[2022] JMSC Civ 168

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. SU 2019 CV 03228

BETWEEN	**MICHELLE BRADY (Alternate Executor of the Estate of Winston Edward Brady, deceased)**	**CLAIMANT**
AND	**PATRICK DONOVAN BRADY**	**DEFENDANT**

Ms. Sherry Ann McGregor instructed by Nunes, Scholefield, DeLeon & Co. for the claimant

Ms Carleen McFarlane and Mr. Christopher O. Honeywell instructed by Christopher Honeywell & Co. for the defendant

HEARD: 23RD JUNE 2022 & 30TH SEPTEMBER 2022

Civil Procedure - Rule 26.8 of the Civil Procedure Rules - application for relief from sanctions - whether the defendant's application for relief from sanctions ought to be granted - whether the application was made promptly

MASTER C. THOMAS (AG)

Introduction

[1] Before the court is an application for relief from sanctions made by the defendant. By way of a Notice of Application for Court Orders for Relief from Sanctions accompanied by an affidavit in support, both filed on 11th March 2022, the

defendant seeks orders that there be relief from sanctions and alternatively, that the standard disclosure filed on 14th December 2021 stands as being filed in time. The grounds of the application are as follows:

1. That the Defendant has a good explanation for his failure to comply with the Court's deadline;
2. That the failure to comply was not intentional;
3. That the Defendant has filed the requisite discovery documents but only missed the filing of standard disclosure documents by twelve (12) days due to intervening illness;
4. That the Defendant has complied with all other relevant rules, practice directions, orders and directions;
5. That the Defendant had to change his legal counsel due to the fact that his previous counsel was dilatory and not sufficiently responsive and the Defendant was fearful that based on the rate at which the matter was being handled he would miss the Court's deadline;
6. That the Defendant's new attorneys came on record at the last minute and therefore had very limited time to comply with the case management orders;
7. That compliance with the relevant case management orders required a detailed historical audit of records over several years and the recovery of many cheques and other documents which [were] in the possession of the Defendant's bank and elsewhere and these documents were difficult to generate and collate;
8. That the delay in filing the Standard Disclosure was due also to multiple health challenges which made it difficult for the Defendant to retrieve and put together records, dating as far back as 2013, during this period;

9. That the Defendant succeeded in filing the account ordered by the court in time but fell ill during that said period and was therefore not able to complete the discovery of documents until the 14th day of December 2021;
10. That the accounting which has been filed and served in time by the Defendant demonstrates that the Defendant has legitimately expended the queried proceeds of sale (being the subject of the sale) on or on behalf of his deceased father, and based on said deceased's instructions and that therefore on the merits of the case he owes nothing to the deceased's estate;
11. That in light of the above upon a proper consideration of the overriding objective of the court, the justice of the case supports the favourable consideration of this application;
12. That the granting of these Orders will not adversely affect the Trial date or prejudice the Claimant.

Background

The Claim

[2] The claimant, Michelle Brady, is the alternate executor of the estate of Mr Winston Edward Brady, who was her late father ('the deceased'). By way of this claim, the claimant is seeking to recover from her brother, the defendant, Patrick Brady, the sum of Two Hundred and Fifty-Nine Thousand Four Hundred and Fifty United States Dollars and Eighteen cents (USD$259,450.18). She alleges that this sum represents a portion of the net proceeds of sale of the interest of the deceased in property situated at 90 Hope Road in the parish of St. Andrew and registered at Volume 1464 Folio 474 (formerly Volume 580 Folio 11) of the Register Book of Titles ("the subject property").

[3] The claimant asserts that the defendant was appointed as donee by their father under a Power of Attorney dated the 9th of July 2009. Further, the claimant alleges that under this Power of Attorney, the defendant was subject to directions to pursue a transaction for the sale of the deceased's interest in the subject property. She avers that during the course of the transaction for sale of the subject property, the defendant was directed by the deceased to deposit his portion of the net proceeds of the sale into an account held at the National Commercial Bank Jamaica Limited ("NCB") in the joint names of Michelle and Michael Brady, two of the defendant's siblings, who are also the deceased's children.

