[2026] JMCA App 6

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP P
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE V HARRIS JA

APPLICATION NO COA2026APP00042

BETWEEN	**PISEAS FISHING & DIVING LIMITED**	**APPLICANT**
AND	**JAMAICA PUBLIC SERVICE COMPANY LIMITED**	**RESPONDENT**

Ms Catherine Minto for the applicant

Ms Tana'ania Small KC and Ms Kathryn Williams instructed by Livingston Alexander & Levy for the respondent

11 and 13 March 2026

Civil procedure – Expert evidence – Order for attendance of expert witness at trial – Whether order for attendance of expert at trial for cross-examination was a proper exercise of judicial discretion – Whether expiration of time-limit for the putting of questions to expert before trial precluded right to cross-examine expert witness at trial – Civil Procedure Rules, 2002, rules 32.7, 32.8 and 32.18

MCDONALD-BISHOP P

[1] This is an application brought by Piseas Fishing & Diving Limited, the applicant, for leave to appeal the decision of Master L Jackson (Ag) ('the learned master') and for the application to be treated as the hearing of the appeal. The applicant brought a claim in the Supreme Court against the respondent, Jamaica Public Service Company Limited, on 12 October 2018, claiming damages for negligence arising from a fire that occurred at the applicant's business premises on 30 July 2015, which caused damage and losses.

[2] The respondent filed its defence on 8 February 2019, denying liability for the fire and consequential damage and loss.

[3] The matter proceeded through various processes in the Supreme Court, including case management and pre-trial review, in preparation for the trial, which is scheduled to be held within the week after the hearing of this application.

[4] During the course of those interlocutory proceedings, both parties sought permission to rely on expert evidence at trial, which was granted. The expert evidence was deemed necessary by the parties and the court to assist with determining the cause of the fire, which gave rise to the applicant's claim. Related to that permission were further applications and orders made concerning the use of or reliance on expert evidence at trial. The orders most immediately relevant to this appeal were those made by the learned master on 14 November 2025, 16 January 2026 and 19 February 2026.

[5] At the pre-trial review on 14 November 2025, the learned master ordered that any expert report the respondent wishes the court to consider at trial must be filed and served by 5 December 2025. She also granted the respondent an extension of time until 5 January 2026 to put questions to the applicant's expert, Mr Curt Lewis ('Mr Lewis'), and ordered that if the respondent failed to do so by the specified date, no further opportunity would be given to put questions to the expert ('the unless order').

[6] On 16 January 2026, when a further pre-trial review was held, the learned master refused an oral application by the respondent for the applicant's expert to attend the trial for cross-examination on the basis that the unless order of 14 November 2025 had taken effect. She also made orders appointing Mr Kevin Donaldson ('Mr Donaldson') as the expert for the respondent; admitting Mr Donaldson's report into evidence without the need to call him at trial; and that Mr Lewis and Mr Donaldson prepare a joint expert report by 13 February 2026. The experts were unable to produce a joint expert report as ordered by the learned master.

[7] On 19 February 2026, during yet another pre-trial review, the learned master had two applications listed before her: (i) an application filed by the applicant on 9 February 2026 for the court not to allow the respondent to rely on its expert's report; and (ii) an

application filed by the respondent on 16 February 2026 for, among other things, directions as to whether its expert witness, Mr Donaldson, ought to respond to some of the questions put to him, an order striking out the report of the applicant's expert and/or, alternatively, for both expert witnesses to attend the trial for cross-examination ('the respondent's application'). The learned master made several orders at the end of that hearing. Among them was order no 5, which stipulated, in part, that "the expert Curt Lewis… [is] required to attend the trial for cross-examination". This aspect of order no 5 is the subject of the applicant's application for permission to appeal.

The application for leave to appeal

[8] The applicant seeks to rely on six broad grounds of appeal, primarily arguing that the learned master erred in her decision on various grounds, as summarised below.

i) The respondent did not meet the legal criteria for calling the applicant's expert at trial.

ii) Considering the specific facts and prior orders issued during the proceedings up to that date, the order for the expert's attendance should not have been made.

iii) The court had previously directed that the expert evidence be submitted in written form.

iv) There was no application before the learned master for the expert to attend for cross-examination, and considering the costs and difficulties in securing the witness' attendance from overseas, the order should not have been made without notice and without any opportunity to consult the expert.

v) An unless order had been made foreclosing any further questions to be put to the expert, and the order was not appealed.

vi) The learned master had refused the earlier application for the expert to be called because the unless order had already taken effect.

vii) The respondent's application challenging the expert report was short-served, and no explanation was provided for the late service.

viii) The respondent's application lacked *bona fides*.

ix) There was no order reserving the right to call the expert to attend the trial for cross-examination, and the learned master did not establish his availability.

x) Making the order at a late stage would cause obvious prejudice to the applicant regarding costs and expenses related to calling the expert, which the learned master did not consider.

[9] To support the application, the applicant relies on the affidavit of urgency of Wayne Lawrence, its principal director and shareholder.

[10] For detailed reasons contained in the affidavit of Mr David Flemming ('Mr Flemming'), the respondent's in-house legal counsel, and written submissions filed in response to the applicant's submissions, the respondent opposed the application on the basis that the proposed appeal has no real chance of success.

