[2017] **JMSC Civ.61**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2012HCV00691

BETWEEN	**MONICA DYSTANT**	**CLAIMANT**
AND	**PROPRIETORS STRATA PLAN #788**	**DEFENDANT**

Mr. G. Mellish for the Applicant/Defendant

Ms. J. Telfer for the Claimant/Respondent

Application for relief from sanctions – Distinction between application to set aside default judgment and application for relief from sanctions – Whether judge of concurrent jurisdiction can set aside judgment of another – Whether slip rule applies to error made by judge -

HEARD IN CHAMBERS: December 20th, 2016, February 10, 2017 and May 2, 2017

CORAM: WINT-BLAIR, J (Ag.)

[1] By an Amended Re-listed Notice of Application for Court Orders dated December 9, 2015 and filed December 10, 2015, the applicants/defendants ("the defendants") sought the following orders:

1. "That the Orders by the Honourable Mrs. Justice V. Graham-Allen made on the 14th day of January, 2015 be set aside.

2. That the Default Judgment entered on the 14th day of January, 2015 be set aside.

3. That the Defendant be granted relief from sanction [sic] by restoring the Defendant's claim and permitting the filing of the Defendant's Statement of Facts and Issues.

4. That in any event the 'amended final judgment' filed herein on October 1, 2015 is a nullity the learned judge being functus officio.
5. That the amended final judgment be stayed until further order of the court.
6. That a new trial date be set."

Chronology

Document	Date filed/Event
Claim form and particulars of claim	February 1, 2012
Defence	March 21, 2012
Amended Claim Form and Amended particulars of claim	May 22, 2012
Case Management Conference:	December 4, 2013 Defendant and Counsel absent adjourned to May 27, 2014 with a trial date of January 24, 2015 for 3 days and a pre-trial review of December 3, 2014.
Pre-trial review, CMC orders not complied with	December 3, 2014
Unless Order	December 12, 2014
Defendant fails to file statement of facts and issues	
Application for Judgment to be entered in terms of the	
Particulars of claim together with interest on behalf of the Claimant without trial as Defendant's case struck out	January 13, 2015
Judgment entered	January 14, 2015
Final Judgment filed	January 22, 2015

Amended formal order made September 12, 2015	October 1, 2015
Application for relief from sanctions	January 26, 2015
Defendant files amended re-listed notice of application for court orders	December 10, 2015

Submissions

[2] The defendant submitted that an order made after striking out or a order for failure to obey procedure may be set aside by a judge of concurrent jurisdiction. This flowed from the inherent jurisdiction of the court set out in **Evans v Bartlam** [1937] A.C. 473. He submitted that:

> *"Whatever emanation of a judgment made without a hearing comes before a judge she has jurisdiction to set it aside if, as in this instance, the conditions of CPR 26.8 are satisfied. This is the case whether it is perfected or not, whether the slip rule has been utilized or not: the jurisdiction to set aside is intact."*

[3] Mr. Mellish relied on the case of **Leymon Strachan v The Gleaner Company Ltd. & Another** [2005] 1 WLR 3204 submitting that there having been no determination on the merits, this court had the jurisdiction to set aside the judgment of Graham-Allen, J. It was irrelevant whether she had the jurisdiction to perfect that judgment at a later date. This court is only required to look at "whether the defendant had overcome the hurdles set by the rules to set aside a judgment entered after striking out. See CPR 26.6(4)."

[4] Ms. Telfer submitted that the judgment of Graham-Allen, J was not a default judgment in accordance with part 12 of the CPR and that there has been no evidence to this end. The defendant had not complied with the provisions of part 13 of the CPR and therefore cannot ask this court to set aside the judgment in this way.

[5] She submitted further that the judgment entered was in fact a judgment without trial after striking out. She relied on the Supreme Court case of **H.B. Ramsay et al v. Jamaica Redevelopment Foundation, Inc and another** [2012] JMSC Civ

64 in which Fraser, J clearly stated at paragraphs 29 and 30 that Rule 26.6 is inapplicable to a situation in which judgment has been obtained without trial after striking out which is the fact situation in the instant case. She relied on the portion of that decision set out below:

> *"Clearly in this case the right to enter judgment had arisen consequent on the automatic striking out of the case, the unless order having not been complied with. The claimants could therefore not proceed under rule 26.6(1) and hence the 14 day period within which to apply set out in paragraph (2) which is specifically in relation to paragraph (1), would also not apply."*

[6] Ms. Telfer also relied on the dicta of the Privy Council in **A.G. v Universal Projects Limited** [2011] UKPC 37 to bolster her argument.