[4] The claimant alleges that upon the completion of the transaction of the sale of the subject property, the defendant had acknowledged receipt of the sum of Three Hundred and Fifty-Seven Thousand Seven Hundred and Eighty-Three Dollars and Nineteen Cents (USD $357,783.19) from Chapman Law, who were the attorneys-at-law for the vendors.

[5] The claimant maintains that the defendant in his statement, had set out various amounts that were deducted from the net proceeds of sale, including rent and taxes, in the sum of Thirty- Three Thousand and Ten Dollars and Six Cents (USD $33,010.06), which leaves a balance of Two Hundred and Fifty United States Dollars and Eighteen Cents (USD $259,450.18).

[6] The claimant contends that the defendant, failed, neglected and/or refused to follow their father's directives and instead deposited Two Hundred and Fifty Thousand United States Dollars (USD$250,000.00) from the proceeds of sale of the subject property into an account at NCB Capital Markets Limited held in his own name, on or about September 26, 2013. There had been repeated demands for the defendant to call in the investment and pay the principal and all accrued interest in the sums invested with NCB Capital Markets Limited to the claimant. However, he had failed, neglected and/or refused to do so. Consequently, the instant claim was commenced.

[7] The claimant asserts that she is entitled to recover from the defendant the balance of the net proceeds of sale, being $259,450.18, inclusive of the sum of $250,000.00 which was invested at NCB Capital Markets Limited, for the benefit of the deceased's estate. She maintains that the deceased's portion of the net proceeds of sale of the subject property was intended to be invested.

[8] In his defence filed on 28 October 2019, the defendant avers that he and the claimant are children of the deceased. By the deceased's last will dated 28th February 2013, the deceased named his wife (and mother of the claimant and the defendant) Joan Helen Segree as his liquidator. The subject property was owned by the deceased and two other parties as tenants in common. The parties decided to sell the property and the deceased was entitled to one third of the proceeds of sale less expenses and costs. The defendant averred that sometime after the completion of the transaction in or around August 2013, he received the proceeds of sale in keeping with an amended statement of account.

[9] As paragraphs 12, 16 and 19 of the defence are integral to this application, I have set them out in their entirety below:

> 12. Pursuant to the deceased's directives as well as agreement between them, the defendant from the date of the receipt of the sale proceeds began settling a number of bills for the deceased as well as to pay his and Joan Helen Segree's monthly living expenses in Canada.
>
> 16. During the deceased's lifetime he instructed the defendant to withdraw CAD$50,000.00 from the sale proceeds which was paid to Michael Brady who was responsible for renovation work being done to the deceased's house in Montreal, Canada. During the period of renovation, the deceased and Ms. Segree

resided in a rented apartment. The defendant was also instructed by the deceased to pay the rental money from the sale proceeds which he did.

19. Further, in about early 2015, the claimant placed their mother in a home for the aged in Quebec. The defendant transfers approximately CAD$2,500.00 to a joint account held with his brother Michael Brady which is used to pay Ms. Segree's monthly expenses. This money is withdrawn from the said sales proceeds.

[10] The case management conference came before Master Orr (Ag) (as she then was) on the 14th of April 2021. The claimant and the defendant as well as their respective counsel were present. On that occasion, the Master made a number of orders, the ones relevant to this application being: -

(1) Standard Disclosure is to take place on or before June 30, 2021.

(2) Inspection of Documents is to take place on or before July 16, 2021.

(3) The Defendant is to provide an accounting of US$259, 450.18 received on behalf of Winston Brady, deceased, in light of his admission at paragraphs 12, 16 and 19 of the Defence filed on October 28, 2019, and this accounting is to be filed and served by July 16, 2021.

(4) This Case Management Conference is adjourned to September 27, 2021 at 11:00a.m. for 1 hour.

[11] On the 27th of September, 2021, the adjourned case management conference came before Rattray J, who made the following orders with respect to orders 1, 2 and 3 above:

(*1*) *Time for the parties to comply with Orders 1, 2 and 3 made at the Case Management Conference on April 14, 2021 is extended to December 2, 2021 by 4:00p.m., failing which the Statement of Case of the party or parties in default to stand struck out.*

(2) Case Management Conference is adjourned to March 28, 2022 at 2:00p.m. for two (2) hours.

