COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

Claim No. 01468 of 2022

BETWEEN

CHANDLER

Claimant

AND

HISCOX DEDICATED CORPORATE MEMBER LIMITED

First Defendant

CERTAIN UNDERWRITER AT LLOYD'S LONDON SUBCRIBING SEVERALLY ON GENERAL POLICY NO. B1230GP04015A19

Second Defendant

BEFORE: The Honorable Madam Justice Carla D. Card-Stubbs

APPEARANCES: Ryan Brown of Counsel for the Claimant
Kevin A.C. Moree and Andrew Smith of Counsel for the First & Second Defendant

HEARING CONDUCTED ON THE PAPERS

Court's Jurisdiction to order determine order of trial of issues and Preliminary issues - Factors - Part 26.1(2) (d) & (e) of the Supreme Court Civil Procedure Rules 2022 (as amended) ("CPR")

Whether Court has jurisdiction to give leave to file a rejoinder – Definition of statement of case – Part 2 CPR

INTRODUCTION AND RULING

1. This ruling concerns applications as to whether certain issues, and if so, what issues ought to be determined as preliminary issues prior to trial as well as an application by the Defendant to strike out the Claimant's Reply.

2. The parties made written representations pursuant Part 26, Rule 26.2(n) CPR which provides that a Court may "instead of holding an oral hearing deal with a matter on written representations submitted by the parties".

3. For the reasons set out below, this Court finds and orders several issues to be tried and determined as preliminary issues. The Court grants leave to the Defendants to amend their Defence. The CPR does not make provision for the filing of a pleading or statement of case known as a rejoinder.

BACKGROUND

4. The Claimant filed its action against the First and Second Respondents on October 19, 2022 by way of a Specially Indorsed Writ of Summons. The First and Second Respondents entered an Appearance and subsequently filed a Defence on November 24, 2022. Shortly thereafter, the Defendants filed a Summons on December 5, 2022 for the determination of a preliminary issue. That application is supported by the Affidavit of Alexandria K. Russell filed June 30, 2023.

5. On December 9, 2022, the Claimant filed a Reply and then on January 5, 2023 filed a summons seeking the determination of certain questions as preliminary issues before trial. That application is supported by the Affidavit of Delevia Rolle filed July 21, 2023.

6. On December 29, 2022, the Claimants filed a Notice of Referral to Case Management. On June 23, 2023, the Defendants filed a Notice of Application to, inter alia, strike out the Reply or, in the alternative, grant the Defendant leave to file a rejoinder. That application is supported by the Affidavit of Alexandria K. Russell.

7. I note for the purposes of this ruling that consideration of the Defendant's application to remove the First Defendant is stayed pending the determination of the preliminary issues.

8. The Claimant's case on his pleading is that he had an insurance policy with the Defendants, the subject of which was his dwelling located in Great Guana, Abaco. The allegation is that the policy was in effect at the time that the Claimant suffered a loss, which loss the Claimant says is covered by the insurance policy. The Claimant's case is that fire and/or explosion destroyed the insured dwelling (pleaded at paragraphs 19 and 22 of the Statement of Claim). The Defendants denied the claim under the pleaded policy. The Claimant claims damages for loss suffered as a result of the Defendant's "negligent performance and/or breach of the Defendants' obligations" under the policy.

9. The Defendants admit underwriting the pleaded homeowner's property policy but deny liability. They plead that the insurance claim made by the Claimant "does not fall within the scope of the policy" (pleaded at paragraph 12 of the Defence). The Defendants plead that the Claimant's "premises was destroyed due to the action of wind during Hurricane Dorian" (pleaded at paragraphs 6 and 11 of the Defence).

10. The parties are therefore joined on the issue of the cause of any loss.

11. The Defendants also pleaded a clause under the policy that they say would bar the Claimant from commencing the action (pleaded at paragraphs 13 and 14 of the Defence). I will refer to same as "Clause G".

12. By virtue of a Reply, the Claimant made several allegations of fact in relation to Clause G. The apparent purpose of the allegations there set out is the Claimant's attempt to show why he ought not to be barred from bringing the action. The Reply also goes on to invoke pieces of legislation that the Claimant pleads would render Clause G ineffective in law.

PRELIMINARY ISSUES

13. The parties separately posited issues for determination prior to trial.

LAW AND ANALYSIS

14. The parties make their application pursuant to the Civil Procedure Rules 2022 (as amended) ("CPR"). The Court's power to determine the order in which issues

should be tried, and therefore what to treat as a preliminary issue is found in Part 26. Part 26.1(2)(d) and (e) provide:

> Court's general powers of management.
>
> (1) The list of powers in this rule is in addition to any powers given to the Court by any other rule, practice directions or any enactment.
>
> (2) Except where these rules provide otherwise, the Court may —
>
> (a) …
>
> (b) …
>
> (c) …
>
> (d) decide the order in which issues are to be tried;
>
> (e) direct a separate trial of any issue;
>
> (f) …
>
> (g) …
>
> (h) …
>
> (i) dismiss or give judgment on a claim after a decision on a preliminary issue;
>
> **……**

15. The purpose of the Part 26 powers is in keeping with the Court's mandate to actively manage cases and to further the overriding objective of enabling the court to deal with cases justly. In determining whether to try issues separately, a court will have regard to the overriding objective. This may include trying preliminary issues to save time and expense.

