Any reporting of this decision of the court should be edited to remove the name of each party to protect their identity.

[2025] JMSC Civ 118

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. SU 2019 CV 05159

BETWEEN	**RN**	**CLAIMANT/APPLICANT**
AND	**SKIL**	**1ST DEFENDANT/RESPONDENT**
AND	**SM**	**2ND DEFENDANT/RESPONDENT**

IN CHAMBERS

Messrs. Ian Wilkinson KC and Lenroy Stewart instructed by Messrs. Wilkinson Law for the Claimant/Applicant

Mr Emile Leiba and Ms Samantha Grant instructed by Messrs. DunnCox for the 1st Defendant/Respondent

Mr Neco Pagon instructed by Messrs. Aligned Law for the 2nd Defendant/Respondent

Heard: 22 May 2025 and 26 September 2025

Civil Procedure – Application for relief from sanctions – Multiple applications made by the claimant for relief from sanctions for the failure to file and exchange his witness statement within the time stipulated by order of the court – Application for relief from sanctions refused by the court – Res judicata – Whether the doctrine of res judicata applies to the subsequent application for relief from sanctions – Whether the doctrine of res judicata applies to discretionary decisions which are

made at an interlocutory stage and before any findings of fact are made – Issue estoppel – Whether the doctrine of issue estoppel applies to the subsequent application for relief from sanctions – Whether the doctrine of issue estoppel applies to discretionary decisions which are made at an interlocutory stage and before findings of fact are made – Abuse of process – Whether the application for relief from sanctions amounts to an abuse of the process of the court – Whether the claimant has demonstrated that there has been a material change in circumstances so as to warrant the court's varying or rescinding a previous order of a court of concurrent jurisdiction

Constitutional relief – Whether specific provisions of the rules of the court are unconstitutional – Whether the requisite jurisdiction of the court is invoked to grant constitutional relief – Sections 16(2) and 19, The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, Sections 28 and 48(g), Judicature (Supreme Court) Act, Rules 8.1(3), 8.1(4), 8.8, 26.8(1), (2) and (3), 29.6, 29.11, 56.9 and 56.10, Civil Procedure Rules, 2002, as amended

A. NEMBHARD J

INTRODUCTION

[1] This matter concerns an amended application for relief from sanctions, which is made by the Claimant/Applicant, RN, as a consequence of his failure to file and exchange witness statement(s) within the time stipulated by an Order of the court. The amended application for relief from sanctions raises important considerations in relation to the applicability of the doctrines of res judicata and issue estoppel to discretionary decisions which are made at an interlocutory stage of an action and before any findings of facts have been made. Significantly, the amended application for relief from sanctions also raises important considerations in relation to whether the Claimant/Applicant has demonstrated, on a preponderance of the evidence, that there has been a material change in circumstances, such as to

warrant the Court's varying or rescinding an Order of a court of concurrent jurisdiction.

The amended application for relief from sanctions

[2] The amended application for relief from sanctions is contained in the Amended Notice of Application for Court Orders for Relief From Sanctions and Extension of Time to Comply with Orders, which was filed on 10 December 2024, ("the 10 December application"). By virtue of that application, the Claimant/Applicant, RN, seeks the following relief: -

1. That the Applicant be granted relief from sanctions for failing to file his Witness Statement on or before the 30th day of June 2023.
2. That there be an extension of time within which to file and serve his Witness Statement and Pre-Trial Memorandum.
3. That the time for filing and serving this application be abridged.
4. That the Claimant's witness summary that was filed on July 22, 2024, be permitted to stand as filed in time.
5. Further, or alternatively, that the Court issues a new case management timetable regarding the filing of witness statements.
6. Further, or alternatively, that the Claimant be permitted to file a further witness summary or a further witness statement.
7. Further, or alternatively, that the Claimant be permitted to be called as a witness to give viva voce evidence-in-chief at his trial in lieu of or instead of evidence-in-chief via a witness statement or witness summary.
8. Further, or alternatively, that the Claimant be permitted to be called as a witness and his affidavits which were filed in response to the 1st Defendant's application for summary judgment be utilised in lieu, or instead of, evidence contained in a witness statement or witness summary.
9. That the applicant be permitted to participate actively in the trial to be held of the Claim.

