[2012] JMSC Civ 64

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2008 HCV 01405

BETWEEN	H. B. RAMSAY & ASSOCIATES LIMITED	1ST CLAIMANT
AND	CALEDONIA HARDWARE LIMITED	2ND CLAIMANT
AND	HAROLD B. RAMSAY	3RD CLAIMANT
AND	JANET RAMSAY	4TH CLAIMANT
AND	JAMAICA REDEVELOPMENT FOUNDATION, INC	1ST DEFENDANT
AND	THE WORKERS BANK	2ND DEFENDANT

IN CHAMBERS

Debayo Adedipe instructed by Debayo Adedipe & Co for the Claimants

Mrs Sandra Minott-Phillips and Ms. Ky-Ann Taylor instructed by Myers Fletcher & Gordon for the 1st Defendant

Mr. Lackston Robinson and Ms. Deidre Pinnock instructed by the Director of State Proceedings for the 2nd Defendant

April 4, 2011 and June 6, 2012

Relief from Sanctions – Failure to comply with 'unless' order – CPR rule 26.8 – Mandatory and discretionary elements of rule

FRASER J.

BACKGROUND TO THE APPLICATION

[1] On March 2, 2010 Master Lindo ordered, amongst other things, that the claimants pay costs to the defendants in the sum of $8,000 each, to be paid on or before April 12, 2010.

[2] On April 13, 2010, the costs not having been paid, Master Lindo made the following order in relation to those costs: "Unless the costs awarded to the Defendants on March 2, 2010 are paid on or before June 18, 2010 at 2 p.m., the Claimants' statements of case are to stand struck out."

[3] By covering letter dated July 14, 2010 counsel for the claimants sent cheques in the sum of $8,000 to counsel for both the 1st and 2nd defendants. The cheques to both defendants were returned. In the case of the 2nd defendant by covering letter dated July 30, 2010, returning the cheque, it was noted that it was incorrectly drawn in the name of the "Director of State Proceedings" rather than in the name "Finsac".

[4] By Notice of Application for Court Orders dated and filed July 15, 2010 the claimants sought relief from the sanction striking out their "statement of case". That sanction flowed automatically from breach of the order of the Master made on April 13, 2010, they having failed to pay the costs by 2 p.m. on June 18, 2010, as required by the order.

THE SUBMISSIONS OF THE CLAIMANTS

[5] In support of the application, counsel for the claimant relied on two affidavits filed by the 3rd claimant on behalf of all the claimants, dated July 15 and October 20, 2010 respectively. In his first affidavit the 3rd claimant indicated that the costs had been paid into the office of counsel for the claimants two days before the deadline and that he had just been informed that through inadvertence the costs

were not paid over to counsel for the defendants. The second affidavit outlined that, pursuant to business interests in the 1st and 2nd claimants, the 3rd and 4th claimants personally guaranteed some of the financial transactions entered into by the 1st and 2nd claimants with the 2nd defendant; the 1st defendant having come into the picture by being the purchaser of the claimants' obligations to the 2nd defendant. The 3rd claimant averred that he had tried unsuccessfully for years to obtain from both defendants a full account of the sum the claimants owe. All his assets had either been sold or were at risk of being sold due to the claimants' indebtedness.

[6] The 3rd claimant in this second affidavit also pointed out that cheques were sent by his counsel to counsel for the defendants on July 14, 2010 but that both counsel rejected them. The 3rd claimant maintained that the overriding objective of the rules and the interests of justice required that his very substantial claim be adjudicated and that the defendants had not really suffered any prejudice, and in any event, had rejected the cheques when tendered.

[7] Counsel highlighted that the 2nd affidavit raised real issues of accounting and that all the claimants' assets were tied up in the action. He submitted that the issues to be tried were weighty and that an Enquiry concerning how matters such as this had been conducted was ongoing. He maintained that relief should be granted as the breach was not one that went to the heart of matter. There had been no wilful disregard or intentional disobedience of the court's order and much was at stake. Further when the cheques were in fact tendered, payment was rejected on the basis that it was not pursuant to the order, the time having passed.