The law

[11] The law to be applied in determining whether the application should be granted is well settled and requires no extensive recitation.

[12] Rule 1.8(7) of the Court of Appeal Rules, 2002 states that generally "…permission to appeal in civil cases will only be granted if the Court or the court below considers that there is a real chance of success". The chance of success must be real, in the sense of being "realistic" rather than fanciful (see **Evanscourt Estate Company Limited v National Commercial Bank Jamaica Limited** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 109/2007, judgment delivered 26 September 2008 at pages 9 and 10, and **Garbage Disposal & Sanitations Systems Ltd v Noel Green and others** [2017] JMCA App 2 at paras. [27] to [29]).

[13] The applicant contended that the order made by the learned master was an improper exercise of her discretion, given the history and particular facts of this case, and an affront to the law and overriding objective of the Civil Procedure Rules, 2002 ('CPR'). Therefore, in determining whether the test for leave is satisfied and whether the appeal should succeed, the court must consider the standard of review it is required to apply when examining the exercise of the learned master's discretion. The standard is that established in **Hadmor Productions Limited and others v Hamilton and others** [1982] 1 All ER 1042, which this court has now fully adopted (see, for example, **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1 ('**AG v Mackay**') at para. [19]).

[14] The statement of principle is that this court ought not interfere with the exercise of a first instance judge's discretion, unless there has been a misunderstanding by the judge of the law or of the evidence, or an inference that particular facts existed or did not exist which can be shown to be demonstrably wrong, or where the judge's decision is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it (see **AG v Mackay** at para. [20]). This standard must serve as the lens through which the application is evaluated to determine whether the proposed appeal has a real chance of success.

Analysis

[15] The pivotal question in conducting this enquiry is whether there is any arguable ground of appeal with a real chance of success on appeal.

[16] The court observes that the learned master's reasons for her decision have not been provided, and no agreed summary of those reasons has been filed by the parties, which appears to be due to the urgency with which the application was filed. The court has nonetheless considered whether, in the absence of reasons, the impugned decision should stand as properly made when the facts and circumstances of the case are reviewed on the rehearing (see **Ray Dawkins v Damion Silvera** [2018] JMCA Civ 25 at para. [45]).

[17] Having examined the proposed grounds of appeal and counsel's submissions on both sides, the central issue is whether the learned master erred in law in exercising her case management powers to order the applicant's expert witness to attend at trial (proposed grounds of appeal (i) and (ii)). The resolution of this central issue has prompted consideration of some subsidiary questions emanating from the proposed grounds of appeal. I am inclined to generally follow the respondent's counsel's outline of the sub-issues linked to this main issue, for clarity and convenience, and therefore I adopt them with some necessary modifications as follows:

(a) Whether the learned master was restricted from ordering the expert witness' attendance at the trial for cross-examination, considering previous orders made (proposed grounds of appeal (iii), (iv)(a), (iv)(c), (iv)(d), (iv)(e) and (iv)(j)).

(b) Whether the learned master erred in failing to consider the unavailability of the applicant's expert to attend the trial, the costs involved in securing his attendance, and the potential prejudice to the applicant before directing that the expert should attend for cross-examination (proposed grounds of appeal (iv)(b), (iv)(k), and (vi)).

(c) Whether the learned master erred in ordering the attendance of the applicant's expert witness at the trial for cross-examination, considering that the respondent's application filed on 16 February 2026 was short-served (proposed grounds of appeal (iv)(b), (iv)(d), (iv)(g), (iv)(h), (iv)(i), and (v)).

[18] Each subsidiary issue is examined prior to addressing the central and overarching issue of whether the learned master erred in issuing the impugned order.

Sub-issue (a): whether the learned master was restricted from ordering the expert witness' attendance at the trial for cross-examination, considering previous orders made (proposed grounds of appeal (iii), (iv)(a), (iv)(c), (iv)(d), (iv)(e) and (iv)(j))

[19] The starting point for analysing this issue is the applicant's strong reliance on rule 32.7 of the CPR, which states that "[e]xpert evidence is to be given in a written report unless the court directs otherwise". On the basis of this rule, the applicant applied for, and was granted, an order on 1 February 2024 certifying Mr Lewis as its expert witness and allowing him to present his evidence in written form at the trial. When this order was issued, there was no directive for the witness to attend for cross-examination, nor was there any order restricting his attendance for cross-examination. The unchallenged evidence of the respondent, however, was that the respondent had raised its desire to have the applicant's expert attend the trial for cross-examination, but the application was deferred by the court for renewal upon service of the expert report.

[20] Following this order approving the evidence in written form, the applicant obtained the report and disclosed it to the respondent on 13 May 2025. By then, the court had already made several orders, starting on 1 February 2024, for the respondent to put written questions to the applicant's expert pursuant to rule 32.8 of the CPR. The respondent failed to do so, resulting in orders made by the learned master on 14 November 2025 in terms that:

> "5. The [respondent] is granted an extension of time to January 5, 2025 to put question[s] to the expert Curt Lewis.
>
> 6. If the [respondent] fail [sic] to comply with order No. 5, then no further opportunity will be given for questions to be put to Mr Lewis."

