IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2023CV02870

BETWEEN	**MARVIN MARSH**	**CLAIMANT**
A N D	**WESTERN REGIONAL HEALTH AUTHORITY**	**1ST DEFENDANT**
A N D	**SOUTHERN REGIONAL HEALTH AUTHORITY**	**2ND DEFENDANT**
A N D	**THE ATTORNEY-GENERAL OF JAMAICA**	**3RD DEFENDANT**

IN CHAMBERS (Via Video Conference)

Mr. Anthony Williams with Ms. Anique Falconer instructed by Usim Williams & Co for the Claimant

Mr. Nicolai Bedassie with Mr. Duncan Roye instructed by the Director of State Proceedings for the Defendants

March 23, and April 21, 2026

Civil Practice and Procedure – Civil Procedure Rules – Rule 26.8 – Applications for Relief From Sanction – Whether Claimant's Application for Relief Was Made Promptly – Whether or Not Claimant Would Be Entitled to Relief Otherwise.

Civil Practice and Procedure – Consequence if Application For Relief from Sanction Fails and Witness Statement is Not Allowed – Whether or Not the Claimant's Claim Should Be Struck Out Due to Lack of Evidence to Support Same at Trial.

DALE STAPLE J

BACKGROUND

[1] The Claimant was shot and injured in or around September 18, 2017. He sought treatment initially at the Falmouth General Public Hospital. From there, there was

a series of events which, according to him, was due to the negligence of the servants and/or agents of the Defendants which resulted in him having very serious complications in his treatment. As a consequence of these complications, he says he has suffered serious injuries, loss and damage.

[2] He sued the Defendants to recover damages for Negligence.

[3] Eventually, on the 3rd December 2024 the court, as presently comprised, held a Case Management Conference with a view to setting the matter on course for a trial, settlement negotiations having broken down irretrievably.

[4] Amongst the Orders made was one for both parties to file and exchange witness statements by the 31st March 2025 by 4:00 pm. A further Case Management Conference was set for the 5th May 2025 at 10:00 am.

[5] It is important to note that on the 17th April 2025, the Claimant filed an application for appointment of expert witness. In this Court's view then, it meant that counsel for the Claimant had reviewed their file and determined that such an application was necessary. It suggests that counsel reviewed the file, considered things that were absent from same and made a decision to file an application to address this deficiency.

[6] The Claimant filed their witness statements on the 28th March 2025, but they did not serve it by the 31st March 2025. The Defendants had not filed any witness statement at all. However, the Defendants filed an application for relief from Sanction. At the Case Management Conference held on the 5th May 2025, the parties were concerned with the issues relating to the Defendants' non-compliance. A further Case Management Conference was set for the 26th June 2025 at 2:00 pm for 1 ½ hours. Among the other orders made on May 5, 2025 was an order that any applications that the parties wish to be heard were to be filed and served within time to be heard at this Case Management Conference.

[7] On the 26th June 2025, the Court started hearing the Defendant's application filed on the 17th April 2025, but further documents were needed and a further case management conference was scheduled for July 21, 2025. Again, another order was made for any applications that the parties wished to be heard to be filed and served in time for this date.

[8] The Claimant, on the 17th July 2025, filed an amended application for appointment of expert witness to address issues relating to the late receipt of an expert report. So this means that, again, counsel for the Claimant received documents, **reviewed their file** (emphasis mine) and thought it necessary to make an amendment to an existing application.

[9] At the Case Management Conference on July 21, 2025, the Court considered the Claimant's Amended Application for Court Orders as well as the Defendant's application for relief from Sanction filed on the 27th June 2025. The Defendants' application was stoutly resisted by the Claimant's counsel and the Court refused the Defendants' application for reasons set out in the Minutes of that date.

[10] Immediately after this refusal, Mr. Roye pointed out that the Claimant had yet to serve their witness statements on the Defendants. It was at this point that counsel for the Claimant realised that there was potentially no compliance on their part. Counsel did a quick check and it was confirmed that the Claimant was non-compliant with the order for **service** (emphasis mine) of the Witness Statements. A further date was set by the Court for Mr. Roye to file and serve an application to strike out the Claimant's case for lack of evidence. Importantly, the Court made yet another order that any other applications that the parties wished to be heard should be filed and served in time to be heard at the Case Management Conference scheduled for the 29th October 2025.

[11] The next Case Management Conference was scheduled for the 29th October 2025, but due to Hurricane Melissa, this date was changed to the 13th January 2026. In

the meantime, the Claimant filed a Notice of Filing of Witness Statement on the 24th July 2025.