Order No. 1 – Application to set aside orders of Graham-Allen, J

[7] Whether this court can grant the order sought is set out in **A.G. v Universal Projects Limited** (supra) in which Lord Dyson stated at paragraph 27:

> *"If a default judgment is entered, the rules provide that the defendant can apply to have it set aside, but only if the conditions set out in rule 13.3(1) or rule 26.7 (whichever is applicable) are satisfied. There is no recourse to the inherent jurisdiction of the court. The territory is occupied by the rules. The court's inherent jurisdiction cannot be invoked to circumvent the express provisions of the rules. As the Board said in* ***Texan Management v Pacific Electric Wire and Cable Co. Ltd.*** *[2009] UKPC 46 at paragraph 57:*
>
> *"The modern tendency is to treat the inherent jurisdiction as inapplicable where it is inconsistent with the CPR, on the basis that it would be wrong to exercise the inherent jurisdiction to adopt a different approach and arrive at a different outcome from that which would result from an application of the rules."*

[8] The defendant has to apply for relief from sanctions and comply with the provisions of the rules. As such, the order sought cannot be granted by the invocation of the inherent jurisdiction of the court.

[9] Ms. Telfer also argued that a judge of concurrent jurisdiction had no jurisdiction to set aside the judgment of Graham-Allen, J. In this regard, Mr. Mellish relied on the case of **Leymon Strachan v The Gleaner Company Ltd. & Another** (supra) in support of his argument that this court had the power to set the judgment aside.

[10] The portion of the decision of the Privy Council in **Leymon Strachan** relevant to these proceedings is set out below:

> *"The Supreme Court of Jamaica is a superior court or court of unlimited jurisdiction, that is to say it has jurisdiction to determine the limits of its own jurisdiction. From time to time a judge of the Supreme Court will make an error as to the extent of his jurisdiction. Occasionally, his jurisdiction will have been challenged and he will have decided (after argument) that he has jurisdiction; more often, he will have exceeded his jurisdiction inadvertently, its absence having passed unnoticed. But whenever a judge makes an order he must be taken implicitly to have decided that he has jurisdiction to make it. If he is wrong, he makes an error whether of law or fact which can be corrected by the Court of Appeal. But he does not exceed his jurisdiction by making the error; nor does a judge of co-ordinate jurisdiction have power to correct it. As between the parties, and unless and until reversed by the Court of Appeal, his decision is res judicata."*

[11] The facts of **Leymon Strachan** are well known and involved the setting aside of a default judgment. Mr. Mellish submitted that as there had been no hearing on the merits this would give this court the power to set it aside. There is no evidence before this court that the hearing before Graham-Allen, J was not a hearing on the merits. As a consequence, there is no material before this court upon which the exercise of such, a discretion could be based. The answer to whether or not this court can grant order #1 is to be found in the dicta of the Privy Council in Leymon Strachan as set out below:

> *"In the present case Walker J held that he had jurisdiction to make the order he did. If wrong, his decision could be reversed by the Court of Appeal which would be bound without going into the merits to set aside his substantive order as a nullity. As between the parties, however, and unless and until reversed by the Court of Appeal, his decision (both as to jurisdiction and on the merits) was*

res judicata. ***As a judge of co-ordinate jurisdiction Smith J had no power to set it aside****." (Emphasis mine).*

[12] Applying the reasoning of the Privy Council to the facts of the instant case, having made the order, the learned judge must be taken implicitly to have decided that she had jurisdiction to make it. If she has erred, whether in law or fact, this, can be corrected by the Court of Appeal. She has not exceeded her jurisdiction by the making of the order later said to be in error and there is no power in this court, being a court of concurrent or co-ordinate jurisdiction to correct it. The decision of Graham-Allen, J. is binding on the parties unless and until it is reversed by the Court of Appeal. The orders as perfected are res judicata. For these reasons, the order sought is refused.