[21] The respondent failed to comply with order no 5 above. Affidavit evidence filed in support of the instant application by Mr Wayne Lawrence, the applicant's affiant, reveals that on 16 January 2026, the respondent made an oral application for the applicant's expert witness to attend the trial for cross-examination. The application was opposed by the applicant's counsel, who averred that order no 6 (the unless order) had taken effect, thereby precluding cross-examination of the expert. The same affiant deposes that the

learned master accepted those arguments and did not grant the order. This is disputed by the respondent, but resolution of that dispute is not necessary for present purposes.

[22] On 19 February 2026, following the consideration of applications brought by the parties, including the respondent's application, the learned master made the order requiring the applicant's expert to attend trial for cross-examination, which is the subject of this application for leave to appeal. She also ordered the respondent's expert to attend the trial for cross-examination.

[23] The record shows that the learned master issued this order after the respondent failed to comply with the unless order to put questions to the applicant's expert and also failed to agree on a joint report as ordered. At that time, the learned master had before her an explanation from Mr Flemming, the respondent's affiant, for the respondent's non-compliance with the unless order and for the request for the attendance of the expert witness for cross-examination. In his affidavit, Mr Flemming explained that during the hearing on 1 February 2024, before Master McNeil (Ag), the respondent's counsel had requested an order for Mr Lewis to attend the trial for cross-examination, but the master ruled that Mr Lewis should first file and serve his expert report before the court could make such an order. Master McNeil (Ag) also indicated that the respondent should renew its request for Mr Lewis to attend the trial for cross-examination at a later pre-trial review after reviewing his expert report (para. 5 of the affidavit). This evidence was not challenged by any contrary evidence from the applicant. It thus suggests that, at least a year before the pre-trial review on 19 February 2026, the respondent had indicated its likely need to cross-examine the applicant's expert.

[24] The core of Ms Minto's argument, on behalf of the applicant, is that the order allowing cross-examination conflicts with the unless order. However, this position is unsustainable when considering the subject and purpose of the unless order. The subject of the order was the putting of the respondent's questions to the applicant's expert under rule 32.8 of the CPR. The purpose was to regulate the timeframe within which the respondent could exercise its procedural right under rule 32.8 of the CPR to put questions

in writing to the expert. This order did not relate to the respondent's right to cross-examine the expert during the trial, which remains a substantive right at common law.

[25] Ms Minto's interpretation of the order as barring questions by way of cross-examination at trial is incorrect, and the same would apply to the learned master's decision refusing the application on the basis that the unless order had taken effect, if in truth and in fact that was her reason for doing so, as contended by the applicant.

[26] The rules prescribe the limits and scope of such questioning. Rule 32.8 of the CPR states, in part, that:

> "(1) A party may put written questions to an expert witness instructed by another party or jointly about his or her report.
>
> (2) **Written questions under paragraph (1)** –
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> (a) may be put once only;
>
> **(b) must only be in order to clarify the report;** and
>
> (c) must be put within 28 days of service of that expert witness's report, unless –
>
> (i) the court permits; or
>
> (ii) the other party agrees." (Emphasis added)

[27] As is clear from rule 32.8(2)(b), questions posed to the expert are limited to clarifying the report only. Although the rule does not define clarification, counsel for the respondent has assisted the court by providing a suitable interpretation of the term, supported by strong and authoritative judicial guidance, which I found necessary to follow. The relevant jurisprudence confirms that questions put to an expert witness should not require the expert to undertake new investigations or tests, significantly expand upon their report, or conduct a form of cross-examination by post, including raising questions regarding the expert's credibility (see **Mutch v Allen** [2001] EWCA Civ 76; White Book Civil Service 2019: Civil Procedure ('the White Book 2019') Volume 1 at para. 35.6.1).

[28] These principles were endorsed and adopted by this court in **Perrie Daley v Attorney General** [2015] JMCA Civ 11, in which Brooks JA (as he then was), writing on behalf of the court, opined that:

> "[18] … A reading of the rule does show clearly that there are three distinct requirements or conditions that must be satisfied (conjunctively) before written questions may properly be put to an opposing party's expert witness. Those requirements related to the number of times the questions may be put (the frequency), the purpose for which the questions are to be put (purpose) and the time within which the questions are to be put (the 'limitation' period).
>
> …
>
> [27] **This leads to the conclusion, then, that it is a mandatory requirement under rule 32.8(2) that the questions to be put to the experts must only be in order to clarify the report and there is no power in the court to waive that requirement.** Therefore, the learned Master could not properly have permitted the questions to be put for any other purpose than to clarify the expert reports in question.
>
> [28] The question that arises from this conclusion is whether the questions that the respondents sought to put to the expert were only for the purpose of clarifying the report. **In applying some of the dictionary meanings of the word 'clarify', to the question to be resolved it would mean that the questions should be to make the report more comprehensible, lucid, simpler, intelligible, less ambiguous or confusing. Furthermore, it may be said, in endorsement of the view suggested in the extract taken from the 2010 White Book (paragraph [22] above), that rule 32.8(2)(b) should not be used to require an expert to expand significantly on his or her report, or to conduct a form of cross-examination by post, including on the expert's credibility. I would expand on that to say further that neither should the rule be used to elicit information on new matters totally unrelated to matters contained in the expert report.**" (Emphasis added)

[29] It goes without saying, therefore, that any order for questions to be put to an expert does not and cannot include questions for cross-examination, which are to be posed during the trial and not as part of pre-trial processes or proceedings. Moreover,

cross-examination is broader than clarification. While cross-examination may encompass clarification, it can, and invariably does, involve questions challenging credibility and reliability, as well as putting one's case to the witness for their comment, which could be favourable to the cross-examiner's case. Therefore, the putting of questions under rule 32.8 and, by extension, the unless order made for the purpose of managing that process, cannot properly be interpreted as excluding cross-examination, a procedure reserved for the trial process as part of the law of evidence.

