[2018] JMSC Civ 37

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016 HCV 02428

BETWEEN	**VICTORIA MARIE MEEKS**	**CLAIMANT**
AND	**JEFFREY WILLIAM MEEKS**	**DEFENDANT**

IN CHAMBERS

Robert Collie, Dimitri Adams and Dionne Samuels, instructed by Collie Law for the Claimant

Gordon Steer, Judith Cooper-Bachelor and Kaye-Ann Parke, instructed by Chambers, Bunny and Steer for the Defendant

HEARD: January 17 and March 9, 2018

APPLICATION FOR RELIEF FROM SANCTIONS – RULE 26.8 OF THE CIVIL PROCEDURE RULES (CPR) – MATRIMONIAL PROPERTY DISPUTE

ANDERSON, K. J

The general background to the claim

[1] The parties to this claim, are married to each other and were so married, as of September 14, 1991. The parties though, no longer have a functional marital relationship and also, live separate and apart from each other.

[2] The claimant's claim was seeking to enable the claimant to obtain court orders requiring the defendant to pay specified sums to the claimant as spousal maintenance, maintenance for the children of the marriage, and also is seeking

to obtain in the claimant's favour, an order of this court granting joint custody of one of the children of the marriage, with care and control to the claimant; and courts orders as regards division of both real property and also, some items of personal property. There are two (2) children of the parties' marriage, one of whom was born in July of 1997 and the other of whom was born in December, 1998. Those children are therefore, both now adults. The claimant's claim, which is being pursued by means of a Fixed Date Claim Form, was filed on June 13, 2016.

[3] In response, the defendant had filed an affidavit on October 5, 2016 and in that particular affidavit, was apparently disputing all orders/reliefs that are being sought by the claimant.

[4] Subsequently, various court applications have been filed by the parties and it is apparent that the parties are each, vigorously disputing most of the other's assertions. A trial of the claim has been scheduled for July 17 and 18, 2018. There were prior scheduled trial dates, which were on April 26 and 27, 2017 but on April 27, 2017, Justice N. Simmons, had, amongst other orders, also ordered that the defendant's application for relief from sanctions, which was filed on April 27, 2017, be heard by this court, on January 17, 2018.

[5] The claimant's application for joint custody of one of the children of the marriage, was, at an earlier stage of court proceedings pertaining to this claim, by consent of the parties, withdrawn.

[6] We are now at the stage therefore, wherein the defendant's application for relief from sanctions is now under consideration, as that application was presided over, by me, on January 17, 2018. That application was filed by the defendant, on April 27, 2017.

[7] Defence counsel have accepted that a sanction has been imposed by this court, upon their client, arising from their client's failure to have complied with the

unless order made in relation to him, by Palmer-Hamilton, J. The sanction which has been imposed, is the striking-out of the defendant's statement of case. Accordingly, although there has not yet been filed, any draft order reflecting that judgment on this claim has been granted in favour of the claimant, it is quite rightly, undisputed either as between party and party, or as between either party and the court, that at this time, judgment has been entered in favour of the claimant.

[8] Of course too, the judgment takes effect from the date when it is, for the purposes of this court's records, entered. The date of entry of the judgment, is the date when this court has pronounced the judgment as having taken effect. It does not take effect from as of the date of this court's, 'perfection' of the judgment order, in a written and filed court document. See: **Holtby v Hodgson** – [1889] 24 QBD 103.

The background to the defendant's application for relief from sanctions

[9] The defendant's application for relief from sanctions, was filed on April 27, 2017. By means of that application, as was specifically stated in that document, the defendant has sought to obtain an order of this court, relieving him from the sanction of paragraph 1 of the formal order made on March 2, 2017 by the Honourable Mrs. Justice Lisa Palmer-Hamilton, J which stated as follows: '*specific disclosure of the audited accounts for the last five (5) years up to 2016, accounting books, records and financial statements for the same period of Jeffrey Meeks limited is to be made. Unless the defendant specifically discloses these documents by Monday, March 20, 2017, his statement of case will be struck out and judgment will be entered for the petitioner/claimant.'*

[10] The grounds specified as being relied on, in support of that application, are as follows:

i. That the applicant had not fully complied with the 'unless' order made by the Honourable Mrs. Justice Lisa Palmer-Hamilton.

ii. That the applicant made the application promptly.

iii. That the failure to comply was not intentional.

iv. That there is a good explanation for the failure to comply.

v. That the applicant has generally complied with all other rules, practice directions, orders and directives of the court.