[8] Counsel cited the Civil Procedure Rules (CPR) rule 26.8 and acknowledged that timelines had been missed which was a factor to be considered, that the trial date had not been met and that a new timetable would have to be set for the matter to come on for trial. He pointed out that the application for relief from sanctions was filed on July 15, 2010 but had only come on for first hearing on October 20, 2010, when it had to be adjourned due to issues of late service.

[9] Counsel further submitted that having regard to the nature of the issues that have been joined and the value of the subject matter at stake, the interests of justice required that relief be granted in terms that compensate the defendants for any costs or inconvenience incurred or suffered. Counsel also advanced that the judgment for costs of the action was obtained by the first defendant based on the striking out. Therefore if relief was granted the substratum for that judgment would go.

THE SUBMISSIONS OF THE 1ST DEFENDANT

The application was not made promptly

[10] Counsel for the 1st defendant submitted pursuant to CPR rule 26.8 (1) that an application for relief from sanctions must be made promptly and be supported by evidence on affidavit.

[11] Counsel advanced that the application had not been made promptly for several reasons as listed below:

a. The striking out of the claimants' statements of case as a result of the breach of the 'unless' order occurred on June 18, 2010. (The case of ***Marcan Shipping (London) Ltd v Kefalas and another*** [2007] EWCA Civ 463 was cited to show the automatic effect of the sanction for breach of an 'unless' order without the need for a further order.)
b. The application for relief from sanctions was not filed until July 15, 2010 (almost one month after the statements of case had been struck out).
c. The striking out of the statements of case on June 18, 2010 meant that as of that date the claimants had no statements of case and, consequently, there was no existing allegation in relation to which there could any longer be a requirement on the defendants to prepare a witness statement (the deadline for the exchange of which with the claimants was July 30, 2010).
d. Counsel further submitted that the application had generally been dogged by delay. The application though filed on July 15, 2010 was not served

until October 8, 2010. When the matter came before the court on October 20, 2010 it was adjourned on the application of counsel for the claimants as the affidavit of the 3rd claimant had only been served by facsimile on the 1st defendant the day before and counsel was unsure whether or not the affidavit had been served on the 2nd defendant. Costs were awarded to the defendants.

e. Counsel for the 1st defendant in her submissions queried why, if the application for relief was so important, had the affidavits been filed so late? Further counsel submitted there was no detectable effort in relation to the affidavit of urgency filed by counsel for the claimants, given that the matter was just being heard eight months after being filed.

f. On September 15, 2010, (prior to being served on October 8, 2010 with the claimants' application for relief from sanctions), the 1st defendant applied for, and was granted, Judgment for costs of the action *(CPR rule 26.5 (7))* on September 20, 2010. The 1st defendant had not been served with any application for the setting aside of that judgment, which was served on the claimants' counsel by fax on September 23, 2010.

g. The 14-day period from the date of service of the judgment, being the time provided by the CPR for making an application to set aside such a judgment *(CPR rule 26.6 (2))* expired on October 8, 2010. The language used by the CPR when speaking to the time within which the application should be made is the mandatory **"must"**. Therefore the court's power to extend the time *(CPR rule 26.1 (2) (c))* for complying with rule 26.6 (2) ought not to be exercised without very good reason being shown.

h. Unless and until the applicants made an application for an extension of time to apply to set aside, and obtained an order setting aside the judgment granted in favour of the 1st defendant, the application for relief from sanctions was pointless.

i. Neither the claimants nor their counsel was present at the pre-trial review on September 20, 2010, when judgment was granted in favour of the 1st defendant. Their absence from court without prior notification to the court

or to counsel for the 1st defendant was significant given their awareness of the matter being before the court for pre-trial review on that date. The fact that the claimants were aware of the pre-trial review date was evidenced by their being represented at the Case Management Conference on April 13, 2010 by counsel Mr. Akin Adaramaja holding for Mr Adedipe and the indication by Mr. Adedipe in his Affidavit of Urgency that he wished an early date to have the application for relief from sanctions heard, given that the pre-trial review date was September 20, 2010.

