[2022] JMSC Civ. 226

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2016 HCV 0346

BETWEEN	**WAYNE LEWIS**	**CLAIMANT**
AND	**CVM TELEVISON LIMITED**	**DEFENDANT**

CONSOLIDATED WITH:

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2016 HCV 01776

BETWEEN	**WAYNE LEWIS**	**CLAIMANT**
AND	**CVM TELEVISON LIMITED**	**DEFENDANT**

IN CHAMBERS

VIDEO CONFERENCE

Mr. Aeon Stewart instructed by Knight, Junior and Samuels appeared for the Claimant

Mr. Andre Sheckleford instructed by Hart Muirhead Fatta appeared for the Defendant.

Heard: October 27, 2022 and December 16 2022

Civil Procedure – Whether failure to participate in future mediation within timelines constitutes failure to comply with unless orders – Whether there was failure to comply with the unless orders – Whether relief from sanctions should be granted – Alternatives to striking out – Whether costs should be awarded against the

Claimant for opposing application for relief from sanctions – Application of Civil Procedure Rules 2002: 1.1, 26.5, 26.8, 42.8, 42.9 and 64.6

MASTER CARNEGIE (Ag)

This is an oral judgment delivered on December 16th 2022, which I have now reduced to writing.

BACKGROUND

[1] The procedural history of this claim is summarized as follows:

a. On August 12, 2016, the Claimant filed a Claim Form and Particulars of Claim seeking to recover the following from the Defendant:

1. Monies due and owing to the Claimant as per the employment contract between the parties;

2. For that in breach of the employment contract between the parties entered into on or about the 30th day of May 2003 and the subsequently modified employment contract which took effect on the 1st day of February, 2004, the Defendant has willfully refused and/or neglected to pay in full the sums agreed, that is 10% on commission for services provided, by paying to the Claimant 2% on commission for services provided, from the date of commencement of the employment contract to June 2016 and continuing resulting in the Claimant suffering loss and damage and incurring expense;

3. Interest pursuant to the Law Reform (Miscellaneous Provisions) Act;

4. Attorney costs;

5. Costs; and

6. Such further and other relief as this Honourable Court may deem fit.

b. On September 6, 2016, the Defendant filed an Acknowledgment of Service.

c. On October 31, 2016, Consent to file Defence out of time was filed by counsel for the Claimant, and the Defence was filed by the Defendant on the same day.

d. On August 17, 2018, Palmer-Hamilton J (Ag) (as she then was) granted an order refusing the Defendant's Application to Strike out the Claim filed on March 16, 2017. In the same order, Palmer-Hamilton J (Ag) ordered that claim number 2016 HCV 03406 is to be consolidated with claim number 2016 HCV 01776. It was also ordered that by and with consent, the parties are referred to mediation, and the time within which mediation is to be completed is extended to November 19, 2018.

e. On January 16, 2019, the following unless orders were made by K. Anderson J:

   1) The parties shall go to mediation and participate in any further mediation session held with respect to Claim No. 2016 HCV 03406 and shall do so by no later than April 30, 2019.

   2) If either party shall fail to comply in any respect with order number 1 above, then that party's statement of case shall stand struck out without the need for any further court order.

f. A mediation report was filed on April 8, 2019, for a mediation session which took place on March 26, 2019. It was indicated in the mediation report that "the parties and the mediator met, and the mediator considered that there are reasonable prospects of agreement, and an extension of time is required and requested herein."

g. On May 2, 2019, the Claimant filed a Notice of Application seeking the following orders:

   1. Pursuant to Orders one (1) and two (2) of the Honourable Mr. Justice K. Anderson made on 16 January 2019, Judgment is entered against the Defendant in respect of Claim No. 2016HCV03406, Wayne Lewis v CVM Television Limited with damages to be assessed.

   2. Costs to the Claimant.

   3. Such further and other relief as this Honourable Court deems just.

   The grounds of this application are as follows:

   a) This application is being made pursuant to CPR 26.5, 42.8 and 42.9.

   b) That on the 16 January 2019 the Honourable Mr. Justice K. Anderson made Case Management Orders in respect of Claim No 2016HCV03406, Wayne Lewis v CVM Television Limited.

   c) The Defendant has failed to comply with the unless order contained at number 1 in that they have failed to participate in any mediation session prior to the 30 April 2019.

   d) That the sanction imposed by way of order number 2 follows in that the Defendant's statement of case stands struck out without need for any further Court order.

   e) The granting of the orders herein would be in keeping with the overriding objective.

h. Affidavit in support of the application was also filed on May 2, 2019.

i. On 21st of April 2021 an affidavit sworn to by Mrs. Paula Tyndale Harris was filed on behalf of the Defendant.

j. On June 8, 2021 the Defendant filed a Notice of Application seeking the following orders:

    1. Should there be found a failure to comply with order no. 1 of the order of K. Anderson J of 23rd January 2019 ("the Order") on the part of that Defendant, that the Defendant be relieved of the sanction in order no. 2 of the Order;

    2. There be such further or other relief as the Court deems fit;

    3. Costs to the Defendant.

k. Written submissions in support of the Claimant's Application were filed on June 8, 2021. The Claimant also filed submissions in response to the Defendant's Application on July 26, 2021.

l. Written submissions in support the Defendant's Application were filed on June 8, 2021.