[11] There is one affidavit which has been filed in support of the defendant's application for relief from sanctions. That affidavit, was deponed to, by the defendant and was filed on the same date on which the relevant application was filed, which, as should be recalled, is: April 27, 2017. There is an affidavit being relied on, in opposition to the defendant's application. That is the affidavit of attorney Dionne Samuels, who is employed with the law firm which currently, represents the claimant, namely: 'Collie Law.' She has deponed to having been unable to open certain thumb drives, the relevance of which will become apparent, when the defendant's evidence in support of his application is considered further on, in these reasons. No further reference though need to be made to the affidavit of Ms. Samuels, as it cannot assist this court in resolving the attendant issues which have arisen upon the defendant's application.

[12] For the defendant though, apart from the affidavit evidence which they are relying on, the defendant is also relying on a further list of documents which was filed by the defendant, on January 17, 2018. The defendant's original list of documents was filed on March 20, 2017. That original list was served on March 20, 2017 and the claimant's counsel accepted service of the further list of documents on him, whilst in chambers, during the hearing of the said application, which I presided over on the date when that further list was filed – January 17, 2018.

[13] On April 26, 2017, the claimant filed an application for court orders, seeking to have the defendant's statement of case struck out and for judgment to be entered in favour of the claimant, arising from the failure of the defendant to have

complied with the order for specific disclosure of the accounting books and records of Mrs. Justice Palmer-Hamilton, which was made on March 2, 2017.

[14] As earlier noted in these reasons, the defendant is not now disputing that he has failed to comply with that particular court order.

[15] That application of the claimant also sought the sanctioning of the defendant, arising from the defendant's alleged failure to strike out references to 'common law spouse' and/or, 'common law situation' and 'open cohabitation with her common law spouse' in paragraphs 31, 42 and 43 of the defendant's affidavit which was filed on December 5, 2016. Mrs. Justice Palmer-Hamilton had on March 2, 2017, also ordered that those portions of that affidavit, be struck out.

[16] As is to be recalled, the trial of this claim, had been scheduled to commence on April 26, 2017. The claimant though, had, on that same date, filed an application seeking to have the defendant's statement of case struck out. The trial of this claim was therefore adjourned by order of this court, made on April 27, 2017. No doubt, that was done because, it would not have been a wise use of this court's limited resources, to have proceeded with the trial of this claim in chambers, in circumstances wherein, there was yet to be determined, whether the defendant's statement of case either was, by virtue of the defendant's failure to comply with the unless order, to, 'be struck out,' or alternatively, whether the defendant should, 'be sanctioned' arising from his alleged failure to comply with another aspect of Mrs. Justice Palmer-Hamilton's order which was made on March 2, 2017.

[17] For some reason which I have been unable to comprehend, the claimant filed another application for court orders, seeking to thereby have this court order that the defendant's statement of case be struck out. I have not been able to comprehend why it was that the claimant's counsel felt it necessary, on the claimant's behalf, to file that other application, which was filed on July 27, 2017 and was set down by the Registrar, to be heard before me, in this court. Since

that application has not yet been heard and/or determined by this court, I will make no further pronouncement thereon, in these reasons.

[18] That application was not heard by me, on January 17, 2018, since, as I had then explained to counsel who then appeared before me, as regards this matter, it would be pointless for same to be heard by me, in circumstances wherein, the defendant's statement of case has already been struck out, as a consequence of which the defendant now has before this court, undergoing consideration of and awaiting ruling thereon, an application for relief from sanctions.

[19] It would and could properly, only be if the defendant's application for relief from sanctions, is granted, that those two (2) pending applications of the claimant to strike out the defendant's statement of case, would then need to even be scheduled for hearing and accordingly, this court will schedule both of those applications for hearing before a Judge or Master of this court at a later date, if the defendant's application for relief from sanctions, is successful.

The law as regards applications for relied from sanctions

[20] The grounds being relied on by the defendant, in support of his application for relief from sanctions, were earlier set out in these reasons. Suffice it to state at this stage, that grounds numbers 2 to 5 of the specified grounds, are all grounds which must be proven by the applicant who seeks to have this court grant/order relief from a sanction imposed by this court. Those grounds are all therefore, pre-requisites to the granting of any application for relief from sanctions.

