[2021] JMCC COMM. 45

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2018 CD 00566

BETWEEN	**GUARDIAN LIFE LIMITED**	**CLAIMANT**
AND	**CATHERINE ALLEN**	**DEFENDANT**

Mr Michael Hylton QC, Mr Kevin Powell, Ms Shanique T. Scott and Mr Mikhail Williams, instructed by Hylton Powell, Attorneys-at-Law for the Claimant

Mrs Georgia Gibson Henlin QC, Ms Stephanie Williams and Ms Peta Shea Dawkins instructed by Henlin Gibson Henlin, Attorneys-at-Law for the Defendant, (Formerly represented by Captain Paul Beswick, Ms Terri-Ann Guyah, Ms Gina Chang and Ms Aisha Thomas, instructed by Messrs Ballantyne, Beswick & Company)

HEARD: 25th, 26th November 2019, 28th, 29th, 30th September, 7th October 2020, 23rd February, 16th, 17th, 21st, 22nd, 23rd September, 14th October and 3rd December, 2021

Breach of Confidence – Principles to be applied – What is confidential information – Do special rules apply to consultations between actuaries or between actuaries and other professionals - Whether detriment or loss must be proved

Breach of Contract- Principles to be applied – Whether communication of confidential information in proper course of actuary's duties - Whether detriment or loss must be proved

Breach of Fiduciary Duty – Principles to be applied

Damages –- Whether negotiating damages may be awarded where there is no evidence of actual quantifiable loss

Injunction – Principles – Final prohibitory injunction

LAING, J

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Background

[1] The Claimant, Guardian Life Limited (also referred to herein as "Guardian"), is a company incorporated under the Companies Act of Jamaica with its registered offices at 12 Trafalgar Road, Kingston 5 in the parish of St Andrew which at all material times carried on business as an insurance underwriter.

[2] The Defendant, Catherine Allen is an Actuary. She was employed to Guardian on the 3rd January 2005 pursuant to a contract of Employment dated 14th September 2004 ("the Contract of Employment"). On the 1st November 2006 the Defendant was appointed as Guardian's Appointed Actuary and as one of its Vice Presidents on the 1st April 2007. The Claimant was required to have an Appointed Actuary pursuant to the Insurance Act.

[3] On the 15th August 2018, the Contract of Employment was terminated by the Claimant. The reason proffered was that her position as Appointed Actuary had become redundant. On the same date, the Defendant's laptop computer ("the Laptop") was retrieved from her.

[4] The Claimant retained PricewaterhouseCoopers (PwC) on the 23rd August 2018 to carry out a forensic examination on the Laptop to determine whether or not there had been any unauthorised disclosure of confidential information. PwC was unable to accept the retainer and was replaced by the Mintz Group LLC. On 11th October 2018, the Mintz Group LLC produced a report of its findings in which it concluded that on numerous occasions the Defendant shared the Claimant's confidential information and documents with persons outside the company and who were not entitled to receive such information ("the Mintz Report").

[5] The Claimant asserted that based on the findings of the Mintz Report the Defendant was terminated summarily and for cause by way of letter on 1st November 2018.

[6] The Claimant concluded that the Defendant was in breach of contract and in breach of her fiduciary duties in the following ways, specifically, she had:

a) Emailed Confidential Information to unauthorized persons including employees of Sagicor Group Jamaica, the Claimant's main competitor.

b) Emailed Confidential Information to her personal email addresses; and

c) Attached external hard drives to the laptop computer and transferred substantial amounts of data from the laptop.

[7] The Claimant thereafter instituted this Claim against the Defendant, asserting that she had made unauthorized disclosures of Guardian's confidential information and trade secrets to third parties (the Claim"). Prior to the filing of the Claim, the Defendant had on 3rd September 2018 filed Claim Number No.2018 CD 00503 for damages against Guardian alleging that, *inter alia,* Guardian breached the Contract of Employment and wrongfully dismissed her ("the Concurrent Claim")

The Claim

[8] The Claimant by its Claim Form and Particulars of Claim filed on 12th October 2018 claims damages for breach of contract, breach of fiduciary duty, breach of confidence and also prays for an injunction.

[9] The Claimant relies on clause 15 of the Contract of Employment which contained the following expressed terms as it relates to confidentiality.

> *"You agree,* ***except in the proper course of your duties****, not to divulge to any person, firm, or company, and to use your best endeavours to prevent the unauthorized publication or disclosure of any confidential information concerning the business or finances of this Company or any of its dealings, transactions or affairs of any such confidential information concerning any of its Subsidiaries or Associated Companies or of any of its clients.*
>
> ***Except in the proper course of your duties****, all notes and memoranda of any confidential information concerning the business of the Company or its Subsidiaries or Associated Companies or any of its clients, suppliers, agents or distributors which shall be acquired, received or made by you*

> *during the course of your employment shall be the property of the Company and shall be surrendered by you to someone duly authorised in that behalf at the termination of your employment or at the request of the Board at any time during the course of your employment." (emphasis supplied)*

[10] The Claimant averred that the Defendant by virtue of her position as Guardian's Assistant Vice President, Vice President and Appointed Actuary had access to information which was confidential and which also amounted to trade secrets ("the Confidential Information"). These include:

a. The Claimant's management accounts and details of its profit margins;

b. The Claimant's business strategies;

c. The Claimant's financial and business assumptions;

d. The Claimant's product details and pricing;

e. Details of tenders for new business; and

f. The Claimant's assets and maturity profile of those assets

[11] The Claimant asserted that at all material times, the Defendant owed fiduciary duties to the Claimant including but not limited to:

a. A duty not to disclose the Confidential Information which she received in her capacity as an employee of Guardian;

b. A duty to act with honesty and in good faith; and

c. A duty to act bona fide and in the interest of Guardian and not to exercise her authority for any other collateral purpose.

It was also asserted that there was an implied term of the Contract of Employment that the Defendant would not disclose without authorization or misuse the Confidential Information.

The Issues

[12] Mr Hylton in his opening submissions suggested that the issues raised on the Claim are as follows:

a) Did the Defendant have access to confidential information?

b) If so, whether the Defendant owed Guardian a duty not to disclose its confidential information?

c) Whether the Defendant is exempted from liability under section 45 of the Insurance Act.

d) Whether there was a breach of implied term of the Defendant's employment contact of 2004?

e) Whether the Defendant owed a fiduciary duty to the Claimant.

f) Whether the Defendant had a continuing obligation to not disclose Guardian's confidential information after her termination?

g) Whether there was any loss or damage to the Claimant caused by any action of the Defendant during her employment?

Mr Hylton did a comparison with the issues as identified in the Defendant's opening skeleton submissions and contended that there was substantial agreement between the parties. I will address these issues albeit not in the order with which they appear. I will also consider other issues which I have deemed necessary to explore in order to make a determination on the Claim and Counterclaim herein.

Termination on the ground of Redundancy

[13] At the start of the trial Mr Hylton QC made the observation that the Defendant used the term "purported redundancy" which suggested that she did not accept that the redundancy was genuine and he referred in some detail to the allegations she

made in the Concurrent Claim. Mr Hylton submitted that the issue of the Defendant's termination is not relevant in this case, but considered that this issue may go to the credibility of the witnesses and promised to address these assertions in the course of the evidence. In this regard it is noted that the case presented by the Claimant covered in detail issues related to the Defendant's initial termination on the ground of redundancy.

[14] It appeared that Captain Beswick (who then represented the Defendant) was of the view that this issue of termination was material and the evidence could assist the Defendant's case. The consequence of him holding this view, was that a considerable portion of the trial was occupied with evidence related to the issue of termination of the Contract of Employment and whether the true reason for the Claimant's initial termination of the Defendant's employment termination was really on the basis of redundancy or due to the Defendant's disagreement with the Claimant's actions in relation to the treatment of the company's reserves.

[15] Following the unfortunate and unexpected passing of Captain Beswick, Mrs Gibson Henlin QC took the reins of the Defence. Initially, Mrs Gibson Henlin appeared to have shared the view of Captain Beswick as to the importance of the issue of termination. She pursued a line of cross examination of Mr Tewari which went to the Claimant's assertion that the initial termination of the Defendant was on the basis of redundancy. Mr Tewari is the Chief Executive Officer of Guardian Holdings Limited, which is the parent company of the Claimant. However, in her closing submissions, Mrs Gibson Henlin adopted a more nuanced and pragmatic approach to the evidence which is consistent with the views as initially expressed by Mr Hylton. She has made it patently clear in her written submissions that this Claim does not concern the termination of the Claimant's employment and that those matters are being dealt with in the Concurrent Claim No. 2018 CD 00503. Consequently, no findings are being requested by the Defendant on that issue. This was stated in the following terms:

> *"Insofar as facts concerning the termination arise in this case, it is by way of context only and not requiring findings of fact or relief in relation to wrongful termination"*

[16] The suggested approach of both Queen's Counsel as to the treatment of the evidence of termination is manifestly sensible and I will adopt that approach. I will rehearse and summarize the evidence related to the Defendant's termination, but only to the extent that it is necessary for the purpose of providing context to the issues stemming from the alleged unauthorised disclosure by the Defendant.

The evidence of Mr Hosin in relation to the issue of redundancy

[17] Mr Eric Hosin is the President of the Claimant. He stated that he started working at the Claimant on 1st September 1999 and was appointed its President on 1st January 2010. Prior to that he had spent nine and a half years working at Jamaica Mutual Life and so he has been in the insurance industry for approximately 30 years. He stated that the Defendant was designated the Appointed Actuary of the Claimant in keeping with the provisions of the Insurance Act, which requires insurance companies to appoint an Actuary to carry out the functions prescribed in the Insurance Act and other applicable legislation.

[18] Mr Hosin also gave evidence that the practice in Jamaica and elsewhere in the Caribbean is for life insurance companies to not use their own employees as their Appointed Actuaries and instead to outsource the post. He stated that as at April, 2018 every other life insurance company in Jamaica had done so and specifically identified NCB Insurance Limited, JN Life Insurance and Scotia Bank Life as insurance companies that had done so. He went on to state that appointing an Actuary who is a member of an international firm has several advantages including providing the company with access to independent and more experienced actuarial capabilities and a greater pool of international expertise in the latest actuarial techniques.

[19] Mr Hosin's evidence is that sometime in April 2018 he and Mr Ravi Tewari had discussions about the outsourcing of the functions of Appointed Actuary. Based on

those discussions, Mr Tewari decided that the board of directors should formally consider whether to outsource the functions of the Appointed Actuary. On 15th August 2018 the board met and decided to outsource the functions of Appointed Actuary.

[20] Mr Hosin stated that a special board meeting was held on 15th August 2018. He explained that a special board meeting was necessary because Guardian Holdings Limited, its parent company, had recently shortened the timeline for the Claimant's audit for 2018 to be completed. This meant that the year-end work would have needed to begin in the third quarter of 2018. If a new Appointed Actuary was to complete the necessary work to meet the new timeline, the appointment of that Actuary could not wait until the next meeting of the Claimant's board of directors which was scheduled for October 2018

[21] He stated that the 15th August 2018 board meeting was held at the home of Director Lazarus because Mr Lazarus could not travel to the Claimant's offices. He further stated that as a consequence of the decision to outsource the functions of Appointed Actuary, the Claimant's board also decided at that meeting that the Defendant's position should be made redundant. After the board meeting on 15th August 2018, the Defendant was invited to a meeting in his office along with Mrs Audrey Basanta-Henry. He explained the Board's decisions to the Defendant and the letter of separation was handed to her.

The Evidence of Audrey Basanta Henry relating to redundancy

[22] At the material time, Mrs Basanta-Henry was the Vice President, Corporate Resources, of the Claimant. She was employed to the Claimant since 1st January 2002 and held this position until she retired on 30th June 2020. She stated that position was previously titled Vice President Human Resource and Corporate Services but that title was changed in or about 2007. Her duties and responsibilities included oversight for Guardian's human resource management functions, which comprise of the hiring, deployment, compensation, and termination of employees.

[23] Mrs Basanta-Henry's evidence was that she was invited by Mr Hosin to attend a board meeting on 15th August 2018 to act as recording secretary in substitution for Ms Ashman who was on vacation. She attended and prepared the Minutes of that meeting. During cross examination she explained that she had earlier been advised of the intention to make the position of Appointed Actuary redundant. She had done the calculation of the Defendant's entitlement as at 31st July 2018 because it was anticipated that there would have been board approval of that decision. 15th August 2018 was the date on which the Defendant was scheduled to return from her vacation and this was the least disruptive time to have made the decision to terminate her employment.

[24] Mrs Basanta-Henry said that after the board meeting, she attended a meeting with Mr Hosin and the Defendant in Mr Hosin's office. Mr Hosin advised the Defendant of the board's decision. The Defendant was given the termination letter and advised that she could read it there if she wished but she said she would read it later. Mr Hosin advised the Defendant that he would be meeting with her team and would advise them of the outsourcing of the actuarial functions. Mrs Basanta-Henry said she reminded the Defendant of the Claimant's policy on termination and the need to retrieve the Laptop and that the information technology department could arrange for her to get any personal files that she would like to retain.

[25] Mrs Basanta-Henry stated that after the meeting was concluded she accompanied the Defendant to the Defendant's office to retrieve the Laptop. The Defendant asked what the real reason for her termination was and she told her it was as Mr Hosin had indicated. Mrs Basanta-Henry said that she noticed that wires were connected to the Laptop and called the Vice President, Information Technology, to disconnect the Laptop. While waiting she told the Defendant that if she was not going to exercise her option to purchase the car that had been assigned to her, a motorcar could be provided to her for her use, for three months. The Defendant declined the offer and said that she would use the motorcar she had just bought. The Vice President, Information Technology, then arrived and disconnected the Laptop.

Evidence of Mr Ravi Tewari relating to redundancy

[26] Mr Ravi Tewari's evidence is that he is an Actuary and a director of Guardian Holdings Limited. He is also the Chief Executive Officer of the Guardian Group of Companies and the Chairman of the Claimant. He has more than 25 years' experience in the life, health and pensions industries and more than 20 years' experience as an Actuary. He started his career in actuarial services in 1992 as an Actuarial student working in consultancy in life insurance and in pensions. He became an Actuary in 1998.

[27] His unchallenged evidence is that on or about 23rd April 2018, by an agreement in writing the Claimant retained Eckler Ltd. ("Eckler"), to perform certain actuarial and consulting services. This was while the Defendant was the Appointed Actuary. These services included a review of the 2017 Appointed Actuary Report, and to, *inter alia*, "*Investigate further opportunities of reserves reduction and /or required surplus to eliminate or reducing (sic) any double-counting or conservatism*". Mr Tewari described this as an engagement to do the company's "warm up exercise", (to examine the reserving systems and methodology) which is by definition a short-term engagement. He clarified that, as confirmed in the Board meeting in August, Eckler was engaged on a long-term basis to be the Claimant's Appointed Actuary.

[28] Mr Tewari's evidence describes the process by which the Defendant's position was made redundant and how Eckler came to be the Appointed Actuary as distinct from holding only a short term engagement. He stated that sometime in April 2018, he had discussions with the President of the Claimant, Mr Hosin about outsourcing the functions of the company's Appointed Actuary. They were considering outsourcing those functions having regard to the changing circumstances internationally and the recent practice in Jamaica and the Caribbean generally. These changes involved life insurance companies using an external Actuary to perform the statutory functions of Actuary and every other insurance company by April 2018 had done so. This had also been done in the southern Caribbean in the Trinidadian limb of the Guardian organization. He stated that the reasons to

outsource the position were compelling, as Guardian was growing and had aspirations of becoming an international player.

[29] He explained that his organization realized that, no matter how good an in-house Actuary is, if that person spent most of their career just working for the Guardian group, they would have never had exposure to what was going on in the outside world and received the exposure to new techniques, new ways of working at issues, and the opportunity to collaborate in a wider setting. In addition, there were two secondary reasons. One had to do with the peer review process because in an outsourced firm, there would be a number of actuaries who could peer review each other's work. It was not economically feasible to employ multiple actuaries to do a peer review of a certain quality within a small company. The second subsidiary reason related to succession planning. With a single in-house Actuary the company would be exposed to issues should that Appointed Actuary not be able to continue for any particular reason. By outsourcing to an outside firm, the firm itself has redundant actuarial resources and built-in mechanisms for succession planning.

[30] Mr. Tewari said that the decision to outsource was made in late July or early August 2018 and that it took so long to implement because the company was considering two candidates for appointment, each of which had their respective pros and cons. One candidate was KR Consultants. Their advantage was that they already did the Appointed Actuary work for the Trinidadian parent company and as a consequence they were familiar with the Group of companies to which the Claimant belonged. The disadvantage attached to them, was that because they were only based in Trinidad, their international experience was limited and the Claimant had concerns about whether it would have access to true international expertise.

[31] The other firm was Eckler which was a company based in Canada. Its advantage was that it was an international company seeing a broad range of clients. The disadvantage was their lack of familiarity with the Claimant.

[32] Mr Tewari said that the decision was in favour of the appointment of Eckler. The first reason was that the company found that its expertise vastly outweighed the lack of familiarity. The second reason had to do with its resources because the deadline for the Claimant's audit had become much more aggressive and the Claimant did not believe that KR Consultants had the resources to complete the Claimant's actuarial work in order to deliver in time for the audit.

[33] Mr Tewari later explained that the person within Eckler who was being appointed was Mr Sylvain Goulet and that Mr Kyle Rudden works for KR Consultants. The relevance of these gentlemen's involvement and in particular that of Mr Goulet, will later become apparent.

[34] Mr Tewari stated that he decided to bring the matter before the Claimant's board of directors for them to formally consider whether to outsource the functions of the Appointed Actuary. A special board meeting was convened to consider this issue and the board agreed to outsource the functions. He was not at the 15th August meeting. He explained that even before the advent of the Covid-19 pandemic it was not normal for him to attend board meetings, other than the regular quarterly meetings especially if there is only one item on the agenda. He further explained that it would not have been convenient to wait for the next regular meeting of the board because of the deadlines for the audits. The next regular meeting would have been in October 2018, and the Claimant could not wait until then to make a decision because it had to deliver urgent actuarial work. In cross examination, he admitted that the purpose of the 15th August 2018 meeting was to advise the board of the recommendation of Mr Hosin and himself, based on their decision in April 2018 to outsource the post of Appointed Actuary and to seek the board's approval.

[35] In responding to the question raised by the Defendant as to why the Claimant did not offer the position to her if it wanted to outsource it, Mr Tewari explained that such a step would not have satisfied any of the Claimant's criteria for outsourcing the position, in that, it would not bring new and international expertise and experience into the organization, it would not change the status for succession

planning nor would it have created an environment in which the Claimant could have a robust peer review of actuarial work.

[36] Mr Tewari said that in late July or early August when the decision as to whom the position of Actuary was to be outsourced was made, there was no disagreement with the Defendant at that date. He stated that the last Board Meeting prior to the 15th August 2018 meeting was held in the middle of July of that year. That was the regular second quarter board meeting at which he was present and he chaired the meeting. At that meeting the Claimant's financials were presented, of which one of the key drivers is the movement in the reserves. He said the Defendant was present at the meeting and so was Mr Hosin, but the Defendant raised no concern over the financials. Mr Tewari asserted that the Defendant is in the habit of speaking freely in those meetings, and in fact, she would have contributed to other matters. He admitted that he was speaking of what transpired at the meeting from his recollection and also admitted that before that meeting the Defendant had communicated to Mr Hosin that she was not in agreement with the recommendation.

[37] Mr Tewari was asked to comment on the Defendant's evidence that Mr Kyle Rudden, the Group Consulting Actuary raised concerns regarding the employment of Mr Goulet, particularly as this related to a conflict of interest and reserve reduction consequences. The Defendant stated in her witness statement that in Mr Rudden's expert opinion, the conflict of interest arose because Mr Goulet was the Appointed Actuary for Sagicor Financial Corp. Limited so he would be privy to a competing company's finances and trade secrets. The Defendant also stated in her witness statement that these concerns were shut down as Mr Hosin and Mr Tewari indicated that Mr Goulet was already engaged and any risks posed were manageable.

[38] Mr Tewari explained during the trial that Mr. Rudden originally was of the impression that Mr. Goulet was being engaged to do a one-time *ad hoc* exercise on how the Group goes about its reserving basis, and Mr Rudden did not raise

concerns once he was aware that what the Claimant was in fact doing was to outsource the position of Appointed Actuary to Mr Goulet.

[39] Despite Mr Tewari's characterisation of Mr Rudden's position as not being particularly grave, the Court notes that in Mr Rudden's email to Mr Hosin dated 1st May 2018 it is clear that he had a concern about the potential conflict of interest by Mr Goulet's appointment and opined that:

> *4) It sends the wrong signals to the regulators-"we are hiring independent actuaries to see where we can reduce the reserves set by the appointed actuary". Not what you want to do in the middle of an acquisition process.*

The email also confirms a general concern on the part of Mr Rudden as it related to the reduction of the reserves, to the extent that he stated the following:

> *3) It is relatively easy to identify specific areas in GLL and GLOC's reserves which are known to be over-reserved. However, these are often specific offsets against known under-reserving in other areas. Any review needs to clearly require that the overall reserves still meet corporate and regulatory minimum standards.*
>
> *5) "Reserve reduction" has unexpected consequences, and issues need to be understood. In some cases, reduced reserves may be offset by increased capital requirements. Holding the absolute minimum reserves would also increase volatility in future profits.*

Mr Rudden suggested as an alternative an internal peer review process and if another layer of review was required beyond that to consider a high level additional review by someone attached to KPMG Canada who had done work for the company previously.

[40] The documentary evidence discloses that on 1st May 2018 at 1:51 pm Mr Hosin responded to that email from Mr Rudden and indicated that Eckler had already been engaged to do the project, to which Mr Rudden replied indicating that the next steps forward should be discussed with Ravi [Mr Tewari]. On the same day at 3:07 p.m. Mr Tewari responded to each of the issues raised by Mr Rudden. He indicated that there are challenges with contracting Eckler to do a review of the Claimant's reserves, however, those challenges were manageable. Mr Tewari

confirmed that no one was challenging that any review needs to clearly require that the overall reserves still meet corporate and regulatory minimum standards. He also indicated that he could not see how the hiring of Mr Goulet could be seen as a sinister act.