[12] At the next Case Management Conference on the 13th January 2026, the Court, as well as Mr. Roye, were taken aback by the total absence of an application for relief from sanction by the Claimant. Instead, the Claimant sought to argue that by filing the Notice of Filing of Witness Statement, they had somehow remedied the failure to serve their witness statement by March 31, 2025.

[13] The Court then spelt out to the Claimant what had been hinted at from before and made an unless order for them to file and serve an application for relief from sanction. There was compliance with this Order and it was heard on the 23rd March 2026.

THE ISSUES

[14] The first issue the Court must address in an application for relief from sanction is whether or not the application was made promptly. For, as D. Fraser JA said in the case of ***Norman Washington Burton v The DPP***[1], if the application is not made promptly, it must fail and the Court need not consider the matter further.

[15] If I consider the application promptly made, then I must consider the matters under rule 26.8(2) and each must be satisfied otherwise, the application fails.

The Claimant's Argument on promptness

[16] The Claimant's main argument on promptness is that their application was promptly filed in all the circumstances.

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[1] [2023] JMCA Civ 30 at para 55(a)

[17] They cited the authority of ***Ray Dawkins v Damion Silvera***[2], to make the argument that as there had been partial compliance and there has not been any significant delay in the matter proceeding to trial, then the application can be considered to have been promptly made.

[18] The argued further that "prompt' should be given a level of flexibility and one must consider all the surrounding circumstances in assessing whether the application has been made promptly.

The Defendant's Argument on Promptness

[19] Not to do short shrift to the Defendants' submissions, but it essentially amounted to what was good for the goose is good for the gander. In other words, they asserted that as the Claimant strenuously argued that the two month delay in their application for relief was not prompt, so should this extensive delay by the Claimant in his application be considered not to be prompt.

[20] The Defendants also argued that as it was the Court itself that had to prompt the Claimant to make the application for relief from sanction, it could not be considered prompt. They cited the case **of *Nicole Anne Fullerton-Clarke v Western Regional Health Authority***[3] as authority for this proposal.

[21] They argued that the Claimant has given no good reason for the lateness of the application in all the circumstances of the case whether one counts time from the date of breach or the date of discovery of the breach.

THE LAW ON APPLICATIONS FOR RELIEF FROM SANCTION

[22] To err is human. In recognition of this the drafters of the Civil Procedure Rules copied from the English Civil Procedure Rules a codification of a mechanism to allow for the divine forgiveness for error – the relief from sanctions imposed by the

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[2] [2018] JMCA Civ 25
[3] [2023] JMSC Civ 103 at para 14

Rules, Orders of the Court or Practice Directions when we run afoul of those rules, orders or practice directions.

[23] Rule 26.8 sets out the mechanism for obtaining the Court's relief. The most critical aspect of this rule, for the purposes of this ruling, is the requirement under Rule 26.8(1) that applications for relief from sanctions must be made **promptly** (emphasis mine) and supported by affidavit evidence. If this initial threshold is not met, the Court is not required to and really should not proceed to examine the other conditions that are to be met for it to exercise its discretion to grant relief.

[24] That this is so, was long ago confirmed in the case of ***Morris Astley v AG***[4] when Morrison JA (as he then was) stated that, "…rule 26.8(1) provides that such an application must be made (a) promptly and (b) supported by affidavit. **Once these preconditions are met** (emphasis mine) rule *26.8(2)* permits the court to grant relief from sanctions imposed for failure to comply with any rule, order or direction…"

[25] The Court also examined the more recent decisions of ***Meeks v Meeks***[5] and ***Deputy Supt. John Morris et al v AG of Jamaica et al***[6]. Again, at paragraph 67 of the Judgment of the Court in the *John Morris* appeal, P. Williams JA had this to say,

> *"It is accepted that what amounts to promptness significantly depends upon the circumstances of the particular case (see Meeks v Meeks). In this case, I find that the question of promptness was relative to the time the breach had taken place with the consequential sanction taking effect"*

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[4] [2012] JMCA Civ 64 at para 26 per Morrison JA (as he then was)
[5] [2020] JMCA Civ 7
[6] [2023] JMCA Civ 45

[26] So while there may be some flexibility in the approach, the time from which one counts will generally be from the time the breach occurs. There may be cases when the time starts to run from the date the breach came to the attention of the offending party. But this depends on the circumstances of the case and must be borne out by the evidence to enable the Court to exercise this fact discretion.