[30] Support for this view can be found in the proviso to section 4(2) of the Judicature (Rules of Court) Act which provides, in part, that:

> "Provided that no rule of court shall –
>
> (a) Save so far as relates to the power of the Court for special reason to allow depositions or affidavits to be read, affect the mode of giving evidence by oral examination of witnesses in trial by jury, **or the rules of evidence**…." (Emphasis added)

[31] If further support is needed within the context of Part 32, rule 32.8(3) of the CPR provides it. The rule clearly states that "[a]n expert witness's answers to questions under this rule shall be treated as part of that expert witness's report". Therefore, the responses to the questions do not form part of any evidence to be given in cross-examination, but instead form part of the report, which is the expert's written evidence to be adduced at trial as his evidence-in-chief. In the premises, the responses given to clarify the report cannot be considered as a substitute for cross-examination so as to obviate or preclude the need for cross-examination if a party wishes to do so.

[32] Rule 32.8(4) further sets out the consequences of an expert's failure to answer questions put to him. However, there is no expressed consequence in Part 32 or anywhere else in the CPR for failure of a party to put questions to his opponent's expert witness as provided by rule 32.8. In particular, the rules do not prohibit or restrict the right to cross-examination where a party has failed to put questions to an expert. No such consequence can be inferred from the rules.

[33] The right to cross-examine one's adversary in civil proceedings, which can lead to an outcome adverse to one's interest, is not only a feature of our common law but also a vital part of the constitutional right to due process and a fair hearing under section 16 of the Constitution. Therefore, this court could never accept the applicant's contention that the right of the respondent to cross-examine the expert on whose evidence it intends to rely ceased with the unless order prohibiting the respondent from putting questions to the expert to clarify his report within the meaning and intent of rule 32.8. Accordingly, against the background of law as discussed above, the learned master could not have meant or intended by the order she made to foreclose or prohibit cross-examination of the expert witness at trial.

[34] Ms Minto relied heavily on the rules regarding the effect of an unless order. Regrettably, however, those rules are wholly unhelpful to the applicant's cause, and as such have not detained the court in further discussions concerning the unless order.

[35] Equally unacceptable is the applicant's argument that once the order was made for the expert to give his evidence in written form in his report pursuant to rule 32.7, there was no room for an order that the witness be cross-examined. The rule relied on treats with the presentation of the evidence on the part of the party calling the expert. It has nothing to do with the right of the opposing party to challenge the report through cross-examination during the course of the trial. Accordingly, the order of Master McNeil (Ag), permitting Mr Lewis' evidence to be filed in written form (in the report) was not an order that impacted the right of the respondent to cross-examine the expert witness.

[36] But, even if this were the case, the learned master in a subsequent case management proceeding would not have been barred from making the order for cross-examination, given her wide power to control how evidence should be introduced in the case within the context of the overriding objective of the CPR, which is to enable the case to be dealt with justly. In this case, the experts are not in agreement. The respondent, through evidence before the learned master, indicated that its case extends beyond merely clarifying the report to challenging the applicant's expert's findings and

conclusions, which affect the credibility and reliability of the evidence contained in the report. This consequently places the respondent's position requiring the expert for cross-examination outside the scope of rule 32.8, in respect of which the unless order was made.

[37] It must also be emphasised within this context that the purpose of expert evidence is ultimately for the benefit of the court and not merely to serve the interests of the parties. Therefore, the court has that inherent right, over and above what is provided for in the rules, to determine and direct how it desires such evidence to be adduced. In the circumstances, prior orders relating to the use of expert evidence at the trial cannot rigidly constrain the court from responding to developments during the course of the proceedings or making further directions necessary for the just disposal of the case.

[38] The applicant has relied on cases from the United Kingdom ('UK'), where differently worded rules apply to expert evidence. Unlike in Jamaica, the UK's rules allow questions beyond clarification to be posed to an expert during pre-trial preparation, with the court's permission. There is no equivalent provision in our rules. As a result, the respondent has no legal right to put questions to the applicant's expert that do not clarify the report, and so cannot properly be compelled to do so. The absence of questions for clarification does not mean that cross-examination is unnecessary or should be disallowed. The purpose, scope, and style of questioning vary between the two procedures, so they are not mutually exclusive.

[39] In any event, it is for the court, in managing the case, to decide whether the attendance of the expert to be cross-examined will better assist the court and further the overriding objective. This is a power and duty that continues until the conclusion of the trial, making it an ongoing and flexible one. The making of prior orders, therefore, in the course and for the purpose of managing the case, does not bind the court so as not to be able to assess the changing circumstances and to make such decisions as are necessary for the conduct of the case to do justice between the parties.