Order No. 2 – Application to set aside Default Judgment

[13] The Privy Council in **A.G. v Universal Projects Limited** (supra) having reviewed the provisions of the Civil Procedure Rules of Trinidad and Tobago which are virtually identical to ours, concluded that there is a distinct difference between an application to set aside a default judgment and one for relief from sanctions. Lord Dyson explained the meaning of the term sanction at paragraph 13:

> "Gobin, J granted the defendant an extension of time for service of a defence until 13 March but imposed a term that in default the claimant had leave to enter judgment. That term was a "sanction" within the meaning of rule 26.7. The word "sanction" is an ordinary word. It has no special or technical meaning in rule 26.7.[1] Dictionary definitions of "sanction" include the specific penalty enacted in order to enforce obedience to a law". That is precisely what the term attached to the extension of time was. It was a penalty that would be imposed if the defence was not served by 13

[1] Rule 26.7 Civil Procedure, 2006, Jamaica

March. In the language of rule 26.6(1)[2], it was the consequence of the failure to comply with the court order. It is artificial to say that the sanction was the permission to enter judgment. The permission of itself would not affect the defendant. The sanction was the judgment entered pursuant to the permission."

[14] In paragraph 14 Lord Dyson continued as follows:

> *"Rule 13.3[3] and rule 26.7 are dealing with different situations. Rule 13.3 is dealing with setting aside of a default judgment where it has been entered in the circumstances specified in Part 12[4] ie where there has been a failure to enter an appearance of file a defence as required by the rules. Rule 26.7 is dealing with applications for relief from any sanction, including any sanction for non-compliance with a rule, direction or court order where the sanction has been imposed by the rule or court order. The distinction is important: see the judgment of the Board in* ***The AttorneyGeneral v Keron Matthews*** *[2011] UKPC 38".*

[15] In the case of the **Attorney General v Keron Matthews** Lord Dyson again delivering the decision of the Board at paragraph 18 stated as follows:

> *"But it cannot have been intended that, where a defendant wishes to set aside a default judgment, it must satisfy the conditions of both rule 13.3 and 26.7. Part 13 is concerned with setting aside a default judgment. That is clear from the content of the Part and is spelt out in rule 13.1 ("the rules in this Part set out the procedure for setting aside or varying a default judgment entered under Part 12 (default judgments)"). Part 26 is concerned with the court's general powers of management. It cannot have been intended that a defendant who wishes to set aside a default judgment must satisfy the requirements of both rules. If a defendant satisfies the two conditions specified in rule 13.3, his application to set aside the judgment should succeed. The court cannot refuse the application*

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[2] Rule 26.8 Civil Procedure. The Jamaican Civil Procedure Rule contains paragraph, as well as the words "supported by evidence," "on affidavit" in paragraph (b) which are not provided for in Rule 26.7 of the Civil Procedure of Trinidad and Tobago the rules are otherwise identical

[3] Rule 13.3

[4] Rule part 12

of the grounds that, although the rule 13.3 conditions have been satisfied, the further conditions specified in rule 26.7(3) have not been. If it had been intended that, unless a defendant satisfies these further conditions, the court may not set aside a default judgment, this would have been stated in rule 13.3. The fact that it is not stated in rule 13.3 indicates that the rule 26.7(3) conditions have no part to play when the court decides whether to set aside a default judgment. ***It follows that an application to set aside a default judgment is not an application for relief from a sanction imposed by the rule.****" (Emphasis mine).*

[16] Having considered the reasoning of the Privy Council in **A.G. v Universal Projects** (supra), Fraser, J in **H.B. Ramsay** (supra) stated the legal position which I adopt as applicable to the case at bar:

> *"The claimants' only recourse was to seek relief from sanctions and it would not be necessary for the claimants to frame the application as one to set aside the judgment pursuant to a request for relief from sanctions. If the application for relief from sanctions succeeds the judgment would of necessity and by operation of law cease to apply. If the application for relief from sanctions fails the judgment will continue to stand."*

[17] Mr. Mellish relied in his submissions upon rule 26.6(1) which states:

(1) *"A party against whom the court has entered judgment under rule 26.5 when the right to enter judgment had not arisen may apply to the court to set it aside.*

(2) "An application under paragraph (1) must be made not more than 14 days after the judgment has been served on the party making the application."

[18] Rule 42.8 of the Civil Procedure Rules provides that:

> *" A judgment or order takes effect from the day it is given or made unless the court specifies that it is to take effect on a different date."*

[19] The dictum of Fraser J and Rule 42.8 both show that the defendant could not successfully argue based on Rule 26.6 (1), that the right to enter judgment had not arisen as it clearly had, by the automatic striking out of the case, once there had been non-compliance with the unless order. The unless order was specified to take effect on December 12, 2013. Had the defendant been proceeding under this rule, then the filing of the application under rule 26.6(1) a month and a half

after the order took effect was far outside of the 14 day limit prescribed by 26.6(2). The cases cited above also show that there is a distinct difference between an application for relief from sanctions which is what is being considered in the case at bar, and an application to set aside a default judgment which this case is not. Accordingly, the application for the grant of an order at number two of the notice of application is refused.