[27] I also looked at the case of ***Norman Washington Burton v The DPP***[7] where D. Fraser JA said at paragraph 55(a) of the judgment that, "What may be considered prompt will depend on the circumstances of each case, but the natural meaning of the word prompt should not be unreasonably strained or elasticised to bring circumstances within its compass."

[28] In other words, promptness must be assessed using nothing more than the ordinary application of the English language. Pity is no part of promptness. The meaning should not be strained or elasticized to accommodate a non-compliant litigant because you feel sorry for them or fear the imposition of the "draconian" consequences of non-compliance upon them. Courts are not contortionists of the English language to the point where the original intent and purpose of the rule is lost. Sympathy and justice are two different things.

[29] Promptness must be assessed from a point in time. For example, if one is instructed to arrive promptly for an event, one should arrive **at or before** the designated starting time of the event. In the ordinary English language use, arrival after the designated time means one is tardy.

[30] Rule 26.8(1) says as follows:

> 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

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[7] Supra at n1

[31] In my view then, in accordance with the authorities of *Ray Dawkins*, *John Morris* et al, promptness can only be assessed from two dates:

(i) The date of breach; or
(ii) The date of discovery of the breach.

[32] This is because, as one looks at the wording of the rule, the application for relief comes **after** the happening of an event – that event being non-compliance with the rule, order or direction. Therefore the application must be made **promptly after** the breach occurs[8] or, in appropriate cases, one should have reasonably discovered the breach.

[33] The flexibility the Court has in interpreting promptness, is solely in considering the date from which it will consider time to run. In interpreting and applying the rule, I must have regard to the overriding objective of dealing with the case justly[9]. Two critical components of dealing with the case justly, in the context of assessing promptitude, are the need to deal with the case in a fair and **expeditious** (emphasis mine) manner; and the need to allocate to the case no more than its fair share of resources while taking into account the need to allocate resources to other cases.

[34] In considering the expeditious handling of the case, the interpretation that comports with this factor is one which favours time running from the breach date. In other words, the default position is that one must assess with how much celerity after the breach occurred did the defaulter seek relief. Factors such as the ability to meet an as yet set trial date are, according to *Ray Dawkins*, considerations[10].

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[8] See also the decision from the Court of Appeal of Trinidad and Tobago in *Trincan Oil Limited v Schnake* TT 2010 CA 3 at para 22.
[9] See CPR Rule 1.2
[10] See paragraph 66 of the said judgment

But my analysis is done in the context of the obligation by judicial officers to deal with cases in an expeditious manner and our duty, when exercising our discretion and applying the rules, to take the expeditious handling of the case in consideration. Therefore, greater consideration has, in my view, to be attached to the breach date and for parties to conduct the cases properly and with due diligence. If a party wishes the Court to consider the date of discovery of the breach, then, in my view, evidence would have to be provided to convince the Court why this date should be considered instead of the breach date.

[35] There may be a case to be made for the date of discovery of the breach. But, in assessing this consideration, the entirety of the conduct of the case and the Civil Procedure Rules should also be examined. It is the duty of parties to further the overriding objective by ensuring that orders made by the Court are complied with. Parties includes litigants. It is why litigants are required to be at Case Management Conferences. It is why Listing Questionnaires must be carefully filled out and filed and when served scrutinized ensure that what is said in the Listing Questionnaire is in fact so.

[36] The rules are designed to ensure that a litigant has every chance to firstly comply with the orders, rules and practice directions. If there are issues with timely compliance, then there is the opportunity to ask for extensions of time to comply before the breach happens. Then, if after all that, there is a breach, to remedy the non-compliance in a timely manner. This was the position of the Court of Appeal of Trinidad and Tobago from long ago in the case of *AG v Regis*[11] where a strong panel comprising Archie CJ (as he then was), Jamadar JA (as he then was), and Smith JA, said as follows at paragraph 45 of the judgment:

> *We wish to highlight that the CPR, 1998 is designed to promote a culture of compliance, and that the non-compliant ought not to govern the conduct and pace of litigation. In any event the non-compliant are provided for. They*

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[11] TT CA 2011 19 at paras 40-45 in particular.

have several bites at the cherry. They have generous time limits provided by the Rules. In certain circumstances the parties can agree to vary timelines. [See for example, Part 10.3(6) and Part 27.9(4), CPR, 1998] They can apply for an extension before the expiration of the relevant time limits (in which event the strictures of Part 26.7 do not apply). Finally, they can even apply after the time limits have passed. However, the bar is raised after each bite at the cherry. The system is progressive and proportionate. This system honours the conscientious, while accommodating the non-compliant within guided parameters. This approach promotes a culture of compliance, while at the same time eroding the vicious cycle of laissez-faire.