The application was not supported by evidence on affidavit

[12] Counsel also submitted that contrary to the requirement outlined in CPR rule 26.8 (1) the application was not supported by evidence on affidavit. Counsel submitted that the only affidavits served on the 1st defendant in relation to the application were sworn to by Mr. Adedipe, counsel for the claimants, on July 20, 2010 (an affidavit of urgency), and those of Mr. Harold Ramsay sworn to on July 15, 2010 and October 19, 2010 (filed October 20, 2010).

[13] Counsel further submitted that on a consideration of those affidavits there was insufficient evidence before the court for the claimants' application to be granted, even if there had also been an application to set aside the judgment, which counsel had previously submitted was necessary.

Further Submissions

[14] Even if there was evidence of the inadvertent inaction of the Claimants' attorney-at-law (which there wasn't), that inadvertent inaction did not explain the delay in applying for relief from sanctions.

[15] Additionally the claimants had not generally complied with all other relevant rules, practice directions orders and directions (CPR rule 26.8 (2) (c)). Counsel for the claimant set out in tabular form, reproduced below, the breaches alleged.

Date for compliance	Order Not Complied With
March 16, 2010	Order granting leave to file Reply out of time
April 12, 2010	Order for costs in the sum of $8,000 each to the Defendants, to be paid by this date
June 4, 2010	Standard Disclosure
June 18, 2010	Unless order of April 13, 2010 that unless the costs ordered to be paid on March 2, 2010 are paid by June 18, 2010- claimants' Statements of case are struck out
September 6, 2010	Listing Questionnaire to be filed
September 20, 2010	No representation at Pre-Trial review contrary to CPR 27.8

[16] Counsel also advanced that the fact that the sums involved in the claim may be large was not a reason in and of itself without more, why the application should be granted.

[17] In relation to the claim that the defendants had failed to provide a full account to the claimants, counsel maintained that in order to be entitled to an account, the claimants would have to establish that there was a reporting relationship that required accounting between the parties. It was submitted the claimants may not have satisfied that threshold. However, notwithstanding the fact that the 1st defendant maintains the claimants were not entitled to such an account, in the 1st defendant's defence there was a completely particularised statement of account even though there was no accounting relationship. It was to this statement of account that counsel for the claimants had failed to file a reply.

[18] Counsel for the 1st defendant cited the case of ***Barbados Rediffusion Service Ltd v Asha Mirchandani and Others (No 2)*** (2006) 69 WIR 52 as providing

guidance on how the striking out of claims based on 'unless' orders should be approached.

[19] Based on all her submissions counsel for the 1st defendant maintained that the claimants' application should be dismissed with costs to the 1st defendant.

THE SUBMISSIONS OF THE 2ND DEFENDANT

[20] Counsel for the 2nd defendant adopted the submissions of the 1st defendant and added some points for emphasis. Counsel argued that the court should focus on the conduct of the claimants. He submitted it was noteworthy that, though the claim had been filed in March 2008, after three years the matter had not passed the case management stage. He further pointed out that another order was made October 20, 2010 for the claimants to pay costs by Dec 10, 2010. Those costs had also not been paid as though a cheque was sent it had to be returned as it was drawn in the wrong name.

[21] Counsel further pointed out that the 2nd defendant had also filed an application September 30, 2010 requesting judgment, but up to the date of hearing had received no notification from the Supreme Court Registry to indicate that it had been granted.

THE SUBMISSIONS OF COUNSEL FOR THE CLAIMANTS IN REPLY

[22] In respect of the submission of the 1st defendant that the claimants should first seek to set aside the judgment for costs of the action counsel for the claimants submitted that CPR rule 26.6 (1) is a rule that addresses a peculiar situation and to the extent that the right to enter judgment had arisen it would not apply to this situation.

[23] Counsel submitted that CPR rule 26.6(1) not being relevant to this situation the 14 day period within which to apply to set aside the judgment stipulated in CPR

rule 26.6 (2) would not arise. In respect of CPR rule 26.6 (4) the terms of the application were broad enough to address the striking out and the judgment for costs on a request being made that followed the event. Counsel further submitted that he was also asking that the claim be reinstated and the matter proceed to trial.

[24] Concerning the question whether or not an accounting relationship had been established with respect to the 1st defendant it was advanced that as the 1st defendant was pleaded as successor, an accounting relationship was created in light of the agreement between the 1st and 2nd defendants.

