appeal, the appointment of experts, interim payment applications, applications to strike out the amended Reply, an application for certain experts to participate in experts meetings, two applications to substitute experts, applications for payment out, an application for specific disclosure and an application to adduce further factual evidence. The Court also had to rule on dispute agenda items for the experts.

85. It would place the Defendants at a disadvantage and an unequal footing since they would be faced with new evidence at the commencement and during the trial. It will amount to the Court condoning the ambush/surprise to the Defendants by the Claimants new evidence at the trial. If the relief sought in the first application is granted it would mean that to place the Defendants on an equal footing and mitigate any prejudice permission would have to be given to the Defendants to update their evidence which they rely on.

86. How has the management of this matter impacted on the allocation of the Court's resources to other matter? The trial date was scheduled in June 2015 for the entire month of May 2016. With the whole of May 2016 allocated for this trial, the Court has had to reschedule applications and other trials to hear pending and new applications filed by the parties since June 2015 in order to ensure that the trial date is kept. Is it fair to the other

matters which are ready and awaiting a trial to have to be delayed due to this matter? Maybe not.

87. What message will the Court be sending to the legal profession and parties if relief is granted? In my view if relief is granted a clear message to the profession is that this Court is prepared to condone a laissez-faire approach to the conduct of litigation where a party can choose to adopt a particular approach based on its pleadings and 2 years afterwards and 2 months before the trial be permitted to place new evidence before the Court to the detriment of the other parties, in this case the Defendants, after the Court at the High Court and Court of Appeal level has spent considerable time in dealing with many applications in case managing the matter in preparation for trial. Another message if the relief sought is granted, is that a party can be permitted to call new evidence 2 months before a trial once the value of the claim is significant. Indeed if permission is granted the members of the legal profession may be correct to form the view that matters dealt with and time spent during case management are unimportant.

88. While a Court will not step in the away of a party from advancing the best evidence possible in support of its claim, it cannot be in the administration of justice for a Court to permit a party to call witnesses in circumstances where neither the Court nor the parties are aware of the nature of the evidence of the proposed witnesses and the names of the witnesses after a delay of 16 months (from October 2014). It is inconsistent with the overriding objective and to do so would implicate the Court in undermining the administration of justice by condoning trial by ambush.

Failure to comply due to the party's attorney

89. Counsel for the Claimants argued that the failure to comply was not due to the attorney.

90. In response Counsel for the Second Defendant submitted that it was clear from the Roberts affidavit that the Claimants attorneys took a strategic decision to rely on the Dr Bratt report and that this was the reason the first application was not previously pursued.

91. The time for the Claimants making the application to adduce further factual evidence was the 21st October 2014. Based on paragraphs 6 to 8 of the Williams affidavit and paragraphs 46 of the Roberts affidavit it appears that there was a deliberate decision by the Claimants and their attorneys to only rely on the evidence of Dr Bratt to meet the Defences Amended Defences, after the Bratt report was no allowed and that upon receipt and review of the joint statements from experts about one year after the deadline of the 21st October 2014 had passed they then decided to seek new evidence. Therefore the failure to comply laid both with the Claimants and their attorneys.

Transcriptionists

Failure to comply can be remedied within a reasonable time.

92. Counsel for the Claimants admitted that there was no evidence before the Court which would assist the Court in determining if the witness statements of the proposed unnamed witnesses can be remedied within a reasonable time. Counsel for the Second Defendant submitted that there was nothing to respond to since the Claimants did not state who the proposed witnesses are and what is the nature of their evidence.

93. What is the failure the Claimants are asking to be able to remedy within a reasonable time? It cannot be to file witness statements of the proposed witnesses since the first application is simply for them to be permitted to call additional witnesses to adduce further factual evidence to meet the Defendants amended Defence and they have specifically stated that they are not obligated to provide advanced notice of the names of the proposed witnesses of fact nor are they required to state what the proposed witnesses evidence would be (paragraph 10 of the Williams affidavit). In the circumstances it appears that the failure to remedy is simply permission to call certain unnamed witnesses to give me any evidence. There is no evidence to assist me that the failure can be remedied within a reasonable time and I have therefore, so concluded.

Trial dates can be met

94. Counsel for the Claimants argued that if relief is granted and the Claimants are permitted to call additional witnesses to adduce factual evidence to meet the Defendants Amended Defences the Defendants can cross-examine the witnesses and therefore the trial dates ought not to be lost.

95. The Defendants position was that in the absence of any evidence on who are the witnesses and what they are coming to say there is no certainty that the trial dates can still be met.

96. The trial date of May 2016 was fixed since June 2015. The application was made one day after the 25th February 2016 where the Court set out a detailed and elaborate timetable with strict time limits for cross-examination of all the lay witnesses and the expert witnesses. Apart from 1 day in the month of May 2016 the Court has dedicated each working day in that month in order to complete the evidence of the 54 witnesses in the matter. If additional witnesses are to give evidence in circumstances where the names of the witnesses and the nature of the evidence are unknown then it is only reasonable to assume that the trial date will not be met.

Other factors

97. In determining the application I think the other matters such as prejudice to the parties and equal footing are relevant. In my view if relief is not granted there is no prejudice to the Claimants since they already have 15 lay witnesses who are giving evidence on the services available for the treatment of persons with cerebral palsy in Trinidad and Tobago. Further, I do not know the nature of the evidence the proposed witness would give I cannot say with finality that the failure to grant relief would further prejudice the Claimants.

98. On the other hand if relief is granted, the Defendants would be severely prejudiced and placed on an unequal footing since they would be embarking on a trial in circumstances where they would not know who and what the proposed witnesses will be saying. It would limit their level of preparation and at the commencement of the trial they would be faced

with new and updated evidence. Therefore the greater prejudice would be to the Defendants.

99. Having considered the factors under 26.7 (4) the weight of the factors lay in not granting the relief sought.

ORDER

100. The application is dismissed with the Claimants to pay the Defendants costs.

101. The said costs are to be assessed in default of agreement.

Margaret Y Mohammed

Judge