[21] Having so stated and particularly for the benefit of persons reading these reasons, who are not aware of what those pre-requisite grounds, as precisely set out in the applicable rules of court are, it behoves this court, for present purposes, to set out the applicable rules of court.

[22] Those pre-requisite grounds are set out in **rule 26.8 (1) and (2) of the Civil Procedure Rules (CPR)**. Those paragraphs of that rule, state 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.'*

[23] It is undisputed and indeed, is not disputable, that the defendant's application for relief from sanctions, is supported by evidence on affidavit.

[24] There is though, dispute as to whether the defendant's application for relief from sanctions, has been made promptly; and also as to whether there is good explanation for the failure to have complied with the pertinent unless order; and further, as to whether the defendant ('the party in default') has generally complied with all other relevant rules, orders and directions of this court.

[25] With these disputes between the parties, clearly in mind, the importance of the specified pre-requisite grounds, for the purposes of this court's consideration of the defendant's application for relief from sanctions, is apparent.

[26] What though, makes the importance of the said pre-requisite grounds, all the more apparent, if not stark, is the law as regards the significance of those grounds for the purposes of this court's consideration of any application for relief from sanctions.

[27] There are several cases in which the pre-requisite grounds have been carefully considered by this nation's courts, but to save time and effort, I will only refer in these reasons, to one of those cases, which, to my mind, adequately sets out the applicable legal principles as regards the pre-requisite grounds.

[28] That case is: **H.B Ramsay and Associates Ltd., Caledonia Hardware Ltd. and Harold B. Ramsay, Janet Ramsay and Jamaica Redevelopment Foundation Inc. and The Workers Bank** – Supreme Court Civil Appeal No. 88/2012.

[29] That matter pertained to an appeal that was pursued against a judgment which emanated from this court and which was delivered by D. Fraser, J. In that judgment, the learned judge had dismissed an application for relief from sanctions that had been filed by the appellants. The appellants, on appeal, asserted that the learned judge wrongly exercised his discretion in refusing their application.

[30] On appeal, in a unanimous decision, the Court of Appeal, dismissed that appeal. The reasons for judgment were pronounced by Brooks, JA.

[31] It is only necessary, for present purposes, to quote from paragraphs 31 and 32 of the judgment in that case as cited, in order to make the legal position, clear.

[32] In those paragraphs, Brooks, JA stated as follows:

> *'[31] An applicant who seeks relief from a sanction, imposed by his failure to obey an order of the court, must comply with the provisions of **rule 26.8 (1)** in order to have his application considered. If he fails, for example, to make his application promptly the court need not consider the merits of the application. Promptitude does, however, allow some degree of flexibility and thus, if the court agrees to consider the application, the next hurdle the applicant has to clear is that he must meet all the requirements set out in **rule 26.8 (2)**. Should he fail to meet those requirements then the court is precluded from granting him relief. There would,*

*therefore, be no need for a court, which finds that the applicant has failed to cross the threshold created by **rule 26.8 (2)** to consider the provisions of **rule 26.8 (3)** in relation to that applicant.'*

*'[32] In the instant case, the appellants not only failed to make their application promptly, but also gave no explanation for their default. Fraser J was, therefore, correct in refusing to consider the provisions of **rule 26.8 (3)** and was correct in refusing the application for relief from sanctions.'*

[33] I have therefore referred to that which has been set out in **rule 26.8 (1) and (2)** as being 'pre-requisite grounds' for the purposes of any application for relief from sanctions. They are each and all, pre-requisite grounds, because, if an applicant for relief from sanctions, fails to satisfy this court, in accordance with the requisite standard of proof, that the applicant has complied with all of those grounds, then, this court is precluded from lawfully granting that application.

[34] It was because the appellant in the **Ramsay** case, who had been the unsuccessful applicant for relief from sanctions, in this court, had not satisfied all the grounds as set out in **rule 26.8 (1) and (2) of the CPR** ('the pre-requisite grounds'), that the appellants' appeal, was dismissed and their application for relief from sanctions, denied.

[35] What is therefore now to be determined by this court, in light of the application and the pertinent submissions, is whether those pre-requisite grounds have been complied with/met, by the applicant. The burden of proof rests solely on his shoulders in that regard and the requisite standard of proof is, as applied, proof on a balance of probabilities.

[36] In the analysis which follows immediately hereafter, therefore, I will, to the extent necessary, consider in turn, each of the pre-requisite grounds, for the purpose of determining whether or not the applicant has or has not complied with each of same.