[12] On 7th October 2021, the claimant filed her list of documents. The defendant, on 1st December 2021, filed an affidavit apparently in compliance with the order for the accounting to be provided. That affidavit exhibited the following three documents: Income and Expenditure for the Years 2013-2020; Analysis of Expenses for Years 2013-2021; and letter dated 31 July 2013 from the deceased to the lawyer with carriage of sale for the subject property. Then, on 14th December 2021, the defendant filed a document entitled "Standard Disclosure". As will be readily appreciated from this chronology, as at 2nd December 2021, the date set for compliance with orders 1, 2 and 3 of the orders of Master Orr, no disclosure had taken place. As a consequence, the striking out sanction took effect. As stated previously, on 11th March 2022, the defendant filed the instant application.

[13] Two affidavits sworn to by the defendant and one sworn to by his attorney, Christopher Honeywell, were filed in support of the application.

[14] In his first affidavit filed on 11th March 2022, the defendant deponed that the "work in complying with the orders were [sic] not commenced by [his] previous attorneys in a timely fashion or at all and this, among other issues, as a matter of desperation, prompted [him] to change legal counsel". He stated that it was in mid-November 2021 that he retained the services of Christopher O Honeywell and Company and it was only after securing their services that he received the necessary guidance and advice as to how to effectively proceed in order to comply with the case management orders. He stated that he managed with great effort to go through the

process with his attorney and accountant in order to comply with the order for accounting and this entailed retrieving records from as far back as 2013 and analysing over three hundred and twenty- four (324) entries in his bank statements and other records. The defendant deponed that the effort and strain of complying with the orders took an unfortunate toll on his health as he is afflicted with both lung cancer and diabetes. As a result, he broke down mentally and physically and got very sick.

[15] The defendant also deponed that in relation to complying with the order for standard disclosure, as a result of the many health challenges he experienced, it was hard for him to do all the necessary footwork to locate, secure and analyse all the documents to be discovered. A significant number of those documents required him to apply to more than one commercial bank locally and in Canada and because he was sick between November and December, this slowed him down considerably.

[16] In his supplemental affidavit, the defendant also stated that the majority of documents which is included in the disclosure of documents took more time to obtain from various third party banks whereas he was able to present statements and cheque stubs to the accountant in addition to the cheques. All cheques received were eventually sent to the accountant. After several days of communicating with them and securing and forwarding documents and information to them to render the accounts, he learned from his attorneys that the instructions which he had supplied to his accountants were flawed and likely to be at variance with the court order and pleadings. This prompted a series of emergency meetings between the said accountants and his attorney to clarify the scope and content of the exercise. It was during this high pressure period that his health deteriorated significantly. He deponed that he even lost the ability to see for a few days when he was scheduled to travel from Negril to Kingston for a meeting with his attorney.

[17] Mr Honeywell in his affidavit detailed the personal difficulties he had which resulted in him filing the application in March of 2022. He deponed that he was required to

travel abroad in late December 2021, in the aftermath of the death of his step-son in order to address some important personal matters. He left Jamaica two days after Christmas and returned on January 2, 2022. Mr. Honeywell deponed that it was his intention to file the application the same week of his return but unfortunately he contracted COVID-19 which negatively impacted his hypertensive condition. In the height of the infection, he was sleepy and dazed for an extensive period and was not able to concentrate properly. He was advised by his doctor that he was experiencing brain fog associated with the COVID-19 infection. He stated that for the majority of February he was only able to perform tasks with little intellectual demand. Mr Honeywell relied on the medical certificate of a Dr Bennett. He also deponed that he had to assist his elderly mother who was afflicted with COVID, while he himself was dealing with the illness.