<u>SUBMISSIONS MADE ON BEHALF OF THE CLAIMANT</u>

[2] The oral and written submissions made for and on behalf of the Claimant were summarized.

(a) <u>Whether the defendant has failed to comply in any respect with court orders to go to mediation and or participate in any future mediation session held with respect to Claim No. 2016 HCV 03406, by April 19, 2019.</u>

[3] Counsel submitted that reliance should be placed on the affidavit filed on behalf of the Claimant and Defendant in coming to the determination of whether the unless order made by K. Anderson J took effect on May 1st 2019. Counsel for the Claimant submitted that on this issue, it is a question of fact whether Defendant

failed to comply with the unless orders made by K. Anderson J, the same having taken effect on the failure on the part of the Defendant to participate in any future mediation session.

[4] Counsel submitted that on March 26, 2019, the parties attended mediation, following the unless orders by K. Anderson J made on January 23, 2019. Counsel submitted that after attending mediation on 26th March 2019, another date was set by the mediator for the parties to continue mediation on April 2nd 2019, but a day before that date, the Defendant's Attorney-at-Law cancelled without proposing a continuation date.

[5] It is counsel's submission that they made repeated attempts to continue the mediation in the matter, but those efforts were frustrated by what counsel characterizes as the Defendant's tardiness, unresponsiveness and lack of cooperation in convening the same. Counsel for the Claimant submitted that such attempts were in the form repeated telephone calls and letters to counsel for the Defendant reminding them of the need to act promptly and the timeline for compliance with the unless order.

[6] Counsel submitted that at no time did counsel for the Defendant indicate the subject file was damaged by water or provided an explanation for their failure to respond to communication, especially when the need for prompt action at the time would have been fresh on their minds.

[7] Counsel submitted that up to the time of filing the application for court orders on May 2nd 2019, to enter judgement, counsel for the Defendant had not applied for relief from sanctions. Counsel submitted further that the explanation for the failure to communicate was given April 21, 2021, two years after the filing of the application to enter judgment.

[8] Counsel for the Claimant submitted that it is on these facts and the admittance of delay on the part of counsel for the Defendant, that they failed to comply with the unless order made on January 26 2019, by K. Anderson, J.

(b) Whether the "unless order" made by the Honourable Mr. Justice Kirk Anderson has taken effect as against the defendant with respect to Claim No. 2016 HCV 03406.

[9] Counsel submitted that the unless order made by K. Anderson J on January 16th 2019 took effect from the 1st May 2019, by what counsel states was the failure of the defendant to comply with those orders no later than 30th April 2019. In support of his submission, counsel relied on the decision of **HB Ramsay JDRF and the Workers Bank – [2012] JMSC Civ. 64 and Marcan Shipping (London) Ltd. v Kefalas and Another – [2007] EWCA Civ. 463** that a sanction imposed arising from a breach of order, takes effect without the need for any subsequent court order.

[10] It was counsel's submission that with the sanction automatically taking effect the explanation offered by counsel for the Defendant is of little assistance to determining whether the Defendant has failed to comply with any aspect of the unless order. Counsel's final submission on this point was that any explanation for the delay would not be of relevance to any relief which the defendant would be seeking with respect to what flows from the unless order made on January 16th 2019.

SUBMISSIONS MADE ON BEHALF OF THE RESPONDENT IN RESPONSE TO THE APPLICATION TO ENTER JUDGEMENT

[11] In his response counsel for the Defendant sought to place in context his oral and written submissions within the meaning of the order and whether relief from sanctions and award of costs to the Defendant should be awarded by setting out

the background. The summary of counsel's oral and written submissions are set out accordingly.

Background

[12] It was counsel' submission that the Claimant produced documents from the chartered accountant at the mediation which counsel indicated time was required to review those documents produced. Counsel submitted that, consequently the mediator reported that the parties and the mediator met and the mediator considered that there are reasonable prospects for agreement and an extension of time is required. Counsel submitted that the mediation was meant to continue 2nd April 2019, and attempts were made by the Defendant to facilitate the continuation of mediation albeit after the date in the unless order, but Claimant's counsel did not respond to these overtures.