[37] That is though, it should be noted, not necessarily going to be the conclusion of the requisite analysis, for the purposes of the defendant's application, since, if the pre-requisite grounds have been duly complied with, then this court will next have to consider each of the several considerations as set out in **rule 26.8 (3) of the CPR**, for the purpose of reaching a conclusion as to whether or not, the defendant's application for relief from sanctions is to be granted. On the other hand, if any of the pre-requisite grounds have not been duly complied with, then there is no need for this court to give any consideration to **rule 26.8 (3)** for the purpose of concluding upon the defendant's application.

[38] The pre-requisite grounds are now addressed in turn, to the extent that is necessary for present purposes, under separate headings, save and except for that which has already been addressed and which is undisputed, that being that the defendant's application must be supported by affidavit evidence.

The application must be made promptly

[39] In respect of this matter, which these reasons pertain to, the defendant has made contentions to this court, in respect of this application for relief from the sanction which was imposed as a consequence of his failure to comply with an unless order. The sanction imposed by that unless order, was imposed automatically, once there had been, on the part of the defendant, non-compliance therewith.

In that regard see: **Dale Austin and The Public Service Commission and The Attorney General of Jamaica** – Supreme Court Civil Appeal Nos. 106 and 117/2015, especially at paragraphs 83 and 88.

[40] Accordingly, the relevant sanction, which was the striking out of the defendant's statement of case, took place from as of March 21, 2017, since the unless order of Palmer-Hamilton, J had required that the defendant make specific disclosure of the audited accounts for the, 'last five (5) years up to 2016, accounting books, records and financial statements for the same period, of Jeffrey Meeks Ltd.' by

Monday, March 20, 2017. The defendant failed to comply with that order and that is why his statement of case has been struck out.

[41] As ought to be recalled, the defendant's application for relief from sanctions, was filed on April 27, 2017 and this therefore means that said application was filed over a month after the sanction imposed by the relevant unless order, had taken effect.

[42] In the **H.B Ramsay and Associates Ltd**. case *(op. cit.),* the sanction took effect from June 19, 2010, since compliance with the unless order, required compliance to take effect by June 18, 2010. As was succinctly stated by Brooks, JA who delivered the Court of Appeal's judgment in that case and with whose judgment, the other justices who presided over that case, in the Court of Appeal, namely: Panton, P (now retired) and Morrison JA (as he then was), *'...The failure automatically brought the sanction into force. In that context, it is inconceivable that it should have taken almost a month (July 15, 2010) for the application for relief from sanctions to have been filed.'* (paragraph 16) Further on, at paragraph 18, Brooks, JA stated: '*In the circumstances, I find that the application was not made promptly and, for that reason, should not be considered. It should, therefore, fail. In that regard I am, respectfully, in complete agreement with Fraser J in his finding to that effect. Like the learned judge, however, I shall consider the other aspects of the application in the event that* ***rule 26.8 (2)*** *should, in fact, also be considered.'*

[43] Of course if one were to measure promptitude, solely by reference to a period of time and if one were to slavishly follow case precedent in assessing whether an applicant has or has not, filed his application for relief from sanctions, 'promptly,' then based on the time period in the **H.B Ramsay** case *(op. cit.)* which was not considered as being, 'prompt', that being a period which was two (2) days less than a month and the fact that in the present case, the application for relief from sanctions, was filed over a month after the sanction which had been imposed by the unless order, had taken effect, it follows that, as such, measured in that way

and based solely on precedent, the defendant's application was not filed, 'promptly.'

[44] That is though, not the correct approach to be adopted and applied by this court, when considering the issue of whether or not an applicant pursuing an application for relief from sanctions, has 'made,' or in other words, filed, that application, promptly.

[45] As Brooks, JA in the **H.B Ramsay** case, to my mind, had wisely asserted, at paragraph 10: '*In my view, if the application has not been made promptly the court may well, in the absence of an application for an extension of an application for an extension of time, decide that it will not hear the application for relief. I do accept, however, that the word 'promptly,' does have some measure of flexibility in its application. Whether something has been done promptly or not, depends on the circumstances of the case.'* That wise assertion was repeated by Brooks, JA, in paragraph 31 of his judgment in that case. There is no litmus test that can be used for the purpose of determining whether or not a party's application for relief from sanctions, has or has not been filed, 'promptly.'