Submissions

For the Defendant/Respondent

[18] It was argued that though the defendant's application was perhaps not as prompt as may be expected by the court in ordinary circumstances, there were considerable extenuating circumstances that rendered the circumstances other than ordinary. Reference was made to Court of Appeal decision of ***H.B. Ramsay & Associates Ltd. et al v. Jamaica Redevelopment Foundation et al [2013] JMCA Civ 1***, specifically, the pronouncements of Brooks JA in paragraphs 9 and 10 of the judgment with respect to the court's assessment of the promptness of this type of application. Learned counsel reiterated that 'promptly' does not mean 'immediately'. Further, it was asserted that the circumstances of Mr Honeywell's family loss and then debilitating illness as a single practitioner, having recently took over the conduct of the matter are seriously extenuating circumstances that the court should consider.

[19] It was also argued that the continuation of the case management conference was already set for 28th March 2022 and that in the best of times, but more particularly

so during the onset of the pandemic and its effect on court operations, that it would have been unlikely for the Defendant to have secured a date for hearing before 28th March 2022. On this point, it was submitted that the court should exercise "flexibility" and find that the application was made promptly in all the circumstances.

[20] Counsel also submitted that the reality of the accounting is that all the money plus more had been paid and accounted for in time and the claimant had not given any indication that she was taking issue with any of the contents of the accounting. In reality then, if no relief from sanctions were granted, the defendant who has paid out all the money would have to pay it out again. The claimant's case had been answered by the accounting and if the claimant hopes to gain judgment by the failure of the defendant to comply with the order, she would be unjustly enriched.

[21] With respect to whether the failure to comply was intentional, it was submitted that the defendant's affidavits demonstrate a genuine and earnest attempt on his part to comply with the orders and deadlines of the court. It was argued that the defendant had to terminate the services of another attorney because of a concern that there was no advancement in complying with an order of the court. Counsel reminded the court of the considerable task of having an accountant review nearly four hundred documents dating back to 2013 within, what it was argued, was a narrow window of time. This undertaking, it was argued, had adversely impacted the defendant's health, but yet he still carried on with this task and this was demonstrative of the earnestness of his actions. On this basis, it was submitted that missing the deadline for the discovery by twelve (12) days could not be seen as intentional.

[22] Counsel also submitted that the defendant had to retrieve and secure the documentary proof from the relevant banks (which were largely Jamaican and Canadian banks). Consequently, the defendant's explanation that this task took a little more time is quite plausible in the circumstances, and therefore, the missed deadline was clearly not intentional.

[23] With regard to whether there was a good explanation for the default, counsel reiterated that the sheer enormity of the accounting exercise required to comply with the order of the court, plus the purported lack of support from the previously retained counsel represents a good explanation for the failure. Learned counsel also reminded the court of the deteriorating health of the defendant that impacted his ability to meet the deadline.

[24] On the factors listed in rule 26.8(3) of the Civil Procedure Rules ('CPR'), it was argued that the defendant would suffer a terrible injustice, should he not be granted the relief that he seeks. The claimant sought an accounting to determine whether any monies were owed by the defendant to the estate, and the Defendant has since provided this accounting. Striking out the defence after the defendant has answered the pith of the claim against him would be against the administration of justice. It would be contrary to the interests of administration of justice as the defendant has demonstrated that he does not owe the sum that the claimant is alleging is owed to their deceased father's estate.

[25] It was submitted that the account rendered by the defendant is evidence and not a part of his statement of case. Therefore, even if the defence were to be struck out, the court would nevertheless need to consider the statement of account. Further, the continued existence of the said accounting remains a bar to the claimant securing any payment from the defendant.

[26] With respect to the consideration whether the failure to comply is the defendant's fault or that of his attorneys, reference was made to ***Merlene Murray- Brown v Dunstan Harper & Winsome Harper [2010] JMCA App 1*** and ***Jamaica Public Service Co. Ltd v Francis et al [2017] JMCA Civ 2***. Counsel argued that the defendant was initially handicapped by his attorneys that made it difficult for him to make the court's deadline. Also, had it not been for the genuine personal and physical challenges of the defendant's counsel, the approach to the court would have happened sooner, though the timing of the hearing was not likely to be sooner.