The Defendant's Position

[13] Counsel submitted that the Defendant acted in a manner to facilitate the actual aim of mediation rather than rather merely avoiding sanction. Counsel further submitted that the Claimant's counsel is engaging in technical game playing to obtain a litigation advantage, by acting contrary to the overriding objective and the spirit of litigation, with a view to achieving a technical outcome.

[14] Counsel submitted the parties and the mediator met and the mediator considered that there are "reasonable prospects for agreement and an extension of time was required and requested herein." The mediation session later scheduled for April 2, 2019, was further adjourned at the request of the Defendant as the accounts had at that point, still not been reviewed with sufficient detail to facilitate a fruitful session.

[15] It was further submitted by Counsel that in or about the middle of April 2019, the law office of the Defendant's Attorneys-at-Law suffered severe water damage which affected several files, including counsel's file, and many facets of activity

concerning this matter. Counsel submitted that despite those occurrences, the Defendant attempted to facilitate the continuation of the mediation, though it was after the date, in the order of K. Anderson J.

Effect and Meaning of the Unless Order

[16] Counsel's position is that, on the interpretation of the plain meaning of the order of K. Anderson J, there has been no breach on the part of the Defendant. It was Counsel's submission in respect of the meaning and effect of the order that mediation was meant to continue April 2nd 2019, and therefore requested a further adjournment as the accounts had not yet been examined in sufficient depth to facilitate meaningful mediation.

[17] The Defendant's Counsel further submitted that the Claimant is engaging in "technical game playing" in an attempt to gain a litigation advantage by acting contrary to the overriding objective. The order of K. Anderson J, Counsel submits, directed that the parties attend mediation and "participate in any further mediation session held with respect to Claim No. 2016 HCV 03406, and shall do so by no later than April 30, 2019".

[18] Counsel submitted that if the Claimant wishes to place reliance on the events surrounding the mediation session which was scheduled for April 2, 2019, there was no further mediation session held on that day and same was not aborted.

[19] It was counsel's submission that the Defendant has ostensibly been acting in a manner so as to facilitate the true purpose of the mediation, that is, to actually arrive at a settlement, rather than simply ticking a box in a check list or rather merely avoiding sanction.

SUBMISSIONS ON BEHALF OF THE DEFENDANT FOR APPLICATION FOR RELIEF FROM SANCTIONS

[20] Counsel submitted that the application for relief from sanctions was filed with the intention that the application be heard contemporaneously with the Claimant's application. Counsel submitted that if there can be said to be a failure to comply which they cannot say there is – relief from sanctions from striking out would be appropriate.

[21] Counsel placed reliance of the provision of CPR 26.8 demonstrating that failure to comply was not intentional as the reason for non-compliance was the experience of severe water damage to files in the office, including the file in respect of the subject matter at bar.

[22] It was counsel's submission that the Defendant has generally complied and has been facilitative of mediation in respect of claim number 2016 HCV 01776. Counsel submitted that if there is a failure to comply with the unless order by the Defendant the application of sanction would not be consonant with the administration of justice, because any such failure can be remedied in one of several ways –

(i) by a continuation of mediation as the Defendant has sought;

(ii) a joint request to the mediators by the parties that the mediation held on March 29th 2019 be treated as dipositive with no resolution; or

(iii) asking the court to make an or for case management conference to be scheduled.

[23] It was counsel's submission that any likely trial date can still be met, if relief from sanction is granted, and granting relief would therefore not have an inimical effect on either party.

Why Costs should be awarded against the Claimant

[24] Counsel later referenced the English Court of Appeal decision **Denton and Ors v TH White Ltd [2015] 1 All ER 880**, which dealt with the dangers of a misconstrued reading of another Court of Appeal decision, **Mitchell v News Group Newspapers Ltd. [2014] 2 All ER 430**. Counsel for the Defendant applied that case to indicate that a litigant and its Attorney-at-Law ought not to take advantage of the mistakes of opposing party in the hopes that relief from sanctions is denied and they would get a windfall, strike out or other litigation advantage. Counsel submits that paragraph 42 of the case indicates that the parties should be ready to agree on limited but reasonable extensions for two main reasons: because compliance should be the norm rather than the exception, and because the parties should work together to make sure that "satellite litigation" is avoided even where a breach has occurred.

[25] Counsel for the defence submitted that costs ought to be awarded to the Defendant relying on the case of **Woodward v Phoenix Healthcare [2019] EWCA Civ. 985** counsel applied the definition of the "technical game playing" as follows:

> *"In my judgement, 'technical game playing' is conduct such as taking and procedural points which are, or may be technically correct, but which are contrary to the spirit in which litigation should now be conducted, in terms of furthering the overriding objective. 'Technical game playing' is conduct such as resisting meritorious applications for relief from sanctions in circumstances where, in accordance with the criteria in* ***Denton v White****, such an application is bound to succeed."*

[26] Counsel submitted that where failure is seen to be neither serious nor significant; where good reason is demonstrated; or where it is otherwise obvious that relief from sanctions is appropriate, parties should agree that relief from sanctions should be without the need for further costs to be expended in satellite litigation.