[41] Consistent with that e-mail, in his evidence in Court Mr Tewari opined that there was no conflict issue because it is very normal for the same Actuary to be the Appointed Actuary for many insurance companies. Mr Goulet was the appointed Actuary for a number of insurance companies, and another Actuary who Mr Tewari knows well, Mr Whittaker, was the Appointed Actuary for three insurance companies.

[42] Mr Tewari was directed by Mrs Gibson Henlin to an e-mail sent on 29th June 2018 at 8:04 pm by the Defendant to Mr Hosin copied to Meghon Miller-Brown of Guardian, but which was forwarded by the Defendant to Megan Irvine at 8:54 p.m. (this email will also be referred to subsequently in this judgment). The essence of the email was that the Defendant did not:

> *"...recommend implementing year-end related reserves changes, in particular changes of this magnitude, this early in the year since we are unsure of what the final reserve impact will be until the final review is completed at year end. Additionally, we need to ensure that any changes made will be acceptable to the auditors and the regulators."*

[43] Mr Tewari was asked by Mrs Gibson Henlin, whether Mr Hosin had a duty to bring the contents of this e-mail to the attention of the board and his response was that Mr Hosin did not if the matter was resolved. He said the fact that the Defendant sat in the meeting and said nothing meant that it was resolved but conceded that Mr Hosin did not introduce the disagreement and inform the board that the matter was resolved. He said that going into the meeting he was not aware that the Defendant disagreed with the treatment of the reserves by the Claimant.

[44] Mr Tewari had been asked by Mr Hylton to comment on an email the Defendant wrote to Mr Goulet and in particular sub-paragraph 3) where she stated that "*The Q2 reserve adjustment will attract increase scrutiny and the Auditors and the*

Regulator". He explained that scrutiny from the regulators is not a bad thing because that is the job of a regulator and the Claimant always conducts itself appropriately. He said that this particular reserve adjustment was a part of the 2018 financial year. The Company received confirmation from the Regulators that they were happy with the company reserving, and this particular reserve adjustment also went through the analysis of the Auditors who were either Ernst & Young or PwC at the time.

[45] Mr Tewari confirmed that the Financial Services Commission ("FSC") confirmed by letter dated 7th November 2019 that it accepted the Appointed Actuary's calculations of the Claimant's financials for the year ending 31st December 2018.

[46] In his oral evidence, Mr Hosin explained that at the end of each financial year the Appointed Actuary is required to submit an Actuary's Report to the FSC. This gives details about the results and movements during the financial year. After this report is submitted, there is discussion between the Actuary and the FSC, by way of response to inquiries that the FSC may have. Thereafter the FSC will write a letter to him.

[47] I have rehearsed the evidence on behalf of the Claimant concerning the evidence of the adjustment of the reserves at great length and perhaps unnecessarily so because I am not required to make a determination as to its correctness. It is desirable that an effort is made during trials to narrow the issues by concentrating on only those issues which are relevant to the determination of the case. I have previously noted that in this case and for the purposes of this judgment it is not necessary for me to make any findings on the issue of the Defendant's dismissal. However, having reviewed the events prior to the dismissal of the Defendant on the ground of redundancy, it is pellucid that there was a disagreement between the Defendant and the Claimant as to the treatment of the reserves. What is also significant is the unchallenged evidence that the FSC ultimately approved the adjustment which the Claimant implemented.

The Defendant's version of the chronology of events leading to her dismissal on the ground of redundancy.

[48] In response to the assertion that she was terminated by reason of redundancy, the Defendant's position was that she was terminated on the false basis of redundancy on 15th August 2018. She said she was terminated because she expressly did not agree with the actions of the Claimant in that she refused to support irresponsible and reckless acts of the Claimant towards the reserves of the Claimant.

[49] I have previously reviewed the evidence of the Claimant as to the reasons it asserts for Eckler's and Mr Goulet's involvement and it requires no further interrogation having regard to my finding that there was a disagreement between the Defendant and the approach suggested by Mr Goulet. I will trace the Defendant's evidence as it relates to the chronology of events in detail, but not for the purpose of resolving any issues related to dismissal on the ground of redundancy. I find that it is necessary to do so to the extent that the Defendant has asserted that some of the emails she sent to Megan Irvine and to a lesser extent to Mr DeCarish, were for the purpose of securing the information contained therein having regard to her concerns. It is therefore necessary to trace the sequence of emails and events to which the Defendant referred because this provides the factual matrix underlying her defence to the claim which alleges that she improperly disclosed the Claimant's confidential information. The issue of the disclosure will be addressed in the second half of this judgment.

[50] On 21st May 2018 Mr Goulet sent an email to the Defendant in which he stated:

> *Good afternoon, Catherine.*
>
> *As you know, we have been asked by Eric to provide a peer review of Guardian's valuation. The objective of our peer review is to either confirm the validity of all assumptions and methods, including calculations, or to otherwise recommend changes based on our findings. If we make such recommendations for changes, it will be your decision to implement them of (sic) not, not ours.*
>
> ...

[51] On Thursday 28th June 2018 Mr Goulet sent an email to Mr Hosin copied to Mr Tewari and the Defendant in which he stated that he needed to discuss it with the Defendant but expected that she would be okay with his proposed changes. He indicated that as of that point the possible changes add up to about JM$ 1.9 B for which he gave a summarised breakdown. He stated that:

> *"If you wanted to release JM$1 B as of July 5th, I am comfortable with that number until I return and finish the review with my staff, and discuss with Cathy [the Defendant] and her staff. But JM$1 B is easily achievable, in my opinion."*

[52] On 29th June 2018 at 20:04 the Defendant wrote an e-mail to Mr Hosin copied to Meghon Miller Brown of the Claimant indicating that as discussed "we" have been working on an analysis of the Company's annuity Mortality Assumptions which was finished and a report of the findings was being prepared. Reference was earlier made to this email, which was put to Mr Tewari as evidence of the Defendant's disagreement with the Claimant's proposed course.

[53] Mr Hosin responded on the same date by e-mail in which he stated that he is using approximately half of the additional amount the Defendant had calculated and the amount recommended by Sylvain [Mr Goulet] which is also a half of what he had determined at that point. He stated that "*Given Sylvain qualifications and very extensive international experience to include detail (sic) knowledge of Jamaica and the rest of the Caribbean we will at this point conservatively use his recommended amount*."

[54] The Defendant explained in her witness statement that the effect of this course as was proposed, was that using half of her assessment of JM$1.12B minus JM$440 million which had already been taken, would result in a net of JM$340 million. Added to this would be the sum of JM$1 billion recommended by Mr Goulet, being approximately half of the JM$1.9 billion which Mr Goulet had determined to be available as per his 28th June 2018 e-mail. The total reserve release would have been JM$1.34 billion, a figure which the Defendant said she found to be reckless on his part.

[55] The Defendant expressed her position in an e-mail to Mr Goulet on 4th July 2018. She referred to Mr Goulet's email to Mr Hosin in which he had stated that based on his preliminary review he would be comfortable with a reserve release of JM$1 billion being reflected in the June 2018 accounts. The Defendant indicated to him that ultimately she is accountable for changes to the reserves and that since he had started the review process, it was necessary for both of them to discuss his review and allow for the analysis of the complete results before implementing changes. She identified several issues that needed to be considered and discussed as follows:

> 1) *Your review is not complete, and you have not yet had a chance to discuss your proposals with me. As such, there may be issues that limit the applicability of your suggestions.*
>
> 2) *The possibility of reserve strengthening at year end exists. We have already seen signs of falling local interest rates and regional economists are expecting an upgrade in Jamaican government debt ratings and strengthening of the Jamaican dollar. There is a distinct possibility that an unpleasant year end surprise awaits us.*
>
> 3) *The Q2 reserve adjustment will attract increased scrutiny from the auditors and the regulator. Any material reserve reductions will need to be clearly supportable. This should not be a problem once all the necessary supporting analyses and documentation has been completed.*
>
> 4) *The auditors' actuaries are having a year-end planning meeting with me tomorrow. This meeting will cover the changes that are being considered for year-end as well as any new information that we are aware of at this point. I will advise the auditors that the Company is likely to make a significant reserve adjustment in Q2 in expectation of reserve releases primarily from reduced expense inflation assumptions recommended by you. When I am asked whether I support this adjustment, I will say that I cannot particularly justify the reduced expense inflation assumption at this point, until you and I have had discussions and I have done the necessary analyses.*
>
> 5) *I know that you are looking for areas where reserves may be safely reduced. However, you would appreciate that there are also areas in the valuation that are possibly currently under-reserved, and that the overall liability position needs to be considered-we will cover this in our discussions.*

[56] The Defendant's evidence is that just minutes after she responded to Mr Goulet's finding on the reserve on 4th July 2018 indicating her concerns, she received a call from Mr Hosin. She recounted that he was very upset at the email and referred to Mr Goulet's seniority in the field and his international experience being superior to her experience and qualification. The Defendant asserted that Mr Hosin contended that she did not want to have the peer review done and did not want anyone to review her work. Moreover, she expressed the view that he *"acted in the most hostile, arrogant, rude and abusive manner and treated me as if I was a child to be disciplined*".

[57] In paragraph 13 of her witness statement, the Defendant stated that on 9th August 2018, she received an email from the Claimant's Compliance Officer Ms Diana Thomas-Morris forwarding a request from the FSC for information relating to the appropriateness of the release of reserve of JM$1.2 billion between June 2017 and June 2018 and a further request for documents in support of the explanation. The email from Ms Diana Thomas-Morris also directed the Defendant to respond to the FSC.

[58] The Defendant stated in paragraph 14 of her witness statement that she responded to Ms Thomas-Morris on the same date, 9th August 2018, by email explaining the year end analyses of the actuarial department for a reduction in reserves of about $1.2B and a further reduction to the actuarial reserves by the Finance Division. She also referred Ms Thomas-Morris to Mrs Meghon Miller-Brown, the Claimant's Chief Financial Officer, for clarification on the remainder of the final June 2018 reserve releases. The Defendant asserted that she was not copied on the response of the Claimant at the time that it was sent to the FSC.

[59] In amplification of her witness statement, the Defendant was asked to explain the circumstances of her email to Diana Thomas-Morris, which is referred to at paragraph 14 of her witness statement. The Defendant explained that paragraph 13 of her witness statement speaks to a series of events and emails that are related to a reduction in reserves that she had not approved and had a disagreement with.

That led to a meeting with the FSC's Chief Actuary, on the 8th of August 2018. The FSC's Chief Actuary came to the Claimant's office to do an inspection of the 2017 Actuary Report and the reserve calculations. During that meeting, the Defendant spoke to her about the concern that she had and the fact that the Company had put a reduction in the reserve of about $1.25 billion into the accounts as at the end of June 2018. The Defendant indicated to her that this reduction in reserve or release in reserve had been included without her approval. That led to the events described in paragraph 13 of her witness statement, which states that (on the next day), the FSC sent an email to the Compliance Officer, Diana Thomas-Morris, requesting that she explain the variance in the reserve that is about $1.2 billion. The Defendant stated that the FSC would have noted the significant variance and this was the same reserve of these figures that she had addressed with the Chief Actuary the day before.

[60] The Defendant said that she did not see and was not copied on the Claimant's response to the FSC's request for an explanation. She only became aware of it on 14th August 2018 when she received an email from the FSC's Chief Actuary, Ms Angela Beckford, attaching the response from the Claimant regarding the basis for the variance of JM$1.2 billion and querying whether the information was accurate. The Defendant has asserted that the response of the Claimant gave the impression that she sanctioned and agreed to the release of these reserves which was not correct. She said she would not have approved any release of reserves to "smooth the profits" of the company since that was neither her role nor function. She stated that the company's response included the following:

> *"It has been GLL's custom to make material adjustments to actuarial reserves at year end, post the reviews of actuarial assumptions and other modifications/fixes conducted by the Actuarial Department. In order to smooth the profits of the company over the financial year, a management decision was taken, with the agreement of our Appointed Actuary to commence the year-end review at half-year for those items that could reasonably be brought forward to June 2018. It was also agreed that the remaining analyses would be completed closer to year end."*

The Defendant confirmed that she was terminated on 15th August 2018 and responded to the FSC's e-mail on 10th September 2018, to which the Claimant responded by letter dated 25th September 2018.

[61] The Defendant's evidence is that on 15th August 2018 she was invited to a meeting where Ms Basanta-Henry and the President Mr Hosin were also present. She was informed that it was the Claimant's decision to terminate her employment with immediate effect. She was then handed a letter dated 15th August 2018 indicating the grounds of termination was due to redundancy of the post and the post of Appointed Actuary was being outsourced to an external Actuary. She was advised to hand over company property which included laptop and keys to the company motor vehicle.

[62] The Defendant said that Ms Basanta-Henry took custody and control of the Laptop and there were no wires, except for the battery charger cable and possibly the network cable attached to the Laptop.

BREACH OF CONFIDENTIALITY AND TERMINATION FOR CAUSE

The Evidence of Audrey Basanta-Henry

[63] Mrs Basanta-Henry stated that as a part of her duties and having regard to the positions held by the Defendant, the Defendant attended various meetings of the Board and other management meetings. The Defendant also took part in confidential discussions and received confidential information regarding the Claimant's operations and business plans. She stated that the Defendant therefore had access to a wide variety of confidential information and documents relating to Guardians business and operations.

[64] Mrs Basanta-Henry also stated that between 2012 and 2017 during the course of her employment, the Defendant signed Guardian's Code of Ethics for Officers as well as a Conflict of Interest and Exemption from Disclosure of Interest Form and a Code of Business Conduct dated 29th November 2013. She stated that the

Contract of Employment included an express provision related to confidentiality and as such the Defendant was under an obligation to not divulge, disclose or misuse any confidential information and document relating to the Claimant's business. Accordingly, the Defendant was not permitted to share Guardian's information and documents with persons outside of the Claimant.

[65] Mrs Basanta-Henry said that the Defendant was assigned the Laptop to carry out her duties which she was allowed to use outside the regular working hours and outside of work. Other managers and executive are also assigned laptops for the same purpose and on the same terms.

[66] Mrs Basanta-Henry's evidence was that after the Laptop was retrieved from the Defendant the Vice President of Information Technology retained custody of it. Two days after it was taken from the Defendant, the Vice President of Information Technology brought the laptop to her, at her request, because based on certain information she received, (from a source she did not wish to disclose), the Defendant had shared with unauthorised persons a confidential Guardian email sent to her by the Claimant's President Mr Hosin.

[67] Mrs Basanta-Henry recounted that she turned on and accessed the Laptop but did not find evidence that the particular confidential e-mail for which she had been searching had been shared. However, she saw other e-mails containing confidential information which had been sent to Megan Irvine who she knew to be an executive at Sagicor Life, one of the Claimant's main competitors.

[68] She stated that as a result of what she saw on the Laptop, she contacted Mr Hosin and informed him of what she had discovered. She received instructions and she immediately turned off the Laptop and locked it away until arrangements were made to retain PricewaterhouseCoopers. PricewaterhouseCoopers were retained on 23rd August 2018.

[69] The Claimant retained Mintz Group LLC ("Mintz") an independent international forensic investigator and examiner with offices in various countries around the

world to carry out the investigation and analysis. On 11th October 2018 Mintz produced a report of its findings which showed that the Defendant forwarded over 1000 emails from her corporate email to her personal email address ("the Mintz Report").

[70] Mrs Basanta-Henry explained that she relied heavily on the Mintz Report. She asserted that whether the information is draft or final no employee including the president has the authority or permission to disclose its financial information to competitors or the public before approval of the financial statements by the Board of Directors of Guardian Holdings Limited and publication of the group consolidated results. She confirmed that the Claimant did not require or authorize the Defendant to share that information and documents with persons outside the company whether as part of her duties as Appointed Actuary or Vice President or at all.

[71] As it relates to the separation of the Defendant for cause, Mrs Basanta-Henry stated that based on legal advice and the findings of the Mintz report, there were grounds on which the Claimant could terminate the Defendant's employment for cause. She further stated that she was directed by Mr Hosin to bring the Mintz report to the Defendant's attention and same was done by way of a letter dated 18th October 2018 which was delivered by one of the Claimant's bearer to the Defendant's home and also a copy was sent the Defendant's attorney-at-law. There was no response from the Defendant and on 1st November 2018 the Claimant terminated the Defendant's employment by a letter of that date.

Sending confidential information to personal account

[72] As it relates to the issue of employees sending work emails to their personal email accounts, Mrs Basanta-Henry said that prior to August 2018 the Claimant did not have a written policy on employees sending work emails to their personal email accounts because it did not believe that such a policy was necessary. This is because, executives and other key personnel are able to access work emails on

the company laptops from their homes and the Claimant pays the full cost of internet service at their homes. Senior officers can also access their work email from cellular phones that were provided to them and as such there was no need for employees to forward work emails to their personal email accounts or personal devices. In August 2018 after the Claimant discovered that the Defendant had disclosed its confidential information, it introduced a policy in relation to work emails which was communicated to all staff in an email on 20th August 2018.

[73] The Defendant's defence was that there was no code or procedure in place at the Claimant whilst she was employed that prevented her from sending emails to her personal account. She maintained that the information emailed from her assigned Guardian email to her personal email was not in breach of any implicit or explicit code, contract, law or duty particularly as it did not involve disbursement to anyone but herself for the purpose of accessing them on her iPad tablet. Any such rule was implemented after her termination on August 15, 2018 and would not apply to her upon her termination.

[74] Mr Hylton in his closing submissions indicated that the Claimant would not be relying on the Claimant's emailing of information to her personal email address, without more, to support its claim and accordingly I need not spill any more ink on this issue.

Emailed Confidential Information to unauthorized persons including employees of Sagicor Group Jamaica, the Claimants main competitor.

[75] Mrs Basanta-Henry asserted that the Mintz Report showed that on numerous occasions the Defendant shared Guardian's confidential information and documents with persons outside the company and who were not entitled to receive that information.

[76] During cross examination Captain Beswick asked Mrs Basanta-Henry to identify from the bundle of agreed documents, evidence of specific documents or communication which the Claimant was asserting contained confidential

information that had been improperly shared. She did so. However, in an effort to avoid unnecessary duplication, I will not rehearse here evidence at this juncture. Instead, when I assess the documents on which Mr Hylton indicated that the Claimant is focusing, I will at that stage include Mrs Basanta-Henry's comments to the extent that they are of assistance.

[77] In paragraph 4 of its Particulars of Claim, the Claimant identified six categories of documents to which it said the Defendant has access. It averred that this information was confidential and amounted to trade secrets. These categories are previously identified in paragraph 11 of this judgment. The Defendant in her Defence denied divulging any or all of the said information. She put the Claimant to proof that all of the said information was confidential and/or amounted to trade secrets. The Defendant also addressed each broad category and commented on why each was not confidential or did not amount to a trade secret.

The Annuity Quote

[78] One of the disclosures which the Claimant had averred it was relying on, relates to an e-mail received by the Defendant in 2014. It has been referred to as the "annuity quote" and I will use that term for convenience only with the full recognition that the Defendant is asserting that it is a misnomer. The Claimant has complained that the Defendant did not refer it to the President of the Claimant. The evidence is that the Defendant forwarded the email she received to Megan Irvine at Sagicor.

[79] The Defendant's evidence was that this communication, which was from Howard Hines was not a request for quotes. It was a request for the rates (assumptions) such as interest rates (same as discount rates), mortality rates, expenses *et cetera* which would be used to do the pricing. Such rates, she stated, are proprietary and are never discussed with the competitor or anyone outside of the Claimant and this was never divulged to Mr Howard Hines, the person who made the request. She explained that at that particular time she wanted a second opinion and as such she chose to consult with Megan Irvine due to her expertise in this area being the

Assistant Vice President of Pension and Annuities at Sagicor. The Defendant said that she and Megan concluded that to satisfy the request as framed would mean that she would have to provide the Claimant's rates. This would have constituted a flagrant breach of the Claimant's policy and as such she did not do that.

[80] The evidence of the Defendant on the issue of the nature of Mr Hines' enquiry is supported by the evidence of Mr St Elmo Whyte. He is a Consulting Actuary and Lecturer at the University of West Indies, Mona Campus and the Managing Director of ACTMAN International Limited a consulting company.

[81] Mr White explained that a client of his, was in the process of de-risking an aspect of its pension plan and had approved the purchase of annuities to complete the process. It was already agreed who the provider would be and that provider was neither the Claimant nor Sagicor. He stated that his client sought his professional opinion as to whether the terms offered by the selected provider were consistent with the market. Based on this he asked Mr Howard Hines, his colleague to find out from both Sagicor and the Claimant the basis they used for pricing a particularly a large block of annuities. Mr Hines sent those e-mails on 20th May 2014.

[82] In his closing submissions, Mr Hylton adopted a much more targeted and focused approach and indicated that he would not be relying on the annuity quote. Mr Hylton has identified 8 email communications including attachments on which the Claimant wishes to concentrate and I will examine the evidence in respect of each of them in turn. Five of these emails were sent to Mr Sean DeCarish ("Mr DeCarish") the Defendant's spouse and three to Ms Megan Irvine, her close friend. I will firstly consider whether the emails and documents attached thereto are confidential. It is therefore convenient at this juncture to consider a necessary component of this analysis, namely, what exactly is confidential information?

What is confidential information?

[83] The Defendant accepted as a working definition Mr Hylton's suggestion that confidential information is information not publicly available which the holder does

not want to become publicly available. She said that during her employment as Appointed Actuary she attended board meetings and received board papers but did not agree that those board papers fall within the definition of confidential information as a broad category. She stated that in her opinion there may be information in the board papers which is confidential.

[84] The Defendant conceded that to the extent that in paragraph 5 of her witness statement she denied divulging any confidential information, that was incorrect. She said she meant that except in the proper course of doing her duties, she did not divulge any confidential information or trade secrets.