[25] Counsel for the claimant embraced the ***Barbados Rediffusion Service Ltd*** case, indicating that it provided useful guidance as to the way the striking out power should be exercised. He submitted that the tenor of the judgment is that the main concern of the court should be whether or not there had been defiant or contumelious disobedience of the court's order. He submitted there was no evidence of contumely and therefore in all the circumstances there was nothing that had happened that an appropriate order for costs that is obeyed would not remedy. Therefore having regard to the overriding objective the relief sought should be granted and a new time table set to bring the matter to trial.

THE LAW AND ANALYSIS

Was there a need for the Claimants to first obtain an order setting aside the judgment for costs prior to making an application for relief from sanctions?

[26] One of the bases on which the application was opposed by counsel for the 1st defendant is that the judgment having been obtained, the claimants would first have to seek and obtain an extension of time in which to seek to set aside the judgment and succeed in setting it aside, before proceeding to apply for relief from sanctions. Counsel for the claimant said nay; the judgment flowed from the sanction of the claim having been automatically struck out, the 'unless' order

having been breached. Once that sanction was lifted the substratum for the judgment would necessarily evaporate and the judgment could not stand.

[27] A somewhat related issue was addressed by the Judicial Committee of the Privy Council in the case of ***Attorney General of Trinidad and Tobago v Universal Projects Limited*** 2011 UKPC 37. In that case at paragraph 1 it was stated:

> The principal issue that arises on this appeal is whether an application by a defendant to set aside a judgment following non-compliance with a court order extending time for filing a defence in default of which permission is given to the claimant to enter judgment is (i) an application to set aside judgment under CPR 13.3 (as is contended by the Attorney General) or (ii) an application for relief from sanctions under CPR 26.7 (as contended by Universal Projects Limited).

[28] The Board after a detailed review of the relevant sections of the Trinidad and Tobago CPR and a reference to ***The Attorney General v Keron Matthews*** 2011 UKPC 38, which also dealt in detail with the difference between an application to set aside a default judgment and one for relief from sanctions, concluded that the appropriate application in those circumstances would be for relief from sanctions.

[29] The judgment obtained in this case however was not a default judgment under Part 13 of our CPR but a judgment without trial after a striking out, for costs to be taxed under CPR rule 26.5 (7). Even without recourse to the ***Universal Projects*** case to import and apply by analogy reasoning from that case, I accept the submission of counsel for the claimants that the answer to the position advanced by counsel for the 1st defendant is found in CPR rule 26.6 (1) (2) and (4). Those rules state:

> (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.

...

(4) Where the application to set aside is made for any other reason, rule 26.8 (relief from sanctions) applies.

[30] 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 therefore could 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. The submission that the claimants need to apply for an extension of time to set aside the judgment and then successfully apply to set aside the judgment prior to making an application for relief from sanctions, is therefore misconceived. 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.

The Application for Relief from Sanctions

[31] The case of ***Marcan Shipping (London) Ltd v Kefalas and another*** [2007] EWCA Civ 463 was cited by counsel for the 1st defendant to support the proposition that the sanction in an 'unless' order took effect without the need for any further order, if the party to whom it was addressed failed to comply with it in any material respect. That position was accepted by all parties and the court. The matter therefore proceeded on the basis that the claim stood struck out from 2 p.m. on the 18th June 2010, the costs not having been remitted to the defendants by then as required by the order.

[32] 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 orders and 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.

[33] At the outset it is critical to note the mandatory requirements of rule 26.8 (1) and (2) which must be satisfied, before the discretion of the court can be exercised to grant an applicant relief from sanctions. In ***Kristin Sullivan v Rick's Café Holdings Inc T/A Rick's Café(No 2)*** 2007 HCV 03502 (April 15, 2011), Sykes J. reviewed authorities from England, the Eastern Caribbean and Trinidad and Tobago concerning the interpretation of their sections dealing with relief from

sanctions. He noted that the relevant sections in St. Christopher and Nevis and Trinidad and Tobago were worded in the same way as in the Jamaican CPR and were each stricter than the comparable section of the English rules.