[27] Counsel submits that the case purports that the Court should seek to penalise such "opportunism" and heavy costs sanctions ought to be imposed on parties who are

unreasonable in refusing to agree extensions of time or unreasonable in opposing an application for relief from sanctions.

[28] Counsel therefore submits that the Claimant's quick filing of the application for judgment was unmeritorious. Counsel claims that the Defendant had sought to facilitate the primary function of mediation and come to an actual settlement, while the Claimant failed to entertain any discussions to continue the mediation.

[29] Counsel concluded their submissions by highlighting that, though they do not believe that there is any breach or non-compliance with the order of K. Anderson J, the circumstances warrant that the Defendant's application for relief from sanctions be granted, with costs to the Defendant.

CLAIMANT'S SUBMISSIONS IN RESPONSE TO THE APPLICATION FOR RELIEF FROM SANCTIONS

[30] Counsel submitted that for relief from sanctions to be granted, the test of CPR 26.8(1) must first be satisfied before the court can consider the conditions of CPR 26.8(2). Reliance was placed on the decision of Morrison JA (as he then was) in **Morris Astley v the Attorney General of Jamaica and the Board of Management of the Thompson Town High School [2012] JMCA Civ 64** paragraph 26 where Morrison J A held that the factors of 26.8(1) are preconditions that must be met before the court is permitted to grant an application for relief from sanctions under CPR 26.8(2).

[31] Counsel's submission in respect of the first requirement of CPR 26.8(1), continued by way of illustration as to whether the application was made promptly by referencing the decision of **National Irrigation Commission Limited v Conrad Gray & Marcia Gray [2010] JMCA Civ. 18**. Harrison J.A. at paragraph 14 of the judgment which describes promptly as an "ordinary English word" that was "plain and obvious in its meaning". Counsel also relied on the authority of **Regency Rolls**

Limited v Carnall [2000] EWCA Civ. 379, where promptly was construed as "with alacrity" and acting with all reasonable celerity in the circumstances.

[32] Counsel in relying on the decision in **H.B. Ramsay & Associates Ltd & Another v Jamaica Redevelopment Foundation Inc. & the Workers Bank [2013] JMCA Civ 1**, submitted that it was held in that case that, if an application for relief from sanctions is not made promptly, it would be unlikely that relief from sanctions would be granted. Counsel also submitted that as such the Court of Appeal in this case has indicated that the formulation of Rule 26.8 of the CPR "demands compliance".

[33] Counsel submitted that the Defendant's application for relief from sanctions was not made promptly as the unless order had taken effect April 30, 2019 and the Defendant's application was made on June 8, 2021, approximately two years and one month later. Counsel further submits that the Defendant was put on notice by the Attorneys-at-Law for the Claimant of the need to comply with the court's order by letters dated April 11, 2019 and April 18, 2019. Counsel submitted that the Defendant, at the very earliest being April 30, 2019, would have been fully aware of there being non-compliance on their part and therefore should have made the application for relief promptly thereafter.

[34] Counsel submitted that the Defendant has put forward no evidence to show that upon receiving notice from Claimant's counsel they acted expeditiously at the earliest possible juncture. Counsel further submitted that upon the Claimant serving the Defendant with an Application for Judgment to be entered on May 2nd 2019, the Defendant filed the Affidavit of Paula Tyndall Harris on April 21, 2021. Counsel continued by submitting that the Defendant did not see it fit to file an application for relief from sanctions at that time, despite being alerted as to Claimant's notice of application. It was their submission that the delay in filing the Defendant's application should be seen as egregious by any standard that is applied, and the Defendant would fail on the first prong of being prompt.

[35] Counsel also submitted that the Defendant's application is not supported by affidavit evidence as is required by CPR 26.8(1). It is was submitted that the Affidavit of Paula Tyndall Harris was filed one month and 18 days prior to the filing of the Defendant's application for relief from sanctions, and was merely filed in response to the Claimant's application for judgement to be entered.

[36] It was further submitted that if the Court rejects the Claimant's previous submissions, the application for relief from sanctions ought not to be granted because the Defendant has not met the threshold for such an application under CPR 26.8(2), which must be cumulatively met; that the failure to comply was not intentional, that there is a good explanation for the failure, and that the party in default has generally complied with all other relevant rules, practice directions and orders.