16. There are several factors that a court ought to bear in mind in making the determination. Counsel for the Claimant relied on the case of *The Ontario Securities Commission v. Pushka and another,* [2018] 1 BHS J. No. 94, which I find to be an accurate statement of the law in this jurisdiction.

17. In *The Ontario Securities Commission v. Pushka and another,* [2018] 1 BHS J. No. 94, Winder, J, as he then was, opined on the factors that a court must take into account in making the determination. In that case, Winder, J considered the former rules under the Rules of the Supreme Court (R.S.C. 1978, as amended). However, Part 26.1(c) and (d) of the CPR is a replica of the previous Rules of the Supreme Court (R.S.C. 1978, as amended) ('RSC') Order 31(A), Rules 18(2)(e) and (f), which provided, "Except where these Rules provide otherwise, the Court may (e) decide the order in which issues are to be tried and (f) direct a separate trial of any issue…" Therefore, on this point, the case of *Ontario Securities Commission v. Pushka and another* is highly instructive and remains good law.

18. At paragraphs 7 – 8, the learned judge said:

> 7. “Additionally, Order 31A of the Rules of the Supreme Court Order 31A imposes upon the court the duty to "deal with cases actively by managing cases, which may include ... (b) identifying the issues in the case at an early stage ... [and] (d) deciding the order in which issues are to be resolved".
>
> 8 Hepburn J. in the Supreme Court case of *Tyrone Morris One Hundred and Sixty-One Others and Paradise Enterprises Ltd* 2014/COM/gen/00471 relying on the decision in *Steel v. Steele (2001) CP Rep 106* enumerated the considerations to be taken into account by a court in determining not to exercise its dis- cretion to order a trial of preliminary issue(s). These were:
>
> (i) "The first question the court should ask itself is whether determination of the preliminary issue would dispose of the whole case or at least one aspect of the whole case."
>
> (ii) "The second question that I think the court should ask itself is whether determination of the is- sue would reduce the time involved in pre-trial preparation;
>
> (iii) "Thirdly, if, as here, the preliminary issue is an issue of law, the court should ask itself how much effort, if any, will be involved identifying the relevant facts for the purpose of the prelimi- nary issue. The greater the effort, self-evidently the more questionable the value of ordering a preliminary issue. (...) The cost and effort in agreeing such a document must to my highly questionable, particularly if there is bound to be a trial relating to a great majority of the issues of law and fact whichever way the preliminary issues is decided."
>
> (iv) "Fourthly, if the preliminary issue is an issue of law, to what extent is it to be determined on agreed facts? The more the facts are in dispute, the greater the risk that the law cannot be safely determined until the disputes of fact have been resolved. Indeed, the determination of a preliminary issue, if there are serious disputes of fact, will run a serious risk of being either un- safe or useless. Unsafe because it may be determined on facts which turn out to be incorrect, and this could even risk unfairly prejudicing one of the parties; useless because, having been determined on facts which turn out to be wrong, it would be of no value."
>
> (v) "Fifthly, where the facts are not agreed, the court should ask itself to what extent that impinges on the value of a preliminary issue."(...) "The characterization of the claim, if there is one, may depend on detailed assessment of the evidence which will have to be considered when deter- mining issues of fact. That can only be

achieved at trial. It could be that, at the hearing, after considering the facts, the trial judge might take a view as to the characterization of the claim- ant's cause of action which differs from the view taken by the court hearing the preliminary is- sue."(...) "It may be that it would not be open to t he claimant to raise the argument at trial, be- cause it has not been pleaded, but it seems to me that determination of the preliminary issue would cut down the flexibility at trial."

(vi) "That, indeed, is effectively a sixth factor which the court should at least take into account when considering whether or not to order or to determine a preliminary issue, namely whether the determination of a preliminary issue may unreasonably fetter either or both parties or, indeed, the court, in achieving a just result which is, of course, at the end of the day what is required of the court at the trial."

(vii) "Seventhly, the court should ask itself to what extent there is a risk of the determination of the preliminary issue increasing costs and/or delaying the trial. Plainly, the greater the delay caused by the preliminary issue and the greater any possibility of increase in cost as a result of the preliminary issue, the less desirable it is to order a preliminary issue. However, in this con- nection, I consider that the court can take into account the possibility that the determination of the preliminary issue may result in a settlement of some sort. In other cases the court may well decide that, although the determination of a preliminary issue would not result in a settlement, it will result in a substantial cutting down of costs and time."

(viii) "Eighthly, the court should ask itself to what extent the determination of a preliminary issue may be irrelevant. Clearly, the more likely it is that the issue will have to be determined by the court, the more appropriate it can be said to be to have it as a preliminary issue."

(ix) "Ninthly, the court should ask itself to what extent is there a risk that the determination of a pre- liminary issue could lead to an application for the pleadings being amended so as to avoid the consequences of the determination."

(x) "Tenthly, the court should ask itself whether, taking into account all the previous points, it is just to order a preliminary issue. In this connection, it should be mentioned that the nine specific tests overlap to some extent."

19. The Defendants relied on the case of *Moorjani Caribbean Limited v Ross University School of Medicine School of Veterinary Medicine (St. Kitts) Limited*

SKBHCV2013/0204 for the statement of factors to be considered by a court in determining whether to make an order for the trial of a preliminary issue.