[40] Furthermore, in this case, where both experts present competing and diametrically opposed opinions and have failed to produce a joint report as ordered by the court, the court's view that there should be mutual cross-examination cannot be regarded as an improper exercise of discretion, despite previous orders that were made.

[41] Accordingly, I accept the submissions of counsel for the respondent that, when the entire procedural history of this matter is considered within the framework of the applicable law, the learned master cannot be criticised for ultimately ordering that the experts attend the trial for cross-examination, even though the previous orders, highlighted by the applicant, were made.

[42] Therefore, there is no merit in the proposed grounds of appeal contained within this sub-issue.

Sub-issue (b): whether the learned master erred in failing to consider the unavailability of the applicant's expert to attend the trial, the costs involved in securing his attendance, and the potential prejudice to the applicant before directing that the expert should attend for cross-examination (proposed grounds of appeal (iv)(b), (iv)(k), and (vi))

[43] Ms Minto contended that given the short timeframe between the order and the trial date, combined with the lack of prior consultation with the applicant as to expert's availability and the costs associated with the expert's attendance, the order for the expert's attendance for cross-examination would inevitably result in either loss of the trial date or undue prejudice to the applicant. She contended that there is no reason for the applicant to be so prejudiced, given the numerous orders allowing questions to be put to the expert and the unless order made by the court.

[44] King's Counsel, Ms Small, ably assisted by Miss Williams, countered in the respondent's written submissions that the applicant had not provided any evidence regarding these concerns before the learned master. Furthermore, after the applicant had Mr Lewis appointed as an expert by the court, he should have been informed of the trial dates and notified that his attendance at the trial might be required. This is especially relevant given that at the pre-trial review on 1 February 2024 before Master McNeil (Ag),

the respondent's counsel raised the issue of Mr Lewis' attendance for cross-examination. That issue was again raised in an oral application by the respondent on 16 January 2026. Consequently, the matter of cross-examination remained active from as early as February 2024, and the applicant was on notice regarding the possible need for cross-examination.

[45] Counsel for the respondent further argued that best practice dictate that attorneys-at-law instructing experts ought to ascertain the availability of experts for trial dates, keep experts updated with the case schedules and consider, where appropriate, whether experts might give evidence via video-link (see the White Book 2019, Volume 1 at para. 35EG.21). Therefore, when Mr Lewis was engaged as an expert by the applicant, it ought to have considered whether Mr Lewis was available to attend the trial as well as the costs associated with securing his attendance at trial. In any event, the applicant has not advanced any cogent evidence as to the costs associated with securing Mr Lewis' attendance at the trial, but has only made bald assertions that it would be costly.

[46] The respondent's position is both persuasive and legally sound. The applicant's contention that the order for cross-examination, made without prior consultation regarding the expert's availability and costs, and resulting in prejudice, lacks concrete support. The applicant failed to present any evidence to the learned master addressing these concerns and instead relied on general assertions that the process would be costly and inconvenient. There is nothing on the face of the material before the learned master which would have necessitated such an inquiry, consistent with the duty to manage the case in accordance with the overriding objective.

[47] The correctness of the respondent's position is further reinforced by the unchallenged evidence regarding the procedural history, which demonstrates that from the time of Mr Lewis' appointment as an expert at the pre-trial review in February 2024, the possibility of cross-examination was communicated to the court and the applicant. Therefore, the applicant was made aware that the expert's attendance at trial might be required. Best practice, as emphasised by the respondent, and which I endorse, requires counsel instructing experts to confirm their availability for trial and to consider alternatives

such as video-link testimony, particularly when costs or convenience are factors. However, the applicant did not take steps to address these issues or seek the court's directions.

[48] The respondent correctly submitted that the applicant's failure to raise these issues before the learned master precludes any claim that the learned master erred by not considering them. The court's duty is to manage proceedings justly and efficiently, not to anticipate and resolve matters not properly brought before it.

[49] Furthermore, and more critically, there was no duty on the learned master to investigate the expert's availability for trial or the associated costs of his attendance on her own initiative in this case. Consequently, the learned master cannot be criticised for exercising her discretion on the basis that she did not consider matters not brought before her and which she would not reasonably be expected to contemplate in her role as a case management judge. Taking all this into account, the applicant's arguments are unfounded, and the grounds of appeal related to this issue lack merit and are thus without a real chance of success.

Sub-issue (c): whether the learned master erred in ordering the attendance of the applicant's expert witness at the trial for cross-examination, considering that the respondent's application filed on 16 February 2026 was short-served (proposed grounds of appeal (iv)(b), (iv)(d), (iv)(g), (iv)(h), (iv)(i), and (v))

[50] The applicant's contention is that the learned master erred in ordering its expert witness to attend the trial for cross-examination, as the respondent's application for that order was short-served and, therefore, deprived the applicant of a chance to respond. Regrettably, upon analysis, the applicant's contention is once again unacceptable. The respondent's application was one made in writing seeking the attendance of the applicant's expert at the trial. The rules governing such applications for court orders are set out in Part 11 of the CPR. The general position established by rule 11.6 is that all applications to the court must be in writing unless a rule, practice direction or the court permits an application to be made orally.