[46] Since there is no litmus test that can be utilized by a court, for the purpose of determining whether or not an application for relief from sanctions, has been made, 'promptly,' it follows that it is incumbent upon any Judge who is considering whether or not to grant such an application, to consider any circumstances made known to that court, via evidence, or which, at the very least, that court can take judicial notice of, which impact upon the issue as to whether or not the applicant's application for relief from sanctions, was filed, 'promptly.'

[47] Suffice it to state for present purposes, that there exists no evidence before the court and no other material, which this court can properly take judicial notice of, which touches on and/or concerns in any way, the reason or reasons as to why

the defendant's application for relief from sanctions was filed when it was, or as to why same was not filed earlier than it was.

[48] In the absence of that evidence, or the existence of any such material, it does appear as though the defendant's application for relief from sanctions, was not filed, 'promptly.' That in and of itself, would be sufficient to dispose of the defendant's application for relief from sanctions, but in the event that I am wrong in that respect, I will next go to consider whether or not the other pre-requisites which the applicant needed to have complied with, in order for his application to be successful, have or have not in fact, been complied with. Those are the pre-requisites as set out in **rule 26.8 (2) of the CPR.** I will address same, in turn, to the extent that may be necessary.

Is this court satisfied that the defendant's failure to comply was unintentional

[49] The defence attorneys are the ones who ought to have, on behalf of their client – the defendant, ensured, so far as it may have been possible (if possible at all), that the order which, as things turned out, was not complied with, was instead, complied with.

[50] If therefore, the attorneys either intentionally or unintentionally failed to do so, it is their intention or lack thereof, which will be attributed to their client.

[51] There exists no evidence for present purposes, which would serve to show that either the defendant or his attorneys, intentionally failed to comply with the relevant court order.

[52] In the only affidavit which was deponed to, by the defendant, in support of his application for relief from sanctions, the defendant has deponed that he sought to comply with this court's order of specific disclosure, by having sought to actually provide such disclosure in an electronic form, as he was of the understanding that same could have been provided by that means, since that was the means used by Jeffery Meeks Ltd. to store its data.

[53] As things turned out, the required data was downloaded on three (3) thumb drives. Apparently, the claimant's law firm was not able to open all of those drives, on the computer or computers (as the case may be), that were then at their office, after those drives had been, 'delivered,' to their office. Subsequently, he (the defendant) caused the extracted ledgers to be, 'delivered,' to the claimant's attorneys' office, via electronic mail.

[54] The defendant has deponed that those, 'deliveries' were made/carried out, prior to 3:30 p.m on the court's stipulated final date for, 'specific disclosure', of the requisite data, which, as is to be recalled, is the audited accounts for the five (5) years up to 2016, as well as accounting books, records and financial statements of Jeffrey Meeks Ltd., for the same time period.

[55] What is important to be noted and understood for present purposes though and especially at this particular juncture, is that what the defendant has deponed to having either done, or at least, to having attempted to do, as disclosed, with respect to that data, does not as a matter of law, constitute, 'specific disclosure' of any of that data.

[56] What the defendant did, or at least, attempted to do as regards that data, was to provide that data to the defendant, in a form whereby the claimant's attorneys and by extension therefore, the claimant, could have accessed same.

[57] That is what would, as a matter of law, be understood as making the requisite data accessible, as distinct from, 'disclosure,' of that data.

[58] That this is so, is clearly recognizable, when one considers the pertinent provisions of **rules 28.6, 28.8 and 28.12 of the CPR**.

[59] For present purposes, it is useful to set out the provisions of **rule 28.6 (1), 28.8 (1) to (5) and 28.12 of the CPR**. Those provisions are as follows:

'28.6 (1) An order for specific disclosure is an order that a party must do one or more of the following things –

a) *disclose documents or classes of documents specified in the order; or*

b) *carry out a search for documents to the extent stated in the order and disclose any documents located as a result of that search.'*

'28.8 (1) Paragraphs (2) to (5) set out the procedure for disclosure.

28.8 (2) Each party must make and serve on every other party, a list of documents in form 12.

28.8 (3) The list must identify the documents or categories of documents in a convenient order and manner and as concisely as possible.

28.8 (4) The list must state –

a) *what documents are no longer in the party's control;*

b) *what has happened to those documents; and*

c) *where each such document then is to the best of the party's knowledge, information or belief.*

28.8 (5) It must include documents already disclosed.'

