[2022] JMSC Civ. 79

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. 2011 HCV 05320

BETWEEN	**METHUEN MORGAN**	**CLAIMANT**
AND	**SHERECE GORDON**	**1ST DEFENDANT**
AND	**CHARLES DIXON**	**2ND DEFENDANT**

HEARD ON PAPER

Raymond Samuels, instructed by Samuels and Samuels, for the claimant

Allison Lawrence, of counsel, for the 1st defendant

January 25 and February 25, 2022

Application for relief from sanction after sanction applied — What was the sanction which applied for failure to file witness statement in time — When did the sanction take effect — Whether the application was made promptly — Whether the state of mind of the applicant ought to be considered — Ignorance as to the true state of the law —Whether the failure to comply was intentional — Whether there is a good explanation for failure to comply — Whether the claimant generally complied with orders of the court — Witness summary — Whether non-compliance has been remedied — Effect of granting relief from sanction on both parties — Can trial dates be met — Appropriate costs order

ANDERSON, K.J

BACKGROUND

The history of this matter

[1] The claimant filed this claim against the defendants on August 25, 2011, seeking damages for injuries, damage and losses which he suffered arising from a motor vehicle collision on March 31, 2009. The claim was served on the defendants. The 2nd defendant has not filed an acknowledgment of service or defence, in these proceedings.

[2] The 1st defendant filed an application for summary judgment on January 29, 2015, later amended on February 8, 2017. At the hearing on February 15, 2017, that application was adjourned to June 20, 2017. The minute of order reveals that the file was not found and submissions and bundle were not provided.

[3] On February 28, 2017, the claimant applied for judgment in default of filing an acknowledgment of service, against the 2nd defendant. On June 20, 2017, the ruling in the summary judgment application was heard and ruling reserved. That ruling was announced on December 18, 2017 and the matter was scheduled to go to case management conference on June 18, 2018. On June 18, 2018, the case management conference was adjourned to January 14, 2019 , pre-trial review was set for January 25, 2022 and the trial was set for May 3, 4 and 5, 2022. Also on that date, the matter was referred to mediation. On January 14, 2019, when the matter came for hearing, mediation had not taken place and the matter was scheduled to be heard on June 5, 2019. On that date, the court made several orders including:

> *'1…*
>
> *2. …*
>
> *3. Witness statements to be filed and exchanged on or before 10th of January 2020.*
>
> *4. …*
>
> *5. Listing questionnaire to be filed and served by or before 7th February 2020.*

6. Pre-trial memorandum to be filed and served by 21st February, 2020. '

[4] The claimant filed the listing questionnaire on February 14, 2020, his pre-trial memorandum on March 31 2020 and his witness statement on March 30, 2020. Those documents were filed, out of time.

[5] The 1st defendant filed a witness summary on January 21, 2022.

The Application

[6] The claimant filed this application for court orders, on January 10, 2022, seeking the following orders:

1. That the applicant be granted relief from any sanction imposed for failure to comply with **Rule 29.4(2) of the Civil Procedure Rules (CPR);**

2. That there be an extension of time granted to the claimant to comply with orders made at Case Management Conference by the Honourable Miss Justice Hutchinson (Ag.) on June 5, 2019;

3. That the claimant's pre-trial memorandum filed on March 31, 2020, Witness statement of Methuen Morgan filed on March 30, 2020 and the listing questionnaire filed on February 14, be allowed to stand as filed within time;

4. That Denton Barnes MBBS, MRCS, LLM, CRA who has provided a medical report dated November 23, 2010, herein, be appointed as an expert witness;

5. That Dr. Denton Barnes's expert report stand as his examination-in-chief;

6. Costs to be costs in the claim;

7. Such further and other relief as this court deems fit.

[7] The grounds on which the claimant has sought those orders are as follows:

a. The court may extend the time for compliance with any rule or practice direction of the court, even if the application for an extension of time is made after the time has passed;

b. A refusal to grant the orders sought will cause the applicant to suffer great losses he would not be able to put before the court, his evidence in chief;

c. The claimant unintentionally and inadvertently did not comply with case management orders within the time specified therefore the claimant is now seeking the court's permission that the claimant's pre-trial review memorandum filed March 31, 2020, witness statement of Methuen Morgan filed on March 30,2020, and the listing questionnaire filed February 14, 2020 be allowed to stand as filed within time;

d. The witness statement not being filed within the specified time the claimant is seeking relief from sanctions pursuant to **Rule 29.11 of the CPR;**

e. The court has the power to grant relief from sanction per **rule 26.8 of the CPR**

f. The failure to comply has been remedied in that the claimant's pre-trial review memorandum filed on March 31,2020, and the listing questionnaire filed on February 14, 2020, have been filed and served by the claimant;