[34] In relation to the Jamaican CPR at paragraph 21 he stated:

> The great virtue of rule 26.8 (1) and (2) of the CPR is that it sets out mandatory criteria which must be met before the discretion is exercised. It ensures greater consistency in outcome. This fundamental shift is perhaps the clearest indication that the Rules Committee comprising eminent judges of the Court of Appeal, the Supreme Court as well as distinguished practitioners at the public and private bar were dissatisfied with the way judges were exercising their discretion to extend time under the CPR. The Committee had before it the English CPR rule 3.9 which does not have the same strict preconditions but chose to reject that approach and introduce mandatory conditions before the discretion can be exercised.

[35] It is in the context of the more stringent nature of the Jamaican CPR rule 26.8 compared to the English CPR rule 3.9 and the rule that it replaced, that the case of ***Barbados Rediffusion Service Ltd*** case, (cited by counsel for the first defendant and also relied on by counsel for the claimants), should be considered. In the ***Barbados Rediffusion Service Ltd*** case the Caribbean Court of Justice had to construe Rules of the Supreme Court (RSC) 1982, Ord 24 r 16 (1) which was the precursor to the English CPR rule 3.9. Ord 24, r 16(1) reads:

> If any party who is required by any of the foregoing rules, or by any order made thereunder, to make discovery of documents...fails to comply...with that order...then ... the court **may make such order as it thinks just**, including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly. [emphasis added]

[36] It is clear that under RSC Ord 24 r 16 (1) a court had the discretion to grant relief if it was thought just. A number of cases reviewed by the Caribbean Court of

Justice indicated the types and nature of factors that should be considered in the exercise of the discretion. At page 77 the Court observed that, ***"What is required is a balancing exercise in which account is taken of all the relevant facts and circumstances of the case."*** (emphasis added). Counsel for the claimants therefore relied on the case in support of his submission that the breach of the court's order which led to the sanction was not contumelious, could be addressed by an appropriate order as to costs, and therefore the court should exercise its discretion to grant the relief from sanctions.

[37] The discretion under the Jamaican CPR is however not automatically engaged as was the case under RSC Ord 24 r 16 (1) and currently is the case under the English CPR r 3.9 that replaced RSC Ord 24 r 16(1). 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.

[38] It is also worthy of note that at paragraph 8 of the ***Ricks Café (No 2)*** judgment, Sykes J. noted that while the factors outlined in rule 26.8(3) all had to be considered if the thresholds established by rule 26.8 (1) and (2) were attained, they were not exhaustive. This court could therefore have regard to other relevant factors if the stage is reached where the exercise of the discretion as prayed, can be contemplated. It is at this point that *"all the relevant facts and circumstances of the case",* as contemplated by the ***Barbados Rediffusion Service Ltd,*** case could be considered. Those relevant facts and circumstances would include whether or not the claimants acted with contumelious disregard for the court.

[39] The first order of business however, is to determine whether or not the mandatory requirements of rule 26.8 (1) and (2) have been satisfied.

Was the application made promptly and supported by evidence on affidavit? (CPR rule 26.8 (1) (a) and (b))

[40] The mandatory condition in CPR rule 26.8 (1) (b) can be addressed more quickly than that in CPR rule 26.8 (1) (a). The third claimant has filed two affidavits, on July 15 and October 20, 2010 in support of the application. Counsel for the applicant also filed an affidavit of urgency on July 20, 2010 seeking to have the application heard prior to the pre-trial review that was scheduled for September 20, 2010. Counsel for the first defendant has taken issue with the sufficiency of the evidence contained in those affidavits. However the threshold at this stage does not appear to extend to the sufficiency of the evidence contained in the affidavits. The question of the sufficiency of evidence would have to be addressed particularly in relation to CPR rule 26.8 (2) and possibly some aspects of (3), if the claimant satisfies the initial requirements of a prompt application supported by affidavit evidence. At this stage however, it is enough that there is affidavit evidence which on its face supports the application for relief.

[41] The mandatory requirement in rule 26.8 (1) (a) however cannot similarly be addressed summarily. The defendants oppose the relief sought maintaining that the claimant's application was not made promptly as it was made almost one month after the sanction took effect. The lack of promptitude they say was exacerbated by the application not being served on them until after almost a further three months had passed and after the first defendant had obtained and served judgment for costs of the action and the second defendant had also applied for judgment.