[20] Order No. 3 - Application for relief from sanctions

[21] The defendants have applied to set aside a Judgment which reads at paragraph 1:

> **"The Defendant having failed to comply with the Order made by the Honourable Justice Christine McDonald on December 3, 2014, in particular paragraphs 1 and 2 of that Order, the Defendant's Statement of case stands struck out."**

[22] The Judgment was entered pursuant to the "unless order." It was well settled in the case of **Marcan Shipping (London) Ltd v Kefalas and another** [2007] EWCA Civ 463 as follows:

> *"Unless" orders have a long history, dating back well into the nineteenth century and it was recognised at an early stage that once the condition on which it depended had been satisfied, the sanction became effective without the need for any further order."*

[23] The defendant's statement of case was therefore struck out as at January 14, 2015. The Notice of Application for court orders was filed on January 26, 2015 seeking to set aside the Judgment of January 14, 2015 as well as for relief from sanctions.

[24] On the 14th day of September, 2015, Graham-Allen,J sitting in Chambers, with Ms. J. Telfer of the firm of Nigel Jones and Company for the claimant and Ms. F. Barnes of the Kingston Legal Aid Clinic appearing for the defendant amended her orders of January 14, 2015. An amended final Judgment dated January 14, 2015 was filed on October 1, 2015 having been perfected.

[25] There is no indication on the record whether or not the application filed an application seeking to set aside the Judgment and/or to obtain relief from sanctions which was heard on this occasion. I can infer that it was not from the absence of orders made regarding any application/s of that nature.

[26] The legal position has been clearly stated by Brooks, J.A. in delivering the judgment of the Court of Appeal in **H.B. Ramsay and Associates Limited et al v. Jamaica Redevelopment Foundation Inc. and The Workers Bank** [2013] JMCA Civ. 1

> *"In a case where the sanction has taken effect, the court, in deciding whether to grant relief, must give due regard to the factors in rule 26.8. In the case of a failure to comply with any rule, order or direction which specifies a sanction for such a failure under rule 26.7 the sanction takes effect unless relief is granted.*
>
> *The rule is that where a party fails to comply (within the time limited)with a rule, practice direction or court order imposing any sanction, that sanction will take effect unless the party in default, applies for and obtains relief from sanction. In principle, where the time limited for compliance has expired, there is no need for a further order from the court for the sanction to take effect. This is because the breach of an order imposing a sanction automatically results in the stated sanction taking effect. See* ***Marcan Shipping (London) Ltd v Kefalas and another*** *[2007] EWCA Civ. 463. A party in default of compliance with such a time limit must seek relief from sanction, if he wishes the effect of the sanction to be removed. The court has to take into consideration the several factors stated in rule 26.8 before granting relief because regard has to be given to the principle that where the court sets a timetable litigants are expected to comply."*

[27] Rule 26.8 of the Jamaican CPR which deals with relief from sanctions reads as follows:

> *"(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 is satisfied that – (a) the failure to*

comply was not intentional; (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.

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

(a) *The interests of the administration of justice;*

(b) Whether the failure to comply was due to the party or the party's attorney-at-law;

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

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

(e) the effect which the granting of relief or not would have on each party.

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

[28] The rule provides for three threshold requirements or conditions precedent to be satisfied before an application for relief can succeed. Rules 26.8(1) and (2) have been interpreted in the cases below.

*In **A.G. v. Universal Projects**: (supra), the Privy Council said:*

"... an application for relief from a sanction must fail unless all three of the conditions precedent specified in rule 26.7(3)[5] are satisfied. These are that "(i)[6] the failure to comply was not intentional, (ii)[7] there is a good explanation for the breach and (iii)[8] the party in

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[5] Rule 26.8(2) Civil Procedure Rules, 2006, Jamaica

[6] Rule 26.8(2)(a)

[7] Rule 26.8(2)(b)

[8] Rule 26.8(2)©

default has generally complied with all other relevant rules, practice directions, orders and directions."