10. A Declaration that the operation and effect of Rules 29.11(1) and 26.8 of the Civil Procedure Rules are in breach of the fair trial rights enshrined in section 16(2) of the Charter of Fundamental Rights and Freedoms and the said rules are unconstitutional, null and void.
11. A Declaration that paragraphs (1)(a) and (2) of rule 26.8 of the Civil Procedure Rules, in their present form, infringe the Claimant's Constitutional rights, except and in so far as they are read as being subject to, at the least, a proviso that relief may exceptionally be granted where their requirements are not met but the interests of Justice so require.
12. That this Honourable Court fixes the date for the trial of the instant Claim.
13. That the costs of this Application to be the costs in the Claim.
14. Such further and/or other Orders as this Honourable Court deems fit.

[3] The application is made on the following bases: -

i. That pursuant to Rule 26.1(2)(c) of the Civil Procedure Rules ("the CPR"), the Court may extend the time for compliance with an order of the Court even if the application for extension is made after the time for compliance has passed.
ii. That pursuant to Rule 26.8(1) of the CPR, the Applicant may make an application for relief from sanctions imposed for a failure to comply with any Order.
iii. That the trial date for this matter will not be affected as the trial period is in the Michaelmas Term in 2025 and the said trial date has not yet been set. It is also the first time that the matter is coming up for trial.
iv. That the Claimant has a good explanation for failing to comply with the Orders, has generally complied with all other Orders and will be severely prejudiced if he is not granted the extension of time and relief from sanctions.

v. That the Defendants will not be prejudiced by the granting of these Orders by this Honourable Court as, among other things, the Claimant has not seen their witness statements.

vi. That it is in keeping with the overriding objective that the Orders sought herein be granted.

vii. That the Claimant has in fact filed and served his witness summary on July 22, 2024. This was well in advance of the trial period of the Michaelmas Term in 2025.

viii. That the Claimant did not and still has not seen any of the witness statements filed on behalf of the Defendants and, therefore, did not obtain any unfair advantage from having not filed and exchanged his witness statement in time.

ix. That at least one of the Defendants also did not file its/his witness statement in time.

x. That the 1st Defendant tried unsuccessfully to obtain summary judgment against the Claimant. This indicates that, at least prima facie, the Court considered that the Claimant has a real prospect of succeeding on the Claim.

xi. That pursuant to Rule 29(3) of the CPR, any evidence taken at the trial or other hearing of any proceedings may be used subsequently in those proceedings. In responding to the summary judgment application, the Claimant filed affidavit evidence which is already disclosed and served on the Defendants. That affidavit evidence is, therefore, available to be relied on by the Claimant. The Court can, therefore, order the Claimant's previously sworn affidavits to be used subsequently at the trial of this claim hereof.

xii. That pursuant to Rule 29(1)(c) of the CPR, the Court may control the evidence to be given at any trial or hearing by giving appropriate directions as to the way in which the evidence is to be placed before the Court, at a case management conference or by other means.

Consequently, the Court can give Orders for the Claimant to give viva voce evidence in lieu, or instead of, the witness summary.

xiii. That the Claimant's right to a fair trial is likely to be breached if he is unable to rely on his witness summary or otherwise give evidence at the trial of the Claim.

xiv. That it is not demonstrably justified in a free and democratic society for the Claimant to be prevented from calling evidence in the specific circumstances of this Claim.

xv. That the Court has an inherent power to grant the relief sought by the Claimant.

xvi. That the Court has a statutory power under section 48(g) of the Judicature Supreme Court Act to – "grant all such remedies as any of the parties thereto appear to be entitled to in respect of any legal or equitable claim properly brought forward by them respectively in such cause or matter; so that as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and multiplicity of proceedings avoided." The Claimant maintains that the current circumstances justify the granting of the relief or remedies being sought by him.