20. In *Moorjani Caribbean Limited v Ross University School of Medicine School of Veterinary Medicine (St. Kitts) Limited,* Master [Ag.] Actie, in reviewing several cases, cited with approval the case of Eamonn McCann v Denis Desmond. She stated at pages 7 to 8:

> [15] In deciding whether to try preliminary issues in advance of the substantive trial the court needs to be circumspect and must take several matters into consideration. *In Eamonn McCann v Denis Desmond* the court stated:
>
> '7. Therefore, given that the default position is a full hearing, I believe that the questions which would naturally address themselves to the mind of a court in considering an application such as this for a modular hearing, would include:-
>
> (1) Are the issues to be tried by way of a preliminary module, readily capable of determination in isolation from the other issues in dispute between the parties? A modular order should not be made if the case could be characterized as an organic whole, the taking out from which of a series of issues would tear the fabric of what the parties need to litigate so that the case of either of the plaintiff or the defendant would be damaged through being seen in the isolated context of a hearing on a number of limited issues.
>
> (2) Has a clear saving in the time of the court and the costs that the parties might have to bear been identified? The court should not readily embark on a modular hearing, simply because of a contention that a saving in time and costs has been identified, but rather it should view that factor in the context of the need to administer justice in the entire circumstances of the case.
>
> (3) Would a modular order result in any prejudice to the parties? If, for instance, the issue as to what damage was occasioned by reason of the wrong alleged by the plaintiff was so intricately woven in to the proofs that were necessary to the proof of liability for the wrong, so that the removal of the issue of damages would undermine the strength of the plaintiff's cases, or the response which a defendant might make to it, then the order should not be made.
>
> (4) Is a motion a device to suit the moving party or does it genuinely assist the litigation by being of help to the resolution of the issues? I return to the idea that a judge should always be aware that tactical decisions are made, often out of an abundance of enthusiasm, by parties to litigation, who may seek to put the other party at a disadvantage through the obtaining of an

order under the Rules of the Superior Courts or one capable of being made within the inherent jurisdiction of the court.…

21. At page 7 of that judgment, at paragraph 13, Master Actie (Ag.) relied on Barrow JA's observation about making a decision to determine a preliminary issue in *Craig Reeves v Platinum Trading Management Ltd.* SKBHCVAP 2008/004:

> "That is a procedure that the court employs when costs and time can be saved if decisive issues can be tried before the main trial."

22. I now turn to the case before me.

DEFENDANTS' PRELIMINARY ISSUE APPLICATION

23. In this case, the Defendants applied for the trial of a preliminary issue to determine whether the Claimant is barred from commencing/continuing this action against the Defendants as a result of Clause G of "Section I – Conditions" in the Policy. Clause G reads:

> *"G. Suit Against Us*
> *No action can be brought against us unless there has been full compliance with all the terms under Section I of this policy and the action is started within two years after the date of loss."*

24. The Defendants submit on Clause G that, "If the Limitation Clause is operative and enforceable, the claim against the Defendants must fail. This would be entirely dispositive of this action and a significant amount of judicial time and litigation costs would be saved."

25. I agree that the hearing of this issue on a preliminary basis serves the case management objectives and could be a time- and cost-saving exercise. It is an issue that would dispose of at least one aspect of the case. It is a decisive issue that ought to be tried before the main trial which could result in the saving of costs and time.

CLAIMANT'S PRELIMINARY ISSUE APPLICATION

26. For its part, the Claimants seeks the following issues to be tried as preliminary issues:

a. Whether or not General policy B1230GP04015A19 that has been underwritten by the Defendants in favour of the Plaintiff covers direct loss by fire or explosion resulting from windstorm or hail;
b. Whether or not the Homeowners 3- Special Form that contains Clause G of "Section 1-Conditions" to the General Policy B1230GP04015A19 was bought to the attention of the Plaintiff at or before the commencement of the effective period of the General Policy B1230GP04015A19 on 2 January 2019 or immediately thereafter;
c. Whether or not the Defendant took steps in Homeowners 3-Special Form to give prominence to Clause G of "Section 1-Conditions";
d. Whether or not Clause G of "Section 1-Conditions is a term that creates a significant imbalance between the parties rights and obligations under General Policy B1230GP04015A19 to the detriment of the Plaintiff;
e. Whether or not Clause G of "Section 1-Conditions" which restricts the ability of the Plaintiff to commence legal proceedings within the period set out in section 5 of the Limitation Act is contrary to the provision of the Unfair Terms in Consumer Contracts Act.

CLAIMANT'S PRELIMINARY ISSUE APPLICATION – ISSUES (b) TO (e)

27. The Parties are not in any material disagreement as it concerns the articulation of the preliminary issue proffered by the Defendants and those proffered by the Claimant as issues (b) to (e). The Defendants submit that "The Defendants have proffered one general question to be determined while the Claimants have posed several questions in connection with the Limitation Clause, all of which are tangential to the Defendants' general question." The Defendants would prefer that the Court treat merely with their general issue and that the Claimants address their posited issues (b) to (e) by way of response. However, it seems to me that if the purpose of determining priority of issues before trial is to effectively manage the case and deal with the matter expeditiously and fairly, then the "tangential issues" are to be addressed at the same time and by way of this Court's direction.