g. The defendants are in possession of all the documents and as such would not be prejudiced while the claimant would be prejudiced if the orders are not granted;

h. The claimant has a good explanation for the failure to comply;

i. The defendant will not suffer any loss if the application is granted and would not cause any hardship to the defendants;

j. If the application is not granted the claimant will not be able to call his witness and as such, will not be able to present evidence for the court to make a decision;

k. The trial dates can still be met if application for relief from sanctions is granted;

l. The defendant is already in a possession of the medical report of Dr. Denton Barnes and is aware of its contents;

m. The reports are in compliance with **Part 32 of the CPR;**

n. The proposed expert witness is a medical practitioner who is a specialist in the field of Orthopaedics and has provided expert reports on the claimant's injuries dated November 23, 2020;

o. The issues to be determined in this case are within the expert's field of expertise;

p. The claimant will be severely prejudiced if the order is not granted;

q. It is in the interest of justice for the claimant that Dr. Barnes be deemed an expert by the court;

r. The court has case management powers to allow the orders herein;

s. The defendant would not be prejudiced if the orders herein are granted; and

t. Granting the orders sought would further the overriding objectives in accordance with **part 1 of the CPR.**

[8] That application, along with the previously scheduled, pre-trial review hearing, arose for hearing before this court, simultaneously, on January 25, 2022. This court made the decision that it will address the application in two (2) parts. The first part concerns the application for relief from sanction and the second part will be the pre-trial review hearing, during which, the claimant's application to appoint expert witness, will be heard and adjudicated upon. The outcome of the first part of this application will no doubt determine the course of action for the order to appoint the expert witness and whether a pre-trial review needs to be held, at all.

[9] There is one affidavit which has been filed in support of the claimant's application for relief from sanction. That affidavit, was deponed to, by the claimant on January 5, 2022 and was filed on the same date on which the relevant application was filed, which, as should be recalled, is: January 10, 2022. No other affidavit evidence has been filed by either party, either in support of, or in opposition to, the pertinent application.

[10] The summary of the evidence in that affidavit is as follows:

a. He was unable to sign his witness statement as he had moved from his then address and his phone number had changed for a short period of time;

b. The pre-trial memorandum was not filed in time, owing to inadvertence on the part of the attorney, who after looking over the file realized same was not filed and filed same on March 31, 2020

c. He was not in contact with his attorney at that time, as he was aware that the trial was set for May 2022 and was only informed, upon his return to that address in March 2020 that he was made aware that his attorneys were attempting to make contact with him and he made contact with his attorney on March 30, 2020 when he reviewed and signed his witness statement, which was filed, on that day;

d. He was informed that his attorney would request an extension of time for the documents to stand as filed within time at the pre-trial review on January 25, 2022;

e. His attorney was only made aware of a recent Court of appeal case in December 2021, which mandated that a formal application for relief from sanctions had to be made in respect of his witness statement, which was filed out of time;

f. He had no intention to disrespect the court by not complying with the order of the court; and

g. He always intended to prosecute the matter.

[11] The claimant and the 1st defendant have filed written submissions and authorities in this matter. The court has read same and will make reference to relevant portions throughout this ruling.

ISSUES

[12] The following issues are now before this court, for determination:

a. What is the nature of the sanction imposed on the claimant?

b. When did that sanction take effect?

c. Whether the claimant's application was made promptly.

d. Whether the claimant's failure to comply was unintentional.

e. Whether the claimant has a good explanation for his failure to comply with the court's orders made on June 5, 2019.

f. Whether the claimant has generally complied with all other relevant rules, practice directions, orders and directions.

g. Whether it is in the interest of justice, that relief from sanction, be granted.

Burden and Standard of proof

[13] Before addressing each of these issues in turn, it is now pertinent to address the issues of burden and standard of proof, as regards the claimant's present application, and also the CPR as regards said application. The burden of proof, rests solely on the claimant's shoulders in that regard and the requisite standard of proof is, as applied, proof on a balance of probabilities.

The applicable CPR

[14] **CPR 29.11**, states as follows:

> *'(1) Where a witness statement or a witness summary is not served in respect of an intended witness within the time specified by the court then the witness may not be called unless the court permits.*
>
> *(2) The court may not give permission at the trial unless the party asking for permission has a good reason for not previously seeking relief under the rule 26.8.'*

[15] **CPR 26.8** governs the discretion of the court in granting relief from sanctions. Those paragraphs read as follows:

> *' 1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –*
>
> *a) made promptly; and*
>
> *b) supported by evidence on affidavit.*
>
> *2) The court may grant relief only if it is satisfied that –*

a) the failure to comply was not intentional;

b) there is a good explanation for the failure, and

c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions.