[4] The 10 December application is supported by the Affidavit of RN in support of Application for Court Orders, which was filed on 6 February 2025.

BACKGROUND

[5] In or around February 2017, RN was employed with the 1st Defendant, SKIL, and was working at one of its proprieties situated in the parish of Saint James.[1] A few months later, in or around September 2017, RN was dismissed. RN alleges that SKIL breached its contract of employment and wrongfully dismissed him.

[1] See – Paragraphs 1, 2 and 5 of the Particulars of Claim, which was filed on 31 December 2019

[6] RN alleges further that, during the course of his employment, he was subjected to continuous and intense unwanted sexual advances, sexual comments, sexual touching, sexual contact and eventual sexual assault by the 2nd Defendant, SM.[2] SM was employed by SKIL, during the course of RN's employment.[3] [4]

[7] RN asserts that this sexual harassment continued unabated despite the numerous reports which he made to SKIL's Human Resource Manager and other authorized personnel. RN alleges that his reports were not investigated and further, that no action was taken by any of the other agents and/or servants of SKIL. It is RN's contention that SKIL neglected to provide a safe working environment by failing to take all the reasonable and necessary steps to ensure his safety during his tenure.[5] Consequently, RN alleges that he sustained personal injuries, endured pain and suffering, suffered damage and loss and incurred expense.[6]

The substantive claim

[8] In his Claim Form, which was filed on 31 December 2019, RN seeks from both the Defendant Company, SKIL and the 2nd Defendant, SM, Damages for negligence, Damages for trespass to the person, aggravated and/or exemplary Damages, interest and costs. RN also seeks Damages for breach of contract and Damages for wrongful dismissal as well as interest from the Defendant Company.[7]

[9] Conversely, SKIL alleges that RN was initially employed on a three-month, fixed-term contract, which commenced on or about 1 February 2017 and ended on or about 2 May 2017. SKIL further alleges that RN was issued a second fixed-term contract for the period of 19 May 2017 to 17 August 2017.[8] The Defendant Company largely denies that RN is entitled to any Damages, interest and costs from it, and further, that RN has no basis for his claim of wrongful dismissal.[9]

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[2] See – Paragraph 6 of the Particulars of Claim, which was filed on 31 December 2019
[3] See – Paragraph 3 of the Defence of the 1st Defendant, which was filed on 19 March 2020
[4] See – Paragraph 6.5 of the Defence of the 2nd Defendant, which was filed on 29 April 2020
[5] See – Paragraphs 7 – 13 of the Particulars of Claim, which was filed on 31 December 2019
[6] See – Paragraphs 15, 17 and 18 of the Particulars of Claim, which was filed on 31 December 2019
[7] See – Claim Form, which was filed on 31 December 2019
[8] See – Paragraph 1 of the Defence of the 1st Defendant, which was filed on 19 March 2020
[9] See – Paragraph 18 of the Defence of the 1st Defendant, which was filed on 19 March 2020

[10] The 2nd Defendant also denies the allegations levied against him by RN. SM maintains that he neither engaged in a course of conduct that would amount to sexual harassment. The 2nd Defendant further alleges that he did not cause or contribute to the alleged injuries, loss, damage or incurred expense that RN contends arose from the alleged negligence and trespass to the person.[10]

Chronology

The previous applications for relief from sanctions

[11] On or about 14 and 15 February 2022, the Learned Master, Miss R. Harris, ordered that witness statements were to be filed and exchanged on or before 30 June 2023.[11] RN failed to comply with this Order of the court and subsequently filed a Notice of Application for Court Orders for Relief from Sanctions and Extension of Time to comply with Orders on 8 March 2024, ("the 8 March application"). By virtue of that application, RN sought an Order that he be granted relief from sanctions for failing to file his witness statement on or before 30 June 2023, among other Orders.