'28.12 (1) When a party has served a list of documents on any other party, that party has a right to inspect any document on the list, except documents –

a) *which are no longer in the physical possession of the party who served the list, or*

b) *for which a right to withhold from disclosure is claimed.*

28.12 (2) The party wishing to inspect the documents must give the party who served the list written notice of the wish to inspect documents in the list.

28.12 (3) The party who is to give inspection must permit inspection not more than seven (7) days after the date on which the notice is received.

28.12 (4) Where the party giving the notice undertakes to pay the reasonable cost of copying the party who served the list must supply the other with a copy of each document requested not more than seven (7) days after the date on which the notice was received.'

[60] Disclosure therefore, of documents is to be done by the means of filing a list of documents. **Rule 28.8 of the CPR**, makes that clear. Furthermore, an order of/for specific disclosure, requires that specified documents are to be disclosed in a list of documents.

[61] In addition, the opposing party is entitled to access those documents, by means of copying same. Of course, although our rules of court do not specifically provide for electronic access to disclosed documents, to be made available to an opposing party, to my mind, if inspection of those documents is permitted to be done via an electronic device and copies can be made thereby also, that would be just as effective and perhaps even, in today's world, be viewed by many litigants and their attorneys, as constituting a far more efficient and timely means of providing for the inspection of documents and moreso, in circumstances wherein, there is a large volume of documents to be inspected and possibly, copied.

[62] That is therefore, no doubt, exactly what the defendant was seeking to enable the claimant to do, by having provided the requisite data to the claimant's attorneys, electronically. It is correct to state that in having done so, the defendant did not comply with the procedural rules governing specific disclosure of the requisite documents, but, nonetheless, in having done what he did in terms of the means by which he sought to enable the claimant's attorneys and thus, the claimant, to have access to those documents, it is apparent that the defendant did not intentionally fail to comply with this court's order for specific disclosure as

was made by Palmer-Hamilton, J on March 2, 2017. I am therefore satisfied, on a balance of probabilities, that the defendant's failure to comply with that order, was unintentional.

[63] The next question to be considered by this court, is whether there exists a good explanation for the defendant's failure to comply with the court's order – that of course being – the order which ultimately resulted in the sanction having taken effect.

[64] In considering that question, it is important to in turn, carefully consider the exact account of the defendant as to his efforts to comply with the relevant court order. The affidavit of the defendant which was filed on April 27, 2017 and in particular, paragraphs four (4) to nine (9) thereof, are the most relevant, for present purposes. It is therefore, worthwhile to quote same. That quotation therefore, now follows:

> *'4 On the making of the order I dutifully attended on my accountants with a copy of the said order. I was provided with the audited accounts for the last five (5) years. That I believed that the audited accounts were sufficient to provide the financial statements for Jeffrey Meeks Limited. Also I am not aware of the company keeping physical accounting books, records and financial statements. What the company uses is a software system on which data is stored.*
>
> *5 That I misunderstood the order. I was not aware that the audited accounts for the last five (5) years were insufficient. I dutifully caused a further list of document to be filed on March 20, 2017 containing the said audited financials. That had I known that my duty to disclose entailed the software system I would have dutifully complied in the same manner that I did with the audited financials.*
>
> *6 That at no time did I intend to disobey the order. When I was alerted on March 26, 2017 that I had not fully complied with the order of the Honourable Mrs. Justice Lisa Palmer-Hamilton I immediately contacted the accountant of Jeffrey Meeks Limited. I pointed out that the order asked for Books, records and financial*

statements. I was advised that the information on the software was available. I ascertained the time that the information could have been made available to the court and went to retrieve the data. The data was downloaded on the three (3) thumb drives. When I received the thumb drive I opened the drives individually on Two (2) separate work computers to ensure that there would be no difficulty in accessing the material thereon.

7 I then quickly took the thumb drives to the office of my attorney-at-law who had been waiting to receive the thumb drives. I told my attorney that I had checked each of the thumb drives twice. That I do verily believe that my attorney quickly took the thumb drive to the office of Hussey and Collie before 3:30 p.m when it was to be delivered by order of the Honourable Mrs Justice Simmons made on April 27, 2017.

8 That I was informed and do verily believe that when one (1) thumb drive was delivered to the chambers of Hussey and Collie the document did not open on the two (2) computers that it had been tested on. When I was advised of same I found that to be strange as I had tested all three (3) thumb drives at work on two (2) different computers.