28. What the Claimant proposes at issues (b) to (e) are articulations relevant to the issues joined between the parties in this case. Those issues are not necessarily captured by the generality of the articulation as proposed in the Defendants' formulation. They all concern how Clause G is to be interpreted and ought to be disposed of together. Having said that, while a court may direct trial on a preliminary issue of law and fact, it is my opinion that the trial of the preliminary

issue must not call for extensive factual analysis which will be traversed again if the matter goes to trial. Issues (b) and (c) as drafted would be issues that require evidence to be laid before the court. They are mixtures of law and fact.

29. I am reminded that to determine facts at a preliminary issue stage, one must be careful not to resolve factual disputes that could render any subsequent trial unsafe. While I believe that in this case the issues under review ought to be dealt with by a preliminary determination and that the factual evidence would be distinct and discreet, it is also apparent that they may be dealt in a manner that does not necessitate the the need for the calling of extensive, or any, factual evidence at this stage. A recasting of these issues would allow for the disposal of this aspect of the case without increasing costs. Therefore the court will reformulate the issues posed by the Claimants at issues (b) to (e) as follows:

(i) Whether the following pre-requisites are necessary to give Clause G effect i.e. make it enforceable

(i) Whether it is necessary to bring Clause G to the attention of the policy holder at or before the commencement of the effective period of the General Policy or immediately thereafter in order to give effect or to enforce to Clause G

(ii) Whether the Defendant(s) must take steps in Homeowners 3-Special Form to give prominence to Clause G of "Section 1-Conditions" in order to give effect or to enforce Clause G

(ii) Whether the following scenarios make Clause G ineffective i.e. render it unenforceable

a. Whether or not Clause G of "Section 1-Conditions is a term that creates a significant imbalance between the parties' rights and obligations under General Policy B1230GP04015A19 to the detriment of a policyholder so as to render it ineffective and unenforceable.

b. Whether or not Clause G of "Section 1-Conditions" which restricts the ability of a Plaintiff to commence legal proceedings within the period set out in section 5 of the Limitation Act is contrary to the provision of the Unfair Terms in Consumer Contracts Act so as to render it ineffective and unenforceable.

CLAIMANT'S PRELIMINARY ISSUE APPLICATION – ISSUE (a)

30. The Claimant has also applied to the court for a trial of a Preliminary issue phrased thus:

> Whether or not General policy B1230GP04015A 19 that has been underwritten by the Defendants in favour of the Plaintiff covers direct loss by fire or explosion resulting from windstorm or hail.

31. The Defendants oppose this application and submis that this issue

> "is not suitable for preliminary determination because:
>
> a. it will be irrelevant and a waste of judicial time and litigation costs if the Court finds that the Residence was destroyed by windstorm/hail rather than fire/explosion; and
> b. even if the Court determines that the Policy does cover direct loss by fire/explosion as a result of windstorm/hail, the cause of the loss is a factual issue which will require extensive expert evidence at the full trial of this matter.
>
> "The real issue to be decided (if this matter goes to a full trial) is the cause of the loss. In this regard, the Fire Coverage Issue is not "readily capable of determination in isolation from the other issues in dispute" nor does it "genuinely assist the litigation by being of help to the resolution of the issues….To use the phrase contained in Rule 26.1(2)(j), preliminarily determining the Fire Coverage Issue "would therefore serve no worthwhile purpose."

32. The Claimant argues that the issue as posed does not require the Court to determine whether the fire was caused by a particular event. The Claimant submits that the issue "simply asks whether the policy covers loss by fire or explosion resulting from windstorm or hail."

33. I find favour with the Claimant's submission in this regard. The issue as posed may be seen as yet another issue, which if decided, would dispose of one discreet aspect of the case. Whether the scope of the policy includes cover of direct loss by fire/explosion as a result of windstorm/hail does not require the investigation of facts suggested by the Defendants. The issue turns on a construction of the contract in the same way that Clause G does.

34. "Type of loss covered" is a matter of construction of the policy document. No, or no great, factual investigation is required in the determination of that issue. If that issue is determined as a preliminary matter, then the relevance of the experts that

the parties indicate that they intend to call become fixed. Based on the pleadings, the Claimant's case is that the loss was occasioned by fire and/or explosion which they say was covered under the policy. If they are correct, then they must go on to prove their case. If they are incorrect on the question of coverage, then the determination of the issue is dispositive of the case.

35. I bear in mind the factors set out in *Ontario Securities Commission v. Pushka and another*, and the overriding objectives of the CPR. It seems to me that a necessary preliminary determination in this matter is the scope of coverage. The parties are joined on what caused the loss which is a factual determination. They have foreshadowed, based on their returns and response at the first Case Management Conference, their intention to call several experts to establish the various positions. It seems to me that such evidence would be relevant only after it is clear as to the type of loss covered.

36. To my mind, making an order for the preliminary determination of the issue (a) as posed by the Claimant is a fair, sensible and economic way to proceed. I note the Defendants' several objections to the determination of this issue. If this is an issue of coverage, it is unclear why this issue is not "readily capable of determination in isolation from the other issues in dispute". It seems to me that this issue is most suitable to be determined in a modular way – it lends itself to isolation from other issues. It also seems to me that if the parties are to go through the exercise of sourcing and engaging experts, then the possibility of reducing the need for experts ought to be appealing. The very argument of the Defendants on Clause G could be adapted here: if the Policy does not cover direct loss by fire/explosion as a result of windstorm/hail, the claim against the Defendants must fail. This would be entirely dispositive of this action and a significant amount of judicial time and litigation costs would be saved.