[12] The 8 March application was supported by the Affidavit of Antonio Davis in Support of Notice of Application for Court Orders (relief from sanctions and extension of time to file witness statement), which was also filed on 8 March 2024.

[13] The record of the court reflects that the 8 March application was not advanced by the Claimant/Applicant, he having elected instead to pursue the application for relief from sanctions for the failure to file his witness statements, which was subsequently filed on 22 July 2024 ("the 22 July application").

[14] The 22 July application was heard by A. Thomas, J, on or about 24 July 2024, who refused to grant the Orders sought therein.

[10] See – Paragraph 3 of the Defence of the 2nd Defendant, which was filed on 29 April 2020
[11] See – Paragraph 4 of the Formal Order, which was filed on 15 February 2022

THE ISSUES

[15] The salient issue which is raised by the 10 December application for the Court's determination is distilled as follows: -

i. Whether the Court ought properly to grant the application for relief from sanctions and order an extension of time for the Claimant/Applicant to file and exchange his Witness Statement.

[16] In seeking to determine this issue, the following sub-issues must also be resolved: -

i. Whether the doctrines of res judicata and issue estoppel are applicable to the 10 December application for relief from sanctions.
ii. Whether the 10 December application for relief from sanctions is an abuse of the process of the court.
iii. Whether the Claimant/Applicant has demonstrated, on a preponderance of the evidence, that there has been a material change in circumstances, such as to warrant the Court's varying or rescinding an Order of a court of concurrent jurisdiction.

THE LAW

The Constitutional framework

The relevant sections of the Jamaican Constitution

[17] The right to due process is one of the many rights which are enshrined in Jamaica's Constitution. Persons who allege that their constitutional rights have been infringed are entitled to apply to the Island's Supreme Court for redress. Sections 16(2) and 19 of the Charter of Fundamental Rights and Freedoms of the Constitution provide as follows: -

> *"16 (2) In the determination of a person's civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interests, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law.*

…

19 (1) If any person alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.[12]

(2) Any person authorized by law, or, with the leave of the Court, a public or civic organization, may initiate an application to the Supreme Court on behalf of persons who are entitled to apply under subsection (1) for a declaration that any legislative or executive act contravenes the provisions of this Chapter.

(3) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this Chapter.

(4) Where any application is made for redress under this Chapter, the Supreme Court may decline to exercise its powers and may remit the matter to the appropriate court, tribunal or authority if it is satisfied that adequate means of redress for the contravention alleged are available to the person concerned under any other law."

[18] Section 28 of the Judicature (Supreme Court) Act makes provision for the exercise of the jurisdiction of the Supreme Court. The section reads as follows: -

"28. Such jurisdiction shall be exercised so far as regards procedure and practice, in manner provided by this Act, and the Civil Procedure Rules and the law regulating criminal procedure, and by such rules and orders of court as may be made under this Act; and where no special provision is contained in this Act, or in such Rules or law, or in such rules or orders of court, with reference thereto, it shall be exercised as nearly as may be in the same manner as it might have been

[12] See – Rules 56.9 and 56.10 of the Civil Procedure Rules, 2002 (as amended). These rules provide that an application for an administrative order must be made by a fixed date claim in form 2, along with affidavit evidence specifically alleging the provision of the Constitution which the Claimant alleges has been, is being or is likely to be breached.

exercised by the respective Courts from which it is transferred or by any such Courts or Judges, or by the Governor as Chancellor or Ordinary."

[19] Section 48(g) of the Judicature (Supreme Court) Act is also relevant for present purposes. The section states: -

"48. (g) With respect to the concurrent administration of law and equity in civil causes and matters in the Supreme Court the following provisions shall apply –

(a) …

….