[85] I had initially expressed concern as to the accuracy of the definition on which the parties had agreed in the absence of any support in law, but having examined a number of authorities I have concluded that my concern was unwarranted. In ***Coco v AN Clark Engineers*** *Ltd [1969] RPC 41 at 47* Megarry J held that one of the elements necessary to found an action for breach of confidence was that the information itself must "*have the necessary quality of confidence about it*". Additionally, in ***Force India Formula One Team Ltd v 1 Malaysia Racing Team SDN BHD and others*** *[2012] EWHC 616 (Ch)* Arnold J at paragraph 217 identified the expression '*the necessary quality of confidence*' as having been coined by Lord Greene in the case of ***Saltman Engineering Co Ltd v Campbell Engineering co Ltd*** *[1963] 3 All ER 413*, in which he defined this quality by antithesis: "*namely, it must not be something which is public property and public knowledge*".

[86] ***In Moorgate Tobacco Co Ltd v Phillip Morris Ltd and Another*** *[1985] RPC 219 at 234*, the Court considered the scope of the Court's equitable jurisdiction to grant relief against the actual or threatened abuse of confidential information in certain circumstances. The learned judge opined that relief would not be available unless, in addition to the information having the necessary quality of confidence about it, the information should be "*significant, not necessarily in the sense of commercially valuable*" (see ***Argyll v Argyll*** *[1967] Ch 302 at 329*) but in the sense that the preservation of its confidentiality or secrecy is of substantial concern to the plaintiff.

[87] Having considered these authorities, I have concluded that the working definition of what constitutes a confidential document that was proposed by Mr Hylton and adopted by the Defendant exhibits the two essential characteristics of confidential information and is an accurate definition in law.

THE RELEVANT DOCUMENTS - EMAILS TO MR DECARISH

A. *(1.) 6th November 2009 email from the Defendant to Mr DeCarish headed "stuff to Ravi" (the Stuff to Ravi Email")*

[88] This email consists of an analysis of a number of issues related to the operations of the Claimant. These include low product profitability, high expenses and criticism of the management of expenses, unproductive sales force and criticism of a number of decisions made by Mr Hosin. It also contained the Defendant's opinion that one of the Claimant's products –"Medecus" was unprofitable because the loss ratios were too high and there needed to be a claims cost study. The Medecus product also features in another document and will be discussed in greater detail below.

[89] Mr Tewari was shown this communication by Mr Hylton and he stated that it was, in his view, confidential information. He said it contains a discussion of what was going on within the company as it relates to the treatment of valuations, and the treatment of some counter-bonds. He acknowledged that, it does not contain any figures but it contains information about what was happening internally within the company. He conceded that he was not aware that the Claimant suffered any loss or detriment by disclosure of this email to Mr DeCarish.

[90] Mrs Henlin suggested to Mr Tewari that the last subhead in this email "Medecus unprofitable" was information that was shared with Mr. DeCarish in the execution of the Defendant's duties given that she was communicating with a finance professional and seeking assistance from him. Mr Tewari disagreed. He also disagreed that the information contained therein was consequent on the cost study referred to therein. Mr Tewari said this is not the information that you use to do a

cost study of health plans. He explained that you would need to break it down by what people are claiming for, what areas of claims, and how you change those benefits. He noted that the document refers to a claim cost study, and a claims cost study is not offered by this information. Mr Tewari suggested that if the Defendant was seeking assistance on this issue in her course of her duties, this could have been sent to colleagues in Trinidad who have experience in this area.

B. *(2.) 13th December 2011 email from the Claimant to Mr DeCarish attaching Medecus premiums claims spreadsheet (the "Medecus Spreadsheet")*

[91] On 13th December 2011 the Defendant shared the Medecus Spreadsheet which was in the form of a Microsoft Excel document referred to as "Medecus Premiums Claims". It should be noted that because of the expandable nature of an excel spreadsheet, the printed versions exhibited in the bundles filed with the Court, do not show the full extent of all the information contained in the file. Mr Tewari explained that the Medecus Spreadsheet is a listing of all or a very large number of the Claimant's group health clients. It divulges their names, the premiums that are billed to them and claims that were paid to those clients. He stressed that it is very relevant to pricing and competing for the business of health clients which are renewable for tender usually every three years but sometimes more often even annually. He posited that it allows someone to see which clients are profitable and which clients a company might want or not want. Having regard to the competition for the business of any of these clients, it shows exactly where the quote should be pitched so as to still be able to make money, but at the same time being as aggressive as possible in dealing with the business. He indicated that this information was not publicly available and neither the FSC, board directors nor debt collectors receive this information.

[92] In cross examination Mr Tewari said that all brokers do not have access to the information contained in the Medecus Spreadsheet. He noted that an insurance broker will have access to the customers for which they are a broker, and they will have access to the records that they create. However, they will not have access to

the records that an insurer holds. Based on this, each broker will have a subset of this list. Mr Tewari reiterated that this information is confidential and not released to any third party or any insurance company except on a tender.

Defendant's comments on the Medecus Spreadsheet

[93] In relation to the Medecus Spreadsheet the Defendant indicated that she had concerns about the performance of the Medecus health insurance over a number of years. In support of this she referred to the "Stuff to Ravi" Email and specifically, the portion of the email with the heading "*Medecus unprofitable*".

[94] The Defendant stated that what she wanted to do as a preliminary step, was to take a look at the loss ratios for the various clients. So, this is the excel file that has all of the clients listing along with their premiums claims and loss ratios. She stated that in her judgment, the information in this file is not confidential. She explained that clients are listed here and in a sphere where you have two players, namely Sagicor and the Claimant, the Claimant would have been aware of Sagicor's clients and Sagicor would have been aware of the Claimant's. That is a consequence of the fact that they are the two players, so, knowing one's own list would mean that you would know the other company's list of clients. She stated that the premiums and claims information would be the information of the individual clients. That information is made available by these clients for pricing and that information would be made available to the companies (Sagicor or the Claimant) doing the pricing. Accordingly, at any point in time that Sagicor or the Claimant wants to do the pricing, they have access to this information through the clients to facilitate either the company's information or directly through their brokers.

[95] While being cross examined by Mr Hylton, the Defendant maintained that in her judgment the Medecus Spreadsheet was not confidential. The Defendant was unable to confirm that the spreadsheet contained much more information than the four columns which was displayed in the bundle namely Clients ID, Clients, Bills

and claims which on the spreadsheet is from 'A' to 'D' but that the actual spreadsheet has 14 columns extending to a column "N".

[96] Mr Whyte, an Actuary called as a witness for the Defendant, was also cross examined about the Medicus Spreadsheet which the Defendant sent to Mr DeCarish. He admitted that it was information to which he did not have access. He was asked by the Court whether (assuming he were a competitor) this is information, which if one has it, would give an insight into the business of the person or corporate entity which provides services to these clients, in this case the Claimant. In other words, whether the composite nature of it provides material from which he could do an analysis of the Claimant's business. He stated that the information does not tell him anything significant and would not be of value because it is not something which a competitor would not otherwise "pick up".

[97] I specifically asked him if it would not be of some value to him to have this information tabulated in one composite document in respect of each of these clients of a competitor or whether it would be worthless information. His response was that he would say "worthless" is being harsh, however he could not see exactly what he would be doing with it.

C. *(3.) 20th February 2012 email from the Claimant to Mr DeCarish attaching Investment Committee meeting papers ("the Investment Committee Papers")*

[98] This email was originally from Claudette Ashman to a number of employees of the Claimant including Mr Hosin and the Defendant. It was time-stamped Friday February 17, 2012 at 14:39 and the subject was "Investment committee Meeting Papers – Part 2 of 2. The E-mail stated: *"Please find attached Part 2 and the final part of the Investment Committee meeting papers prepared for the next meeting to be held on Monday 20th February 2012".*

[99] This e-mail was forwarded from the Defendant to patrickdecarish@gmail.com on 20th February 2012 at 1:18 PM EST and the email reflected that there was a file attachment, the name of which includes "*GLL Cash Report January 31-12…*". The

evidence of Mrs Basanta-Henry was that this was information sent by Claudette Ashman as Company Secretary to the board of directors who are members of the Board's Investment committee and other relevant persons within the Claimant who are entitled to view it. It was suggested to her by Captain Beswick that the attachment was not exhibited and she was unable to refute that suggestion. Captain Beswick then suggested that "*If anything would have been confidential that would have been the document with the cash flow, cash figures, wouldn't you agree with that? That's what would carry confidentiality, correct?*" She agreed that the attachment would have the confidential information.

D. *(4.) 11th April 2012 email from the Defendant to Sean DeCarish forwarding email attaching Dyoll File (" the Dyoll File") (372)*

[100] This was an e-mail from Jacqueline Mcleod to the Defendant and Mark Longman, copied to Mr Hosin and other employees of the Claimant time-stamped Wednesday April 11, 2012 at 15:50 with the subject DyollFIleApril112012.xls. Mrs Basanta-Henry said that this was in respect of customers with policies with Dyoll [Insurance company]. The email stated:

> *Hi Cathy, Mark*
>
> *Attached is the file with comments and information requested. The methodology employed was as follows:*
>
> *i) The reports from Customer Service is a collation of information across the branches and would therefore not have as precise information as needed. In addition to this, other transactions occurred before the initiative was started.*
>
> *ii) The file submitted by Actuarial was cross checked against Capsil and Oracle GL, the General Ledger used as the control point for the payments.*
>
> *iii) Please note that there are transactions in the GL for policies that do not appear on your list. This list is being compiled and will be sent this evening.*
>
> *iv) The following columns were added: Status on Capsil, Status Change Date, Amount paid from Capsil, Variance*
>
> *Please feel free to submit any questions you may have.*
>
> *Regards*
>
> *JM*

This e-mail was forwarded to patrickdecarish@gmail.com on April 11, 2012 6:21:40 PM EDT and reflected that there was an attachment with the file name DyollFIleApril112012.xls.

[101] While being cross examined, the Defendant said that the forwarding of the Dyoll File was an example of her seeking the advice of a financial professional or consulting with a peer. She was asked to explain the nature of the consultation. She said that this is an email with a file that had information that related to the calculation of reserves. She was doing a comparison between surrenders for this block of policies, and the surrender values in the actuary system which is called "AXIS", and comparing those to those from the administrative system which is called "CAPSIL". Any variance between those two would cause her to have a concern about her reserve calculation. So, she asserted that in the proper course of doing her duties, she had a question and a concern about the differences and she felt it reasonable that she could show this information to Mr DeCarish in order to get a view as to the extent of variance in her work in evaluating the reserves for this block which was a closed block business. She wanted to ensure that the reserve that she was then moving from her entire portfolio reserves was a reasonable amount.

[102] The Defendant was asked by Mr Hylton whether she wanted to get Mr DeCarish's view on the reasonableness of the reserves and replied in the negative. Her further response was as follows:

> *On the output of this file there is the comparison between the values coming from my Actuary system, which does calculation of the reserves versus the surrenders on CAPSIL. So, to the extent that they matched perfectly, my reserves in AXIS would be correct. To the extent that they don't match, I would have a variant that I would require to make an adjustment on my reserves.*

[103] In light of what was an obviously evasive response, Mr Hylton in what appeared to be an act of resignation, said "*Let me move on*". However, in my view it was necessary for the Court to understand the nature of the consultation which the Defendant was asserting and I was constrained to ask the Defendant to explain the nature of the consultation in summary as Counsel had been attempting to have

her do, that is, was she seeking to have Mr Decarish's view as to whether her reserve calculations were correct or unreasonable, or in what manner exactly.

[104] The Defendant obliged and explained that she wanted to run her view by Mr DeCarish to get his feedback as to, for example, how close were these numbers from CAPSIL to the numbers in AXIS, and did he agree that the figures are close or whether they diverged sufficiently that she needed to consider making an adjustment.

[105] Mr Hylton then sought to get the Defendant to indicate whether the closeness of the numbers was an actuarial issue or a mathematical question. Her rather unhelpful response for which clarification was not sought was:

> *It's a ratio - not an Actuarial ratio, but a ratio of to what extent do these values differ from each other.*

E. *(5.) 1st November 2017 email from the Claimant to Mr DeCarish attaching 2017 Profitability Study ("the Profitability Study"),*

[106] On 1st November 2017 at 8:32:31 pm, a pdf Document entitled 'Guardian Profitability Study 2017' was sent by the Defendant to Mr DeCarish. The Defendant confirmed that it had been prepared by herself and Mikhail Francis who is a senior member of the Guardian Life Limited actuarial team. At the time he would have been manager of the Actuarial Department and reported directly to the Defendant. It was also sent by the Defendant to Ms Claudette Ashman, the Corporate Secretary of the Claimant who disburses board papers. Mr Tewari stated that it was submitted and considered by the board in the Quarter three meeting in 2017. He explained that usually, annually, the board looks at an assessment of the profitability of all its products and that is what is contained in this report. He opined that it is a highly confidential document and in fact, the most confidential document that he had seen in the package (the bundle of documents).

[107] Mr Tewari stated that in his view it was so confidential because this document is the blueprint for all the Claimant's products. An actuary could use this document

to reproduce any of those products and determine which ones were profitable; and at what ages they were profitable. As a consequence, if one were to try to construct products for a competitor, one would know exactly where to target. This is because one would know exactly whether there is capacity to change rates for products having regard to age for different sizes, and could cherry pick the select portions of the market. He stated that by way of example one might determine that 40-year old women are particularly profitable for the Claimant and therefore, the Claimant might be able to be aggressive at pricing them so one could target other sectors. He described it as the 'innards' of the insurance company and it is the blueprint for its business. It contains the assumptions, the structure, the marketing approach, essentially everything about the Claimant's business. He stated that this information is not publicly available and this sort of document is kept "under lock and key". All employees of the Claimant do not have access to it and its distribution is very limited. The document has contained within it a confidentiality clause reinforcing that it contains proprietary information and its confidential nature. It is expressly stated that the report and its contents must not be disclosed to any third party without the prior written consent of the Company.

[108] Mr Tewari stated that he knew the board considered the Profitability Review because he had chaired the meeting. He remembered the Profitability Review because he had seen many of these profitability studies over the years, and in his early career he would have even produced some of them. However, he noted this document in particular, at the time because of how comprehensive he found it to be containing detail of information anyone could want about each of the Claimant's products.

[109] While being led in amplification by Mrs Henlin Gibson in commenting on the evidence of Mr Tewari that the sending of the Profitability Study was an egregious breach, the Defendant stated that in her opinion, and to the best her actuarial judgment, if the profitability review got into the wrong hands there would be no detriment to Guardian Life. She said that the information in this document was of no value to Guardian or information that was of no value to the competitor or

information that is already known by the competitor about Guardian. She said that the information contains profit margin, assumptions, and it contains product descriptions. The assumptions that are contained in this document are reflective of the company's particular circumstances. The assumptions are calculated and based on the methods that are prescribed by the Regulator. Therefore, the assumptions for Guardian are of no value to the competitor from the point of view that the assumptions would be determined and is required to be determined based on the Insurance Act's formula and generally accepted Actuaries practice that the assumptions are required to be determined and calculated based on the Company's own data and the Company's own experience.

[110] She further explained that Guardian Life and its competitors would use the same method and same principle in calculating assumptions. If Guardian Life comes up with an assumption [for example AXIS,] the competitor's Actuary seeing that assumption would know that, that assumption is of no value to the competitor because that assumption is reflective of Guardian Life's own situation, their own data, their own experience, and would have no value to the competitor because they themselves would have to determine their own assumptions based on their own individual circumstances, data and experience.

[111] For these reasons the Defendant asserted that knowing Guardian Life's assumptions for a particular variable, is of no benefit to the competitor because they themselves would have to do their own calculation and apply their own assumptions. She stated that in fact, it would be wrong for one company to use another company's assumptions and it would be at best, to their disadvantage to do so because in doing their pricing, evaluation and reserve calculation, they are required to use their own assumptions for their own company's circumstances. She stated that furthermore, the Regulator also reviews their calculations to ensure that the actuarial principles in doing a company's calculations are followed and the appropriate methods and assumptions are applied in doing the calculation of the company's return. Additionally, knowing an assumption about Guardian is no information as to the data, the circumstances of the company, you will not be able

to take an assumption to “back solve” in order to determine the data for Guardian, that would be virtually impossible.

[112] The Defendant agreed with Mr Hylton’s suggestion that the Profitability Study also goes through each of Guardian's products, indicates whether it is profitable and how profitable, and what it recommends that the company do to address the situation. She agreed that (for example pages 403 and 404 of the exhibit bundle) refers to the Guardian care plus products. She also agreed that it stated that (as indicated on page 404) there were specific changes following a 2008 Study, and that the product was now meeting profit margins and did not require any more adjustment at that time. She also agreed that (at 405 to 407) this is a product and it sets out specific changes done following studies in 2008 and 2012, and it reads: "*Despite these changes profitability has declined...*" following which it then makes certain recommendations of things to do, to perhaps increase profitability. The Defendant admitted that this information was not publicly available.

[113] The Defendant confirmed that the Profitability Study was prepared by Mikhail Francis and herself. He was at that time part of the Actuary team. The Defendant was directed to the portion of the Profitability Study with the heading “Confidentiality” which reads as follows:

> *This report is prepared for Guardian Life Limited. It is understood that all of the information contained herein is considered to be confidential and for the use of the Financial Services Commission (Jamaica), Guardian Life Limited and its Board of Directors only. This report contains proprietary information. Accordingly, this report and its contents must not be disclosed to any third party without the prior written consent of the Company".*

She was asked whether she recalled including that when she prepared the report and said she did.

COMMUNICATION WITH MEGAN IRVINE

F. *(6.) 9th February 2013 email from Ms Allen to Megan Irvine forwarding President’s debt exchange email (505/510)*

[114] There was an e-mail which was sent by Mr Hosin to the Group "*GLL Heads of Divisions*" with the subject: FW Debt Exchange Defendant sent Saturday February 9, 2013 at 20:22. Mrs Basanta-Henry in her evidence had confirmed that the Claimant's e-mail system provides for groups and the names of the individuals in the group would not appear. This e-mail reads as follows:

> *Hi,*
>
> *Cathy, Meghon and Mike*
>
> *Can you work with your management team to look at the impact on our books. We can make any minor adjustments when we receive the final document on Tuesday morning. Please do all you can to have some results by Monday afternoon.*
>
> *PLEASE let them know that this is very confidential.*
>
> *Thanks*
>
> *Regards*

[115] An attachment was identified with the file name DEBT EXCHANGE 2013.xlsx. The original message which appears below from Mr Hosin was sent on the same day minutes earlier at 20:19 (8:19 PM)

[116] Mr Tewari agreed that all participants in the insurance industry had access to the Debt Exchange Document. He agreed that for Jamaica, and the financial sector, a national concern that was being discussed public to the "group of 10".

[117] In relation to the email sent to Megan Irvine and Ravi Rambarran the Defendant stated that this is a National Debt Exchange document and denies that Mr Hosin was correct when he said that this is confidential information. She stated that the information in the attachment to this email is not confidential or would not have been confidential to Guardian Life, because it represents information provided by the Ministry of Finance, as a follow up to a meeting the Group of 10 had with the Ministry of Finance on that day and the Ministry had promised to provide this information to Group of 10 to do the analysis required on the email. The Group of 10 represented a number of banks and a number of insurance companies for

example, Guardian Life, Sagicor, NCB, JMMB, Jamaica National, Scotiabank and others, the names of which she did not then have. Therefore, this information is not confidential to Guardian Life, it would have been confidential within the Group of 10. Her evidence was that the attachment contained details of the NDX, information bonds, and maturities among other things. Nothing in the email can be confidential as it no way disclosed anything about the Guardian affairs.

[118] She stated that Mr Hosin sent the said document via email to her and all other executives so that an analysis could be done and she sent the document to Mr Rambarran and Ms Irvin who were both doing the analysis for Sagicor and who did not receive the document as yet. She reiterated that the document was not the Claimant's but rather a third party document.

[119] I appreciate that the secrecy of documents can be short lived. Neither Queen's Counsel cited any authority which was directly on all fours or similar to the factual circumstances surrounding the debt exchange, the timing of the Claimant's receipt of the information and the sharing of it by the Defendant. In my view the issue falls to be determined by the application of the general principles which I have identified. I will make a finding as to the Debt Exchange and my reasons therefor later in this judgment.

G. *(7.) 25th June 2010 email from Ms Allen to Megan Irvine forwarding email detailing GLL's Annual Premium Income calculations ("The API")*

[120] Mrs Basanta-Henry identified an e-mail dated 25th June 2010 from the Defendant's address cathy.allen@ghl.com.jm which was forwarded on the same day to Megan Irvine. The email is a draft addressed to Glendon, an employee of the Claimant and department team member of the Defendant, in which a concern is raised about GLL's API and how it is being reported. Mrs Basanta-Henry agreed that the API is reported and the historical figure is in the public domain but that the e-mail is not about that and the sharing of such information needed presidential approval.

[121] On 30th March 2011, the Defendant sent an e-mail to Mr DeCarish in which she wrote " *Hey Sweetie... the API is at the wonderful figure of 56m ....one more day ....hmmmmnnn!*" This is not one of the emails which Mr Hylton indicated that the Claimant is focusing on. However Mr Tewari in commenting on it gave evidence in respect of the importance of the API which is relevant in assessing whether the 25th June 2010 email is confidential as Mrs Basanta-Henry asserted.

[122] Mr Tewari acknowledged that some of the communication between the Defendant and Mr DeCarish was casual but was of the view that the communication (at page 363 of the exhibit bundle) "*Hi Sweetie, the API is at a wonderful figure of 56 million*" was not casual because it divulges internal information which is highly confidential. This is because API stands for Annual Premium Income, which means the amount of business that the company has sold which is not public information and is not required to be disclosed to the Jamaica Stock Exchange. That information was not to be shared with anyone external to the Claimant for at least a few weeks. He agreed that that information is shared monthly or disclosed monthly in the Insurance Association of Jamaica's Report but not at that date. If that figure is at the end of March, it was not disclosed at that date. The purpose of disclosing the figure in the Insurance Association of Jamaica's Report was so that participants who share their information will have a view of the total size of the insurance market. However, he agreed that little damage was done to the Claimant by sharing that information.