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

(a) the interests of the administration of justice;

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

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

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

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

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

[16] **Rule 26.1(2)(c)** provides that the powers given to the court includes the power to:

'(c) extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance had passed.'

[17] **Rule 26.3 (1)(a)** provides that:

'In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court-

(a) That there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings.'

[18] **Rule 26.7** specifically provides that sanctions imposed take effect unless relief is sought and obtained. **Rule 26.9,** is a general rule, which gives the court the power to rectify procedural defaults. That rule does not apply to cases such as this, at this stage, since such a general rule, cannot serve to override the specific rule, which is **Rule 26.7.** Equally, **Rule 26.1(2) (c) of the CPR** cannot serve to avail the claimant with respect to the matter now at hand. That cannot apply, because the sanction has already been applied. See in that regard: **George Freckleton v Aston East [2013] JMCA Civ 39, especially at paragraphs 22-24**.

[19] In the circumstances, the court may, in respect of the listing questionnaire and pre-trial memorandum, extend those timelines. However, as regards the claimant's witness statement, which was neither filed nor served within the timeline which was stipulated at the case management conference, given that a sanction applies with respect thereto, the court has to consider the consequence of the failure to have so done, in the circumstances.

What was the nature of the sanction imposed?

[20] A crucial question which this court ought to address in the circumstances, is, what is the nature of the sanction imposed, owing to the claimant not having filed his witness statement before January 10, 2020?

[21] Dunbar-Green JA (Ag.) (as she then was) in the decision of **Oneil Carter and Ors v Trevor South and Ors [2020] JMCA Civ 54** at paragraph 64 noted as follows, as regards the sanction that applied in respect of a failure to obey rule 29.11:

> *' Under rule 29.11, a party which has failed to serve a witness statement within the time specified by the court must seek and obtain relief from sanctions under rule 26.8, in order to call the witness at trial. It must satisfy the criteria under rule 26.8, by evidence on affidavit, to obtain a favourable exercise of the judge's discretion. The court's case management powers under rules 26.1(2)(c) and (v) and 26.2(1) are inapplicable in a case where rule 29.11 is operational.'*

[22] The sanction imposed, is that the claimant not having complied with the order of the court to file and serve his witness statement within time, may not rely on it, at the trial, to give any evidence.

[23] The Court of Appeal has made it clear that, under **Rule 29.11** once the relevant rule has not been complied with, the sanction takes automatic effect. Edwards JA (acting as he then was) in **Jamaica Public Service Limited v Charles Francis and Anor [2017] JMCA Civ 2** at paragraph 19, in considering a similar application as this, stated the following:

> *'Where the application to extend time is made after the time for compliance has expired and there is a sanction imposed for a failure to comply, that sanction takes effect unless and until there is a successful application for relief.'*

[24] At paragraphs 15 and 16 of the **Jamaica Public Service Limited v Charles Francis and Anor** the following is stated:

> *'The application for relief was made pursuant to rule 26.8 of the CPR. An application for relief from sanctions under rule 26.8(1) is operative where the court makes an order or gives directions and specifies the consequences for failure to comply or where the rules provide a sanction for non-compliance. In respect of the case management orders made in this case, there were no consequences specified in the order itself for a failure to comply.*
>
> *[15] However, under rule 29.11, the appellant's failure to file and exchange witness statements as ordered rendered it unable to call any witnesses unless it was granted relief from sanctions.'*

[25] It matters not, that the order which brought the sanction into place does not state within its expressed terms, the consequences of failure to comply. This does not serve to prevent the automatic imposition, of the sanction. The sanction is imposed by virtue of a party's failure to file and serve a witness statement or summary, within time. If it were otherwise**, rule 29.11 of the CPR** would serve no useful purpose. This court should always be astute not to interpret any form of legislation, in that way.

When did the sanction take effect

[26] The sanction which applied to the claimant, took effect on January 11, 2020. That is because, witness statements(s) were to have been filed and exchanged, '*on or before January 10, 2020.'* That court order read along with **rule 3.2,** in particular, **rule 3.2(3) of the CPR** and **rule 6.6 of the CPR**, would have therefore required that said witness statement(s) were to have been filed and served by no later than 4:00 pm on January 11, 2020. The sanction of being unable to give oral evidence at trial applied after 4 p.m on January 11, 2020.

Relief from sanctions

[27] As the claimant has not complied with the order to file his witness statement within the prescribed time, this court will then consider whether he has met the requirements of the CPR, to be granted relief from sanction.

[28] The claimant's application is supported by evidence on affidavit, so the court will next have to consider, whether the application was made promptly and even if so, whether the listed requirements of **CPR 26.8 (2),** have been met. **CPR 26.8 (1) and (2),** must always be applied, conjunctively.