37. It is my determination that deciding this issue on a preliminary basis could certainly curtail costs and expense. The determination of that issue would dispose of important aspects of the case.

<u>STRIKE OUT APPLICATION AND, ALTERNATIVELY, APPLICATION TO FILE REJOINDER</u>

38. The Defendants filed a Notice of Application seeking the following:

> An Order of the Court pursuant to Rule 26.3 (1) and Rule 20.1 (2) of the Supreme Court Civil procedure Rules, 2022 that:

i. The Reply filed on 9 December, 2022 ("the Reply") be struck out and leave be granted to the Claimant to file and serve an amend Statement of Claim; and
ii. The Defendants be granted leave to file an amended Defence within 14 days from the date on which the amended Statement of Claim is served.

OR Alternatively

iii. An Order of the Court pursuant to Rule 26.1 (2) (v) of the Supreme Court Civil Procedure Rules, 2022 that the Defendant be granted leave to file a rejoinder in response to the Reply.

39. The Defendants submit that the Reply of the Claimant ought to be struck out on the grounds that:

The entirety of the Reply is made up of:

i. Statements of facts which ought to have been included in the Statement of Claim endorsed on the Writ filed on 19 October, 2022
ii. References to statues to be relied upon by the Claimant which ought to have been included in the Statement of Claim, and or legal submissions; and
iii. The Defence does not raise any issues which require definition so as to warrant the necessity of a Reply.

40. The Claimant opposes the application on the basis that the pleadings had been closed and that the Defendants did not file a rejoinder or ask for an extension of time within which to do so. The Claimant pleads in aid Order 18 Rule 20 RSC which provides:

> " (1) The pleadings in an action are deemed to be closed — (a) at the expiration of 14 days after service of the reply or, if there is no reply but only a defence to counterclaim, after service of the defence to counterclaim…"

41. The Claimant also relies on s. 20 of the Interpretation and General Clauses Act, 1978, for the argument that the CPR cannot apply retroactively to pleadings properly filed pursuant to the RSC, the effect of which either takes away or imposes new procedural rights and obligations that would require the recasting and/or refiling of pleadings properly filed.

42. Section 20 of the Interpretation and General Clauses Act, 1978 provides as follows:

> Where a written law repeals in whole or in part any other written law, the repeal shall not —
>
> (a) revive anything not in force or existing at the time at which the repeal takes effect.
>
> (b) affect the previous operation of any written law so repealed or anything duly done or suffered under any written law so repealed.
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed; or
>
> (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any written law so repealed; or
>
> (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed.

43. The Claimant also submits that he was obligated to specifically plead to the facts contained in the Reply - facts that would not be pleaded in the Statement of Claim. Order 18, Rule 8(1) of the former RSC read:

> (1) A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality —
>
> (a) which he alleges makes any claim or defence of the opposite party not maintainable; or
>
> (b) which, if not specifically pleaded, might take the opposite party by surprise; or
>
> (c) which raises issues of fact not arising out of the preceding pleading.

44. The Defendants for their part assert that the Reply raises new factual allegations and creates additional issues in dispute which the Defendants must respond to. They complain that "… the Defendants intend to rely on an estoppel defence in connection with some of the claims made in the Reply and such a defence must be expressly included in the pleadings." The Defendants submit that the allegations contained in the Reply should have been included in the Statement of Claim.

APPLICATION TO FILE A REJOINDER

LAW AND ANALYSIS

45. I will deal with the alternative application first since it is easily disposed of. The Defendants conceded that there is no provision in the CPR that allows for an application for a rejoinder and explains that the application was made out of an abundance of caution.

46. It is correct that there is no provision for a rejoinder under the new rules.

47. Statements of case are the only recognized pleadings under the CPR. The definition section of the CPR at Part 2.1 defines "statement of case" as

> (a) a claim form, statement of claim, defence, counterclaim, additional claim form or defence and a reply; and
> (b) any further information given in relation to any statement of case under Part 34 either voluntarily or by order of the Court.

48. Under the CPR, each party has a duty to set out their case in their statement of case. They cannot rely on facts not alleged in the statement of case. The requirements to set out the case fully are found in the provisions of Part 8 which deals with the initiation of proceedings and of Part 10 which deals with the Defence and Reply. A reply is filed within 14 days of the Defence or with leave of the court (Part 10, Rule 10.9). Thereafter there is no further statement of case that a party may have recourse to. Part 20 which addresses amendments to a Statement of Case also makes it clear that there is no pleading after a Reply. The recourse of a Defendant who wishes to rely on an allegation of fact is to include it in his statement of case. The Defendant may seek leave to amend the Defence.

49. Having regard to the overall scheme of the CPR and the references to statements of case, I find that there is no jurisdiction in this court to give leave for the filing of a pleading called a rejoinder.

APPLICATION TO STRIKE OUT THE REPLY

LAW AND ANALYSIS

50. I think that the law as it relates to retrospective application is irrelevant here. The procedural rules have not robbed the parties of any rights or positions enshrined in law. Under both sets of procedural rules, the court has the jurisdiction and

discretion to cure or to sanction procedural breaches, guided by factors governing the exercise of such discretion. There is, for example, no reason why a court could not exercise its discretion to allow for an extension of time to perform a step once a transition was made to the CPR when it Could very well have exercised such a discretion had the RSC been maintained.