[123] Mr Tewari's evidence therefore supports the evidence of Mrs Basanta-Henry on the confidentiality of this document, which I accept. I acknowledge that whereas the confidentiality would not extend after its disclosure in the public domain, the email referred not only to figures but to the Defendant's methodology in correcting any prior errors and is confidential information.

H. *(8.) 29th June 2018 Email from Ms Allen to Megan Irvine forwarding the annuity mortality analysis (578) ("the Annuity Mortality Analysis")*

[124] This email is described elsewhere in this judgment in the Court's examination of the series of emails which the Defendant asserts demonstrates her disagreement with the Claimant's treatment of the reserves. On 29th June 2018 at 20:04 the Defendant wrote an e-mail to Mr Hosin copied to Meghon Miller-Brown of Guardian which commences *"As discussed, we have been working on an analysis of the company's annuity mortality assumptions. We are finished with the analysis and will be preparing a report with our findings."* The Defendant admitted to Mr Hylton that this was confidential information and so did Mrs Coke.

[125] The Defendant explained that there were two reasons for sending this email to Megan Irvine. One was for safekeeping and the other to share with Ms Irvine her grave concern about this release in reserves of $1.12 billion for which she had not given even an opportunity to review and to give her approval.

[126] Mr Tewari noted that no losses were reported to the Claimant's board consequent on the disclosure of this information in relation to the Annuity Mortality analysis. However, he said being a publicly traded company these numbers are significant. With these numbers being revealed outside the Group it is improper for a publicly traded company. As a consequence, someone can form an impression on how the Claimant's financials would look prior to it being publicly available information. They can proceed to trade in the Claimant's shares based on that knowledge. As a result, it would not reflect as a loss to the injured company but they can resolve it in people trading in our shares based on information that is not publicly available. Such trading is not a good thing if insider information is being used.

The Court's conclusion as to whether the documents are confidential

[127] Save for the communication in respect of the Jamaica Debt Exchange, I am satisfied that the emails highlighted by Mr Hylton are confidential. (I will refer to these seven emails and documents attached collectively as "the Confidential Documents").

[128] As it relates to the Jamaica Debt Exchange, the analysis has to be conducted in the context of the underlying factual matrix which led to the initial email from the government to Mr Hosin. The document originated with the Government of Jamaica ("the Government"), which was the maker and owner of its contents. It was confidential information belonging to the Government which had the right to a claim in respect of any breach of confidentiality related thereto. It is arguable that the information was on receipt by the Claimant imbued with a secondary level of confidentiality in respect of which the Claimant could assert an independent right. However, I have not received from Counsel nor have I been able to locate any authority which supports the existence of such an independent right that would apply on the facts of this case. I hesitate to express a concluded view but I seriously doubt whether such a right exists, which can be asserted against another member of the "group of ten" which was equally entitled to such information.

[129] The evidence is that the Jamaica Debt Exchange information was shared with Sagicor being a member of the "group of ten". There was no evidence as to why the Claimant may have received it before Sagicor (if that is what in fact occurred), but if that were so, then it really is purely an issue of timing. In such circumstances, I find it difficult to see why the Defendant's sharing of the document with Sagicor, because the Claimant received it before Sagicor, could constitute a breach of the Defendant's obligation of confidentiality to the Claimant. I should note for the avoidance of doubt that my views turn on the precise facts of this case. If the email contained for example the details of the Claimant's analysis of the information provided by the Government or communication in respect of the Claimant's stance on whatever was being proposed, the nature and character of that communication would be different and to which different considerations would apply.

[130] The issue was raised, tangentially, as to whether Ms Irvine would have been a proper recipient in such circumstances based on her position on the Sagicor corporate ladder. However, in my view different considerations apply to that issue than applies generally in this claim. This is because the examination of the debt exchange was a broad based consultation between the Government and

companies which was not limited to the Actuaries within those companies. There was no evidence that such consultation within the Sagicor organization would not have properly included Ms Irvine. Accordingly, a different test would apply than is the case when assessing the proper ambit of the consultation permissible when the Defendant is disclosing to Ms Irvine, confidential information belonging to the Claimant.

[131] The Defendant herself admitted that some of the emails were confidential, for example the Annuity Mortality Analysis. I have easily concluded from the evidence on behalf of the Claimant and the Defendant that the emails have "the necessary quality of confidence" and were not public property or the subject of public knowledge. Additionally, the evidence of the Claimant's witnesses which I have accepted is consistent and clear that the documents are significant and the preservation of their confidentiality or secrecy is of substantial concern to the Claimant. I will for the sake of clarity, discuss some of the more pertinent evidence which had a bearing on my conclusion.

Consolidated information - Medecus

[132] It is important to note the elevated importance of information which has been compiled or consolidated. A parallel may be drawn with the issues which arise in the area of intellectual property law. The value of consolidated information is particularly evident when considering the Medecus excel sheet for example. Whereas the information or details in respect of one or a small number of clients might not necessarily meet the test of confidentially, (because that information may be available to some brokers), the consolidation of the information in respect of all the Claimant's clients using that particular product in a single document is of considerably more value and more difficult to acquire. The composite Medecus document in this case is the creation of the Claimant.

[133] The Defendant stated that there would be no detriment to the Claimant occasioned by this Medecus Spreadsheet getting in the hands of a competitor. She posited

that the information has no additional value to the competitor Company, because the competitor has access to the premiums and claims of the clients, but more importantly, is the fact that the information that is required to do pricing here is not in this file. She stated that, in addition to this information you would need significantly more data, and also more critical and important information.

[134] She stated that, you would need information on the breakdown of the particular claims because in order to do pricing a total claim figure is of no use. What you need to know is the claims for surgery, the claims for drugs, the claims for hospitalization, *et cetera*. Accordingly, you would need to know the total amounts being claimed, the number of claims, that sort of data. She said that furthermore, you may not only need it for the current period but for the previous period to get a historical perspective in doing the pricing. Additionally, what you need is a list of the details of persons who would be covered so for particular clients for example, using National Water Commission, you would need a list of all of the persons within that group to be covered. Not only those persons, their dependents, and you would need what we call the "demographic" data. That means you need to know their age, their sex, and you also need to know what benefit or benefits will be provided for in order to do the pricing. The evidence of Mr Whyte supported the Defendant in this regard.

[135] It is important to highlight what in ***Moorgate Tobacco co Ltd v Phillip Morris Ltd and Another*** (supra) might be referred to as the second limb of the test of confidentiality, that is that the information should be "*significant, not necessarily in the sense of commercially valuable... but in the sense that the preservation of its confidentiality or secrecy is of substantial concern to the plaintiff.*" This is because much of the evidence presented on behalf of the Defendant in support of her position that the Claimant did not suffer any loss or detriment seemed to also obliquely suggest that some of the information would not have been commercially valuable to a competitor and was therefore not confidential.

[136] For this reason, the evidence of Mr Whyte does not assist the Defendant when he said that the information in the Medecus Spreadsheet does not tell him anything significant and would not be of value because it is not something which a competitor would not otherwise pick up. His evidence that he could not see what a competitor would do with it is of no importance for the purposes of the analysis of the issue of confidentiality.

[137] The same can be said of the evidence of the Defendant's witness Mr Duggan, an Actuary and witness on behalf of the Defendant, who conceded that "*you have to be very careful about confidentiality and get legal advice on it when you are not sure*". Nevertheless, he ventured to assert that one of the things one has to consider is whether damage could have been caused to the organization and what constitutes damage to an organization.

The Profitability Review

[138] The Defendant's misplaced emphasis on the need for the information to be commercially valuable or capable of causing a detriment to the Claimant is also demonstrated in her evidence in relation to the profitability review. I have previously rehearsed that evidence in detail in considering the profitability review.

[139] I do not find that the Defendant's evidence of the lack of commercial worth of the Profitability Review to a competitor or the evidence that its disclosure to a competitor would not cause any detriment or loss to the Claimant, assists the Defence. I find that the evidence of Mr Tewari as to why the Profitability review is confidential and why the Claimant would not wish to have it disclosed is cogent and I accept his evidence on this issue.

The Issue of the Claimant's credibility

[140] To the extent that the Defendant's evidence as to the confidentiality of the Confidential Documents conflicts with that of the Claimant's witnesses, I have preferred the evidence of the Claimant's witnesses on a balance of probabilities. I

have found the Claimant's witnesses to be consistent in all material particulars. I have found Mr Tewari in particular to be a witness who displayed a willingness to be forthright and to honestly assist the Court in his answers. To the contrary, I have found the evidence of the Defendant to be inconsistent in some areas and unreliable in others. I have treated with these areas of her evidence throughout this judgment and I have indicated my findings in that regard, but it should be noted that in an effort to avoid unnecessary repletion I will not repeat that analysis in its entirety and those findings under one distinct heading.

Were the Confidential Documents disclosed in the proper course of the Defendant's duties?

[141] Heavy reliance was placed by the Defendant on section 2.4 of the Code of Conduct of the IFoA ("the Actuaries Code") states specifically that:

> *2.4. "Members must consider whether input from other professionals or specialists is necessary to assure the relevance and quality of work and, where necessary, either seek it themselves or advise the user to do so, as appropriate."*

(The evidence of Mr Astor Duggan)

[142] In support of the assertion that Actuaries have a right to consult, Mr Astor Duggan was called as a witness of the Defendant. He is a consulting Actuary and the Managing Director of Duggan Consulting Limited (Actuaries and Consultants). He has worked in the actuarial field both in Jamaica and the United Kingdom. He qualified as a Fellow of the Institute of Actuaries in 1988 whilst working in the United Kingdom with R Watson & Sons (Consulting Actuaries) now Willis Towers Watson. He is the Education Advisor in Jamaica for the Institute and Faculty of Actuaries (IFoA) and a past president of the Caribbean Actuarial Association (CAA) and also the past president of the Rotary Club of Kingston.

[143] On the issue of how the actuaries communicate, he stated that in Jamaica most of the actuaries, associates and actuarial students are members of the CAA. He went on to state that there are less than 20 qualified actuaries in Jamaica and as such

they are a close-knit group and most of them attend the annual conference of the CAA and other industry related events.

[144] He went on to say that in an environment such as the actuarial field it is not unusual for an Actuary to communicate with another Actuary or a professional working in the actuarial related field in another organization to discuss a matter of actuarial concern or principle or sometimes to obtain a second opinion even if it is a competitor without breaching client confidentiality. He stated that actuaries, associates and other professionals on several occasions meet as a group to discuss matters of national significance and their actuarial expertise and skill set is used to assist in that regard. He stated that there are many examples such as assisting the Government of Jamaica with the public sector reform, providing comments on pension's reform and phase 11 of the pension's legislation, providing comments on the national debt exchange and other matters in insurance such as IFRS17.

[145] In speaking of an "actuarial related field" he said that was a matter of context. He gave the example of a consultant winding up or partially winding up a pension plan and needing quotations from an insurance company. In such a case it is the Pensions Department or perhaps the Marketing Department that would first be approached, not the Actuary. The person is not an Actuary but the person is very experienced and has a lot of knowledge, (actuarial knowledge), although they might not have done the exams in that area. His reference was therefore to such persons who have a lot of experience and are knowledgeable in dealing with bills, disbursements or bills in relation to an actual quotation which are actuarial related. He said he knew Megan Irvine and she is an example of a person who works in the actuarial related field. In cross examination he said he did not know how far she got in her actuarial exams but knew that she did some exams.

[146] In paragraph 9 of his witness statement Mr Duggan averred as follows:

> *9. I have personally asked other actuaries who are my competitors and other professionals in the industry to obtain a second*

> *opinion and they do likewise without it being considered a breach of client confidentiality. In relation to the appointed actuary of a life insurance company, he or she has a great responsibility to all stakeholders such as the employer, the FSC, the shareholders and policy holders who are directly affected by the appointed actuary's opinion, advice and decisions taken. Therefore, we do communicate with our peers to ensure the soundness of our advice. Furthermore, the code of conduct of the IFoA ("the Actuaries' Code") states explicitly that:*
>
> > *2.4. "Members must consider whether input from other professionals or specialists is necessary to assure the relevance and quality of work and, where necessary, either seek it themselves or advise the user to do so, as appropriate."*

In amplifying his witness statement, he said he did not think "*other professionals or specialists*" as used in section 2.4 of the code was limited to individuals in the actuarial field. (The section of the code was put to Mr Tewari and he accepted it as being accurate.)

[147] In cross examination, Mr Duggan demonstrated that he did not have a full appreciation about the nature and details of the Claim. He stated that if you are an Actuary working on a project and you are not too sure about something and you want expert opinion, you can call another Actuary and discuss the matter with them. He was asked if that was his understanding of what the claim was about and said he was not sure if he could answer that question. However, he said it could also be about that too because it seems as if she might have been accused of speaking with other people or deemed to be speaking with other people and dealing with other professionals and there is absolutely nothing wrong with that as long as there is no damage done to your organization.

[148] In cross examination he also indicated that he did not know if the case is directly about the disclosure of information to a regulated authority such as the FSC but there might have been an issue surrounding that in his witness statement. He asserted that providing information to the Financial Services Commission is required when something happens especially if you are Appointed Actuary of that

insurance company. The Appointed Actuary has a duty to protect those policyholders.

[149] Mr Duggan indicated that every Actuary belongs to one or more associations. Actuaries in the Caribbean are required to join the CAA and as such are required to perform their duties within their area of expertise and the respective standard of practice. The Actuary is further governed by the codes of conducts, ethics, and standards of practice as required by the examining body which he/she is qualified and must submit on an annual basis a minimum number of hours of learning and training which is referred as continuing professional development (CPD). This he said ensures that the actuaries are up to date with changes to the codes, and areas of practice as well as the changes in the environment in which he/she operates. Therefore, regardless of the Actuary's qualification or experience he/she is held at the highest standard.

[150] Mr Duggan was cross examined in respect of paragraph 21 of his witness statement where he concluded that he did not see how the Defendant could have breached any code of conduct or how her disclosures can be considered to be a breach of confidence, fiduciary duty or confidentiality as her actions were done in the proper course of her duties. He was asked to what actions of the Defendant was he referring and in response he said the breach of confidence and the confidentiality issue, specifically speaking to other actuaries and other professionals. He was directed to page 356, a cover email sent by the Defendant to Mr DeCarish on 6th November 2009 which ended "love Cathy G". He was asked if this was an example of an Actuary consulting with a professional or specialist. He admitted that he did not know Mr DeCarish or anything about him and could not answer that question. He was also taken to the email from Claudette Ashman attaching the investment committee meeting papers (page 369) which was also forwarded to Mr DeCarish and again asked if this is an example of an Actuary consulting with a professional or specialist. He reiterated that he did not know Mr Decarish or his skills or training and did not have the information to answer that

question but opined that an Actuary was not restricted to sharing information with other actuaries.

[151] Mr Duggan was asked if he agreed that he could discuss a matter of concern or principle, or seek a second opinion without disclosing his organization's data. He said it all depends on why you are trying to get these opinions. When asked in what circumstances would he disclose his organization's secrets, he explained that he works with a consulting firm where he has data for his clients, and not an organization like insurance companies where the information is something belonging to the company, and accordingly he did not know if he could answer that question properly.

[152] Mr Duggan was asked whether an Actuary would not be bound by the same principles whether in a consulting firm or with an organization. He said generally yes. However, he had never worked with an insurance company where he had data for that insurance company. He stated that he did not necessarily want to go into areas that he had never worked such as in an insurance company, because whereas he might have an idea, he was not the one to answer to things that he was not one hundred per cent certain of, and did not wish to do that as an Actuary.

[153] In response to a question posed by the Court in relation to the evidence in paragraph 21 of his witness statement, he explained that in 2019 when he gave the witness statement he did not have all the information which was before him at the trial.

[154] He explained that he said he was extremely surprised to hear of this Claim against the Defendant because based on his knowledge and experience with her, she is well-known in the professional field. She is highly regarded and she is very experienced in the profession, having worked with various insurance companies, including large ones in Jamaica for a number of years. She has also held high positions in those organizations and her worth was known. He emphasized that she became an Appointed Actuary in an insurance company which is one of the

most important positions in that company. The Appointed Actuary is put there to protect, he or she is the 'force leader' of that company and this is something that the Appointed Actuary is held responsible for, looking after the interest of the policy holders. It is a major, position in the insurance companies, so, she could not get that job if she was not highly regarded and has the experience in insurance.

The evidence of the Honourable Mrs Daisy Coke in relation to consultation

[155] The Hon. Daisy Coke O.J. C.D. is a retired Actuary with a working lifetime that spanned 44 years. Her expert report was filed on 18th October 2019 and supported in most material areas the position of the Defendant. The letter of instructions of the Defendant's Counsel to her dated 7th October 2019, listed eight issues in respect of which an expert report was needed. In her expert report, she framed her answers in numbered paragraphs conforming to those issues as listed in the letter of instruction.

[156] The issue numbered four for example was framed as follows:

> *Is it a breach of confidentiality for an actuary to discuss a matter of actuarial concern or of other concern to her concerning the regulated entity or to obtain a 2nd opinion from a fellow actuary or other person which advice or information he believes would assist her in the performance of her statutory duties and/or functions?*

She opined that:

> *Consultation with colleague professionals on matters to get alternative views is very common. Our professional practice guidance recommends such action. We do this, for example, in dealings with a newly established Regulator, or when significant legislative changes are being discussed or introduced. We use our discretion and never loose (sic) sight of the fact that we are professionals competing in a small financial space. A second opinion may help. Typically these consultations are about practice, or principles, or interpretations, and do not constitute breaches of confidentiality. Of course, peer reviews, which some actuaries routinely or periodically have done, are the logical extension and formalization of the practice of colleague consultations…*

The evidence of Mr Tewari in relation to consultation

[157] Mr Tewari was asked to comment on paragraph 35 of the Defendant's witness statement and in particular the second sentence where the Defendant said: *"Therefore it is not uncommon for an Actuary to communicate with another Actuary or a professional working in actuarial-related fields in another organization to discuss a matter of actuarial concern or principle…"*. Mr Tewari renewed his concern about the use of the term "actuarial related field". He reinforced his position that in deliberating with another Actuary it is only appropriate if that Actuary is outside the organization for that communication to be abstract and not reveal the details of the Actuary's employment and the client because there is a duty of care. He said that in this case, he would add that he was surprised that the Defendant did not see it fit to communicate with other Actuaries within the Guardian Group, because there are many Actuaries and they would have naturally been the persons to have any consultation with, immediately. So there was never any need in an organization like Guardian to have collaboration with Actuaries from outside.

[158] Mr Tewari was asked to comment on paragraph 6 of the witness statement of Mr Astor Duggan and in particular where he said:

> 6. *I say this to say, that in an environment such as the actuarial field, where the profession is relatively small, it is not unusual for an actuary to communicate with another actuary or a professional working in the actuarial-related field in another organization to discuss a matter of actuarial concern or principle or sometimes to obtain a second opinion, even if it is a competitor, without breaching client confidentiality.*

[159] Mr Tewari commented on the use of the phrase "*a professional working in the Actuarial related field*", which he said he did not understand. He questioned the sense in which it was being used and opined that it is either you are an Actuary or you are not an Actuary. He said that if you are an Actuary, you are trained on actuarial matters you would go through the years of examinations and you are bound by the actuarial codes of conduct and discipline.

[160] However, Mr Tewari said as it relates to actuaries needing to communicate with each other especially as the profession is small in Jamaica and the Caribbean, it is true that Actuaries do need to collaborate with each other. However, the nature of the collaboration is always in an abstract manner so as not to divulge sensitive confidential or privileged client information. He nevertheless admitted that an Actuary can communicate with another Actuary raising a matter in an abstract way without divulging the peculiarities to the client and without violating the duty of care that an Actuary has to the client. In fact, this is covered in detail in the Actuarial Code and in the Actuarial Guidelines. The non-actuary is not governed by a code and for that reason as well collaboration with a non-Actuary by an Actuary is completely off limits.

[161] During cross examination Mr Tewari was asked whether an Actuary Assistant is considered an Actuary and he said no. He clarified that in his organization they will not call someone studying actuarial exams an Actuarial Assistant, usually when they use the term Actuarial Assistant it means you are not really in the actuarial field. They would call that person an Actuarial Analyst or an Actuarial student or perhaps an Actuarial Associate. However, he could not speak to other organizations or speculate as to how they assign titles within their structure.

[162] Mr Tewari agreed that in the Defendant's capacity as an Actuary, there is no specific company policy requirement that she seek authorization prior to consulting with other professionals, but there does not have to be one because there is an understanding that she is bound by the duty of care as a professional.

[163] Mr Tewari agreed that the Contract of Employment does not require the Defendant to seek authorization prior to disclosing information or consulting with other professionals provided as it says there, "in the proper course of her duties".

The Court's Conclusion on the right of an Actuary to consult

[164] It is clear from the evidence of the Defendant's witnesses as well as Mr Tewari, that an Actuary does have a right to consult with other professionals and such professionals are not limited to Actuaries.

[165] Mrs Coke expressed it in the following manner:

> *Now, I need when I produce my work in which the results in my analyses, I need to be able to communicate in a fashion that is understood by my public. Otherwise we end up in the situation where people say they are Actuaries, they only do this and they only do that and they do not understand our advice, and do not benefit for the service they have paid for.*
>
> *So, the consultation that our profession envisages is relevant consultation because we require expertise and sometimes, they are people who have some expertise example in communication, example in understanding the landscape that we are working in. For example, when my Actuary come here, the conversation we are having and the conversation we are having with my colleague Actuaries in Jamaica or in Trinidad. So, the expertise we consult with includes other professions, ordinary people who speak better than us and explaining what we are trying to say to our public can understand.*

[166] Mr Hylton has conceded this point as to the need to consult albeit he did not expressly agree with consultations with persons who have some expertise in communication. The point of dispute at its core has to do with the extent of the consultation and the extent to which a client's confidential information may be disclosed.