[37] On the point of the failure on the part of the counsel for the Defendant to comply being unintentional, counsel submits that the affidavit of Mrs. Tyndall Harris is in the form of an apology for the late filing of that document. Counsel submits that the affiant's reference to the late filing being as a result of the application coming to the attention of the Attorneys-at-Law the day before the affidavit was filed is inadmissible hearsay evidence and the affiant has not indicated how this information would have come to her knowledge.

[38] Counsel further submits that counsel for the Defendant did not rebut or refute the Claimant's assertions that the Defendant adjourned the mediation session scheduled for April 2, 2019, a day before the session was to take place, or that the Claimant's counsel telephoned and wrote to counsel for the Defendant about the need to comply with the court's unless order promptly. Counsel submitted therefore that the Defendant's actions showed an intention not to comply with the orders of the court.

[39] In relation to there being a good explanation for the failure to comply with the order of the court, counsel for the Claimant submits that the Defendant has not put

forward a good explanation for the delay in complying with the unless orders. The Defendant's counsel offered as explanation that there were two main reasons for the late filing; the first being the water damage which the Defendant claims affected "thousands of pages of documents" in or about mid-April 2019, and the second being the Covid-19 pandemic which they claim affected management protocols and procedures.

[40] Counsel for the Claimant submits that prior to the filing of the affidavit on April 21, 2021, the Defendant's counsel had at no point indicated to the Claimant's counsel, whether by telephone, email or letter, that they were experiencing challenges as a result of water damage. Additionally, counsel submits that Mr. Andre Sheckleford, counsel for the Defendant, was present when the order was made by K. Anderson J, and would have been aware of the need for compliance. Counsel further submitted on the point that a representative of the Defendant was present at the mediation session on March 16, 2019, and would have been aware of the fact of there being another date that was fixed for the hearing of the April 2, 2019 as agreed between the parties.

[41] Counsel submitted that counsel for the Defendant has not made a request to the Claimant's counsel to provide them with any pleadings or documents in relation to this matter despite, claiming that the documents have been destroyed by water. Counsel also submits that the Defendant's counsel has not indicated the extent of the damage and specifically how it has affected their ability to comply with the unless order of the court.

LAW AND ANALYSIS

[42] I thank counsel for the authorities provided in the matter and which formed part of my consideration for a decision.

[43] Having regard to the submissions made for and on behalf of the parties, several issues for determination arise:

1. Did the Defendant fail to comply with the unless orders?
2. Should the Defendant be granted relief from sanctions?
3. Whether there are Alternatives to Striking Out?
4. Should costs be awarded to the Defendant in opposing the Application for Relief from Sanctions?

Did the Defendant fail to comply with the unless orders?

[44] The unless order made by K. Anderson J, was four-fold. The parties were to -

(a) go to mediation as the first step;

(b) participate in any further mediation session; and

(c) executed both (a) and (b) by no later than April 30, 2019; and

(d) The consequences of failing to comply in any respect would result in either party's statement of case being struck out without the need for any further court order.

[45] Counsel for Claimant filed an application to enter judgement on May 1st 2019 on behalf of the Claimant because of what was deemed to be the Defendant's failure to comply with the unless orders made by K Anderson J, in respect of –

(a) participating in any future mediation sessions; and

(b) the consequence of not complying with the unless order by the date as ordered by the court.

[46] The Claimant's Attorney-at-Law filed the application to enter judgment without trial after striking out as provided in CPR 26.5 which states:

"Judgment without trial after striking out

26. 5 (1) This rule applies whether the court makes an order which includes a term that the statement of case of a party be struck out if the party does not comply with the "unless order" by the specified date.

(2) Where the party against whom the order was made does not comply with the order, any other party may ask for judgement to be entered and for costs.

(3) A party may obtain judgment under this rule by applying for judgment.

(4) The party must –

(i) prove service of the "unless order";
(ii) certify that the right to enter judgment has arisen because the court's order was not complied with; and
(iii) state the facts which entitled the party to judgment.

(5) Where the party applying for judgment is the claimant and the claim is for –

(a) a specified sum of money;
(b) an amount of money to be decided by the court;
(c)delivery of goods where the claim form gives the defendant the alternative of paying their value; or
(d) any combination of these remedies, judgment shall be in accordance with the terms of the particulars of claim together with any interest and costs after giving credit for any payment that may have been made ---

42.8 A judgment or order takes effect from the day it is given or mode unless the court specifies that it is to take effect on a different date

42.9 A party must comply with a judgment or order immediately, unless –
(a) the judgment or order specifies some other date for compliance;
(b) the court varies the time for compliance including specifying payments by instalments; or
(c) the claimant, on requesting judgment in default under Part 12 or judgment on an admission under Part 14, specifies a different time for compliance."