51. The Defendant relied on the case of *Sumitomo Mistsutrust (UK) Ltd et al v Spectrum Galaxy Fund Ltd.* BVIHC (COM) 0172 of 2018 In that case, Jack, J (Ag.) considered the system of pleadings in the Eastern Caribbean in order to determine whether to accede to an application to allow the filing and serving of a Reply. In doing so, Jack, J (Ag.) contrasted the system of pleadings under their previous Rules of the Supreme Court with the current Eastern Caribbean Civil Procedure Rules. The provisions and scheme of the Eastern Caribbean Civil Procedure Rules are closely reflected in the CPR of this jurisdiction. In the learned judge's review, he explained that the common law system of pleadings resulting in the filing of a reply, rejoinder, rebutters etc leading up to a responsive system of pleadings under the RSC, evolved by way of attempt to get the parties to a true joinder of issues. The aim was for all relevant facts to be pleaded and for parties not to be taken by surprise at trial. However, the result could be technical and protracted litigation. Jack, J (Ag.) explained that the current CPR captures the aim of pleadings without the need to be responsive. The current rules require each party to set out all of the facts on which they intend to rely. At paragraph 9, Jack, J (Ag.) opined:

> [9] The general scheme is thus fairly clear. All matters of fact on which the claimant relies should be in the statement of claim (amended, if necessary, to meet points pleaded in the defence); all matters of fact on which the defendant relies should be in the defence (again amended if necessary to respond to amendments to the statement of claim)….

52. In considering the provisions allowing for an application for leave for the filing of a reply, Jack, J (Ag.) opined:

> [11] There is, however, no indication that this provision is intended by a sidewind to alter the general scheme of the CPR that everything in dispute should be in the statement of claim and the defence. Rather, it appears to be a practical measure. In many cases, instead of incurring the expense of amending the statement of claim, it will be simpler and cheaper to put in a short reply, if there is a limited point which needs to be made arising from the defence. There is nothing in the rule which indicates that the old RSC requirement for sequential responsive pleadings must be adopted. Such an interpretation would be contrary to CPR 8.7, 8.7A and 10.5. In deciding whether an allegation should go in a reply or in an amended statement, the

Court should in my judgment be guided by case management principles and apply the overriding objective. It should not be bound by rules of procedure which have ceased to apply in this jurisdiction.

53. In *Sumitomo Mistsutrust (UK) Ltd et al v Spectrum Galaxy Fund Ltd.* BVIHC (COM), Jack, J (Ag.) concludes, at paragraph 12:

> "The modern approach to pleadings is to ensure that an opposing party has proper notice of the case against him, not to look mechanically at whether the old technical rules of pleadings have been observed."

54. Order 18 of the now-repealed RSC which governed pleadings in this jurisdiction, made the following provisions, as far as are relevant, in relation to a Reply:

> 3. (1) A plaintiff on whom a defendant serves a defence must serve a reply on that defendant if it is needed for compliance with Rule 8; and if no reply is served, rule 14(1) will apply.
>
> (2) A plaintiff on whom a defendant serves a counterclaim must, if he intends to defend it, serve on that defendant a defence to counterclaim.
>
> 8. (1) A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality —
>
> 1. (a) which he alleges makes any claim or defence of the opposite party not maintainable; or
> 2. (b) which, if not specifically pleaded, might take the opposite party by surprise; or
> 3. (c) which raises issues of fact not arising out of the preceding pleading.
>
> 10. (1) A party shall not in any pleading make an allegation of fact, or raise any new ground or claim, inconsistent with a previous pleading of his.
>
> (2) Paragraph (1) shall not be taken as prejudicing the right of a party to amend, or apply for leave to amend, his previous pleading so as to plead the allegations or claims in the alternative.
>
> 11. A party may by his pleading raise any point of law.

55. Under the RSC, the rules on pleading were designed to ensure that the parties were clear on the issues joined as the matter proceeded to trial. In the trial, there was to be no tolerance for "trial by ambush" or for trial on matters not pleaded. A party ought to have a fair opportunity to answer the case being brought against it. The same sentiment runs through the CPR. Under these relatively-new rules, a party must set out all the facts relied on in their statement of case. A Claimant

cannot rely on an allegation or factual argument not made in the statement of claim This is set out in Part 8, Rule 8.7. The Defendant must condescend to particulars and it ought to be clear what the Defence denies, admits or does not know to be true. This is the effect of Part 10, Rule 10.5. Gone are the days of bare denials.

56. In this case, the Claimants filed a Reply under the then-governing RSC. The Defendants complain that facts contained in the Reply ought to have been included in the Statement of Claim. Their further complaint is that since the CPR does not allow for any further pleadings after a Reply, they will be left without a pleading to allege facts in response to the Reply. If they are unable to plead those facts, they will not be able to rely on those facts at trial.

57. It is useful to look at the sequence of events. The Claimant filed a Reply to the First and Second Defendant's Defence on December 9, 2022. The Affidavit of Delevia Rolle filed July 21, 2023 avers that the Defendants were served the Reply on the same date by email i.e. December 9, 2022 and that pleadings closed "on or around 23 December 2022."