[42] As noted by Sykes J. in ***Ricks Cafe (No. 2), "Promptly is not defined in the rules, however, it is obvious that the context in which this adverb is used in the rules conveys the sense of 'without delay', 'quickly' or 'at once'".***

(emphasis added). The cases also make it clear that what may be considered prompt will depend on the circumstances of each case. What is also apparent is that a faithful interpretation of the rules would not permit the concept to be elasticised beyond the natural meaning of the word.

[43] In ***Attorney General of Trinidad and Tobago v Universal Projects Limited*** Civ. App No.104/2009 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, moved the Trinidad and Tobago Court of Appeal to hold that in the circumstances of that case, that application was not made promptly. The court took into consideration the history of the matter. The initial date for the filing of the defence having been missed due to the mishandling of files by inexperienced staff in the Attorney General's Office, on February 10, 2009 an extension of time was obtained to file the defence by the 13th March 2009. In default, leave was granted to the claimant to enter judgment against the defendant. The Defence not having been filed nor any further extension of time sought, judgment in default was taken out by the defendant on the 16th March. An application was filed on the 23rd March seeking among other things a stay of the application and alternatively a further extension of time to file the Defence. On 25th March, counsel for the defendant received a letter from the claimant's attorney enclosing a copy of the default judgment dated 16th March. On 1st April, the defendant filed a notice seeking permission to amend the application of 23rd March to include an application for an order that the default judgment be set aside.

[44] On 16th April, Gobin J. granted the defendant permission to amend its application, but said that the application to set aside the judgment was misconceived and that what was required was an application for relief from sanctions under CPR 26.7(the equivalent of CPR 26.8 in Jamaica). The learned judge then treated the application as if it had been made under that rule and

examined the material before her, but found it did not satisfy the tests for the grant of relief and dismissed it.

[45] In the Court of Appeal Jamadar J.A. speaking for the Court at paragraphs 52 - 53 said that:

> This application could have been made shortly after the 13th March, because prior to the 13th March it was clear that a defence would not have been ready on or before that date. Indeed, on the 13th March the Appellant's attorneys wrote a letter to the J.S.O. attached to Gobin J. indicating this to be the case. An application under Part 26.7 could just as well have been filed at that time. 53. Instead nothing was done until the 23rd March, 2009, which in my opinion, in the circumstances of this case, could not be described as being prompt.

[46] Jamadar J.A. in a footnote to the extract above noted that pursuant to Part 40.3 of the Trinidad and Tobago CPR 1998 "where a judgement is entered against a party at a trial in his absence, an application to set aside that judgment "must be made **within 7 days** after … the judgment … was served". It was therefore also in that context that the Court found that a 10 day delay in making the application was not prompt. The similar provision in the Jamaican CPR, rule 39.6, allows 14 days for such an application.

[47] In the instant case the initial order for the payment of costs by April 12, 2010 was made on March 2, 2010. That order having been breached, the 'unless' order of April 13, 2010 allowed the claimant until 2 p.m. on June 18, 2010 to comply with the order or the claim would be struck out. Despite the further time allowed of two months and five days the payment was still not made. 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. To compound the matter, though filed on July 15, 2010 the application for relief was

not served until October 8, 2010. This was after the 1st defendant had obtained and served judgment for costs of the action and the 2nd defendant had also applied for judgment.

[48] The finding that the application was not made promptly is sufficient to dispose of the application. However in the event my conclusion is wrong on that point, I go on to consider the other mandatory conditions that have to be satisfied before relief can be granted.

Was the failure to comply intentional? (CPR rule 26.8 (2) (a))

[49] In his first affidavit in support of the application for relief from sanctions filed on July 15, 2010 the 3rd claimant averred that he paid the sum of $16,000.00 into the office of his Attorney-at-law on June 16, 2010 and that he had just been informed by his said Attorney-at-law that through inadvertence those sums ordered for costs were not paid over to the Attorneys-at-law representing the defendants.