(g) The Supreme Court in the exercise of the jurisdiction vested in it by this Act in every cause or matter pending before it shall grant either absolutely or on such reasonable terms and conditions as to it seems just, all such remedies as any of the parties thereto appear to be entitled to in respect of any legal or equitable claim properly brought forward by them respectively in such cause or matter; so that as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and multiplicity of proceedings avoided."

[20] McDonald-Bishop JA (as she then was) in the authority of **The Attorney General v Cenitech Engineering Solutions Limited & Ors**,[13] in determining how the court's jurisdiction should properly be exercised pursuant to section 48(g) of the Judicature (Supreme Court) Act, made the following pronouncements: -

"[90] This section means that for the court to grant relief not expressly sought, the claim must be properly brought forward by the relevant party to whom the relief is being given in that cause or matter. If section 48(g) is not satisfied, the CPR cannot assist because it can create no jurisdiction and only makes provision for how the court's jurisdiction should be exercised. With this in mind, it is quite obvious that Cenitech did not bring itself within section 48(g) of the Judicature (Supreme Court) Act for constitutional relief to be granted, especially in the form of damages, because it failed to comply with the procedural requirements prescribed by the CPR for the bringing of such a claim. On no objective reading…The fact that a

[13] [2023] JMCA Civ 52

claim "may" have been brought is not the same as saying one was "properly brought forward" as the law requires. Also, the fact that a claim "may" have been brought does not fit within the provision of rule 56.10(1) (even if that rule were applicable). The rule expressly states that an applicant may include, in an application for an administrative order, "a claim for any other relief or remedy" that arises out of or is related or connected to the subject matter of an application for an administrative order.

…

[98] Given all I have said above, I am clearly of the view that rule 56.10 of the CPR was not engaged to permit the court to grant constitutional relief in the absence of a claim for that relief….".

The law in relation to applications for relief from sanctions

[21] Where a party falls into a state of being sanctioned for non-compliance, either by way of a sanction which is imposed by the Civil Procedure Rules, 2002, as amended ("the CPR") or by way of a court-imposed sanction, that party must petition the court for relief from same. Procedurally, this is done by promptly filing an application for relief from sanctions, accompanied by an affidavit in support.[14] Rules 26.8(2) and 26.8(3) of the CPR details the considerations to which the court must have regard when deciding whether to grant the relief which the non-compliant party seeks. These rules provide as follows: -

"26.8(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.

26.8(3) In considering whether to grant relief, the court must have regard to –

[14] Rule 26.8(1) of the CPR stipulates: "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."

(a) the interests of the administration of justice;

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

(c) whether 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."

The importance of promptitude

[22] Rule 26.8(1) of the CPR mandates that an applicant who seeks relief from sanctions must make that application promptly and must support that application by evidence contained in an affidavit. Undoubtedly, promptitude is the most important criterion for an applicant to meet on an application for relief from sanctions. A court is not obligated to have regard to the other considerations delineated in the CPR, where it finds that the application is not made promptly.[15] D Fraser JA, in the authority of **Norman Washington Burton v The Director of Public Prosecutions**,[16] stated that the establishment of promptitude is a *sine qua non*, a condition precedent, to the court's ability to grant relief from sanctions. The learned Judge of Appeal is quoted as follows: -

"[54] …The fact that in several cases courts have gone on to consider the factors listed in rule 26.8(2) and sometimes those in rule 26.8(3), despite concluding that the requirements of rule 26.8(1) have not been satisfied, does not diminish the fact that non-compliance with 26.8(1) is an absolute bar to relief being granted. Whatever the reason a court decides to assess the merit of an application against the requirements of rule 26.8(2) and (3), after determining that rule 26.8(1) has not been complied with, either (and usually) to show that the application was generally hopeless or, that, but for the non-compliance with rule 26.8(1) the application may

[15] See – Paragraphs 36 and 37 of the **Price Waterhouse (A Firm) v HDX 9000 Inc** [2016] JMCA Civ 18 and **Meeks v Meeks**

[16] [2023] JMCA Civ 30

have been granted, it does not change the fact that rule 26.8(1) must be complied with, for the application to proceed.