[37] All this requires is for the parties to apply themselves with reasonable diligence in the conduct of the case. The Court is not overbearing with the rules; neither is it "punishing the litigant" for errors of their lawyer or other such emotive words and phrases. It is simply enforcing the rules in a manner that ensures that the cases proceed expeditiously and fairly so that it can serve as many litigants as it can.

Why Wasn't the Application Filed Sooner than January of 2026?

[38] In this case, the Claimant's application for relief from sanction was not filed until January 16, 2026. The date of breach of the order was April 1, 2025. The date the breach was pointed out to them was July 21, 2025 and they confirmed the non-compliance on this date.

[39] So the time from the breach is 9 months and 2 weeks and the time since the breach was discovered would have been 5 months and about 3 weeks. Indeed, when they came to Court on January 13, 2026, it was the Court itself that had to prompt them to make the application. All that they had done between July 21, 2025 and January 13, of 2026 was the filing of the Notice of Filing of Witness Statement in a failed attempt at compliance with rule 29.7.

[40] Their explanation as to why the application was not sooner made is completely, absent. It is not provided in the affidavit of Ms. Falconer, filed on the 16th January 2026. What she sought to explain was the reason for non-compliance with the

order. But there was no evidence from her as to why they did not sooner file the application for relief from sanction.

[41] There is also no evidence why the Claimant should not have been aware of the non-compliance with the order sooner than the discovery date. When the Court considers that the file was reviewed by the Claimant once in April of 2025 and then again in July of 2025 in order to make an application for expert witness and to amend the said application respectively, it suggests to me that a reasonable attorney-at-law would have and should have checked for general compliance. This is especially so since the question of compliance by the Defendant had been raised from the May 5, 2025 Case Management Conference as well as the June 2025 Case Management Conference. Since the Claimant quoted scripture, they would do well to remember the admonition to consider the beam in one's eye first before looking at the speck in the eye of the other.

[42] It is also important to remember that the Claimant himself has attended all Case Management Conferences to date. He is an intelligent person, being a police officer. There is no evidence from him that he was unaware of the breach or what steps he took to see to it that there was compliance with the orders made.

[43] In my view then, there is no good reason why I should not consider the question of promptness from the breach date in the circumstances of this case. It is true that the evidence suggests, and I find, that the Claimant did not become aware of the breach until the July 21, 2025 Case Management Conference. But this is because, in my view, in the absence of evidence to suggest otherwise, counsel for the Claimant did not pay sufficient heed in their handling of the case. In my view, they should reasonably have been aware of the breach from much earlier than the date of discovery of the breach on July 21, 2025 had they been reasonably diligent in the conduct of the case. Therefore, I consider that time runs from the date of breach in this case. To accept the date of discovery of the breach, in these circumstances, is tantamount to the Court forgiving the unreasonably careless handling of a litigant's business in breach of the Canons of Ethics. This Court is

not willing so to do as it would tend to encourage lower standards of conduct in the profession.

Was the Application Prompt in all the Circumstances?

[44] Counsel strongly argued for the approach of the Court of Appeal in *Ray Dawkins* where they, it was argued, the Court of Appeal seemed to consider a delay of a year from the breach date before counsel for the defaulting party became aware of the breach a reasonable one.

[45] In *Ray Dawkins* the Case Management Judge had ordered that witness statements were to be filed and exchanged on or before 9 May 2014. The witness statement had been filed from 13 June 2012. The witness statement was eventually served on 5 June 2015. The statement was served in advance of the trial date of 22 June 2015. The trial date was adjourned to 6 June 2016. The fact that the appellant had received the respondent's witness statement late was only made known on 7 June 2016 and the respondent's attorney-at-law filed the application for relief from sanction on the same day.