[29] **In H.B. Ramsay and Associates Limited et al v. Jamaica Redevelopment Foundation Inc. & Anor.** [2012] JMSC Civ 64, a decision of D. Fraser, J stated as follows:

> "The claimants must therefore first successfully clear the mandatory hurdles established by rule 26.8 (1) (a) (prompt application) and (b) (supported by evidence on affidavit) and by 26.8 (2) (a) (failure unintentional); (b) (good explanation for the failure) and (c) (compliance by the party in default with other rules, directions and orders). Thereafter the court is empowered to undertake the balancing exercise contemplated by rule 26.8 (3) which outlines factors the court should take into account when considering whether or not to grant relief, the conditions precedent established by rule 26.8 (1) and (2) already having been satisfied."

[30] Giving due regard to the rules and to the authorities cited I hold that the mandatory requirements of rule 26.8 (1) and (2) must be satisfied, before the discretion of the court can be exercised to grant an applicant relief from sanctions. The failure of an applicant to satisfy the court on the evidence presented in relation to all three conditions precedent will result in the application being refused. The failure of an applicant to establish the three conditions precedent means that the court will not go on to the balancing exercise in rule 26.8(3) described by Fraser, J as the threshold requirements or conditions precendent for such an exercise would not have been met.

Conditions precedent

1. Was the application made promptly?

[31] Mr. Mellish submitted that the Judgment of Graham-Allen, J striking out the statement of case was handed down on January 14, 2015. The application for relief from sanctions was filed on January 26, 2015 with supporting affidavits from Andrea Wadsworth and Marvalyn Smith. This was therefore prompt within the circumstances of this case. He cited no authorities in support of this ground.

[32] Ms. Telfer submitted that the defendant was to file its statement of facts and issues by December 12, 2014. The statement of case was therefore struck out after the Registry closed at 3:00pm on that date. The application for relief from sanctions was filed on January 26, 2015 which was a month and a half after the sanction had taken effect.

[33] Ms. Telfer went on to cite **H.B. Ramsay**, (supra) in which Fraser, J observed at paragraph 47 that:

> *"…the application for relief from sanctions was then not made until July 15, 2010. In those circumstances it could not be said that filing the application almost one month after the claim was struck out, satisfied the requirement that the application be made promptly."*

[34] On appeal to the Court of Appeal, in **H.B. Ramsay and Associates Limited et al v. Jamaica Redevelopment Foundation Inc. and The Workers Bank** (supra) Brooks, J.A. at paragraph 10 in respect of promptness said as follows:

> *"In my view, if the application has not been made promptly the court may well, in the absence of an application for extension of time, decide that it will not hear the application for relief. I do accept, however, that the word "promptly," does have some measure of flexibility in its application. Whether something has been promptly done or not, depends on the circumstances of the case."*
>
> *"Rule 26.8 states that the application "must" be made promptly. This formulation demands compliance.... Whether something has been promptly done or not, depends on the circumstances of the case.*
>
> *... I find that the submission does not have much force in the context of a sanction that is applied pursuant to an "unless order". Where such orders are made, the party affected is given notice of the requirement and the penalty for non-compliance. The deadline for compliance should, therefore, be uppermost in his mind."*

[35] In the instant case there is no application for an extension of time before this court. As the fact situation was somewhat unusual, this court did not decline to hear the matter but instead heard arguments on the merits.

[36] Both the defendant and its attorney were absent from the case management conference held on December 4, 2013, which was adjourned to May 27, 2014 with a pre-trial review date fixed for December 3, 2014. On the pre-trial review date, an unless order was made by McDonald, J which would take effect on December 12, 2014. The defendant failed to comply with that unless order as that it had failed to file its statement of facts and issues.

[37] The claimant made an application for Judgment to be entered in terms of the particulars of claim together with interest on behalf of the claimant without trial as defendant's case stood struck out on January 13, 2015. Judgment was entered for the claimant on January 14, 2015. Final Judgment was filed on January 22, 2015. The defendant's application for relief from sanctions was filed on January 26, 2015. An amended formal order was filed October 1, 2015. There is no dispute regarding the fact situation which led to the making of the unless order.

[38] In a chronology of events contained within the affidavit of Marvalyn Smith of the Kingston Legal Aid Clinic filed on January 26, 2015 it appears that there was a failure on the part of the defendant to give instructions to its attorney to enable continued representation. An application to be removed as counsel had been filed by the Kingston Legal Aid Clinic on January 31, 2014 as a result.