[51] Further, applications must be served as soon as practicable after the day on which it is issued, and, in any event, at least seven days before the court is to deal with the application (rule 11.11(1)). The respondent's application was served on 16 February 2026, less than seven days before the pre-trial review on 19 February 2026, at which the learned master considered and disposed of the application. Therefore, based on rule 11.11(1), the respondent's application was, in fact, short-served, as the applicant contended. Rule 11.11(3)(b), however, provides that if the period of notice is shorter than the period required, "the court may nevertheless direct that, in all the circumstances of the case, sufficient notice has been given and may accordingly deal with the application".

[52] As earlier indicated, this court has not been provided with the learned master's reasons for ordering that Mr Lewis attend trial for cross-examination. Therefore, there is nothing to indicate the learned master's reasons for proceeding to consider the respondent's application for the expert's attendance notwithstanding the short service on the applicant. The question for the court is whether this was an appropriate case for the learned master to exercise her discretion to do so. Having considered all the circumstances of the case, I am satisfied that it was an appropriate case for the following reasons.

[53] Although Part 11 establishes the general rule that applications for court orders are to be made in writing, there can be no strict requirement for an application to be in writing and served on an opposing party for an expert witness to attend court and give evidence. Giving oral evidence in court is the default position, and written evidence is the exception. That is why the CPR specifically grants the court the power to order that evidence be given in written form in specified circumstances, which is the exception (see rules 26.1(2)(q), 30.1(1) and 32.7).

[54] The parties' experts were unable to agree to a joint report. The experts' failure to agree is what would have caused the learned master to effectively vacate her order for the production of a joint expert report on 16 January 2026, by ordering the attendance

of both experts at trial for cross-examination. Consequently, the learned master issued the order after all efforts to secure the experts' agreement on a joint report failed. She had the broad power under rule 26.1(2)(v) to "take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective", which she exercised. Accordingly, the applicant's complaint about the short notice of the application cannot impeach the learned master's decision ordering the experts' attendance for cross-examination, given the importance of cross-examination in the trial process.

[55] Furthermore, in this era of sophisticated and instant communication technology, the period between 17 February, when the application was served on the applicant, and 19 February, when the order was made, would have given the applicant adequate time and opportunity to contact its expert regarding his availability and/or to respond to the simple aspect of the application concerning attendance for cross-examination. If the applicant was unable to contact its expert, it was open to it (almost a month before the trial) to request that the court consider whether the trial date could be maintained, given counsel's view of the short notice. It was also open to the applicant to approach the court after the order was made, in light of the approaching trial date, for further directions, including the possibility of vacating the trial date. No such steps were taken. Instead, the applicant chose to appeal the decision as the trial date loomed, thereby adding another layer of delay to the proceedings.

[56] In all the circumstances, there would be no legal basis for this court to disturb the learned master's decision, on an appeal, on the ground that the application was short-served, given the importance of the respondent's right to cross-examine its opponent's witness. There is no appeal with a real chance of success regarding the short service of the respondent's application for the expert witness to attend court, as the applicant had other avenues available to prevent prejudice in presenting its case at trial.

<u>The overarching issue: whether the learned master erred in exercising her case management powers by requiring the attendance of the applicant's expert witness at the trial for cross-examination (proposed grounds of appeal (i) and (ii))</u>

[57] The remaining and overarching question now is: considering all the applicant's complaints cumulatively, and in light of the overriding objective, did the learned master err in exercising her case management powers and discretion by requiring the applicant's expert to attend trial for cross-examination?

[58] The applicant has relied on **Daniels v Walker** [2000] 1 WLR 1382 to argue that calling an expert to give oral evidence should be a matter of last resort, given the expense of having experts attend court, while acknowledging that the court has the discretion to allow oral evidence of experts when all other avenues have been exhausted. As already noted, however, the UK's approach to putting questions to an expert witness during the pretrial procedures is governed by a different procedural regime from ours. In the UK, the court has the authority to permit questions to the expert, at that stage, beyond mere clarification, unlike in Jamaica. Therefore, in our jurisdiction, cross-examination is the only avenue for putting questions to an expert for purposes other than clarification of the report.

[59] In this case, where the respondent has indicated that its purpose for requiring the witness for cross-examination extends beyond clarification and falls outside the permitted scope of rule 32.8, then cross-examination remains the only route to ensure justice is done between the parties. This is because the respondent cannot request the court to dismiss the evidence of the applicant's expert on matters on which he was never challenged or questioned. Counsel for the respondent cited the recent UK Supreme Court case of **TUI UK Ltd v Griffiths** [2023] UKSC 48 as providing useful guidance on this point. The case reiterated the long-standing rule expressed in **Browne v Dunn** (1893) 6 R 67 and other cases, that in civil cases, a party that wishes to challenge the evidence of any opposing witness on a material point must do so through cross-examination if they wish to argue that the evidence should not be accepted. This rule applies to both fact and expert witnesses. The purpose and rationale of the rule are to ensure a fair trial, including fairness to the party presenting the evidence, fairness to the witness whose evidence is challenged, and the judge's ability to make a proper assessment of all the evidence to achieve justice.