[29] There is dispute as to whether the claimant's application has been made promptly; whether the claimant's failure to comply was intentional; whether the claimant generally obeyed all court orders and also, as to whether there is good explanation for the failure to have complied with the pertinent order; and further, as to whether the interests of justice dictate that relief from sanction be granted.

The approach of the court

[30] Brooks JA (as he then was), in **H.B Ramsay and Associates Ltd and Ors. v Jamaica Redevelopment Foundation Inc. and Anor [2013] JMCA Civ 1,** ('the HB Ramsay case') expounded on the principles governing the court's discretion in granting relief from sanctions. At paragraph 31, he pronounced that 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 **CPR 26.8 (1),** in order to have his application considered. If the applicant satisfies this threshold, then the court should go on to consider, whether the applicant has crossed the threshold in **CPR 26.8 (2)** and if so, the court should then go on to consider the factors in **CPR 26.8 (3).** If though, the applicant does not cross the threshold as set by **CPR 26.8 (1) and (2),** then **CPR 26.8 (3),** does not fall for consideration by this court, in the context of an application such as this.

[31] What is therefore now, next to be determined by this court, in light of this application and the pertinent submissions, is whether that threshold, as set out by **rule 26.8(1)** read along with **rule 26.8(2) of the CPR** has been met by the claimant.

Promptitude

[32] At paragraph 10, of **the HB Ramsay case,** the Court of Appeal pronounced that the word 'promptly,' does have some measure of flexibility in its application. The question as to whether something has been done promptly, depends on the circumstances of the case. Brooks JA**,** noted that in considering whether an application, of this nature, is made promptly, the court should consider the explanation given, based upon the circumstances of the case that is then under consideration. He stated that in some instances, at first, it may appear that the application is not prompt. Based however, on the explanation given, when considered in those circumstances, the application may be deemed as prompt.

[33] In **Meeks v Meeks 2018] JMSC Civ 37** the court summarized the following at paragraphs 45-46:

> *'…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.'*

[34] This court accepts both pronouncements as to the state of the law for the interpretation of promptitude and will seek to apply same, to the facts of this case.

[35] On a strict quantitative calculation, the court notes that the application having been filed, two (2) years after the date of the breach, may be deemed, as having been filed, unduly late. Given however that the court has pronounced that a flexible approach is to be taken, which is tailored to the facts of each case, the court will examine those explanations as have been put forward in the claimant's affidavit evidence, as regards why it was, the claimant's application for relief from sanction, was filed as and when it was filed, in determining whether the said application is prompt.

[36] In his affidavit, the claimant has deponed that the application was made promptly. This is so, as even though his witness statement was to have been filed by no later than January 10, 2020 but was not filed until March 30, 2020, it was only because of a decision from the Court of Appeal which was brought to his attorney's attention in December 2021 which laid down that a formal application for relief from sanction needed to be made, as opposed to his previously held view, that he would have just sought an extension of time, at the pre-trial review.

[37] Having been made aware of that case, in December of 2021, this application was filed on January 10, 2022.

[38] The defendant contends however, that this application was not made promptly, as the application was made two (2) years after the deadline. It is also contended that the affidavit in support of the application having been signed in January 5, 2022, there is no explanation why the application was filed five (5) days after that, in circumstances where it was already late.

[39] As adumbrated above, the interpretation of promptly, does have some flexibility, as it is dependent on the facts of the particular case. In this particular case, the relevant factors to be considered, concern the fact that the claimant's counsel had been aware of the failure to meet the timeline but had erroneously planned to remedy that, by seeking an extension of time, at the pre-trial review, until he was made aware of the true state of the law. In the circumstances, the court is left to choose between two (2) periods of interpretation, as to whether this application was made promptly. If the court accepts the explanation given by the claimant then, the court is minded to find that having been made aware of the decision of the Court of Appeal, then the application being made less than a month later, was promptly made.

State of mind

[40] Brooks JA (as he then was) **HB Ramsay case** addressed a submission as to the extent to which the court can take into account the state of mind of the defaulting

party, in deciding whether an application for relief from sanctions, has been made promptly. To this, Brooks JA noted at paragraph 14 that, in the context of an unless order, the state of mind of the party should be placed on complying with the deadline, given the utmost necessity of compliance.

[41] In the case at bar, it seems that a relevant consideration for the court's adjudication on this issue, would indeed be, the state of mind of the applicant. On the evidence of the claimant, upon his having been made aware of the deadline, the application was not made earlier because his attorney advised him, albeit erroneously, that an application was to be made at pre-trial review.