[27] Counsel also asserted that disclosure has already been filed, although filed out of time and inspection had since been performed by both parties, also out of time. It is on this basis that he contended that if the application is granted, the failure will be remedied without the need for any further action by either party. Counsel submitted that the trial date for the matter is set for 2025 [sic], and that it can still be met.

[28] It was also argued that the effect of granting the relief would ensure that the defendant would have had his day in court. It would allow him documentarily prove the contents of his account, which is already before the court. This would allow the defendant to avoid the singular injustice of having to pay twice in respect of an obligation which he already discharged over the five years for his father and then later for his father's surviving spouse. On the other hand, it would allow the claimant as executor of her father's estate to be satisfied as to the extent to which the defendant has accounted for the proceeds of sale. Further, counsel argued, granting the relief sought would also prevent the claimant and the deceased's estate from unjustly enriching itself at the defendant's expense. Reference was made to ***Gloria Findley v Gladstone Francis (unreported) Suit no 5045 of [1994] (judgment delivered 28th January 2005)*** and ***New Falmouth Resorts Limited v National Water Commission [2018] JMCA Civ 13***.

For the Claimant/Respondent

[29] In response to the application, Ms. McGregor argued that the defendant's application ought to be dismissed because it fails to satisfy the mandatory element of rule 26.8(1) of the Civil Procedure Rules ("CPR"), and does not include an application for extension of time.

[30] Learned counsel also submitted that for forty-nine (49) days after the unless order was made, the defendant took no steps to comply with the case management orders. Further, she maintained that the defendant failed to file a List of Documents promptly, as it was filed ten (10) clear days after the defendant's statement of case

had been automatically struck out by the court. At this point, Ms. McGregor argued, no attempt had been made by the defendant to seek relief from sanctions or to extend time within which to comply with the orders for eighty- seven (87) days after the document was filed.

[31] Regarding the defendant's assertions that he had been ill in early December, Ms McGregor pointed out that the defendant had failed to produce any evidence to support this. The application had been adjourned to 28th March 2022, but up to that point, there was no indication that an attempt was made to present a medical report to the court to excuse the defendant's inaction.

[32] Ms McGregor also submitted that the order made at the case management conference on 14 April 2021 for the provision of an account is the same relief that was sought in the claim that had been served on the defendant on 6 September 2019. Bearing this in mind, by the time the defendant retained his new attorneys, he had long known what was being asked of him. This was further evident by virtue of the concessions the defendant made in his defence.

[33] Learned counsel contended that by the time the defendant retained new attorneys, the unless order should have been uppermost in both his and his new attorney's minds, prompting a request for relief from sanctions. Consequently, there is no reasonable excuse for the late filing of the application.

[34] To support these submissions, Ms McGregor relied on the case of ***HB Ramsay***, and asserted that purported compliance with the case management order after the unless order had taken effect is not enough. She submitted that with the default and the automatic sanction being immediately obvious to the defendant, immediate steps should have been taken to seek relief from the court. Ms. McGregor reminded the court that one hundred (100) days had passed before anything was done by the defendant. She further maintained that still, no application for extension of time was included in that relief.

[35] Ms. McGregor contended that it was inexcusable for there to have been inaction from the defendant during the entire December. The defendant's statement of case had been struck out for twelve (12) days and nothing had been done by either the defendant or his counsel to rectify this at that time. Further, for almost fourteen (14) days before he travelled overseas, the defendant's attorney did nothing to seek relief from sanctions. She referred to paragraph 4 of Mr Honeywell's affidavit[1], where he asserted that he intended to file the application in the first week of January 2022. This, she argued, confirms that the delay of more than thirty (30) days was deliberate.