58. On December 29, 2022, the Claimants filed a Notice of Referral to Case Management. Not until June 23, 2023, did the Defendants file a Notice of Application to, inter alia, strike out the Reply or, in the alternative, grant the Defendant leave to file a rejoinder.

59. The filed Reply avers in part:

> 6. Reference is made at paragraph 13 of the First and Second Defendant's Defence to Clause G of "Section 1 – Conditions". General Policy B1230GP04015A19, which is subject to the Laws of The Bahamas, and all the Forms that are incorporated in same, are standard form contracts that were solely produced by the Defendants. At no material times did the Plaintiff and the Defendants negotiate the terms set out in the Homeowners 3 – Special Form, which is incorporated in or forms part of General Policy B1230GP04015A19. The Homeowners 3 – Special Form along with other documents that make up the aforesaid Policy were not provided to, negotiated by, or brought to the attention of the Plaintiff by the Defendants at the commencement date of the Policy. Likewise, Clause G of "Section 1 – Conditions" was not provided to, negotiated by, or to brought to the attention of the Plaintiff at the commencement date of the Policy.

7. Clause G of “Section 1 – Conditions” is not in a document that has been signed by the Plaintiff and the Defendants and no step has been taken by the Defendants to give it any prominence in the aforesaid Form.

8. Section 5 of the Limitation Act permits a Plaintiff to bring an action arising out of a breach of contract before the expiry of six years from the date on which the cause of action accrued. In the circumstances, Clause G of “Section 1 – Conditions” in the Policy, which restricts the ability of the Plaintiff to commence legal proceedings against within the period set out in section 5 of the Limitation Act, is a term which is contrary to the requirement of good faith as it creates a significant imbalance in the parties’ rights and obligations under the Policy, to the detriment of the Plaintiff and is contrary to the provisions of the Unfair Terms in Consumer Contracts Act.

60. From a perusal of the Reply, there are allegations of fact contained therein, as it relates to the policy contract, that were not set out in the Statement of Claim nor raised directly in the Defence.

61. The Claimant has resisted the Defendants’ application. Their position is that the pleadings are closed.

62. Order 18, r. 20(1) RSC provided:

> 20. (1) The pleadings in an action are deemed to be closed —
> (a) at the expiration of 14 days after service of the reply or, if there is no reply but only a defence to counterclaim, after service of the defence to counterclaim; or
> (b) if neither a reply nor a defence to counterclaim is served, at the expiration of 14 days after service of the defence.
> (2) The pleadings in an action are deemed to be closed at the time provided by paragraph (1) notwithstanding that any request or order for particulars has been made but has not
> been complied with at that time.

63. In reference to the relief sought by the Defendants in their application filed, Counsel for the Defendants submitted,
    a. "…Alternatively, in the abundance of caution and mindful that the CPR is still in its infancy in this jurisdiction, the Defendants have applied for leave of the Court to file a rejoinder under Rule 26.1(2)(v) to ensure they have the opportunity make the necessary pleadings in any event.
    b. At the Case Management Conference, counsel for the Claimant indicated that the Claimant was not willing to come to a consent position amicably resolving this issue because the Defendants ought to have filed a Summons seeking leave to file their rejoinder before the implementation of the CPR.
    c. Respectfully, such a position is simply misguided. Even if a Summons had been filed prior to the CPR, it would not have been heard prior to the Case Management Conference. Therefore, it was inevitable that this issue was always going to arise and be decided under the CPR."

64. Those submissions do not address why the Defendants did not seek leave under the old rules. The CPR did not take effect until March 1, 2023. Counsel's estimate, even if valid, that a summons filed under old rules would not have been heard until after the new rules had taken effect, does not explain why no step was taken until months after pleadings were closed, months after the new CPR rules were in place and months after the Claimant had filed a summons under the RSC on January 5, 2023 seeking the determination of certain questions as preliminary issues before the trial. Until the application was filed on June 23, 2023, it would have appeared from the filings made that the issues were fixed and joined on the matters as pleaded.

65. The Defendants have, through their acknowledged inaction and delay, lost the opportunity to file a rejoinder under old rules. No application was made for leave to file a rejoinder while the RSC was extant. I note the Claimant's resistance to any amendment to any pleadings since the pleadings would have been long closed under the RSC. However, the fact that the pleadings are closed is not, in my opinion, determinative of the matter. It seems to me that this Court can still exercise a discretion by way of a case management exercise in this transitionary period to give effect to a scheme of pleadings where the parties are said to be properly joined on the issues.

66. It is not the function of the technical rules of procedure to prevent parties pleading to the issues. I must consider whether there would be any prejudice to the Claimant if, given the passage of time, the Defendants were to be allowed to make a response to the allegations set out in the Reply.

67. I bear in mind that the Claimant filed a Reply under the old rules that prescribed a sequential code. That code was governed by rules and practice regarding the Reply. On scrutiny of the Reply filed, I am of the opinion that the Reply moves beyond a response to the Defence. It moves beyond admitting or refuting elements of the Defence. What the Claimant has successfully done, in my view, is plead a new factual basis for being able to enforce the insurance policy. No challenge was made to the pleadings under the RSC and this court will not exercise any discretion or jurisdiction to revisit pleadings there.

68. I must consider whether there would be any prejudice to the Claimant if, given the passage of time, the Defendants were to be allowed to make a response to the allegations set out in the Reply.