[47] On the facts presented the Claimant's Attorney-at-Law filed the application to enter judgment, because of what the counsel for the Claimant deemed to be a failure on the part of the Defendant to comply fully in any respect with the unless order as prescribed in CPR 26.5.

[48] I have taken cognizance of the submissions by both counsel that the subsequent mediation session was set by virtue of the mediator's report stating more time was needed to complete the exercise. The date set by mediator for the subsequent mediation session was April 2nd 2019, prior to the deadline of April 19th 2019.

[49] Having regard to submissions made by both counsel, it is my considered view that the focus of consideration should be on the unless orders made by K. Anderson J and what it was intended to achieve, rather than a question of whether mediation was completed.

[50] Further, the question of whether there was an intent to complete mediation does not in my mind factor into realm of this interlocutory application, but rather to determine whether the parties achieve the purpose of the unless orders – to not only ensure compliance, but to ensure parties adhere to timelines. At the time the unless orders were made it was three years since the claim was filed.

[51] CPR 1.1 provides for judicial officers to manage cases in furthering the overriding objective, which is well known, but bears stating for present purposes –

"1. 1 (1) The Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.

(2) Dealing justly with a case includes –

(a) ensuring, so far as is practicable, that the parties are on an equal footing and are not prejudiced by their financial position;

(b) saving expense;

(c) dealing with it in ways which take into consideration –

(i) the amount of money involved;

(ii) the importance of the case;

(iii) the complexity of the issues; and

(iv) the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.---

1.3 It is the duty of the parties to help the court to further the overriding objective."

[52] The central principle of furthering the overriding objective in respect of managing cases is reflected in CPR 25 and it states -

> *25.1 The court must further the overriding objective by actively managing cases, this may include –*
>
> *(a) encouraging parties to co-operate with each other in the conduct of the proceedings; ---*
>
> *(g) fixing timetables or otherwise controlling the progress of the case;---"*

[53] I agree with the submission made on behalf of the Claimant, that failure to participate in future mediation would mean a failure on the part of the Defendant to comply with the unless order. The unless order imposed by K. Anderson J stated failure to comply with the unless orders in any respect by April 19th 2019, would result in either party's statement of case being struck out.

[54] The unless order imposed on the parties was intended to secure attendance at mediation and future attendance within a specific timeline and given the procedural history of this matter, the unless order served to prevent any further loss of time by the parties actively engaging as part of dealing with the matter timely and efficiently in furthering the overriding objective, see: CPR 1.1 (2) (a) to (e).

[55] I do not agree with counsel for the Defendant that having started the mediation but not participating in further mediation sessions meant that the unless order has not taken effect. Nor do I agree with counsel's submission that the effect of the order was that it was not intended that the orders should not be completed by that date, but rather only embarked upon by attending the first date set for mediation.

[56] The interpretation of the unless order of K. Anderson J from the perspective advanced by counsel for the Defendant would lead to varying results of what unless orders seek to achieve thereby diminishing the importance of unless orders in ensuring compliance and within certain timeline. Unless orders should be approached as per CPR 26.7(2), the rule in its entirety provides –

"26.7 (1) Where the court makes an order or gives directions the court must whenever practicable also specify the consequences of failure to comply.

(2) Where a party has failed to comply with any of the Rules, a direction or any order, any sanction for non-compliance imposed by the rule direction or the order has effect unless the party in default applies for and obtains relief from the sanction, and rule 26.9 shall not apply.

(3) where a rule, practice direction or order –

(a) requires a party to do something by a specified date; and

(b) specifies the consequences of failure to comply, the time for doing the act in question may not be extended by agreement between the parties."

[57] Counsel for the Defendant did not refute the submissions made by counsel for the Claimant that on cancelling the mediation session the Defendant did not propose a new date when the future mediation would take place. Nor did counsel for the Defendant refute submissions by counsel for the Claimant that numerous letters were sent to counsel for the Defendant to comply with the unless order to which they did not respond for further mediation prior to April 19th 2019. Further, it was not refuted that counsel for the Defendant extended overtures for continuation of mediation, albeit after the date had passed, and the Claimant's attorney did not respond to same.

[58] As the Jamaican saying goes "one hand cannot clap", and both hands were needed prior to the April 19th 2019, to ensure the parties were in compliance with the unless order made by Anderson, J.

[59] I do not agree with the submissions made on behalf of the Defendant that the parties could continue the mediation process after April 19th 2019, at the request of the counsel for the Defendant as CPR 26.7(3) does not allow for such an agreement between the parties. Counsel for the Defendant by submitting on the overtures for continuing the mediation after April 19th 2019, is conflating the mediation procedures with that of the requirements of adhering to an unless order.