[39] This lack of instructions was confirmed by Andrea Wadsworth and attributed to the dissolution of the executive committee of the strata corporation which saw the exit of its secretary Ms. Mary White. In her affidavit, Ms. Wadsworth said that they were unable to hold an annual general meeting and there were a number of failed attempts to do so. Eventually, an interim three member committee was appointed to represent the strata committee and to continue managing the complex.

[40] The Kingston Legal Aid Clinic wrote a letter to the interim committee with the intention to remove their names as counsel of record. The interim committee then made contact and urged their counsel to remain on the record as they could not afford to retain counsel otherwise. The matter was settled and instructions

were given to the Kingston Legal Aid Clinic. The Clinic abandoned its application to have its name removed as counsel on July 2, 2014.

[41] By the date of the pre-trial review on December 3, 2014 before McDonald, J, the claimant had filed and served its amended claim form, affidavit in support of notice of application, statement of facts and issues, list of documents, witness statements and listing questionnaire. The learned judge extended the time for the defendant to comply with the case management conference orders to December 12, 2014 or the statement of case would stand struck out. She also fixed a further pre-trial review for January 14, 2015.

[42] On January 12, 2014 the defendant filed and served one witness statement, list of documents, listing questionnaire but no statement of facts and issues.

[43] Ms. Marvalyn Smith averred in her affidavit that during the November to December 2014 period there was a shortage of staff and several break-ins at the Kingston Legal Aid Clinic's office. Computers and other valuable equipment were stolen and the office experienced several challenges monitoring the case and providing service to the defendant as a result.

[44] She averred that no prejudice would flow from the defendant being allowed to file its statement of facts and issues as the issues are the same and the claimant cannot show how it will be prejudiced. In any event, an order as to costs would adequately satisfy the claimant.

[45] Ms. Telfer filed an affidavit from the claimant in response. Ms. Monica Dystant averred that the orders or Rattray, J and McDonald, J indicated just how much time had been allotted to the defendant in order to effect compliance with the timelines for filing and serving the documents in this matter. She stated that she would suffer irremediable prejudice if the application is granted as the matter has been delayed due to the defendant's non-compliance. She therefore wished to enforce the judgment already handed down in her favour.

[46] In ***Attorney General v Universal Projects Limited*** a delay of 10 days in filing the application (to set aside the default judgment) which was eventually deemed to be an application for relief from sanctions, led the Trinidad and Tobago Court of Appeal to hold that in the circumstances of that case, that application was not made promptly. The Board found no fault in the reasoning of the Court of Appeal and emphasised as inexcusable delay the instructing of outside counsel which took some three weeks.

[47] The instant case contains delay of a month and a half from the date the order took effect to the date the application was filed. The cases show that three weeks is not considered prompt and neither is ten days (See **AG v Universal Projects**). The circumstances of the case at bar when examined by the court do not explain why the application was made a month and a half after the sanction took effect. The affidavits filed on behalf of the defendant do not provide reasons why there was no application made to Graham-Allen, J when they were before her or the delay in filing this application. I find that the application for relief from sanctions was therefore not promptly made.

Was the failure to comply intentional

[48] The affidavits provided by the defendant disclose that there were issues relating to the dissolution of the strata executive committee. The defendant's counsel seemed to also have had its own issues both of which led to administrative inefficiency and the case being stymied. I do not find that the failure to comply was intentional.

Good explanation

[49] Brooks, J.A. for the Court of Appeal in **H.B. Ramsay** citing **A.G. v Universal Projects** held at paragraph 22:

> *"Where there is no good explanation for the default, the application for relief from sanctions must fail. Rule 26.8(2) stipulates that it is a precondition for granting relief, that the applicant must satisfy all three elements of the paragraph. The Privy Council, in* ***The***

> ***Attorney General v Universal Projects Ltd*** *[2011] UKPC 37, in considering a similarly worded rule, used in the Civil Procedure Rules of Trinidad and Tobago, held that the absence of a "good explanation" within the meaning of the rule, was fatal to the application. Their Lordships, in that context, said at paragraph 18 of their opinion:*
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> *"The Board has reached the clear conclusion that there is no proper basis for challenging the decision of the courts below that there was no "good explanation" within the meaning of [the rule equivalent to rule 26.8(2)(b) of the CPR] for the failure to serve a defence by 13 March. That is fatal to the Defendant's case in relation to [the rule equivalent to rule 26.8 of the CPR] and it is not necessary to consider the challenge to the other grounds on which the Defendant's appeal was dismissed by the Court of Appeal." (Emphasis supplied)*