[50] He further averred that the failure to comply with the order was not intended on his part nor on the part of the other claimants; that the defendants were not likely to have been prejudiced by the non-compliance with the order of the court; and that his Attorney-at-law had informed him that immediate steps were being taken to remit to the two defendants the sums due to them or costs so as to remedy the breach of the order.

[51] In his affidavit filed October 20, 2010 the evidence of the 3rd claimant is that he was informed and verily believed that his Attorney-at-law "***sent cheques in the sum of $8,000 each to the Attorneys-at-law for the Defendants on July 14, 2010. Both Attorneys-at-law rejected the cheques and returned them.***" (emphasis added).

[52] In submissions on behalf of the second defendant counsel for the Director of State Proceedings indicated that, apart from the costs ordered on March 2, 2010

being outstanding, costs ordered on October 20, 2010 for the claimant to pay costs to the second defendant of $8,000.00 by December 10, 2010 was not complied with. It should be noted however in relation to that outstanding payment, that the cheque was sent but was returned due to it being made out in the name of the wrong payee. The court would therefore not be minded to use the circumstances of that non-payment as providing support for any pattern of non-payment that would create an inference that the costs which are the subject of this application were deliberately not paid over.

[53] The 3rd claimant's evidence which I accept is that he paid in the money for the costs due to his Attorney-at-law two days prior to the deadline. Further, though the money was not paid over in time, cheques for those costs were in fact sent to the defendants on July 14, 2010. Those facts accord with the 3rd claimant's evidence that the breach of the order was not intended. It would be nothing short of remarkable if the breach was intended given that it was known that it would result in the striking out of the claimants' action. I therefore accept as the 3rd claimant has stated in his evidence, that the breach was unintended.

Is there a good explanation for the failure? (CPR rule 26.8(2) (b))

[54] The Trinidad and Tobago Court of Appeal decision ***Attorney General of Trinidad and Tobago v Universal Projects Limited*** reviewed earlier in this judgment outlined the mandatory nature of the requirements of promptitude and affidavit support for the application. On appeal (2011 UKPC 37), the Judicial Committee of the Privy Council in dismissing the appeal, while not disturbing the analysis of the Court of Appeal on the mandatory nature of the rules requiring the application for relief to be prompt and to be supported by evidence on affidavit, based its decision on the failure of the appellant to satisfy another mandatory requirement — the fact that there was no good explanation for the failure that led to the sanction being imposed. The Board declined to consider the challenge to the other grounds on which the Court of Appeal dismissed the appeal.

[55] In analysing the meaning of "good explanation" at paragraph 23, Lord Dyson who delivered judgment on behalf of the Board said that:

> [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.

[56] In ***Rick's Cafe (No. 2)*** Sykes J. declined to grant relief from sanctions where the omission by counsel to file a core bundle on time, led to the claimant's action being struck out in keeping with an 'unless' order made. Sykes J. found that the explanation proffered by counsel for the omission that his ***'heavy workload with attendant court scheduling over the preceding several months … occasioned this issue not coming to his attention',*** (emphasis added) was not a good one. At paragraph 29 the learned judge opined that:

> The explanation of counsel and the entreaty not to visit her counsel's omissions on her would make policing of the new rules impossible. Taken to its ultimate conclusion, every litigant could simply blame his lawyer or the lawyer could easily say that he is to be blamed and the court would, as a matter of course, overlook the breach and grant relief. Surely this is not the new culture being promoted by the CPR. If that were the case then [the] CPR would not be worth the paper that it is written on.

[57] In the Jamaican case of ***Elenard Reid and others v Nancy Pinchas and others*** CL 2002 R/031 (February 27, 2009), the claimants' sought relief from the sanctions of their claim having been struck out for failure to comply with an order to file a reply to the amended defence by a stipulated time. As in the instant case

the reason advanced for the omission was "inadvertence". At paragraph 54 in analysing that reason Sykes J. said:

> The affidavit does not explain the reason for the failure and so no good reason has been advanced for the failure. Is it that the attorneys removed from one location to the next? Is it that the attorney who had conduct of the matter left the chambers? Was there a flood or fire at chambers which caused the matter to be mislaid? Is it that there was difficulty in contacting the claimant to secure the signature? The affidavit does not attempt an explanation other than ask the court to accept that the omission was due to inadvertence.