Analysis of the Defendant's Communication with Mr DeCarish

[167] The starting point for the Defendant's explanation for sending information to Mr DeCarish is her witness statement. In relation to the communication with Mr DeCarish with respect to the Profitability Study, at paragraph 45 the Defendant stated that he too was employed to the Claimant for a period of over 3 years until recently when his contract was terminated. The Defendant stated:

> *...Therefore I was divulging no information to him that he would not have otherwise been able to ascertain by virtue of his employment to the Claimant. I intend to rely on a copy of the Contract of services between Facilitation Access Services Limited, my partner's company and the Claimant.*

> *That the contract provides that "Services that exceed 12 months will continue under the terms of this agreement until completed". That the final payment to Sean DeCarish was on October 26, 2018. I intend to rely on letter from the Claimant to Mr DeCarish dated October 26, 2018. That as my partner, who also happened to have financial expertise and was also a contractor of the Claimant, I would, on occasion, share my draft of emails to him for his assistance/feedback to wordsmith. I was not relying solely on his advice or any such thing. It did not involve any analysis or assumptions, it was more about form than substance. In fact, most of the emails he assisted me in drafting or rewording were not sent to anyone as I did otherwise. Many of the emails received from Mr. DeCarish or sent to him were not work-related or Guardian's confidential information in any way. I have sent documents to him for safekeeping in accordance with my duty to report under section 44(5) of the Insurance Act. That I was so deeply concerned with some of the actions of the Claimant that I feared the consequences for myself, in terms of my responsibility, the policy holders and the company's financial security, I wanted to ensure that he had access to the documents in the event of anything.*

[168] I have noted that when the Defendant was being cross examined about the Medecus spreadsheet she was asked whether the information in the spreadsheet was information that Mr. DeCarish would have received in the course of collecting debts for Guardian. Her response was that some of this information is provided to Mr. DeCarish in the course of collecting debts for Guardian for those clients for which premiums have not been paid to Guardian. The Defendant indicated that she was aware Mr. DeCarish was asked to collect premiums owed for Guardian, and in the course of doing his duty, information was provided to him which included premium information that was for Guardian and to the best of my knowledge it also may have included other information. She was not certain if this included claims paid.

[169] To the extent that the Defendant conceded that "some" of the information was provided to Mr DeCarish, this is clear evidence of the Defendant being evasive in her response in an effort to deny the confidentiality of the document. The Medecus spreadsheet contains a wide range of information and one can reasonably infer that a debt collector would not need much more information than the premiums outstanding which his services are being engaged in order to recover.

[170] Therefore, to the extent that the Defendant is seeking to justify communication of any of the Confidential Documents which the Court has found to be confidential on the basis that Mr DeCarish's company had a contract with the Claimant, that

defence is stillborn and I reject that evidence. The Defendant admitted during cross examination that the contract of the Claimant with Mr DeCarish was for debt collection services. The Confidential Information disclosed to Mr DeCarish with which we are concerned, was not information that was available to every Guardian employee and no rational explanation has been presented to the Court as to why a debt collector would have had or needed to have access to this information.

Did Mr Decarish have special communication skills?

[171] The Court has not been presented with any evidence from the Defendant of any special communication skills which Mr DeCarish possesses which might justify sharing with him confidential information belonging to the Claimant. The Defendant has not asserted in respect of any of the confidential documents the particular assistance sought (or obtained) which made the communication of the information expressed in any of the confidential documents more effective.

[172] The evidence of Mrs Coke which I have quoted as to the need for effective communication has to be viewed in its proper context. Mrs Coke has stated that she needs to be understood by her public, which I understand to be her target audience. For a consultant in the position of Mrs Coke, this audience will constantly shift as retainers change and will necessarily involve persons from various sectors of the economy. The target audience of the Defendant is primarily the Claimant and occasionally, the Regulatory authority, the FSC. The Defendant has stated that the assistance of Mr Decarish in "wordsmithing" (to borrow the phrase Mrs Gibson Henlin used) was "more about form than substance". That characterisation is significant because I do not accept that the law permits the disclosure of confidential information merely for the purpose of allowing the party to whom it is disclosed to make minor "wordsmithing" changes. The Defendant while giving her evidence impressed the Court with her eloquence and the clarity with which she expressed herself. I do not accept that as an Actuary with many years in her field, she would have needed Mr DeCarish's assistance in respect of improving the Defendant's communication in respect of any of the confidential documents.

[173] Mr Hylton has also made an important submission in relation to the assistance of Mr DeCarish which I find to be forceful. He submitted that the problem with the "word-smithing defence" is that Mr DeCarish was sent five emails. These included the Profitability Study, the Medecus Spreadsheet, the Dyoll file and the Investment Committee Papers, none of which it could be reasonably suggested that he was word-smithing. The very first email, the Stuff to Ravi email, is potentially the only email to which Mr DeCarish's word-smithing skills could have been relevant.

[174] It seems clear that in the particular circumstances of this case, involving an in-house Appointed Actuary and not a Consultant Actuary, the consultation which is permitted in law is consultation dealing with matters of substance not form. The Defendant has also asserted that her communication with Mr DeCarish was consultation with a financial professional with approximately three decades of experience.

Was Mr Decarish a Finance Professional?

[175] The Defendant in amplifying her evidence stated that other than being a finance professional, Mr DeCarish is her significant other, her spouse. She stated that he has had over three decades of experience as a finance professional, including experience on Wall Street in Banking and Investments. He worked with several banks and investment firms including Bank of New York, Chemical Bank, Citi Bank, S.G. Warburg Investment Bank. His specialty was in the area of operations, and also dealing with bonds and equities and in the trading of those.

[176] In paragraph 45 of her witness statement the Defendant stated that Mr DeCarish has "financial expertise". The basis of and extent of this financial expertise was not volunteered. In cross examination she admitted that during her amplification was the first point in the Claim that she had offered details of Mr DeCarish's work history. The Court would have been inclined to attach very little weight to his evidence. However, importantly, the Defendant admitted that Mr DeCarish's experience in the financial sector on Wall Street was prior to her relationship with

him and that she acquired this knowledge by virtue of him telling her. I accept the submission of Mr Hylton that this evidence as to Mr DeCarish's financial expertise as having been acquired on Wall Street is hearsay and inadmissible. Accordingly, the Court will attach no weight to this evidence. There is therefore no cogent evidence before the Court of Mr DeCarish being a financial professional.

[177] Mr Tewari did not agree with the suggestion made to him by Mrs Gibson Henlin that in the emails to Mr DeCarish the Defendant sought the advice of a finance professional with over three decades of its period. He explained that he did not know that Mr. DeCarish is a finance professional and only knew him in the context of him being a debt collector.

[178] In any event even if Mr DeCarish was a financial professional I accept the submissions of Mr Hylton that there is no evidence in the e-mail communication with Mr DeCarish of the nature of the consultation or the assistance or input which was being sought of him by the Defendant.

Printing of the Profitability Study

[179] In clarifying her reference to remote access in paragraph 60 of her witness statement, the Defendant said that typically, she would use her Laptop while working at the office to do the heavy lifting during the work day which would include lots of analyses, for example dealing with excel files but would leave her Laptop at the office and just take home her phone and iPad. In the evenings any work that would be done would be reviewing emails sent to her by members of her Actuarial team and lighter weight work. As a consequence, she did not need to take her laptop home.

[180] However, there were occasions for example involving the profitability study, when she had reason to be preparing for the next day while at Mr DeCarish's office/house where she would often go and spend the evening, through the night, into the next morning. She needed to review and analyze the Profitability Study Report that had been done by her Actuarial team. That Report has many pages,

voluminous in nature, a lot of data, and had a lot of analyses and figures for her to review. She asserted that for the purpose of going through the report, she forwarded the email to Mr DeCarish for him to print for her on his printer (page 381) and that would have facilitated her being able to do her work at that time and would allow her to go through a large file, do her cross checks, and make her notes in the document in preparation for work the next morning. Therefore, she would have done her work using the printed source of that document.

The Court's conclusion on the printing defence to the disclosure of confidential information

[181] The Defendant was asked in cross examination why she did not print the document at the office since there were working printers there. She said she was at Mr DeCarish's residence in the evening at 8:34 p.m. and forwarded the email to him because she wanted to do some work regarding this document, which is a voluminous document, containing a lot of data, tables and information. She said she wanted to have it printed for the convenience of being able to copy those we had cross-referenced and go through it to make those notes.

[182] The Defendant admitted that while giving evidence during the trial was the first time she was disclosing that the reason for sending the profitability study to Mr DeCarish was for him to print it for her. She has recounted in great detail the circumstances which led to the need for him to print it. It is reasonable to conclude that this information would have been similarly fresh in her mind on the 2nd August 2019 when she signed her witness statement and up to trial. She suggested that forwarding a document in order to have remote access which is disclosed in her witness statement encapsulates printing. I do not accept that and there is no good reason why the reason of printing was not disclosed earlier. I would also expect that given the Defendant's vast experience, before leaving her office that day she would have known that she was going to be working on that voluminous document and would have needed a hard copy to work with. I do not accept that she only came to this realization at 8.34 p.m. while at Mr DeCarish's home. Furthermore, I

have not been given a reasonable explanation as to why she could not have printed the document herself by accessing her email remotely using Mr DeCarish's computer rather than having to forward it to him to print. In these circumstances I do not accept on a balance of probabilities that the Defendant is being forthright when she said that that printing was the reason for the disclosure.

[183] I accept the submissions of Mr Hylton that even if printing was the reason, that would not provide a defence to the unauthorised disclosure. It must be appreciated that confidential information belonging to one's employer which may be disclosed to another person by email, even if it is done for the purpose of printing, remains thereafter in the custody and control of the recipient. The sender loses all control over that information and the receiver is at liberty to do with it as he pleases. As a matter of good sense a disclosure by email for the purpose of printing cannot amount to a good defence to such disclosure. It is therefore my finding that the disclosure of the profitability study to Mr Decarish was done with no lawfully permitted reason.

The Court's analysis of the communication with Megan Irvine

[184] Megan Irvine was not an Actuary. However, she was described as someone working in the actuarial related field. The Claimant has conceded that the permissible consultation by the Defendant is not limited to Actuaries and accordingly consultation with Ms Irvine would not be precluded. The issue is then raised as to what was the nature of the consultation with Megan Irvine?

Was there legitimate Consultation with Megan Irvine?

[185] There is no evidence of the Defendant consulting with Megan Irvine in relation to the Annual Premium income calculations or the Annuity Mortality analysis.

[186] In relation to the email with the annuity mortality analysis the Defendant said there were two reasons for sending this email (as with the email from Kyle Rudden). One reason was for safekeeping and the other was to share her grave concerns with

her friend of many years, Megan Irvine. The Defendant stated that Ms Irvine is someone who is in the actuarial community and appreciates governance among Actuaries, so it is something she shared with her out of concern in the proper course of doing my duties as an Appointed Actuary.

[187] I have previously made reference to paragraph 45 of the Defendant's witness statement where she stated that she had also sent documents to Mr DeCarish for safekeeping in accordance with my duty to report under section 44(5) of the Insurance Act.

[188] Mr Tewari was asked to comment on paragraph 20 of Mr Duggan's witness statement where he speaks to the need of Actuaries to keep records. Mr Tewari agreed that Actuaries need to keep records of the decisions that they have made, especially in the event that Management does not agree with the decisions. He stated that Actuaries do not, and he has never seen an Actuary finding it necessary to keep records of reams of data that are proprietary to a client or to an employer. He explained that Actuaries need to keep documentation to support their decisions and to confirm their decisions and their disagreement, not for underlying data.

Whistleblower policy

[189] In cross examination Mr Tewari indicated that he was not aware that keeping company data falls under the rights of the Whistleblower Policy. The Whistleblower Policy gives the employees protection should they report any incident concerning nefarious activities within the company. He admitted that the Defendant communicated significant disagreement about the reserve but would not agree that she considered the treatment of the reserve as he indicated that he did not think it would be reasonable for her to keep reams of data in order to make a report under the Whistleblower Policy and trigger an investigation within the company, because if she made a report under the Whistleblower Policy it would be immediately investigated, there is no need to take away data to establish nefarious activity.

[190] The Defendant's evidence is that events leading up to the email to Mrs Diana Thomas of the FSC in sum total caused her concern and she expressed her concern and disagreement with the fact that Guardian Life had hired an external Actuary who proposed a release in reserve in excess of a billion dollars. I had expressed to Counsel that I understood her to be saying that these events or series of events and emails amounted to acts which are tantamount to a Whistle-blower Report. However, Mrs Gibson Henlin framed it as being not so much as whistle-blower report but a report.

[191] The Defendant's position is supported by Mrs Coke whose evidence was that she was convinced that the Defendant's retention of some of the Claimant's information to protect herself was a reasonable action by the Defendant, given the circumstances in which she was first terminated from employment on curious grounds of redundancy.

[192] It should be noted that the Defendant's retention of information is not central to the Claim, nor is the disclosure of information to the FSC. What is of relevance is the Defendant's disclosure of confidential information to Mr DeCarish and Ms Megan Irvine. In any event, I have not been referred to any authority to support the proposition that a person, Actuary or otherwise is excused from liability in the disclosure of confidential information where that information is sent to an unauthorised third party to keep safely.

[193] The evidence of the Defendant of the need for Mr DeCarish and Megan Irvine to be given documents for safekeeping conjures up images of the classic whistle blower novels or movies in which the lead character shares the confidential information with a close friend or confidant with instructions as to what should be done with it if anything happens to him or her. There is no reason to suspect that there was any sinister plot hatched in the board room of the Claimant which needed this added level of protection.

[194] This was not a case of whistleblowing in the sense of the Defendant reporting wrongdoing on the part of the Claimant in the public interest or as part of her statutory duties. There was an open disagreement about the treatment of the reserves and the FSC has the information it needed or was in a positon to request additional information if it had concerns as to the legitimacy of the Claimant's actions before making a ruling. If the Defendant was of the view that evidence of her objection could or would be erased, then all she needed to have done was to keep such evidence herself. It is noteworthy that in paragraph 31 of her witness statement the Claimant stated that as a result of certain issues in 2017: *"I sent copies of the documents to myself in 2017 to protect myself from incrimination and my belief that these exact circumstances were a live and true possibility, and I would have needed this information to protect and defend myself"*. The Defendant has not produced a credible explanation as to why a similar course could not have been adopted in respect of the confidential information she asserted was sent to Megan Irvine and Mr DeCarish for safekeeping. In these circumstances in the absence of cogent evidence supporting such a course, on a balance of probabilities I have found her explanation to lack credibility.

[195] In cross examination the Defendant was referred to paragraph 61 of her witness statement in which she made a reference to the Mintz Report and what they said about emails to three (3) different persons: Ravi Rambarran, Sean DeCarish and Megan Irvine. In relation to the emails to Megan Irvine, the Defendant stated that: *"Between 2009-2018, I sent 6 Guardian emails to Megan. One email dealt with the behaviour of an employee towards his colleagues, another 2 dealt with my car benefits, two were about the "infamous" annuity email and the other is about a change in management."* The Defendant was confronted with other emails she had sent to Megan Irvine during this period and her explanation was that she did not include in the 6 emails, the e-mails which she forwarded for safe keeping. This explanation is not logical or convincing and is evidence of the Defendant not being forthright about her conduct and the extent of the disclosure she made to Megan Irvine.

The applicability of the Insurance Act

[196] The Defendant initially asserted that she has a statutory duty by virtue of section 44 (15) of the Insurance Act where she would be exempted from civil liability.

[197] Mr Hylton cross examined the Defendant in relation to this proposition and she was directed to section 44 (14) and 44 (15) which read as follows:

> *(14) Any oral or written statement made by an actuary or former actuary of a registered insurer pursuant to this section shall be protected by qualified privilege.*
>
> *(15) Any actuary or former actuary of a company who in good faith makes an oral or written statement pursuant to subsection (9), (10) or (12), or section 45 shall not be liable to any civil action as a consequence of making such statement.*

The Defendant was asked to look through the sub-sections (9), (10) and (12) of section 44 to see that they refer to statements made to specific persons. The Defendant was then asked if she agreed that section 44 (14) only applies in relation to statements to the companies, Directors, Shareholders, Policyholders, Audit Committee and Management and the FSC. She did not agree and suggested that it could for example include a report in writing to the company's CEO and CFO which Mr Hylton indicated would be captured by his reference to Management. The Defendant agreed that the protection afforded by section 44 (15) was in respect of communication to the limited class of persons referred to and on which they had agreed.

[198] Mrs Coke sought to support the initial position of the Defendant (before the Defendant conceded the limitation to a particular class). Issues 2 and 3 of the letter of instruction to Mrs Coke seeking her opinion are related and state as follows:

> *2. Does the Insurance act and/or its regulations provide immunity from prosecution for any disclosure/s made by the Appointed Actuary?*
>
> *3. Does the Insurance Act and/or its regulations provide any protection to the Appointed Actuary who has sought to protect information which he believes it can have materially adverse effects on our company's financial condition, and which in the Actuary's opinion needs to be in her possession?*

It was her opinion that the Insurance Act provides immunity from prosecution for any disclosure/disclosures made by the Appointed Actuary.

[199] During cross-examination, Mrs Coke was directed to a portion of her Expert Report in which she stated that: *"It is my opinion that the Insurance Act provides immunity from prosecution for any disclosure/ disclosures made by the Appointed Actuary"*. She was asked by Mr Hylton whether she wished to qualify that statement in any way on reflection because as worded, it suggests that the Act provides immunity for any disclosure. She stated that she wanted to have her statement remain in its current form. She was referred to sections 44 (14) and 44 (15) of Act and it was suggested to her that the Act does not provide immunity for any disclosure made by an Appointed Actuary, but instead provides immunity for disclosures to the specific person set out in those two sections. She did not agree and stood by what she said in the Report.

[200] Mrs Coke suggested that if the construction advanced by Mr Hylton is correct, then in her opinion the law needs to be changed. However, I find that the interpretation placed on the section is indeed correct on a plain reading of the section which is clear and unambiguous.

[201] Mr Duggan was clear that the qualified privilege protection offered by 44(15) extended to the Appointed Actuary's communication with the FSC but was unprepared to take it beyond that during cross examination.

Communication with the FSC

[202] It was the Defendant's evidence that she is liable under the Insurance Act and the Insurance Actuary Regulations 2001 and Guidelines on the Criteria for Auditors and Actuaries to the FSC to account for the reserves, other policy liabilities and to report on the company's future financial condition. She stated that on such basis it is her responsibility to ensure that she place such evidence in safekeeping to protect her from civil action and that is what she did. In doing so she does not need permission or consultation.

[203] Having regard to the clear terms of section 44(14) and 44 (15) the Insurance Act, it is quite clear that the disclosures to FSC are protected. That was clearly recognized by the Claimant and there was no assertion that the Defendant's emails to the FSC amounted to a breach of her legal obligations.

[204] What is equally clear is that section 44 of the Act provides no protection to the Defendant for the disclosures of the Claimant's confidential information to Mr DeCarish and Ms Irvine.

The Court's conclusion on Defences to the Disclosure

[205] I have already addressed my reasons for finding that the documents were confidential. The Defence is based on the proposition that the specialized nature and small size of the Actuarial profession confers on its members a special if not a unique right to disclosure of the confidential information of the persons and institutions served by this august body. I reject this proposition as not having any basis in practice, precedent or law.

[206] I have already noted that the Claimant is not asserting that an Actuary and the Defendant in particular is not entitled to consent with professionals including those who are not Actuaries. Mrs Coke during her evidence made the profound statement that "*common sense cannot be legislated.*" I could not agree more. It is indeed an issue which ought not to pose difficulty if persons holding confidential information apply common sense. The fact that one is an Actuary does not mean that, without more, you are entitled to disclose the confidential information of your client or employer to another Actuary or a third party professional because you wish to have their view or assistance with your analysis.

[207] Mrs Coke's evidence also highlights a particular danger when the holder of confidential information is communicating with one's spouse. Mrs Coke expressed her opinion as follows:

> *"M'Lord, if I was married to an Accountant the conversations I have at my work would be different from what I have with my husband who is an*

> *Engineer. What my husband had was common-sense – Plenty of it. So, I would discuss things with my husband connected to my work. Because I would benefit from his common sense, he kept on saying I was mechanically dumb. I think our profession expects us to use our common-sense in interpreting standards and the code of ethics that governs our work."*

In this case the romantic nature of the relationship between the Defendant and Mr DeCarish has also highlighted the manner in which difficulty can arise. Although the Defendant has asserted that some of the communication with Mr Decarish was in the form of professional consultation, there is a plethora of emails which were not addressed in detail during the trial, in which, although there might not have been confidential information exchanged, demonstrates the widespread sharing of the Defendant's views about the Claimant's operations including very uncomplimentary statements about the Claimant's President. Whereas, I have made my findings without placing much weight on this evidence, it is capable of influencing the Court's assessment of the Defendant's credibility when she asserts professional consultation as between herself and Mr DeCarish.

[208] The evidence of the Defendant is that it is common place to share information within the industry to assess the impact of changes or new industry meetings/initiative in the industry itself. These included matters relating to the Jamaica debt exchange, national debt exchange, tax changes, discount rate and pension reform. These were all areas that they were called upon to make recommendation, do analysis, quantitative impact studies and provide comments. I fully accept that such high level consultation is perfectly acceptable.

[209] I accept that the position as it relates to actuaries communicating between themselves in the real word has been accurately stated by Mr Tewari when he said the nature of the collaboration is always in an abstract manner so as not to divulge sensitive confidential or privileged client information and without violating the duty of care that an Actuary has to the client. In my view this applies more so to communication with other professionals who are not actuaries and accordingly are not bound by the code of conduct that binds actuaries.

[210] I have indicated that I accept that an Actuary's right to consultation in appropriate circumstances is not limited to other actuaries. However, the importance of the actuaries' code of conduct should not be underestimated. Evidence of the force and faith in such a code in my opinion is demonstrated by the fact that competing clients share the same Actuarial firm and in some cases the same Actuary. This is a tremendous compliment to the profession and speaks volumes of the faith which such clients have in the ability of the Actuary to compartmentalize in leak-proof silos each client's confidential information. In this regard, the fact that Mr Decarish and Ms Irvine were not Actuaries (although Ms Irvine was employed in the actuarial field) would not afford them this benefit of trust and highlights the need for there to have been a good explanation for the sharing of the Confidential Information with them in order for the Defence to succeed.