Ignorance of the law

[42] In the case: **Dorothy Vendryes v Dr. Richard Keane & Karene Keane [2010] JMCA App 12,** (the Vendryes case) the appellant's record of appeal which should have been filed on August 21, 2009 was not filed until May 3, 2010. It was only after the respondents filed their application to dismiss the appeal on April 14 2010 that the appellant applied to extend time on May 4, 2010. McIntosh JA (acting as she then was) refused the respondent's application to dismiss the appellants' appeal for failure to comply with **rule 2.6(1)(c) and 2.7(3)(iii) of the Court of Appeal Rules** and allowing the appellant's application to extend time for filing their skeleton arguments, chronology and record of appeal.

[43] At paragraph 51, the court noted as follows:

> *' Ignorance of the law, it has oft been said, is no excuse and that must particularly be so in the case of an attorney-at-law but the explanation advanced still warrants some consideration. When a certain procedure has been followed over time it becomes routine and in this case the old procedure was being followed until the new procedure became known at which point the appellant's attorney acted within a reasonable time, filing the outstanding documents some fifteen or so days after receiving the respondents' notice of application.'*

Following that observation, the court noted that the explanation was genuine and it was accepted that the delay was unintentional and not contumelious.

[44] Whether that dicta which has been quoted, immediately above, can properly be applied to the case at bar, requires careful adjudication by the court. This court is aware that in the past, litigants have erroneously held the belief that the way to remedy a witness statement which was filed out of time, was to seek an order that said witness statement be allowed to stand, as if it had been filed within time. This is however, contrary to the express provisions of C.P.R. 29.11. This court has recognized that since as of 2017, there has been case law emanating from the Court of Appeal which has served to make it clear that such is not the correct approach. See in that regard: **Jamaica Public Service Limited v Charles Francis and Anor [2017] JMCA Civ 2**. '

[45] This court will now have to consider the provided explanation within that overall context. The explanation proffered for the delay is an understandable one. This court is of the opinion that this application was promptly made, within the particular context of this particular case. The court accepts that counsel for the claimant, having been ignorant of the state of the law until December of 2021, acted promptly in filing the application, after he had become aware of same.

[46] This court rejects the defendant's submissions that the delay of five (5) days between when the claimant's affidavit in support was signed but not filed, is one which renders the application late. To refer to same as a special time, for which an explanation needed to have been proffered, is illogical. Clearly, the entirety of the time between when the sanction took effect and when the application was filed, is the relevant period. Not the five-day period as the 1st defendant is urging. If there had been an explanation for that five-day period and none related to the period of time from when the sanction took effect and when the claimant applied for relief, that would not have helped the claimant. The claimant has proffered an explanation for that period. The explanation is that he incorrectly thought that he could have applied for an extension from the date when the sanction would have taken effect, until December, 2021. This court having carefully considered same, is satisfied that in the circumstances, promptitude ought to be given a flexible

meaning and has so found that the application was made promptly, within the particular context of this particular application.

Interests of justice

[47] **Rules 1.1 and 1.2 of the CPR** provide that:

> *'(1) These 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*
>
> *(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases. Application of overriding objective by the court*
>
> *1.2 The court must seek to give effect to the overriding objective when interpreting these rules or exercising any powers under these rules.'*

[48] In interpreting **CPR 26.8,** the court ought to have regard to the overall interests of justice. The court notes that the special words in **CPR 26.8.3** qualify the general words in **rule 1.1.** This however does not mean that the overall interests of justice do not apply to **CPR 26.8.(1) and (2)**. What those overall interests of justice cannot do though, is to serve to over-ride the special provisions of **CPR 26.8(1) and (2).** They can only serve to assist the court in interpreting those special provisions. In that regard, therefore, cases which address the issue of promptitude, will be of

relevance, albeit not conclusive, as everything depends on the particulars facts, of each particular case. This court having extracted the relevant principles, has reached the conclusion that in this case, in considering the state of mind of the applicant, as soon as he was made aware of the true state of the law, his application, for relief from sanction, was made promptly.

Unintentional

[49] It is important to note that **CPR 26.8 (2) (a)** stipulates that one must show that the failure to comply with the order of the court, was unintentional.

[50] The claimant has given evidence that his failure to comply was unintentional. This was owing to his temporary relocation and he did not think it prudent to inform his attorney of that, as he understood that the trial of this claim, was scheduled to be held in May of 2022. The 1st defendant has contended that the claimant acted intentionally in his failure to comply with the relevant court orders, in that he was present at the hearing wherein the several orders were made and he ought to have been aware that he had a duty to maintain contact with his attorney. It is contended that when he intentionally decided to move and be out of contact with his attorney, those were intentional acts and as such, he must be deemed to have acted intentionally, in not obeying the order of the court.