[46] The Court of Appeal, at paragraphs 66-67, said as follows:

> *[66] If the assessment of whether the application was made promptly should be dependent solely upon the time at which the breach occurred, the respondent's application was made approximately a year after the deadline for compliance and that could be viewed as amounting to inordinate delay. However, the fact that there had been partial compliance and that there was in effect no negative delays to the matter proceeding to trial, were circumstances which ought to be taken into consideration. [67] Further, the circumstances under which the breach was brought to the attention of the court at the time of trial ought also to be considered. In the factual circumstances of this case, the reaction of the respondent in applying for relief from sanction can then be regarded as prompt. Thus, in the peculiar circumstances of this matter, the learned judge cannot be faulted for having concluded that the first hurdle to the making of the application had been sufficiently met.*

[47] Firstly, I find it rather curious that the Court of Appeal could say that there were, ”…no negative delays to the matter proceeding to trial” when the trial had to have

been adjourned for over a year as a consequence of the non-compliance with the rules. Counsel has used this case to say that what this means is that, according to the Court of Appeal, such a delay is excusable and I should so excuse in this case.

[48] Secondly, there was no discourse as to whether or not, the breach should have been discovered earlier by counsel for the Respondent had they diligently conducted the case.

[49] In my view, the most important factor was that the very day the breach was brought to their attention, the Respondent applied for relief from sanction. This was found by the panel in *Ray Dawkins* to have been a prompt application[12].

[50] Similarly, there is the recent decision of ***Oneil Edwards v JPS***[13]. In that case, following a similarly tortuous and lengthy period of the litigant failing to comply with an order for the filing of a witness statement, and a similarly convoluted process of discovery of the breach as in ***Ray Dawkins***, the Court of Appeal held that an application for relief made 3 weeks after the breach was (eventually) discovered and shortly before the (adjourned) trial, was promptly made.

[51] Contrary therefore to counsel's submissions, in both ***Ray Dawkins*** and ***Oneil Edwards*** the **application** (emphasis mine) for relief from sanction was made quite shortly after the breach was brought to the attention of the defaulting party. In the case of ***Ray Dawkins***, it was the same day of being notified of the breach and in the case of ***Oneil Edwards***, it was 3 weeks from the date of being notified of the non-compliance. In this case, the application for relief was not made until over 9 months after the breach. But if I am wrong for considering the breach date as the operative date, then it was brought over 5 months and 3 weeks from the date it was brought to the attention of the applicant's counsel.

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[12] See paragraph 67 of the *Ray Dawkins* decision supra
[13] [2025] JMCA Civ 13

[52] In fact, as stated above, it was the Court that had to prompt the application from the Claimant. The Claimant recognised that something had to be done from as far back as the 21st July 2025, but what was done was an ill-advised attempt at retroactive compliance with rule 29.7.

[53] Counsel argued forcefully that we are still at the stage of Case Management and there has been neither Pre-Trial Review nor Trial date set. Therefore, in this context, the application is prompt. However, the Court could not set the matter for Pre-Trial Review as the Court was still dealing with the Claimant's application for appointment of expert up to the 21st July 2025. Rule 11.3 states that as far as possible all applications relating to pending proceedings must be dealt with at a case management conference or a pre-trial review. According to Direction 13 of Practice Direction 20/2021, issues relating to appointment of experts should be dealt with at the Case Management Conference stage. The case was, therefore, not ready for Pre-Trial Review due to the delays on the part of the Claimant in getting their expert evidence together some 2 years after the filing of the suit. The Claimant cannot delay the process and then use that same delay to their benefit.

[54] In the circumstances of this case then, the delay of five months cannot be considered prompt.

[55] Since I have found that the application was not made promptly, it therefore means that the application for relief from sanction fails.

CONSEQUENCE OF BREACH

[56] The Court had, on January 13, 2016, made an order for the Claimant to show cause why their case should not be struck out. This was to be heard if the application for relief from sanction was refused. This is because the Claimant would not have any material evidence to support his claim at trial.

[57] The Civil Procedure Rules are silent on what the consequences should be if the application for relief from sanction is refused **before trial** in the case where the default involves a witness statement. The authorities I have seen that deal with

issues of non-compliance with the rules and relief from sanction have all arisen in the midst of a trial. See for example decisions in ***Kenrick Layton v Island Traffic Authority et al***[14] and ***George Bryan v Grossett Harris***[15].

[58] The starting point is Rule 29.2. I will set out the rule below:

> 29.2 (1) The general rule is that any fact which needs to be proved by the evidence of witnesses is to be proved -
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> (a) at trial, by their oral evidence given in public; and
> (b) at any other hearing, by affidavit.
>
> (2) The general rule is subject -
>
> (a) to any provision to the contrary contained in these Rules or elsewhere; and
> **(b) to any order of the court** (emphasis mine)

[59] This means, in my view, that once the Court makes an order that the evidence is to be given by Witness Statement and for the filing and service of Witness Statements, then the general rule in rule 29.2(1)(a) is overridden until a further order is made before breach.