[55] Therefore, from my examination of rule 26.8 of the CPR and consideration of cases interpreting its application, it appears the effect of paragraphs (1) to (3) of that rule is as follows:

> *(a) an application for relief from sanctions cannot be granted unless it has been made promptly and supported by affidavit. 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 elasticized to bring circumstances within its compass. If the court decides that the application was not made promptly, the application must be refused and there is no discretion to exercise – paragraph 1:* ***National Irrigation Commission Ltd v Conrad Gray and Marcia Gray*** *para [16];* ***Morris Astley v The Attorney General of Jamaica and Another*** *para. [39];* ***H B Ramsay and Associates Ltd et al v Jamaica Redevelopment Foundation Inc et al*** *paras. [9], [10] and [31];* ***Universal Hospital Board of Management v Hyacinth Matthews*** *para. [40];* ***Price Waterhouse (A Firm) v HDC 9000 Inc.*** *para [36];* ***Meeks v Meeks*** *para [26]; and* ***National Workers Union v Shirley Cooper*** *para. [69];*
>
> *(b) if paragraph 1 has been satisfied it is only then that the discretion of the court to grant relief is potentially activated. It will only be activated if all three conditions precedent in paragraph 2 are satisfied, namely the failure to comply was not intentional, there is a good explanation for the failure and the party in default has generally been compliant with all other relevant rules, practice directions, orders and directions. The factors are cumulative – paragraph 2:* ***Morris Astley v The Attorney General of Jamaica and Another*** *para. [39];* ***H B Ramsay and Associates Ltd et al v Jamaica Redevelopment Foundation Inc et al*** *para [31];* ***Universal Hospital Board of Management v Hyacinth Matthews*** *paras. [39] – [41]; and* ***Price Waterhouse (A Firm) v HDX 9000 Inc*** *para. [37];*
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> *(c) if paragraphs 1 and 2 have been complied with, in deciding whether to exercise the discretion activated under paragraph 2, the court is mandated*

to have regard to the factors listed in paragraph 3 as may be relevant to the circumstances of the particular case – paragraph 3: ***Morris Astley v The Attorney General of Jamaica and Another*** *para [39]; and* ***Universal Hospital Board of Management v Hyacinth Matthews*** *para. [50].”*

[23] Brooks JA (as he then was) in **Price Waterhouse (a Firm) v HDX 9000 Inc**[17] opined as follows: -

> *“[36] It was stated in* ***HB Ramsay****, that there was a degree of flexibility in the assessment of the promptitude of an application. It may well be that the explanation for what may at first blush seem a delay demonstrates that the application was indeed made promptly.* ***Each case would turn on its own facts. If, however, the court is of the view that the application was not made promptly, and there is no application for extension of time, the application for relief from sanction should fail.***
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> *[37]* ***The learned judge in this case, having found that the application had not been made promptly, was therefore, in error to have continued to consider the other aspects of rule 26.8. He compounded that error when he went on to consider the provisions of rule 26.8(3), despite his finding HDX had not complied with all the provisions of rule 26.8(2)*** *…* ***Rule 26.8(2) is definitive in its terms. It clearly states that the court may only grant relief if it were satisfied that all three aspects of paragraph (2) have been satisfied…***
>
> *The learned judge, not having been satisfied of the application of those three aspects, ought not to have granted relief from sanctions. His reference to the criteria in paragraph (3) on the basis of applying the overriding objective was misguided. Judges must be reminded that resort to the overriding objective may only be had in the absence of specific provisions which are clear in their meaning.”*
>
> ***[Emphasis added]***