[211] Mr Tewari also explained that it is the practice to consult with people within your organization when you are dealing with confidential information and then seek authorization to go to external consultants should you need to do so. I accept that this is the practice and I consider this to be a logical and a common sense position, especially in the Claimant, which is a company which is a part of a group of companies not operating in individual silos and in which there are other actuaries employed.

Comment on expert evidence on behalf of the Defendant

[212] In analysing expert evidence, the Court is required to weigh it and determine its probative value as may be appropriate. The Court is required to consider the evidence against the background and in the context of all the other evidence.

[213] It is unfortunate but necessary for me to state that I have attached very little weight to the expert evidence of Mrs Coke. I accept the submission of Mr Hylton that she was not an independent, objective or disinterested expert witness. I was concerned firstly, that she sourced and relied on documents that were not included in her letter of instructions contrary to the CPR. She has also had a long and close relationship

with the Defendant and Ms Irvine. I came to the conclusion that she was making a deliberate effort to frame her evidence to support the Defendant even where the opinion exceeded the ambit of her expertise. This is evident in her evidence on the effect of the Insurance Act as well as her comments on the Defendant's dismissal and her questioning of whether the Defendant could have been dismissed for cause after she was previously dismissed on the basis of redundancy.

[214] Mr Dugan, although not appointed as an expert, is a professional of considerable experience who could have been so appointed. His evidence also reflected an underlying intention to assist the Defendant's case which it is clear he did not have a full appreciation of. For this reason, his evidence was generally unhelpful.

Loss to Claimant

[215] The evidence of the Defendant was that she was currently involved in the pricing of Sagicor's products and when she was at Guardian she was involved in pricing there also. She stated that to the best of her knowledge and based on her Actuarial expertise, pricing is not mimicked, in the sense that Sagicor would look at Guardian's price and underbid it. She would not sanction that.

[216] The Defendant was asked by Mr Hylton whether she was aware whether Sagicor copied products and mimicked prices in the past. Her response was that insurance companies largely mimic the other companies' products from the point of view of product features and design, but in terms of pricing, the pricing would be unique for each specific company's situations and circumstances. Following her response, she was confronted with paragraph 5 d.i of her witness statement where in the second sentence (222) she stated that: *"In fact, Sagicor and Guardian largely copy each other's product details and mimic as far as is viable, the pricing."* She asserted that her witness statement was not incorrect. She noted that there was the qualification "as far as is viable".

[217] I have included this evidence not because the Claimant was relying on evidence of price mimicking by the Claimant's competitors as that was not a line of argument

advanced by the Claimant. What it provides however is additional evidence of the evasive character of the Defendant's evidence on this particular point. The assertion in her witness statement that *"In fact, Sagicor and Guardian largely copy each other's product details and mimic as far as is viable, the pricing"* is clear. The words "*as far as is viable*" speak for themselves.

[218] It was suggested to the Defendant that this is one of the main ways in which a competitor gains a competitive advantage and that this price mimicking is better done with the kind of information that is in the Medecus Spreadsheet. Having regard to the assertion in her witness statement, the suggestion would seem to be a reasonable deduction. However, rather than accepting that this was a possibility, the Defendant ventured into a long explanation as to what "*as far as is viable*" in this context means.

[219] A considerable portion of the cross examination conducted by Captain Beswick of Mrs Basanta-Henry and to a lesser extent the cross examination by Mrs Gibson Henlin, was devoted to demonstrating that there was no evidence of a loss suffered by the Claimant from the disclosures by the Defendant. I have previously noted when considering the Annuity Mortality Analysis email that Mrs Gibson Henlin explored with Mr Tewari the Defendant's position that Guardian did not suffer a detriment by the disclosure of Annuity Mortality Analysis to Megan Irvine by email on 29th June 2018.

[220] Following an enquiry by the Court, Mr Hylton helpfully confirmed that that there is no evidence by the Claimant that there are direct financial losses resulting from the disclosures. Accordingly, it is unnecessary for me to interrogate those portions of the evidence.

The Defendant's submissions on the need for loss or detriment

[221] Counsel for the Claimant submitted that there is substantially no difference between liability and/or remedy in relation to the reliefs sought by the Claimant.

There are three substantive claims, these are for breach of contract, breach of fiduciary duty and breach of confidence.

[222] Initially it was submitted that proof of a detriment or loss was necessary to sustain a claim for breach of contract. Mrs Gibson Henlin subsequently offered a more nuanced position which was that it is necessary for the Claimant to prove a loss or detriment in this case. In construing the Contract of Employment one has to examine it in its entirety and for there to be a breach on the basis of an unauthorised disclosure, then it would have to be disclosure which causes loss or detriment. In aid of this construction the Defendant relies on clause 16 of the Contract of Employment which provides that the Defendant's employment may be terminated:

> *...if you are guilty of any gross default or misconduct in connection with or affecting the business of the Company or in the event of any breach or non-observance by you of any provision which is materially detrimental to the Company's interest...*

[223] Adopting this modified argument did not affect the core and structure of the Defendant's submissions in which the breach of contract and breach of confidence claims were addressed together. It was submitted that in relation to the breach of contract claim, in the absence of a definition of "confidential information" in the contract, the Court has to assess whether the relevant information is confidential. Initially, it was submitted, that the breach of contract is rolled into and contingent on a finding of breach of confidence.

[224] In relation to the breach of confidence claim, Mrs Gibson Henlin relied on ***Coco v A.N. Clark (Engineers) Limited*** *1968 FSR 415* which she submitted has been applied in Jamaica on several occasions most notably in ***Paymaster (Jamaica) Limited and another (Respondents) v. Grace Kennedy Remittance Services Limited (Appellant) Paymaster (Jamaica) Limited v. Grace Kennedy Remittance Services Limited and another (Respondents) (Jamaica).***

It was submitted that following the principles established in ***Coco v A.N. Clark***, the Claimant has to prove the following three elements in order to succeed:

a) The information must be confidential either because there is a contract, or the circumstances are such that the information was imported in circumstances that cloaked it with the quality of confidentiality.

b) The information must be disclosed.

c) There must be unauthorised use, or misuse of the information to the detriment of the person communicating it.

[225] In relation to the third element the following portion of Megarry J's judgment at page 421 in particular was relied on by Mrs Gibson Henlin:

> *Thirdly, there must be an unauthorised use of the information to the detriment of the person communicating it. Some of the statements of principle in the cases omit any mention of detriment; others include it. At first sight, it seems that detriment ought to be present if equity is to be induced to intervene;* ***but I can conceive of cases where a plaintiff might have substantial motives for seeking the aid of equity and yet suffer nothing which could fairly be called detriment to him, as when the confidential information shows him in a favourable light but gravely injures some relation or friend of his whom he wishes to protect. The point does not arise for decision in this case, for detriment to the plaintiff plainly exists. I need therefore say no more than that although for the purposes of this case I have stated the proposition in the stricter form, I wish to keep open the possibility of the true proposition being that in the wider form.***
>
> *(emphasis supplied by the Court for ease of identification)*

The Claimant's submissions on the need to prove detriment or loss

[226] Mr Hylton has challenged the assertion that ***Coco v A.N. Clark*** imports a requirement for detriment or loss as an inflexible rule. In support of his position he relied on the highlighted portion of the judgment of Megarry J quoted in the preceding paragraph. Mr Hylton submitted that financial loss and in fact any damage at all, is not a requirement in a claim for breach of confidence. He also relied on the House of Lords Decision in ***Attorney General v Observer Limited***

& Others No. 2 *[1990] 1 AC 199* in which Lord Keith at page 256 stated the following:

> *In cases of infringement of intellectual property rights it is often the case that the victim of the wrong cannot demonstrate any actual loss, and therefore there is statutory sanction for compensation based on what the victim would have reasonably charged for a licence allowing the activity carried out by the wrongdoer, or for an account of the profits made by the wrongdoer. The traditional view is that common law damages cannot be awarded on such bases. Relatively recent developments have shattered the traditional view so far as English law is concerned.*
>
> *In certain cases, principally concerned with wrongs against property... English law has developed a type of damages, the measure of which is based upon what the innocent party would have reasonably required as a payment for permitting what otherwise would have been a breach of contract, or of a breach of what in Scots law would be described as a land obligation, or of a breach of duty in delict. In such cases it is often the position that the victim is unable to demonstrate any loss actually incurred or damage sustained. The amount of the damages is based on a reasonable price for a waiver of the wrong produced by hypothetical negotiations. This measure is regarded as compensatory in that the damages are the redress for loss of the economic value of the right to allow what would otherwise be a wrong.*

[227] Mr Hylton also submitted that the Claimant's reliance on the Paymaster case is misconceived because the Privy Council found that the Court of Appeal did not have a sufficient basis to overturn the finding of the judge at first instance. Also, the Defendant GKRS had not used the Claimant's information and the issue of whether a detriment was suffered was not material.

The Court's conclusion on whether a detriment or loss is required.

[228] The statement of law as to the elements necessary to found an action for breach of confidence is clearly stated in ***Coco v A.N. Clark***. However, the often overlooked portion of Megarry J's judgment relied on by Mr Hylton and to which reference has already been made, is of equal force. This is supported by the decision of the Court in ***Attorney General v Observer Limited & Others No. 2*** (supra).

[229] Mr Hylton has also referred to the judgment in ***Island Lubes Distributors Limited and Another v John Levy and others*** *[2021] JMCC Comm 27*, a decision of this Court on an interlocutory application for injunctive relief, based

on, *inter alia*, a claim of breach of confidence. The Claimants were represented by Mrs Gibson Henlin. It was noted that although reliance was placed on ***Coco v A.N. Clark*** in stating the applicable principles, in expressing the third requirement that there be an unauthorised use of the information, the Court did not extend it to include the need for detriment.

[230] I remain convinced and fortified in my opinion that the position I arrived at in ***Island Lubes*** (supra) is correct, and there is no requirement for detriment to be proved in every case of breach of confidence. Accordingly, I am firmly of the opinion that it is not necessary for the Claimant to prove detriment or loss in this case. If additional support for this position is needed, it should be noted that Laddie J in ***Ocular Sciences Ltd & Anr v Aspect Vision Care Ltd & Ors Geoffrey Harrison Galley v Ocular Sciences Ltd - [1997]*** *RPC 289* at page 368 is of a similar opinion. Having considered Megarry J's three component test, in referring to the third requirement he stated the following:

> *"Nothing turns on the last of these. This being a case which is advanced primarily as one arising out of contract, it was not suggested that the plaintiffs needed to prove damage for the purpose of establishing the defendant's liability. The first two, on the other hand, are central to the proceedings."*

The Court's conclusion on breach of contract and breach of confidence

[231] For the reasons stated herein, I find that there is no justification as a matter of practice or law for the Defendant to have disclosed the Confidential Documents in this case. Such disclosures cannot reasonably be considered to have been made "*in the proper course of her duties*". Accordingly, I find that the Defendant has disclosed confidential information in breach of her Contract of Employment and is liable for the tort of breach of confidence. Neither cause of action requires the Claimant to establish damage, loss or detriment.

Analysis and conclusion in respect of breach of fiduciary duty

[232] The Claimant relies on the same averments and facts to allege that the Defendant breached her fiduciary duties. It is submitted by the Defendant that the same analysis that was used to assess the material and actions of the Defendant in relation to a breach of confidence/contract applies here. The Defendant submitted that there was no evidence that she acted in bad faith or that she did not exercise due care and skill in any of the alleged disclosures in breach of her fiduciary duties to the Claimant. The Claimant has not disclosed any detriment or damage suffered by the Claimant as a result of the Defendant's alleged breach of fiduciary duties to the Claimant.

[233] The duties of directors and officers are encapsulated in sections 174 and 174A of the Companies Act, the latter of which was introduced by the Companies (Amendment) Act 2017 and provides as follows:

> ***174.***—*(1) Every director and officer of a company in exercising his powers and discharging his duties shall—*
>
> *(a) act honestly and in good faith with a view to the best interest of the company; and*
>
> *(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances, including, but not limited to the general knowledge, skill and experience of the director or officer.*

[234] The Defendant was an officer of the Claimant and was subject to these statutory obligations. Having regard to the Court's findings in respect of her conduct which amounted to a breach of the Contract of Employment and which also amounted to a breach of confidence, I am satisfied that this conduct also amounts to a breach of the fiduciary duty which she owed to the Claimant.

THE REMEDIES

Submission of the Claimant on the remedies

[235] The Claimant submitted that having proven the breaches of confidence, Guardian Life is entitled to seek relief from the Court, and the usual and most appropriate remedy is an injunction to prevent further breaches. An injunction in the terms claimed is particularly necessary in the present case, where the Defendant is now employed by Guardian Life's main competitor.

[236] It was also submitted that on the evidence in this case, Guardian Life is also entitled to damages. In their most recent edition, the learned authors of Stair Memorial Encyclopaedia state at volume 7 paragraph 7:

> *In cases of infringement of intellectual property rights it is often the case that the victim of the wrong cannot demonstrate any actual loss, and therefore there is statutory sanction for compensation based on what the victim would have reasonably charged for a licence allowing the activity carried out by the wrongdoer, or for an account of the profits made by the wrongdoer. The traditional view is that common law damages cannot be awarded on such bases. Relatively recent developments have shattered the traditional view so far as English law is concerned.*
>
> *In certain cases, principally concerned with wrongs against property... English law has developed a type of damages, the measure of which is based upon what the innocent party would have reasonably required as a payment for permitting what otherwise would have been a breach of contract, or of a breach of what in Scots law would be described as a land obligation, or of a breach of duty in delict. In such cases it is often the position that the victim is unable to demonstrate any loss actually incurred or damage sustained. The amount of the damages is based on a reasonable price for a waiver of the wrong produced by hypothetical negotiations. This measure is regarded as compensatory in that the damages are the redress for loss of the economic value of the right to allow what would otherwise be a wrong.*

[237] The Claimant has also, and more importantly relied on the decision of the United Kingdom Supreme Court in ***One Step (Support) Limited v Morris-Garner & Anor*** in support of its claim in relation to "negotiating damages" and it is necessary for the Court to examine that judgment in detail. In support of the applicability of such

damages reliance was also placed on the case of **Force India *Formula One Team Ltd v 1 Malaysia Racing Team SDN BHD and others*** *[2012] EWHC 616 (Ch).*

[238] The Claimant submitted that the facts of the instant case fall squarely within the parameters Lord Reed set out in paragraphs 92 and 93 of the ***One Step*** (supra) judgment, and that the Court should grant damages to be assessed on the basis the trial judge ordered in that case, although it was acknowledged that the Supreme Court ordered damages on a different basis having examined the facts.

The Defendant's submissions on remedies

[239] The Defendant submitted that there is no basis on the statements of case or in law for asserting that there is a post-termination duty of confidentiality because there is no contract to that effect. The documents allegedly disclosed in this case span a period of over ten years and most of the information would by now have been in the public domain, in Financial Statements or the Insurance industry association publication. Accordingly, the injunctive relief sought on these facts should therefore be refused.

[240] It was further submitted that no damage was suffered by the Claimant such as to give rise to a remedy of damages for either breach of contract or breach of fiduciary duties.

Discussion and conclusion on the applicable remedies

[241] The Claimant has placed heavy reliance on ***One Step*** in support of its claim for "negotiating damages". It is therefore necessary to examine this case in detail and in so doing it is clear that this area of law is difficult to navigate. In ***One Step*** the Claimant company provided assisted living care for vulnerable children. The Claimant brought a claim against the Defendants, a former director and shareholder respectively who had established a competing business in the same areas of the Claimant's operation. The Claimant alleged breach of a restrictive covenant not to compete with the Claimant, not to solicit its clients or use its

confidential information. The trial judge found that the Defendants had acted in breach of contract by breaching the non-compete covenants, the non-solicitation covenants and that the first defendant had also acted in breach of the contractual confidentiality clause and an equitable duty of care and had used the information in setting up the competing business. Lord Reed JSC observed at page 667 that the trial judge did not make a separate order in respect of the first defendant's breach of her contractual duties of confidence and implicitly appears to have proceeded on the basis that no such separate award was necessary since the harm caused by it would be reflected in an award in respect of the breach of the non-compete and non-solicitation covenants.

[242] The learned judge concluded that the claimant was entitled to damages to be assessed on a "Wrotham Park" basis named after the case of ***Wrotham Park Estate Co Ltd v Parkside Homes Ltd*** [1974] 1 WLR 798. He reached this conclusion largely because he found that it would be difficult for the claimant to identify the financial loss it had suffered as a result of the defendants' wrongful competition. His decision was upheld by the Court of Appeal which held that damages based on a hypothetical release fee were available whenever that was a just response. The Court of Appeal also held that it was for the judge to decide on a "broad brush basis" while, taking into account, if he deemed appropriate, the difficulties which the claimant would have in establishing damages on the ordinary basis.

[243] Before the Supreme Court the issues to be determined were the following:

> *"...where a party is in breach of contract, in what if any circumstances is the other party to the contract entitled to seek negotiating damages ,i.e damages assessed by reference to a hypothetical negotiation between the parties, for such amount as might reasonably have been demanded by the claimant for releasing the defendants from their obligations;. and secondly, whether the Court of Appeal was correct to uphold the judge's finding that such damages are available in this case."*

Lord Reed (with whom Baroness Hale of Richmond PSC, Lord Wilson and Lord Carnwath JJSC agreed), expressed a preference for the term "negotiating

damages" rather than "Wrotham Park damages". He commenced his analysis at paragraph 4 by noting the following general principles identified by Lord Wilberforce in ***Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd*** *[2011] 1 WLR 2370,*:

> *(1) Damages (often termed "user damage') are readily awarded at common law for the invasion of rights to tangible moveable or immoveable property (by detinue, conversion or trespass) ...*
>
> *"(2) Damages are also available on a similar basis for patent infringement and breaches of other intellectual property rights of a proprietary character ...*
>
> *"(3) Damages under Lord Cairns's Act are intended to provide compensation for the court's decision not to grant equitable relief in the form of an order for specific performance or an injunction in cases where the court has jurisdiction to entertain an application for such relief ...*
>
> *"(4) Damages under this head (termed "negotiating damages' by Neuberger LJ in Lunn Poly [2006] 2 EGLR 29, para* ***22****) represent "such a sum of money as might reasonably have been demanded by [the claimant] from [the defendant] as a quid pro quo for [permitting the continuation of the breach of covenant or other invasion of right]': Lunn Poly, [*Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd *[2006] 2 EGLR 29,] at para* **25**.
>
> *"(5) Although damages under Lord Cairns's Act are awarded in lieu of an injunction it is not necessary that an injunction should actually have been claimed in the proceedings, or that there should have been any prospect, on the facts, of it being granted ..."*

[244] Starting at first principles, Lord Reed acknowledged that the award of negotiating damages under the Chancery Amendment Act 1858 (commonly referred to as Lord Cairns's Act), and also at common law, has been influenced by the award of "user damages" at common law for the tortious invasion of rights to tangible property, and the award of damages on a similar basis for infringements of intellectual property rights. Lord Cairns's Act permitted the Court of Chancery for the first time to award damages in addition to or in substitution for the equitable remedies of injunction or specific performance in certain cases. Lord Reed examined the Wrotham Park line of cases which he divided into two phases as follows:

> *48. "an initial period in which "awards based on a hypothetical release fee were made in the exercise of the jurisdiction under Lord Cairns's Act in*

substitution for injunctions to prevent interferences with property rights and breaches of restrictive covenants over land, and a later period in which awards calculated in a similar way were made at common law on a wider and less certain basis."