[50] In respect of oversight as an explanation, in **AG v Universal Projects Limited** Lord Dyson in delivering the opinion of the Board stated at paragraph 23:

> *"[I]f the explanation for the breach...connotes real or substantial fault on the part of the defendant, then it does not have a "good" explanation for the breach. To describe a good explanation as one which "properly" explains how the breach came about simply begs the question of what is a "proper" explanation. Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly if the explanation for the breach is administrative inefficiency."*

[51] There are no dates in the affidavit of Andrea Wadsworth to explain when the various events which transpired took place. This means the court has no material before it upon which to make a determination as to the merits of the content of her affidavit. Nevertheless I have juxtaposed it against the affidavit of Marvalyn Smith in order to obtain a full picture of the defendant's evidence.

[52] It appeared that the defendant's case was in disarray. The absence from the case management conference of December 4, 2013 before Rattray, J was the beginning of a series of events which served to impair the defendant's position. Rattray, J made the orders set out below and then adjourned the case

management conference to May 27, 2014 at which time both parties and their counsel were present.

[53] The case management conference orders of Rattray, J made on May 27, 2014 are set out below:

> "1.) Standard disclosure by the parties on or before 16th July 2014 by 4:00pm;
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> 2.) Inspection of documents on or before 30th July, 2014;
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> 3.) Witness Statements to be filed and served on or before 29th September 2014 by 4:00pm.
>
> 4.) Each party to file and serve their own Statement of Facts and Issues on or before 27th October 2014 by 4:00pm;
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> 5.) Trial date set for the 26th of January 2015 for three days;
>
> 6.) Listing questionnaires to be filed and served on or before 25th November 2014 by 4:00pm;
>
> 7.) This order is to be filed by the claimant's attorneys-at-law and served on the defendant and or its attorney-at-law."

Returning to Ms. Smith's affidavit it is plain to see that the above orders were honoured in the breach by the defendant. There is no explanation for the failure to comply with the case management conference orders after the instructions from the defendant were received. Nevertheless, at the pre-trial review on December 3, 2014, McDonald, J extended time for the defendant to comply until December 12, 2014 with an unless order which would take effect in default. The defendant's counsel filed three of the documents ordered by Rattray, J on December 12, 2014 but failed to file its statement of facts and issues.

[54] The submissions of Ms. Telfer on this point are of great assistance she argued that the affidavits refer to a shortage of staff, break-ins and theft but not how these factors affected the attorneys and occasioned the non-compliance. There was no indication whether the attorney with conduct of the matter had his/her computer stolen and was therefore unable to prepare the document, or was the matter left unassigned due to the shortage of staff. She further submitted that as

most of the documents were signed, filed and served on December 12, 2014, the statement of facts and issues could similarly have been. This amounts to inexcusable oversight as it is administrative inefficiency which is not a good explanation.

[55] Further to these submissions Ms. Telfer argued that there was a meeting on December 3, 2014. The affidavit of Andrea Wadsworth says that the interim strata committee met with the Kingston Legal Aid Clinic to give instructions regarding the order made on December 3, 2014. This suggests that the meeting took place after the order was made whether on December 3 or some other date.

[56] Despite the matters averred to in the affidavits in support of the application it cannot be gainsaid that McDonald, J generously granted a short period for the defendant to put its house in order between December 3 and 12, 2014. Even then, it was one document short. The result is that the unless order took effect.

[57] The explanation for the delay is not considered a good one. It does not address the legal requirements as set out in **AG v Universal Projects Ltd.** The explanation connotes administrative inefficiency and inexcusable oversight as set out in the affidavit of Marvalyn Smith. This does not constitute a good explanation as has been shown by the case law.

<u>Has the defaulting party generally complied with all other relevant, rules, practice directions, orders and directions</u>

[58] The defendant was absent from the case management conference held on December 4, 2013. The defendant then failed to give instructions to its attorneys which led to an application for counsel to be removed from the record in January 31, 2014. Counsel was put in a position to continue to act for the defendant on July 2, 2014. It is of note that counsel attended the case management conference held by Rattray, J on May 27, 2014 despite this averment. This suggests that fences had been mended well before July 2, 2014. It was on this date that the defendant's counsel received the case management orders. All documents were to be filed and served well before December 12, 2014. There is

no indication on the evidence to explain the intervening period between May 27, 2014 and November or what caused the defendant's counsel to wait until December 12, 2014 to file and serve the witness statement, list of documents and listing questionnaire, absent was the statement of facts and issues. All the defendant's documents were filed out of time and in breach of the orders made by Rattray, J on May 27, 2014.