[51] The evidence of the claimant, is credible. There are many court documents, in court proceedings such as this, which can be signed by the attorney on behalf of his/her/their clients. Even up until the case management stage, documents could have been signed by the attorney and filed with the court, without the need for the client's signature to have been on any of those documents. If the client hears at a case management conference that a witness statement is to be filed and served by a certain date and a trial is to be held by a certain date, it is not to be assumed that the witness understands at that time, that unless he personally signed the witness statement, in order for it to be filed with the court, then there will be no witness statement before the court. Unless he knew that, it cannot be said that the

explanation that he has put forward is unbelievable. If that explanation which he has put forward is credible and this court has believed it, which it has, then in such circumstances, this court cannot properly conclude that his failure to make his attorney aware of his address at that time, shows an intent to not comply with the order of the court, as regards the date by which he ought to have filed and served his witness statement(s).

A good explanation for breach

[52] The Privy Council at paragraph 23 in the **Attorney General v Universal Projects Ltd [2011] UKPC 37**, noted the following as regards a good explanation:

> *'The Board cannot accept these submissions. First, if the explanation for the breach ie the failure to serve a defence by 13 March connotes real or substantial fault on the part of the defendant, then it does not have a "good" explanation for the breach. To describe a good explanation as one which "properly" explains how the breach came about simply begs the question of what is a "proper" explanation. Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly if the explanation for the breach is administrative inefficiency.'*

[53] At paragraph 50b in **the Vendryes case**, the court noted as follows:

> *'The sufficiency of the reason/explanation proffered is entirely for the determination of the court having regard to all the surrounding circumstances - ("It is incumbent on the court, after examining all the circumstances of a case to determine how best to deal with it justly", per Harris JA (Ag) in Auburn Court).'*

[54] Counsel for the defendant has contended that the explanation given by the claimant is not a good one. This is so, as the claimant had, in having absented himself for the relevant period, showed scant regard for the progression of his claim and chose to solely focus on trial dates instead of thinking about all relevant dates. It is also contended that the inadvertence by the claimant's counsel, is not a good explanation.

[55] In relation to considering whether there is a good explanation, the court has to consider the claimant's explanation as to his absence and also the role which his attorney's ignorance of the law, played in the circumstances.

Witness summary

[56] The claimant has given evidence that at the relevant time, he was living at a different address. This was, as this court accepts it, the primary reason why his witness statement was neither filed nor served, within time. That is so because the claimant's attorney was not able to locate the claimant in a timely way, so as to have the claimant sign and certify his witness statement as true, which are requirements of **CPR 29.4 and 29.5.** Secondary to that, the claimant's attorney did not think that it was necessary to file a witness summary.

[57] **Rule 29.6 of the CPR** provides that:

> *'(1) A party who is –*
>
> *(a) required to serve; but*
>
> *(b) not able to obtain, a witness statement may serve a witness summary instead.*
>
> *(2) That party must certify on the witness summary the reason why a witness statement could not be obtained*
>
> *(3) A "witness summary" is a summary of –*
>
> *(a)the evidence, so far as is known, which would otherwise be included in a witness statement; or*
>
> *(b) if the evidence is not known, the matters about which the party serving the witness summary proposes to question the witness.'*

[58] Though the court order made reference to filing a witness statement, the CPR when looked at, actually provided a remedy to the claimant, which his attorney could have readily utilized, by having filed and served a witness summary, in lieu of the filing and service of a witness statement, given the claimant's inability to be found. Had he, the claimant's attorney, filed and served a witness summary within the time allotted by this court at case management conference, for the filing and service of the claimant's witness statement(s), then the claimant would have been in compliance. No doubt however, the claimant's attorney did not think it necessary to do that, as he was of the opinion, that even if the witness statement was filed late, an extension of time would have been granted so as to allow for same, to

have been deemed by this court, as having been filed and served within time. He did not know that a sanction would have applied, making an application for relief from sanction, necessary.

[59] The court has taken judicial notice of the fact that the erroneous view held by the attorney, as to his supposedly having been able, he erroneously, then believed, to simply obtain at the pre-trial review hearing, an extension of time for filing and service of a witness statement, is not one which is held by himself alone. Even some judges in the past, were also of that same view. This was a procedure which was followed in the breach, more often than in the observance. In the circumstances, whilst the law stipulated otherwise, it is very clear that Mr. Samuels is not the only attorney that was not, even in recent times, aware of the law in that regard.