[60] Lord Hodge in **TUI UK Ltd v Griffiths**, at para. 70 of the judgment, explained the rule in this way:

> "70. … the status and application of the rule in *Browne v Dunn* and the other cases which I have discussed can be summarised in the following propositions:
>
> **(i) The general rule in civil cases, as stated in *Phipson*, 20th ed, para 12-12, is that a party is required to challenge by cross-examination the evidence of any witness of the opposing party on a material point which he or she wishes to submit to the court should not be accepted. That rule extends to both witnesses as to fact and expert witnesses.**
>
> **(ii) In an adversarial system of justice, the purpose of the rule is to make sure that the trial is fair.**
>
> **(iii) The rationale of the rule, ie preserving the fairness of the trial, includes fairness to the party who has adduced the evidence of the impugned witness.**
>
> **(iv) Maintaining the fairness of the trial includes fairness to the witness whose evidence is being impugned, whether on the basis of dishonesty, inaccuracy or other inadequacy.** An expert witness, in particular, may have a strong professional interest in maintaining his or her reputation from a challenge of inaccuracy or inadequacy as well as from a challenge to the expert's honesty.
>
> **(v) Maintaining such fairness also includes enabling the judge to make a proper assessment of all the evidence to achieve justice in the cause. The rule is directed to the integrity of the court process itself.**
>
> **(vi) Cross-examination gives the witness the opportunity to explain or clarify his or her evidence.** That opportunity is particularly important when the opposing party intends to accuse the witness of dishonesty, but there is no principled basis for confining the rule to cases of dishonesty.
>
> (vii) The rule should not be applied rigidly. It is not an inflexible rule and there is bound to be some relaxation of the

> rule, as the current edition of *Phipson* recognises in para 12.12 in sub-paragraphs which follow those which I have quoted in para 42 above. Its application depends upon the circumstances of the case as the criterion is the overall fairness of the trial. Thus, where it would be disproportionate to cross-examine at length or where, as in *Chen v Ng*, the trial judge has set a limit on the time for cross-examination, those circumstances would be relevant considerations in the court's decision on the application of the rule.
>
> (viii) There are also circumstances in which the rule may not apply: see paras 61-68 above for examples of such circumstances." (Emphasis added)

[61] The case of **A Local Authority v AX and others** [2025] EWFC 137 ('**A v AX**'), which applied **TUI UK Ltd v Griffiths**, was also brought to the court's attention. The case emanates from the Family Court of England and Wales, which has rules expressly providing for the court's power to order the attendance of witnesses for cross-examination. According to those rules, the test to be applied when considering whether to direct the attendance of the expert or experts was whether it was "necessary to do so in the interests of justice" (see para. [15] of **A v AX**). The court opined that:

> "56. Questions likely to be at the forefront of the court's mind when deciding whether it is necessary in the interests of justice to direct the attendance of the experts are **(i) the extent to which the expert evidence is relied on, (ii) the extent to which the expert evidence is disputed, (iii) whether the parts of the expert evidence that are disputed are central to determination of the issues the court must decide, (iv) the degree of consensus or disagreement between the instructed experts, (v) whether it is possible fairly to deal with the points of dispute in writing without the attendance of the expert, (vi) whether the expert evidence deals with a particularly novel or controversial area or an area where there is a lack of scientific consensus or rapidly evolving research, (vii) whether expert evidence suggests that a dogmatic approach has been taken by an expert or that the reputation or amour propre of the expert is at stake, (viii) what other evidence is available to the court relevant to determining the issues before it, (ix) the position of the party against whom allegations are made and (x) whether**

> **the opportunity to challenge the expert evidence is necessary to ensure the overall fairness of the hearing.** This is not an exhaustive list." (Emphasis added)

[62] Unlike in the Family Court of England and Wales, the CPR does not explicitly specify the test the court in this jurisdiction should consider when deciding whether to direct an expert to attend trial for cross-examination. I would hold, however, that because the exercise of case management powers under the CPR, as well as fact that the interpretation or application of any rule, is governed by the overriding objective under rule 1.1, the test for determining whether the court should order attendance of an expert witness is whether the attendance is required to deal with the case justly in accordance with the overriding objective. This test is, in substance, equivalent to the test established under the rules of the England and Wales Family Court, which were applied in **A v AX**.

[63] Having that the test applicable in this jurisdiction is equivalent to that applied in **A v AX**, I am satisfied that the factors outlined in that case are relevant considerations and could prove useful in determining whether an order should be made for an expert to attend trial for cross-examination. The case provides a useful guide in determining whether the learned master erred in making the order she did.

[64] Having considered all the circumstances against the background of the relevant principles of law, including the purpose of cross-examination and its place as a component of the right to a fair hearing, I am persuaded to agree with the respondent's submissions for the reasons advanced by counsel on its behalf, that the proposed grounds of appeal giving rise to this issue have no merit for the following reasons.

[65] In Jamaica, rule 32.8 of the CPR limits the scope of written questions put to experts to clarification only. Accordingly, if a party has questions for an expert witness which go beyond the scope of clarification and goes to the credibility and reliability of an expert witness, then that party's recourse is to require that the expert attend trial to be cross-examined as it is impermissible to put questions to the expert outside of the scope of clarification not only by virtue of the rules but at common law.