Discussion and Analysis

[36] The central issue in this application is whether the defendant's application for relief from sanctions ought to be granted. The provisions of rule 26.8 of the CPR outline the approach to be taken by the court when faced with applications for relief from sanctions. They have been set out below: -

> *"26.8(1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be-*
>
> *(a) made promptly; and*
>
> *(b) supported by evidence on affidavit.*
>
> *(2) The court may grant relief only if it satisfied that-*
>
> *(a) the failure to comply was not intentional;*

[1] See – "**Affidavit of Christopher Honeywell in Support of Notice of Application for Court Orders for Relief from Sanctions**", which was filed on March 21, 2022

> *(b) there is a good explanation for the failure; and*
>
> *(c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions."*

[37] Brooks JA in **HB Ramsay** set out the approach to be employed by the court in applying this rule. He stated:

> "*An applicant who seeks relief from a sanction, imposed by his failure to obey an order of the court, must comply with the provisions of rule 26.8(1) in order to have his application considered.* ***If he fails, for example, to make his application promptly the court need not consider the merits of the application. Promptitude does, however, allow some degree of flexibility and thus, if the court agrees to consider the application, the next hurdle that the applicant has to clear is that he must meet all the requirements set out in rule 26.8(2).*** *Should he fail to meet those requirements then the court is precluded from granting him relief. There would, therefore, be no need for a court, which finds that the applicant has failed to cross the threshold created by rule 26.8(2), to consider the provisions of rule 26.8(3) in relation to that applicant."* (Emphasis supplied)

[38] The approach laid down by Brooks JA in **HB Ramsay** was later applied by Phillips JA in **University of the West Indies v Hyacinth Matthews [2015] JMCA Civ 49**. In that case, Phillips JA clarified the approach to be adopted in applying the three paragraphs of rule 26.8. At paragraph [36], Phillips JA stated:

> "***Rule 26.8 of the CPR … is divided into three separate paragraphs. Due to the umbrella words of each paragraph, they fall for consideration at different stages when considering whether to grant relief from sanctions. Paragraph 26.8(1) (which requires the application to be made promptly and to be supported by evidence) acts as a preliminary test which must be satisfied before the application can be considered by the court under rule 26.8(2).*** *Rule 26.8(2) states three specific factors that must be in effect in order for the court to grant relief, and in circumstances 'only if it is satisfied…" As a consequence, the matters set out therein must be satisfied before the court can consider the factors set out in rule 26.8(3). Put another way, any failure to satisfy those factors precludes the consideration of the court under rule 26.8(3)."* (Emphasis supplied)

[39] Therefore, if the court considers that the requirements in rule 26.8(1) have not been met, the court need not go on to consider whether the factors in the 26.8(2) and (3) have been met. Indeed, in ***Jeffrey Meeks v Theresa Meeks*** **[2020] JMCA Civ 7**, F Williams J, with whom the other judges agreed, found that in an application for relief from sanctions, the requirements of rule 26.8(1) having not been satisfied, the learned judge below was not obliged to go on to consider whether the other requirements of rule 26.8 of the CPR had been met.[2] He stated:

> *The application having failed to pass the requirements of rule 26.8(1), there was no further obligation on the learned judge to have given consideration to rule 26.8(2) and (3) of the CPR.*

[2] The court did, however, go on to consider whether the requirements of rule 26.8(2) had been met.

I must therefore first consider whether the preliminary requirements of rule 26.8(1) have been met.

[40] It is clear that the application was supported by affidavits. Thus, the critical hurdle that the defendant must now cross is satisfying the court that the application was made promptly.

[41] In addition to Brooks JA's dictum in **HB Ramsay** that there is some flexibility to be applied to the word "prompt", there is also the earlier dictum of K Harrison JA in ***National Irrigation Commission Ltd v Conrad Gray and Marcia Gray*** **[2010] JMCA Civ 18** where in commenting on the meaning of the word "promptly, the learned judge of appeal stated[3]

> *Promptly is an ordinary English word which we would have thought had a plain and obvious meaning, but if we need to be told a bit more about what it means, we do have the authority of* ***Regency Rolls Limited v Carnall*** *[2000] EWCA Civ 379 where Arden L.J. pointed out that the dictionary meaning of 'promptly' was 'with alacrity'. Simon Brown, L.J. said: 'I would accordingly construe 'promptly' here to require, not that an applicant has been guilty of no needless delay whatever, but rather that he has acted with all reasonable celerity in the circumstances'."*

[42] Rattray J's unless order had been made on 27th September 2022, having the effect of extending the time within which the parties had to comply with the orders of Master Orr (as she then was) to 2nd December 2021. The evidence of the defendant was that he retained Mr Honeywell's services in mid-November 2021. It was his evidence also that it was only after securing the services of his present

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[3] See paragraph 14

attorneys that he received the necessary guidance and advice as to how effectively proceed in order to comply. His evidence was that the affidavit exhibiting the accounting was filed on 1st December. The list of documents was not filed until 14th December 2021, twelve (12) days after Rattray J's unless order would have taken effect.