[245] Having conducted a scholarly analysis of numerous judgments Lord Reed arrived at the following conclusions which are well worth reproducing:

> ***91*** *The use of an imaginary negotiation can give the impression that negotiation damages are fundamentally incompatible with the compensatory purpose of an award of contractual damages. Damages for breach of contract depend on considering the outcome if the contract had been performed, whereas an award based on a hypothetical release fee depends on considering the outcome if the contract had not been performed but had been replaced by a different contract. That impression of fundamental incompatibility is, however, potentially misleading. There are certain circumstances in which the loss for which compensation is due is the economic value of the right which has been breached, considered as an asset. The imaginary negotiation is merely a tool for arriving at that value. The real question is as to the circumstances in which that value constitutes the measure of the claimant's loss.*
>
> ***92****. As the foregoing discussion has demonstrated, such circumstances can exist in cases where the breach of contract results in the loss of a valuable asset created or protected by the right which was infringed, as for example in cases concerned with the breach of a restrictive covenant over land, an intellectual property agreement or a confidentiality agreement. Such cases share an important characteristic with the cases in which Lord Shaw's "second principle" and Nicholls LJ's "user principle" were applied. The claimant has in substance been deprived of a valuable asset, and his loss can therefore be measured by determining the economic value of the asset in question. The defendant has taken something for nothing, for which the claimant was entitled to require payment.*
>
> ***93*** *It might be objected that there is a sense in which any contractual right can be described as an asset, or indeed as property. In the present context, however, what is important is that the contractual right is of such a kind that its breach can result in an identifiable loss equivalent to the economic value of the right, considered as an asset, even in the absence of any pecuniary losses which are measurable in the ordinary way. That is something which is true of some contractual rights, such as a right to control the use of land, intellectual property or confidential information, but by no means of all. For example, the breach of a non-compete obligation may cause the claimant to suffer pecuniary loss resulting from the wrongful competition, such as a loss of profits and goodwill, which is measurable by conventional means, but in the absence of such loss, it is difficult to see how there could be any other loss.*

> ***94*** *It is not easy to see how, in circumstances other than those of the kind described in paras **91–93**, a hypothetical release fee might be the measure of the claimant's loss. It would be going too far, however, to say that it is only in those circumstances that evidence of a hypothetical release fee can be relevant to the assessment of damages. If, for example, in other circumstances, the parties had been negotiating the release of an obligation prior to its breach, the valuations which the parties had placed on the release fee, adjusted if need be to reflect any changes in circumstances, might be relevant to support, or to undermine, a subsequent quantification of the losses claimed to have resulted from the breach. It would be a matter for the judge to decide whether, in the particular circumstances, evidence of a hypothetical release fee was relevant and, if so, what weight to place upon it. However, the hypothetical release fee would not itself be a quantification of the loss caused by a breach of contract, other than in circumstances of the kind described in paras **91–93** above.*

[246] The Supreme Court in ***One Step*** concluded that neither the Judge nor the Court of Appeal adopted the correct approach on the facts of the case. It held that the Judge was mistaken in his belief that the difficulty in quantifying financial loss justified the abandonment of any attempt at such quantification and the Judge was wrong in awarding instead a remedy which was not compensatory in a meaningful sense. On the other hand, it held that the Court of Appeal was mistaken in treating the deliberate nature of the breach, or the difficulty of establishing precisely the consequent financial loss, or the claimant's interest in preventing the defendants' profit-making activities, as justifying the award of a monetary remedy which was not compensatory. The Supreme Court also expressed the view at page 690 that:

> *The idea that damages based on a hypothetical release fee are available whenever that is a just response, that being a matter to be decided by the judge on a broad brush basis, is also mistaken. The basis on which damages are awarded cannot be a matter for the discretion of the primary judge.*
>
> ***98*** *This is a case brought by a commercial entity whose only interest in the defendants' performance of their obligations under the covenants was commercial. Indeed, a restrictive covenant which went beyond what was necessary for the reasonable protection of the claimant's commercial interests would have been unenforceable. The substance of the claimant's case is that it suffered financial loss as a result of the defendants' breach of contract. The effect of the breach of contract was to expose the claimant's business to competition which would otherwise have been avoided. The natural result of that competition was a loss of profits and possibly of goodwill. The loss is difficult to quantify, and some elements of*

> *it may be inherently incapable of precise measurement. Nevertheless, it is a familiar type of loss, for which damages are frequently awarded. It is possible to quantify it in a conventional manner, as is demonstrated by Mr Hine's report.*

[247] It is therefore important to highlight that there are important differences between ***One Step*** and the instant case. Notably, in ***One Step,*** there was evidence of an estimate of the loss the Claimant had suffered which is absent in the case before me. Furthermore, it cannot be said that the effect of the Defendant's breach of the Contract of Employment was a loss of profits and/or goodwill. Accordingly, there is no risk that an order for the assessment of negotiating damages could be viewed as an improper substitution of an assessment of compensatory damages based on the evidence before the Court, whether based on an incorrect assessment of the difficulty of the latter, or otherwise.

[248] Another important distinction is that in this case the Claimant is also seeking an injunction. Consequently, this case does not fall within the category of cases identified by Lord Reed in the initial period in which "*awards based on a hypothetical release fee were made in the exercise of the jurisdiction under Lord Cairns's Act in substitution for injunctions…*". The basis of any award of damages of negotiating damages would be:

> *...for breach of contract where the loss suffered by the claimant is appropriately measured by reference to the economic value of the right which has been breached, considered as an asset. That may be the position where the breach of contract results in the loss of a valuable asset created or protected by the right which was infringed. The rationale is that the claimant has in substance been deprived of a valuable asset, and his loss can therefore be measured by determining the economic value of the right in question, considered as an asset. The defendant has taken something for nothing, for which the claimant was entitled to require payment.*

[249] Notwithstanding the fact that there is no evidence that the Defendant has exploited the Confidential Information, as is the facts of most of the cases examined in ***One Step***, the general principles as identified by Reed JSC and in particular the ones quoted in the preceding paragraph are apposite.

[250] In the ***Force India Case*** at paragraph 381 the learned judge opined as follows:

> *Where the obligation of confidentiality that has been breached by the Defendant is a contractual one, the obvious starting point is the proposition that the Claimant is entitled to damages assessed on the normal contractual measure, that is to say, compensation for the loss of his bargain. Thus the Claimant can recover such sum as will put him in the position that he would have been if the contract had been performed. In a breach of confidence case, that means the position the Claimant would have been in if the information had not been misused.*

He identified three categories of cases. The first is where the claimant exploits the confidential information and can prove his profits have been diminished as a result of the breach. The second is where the claimant grants licences for a fee or royalty and has lost the opportunity of granting a licence. A variant of the second is where the claimant would have assigned the contractual right to the obligation of confidence (by sale rather than granting a licence and has lost the sale. The third is where the claimant cannot prove that he has suffered financial loss in any of these ways. The learned Judge stated that in the third type of case the user principle is not directly applicable. He then considered the cases dealing with what he said should have variously been referred to as "*Wrotham Park* damages", "gain-based damages" and "negotiating damages" and concluded that "*these are damages assessed as the price which the defendant could reasonably have demanded as the price for agreeing to relax the contractual restriction in question.*"

[251] Interestingly in the ***Force India Case*** (supra) it was common ground between Counsel that negotiating damages may be awarded for breach of a contractual obligation of confidence.

[252] Having found that the Defendant disclosed the Claimant's confidential information in breach of the Contract of Employment, I also find that the Claimant is entitled to damages by reference to the economic value of its asset, namely the right to its information, which has been infringed by the Defendant's actions.

[253] I accept the submissions of Mr Hylton that it would not be appropriate for me to attempt to assess a figure based on the negotiating damages approach since

sufficient information is not before the Court. I appreciate that such an assessment will be a difficult exercise. Moreover, because this is a case in which the Claimant is also seeking an injunction, I appreciate the issue of the date of assessment of any hypothetical release fee will be relevant and the relevant considerations are discussed by Lord Reed JSC and also by Lord Sumption JSC and Lord Carnath JSC in ***One Step***. However, these are issues to be grappled with by the Judge conducting the assessment at the appropriate time.

[254] I feel inclined to add by way of comment that we are currently living in what has been described as the digital age where economies are driven by information technology. The importance of data and the development of complex algorithms has made it possible to extract valuable assumptions and high probability conclusions from large quantities of data in respect of diverse groups of persons. The view of data as confidential material cannot ignore this current reality. In this regard, the ability of a claimant to obtain relief without being able to prove direct financial loss is a valuable tool in modern jurisprudence.

[255] The Claimant is a commercial entity but it can hardly be argued that its only interest in the Defendant's performance of her obligations was commercial or economic. It is therefore the responsibility of the Court to provide specific relief, in this case in the form of an injunction to ensure the performance of the Defendant's contractual obligation.

[256] It is settled law that the obligations of an employee in a contract of employment are determined by the terms of that employment contract, pursuant to which he or she is engaged. I find without any hesitation that it was implied in the Contract of Employment that obligations imposed by the non-disclosure clause were intended to survive the end of her employment. It would make little commercial or practical sense if the Defendant had a licence to disclose all the Claimant's confidential information once she ceased to be an employee.

The test for the grant of permanent injunction

[257] The Court may grant permanent relief in the form of a final prohibitory injunction having regard to its determination of this claim on a balance of probabilities. The injunction is an equitable remedy and as a consequence its granting is discretionary and subject to equitable considerations as to whether it is an appropriate remedy.

[258] In ***Ocular Science***s (supra) at page 393 the learned judge made the following observation:

> *In the case of actions for breach of confidence it is possible to split the prohibitory injunction which the plaintiff will normally invite the court to make into two distinct parts. First there is the order which restrains the wrongdoer from continuing to use, or benefit from the use of, the confidential information. Secondly there is the order preventing the wrongdoer from making the information public. The first is primarily directed to prevent the wrongdoer from benefiting from his wrongful acts or continuing to inflict damage on the plaintiff while the second is directed more to preserving the confidential nature of the information, that is to say preserving the subject matter of the suit. There is no reason why a court should feel constrained to choose simply between granting both or neither. The factors which may justify granting or refusing one type of prohibitory injunction may not be identical to those relevant to the grant or refusal of the other. Particularly in relation to this type of relief; the court has a duty to frame the relief ordered to secure a just and equitable result.*

[259] In this case, the main purpose of granting a prohibitory injunction would be to prevent the continuation of a breach, as opposed to stopping the flow of a benefit arising from the breach, since there is no evidence of the latter. In ***Attorney General v Guardian Newspapers (No 2)*** [1990] 1 AC 109 (the Spycatcher case) the court concluded that a third party in possession of confidential information was bound by a duty of confidence unless the duty was extinguished by the information becoming available to the general public or there was a countervailing public interest which required the disclosure.

[260] I accept the submissions of Mrs Gibson Henlin that some of the Confidential Information may have become public information by now. However, I find that there is still confidential information which is deserving of protection and in respect of

which an injunction can be so drafted as to be no wider than is necessary to protect the Claimant's rights.

The Amendments to the Defendant's statement of case

[261] On 29th September 2020, after this trial had commenced, the Defendant filed a Notice of Application seeking permission to amend the Defence and Counterclaim ("the Application"). The Application was heard on 3rd December 2020 and on 12th January the Court delivered a written judgment allowing the proposed amendments which bears the citation [2021] JMCC COMM 1.

THE COUNTERCLAIM

[262] The Defendant has filed a Counterclaim. The Counterclaim includes the following pleadings:

> *20. The Defendant has suffered damages due to the actions of the Claimant:-*
>
> *a) Initiated civil proceedings maliciously through this Claim intended solely to cause her harm and detriment.*
>
> *b) Used the 'Mintz Report' to defame her and disclose private information about her children, and the Claimant further compounded the damage to the Defendant in that:-*
>
> *i. Agents and/or servants of the Claimant disclosed the contents of the 'Mintz report' in meetings at the Claimant's offices to other agents and/or servants of the Claimant and to other persons in the insurance industry.*
>
> *ii. The information in the said report made certain implications and imputations that were not true and which were not qualified.*
>
> *c) Breached the Defendant's constitutional rights to privacy by virtue of:-*
>
> *i. The said 'Mintz Report' upon which the search order accompanying this claim was based contains highly personal information not only about the Defendant personally but also her children and grandchildren, who were not a party to the action and now have their own private family information without their consent exposed to public domain in a clear violation of the constitutional right to privacy and family;*

ii. The agents and/or servants of the Claimant did divulge the contents of the said 'Mintz Report'

d) Continued to harass her at home even though she has been terminated since August 15, 2018.

i. The Defendant was terminated by reason of redundancy on August 15, 2018.

ii. In this matter, the Defendant's acknowledgment of service indicated that service of all other documents should be to the Defendant's attorneys-at-law now of record.

iii. On or about the 1st November 2018, the Claimant sought to serve the Defendant at her home with a further termination letter and other documents.

e) Recklessly misled the Court into an unsound, unnecessary and unlawful search order which resulted in a search of her home on October 16, 2018.

21. In the circumstances where there is a parallel proceeding 2018 CD 0556 which touch and concern the same contract of employment and similar issues, and the Defendant is protected from civil liability under the Insurance Act, this proceeding 2018 CD 0566, is an abuse of process.

22. In the circumstances, the Defendant has suffered significant loss and damage.

The Evidence of the Defendant in support of the Counterclaim

[263] Prior to working at Guardian, the Defendant worked with the Financial Services Commission for a period of three years as Chief Actuary. She was also the Actuarial Assistant later promoted to Assistant Vice President and Actuary for the period of eleven years where she worked with the Appointed Actuary during which she was responsible for Actuarial functions for subsidiaries of Life of Jamaica. Prior to this she was employed as an Actuarial Analyst for the period of five years for the American Bankers Insurance Company in Florida, United States of America. She is also a Fellow of the Society of Actuaries based in the United States of America which is one of the licensing bodies which certifies persons to be Actuaries. She is currently a Council member and Secretary of the Caribbean Actuarial Association.

[264] She gave evidence that she had an unblemished record of performance and she is well respected in her field. She stated that there has been no damage or harm that has resulted to the Claimant contrary to the assertion. It is her, the Defendant that has suffered great harm and damage due to the actions of the Claimant and this malicious prosecution.

[265] The Defendant has asserted that the Mintz Report has been circulated to employees of the Claimant which has defamed her reputation. She asserted that the Mintz Report has breached her constitutional rights to privacy as it contains personal information about her children and grandchildren who were not a party to the action and the information is now out in the public domain.

[266] She also stated that her reputation has been tarnished as her scope of employment in the Caribbean has been diminished due to the false allegations made against her.

[267] It was also her evidence that she knew Richard Byles, Megan Irvine and Ravi Rambarran in excess of 20 years. She denied the allegation of inappropriate sharing of information or benefit and said that such allegation is a vicious attempt to demonize longstanding cordial relationships by drawing nefarious inferences of fact. She stated that any communication and relationship she had with employees of the competitor Sagicor has nothing to do with Guardian.

[268] The Defendant also averred that the Search Order granted on 12th October 2018 by Justice C. Edwards ("the Search Order") was granted improperly in circumstances where there existed no imminent risk of dissipation or destruction of the items which was being sought in the Search Order. This was in part because there was no evidence of mass deletions.

[269] It was further averred that the Search Order as granted represented a flagrant violation of the Defendant's constitutional right to protection:

(i) from search of the person and property:

(ii) of private and family life, and home; and

(iii) of correspondence.

[270] The Defendant included a prayer for multiple reliefs as follows:

(i) *A declaration that the Defendant did not breach her duty of confidentiality to the Claimant;*

(ii) *A declaration that the proceedings herein are malicious in nature;*

(iii) *An order directing the Claimant to disclose forthwith and in any event within 24 hours of this order, all the persons, government bodies, financial institutions, or any other entity or individual whatsoever whether in or out of the island and whether foreign or domestic, with copies of all correspondences thereto, and that the Claimant be directed to write to each and every one of these entities and/or persons in a format mutually agreed by the parties advising that the 'Mintz report' has been withdrawn and that the Defendant herein has been cleared of any and all suspicions and/or alleged breaches and affixing a copy of the order herein indicating the declarations of the Court, and provide proof of delivery/service of the said letters/order to the Defendant's Attorney herein;*

(iv) *Damages for slander and defamation;*

(v) *Damages for loss to professional reputation, loss of future job prospects, humiliation, shock and injury to feelings, by virtue of the malicious and libelous actions of the Claimant by publicizing the contents of the Mintz report and by making other disparaging comments about the Defendant causing the Defendant to suffer, ridicule and being defamed and slandered by the public, her associates, family and her colleagues pursuant to the Defamation Act;*

(vi) *Damages for loss of future income and handicap on the labour market due to the malicious actions of the Claimant herein in unlawfully and maliciously procuring a search order and initiating the Claim herein;*

(vii) *Damages for mental distress;*

(viii) *Damages for breach of contract;*

(ix) *Damages for malicious civil prosecution initiated by the Claimant;*

(x) *Damages for breach of the constitutional right to privacy and breach of the Charter of Fundamental Rights and Freedoms by reason of failing to adhere to the principles of natural justice by refusing to*

afford the Defendant a hearing before depriving her of her right to privacy and before attempting to dismiss her cause;

(xi) *Aggravated damages on the footing that the Claimant, deliberately and/or wilfully and/or spitefully and/or recklessly and/or maliciously abused their authority as a major player in the insurance arena to procure a search order and to initiate civil proceedings against the Defendant, knowing full well that there was no statutory or other basis for the commencement of such proceedings;*

(xii) *A permanent injunction restraining the Claimant, and Mr. Eric Hosin personally, whether acting in concert or individually, by themselves, their servants and/or agents and any person so connected to them, from taking any steps whatsoever from publishing, commenting and/or otherwise communicating any information adverse to the interests of the Defendant herein or which would reasonably be believed to cause her harm and if in the event such communication should become necessary then the Attorneys-at-Law for the Defendant be copied on all such correspondence;*

(xiii) *An order that the Search Order granted October 12th, 2018 by Justice C. Edwards be discharged;*

(xiv) *An order that the Claimant's attorneys-at-law, the Supervising Attorney and the Computer Expert and any other person having care, custody and/or of the said information, be immediately ordered to return all items seized from the Defendant during the search of her home pursuant to the October 12, 2018 Search Order of Justice C. Edwards and destroy any and all copies and reproduction of such items;*

(xv) *An order that the Claimant, Mr. Eric Hosin, the Claimant's attorneys-at-law, the Supervising Attorney the Computer Expert and any other person(s) so identified by virtue of Order 4, be restrained from referring to, relying on, sharing, divulging, communicating or from using any other method of dissemination, of any and all of the items, information, evidence, documents or such items as were accessed or become available as a result of the search of the Defendant's home pursuant to the October 12, 2018 Order of Justice C. Edwards;*

(xvi) *An order that all the documents exhibited to the Mintz Report or disclosed under the search order which speak to, refer to, identify the personal information of her any of her three children including but not limited to their health information, banking or financial arrangements and their children be destroyed and a certification to the Court that no copies exist be issued;*

(xvii) *An order that the Court direct that an Assessment of Damages hearing be fixed in keeping with the undertaken (sic) given by the*

Respondent/Claimant pursuant to the October 12, 2018 Order of Justice C. Edwards;

(xix) *Special damages for legal fees incurred in the defence of these proceedings;*

(xiv) *General Damages;*

(xv) *Punitive damages on the footing that any sum awarded for compensatory and/or aggravated and/or exemplary damages will be insufficient both to reflect the gravity of the actions and conduct of the Claimant and to deter insurance companies from permitting its officers, servants and/or agents and/or employees from acting similarly in the future and further that the actions of the Claimant's officers amounted to oppressive, arbitrary and unconstitutional actions;*

(xvi) *Interests thereon at such rate and for such period as this Honourable Court deems just pursuant to the Law Reform (Miscellaneous Provisions) Act;*

(xvii) *Costs and Attorney-at-Law Costs;*

(xviii) *Such further and/or other relief as this Honourable Court deems just.*

(It is noted that the numbering following subparagraph (xvii) is inaccurate but reproduced as filed).

The Defence to the Counterclaim

[271] Guardian asserts that it filed this Claim without malice and with legal justification based in part on the findings of the Mintz Report. Guardian averred that it only disclosed the Mintz report in the Court proceedings. It further averred that it filed the Claim and properly obtained the search order to prevent the Defendant from continuing to wrongfully use and share the Confidential Information.

[272] It is not contested that the Mintz Report contains personal information about the Defendant and members of her family, including medical details about her daughter. Ms Dresher, the expert responsible for the preparation of the report, was asked by Captain Beswick to explain the relevance of the information related to the Defendant's family members to Guardian's confidential information and her

response was that these documents show the personal nature of the relationship between the Defendant's children and senior executives at Sagicor.

[273] Mrs Basanta-Henry admitted that prior to obtaining the search order, The Claimant did not reach out to the Defendant in order to get access to her personal devices. She stated that if she disclosed the findings of the Mintz Report to the Defendant she would have been able to delete information. She accepted that she saw no evidence of mass deletions. Mrs Basanta-Henry also conceded the Defendant had the opportunity to make mass deletions after the 1st attempt at executing the search order which was unsuccessful.

[274] Mr Tewari stated that Guardian did not disclose or authorise the disclosure of the Mintz Report to anyone outside of these proceedings and that he is not aware of anyone outside of the proceedings to whom the Mintz Report was disclosed.

Submissions on behalf of the Defendant – the constitutional claim

[275] It was submitted that the Guardian's search of her private and/or personal emails stored in her work email address, and the disclosure of said private and/or personal information in the Mintz Report was done in breach of constitutional right to privacy as secured in section 13(3)(j) of the Charter of Fundamental Rights and Freedoms which provides:

> *(j)the right of everyone to-*
>
> *(i) protection from search of the person and property;*
>
> *(ii) respect for and protection of private and family life, and privacy of the home; and*
>
> *(iii) protection of privacy of other property and of communication.*

[276] Reliance was placed on the Court of Appeal decision in ***Tomlinson v Television Jamaica and others*** *[2020] JMCA Civ 52* to support the Defendant's locus standi to bring a claim for breach of her constitutional rights by virtue of the horizontal application of the Charter of Rights in protection against infringement by individuals and not just the state.

[277] It was conceded that "*there is no judicial consideration of the issue of respect for and protection of private and family life, and privacy of the home and the protection of privacy of other property and of communication in the context of the Charter of Fundamental Freedoms*". However, Mrs Gibson Henlin urged the Court to obtain guidance form the persuasive authority of the Court of Appeal of New Zealand in ***Hosking v Runting*** *[2005] 1 LRC 320*. The Court was also referred to the case of ***Copland v. The United Kingdom*** *Application no.62617/00* which was a decision of the European Court of Human Rights. In ***Copland*** (supra), the Court found that the monitoring of an employee's work email and telephone calls by her employer amounted to an interference with her right to respect for her private life and correspondence under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which Counsel submitted was similar to our Charter of Fundamental Rights and Freedoms. Critical to the Court's conclusion was the finding that:

> *42. The applicant in the present case had been given no warning that her calls would be liable to monitoring, therefore she had a reasonable expectation as to the privacy of calls made from her work telephone (see Halford, § 45). The same expectation should apply in relation to the applicant's e-mail and internet usage.*

It was submitted that in the absence of a policy of the Claimant which prohibited the use of the Claimant's equipment for personal communications, the Defendant had a reasonable expectation of privacy in the use of the Laptop.

Submissions on behalf of the Defendant - the search order

[278] It was submitted that the Search Order should not have been granted and that its execution was in breach of The Defendant's constitutional right to protection from search of the person and property as guaranteed at section 13(3)(i) of the Charter of Fundamental Rights and Freedoms.

[279] It is submitted that the conditions as set out in ***Anton Piller KG v Manufacturing Processes Ltd*** *[1976] Ch 55* were not satisfied as at the time of the granting of the Search Order the Claimant knew that it had not suffered any loss from the

disclosure of the information commencing from 2009 based on the Mintz Report. Furthermore, trial has confirmed that the Claimant did not have a strong prima facie case.

[280] It was further submitted that the Claimant also did not disclose that it did not have a policy that prevented employees from sending emails from their work emails to personal emails.