69. I find that in this case there is no prejudice to the Claimant. It is the Claimant who has set up allegations that the Defendants wish to respond to. It is also the Claimant who has fashioned preliminary issues that would, if determined in their favour, require evidence from both parties at the substantive trial to deal with that issue. Having cast such issues for preliminary determination, it ought not lie in the mouth of the Claimant to prevent the Defendants from setting out their case via pleadings.

70. Will an amendment of pleadings at this stage delay a trial? I take into account that no comprehensive case management directions have been made at this point. No witness statements have been filed. There is no trial timetable that will be delayed or interfered with.

71. I take into account the reminder in *Sumitomo Mistsutrust (UK) Ltd et al v Spectrum Galaxy Fund Ltd.* BVIHC (COM), that the "modern approach to pleadings is to ensure that an opposing party has proper notice of the case against him, not to look mechanically at whether the old technical rules of pleadings have been observed."

72. What this Court has the jurisdiction to do is to see whether, as a case management exercise, the pleadings may be made compliant for the purposes of proceeding under CPR. The Claimant has made an allegation in the Reply, which is now deemed a statement of case under the CPR. It is this Court's determination that the Defendants must be given an opportunity to respond to what essentially are facts leading to a substantive basis supplied by the Claimant for sustaining his case. Those facts are not alleged in the Statement of Claim. If the Defendants are

to respond to the allegation at trial, the Defendants must put all their allegations of fact in their statement of case, namely, the Defence.

73. I agree with the learned judge in *Sumitomo Mistsutrust (UK) Ltd et al v Spectrum Galaxy Fund Ltd.* BVIHC (COM) that there is no requirement for sequential responsive pleadings as under the RSC. The CPR requires that the matters in dispute are discernible from the statements of case. The scheme of the CPR is to ensure that the issues are joined on the pleadings. I must be guided by the mandate to actively case manage and consider how best it may be achieved in this circumstance.

74. The Defendants have asked for the Claimant's Reply to be struck out and for the Claimant to amend his Statement of Claim. To the extent that the Claimant has pleaded his case on the basis of pleadings filed under the RSC, I find no reason to now require him to amend his Statement of Claim in order to allow the Defendants to amend their Defence. The transition to the new rules should not cause litigants to incur unnecessary costs and expense if any perceived defect can be case-managed without prejudice to the parties.

75. I find that the most fair and economical way to proceed in this case is for the Defendants to amend their Defence to respond to the Reply. This obviates the need for the Claimant to make any amendment to his pleadings, and it ought not the prejudice the Claimant. This Court therefore grants leave to the Defendants to amend their Defence to respond to the allegations in the Claimant's reply. Same must be filed and served within 21 days of today's date.

76. While the Defendants are successful in their application for an amendment, I find that, given the considerable lateness of the application and absent a compelling excuse for same, they ought not to be awarded costs. No order is made as to costs.

CONCLUSION

77. For the reasons stated above the Court will order that several issues be tried as preliminary issues and that the Defendants amend their Defence in order to reply to the Claimant's Reply.

78. The CPR does not make provision for the filing of a pleading or statement of case known as a rejoinder.

ORDER

61. The order and directions of this Court are as follows.

1. On the Defendants' Summons filed on December 5, 2022 and on the Claimant's Summons filed on January 5, 2023, the Court directs that the following will be tried as preliminary issues:

A. Whether the Claimant is barred from commencing/continuing this action against the Defendants as a result of Clause G of "Section I – Conditions" in the Policy ("the Limitation Clause") which reads:

> "G. Suit Against Us
>
> No action can be brought against us unless there has been full compliance with all the terms under Section I of this policy and the action is started within two years after the date of loss."

B. Whether the following pre-requisites are necessary to give Clause G effect i.e. make it enforceable

(i) Whether it is necessary to bring Clause G to the attention of the policy holder at or before the commencement of the effective period of the General Policy or immediately thereafter in order to give effect or to enforce to Clause G

(ii) Whether the Defendant(s) must take steps in Homeowners 3-Special Form to give prominence to Clause G of "Section 1-Conditions" in order to give effect or to enforce Clause G

C. Whether the following scenarios make Clause G ineffective i.e. render it unenforceable

a. Whether or not Clause G of "Section 1-Conditions is a term that creates a significant imbalance between the parties' rights and obligations under General Policy B1230GP04015A19 to the detriment of a policyholder so as to render it ineffective and unenforceable.

b. Whether or not Clause G of "Section 1-Conditions" which restricts the ability of a Plaintiff to commence legal

proceedings within the period set out in section 5 of the Limitation Act is contrary to the provision of the Unfair Terms in Consumer Contracts Act so as to render it ineffective and unenforceable.

D. Whether or not General policy B1230GP04015A 19 that has been underwritten by the Defendants in favour of the Plaintiff covers direct loss by fire or explosion resulting from windstorm or hail.

2. On the Defendants' Notice of Application filed on June 23, 2023, leave is granted to the Defendants to amend their Defence to respond to the allegations in the Claimant's Reply. Same must be filed and served within 21 days of this ruling.

3. In each application, each party will bear its own costs.

4. The court will give directions for the hearing of the preliminary issues at the next case management conference to be held on March 21, 2024 at 9:30am.

5. The court will hear and determine the preliminary issues at a hearing on April 25, 2024, commencing at 10:00am.

Dated this 5th day of March 2024

Carla D. Card-Stubbs, J