[24] If the preconditions which are set out in rule 26.8(1) of the CPR are met, then the court must proceed to consider the application of rule 26.8(2) of the CPR and thereafter that of rule 26.8(3) of the CPR. In **New Falmouth Resorts Limited v**

[17] [2016] JMCA Civ 18

National Water Commission,[18] President Morrison identified the following considerations to which a court must have regard when determining an application for relief from sanctions: -

> *"[47] …on an application for relief from sanctions under rule 26.8(2),(i) the court must be satisfied that the particular sanction was properly imposed; (ii) the default position in relation to an 'unless' order, that is, the position that will obtain in the absence of a case for relief from sanctions being made out by the applicant, is that the sanction imposed for failure to comply with the order will follow; (iii) if the application is combined with an application to vary or revoke a previous order, that application should generally be considered first; (iv) an applicant for relief from sanctions must comply with all three requirements of rule 26.8(2) as a precondition to obtaining relief; (v) in considering whether that threshold has been crossed, the court must also consider the factors listed in rule 26.8(3), together with any other relevant considerations will, taking into account the circumstances of the particular case, enable the court to deal with the matter justly; and (vi) the judge hearing the application should demonstrate that he or she has considered and balanced all the factors relevant to the particular case and in keeping with the overriding objective."*

Good explanation

[25] If a party fails to demonstrate that there is a good explanation for the non-compliance, then the application fails. In addressing the requirement that there be a good explanation for the failure to comply, Brooks JA (as he then was) referred to the authority of **The Attorney General v Universal Projects**.[19] There the Board of the Privy Council considered similarly worded provisions of the Civil Procedure Rules of Trinidad and Tobago. At paragraphs [22] and [23], Brooks JA stated as follows: -

> *"[22] Where there is no good explanation for the default, the application for relief from sanctions must fail. Rule 26.8(2) stipulates that it is a precondition for granting relief, that the applicant must satisfy all three elements of the paragraph. The Privy Council, in* ***The Attorney General v Universal Projects Ltd*** *[2011] UKPC 37, in*

[18] [2018] JMCA Civ 13
[19] [2011] UKPC 37

considering a similarly worded rule, used in the Civil Procedure Rules of Trinidad and Tobago, held that the absence of a "good explanation" within the meaning of the rule, was fatal to the application. Their Lordships, in that context, said at paragraph 18 of their opinion:

'The Board has reached the clear conclusion that there is no proper basis for challenging the decision of the courts below that there was no "good explanation" within the meaning of [the rule equivalent to rule 26.8(2)(b) of the CPR] for the failure to serve a defence by 13 March. ***That is fatal to the Defendant's case in relation to*** *[the rule equivalent to rule 26.8 of the CPR]* ***and it is not necessary to consider the challenge to the other grounds on which the Defendant's appeal was dismissed by the Court of Appeal****.'"*

[Emphasis applied]

[26] Lastly, the court must consider whether the party in default has generally complied with all other Orders, rules and directions. In this regard, Brooks JA opined that: -

"[27] … a court assessing an application for relief from sanctions should not be restricted to considering the applicant's conduct prior to the application of the sanction; subsequent action may well indicate the attitude of the applicant to the progress of the matter. In any event, not all sanctions inflict a penalty that is fatal to that party's case. In such cases, subsequent action should be considered."

The law in relation to applications for extension of time

[27] There is a fundamental difference between applying for an extension of time before a time limit has expired and seeking relief from a sanction after the event.[20] Generally, a party who finds himself unable to comply with an Order or direction in time, or who is already in breach and has not been able to agree an extension with the other party or parties to a claim, must make an application asking the court to extend the time for compliance.[21] The court has a general power to extend or shorten time for compliance with any rule, practice direction, Order or direction of

[20] See – **Robert v Momentum Services Ltd** [2003] EWCA Civ 299, [2003] 1 WLR 1577. See paragraph 46.23 of the text, Blackstone's Civil Practice 2012, Oxford University Press