[281] The Court was urged to consider that the search did not produce any information which was relevant or utilized in the proceedings. Counsel noted that in arriving at his decision to discharge the Anton Pillar Order in ***Lock International PLC v Beswick and others*** *[1989] 3 All ER 373* Hoffman, J at page 386 reasoned that:

> *...the material seized by the plaintiff improves its case very little and comes nowhere near demonstrating that the defendants were indeed the kind of dishonest people who would, but for the order, have destroyed incriminating documents.*

[282] Mrs Gibson Henlin further submitted that there is a requirement that there should be evidence from which an inference of dishonesty, and an inference that the Defendant would destroy evidence can be drawn and that this was described in ***CCS Corporation v Secure Energy Services Inc*** *[2009] ABQB 275* at paragraph 54 in the following terms:

> *...given the extraordinary and intrusive nature of the Anton Piller remedy, the inference that the appellants would destroy evidence must be strong."*

Guardian's submissions on the constitutional issue

[283] Mr Hylton submitted that even without considering the merits of these claims, the Court should dismiss them. He referred to Section 19(4) of the Constitution which provides that:

> *"Where any application for redress is made under this chapter, the Supreme Court may decline to exercise its powers and may remit the matter to the appropriate court, tribunal or authority if it is satisfied that adequate means of redress for the contravention alleged are available to the person concerned under any other law".*

In support of these submissions he argued that the courts have consistently refused to entertain claims alleging breach of constitutional rights when the claimant has a private law remedy and relied on the Privy Council case of ***Jaroo v The AG of Trinidad and Tobago*** *[2002] UKPC 5; [2002]AC 871* in which Lord Hope who delivered the judgment of the Court stated in paragraph 29 as follows:

> *It has been made clear more than once by their Lordships' Board that the right to apply to the High Court which section 14(1) of the Constitution provides should be exercised only in exceptional circumstances where there is a parallel remedy.*

Guardian's submissions on the Search Order

[284] As it relates to the Defendant's prayer for an order that the Court direct that an Assessment of Damages hearing be fixed in keeping with the undertaking given by the Guardian pursuant to the Search Order, Mr Hylton has commended the case of ***Ushers Brewery v King & Co*** *[1972] Ch. 148* in which Plowman J in considering whether to grant an enquiry as to damages made the following observation at page 154:

> *It is in my judgment established by the authorities that an inquiry as to damages will not be ordered in these cases until either the plaintiff has failed on the merits at the trial or it is established before trial that the injunction ought not to have been granted in the first instance.*

[285] Mr Hylton submitted that Guardian is not liable to the Defendant under the tort of malicious prosecution of civil proceedings, a relatively new tort first recognized by the Supreme Court of England and Wales in ***Willers v Joyce and another*** *[2016] 3 WLR 477*. He submitted that firstly, the present proceedings have not ended in the Defendant's favour, whether by settlement, abandonment or judgment which is a requirement for the tort. Secondly, there is no evidence on which this Court could conclude that Guardian brought these proceedings without reasonable or probable cause, and acted maliciously on instituting them which is also a requirement. Furthermore, there was no evidence of the loss which the Defendant suffered.

Guardian's submission on defamation

[286] As it relates to the Defendant's Prayer for "(iv) Damages for slander and defamation", it was submitted by Mr Hylton that ***Section 6 of the Defamation Act, 2013*** abolished the distinction between libel and slander and the law now only recognizes a cause of action for defamation.

[287] Mr Hylton also relied on Rules 69.2(a) and (b) of the CPR which provide as follows:

> *69.2 The particulars of claim (or counterclaim) in a defamation claim must, in addition to the matters set out in Part 8 –*
>
> *(a) give sufficient particulars of the publications in respect of which the claim is brought to enable them to be identified; and*
>
> *(b) where the claimant alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, give particulars of the facts and matters relied on in support of such sense; and*
>
> *(c) where the claimant alleges that the defendant maliciously published the words or matters, give particulars in support of the allegation.*

[288] It was further submitted that the Amended Counterclaim does not give sufficient (or any) particulars of the publication of the alleged defamatory statements. It does not identify what words defamed the Defendant, who published them or to whom they were published although she alleges that the Mintz Report was "*discussed and/or circulated to employees of the Claimant which has defamed her reputation*".

[289] Mr Hylton also submitted that there is extensive authority that no cause of action lies against persons for anything they say or do during proceedings before the court. In support of this position he relied on the English Court of Appeal case of ***Marrinan v Vibert*** *[1962] 3 All ER 380*, in which it was held that witnesses or parties to proceedings have an absolute immunity against any claim for the words written or spoken in the ordinary course of those proceedings.

Analysis and conclusions in respect of the Counterclaim

(a) The Court's conclusion in respect of the constitutional claim

[290] In ***Tomlinson v Television Jamaica and others*** (supra), Mr Tomlinson sought to have a 30 second video aired on TVJ and CVM broadcasting stations. The video was described by him as a "Public Service Announcement" but payment was offered for it to be aired. It featured him portraying the role of a gay man in conversation with a female character in the role of his aunt. TVJ and CVM refused to air the video and Mr Tomlinson brought a claim alleging that the refusal violated his right to distribute or disseminate information, opinions and ideas through any media as guaranteed by Section 13(3) (c) and (d) of the Charter. The Full Court dismissed the claim and refused to grant the reliefs which had been sought. On appeal to the Court of Appeal, the appeal was dismissed. However, Phillips JA, with whom the other judges agreed, pronounced that "*horizontal application of the Charter of Rights is now part of the constitutional landscape of the Country.*" At paragraph 90 of the judgment the learned Judge stated that:

> *"...with the promulgation of section 13(5) of the Charter, a citizen may enforce rights guaranteed under the Charter against other private individuals and juristic persons, which includes companies. This is what is referred to as the horizontal application of Charter rights: citizens are now permitted to sue each other, alleging a breach of their human rights."*

[291] Mr Hylton does not challenge the accuracy of the statement of the law by Phillips JA and as relied on by the Defendant. Instead he suggests that there is a qualifier and relies on the Privy Council case of ***Jaroo v The AG of Trinidad and Tobago*** in support of his position that the Defendant should have recourse to her private law remedies before asserting her claim for breach of her constitutional rights. In **Jaroo**, the appellant had purchased a motor vehicle in good faith. He attempted to change the category under which it was licensed and during that process there was suspicion that the motor vehicle was stolen and accordingly it was detained by the police. Following numerous requests for the return of the motor vehicle, without any success or reason for its continued detention, the appellant applied for constitutional relief by way of originating motion to the High Court. The essence of

his case was that that his constitutional rights under s 4(a) and s 4(b) had been infringed because he had been deprived of the enjoyment of his property without due process of law and because he had not been afforded protection under the law.

[292] Chapter 1 of the Constitution of the Republic of Trinidad and Tobago of 1 August 1976 provides:

> *"4. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely –*
>
> *(a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law;*
>
> *(b) the right of the individual to equality before the law and the protection of the law; . . ."*

[293] The Judge ruled that he had failed to prove that he was entitled to the motor vehicle the seizure of which was lawful in the exercise of inquiries and that the continued detention of the motor vehicle was also lawful to preserve an exhibit.

[294] Their Lordships noted that the Judge did not state anywhere in his judgment that the claim for return of the vehicle ought to have been brought before the court by means of a common law action and not by way of a constitutional motion. In the Court of Appeal, the appellant's arguments under section 4(a) and 4(b) were rejected. However, the Court questioned whether proceedings under the Constitution ought to be invoked in matters where there is an obvious available recourse under the common law, thus raising the issue of the appropriateness of the constitutional route which the appellant had chosen. It therefore became necessary for the Privy Council to consider the extent of the Appellant's constitutional rights under s 4(a) and whether it had been breached but also whether the appellant's choice of a constitutional motion was an abuse of process.

[295] For purposes of my decision I will not devote much time to the Privy Council's analysis of the constitutional right, save to say that the constitutional right in that case is wholly different from the rights which the Defendant is asserting have been breached. What both sets of rights have in common however is that they have parallel remedies. In **Jaroo** the Privy Council at paragraph 32 agreed with the Court of Appeal that the appropriate remedy for the appellant to pursue at common law was an action for delivery in detinue. The question in that case was whether it was "*clearly inappropriate for him to proceed by way of an originating motion under section 14(1) in the circumstances?*" That section provides as follows:

> *14. (1) For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of this Chapter has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion.*

[296] In **Jaroo** it was argued on behalf of the appellant before the Privy Council that once he could establish that there had been a breach of his constitutional guarantee, the choice of remedy was a matter for the individual. The court's response was as follows:

> *Their Lordships do not accept this argument. The appropriateness or otherwise of the use of the procedure afforded by s 14(1) must be capable of being tested at the outset when the person applies by way of originating motion to the High Court. All the court has before it at that stage is the allegation. The answer to the question whether or not the allegation can be established lies in the future. The point to which Lord Diplock drew attention was that the value of the important and valuable safeguard that is provided by s 14(1) would be diminished if it were to be allowed to be used as a general substitute for the normal procedures in cases where those procedures are available. His warning of the need for vigilance would be deprived of much of its value if a decision as to whether resort to an originating motion was appropriate could not be made until the applicant had been afforded an opportunity to establish whether or not his human rights or fundamental freedoms had been breached.*
>
> *[39] Their Lordships respectfully agree with the Court of Appeal that, before he resorts to this procedure, the applicant must consider the true nature of the right allegedly contravened. He must also consider whether, having regard to all the circumstances of the case, some other procedure either under the common law or pursuant to statute might not more conveniently*

> *be invoked. If another such procedure is available, resort to the procedure by way of originating motion will be inappropriate and it will be an abuse of the process to resort to it. If, as in this case, it becomes clear after the motion has been filed that the use of the procedure is no longer appropriate, steps should be taken without delay to withdraw the motion from the High Court as its continued use in such circumstances will also be an abuse.*

[297] There is a consistent reference in **Jaroo** to the procedure to be employed and this stems from the fact in May 1988 when the appellant commenced his legal proceedings, the originating process for constitutional claims was by originating motion under section 14 of the Constitution of the Republic of Trinidad and Tobago. This position preceded the adoption of the Civil Proceedings Rules in that Republic which had an original commencement date of 1 January 1999. Its rule 8.1 (4) (d) is similar to the Jamaican CPR 8.1 (4) (f) which provides that a Fixed Date Claim Form must be used where by any enactment proceedings are required to be commenced by petition, originating summons or motion.

[298] The question is raised as to whether the decision in **Jaroo** was fundamental in relation to the proper procedure to be employed or whether it is to be interpreted to be of wider application and speaks equally to the availability of an appropriate claim which is parallel to the constitutional claim which the litigant has brought. I have concluded that the latter is the correct position.

[299] Even with the adoption of the CPR in Jamaica, the correctness of the procedural route employed by a litigant in asserting a breach of his or her constitutional rights may still be relevant especially where as in this case the constitutional claim is being brought within the ambit of a claim form seeking other private law remedies. If, for no other reason than the fact that a claim for constitutional redress is not normally tried by a single Judge, but by the Full Court comprised of three Judges of the Supreme Court, as opposed to a single Judge. In the case of ***Bain, Courtney Brendan v The University of the West Indies*** *[2017] JMFC FULL 3*, the obverse of the course currently adopted by the Defendant arose, in that the claimant in that case sought constitutional redress by Fixed Date Claim Form to be heard in the usual manner by the Full Court. However, included therein was a

claim for, *inter alia*, defamation. The Full Court held that the claim for defamation was appropriate because it was related and connected to the subject matter of the application for an administrative order.

[300] I do not find it necessary to arrive at a conclusion on the purely procedural issue relating to the originating process employed, partly because this issue was not central to the submissions of Counsel for either party. Instead, I will concentrate on the primary question which was raised as to whether, to the extent that ***Jaroo*** places restrictions on the litigants right to redress, such restrictions are still applicable in the context of the Jamaican reality of an expanded Charter of Rights which permits horizontal application. Expressed differently, in the context of this claim, is it appropriate for the Defendant to bring the constitutional claim while asserting other private law claims? Unfortunately, the Case of ***Tomlinson*** (supra) does not assist in this regard, because in that case the issue did not arise. I would suggest that was because the claim for constitutional redress was the only practicable form of redress available to the claimant given the facts of that case.

[301] However, I am compelled to reach the conclusion that the reasoning behind the restriction placed by ***Jaroo*** and other similar cases is equally applicable notwithstanding the Charter and its horizontal application. That reason being that the valuable constitutional safeguard "*would be diminished if it were to be allowed to be used as a general substitute for the normal procedures in cases where those procedures are available*".

[302] In the freshly minted Second Edition of Robinson, Bulkan and Saunders, ***Fundamentals of Caribbean Constitutional Law*** (2nd edition Sweet and Maxwell, 2021), paras. 5-010-5-011, the learned authors posit that Section 13(5) and the authorities suggest some elements of a methodology for evaluating these claims.

[303] Section 13(5) of the Charter provides as follows:

> *A provision of this Chapter binds natural or juristic persons if, and to the extent that, it is applicable, taking account of the nature of the right and the nature of the duty imposed by the right.*

The learned authors suggest that implicit in this section, is a requirement that, firstly, the *"nature of the right"* must be evaluated and this should include an assessment of the intensity of the constitutional right. Secondly, the *"nature of the obligation"* imposed by the right must be examined and this should include an assessment of the potential for invasion of the right by non-state actors. Thirdly, is the consideration of *"whether a limit on the right is demonstrably justifiable in a free and democratic society".* This third factor is not stated in the section, but it is suggested by the authors that a natural or juristic person can assert legitimate interests in limiting rights in a manner similar to that available to the state. The final proposition of the authors, which supports the submissions of Mr Hylton, is as follows:

> *Fourthly, and finally, where a constitutional claim against a natural or juristic person is contemplated, other remedies in contract, tort, employment law, for instance, may be available. The court should exercise its discretion to decline to grant redress, and remit the case to another forum, if it is satisfied that there is an adequate means of redress under other law. The possibility of declining redress was an important answer to the fear that s.13 (5) would open the floodgates of constitutional claims brought against natural and juristic persons.*

[304] I have found the opinions expressed by the learned authors to which I have referred, to be sound and consistent with my views on this issue. It cannot be gainsaid that the privacy rights which the Defendant alleges have been breached are important constitutional rights. However, having considered the claim for constitutional relief against the backdrop of section 13 (5) of the Charter, I have concluded that the Defendant has adequate means of redress under other law. I accept the submissions of Mr Hylton that not only are other remedies available to the Defendant, but she has invoked them. Mr Hylton has pointed to the claims she has asserted for breach of contract, defamation, malicious civil prosecution and others. A brief look at the prayer of the Counterclaim, (which is reproduced above), sufficiently reinforces that point. The Defendant had the opportunity to have

included in her wide-ranging claim, any other claim which she considers justiciable based on the alleged wrongful disclosure of her private information.

(b) The Court's Conclusion in respect of Search Order

[305] At the time when the search order was obtained Guardian had already obtained the Mintz Report which disclosed that the Defendant had made numerous unauthorised disclosures of confidential information. The Application for the Search Order was also based on these disclosures and was not wholly grounded on the e-mails by the Defendant to herself. The statement of Warren J in reflects what is a well- reasoned approach with which I agree, where he opined as follows in ***Indicii Salus Ltd (in Receivership) v Chandrasekaran*** *[2007] EWHC 406* at paragraph 14:

> *...It is clearly correct that all that has to be shown is a "real possibility" of destruction of evidence (and in principle the same applies to hiding rather than destruction). It follows, I consider, that the court does not have to be satisfied before making a search order that the Defendant actually would destroy evidence; and it may be, on the facts of a particular case, that the court is satisfied that the Defendant actually would breach a lesser order such as that which Mr Penny mentions and may, in all the circumstance including that fact, decide that there is a "real possibility" of destruction of evidence. An applicant must, nonetheless, consider whether a lesser form of order would be adequate. If there is no reason to think that a Defendant would disobey an order, for instance for delivery up of a Claimant's property, then it would not be appropriate to seek to obtain a search order.*

[306] The learned judge arrived at this conclusion after considering the comments of Dillon LJ in ***Booker McConnell plc v Plascow*** *[1985] RPC 425*:

> *"The phrase 'a real possibility' is to be contrasted with the extravagant fears which seem to afflict all plaintiffs who have complaints of breach of confidence, breach of copyright or passing off. Where the production and delivery up of documents is in question, the courts have always proceeded, justifiably, on the basis that the overwhelming majority of people in this country will comply with the court's order, and that defendants will therefore comply with orders to, for example, produce and deliver up documents without it being necessary to empower the plaintiffs' solicitors to search the defendant's premises."*

He also considered ***Lock International PLC v Beswick and others*** *[1989] 3 ALL ER 373* and the observation of Hoffmann J who said this:

> *"Even in cases in which the Plaintiff has strong evidence that an employee has taken what is undoubtedly specific confidential information, such as a list of customers, the court must employ a graduated response. To borrow a useful concept from the jurisprudence of the European Community, there must be proportionality between the perceived threat to the plaintiff's rights and the remedy granted. The fact that there is overwhelming evidence that the defendant has behaved wrongfully in his commercial relationships does not necessarily justify an Anton Piller order. People whose commercial morality allows them to take a list of customers with whom they were in contact while employed will not necessarily disobey an order of the court requiring them to deliver it up. Not everyone who is misusing confidential information will destroy documents in the face of a court order requiring him to preserve them."*

[307] In the end Warren J adopted the observations of Oliver LJ in the decision of the Court of Appeal in ***Dunlop Holdings Ltd v Staravia Ltd*** [1982] Com LR 3. which was approved by Hoffmann J in ***Lock International plc v Beswick*** (supra at p 1280 G) where Oliver LJ said this:

> *"It has certainly become customary to infer the probability of disappearance or destruction of evidence where it is clearly established on the evidence before the Court that the Defendant is engaged in a nefarious activity which renders it likely that he is an untrustworthy person. It is seldom that one can get cogent or actual evidence of a threat to destroy material or documents, so it is necessary for it to be inferred from the evidence which is before the Court."*

[308] I accept the guidance offered by these authorities and I find that there was sufficient evidence before the Court to show that there was a real possibility that the Defendant would destroy or conceal evidence and an increased risk of this if she were given notice of the application. The fact that there was no evidence of actual deletions or destruction is not of much weight. There was sufficient evidence on which the Court could draw the inference that this was a real possibility. It is not a quantum leap to conclude that the Defendant who had disclosed confidential information, conduct which can properly be described as nefarious activity, may have attempted to erase evidence of that wrongdoing or further disclosures which may have been made of the information which was the subject of the discovered disclosure. This was not a case of a person simply having a client list. The extent of the disclosure which includes Guardian's business operations are matters which would have, quite correctly, influenced the learned Judge when making the order.

I will however decline the invitation of Mr Hylton to consider the conduct of the Defendant in response to the Search Order since this would be applying evidence in hindsight which the learned judge hearing the application for the Search Order would not have had.

[309] It is accurate that at the time of the Application for the Search Order Guardian could not have proved any loss, as it has also not done at trial. However, this would not have been of much significance at that point in the chronology of the events.

[310] I am not attracted to the argument that the information sought in the Search Order could have been otherwise obtained either by a request from Counsel or in the Concurrent Claim between the parties. In this respect the conduct of the Defendant is relevant because her lack of cooperation on the first attempt to execute the search order tends to suggest that a simple request may not have been sufficient. Furthermore, there are sufficient differences between this Claim and the Concurrent Claim to have prevented the obtaining of the information which was the subject of the Search Order in the Concurrent Claim.

[311] Based on the foregoing, I have concluded that the Search Order was correctly granted and that it was no wider than was reasonably required in the circumstances.

(c) The Court's conclusion in respect of the claim for defamation

[312] I have considered the submissions of Mr Hylton in relation to the claim for "damages for slander and defamation", I accept his submissions that the claim for defamation is insufficiently particularised in breach of the CPR. In any event the Mintz Report accurately stated the information which the Defendant forwarded to third parties, I have found by this judgment that the Defendant forwarded confidential information in breach of the Contract of Employment. I also accept the evidence of the Claimant that the Mintz Report and/or its findings were not circulated generally to staff and only to the management of the company and for

purposes of these proceedings. In such circumstances the claim for defamation is not established on a balance of probabilities.

[313] Before making of the orders disposing of the claim I find it necessary to make a few comments. The first is that the trial of this claim has taken an unusually long time especially when considered against the established standards in the Commercial Division of the Supreme Court. This has been largely due to the intervention of the Covid-19 pandemic which resulted in a number of trial dates being vacated. This was either because the entire country was in lock-down mode or because persons connected with the trial had tested positive for the virus. We have also been affected by the untimely passing of Captain Beswick, who ably represented the Defendant in the initial stages. I trust it will not be viewed as inappropriate for me to say that he will be sadly missed. In my interactions with him over the years I have found him to be a gifted and creative advocate who was always tenacious in advancing the cause of his clients. This was demonstrably so in the case of the Defendant herein.

[314] Against this background, I wish to commend Mr Hylton for his consistent efforts to make himself available wherever possible as well as Mrs Gibson Henlin who on relatively short notice replaced Captain Beswick and conducted the remainder of the trial. Lastly, I wish to thank learned Queens' Counsel for their industry and research evidenced by the high quality of the closing submissions. Equally important was their usual incisive, analytical and pragmatic approach to the issues and evidence, which resulted in the efficient use of judicial time.

Final conclusion and disposition of Claim and Counterclaim

[315] Having regard to the findings as contained herein, the Court makes the following orders:

1. Judgment for the Claimant on the claim for breach of contract, breach of confidence and breach of fiduciary duty with an assessment to be conducted to determine the quantum of negotiating damages.

2. An injunction is granted to restrain the Defendant from disclosing or making use of the information which has been found by this Court to be Confidential Information of the Claimant, save for any portion of that information which has now become public information by virtue of the Claimant disclosing same to the Financial Services Commission and or any other regulatory authority or body which requires such disclosure or which has entered the public domain by any other means.

3. Judgment for the Claimant on the Counterclaim.

4. The application for a stay of execution is refused.

5. Costs of the Claim and Counterclaim are awarded to the Claimant to be taxed if not agreed.