An order must be complied with even if there is delay in sealing it **Blackstone's Civil Procedure and Practice 2022, 22nd Edition, Simes and French, p. 878**.

[60] I must add that submissions made by counsel for the Defendant as to the reasons on their part for not continuing the mediation prior to the deadline does not in my mind advance their position that the unless order has not taken effect.

[61] I do not find the reasons advanced by counsel for the Defendant for failure to participate in any further mediation relevant to whether the unless order has been complied with and therefore has taken effect.

[62] Therefore, I agree with the submissions made by counsel for the Claimant that the reasons for failing to take part in future mediation should be in furtherance of an application for relief from sanctions.

[63] By virtue of the foregoing analysis, I agree with counsel for the Claimant that the Defendant did not comply with the unless order made by K. Anderson, J and consequently the unless order took effect May 1st 2019, see: **CPR 26.5**.

[64] It is settled law that where an unless order has taken effect, if the party to whom it was address failed to comply with it in any material respect, there is no need for any subsequent court order: **H B Ramsay JDRF and the Workers Bank – 2012 JMSC Civ 64 and Marcan Shipping (London) Ltd. V Kefalas and Another – (2007) EWCA Civ 463.** Unless orders take effect on the day it is pronounced except where the court specifies otherwise, see: **CPR 42.8** and **42.9**; **Blackstone's Civil Procedure and Practice** (**supra)**.

Should the Defendant Be Granted Relief from Sanctions?

[65] An unless order assumes that the sanction was in principle properly imposed and failure to comply means the order takes effect, unless the defaulting party applies for and is granted relief from sanctions, see: **Blackstone's Civil Procedure and Practice (supra)**.

[66] The decision of **White v Grant and Daley Suit CL 1993/W 127,** involved the matter where the Defendants made an application for relief from sanctions. Brooks JA opined on the importance of complying with unless orders –

> *"The general principle is that unless orders are to be given priority by those affected by them and should be complied with precisely. The court considering application for relief from sanctions should always be mindful that it does not send the contrary signal to litigants and their attorneys-at-law Sir Swindon Thomas made this point in* ***RC Residuals Limited v Linton Fuel Oils Ltd. [2001] 1 WLR 2782 (at p. 2789)****."*

[67] CPR 26.8 provides -

> *"26. 8 (1) An application for relief from sanction imposed for a failure to comply with any of the rule, order or direction, must be –*
>
> *(a) made promptly;*
>
> *(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 that party's attorney-at-law;*
>
> *(c) whether 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."

[68] This approach to relief from sanctions, unlike the English CPR, requires that in Jamaica the CPR 28.6(1)(a) and (b) must be complied with as an initial step before proceeding to establishing whether 28.6(2) has been complied with. The English CPR 3.9(1) provides –

"3.9 (1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –

(a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders.

(2) An application for relief must be supported by evidence."

[69] In the decision of **Crichton Automotive Ltd. v Zulfiquar Motors [2019] JMC Civ 197**, the court was referred to the case of **HB Ramsay and Associates and Another Jamaica Redevelopment Foundation (supra)** para 5, where it was held by Brooks JA that CPR 26.8(1) and (2) must be satisfied, with promptitude being first, which is to be applied with a measure of flexibility.

[70] CPR 26.8(1) has been the subject of extensive judicial interpretation in respect of meeting the initial threshold of what constitutes promptness, as a first step in considering applications for relief from sanctions. It falls to be determined therefore whether the application for relief from sanctions at bar was promptly made in the face of the sanction.

[71] The decision of **Reid, Elenard and Abdalla Shanti v Pinchas Nancy and Pinchas [2002] CLR 03** involved an application for sanctions imposed by an unless order. Sykes, J (as he then was) stated at paragraph 33 –

> *"…CPR 26.8 is far more stringent than the English Rule…If the applicant fails on any of these paragraphs that is the end of the matter for him."*

[72] Sykes, J further held at paragraph 37 –

> *"…that promptly does not necessarily mean immediately, there can be some amount of elasticity in its meaning, and the more removed one is from the date the sanction takes effect the less prompt the application is with the need to explain more fully the reasons for the delay in applying for relief."*

[73] Promptness in Jamaican jurisprudence therefore means acting promptly to seek relief from sanctions in the realization that compliance with the unless order would not have been fulfilled within the required time and filing the application on such realization.

[74] The Defendant has not in the face of unrefuted evidence by the Claimant denied that they failed to respond to several communications by counsel for the Claimant, of the need to act promptly to avoid sanctions. Counsel for the Defendant, notwithstanding Covid-19 Pandemic and water damage, still had a duty to ensure compliance with court orders. Counsel for the Claimant submitted that the Defendant faced with a challenge could in those circumstances apply for relief from sanctions in the face of certain failure to comply.