[59] It has been argued by the defendant that it was simply the statement of facts and issues which was absent overlooking the fact that all the documents filed were filed in breach of the case management orders of the court. This was despite McDonald, J on December 3, 2014, granting an extension of time with an unless order in the event of default to December 12, 2014.

[60] In other words, the defendant and its attorney failed to attend the case management conference on December 3, 2013 which led to an adjournment of the conference to May 27, 2014. There has been no compliance with the orders of May 27, 2014 of Rattray, J. There has also been no compliance with the orders of McDonald, J on December 3, 2014. It cannot be said that the defendant has generally complied with all the orders made in this matter. The order sought at number three of the notice of application is refused.

[61] Order No. 4 - the 'amended final judgment' filed herein on October 1, 2015 is a nullity the learned judge being functus officio.

[62] Both claimant and defendant agree that Graham-Allen, J was at liberty to amend her judgment of January 14, 2015 as her orders had not yet been perfected. The learned judge at a hearing which included both sides amended her judgment of January 14, 2015. This judgment was then perfected having been filed on October 1, 2015.

[63] Both sides relied on the case of **Lyndel Laing v Dawn Llewelyn McNeil et al** [2013]JMCA Civ 27 where Harris, J.A. at paragraph 12 of the judgment stated:

> *"It is a well established principle that a court or judge is devoid of the power to amend or correct any defect in its judgment or order after it has been perfected. In R v Cripps, Ex parte Muldoon and Others, Sir John Donaldson MR speaking to the rule, at page 695, said:*
>
> *"…**once the order has been perfected, the trial judge is functus officio** and in his capacity as the trial judge, has no further power to reconsider or vary his decisions whether under the authority of the slip rule or otherwise. The slip rule power is not a power granted to the trial judge as such. It is one of the powers of the court, exercisable by a judge of the court who may or may not be the judge who was in fact the trial judge."* (emphasis mine)

[64] However, a judge may, at any time prior to the perfection of an order reconsider and vary his decision – see In **Re Suffield and Watts Ex parte Brown** [1888] 20 QBD 693. It is only permissible for the judge to correct a mistake or an error in a perfected judgment or an order in circumstances where rule 42.10 of the CPR applies.

[65] The rule reads:

> *42.10 (1) The court may at any time (without an appeal) correct a clerical mistake in a judgment or order, or an error arising in a judgment or order from any accidental slip or omission.*
>
> *(2) A party may apply for a correction without notice.*

This rule only comes into operation where, in a judgment or an order a clerical mistake, or an error emanating from an accidental slip or omission is manifested. The purport and spirit of the rule is to bring a judgment or an order in which an error, omission or mistake arises in harmony with that which a judge intended to pronounce. Therefore, a judge is not competent to alter a judgment or an order once it has been drawn up and perfected, if it accurately expresses the intention of the court or the judge. To qualify under the rule, an applicant must show that the error, omission or mistake is one in expressing the manifest intention of the judge."

[66] A full year had passed between the date of the first missed case management conference and the pre-trial review. It was only on July 2, 2014 that the Kingston Legal Aid Clinic agreed to continue its representation in the matter and discontinued its application to be removed from the record, what transpired between July 2, 2014 and the beginning of November when there had not yet been any break-ins is not explained. There is no indication as to whether the staff shortage was of legal staff or how this would have impacted the operations of the office.

[67] In the case at bar, Graham-Allen, J conducted proceedings on September 12, 2015 at which certain amendments were made to her orders of January 14, 2015. Both parties were then represented by counsel. The orders had not yet been perfected. If both sides agree on this the learned judge could not have been functus officio. The slip rule is also irrelevant on the facts of this case. Order #4 is refused.

Order No. 5

[68] Rule 42.13 governs a stay of execution or other relief. There is no material contained within either affidavit relied upon by the defendant which sets out the sufficiency of evidence required by the rule. The court therefore has not been provided with any evidence upon which a decision can be based. Order number. five is refused.

[69] Orders

1. The application filed December 10, 2015 is refused.

2. Cost to the Claimant to be taxed if not agreed.