9 I then caused an email to be sent containing the ledgers extracted and in Excel. That this email was sent before the 3.30 p.m timeline in compliance with the order of the Honourable Judge.'

[65] As will, I think, be readily recognizable, from that which has been deponed to, by the defendant, as above-quoted, the defendant has not even, in that affidavit evidence of his, accepted that there was any failure on his part, to comply with the pertinent court order. What he has instead done, by means of that evidence, is, suggested that he acted in compliance with the pertinent court order, in so far as he provided the requisite information to the claimant's attorneys, electronically, in a timely way.

[66] Of course though, his evidence in that regard, is of no assistance to him now. You may ask, why is that? To put it simply, that is so, because, at this stage, it is clearly and rightly so, now accepted by the defendant, that he did not in fact

comply with the pertinent court order. He did not comply with that order in so far as he did not file a list of documents pertinent to the specific disclosure of documents, which he was required to have made.

[67] It is in fact, because he has failed to comply with the pertinent court order, which is an, 'unless order' – as is the term commonly used among attorneys and Judges, to describe a court order of similar nature, that the defendant is now seeking, by virtue of this application of his, which is now under consideration by this court, to obtain an order of this court, relieving him from sanctions, in particular, the sanction which has resulted in the striking out of his statement of case.

[68] The defendant has, not only failed to provide a good explanation for his failure to comply with the pertinent court order, in reality, he has failed to provide any explanation for same, at all. Not only has he failed to do so in any of the evidence of his, as above-quoted, but in addition, he has not done so, in any other evidence of his.

[69] The defendant relies on his only affidavit, that being the one which was filed on April 27, 2017, in support of his application for relief from sanctions. That affidavit is comprised of a total of eleven (11) paragraphs and totally therefore, represents all of the evidence presented to this court, by the defendant, in support of said application.

[70] In paragraph eleven (11) of that affidavit, the defendant deponed to a conclusion which it is for this court and only this court, for present purposes, to draw a conclusion as to. One of the conclusions which he has deponed to, in that paragraph, is that he has '*given a good explanation for the failure to comply.'* It is for this court now to draw/reach a conclusion as to whether or not the applicant/defendant has given a good explanation for the failure to comply and in that regard, despite the bold conclusion drawn by the defendant and deponed to by him, to the contrary, it is my carefully considered conclusion that the

defendant has utterly failed to give a good explanation for his failure to comply with the pertinent court order, To reiterate, it is my view that in fact, he has also, utterly failed to give any explanation for same, at all.

[71] Apart from the paragraphs of his affidavit evidence which were earlier quoted and paragraph eleven (11) to which I have made reference, the first three (3) paragraphs specify the nature of the pertinent order and what would be the consequence of his failure to comply with same and also sets out the defendant's place of above and his occupation. In paragraph ten (10) of his affidavit, the defendant depones to having, 'generally complied with all other rules and directions save and except an oversight,' the nature of which he has described in that paragraph.

[72] His affidavit evidence therefore, has not, at all provided any assistance to him in offering any explanation, much less, any good explanation, for his failure to comply with the pertinent court order.

[73] That being so, there is, in reality, no need to go any further in considering the defendant's application for relief from sanctions. That is so because the failure of the defendant to satisfy this court of that pre-requisite condition, as set out in **rule 26.8 (2) (b) of the CPR**, must lead to the defendant's said application being unsuccessful.

[74] In the circumstances, I will go no further in considering said application. Finally, let me state that my conclusions as to whether or not the said application was promptly made and also, as to whether or not the defendant has given a good explanation for his failure to comply with the pertinent court order, mirror in large measure, the submissions made to this court upon the hearing of the said application, by the claimant's counsel. No direct reference has been made in these reasons, to the submissions of the defence counsel as regards the said application, but suffice it to state for present purposes, that I did not find same to

be of much assistance to this court in reaching the conclusions that I have reached.

[75] This court therefore, now orders as follows:

1) The defendant's application for relief from sanctions which was filed on April 27, 2017, is denied.

2) The costs of that application are awarded to the claimant with such costs to be taxed, if not sooner agreed.

3) The dates scheduled for trial of this claim, being: July 17 & 18, 2018 are vacated.

4) Leave to appeal is granted to the defendant.

5) A stay of the judgment granted in favour of the claimant upon this claim is ordered.

6) The claimant shall file and serve this order.

.....
Hon. K. Anderson, J.