[43] It is clear that on 1st December 2021 when the accounting was filed, which was one day before the deadline for compliance with Rattray J's order, the defendant would have been acutely aware that he would not have been able to fully comply with Rattray J's order by the given deadline. In circumstances where the order had initially been for compliance in July and where, according to his evidence, the work to comply with the orders was not done by his previous attorneys in a timely fashion, the importance of complying with the order ought to have been foremost in the defendant's mind and he ought to have impressed same on his new attorney, Mr Honeywell. In addition, Mr Honeywell, having been retained in mid-November of 2021, the impending unless order deadline and the necessity of seeking relief from sanctions in the event that that deadline could not be met ought to have been foremost in his mind particularly on 1st December 2021 when the accounting was filed. Yet, no application for an extension of time was made nor was the application for relief from sanctions made on 3 December 2021 or 12 days later when the Standard Disclosure document was filed.

[44] Mr. Honeywell's evidence is that he left Jamaica two days after Christmas in December of 2021 to attend to matters concerning his step-son's passing. The time between the 2nd December and the time of Mr. Honeywell's departure would amount to in excess of 14 working days. Yet, no application was made before his departure. I agree with Ms McGregor's submission that Mr Honeywell's evidence that he intended to file the application in the first week of January makes it clear that his delay in filing the application in December 2021 was deliberate; this would have been despite the fact that he would have been aware that the unless order had taken effect. The application for relief from sanctions was not made until 11th March 2022, approximately seventy-one (71) days after the unless order would

have rendered the defendant's statement of case as being struck out. Admittedly, the court is empowered to apply some measure of flexibility in making the determination as to the promptness of an application. However, in the absence of an explanation indicating the reason for the failure to file the application during the period between the unless order taking effect and Mr Honeywell leaving the island, I am unable to find that the application was made with "reasonable celerity" in all the circumstances.

[45] The series of events which occurred after Mr Honeywell's return to Jamaica, including his illness, which resulted in the delay until March 2022 in making the application are indeed unfortunate; but they cannot be used as a bandage to cover the entire period of delay thereby ignoring the fact that there was no evidence that the application could not have been filed during the period 3 December 2022 to 24 December 2021. Also, I think it is irrelevant whether the application for relief from sanctions would have received a hearing date before the adjourned case management conference date. It is for the registry to assign a hearing date for matters based on the court's diary; nonetheless, it would be totally unacceptable for a party to disregard the orders of the court and the provisions of the CPR on the basis that his application may not receive an early hearing date. As was stated by Brooks JA in **HB Ramsay**, the merits of the claim are irrelevant and so too, I think, is the nature of the judgment that the claimant would be entitled to under rule 26.5 of the CPR.

[46] It is my view that the circumstances of this case are unfortunate. It is true that the defendant did comply with the order for standard disclosure within 14 days of the deadline for doing so, which may be regarded as a relatively short period of time after the deadline and this was in circumstances where it appears that he was hampered by sickness and other adverse circumstances. However, the first focus of rule 26.8 is not on when compliance was carried out but on how promptly the defaulting party approaches the court to seek its indulgence as a result of the default. In the circumstances of this case, in the light of the delay in December, I

am constrained to find that the defendant in filing his application did not approach the court in a manner that may be regarded as prompt.

[47] My finding that the application was not made promptly is sufficient to dispose of the application. I therefore make the following orders:

(i) The application for relief from sanctions is refused.

(ii) A further case management conference is set for 30 January 2023 at 10:00am for ½ hour.

(iii) Leave to appeal is granted.

(iv) Costs of the application to the claimant to be taxed if not agreed.