[60] When one examines rule 29.11 of the CPR, it provides for the trial judge to allow for the witness to give evidence at the trial (other than via the witness statement) if they are able to give a good reason for not making an application for relief from sanction before the trial. Support for this interpretation is had from the seminal case of ***Carter et al v South et al***[16].

[61] But this seems to be the only instance, under the Rules, in which a witness can give evidence, other than through a witness statement, where an order for

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[14] [2021] JMCA Civ 46
[15] (unreported), Supreme Court, Jamaica, Suit No CL 2000 B/089 judgment delivered 21 October 2005

[16] [2020] JMCA Civ 54

evidence to be given by witness statement was made. This provision has been deployed, but in extraordinary cases, as highlighted in the authorities above.

[62] Several authorities[17] have suggested that where there has been no relief from sanction granted for the failing to file the witness statement(s) for the Claimant, then the Claimant can call no witnesses. In such a scenario, the case really ought to be struck out unless the Claimant has other evidence to support their claim. Otherwise, there is no basis to proceed to a trial.

[63] One such case is ***Owayne Weir v Dwayne Williams***[18]. In this case, the Claimant and the Defendant had both failed to comply with orders for the filing of their witness statements. They both filed applications for relief from sanction and both their applications were refused. On February 24, 2025 the Claimant applied for orders to, among other things, allow for the Claimant to give viva voce evidence in chief at the trial of the matter.

[64] The matter appeared before Master L. Jackson (Ag) as she then was. Relying on the decision of ***Kenisha Taylor v Jermaine Holding et al***[19], the learned Master ruled that the Claimant's application must be refused and ordered for them to show cause why their claim should not be struck out.

[65] In the ***Kenisha Taylor*** case, Palmer-Hamilton J ruled that if relief from sanction for failing to file and serve a witness statement is refused, then the Court had no further discretion to permit the witnesses to be called.

[66] In my view, the most that the Court can do is to exercise powers under rule 26.2(1) to vary the original witness statement order to allow for the evidence in chief to be taken orally pursuant to rule 29.2(1)(a). But even this option has been curtailed by

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[17] See the decisions in *JPS v Francis* [2017] JMCA Civ 2 at para 70; and *Deputy Supt John Morris et al v Desmond Blair et al* [2023] JMCA Civ 45 at para 80.
[18] [2025] JMSC Civ 103
[19] [2023] JMSC Civ 114

the Court of Appeal in the decision of ***Carter et al v South et al***. At paragraph 50 of the judgment, the Court of Appeal said,

> "The introductory words in this rule [rule 26.2] preclude the court from acting on its own initiative for non-compliance with rule 29.11, and this is for the simple reason that rule 29.11 sets up its own procedure for dealing with non-compliance".

[67] The Court of Appeal went on to observe, at paragraph 57, that the premise of rule 29.11 is that there existed a feasible order which ought to have been obeyed within the time specified by the order of the Court made at Case Management Conference.

[68] In my view, to vary the order **after non-compliance** (emphasis mine) is an impossibility and further goes against the ethos and thrust of the Civil Procedure Rule regime. In this regime, the expeditious handling of claims is stressed. To promote the more efficient conduct of trials, the witness statement was introduced to remove the need for lengthy evidence in chief where parties would not know what evidence would be coming. It was designed to remove trial by ambush and to promote open hands litigation.

[69] As the Court of Appeal stated in *Carter*, an order for the filing and service of witness statements is not an impossible order. Nor is it difficult. As I said earlier, the rules provide for methods of being compliant. If a litigant is experiencing difficulty with the time for compliance, they can apply for an extension of time or variation of the order **before** (emphasis mine) the breach occurs. But once the sanction is imposed, a different regime arises and this regime is designed to be draconian[20].

[70] The evidence of the reason for non-compliance in this case is flaccid and really does not amount to a good reason. The inadvertence of counsel in this case was inexcusable.

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[20] See the statement of Edwards JA in *JPS v Francis* n. 17 supra.

[71] What evidence does exist is solely from the expert witness. This evidence, by itself, in my view, is insufficient to establish liability on the part of the Defendants.

[72] In my view then there has been no good reason advanced as to why the Claimant's case should not be struck out.

DISPOSITION

1 Application for Relief from Sanction is refused.
2 The Claimant has failed to show cause why his claim should not be struck out and his claim is struck out as having insufficient evidence to support a claim at trial.
3 Costs on the Application to be the Defendants' to be taxed if not agreed.

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Dale Staple
Puisne Judge