[58] In the instant case the explanation advanced by the 3rd claimant is also that of "inadvertence". Inadvertence in a context where costs ordered on March 2, 2010 not having been paid by April 12, 2010 as ordered, an 'unless' order for the payment of those costs was made on April 13, 2010 with the sanction for non-compliance being the striking out of the claimant's case. Despite the fact that over two months was given for the costs to be paid the sum for those costs was paid in to the claimants' attorney-at-law a mere two days before the deadline and the cheques from the claimants' attorney-at-law to the defendants' attorneys-at-law were not forwarded until almost a month after the deadline. As in ***Elenard Reid's*** case no explanation other than "inadvertence" was advanced. In light of the facts in this case and the authorities reviewed, the court is constrained to hold that no good explanation for the failure has been advanced.

Have the Claimants generally complied with all other rules practice directions orders and directions? (CPR rule 26.8 (2) (c))

[59] In her submissions counsel for the 1st defendant pointed out that apart from the non-compliance with the terms of the 'unless' order, the claimants had failed to

comply with other relevant orders and obligations. Those unanswered submissions highlight that the claimants had failed to:

a. comply with the order granting leave to file a reply out of time which stipulated the reply should have been filed by March 16, 2010;
b. comply with the order for standard disclosure by June 10, 2010;
c. file their listing questionnaire by September 6, 2010; and
d. have their representative present at the pre-trial review on September 20, 2010 contrary to CPR rule 27.8. This failure had to be viewed in the context whereby it is clear that counsel for the claimants was aware of the pre-trial review date based on the Formal Order of April 13, 2010 which records the presence of counsel holding for the claimants' attorney-at-law and paragraph 4 of the affidavit of urgency of Debayo Adedipe sworn to, and filed, on July 20, 2010 in which he adverts to the pre-trial review date of September 20, 2010 as one of the bases on which an early date was being sought. It was at this pre-trial review that judgment was granted in favour of the 1st defendant.

[60] Those submissions not having been countered it is manifest that the mandatory requirement that there should have been general compliance with the other rules practice directions orders and directions has not been established.

[61] Based on the analysis conducted it is the finding of the court that the claimant has failed to satisfy the mandatory requirements of having:

a. made a prompt application for relief;
b. a good explanation for the breach of the 'unless' order; and
c. generally complied with all other rules practice directions orders and directions.

[62] Accordingly the application fails and there is no need for the court to examine the discretionary factors outlined in CPR rule 26.8 (3) given that the conditions precedent to the discretion arising have not been met.

[63] Before parting with this matter it is important to address an issue that arose for consideration in some of the cases from Trinidad and Tobago on the question of when sanctions arise. In the trinity of cases ***Trincan Oil Ltd v Schnake*** (Civ App No 91 of 2009), ***Khanhai v Cyrus*** (Civ App 158 of 2009) and ***Keron Matthews v The Attorney General of Trinidad and Tobag***o (Civ App 23 of 2010), an interpretation of the Trinidad and Tobago CPR that created the concept of "implied sanctions" was developed. This concept was also highlighted by Sykes J. in ***Ricks Cafe (No 2)*** in his analysis of ***Trincan Oil***. On appeal in ***Attorney General of Trinidad and Tobago v Keron Matthews*** the Judicial Committee of the Privy Council in disproving that interpretation held at paragraph 16 that, ***"Sanctions imposed by the rules are consequences which the rules themselves explicitly specify and impose."***(emphasis added). At paragraph 18 the Board continued to specify that, ***"an application to set aside a default judgment is not an application for relief from a sanction imposed by the rule."*** (emphasis added).

[64] The effect of the ruling is not limited to the facts of the ***Keron Matthews*** case nor to applications to set aside default judgments. The ruling makes it clear that it is not open to courts to read in "implied sanctions" and import the requirements of the rule dealing with relief from sanctions into other applications, where no explicit consequence is stated or "imposed" by the rules themselves.

CONCLUSION

[65] The claimants having failed to satisfy all the threshold requirements in CPR rule 26.8 (1) and (2) the application for relief from sanctions must fail and is refused. Costs to the defendants to be agreed or taxed. Leave to appeal sought by counsel for the claimants is granted.