[60] Whilst it is true that the claimant should have been aware of all the dates, the critical question for this explanation is. Did he know that he needed to sign and certify his witness statement? Or did he believe that it could have been signed by the attorney on his behalf? There is no evidence to indicate that the claimant knew that he needed to sign his witness statement. In the circumstances and in light of the explanation proffered by the claimant, the court is minded to accept the claimant's evidence that he was not so aware in advance. There is no proper basis which this court has, to enable it to properly conclude that the claimant was aware that he needed to have personally signed and certified his witness statement. The court is minded to accept that it was likely in the claimant's mind that his witness statement would have and could have been, signed by his attorney. Alternatively, this court is also minded to conclude that the claimant perhaps did not even know that a witness statement had to be filed on his behalf. The claimant was perhaps and likely of the view, that he only needed to be present at the trial, which is, where and when he would then provide, only oral evidence to the court.

[61] Since either of those two scenarios are, in this court's considered view, likely to have occurred, it follows that it is also this court's considered view, that the claimant

has proven to the requisite standard, that at the material time, the claimant did not know that he needed to sign and certify his witness statement.

[62] The court having earlier accepted that the explanation given for the claimant's unavailability at the relevant time, is a credible one, is also of the view that said explanation, is a good one. Also when taken together with the presumed lack of knowledge of the claimant's attorney as regards filing a witness summary, in lieu of a witness statement and also the expressed lack of knowledge of the claimant's attorney as regards the requirement of **rule 29.11 of the CPR,** this court is persuaded, to the relevant standard, that the claimant has met the threshold of establishing a good explanation for the failure to file his witness statement, within time.

[63] Though there are two (2) different explanations, the court considers that they are compounded. The claimant's attorney was all along was of the view that even if witness statements were filed late, the court could readily grant the extension for that witness statement to stand as if, having been filed within time. The claimant's unavailability at the relevant time ought not to be looked at, in insolation. In the opinion of this court, it has also to be considered in the light of the state of mind of his attorney, at the relevant time.

General Compliance

[64] The claimant maintains that he has at all times, sought to comply with this court's orders and has always had an intention to prosecute this claim. The defendant contends however, that the claimant has not complied with three (3) of the orders made on June 5, 2019 and as such, it cannot be said that he has generally complied with the orders of the court.

[65] Brooks JA, in the **HB Ramsay case**, at paragraph 27, noted that, a court's assessment of an application for relief from sanctions should not be restricted to considering the applicant's conduct prior to the application of the sanction, but subsequent actions may well indicate the attitude of the applicant, to the progress

of the matter. This examination, should look to decipher, whether an applicant had demonstrated that he/she was serious about getting his/her case back on track and putting himself/herself in a position, where the adverse effect of the default, was minimized.

[66] In a situation where there is a failure to file a witness statement within the time as stipulated by a court order and that order had also stipulated that other documents were to have been filed by a certain time, but some of those documents were filed out of time, the word, '*generally'* as used in **rule 26.8 (2) (c) of the C.P.R,** allows the court some measure of flexibility. To my mind, the flexibility that would be afforded in circumstances where orders have been made on more than one occasion and there was a failure to comply, as distinct from where orders are made on one occasion, albeit it is more than one order within the compartment of that occasion, if there is a failure to comply with some of those orders on that single occasion, it ought not to be equated with the failure to comply with orders made on more than one occasion.

[67] In looking at whether there has been general compliance with court orders, the court should look at same, in terms of its flexibility as to whether the non-compliance has been repeated on more than one occasion, arising from separate orders having been made on separate occasions and there having been non-compliance with one or more of those orders, on one or more of those occasions.

[68] Ultimately this court has had to look at the overall interests of justice as per **rule 1.1** and has borne in mind that as it now stands, as at the time when the application was filed, there had been general compliance with the orders of the court, save and except that with respect to certain documents, they were filed and served out of time, as distinct from not having been filed and served at all. To my mind, that meets the flexible standard of general compliance.

[69] It may very well have been different though, if there had been a failure by the claimant, to comply with court orders, on more than one occasion. Everything

though, always should be considered, depending on the particular facts of each particular case.

[70] The claimant has sought, recently, to advance this claim in a way, that will serve to bring his claim to a state of readiness for trial. In the overall circumstances of this case, this court, has concluded that it ought to grant to the claimant relief from sanction.

Rule 26.8 (3)

[71] **Rule 26.8.(3)** which now falls for consideration before this court provides that:

> *'3) In considering whether to grant relief, the court must have regard to –*
>
> *' (a) the interests of the administration of justice;*
>
> *(b) whether the failure to comply was due to the party or the party's attorney-at-law;*
>
> *(c) whether the failure to comply has been or can be remedied within a reasonable time;*
>
> *(d) whether the trial date or any likely trial date can still be met if relief is granted; and*
>
> *(e) the effect which the granting of relief or not would have on each party.'*

[72] As the court reasoned, an integral part of the claimant being in the position that he is in now, is his attorney. Notably, the claimant had moved away from the address that he had provided to his attorney, but there were things that his attorney could have done, or at the very least, done better. Those things though, were, it seems. not done. In the circumstances, the court deems it unjust in all the circumstances of the case to punish the claimant, arising from the legal failures, of his attorney.