[75] Having regard to the fact that a Notice of Application for Relief from Sanctions was filed two (2) years after the unless orders would have taken effect, I agree with the submission by counsel for the Claimant that the criterion of promptitude has not been achieved and the application for relief from sanctions would therefore fail on this initial step, see: **AG v Universal Projects Ltd [2011] UKPC 37**; **Reid, Elenard and Abdalla Shanti v Pinchas Nancy and Pinchas [2002] CLR 03 at paragraph 33**.

[76] Additionally, there is no indication on file that there was an affidavit in support of the Notice of Application filed for relief from sanctions as required by CPR 26.8(1)(b). Therefore, I agree with counsel for the Claimant that the application for relief from sanctions is not properly before the court and as such is not in

compliance with CPR 26.8 (1) (b) nor CPR 30.3 (1) and (2). Even so, **AG v Universal Projects Ltd (supra)** provides that there has to be a good explanation for an application for relief from sanctions to succeed, Lord Dyson held:

> ***"****[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 which properly explains how the breach came about simply begs the question what is proper explanation. Oversight may be excusable in some circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly, if the breach is administrative inefficiency."*

[77] Consequently, the Defendant's application for relief from sanctions fails without further consideration of the other factors relating to such an application as laid out in CPR 26.8 as the Defendant has not cumulatively met the mandatory requirements laid out in CPR 26.8(1).

Are there Alternatives to Striking Out?

[78] It was the submission by counsel for the Defendant that in considering granting the relief from sanction, the court is to consider making an order for continuation of mediation; or a joint request to the mediators by the parties that the mediation held on March 29th 2019 be treated as dipositive with no resolution; or asking the court to make an order for case management conference. It was counsel's submission that any likely trial date can still be met, if relief from sanction is granted, and granting relief would therefore not have an inimical effect on either party.

[79] Furthering the overriding objective in the case at bar means having regard to all the circumstances as set out in 1.1. Further, the cumulative effect of CPR 26.8(1) and (2) would require considerations in furthering the overriding objectives and CPR 26.8(3), after considerations of the mandatory steps of 26.8(1) and (2) are met. Consideration of alternatives as suggested by counsel would invoke

application in the context of **Denton v White (supra)** and would therefore mean going outside of the mandatory requirements of 26.8.

[80] The court in **White v Grant and Daley (supra)** considered the decision of **International Hotels Jamaica Ltd v New Falmouth Resorts Ltd. (SCCA 56 and 95 of 2003)** and was also of the view that in considering applications for relief from sanctions, trial judges should bear in mind the alternatives to striking out. The view was held in this decision that later consideration applies more to the time of the making of the unless order than to the consideration for relief after that sanction has already been applied. It was therefore understood in the context that if it were otherwise, the importance and effect of the unless order would have been diluted.

[81] In the case at bar, the circumstances do not require I take the further step of considering alternatives to striking out as the mandatory requirement in CPR 26.8(1) has not been complied with, see: **H.B. Ramsay & Associates Ltd Et Al v Jamaica Redevelopment Foundation (supra)**. At the time the unless orders were imposed, the claim was already three years old. Active engagement by both parties even in the face of adversity to ensure the matter was dealt with justly and efficiently is what the circumstances required. At this stage, notwithstanding the mandatory nature of CPR 28.6(1), the alternatives would be to proceed down the path the unless order imposed, which the order intended to avoid. Even so, on the facts presented, what counsel for the defendant is asking the court to consider by way of alternatives could have been actively pursued prior to the imposition of an unless order as part of furthering the overriding objective, see: CPR 1.1.

<u>Should Costs be awarded against the Claimant for opposing the Application for Relief from Sanctions?</u>

[82] Based on the submissions given by both counsel, I am of the opinion that counsel for the Claimant responding to the application for relief from sanctions does not rise to the threshold of technical game playing, to reverse the application of rule 64.6 which states:

"64.6 (1) If the court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful 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."

[83] The Claimant in furtherance of the CPR 26.5, exercised a provision which either party can avail themselves of, see: 26.5(1) and (2). I see no reason in the circumstances to award costs against the Claimant for responding to the Defendant's application for relief from sanctions which was heard contemporaneously with the application for entry of judgment and which for all intents and purposes, the Notice of Application for Relief From Sanctions was not properly supported. In any case, costs follow the event, see: CPR 64.6(1).

[84] In conclusion, I make the following orders –

1. Application for relief from sanctions refused.
2. Orders granted as per application to enter judgment filed.
3. Judgment in accordance with the terms of the particulars of claim together with any interest and costs.
4. Leave to apply granted.
5. Attorney-at-Law for the Claimant to prepare, file and serve formal orders herein.