[66] The learned master would have been well within reason when she ordered that the expert witnesses attend the trial for cross-examination because the main issue in the claim is the likely cause of the fire at the applicant's premises, and the outcome at the trial would depend on technical evidence regarding the cause of the fire. Both parties are relying on expert evidence that is hotly disputed, as both experts have reached different conclusions regarding the cause of the fire. In the face of the diverging views, the experts had failed to agree a joint report despite the court's order for them to do so. In the end, the disputed areas of the experts' evidence are central to the court's determination of the issue that is joined between the parties. The court's need to see and hear each expert give their testimony, and to be subject to cross-examination, cannot be trivialised. It is a legitimate need.

[67] I find it necessary to add that even if the availability of Mr Lewis was not known to the applicant at the time the application was made, the court could have been asked to give further directions for the progress of the case and the taking of the evidence, including through a remote medium or, in the worst case, to request an adjournment, given the proximity of the order to the trial date. These were all matters that could have been addressed in the court below, without the additional expense in time and costs of an appellate proceeding. Parties should always be mindful that they too have a duty to assist the court in promoting the overriding objective (rule 1.3 of the CPR).

[68] In all the circumstances, this was a proper and necessary exercise of the learned master's discretion and broad case management powers conferred by the CPR, including "to take any other step, issue any other direction, or make any other order to manage the case and promote the overriding objective" (see rule 26.1(2)(v)). In the circumstances, it is in the best interest of the parties and the administration of justice for both experts to attend the trial to be cross-examined as ordered by the learned master. Given the dispute between the parties and the conflicting expert evidence, this will assist the court in determining the claim and ensuring the integrity of the trial process.

[69] Accordingly, there is no merit in the applicant's proposed grounds of appeal challenging the exercise of the learned master's discretion.

Summary of conclusions

[70] Upon careful review of the arguments advanced by the applicant and respondent against the background of the proposed grounds of appeal, the relevant law and applicable standard of review, I find, in agreement with the respondent's contentions, that the applicant has failed to demonstrate that any of its proposed grounds of appeal has a real chance of success.

[71] With respect to the effect of previous orders, including the permission for the expert evidence to be in the form of written evidence and the unless order regarding the putting of questions to the applicant's expert, I conclude that none of these orders operated or could have operated to preclude cross-examination of the applicant's expert at the trial.

[72] The respondent's position on the scope and purpose of written questions to expert witnesses under rule 32.8(2) of the CPR is well supported by both the plain language of the rule and the authorities cited. It is clear that the rule imposes mandatory and conjunctive requirements: questions must be limited in frequency, purpose, and timing, and, crucially, they must be asked solely to clarify the expert report. As the authorities have established, consistent with the plain text of the rule, it should not be used as a vehicle for cross-examination by post or for introducing new matters. Accordingly, the learned master would have had no discretion to permit questions to be put to Mr Lewis for any purpose other than clarification, which was not what the respondent intended in putting questions of the applicant's expert.

[73] Secondly, regarding the lack of notice and the timing of the application for cross-examination, the evidence indicates that the possibility of the applicant's expert being required to attend cross-examination was raised as early as February 2024. The applicant, having engaged the expert with the court's permission, should reasonably have

anticipated that his attendance might be necessary. Best practice, as cited by the respondent's counsel, requires that attorneys confirm their experts' availability for trial, keep them informed of relevant dates, and consider all options, including video-link evidence. The applicant's failure to produce any concrete evidence of prejudice before the learned master, beyond mere assertions of costs and inconvenience, significantly weakens its position and renders its complaint under this head unmeritorious.

[74] Furthermore, the CPR do not require the filing of a formal application as a precondition for an order directing a witness to attend trial for cross-examination. The court's discretion in this regard is broad, and the argument that short service of the application precluded the making of the order is misconceived. The court could have made the order even in the absence of a formal application.

[75] Finally, I accept that it is in the interests of justice for the experts to attend for cross-examination, particularly in a case where the resolution of the central issue turns on conflicting technical evidence about the cause of the fire. The trial court will be better assisted by the opportunity to hear and assess the expert evidence tested in cross-examination. This approach ensures that the trial process is fair, transparent, and conducive to the proper determination of the real issues between the parties. It aligns with the overriding objective to deal with the case justly, having regard to what the concept entails as explained in rule 1.1 of the CPR.

Disposition of the application

[76] For the reasons outlined above, I am satisfied that it cannot be said that the learned master, in exercising her discretion and case management powers, misunderstood or misapplied the law or the evidence before her, or that she took into account matters she should not have considered, or failed to consider relevant factors. Nor can it be said that she made a decision so aberrant that no judge, mindful of her duty to act judicially, would have made. On this basis, there is no legal justification for this court to interfere with her exercise of discretion and her ultimate decision to require the attendance of the two experts for cross-examination at the trial.

[77] The proposed appeal has no real chance of success on any of the grounds advanced.

[78] Accordingly, I would order that the application for leave to appeal be dismissed with costs to the respondent.

SIMMONS JA

[79] I have read, in draft, the judgment of McDonald-Bishop P and agree with her reasoning, conclusion and the order she has proposed. There is nothing I could usefully add.

V HARRIS JA

[80] I, too, have read the draft judgment of McDonald-Bishop P. I agree with her reasoning, conclusion, and proposed order with nothing useful to add.

MCDONALD-BISHOP P

ORDER

The application for leave to appeal is dismissed with costs to the respondent.