Failure has been remedied

[73] The court notes that the claimant has remedied the primary defect, which may have prevented his prosecution of his claim at trial, that being his failure to have filed and served his witness statement within time. Same has been filed and served

and in fact, though not done within the time scheduled by the earlier court order, the same was done long in advance of the scheduled trial date. As it stands, the grant of the relief from sanction is the only matter which stands in his way to proceed to trial. In the opinion of the court, the fact that the claimant has remedied his defects, far in advance of the date when this application was filed. Is a positive factor which weighs in favour of the court granting relief from sanction.

Effect of granting relief on either party

[74] In written submissions, the 1st defendant's counsel has stated that the 1st defendant will suffer prejudice, if relief from sanction is granted, because she has not had sight of the claimant's witness statement, as same is sealed. To this end, the court notes that **rule 29. 7(2)** allows for the claimant to do this, being the first party who filed their witness statement in the matter and correctly served the notice on the defendant. This is not a prejudicial impact which the court is minded to give credence or weight to.

[75] If relief were not to be granted, the claim would be struck out for want of prosecution because no evidence will be able to be led by the claimant at trial. If the relief is granted, the matter will go to trial. The claim will then be tried, with the parties both involved and each party will have the opportunity to test the other party's case and overall that best enures to the overall interests of justice, in a circumstance such as this.

Can trial date be met?

[76] Though the court understands that the defendant may not be ready for trial, that should not be a relevant consideration, in the court deciding whether it should grant relief from sanction to the claimant. If the defendant is not ready at trial, the claimant will put forward his evidence and if there is no case put forward to the contrary, the court will still have to consider the claimant's case and consider whether or not it is credible, and proven to the extent as alleged in the claimant's particulars of claim. Parties are expected to be ready to proceed with the trial of a

claim as and whenever scheduled by this court, to take place. The defendant can still succeed in her defence of the claim, if the claimant does not prove his claim to the requite standard.

[77] There is a difference between the claimant's case and the defendant's case in this regard. Where the claimant fails to file a witness statement on time, it is imperative that the claimant must apply for relief from sanction because otherwise, the claimant will have no case to proffer at trial and if the claimant does not proffer any evidence at trial, then the claimant cannot succeed, because the burden of proof, at least initially, rests on the claimant.

[78] That situation is not the same for a defendant. A defendant does not have to put forward a case to the extent that the claim against him/her has to be proven, unless the defendant in response to the claimant's case, puts forward a *'positive defence*,' in which case, the burden shifts to that defendant to establish her defence on a balance of probabilities. See in that regard: **Murphy on Evidence (12th ed.) at paragraph 4.5.**

[79] In the final analysis it is for the court to drive the litigation process, not the litigants or counsel, based on their assessment as to their readiness. In light of the above, the court is not satisfied that the trial cannot still be maintained.

[80] As adumbrated above, the administration of justice lies in favour of relief from sanction being granted.

Costs

[81] In a case of this nature, the costs of the application are to be awarded to the defendant. Though the claimant was successful in obtaining relief rom sanction, no exceptional circumstance has been shown in affidavit evidence, so as to allow the court to depart from the general rule **in 26.8(4).** It is the claimant that has put the defendant in a position where she had to respond to the claimant's application for relief from sanction. Though the application was made at pre-trial review, given

that the court treated with it separately, the costs of same will need to dealt with separately.

CONCLUSION

[82] Any other submissions raised that have not been addressed, are in the opinion of the court, not worthy of any specific attention, for the purposes of this court's ultimate conclusion, in respect of the specific application that was under consideration.

[83] This is a ruling in terms of the application of the law that has to be confined to the particular facts of this particular case. Every case will vary and the consequences of a failure to comply with a relevant case management orders will vary from case to case. In the circumstances of this case before the court, for the reasons set out above, the court is satisfied that relief from sanction ought to be granted.

DISPOSITION

[84] In the circumstances, the court's orders are as follows:

(1) The claimant's application for relief from sanction, which was filed on January 10, 2022 is granted and the claimant's witness statement which was filed on March 30, 2020 shall be deemed as if having been filed and served within time.

(2) The costs of the said application for relief from sanction, are awarded in favour of the 1st defendant and said costs shall be taxed if not sooner agreed.

(3) The pre-trial review is now scheduled to be held before Anderson J. on March 1, 2022 commencing at 10:00 am for one hour and at that hearing the court shall hear the claimant's application for the appointment of Dr. Denton Barnes as an expert witness which was filed January 10, 2022.

(4) The claimant shall file and serve this order.

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