[21] See – Pages 180 – 181 of the **Commonwealth Caribbean Civil Procedure**, Third Edition, Gilbert Kodilinye and Vanessa Kodilinye, Routledge Cavendish.

the court, even if the application for an extension of time is made after the time for compliance has passed.[22]

[28] Notably, in considering whether such an application has been made promptly, the court ought to calculate the time from the point that the litigant was first in breach of the rule(s) and the matter cannot proceed without reference to the courts.[23] The pronouncements of Harrison, Langrin and Panton JJJA in the authority of **Leymon Strachan v Gleaner Company Ltd and Dudley Stokes**,[24] illustrate the principles by which a court ought properly to be guided when considering an application for extension of time. The court is tasked with considering the length of the delay, the reason(s) for the delay[25] as well as the possibility of prejudice to the other party or parties, and the overriding objective of dealing with cases justly. Admittedly, the circumstances before the Court of Appeal in the **Leymon Strachan** authority concerned an application for an extension of time to apply for leave to appeal. Notwithstanding, the guiding principles have been applied by other courts which are faced with applications for extension of time to comply with various other rules or Orders.

[29] Harrison JA is quoted as follows: -

> *"In considering the grant of extension of time, the court is guided by the awareness of the fact that the applicant has been tardy in his conduct and notwithstanding the delay, seeks the exercise of the discretion of the court. The court is also mindful of the merits of the applicant's case, because it would be futile to allow him to proceed, where it is apparent that his case is bound to fail at trial. The authorities show how the courts have considered this issue.*
>
> *The reasons for the delay must be given by the applicant and if his affidavit fails to disclose a sufficiently satisfactory one, the court is unlikely to exercise its discretion in his favour. In* ***City Printery v Gleaner Co****. [1968] 13 W.I.R. 127, an application*

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[22] See – Rule 26.1(2)(c) of the Civil Procedure Rules, 2002, as amended

[23] See – **Philip Hamilton (Executor in the Estate of Arthur Roy Hutchinson, Deceased, testate) v Frederick Flemmings & Anor** [2010] JMCA Civ 19, per Phillips JA at paragraph 41

[24] (Motion No. 12/1999 – judgment delivered 6 December 1999)

[25] The applicant in that authority alleged that the reason for his delay was due to his impecuniosity and Harrison JA found that this was a plausible reason, sufficiently explaining the delay.

for extension of time within which to file the record of appeal was refused, the Court of Appeal holding that the delay of almost two years caused by the fact of clerical changes in the office of the applicant's solicitor was not a sufficient reason to attract the exercise of the court's discretion. Luckhoo, J.A., cautioning that the discretion must be judicially exercised, referred to the observation of the Judicial Committee of the Privy Council in ***Ratnam v Cumarasamy*** *[1964] 3 All E.R. 933. In upholding the decision of the Supreme Court of the Federation of Malaya [sic], dismissing an application for extension of time within which to file the record of appeal, the Board observed:*

'The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were, otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.'"

[30] The legal position may therefore be summarized thus:

i. the rules and Orders of the court provide a timetable for the conduct of litigation and must, prima facie, be obeyed.

ii. where there is non-compliance with the timetable established by the court, it has a discretion to extend time.

iii. in exercising its discretion, the court will consider –

   a. the length of the delay.

   b. the reason(s) for the delay.

   c. whether there is an arguable case with a realistic prospect of success.

   d. the degree of prejudice (if any) to the other party or parties if time is extended.

   e. notwithstanding the absence of a good reason for the delay, the court is not bound to reject an application for an extension of

time, as the overriding principle is that justice must be done.[26] [27]

THE SUBMISSIONS

The submissions advanced on behalf of the Claimant/Applicant

The applicability of the doctrines of res judicata, issue estoppel and abuse of process

[31] Learned Counsel Mr Lenroy Stewart, in his written submissions, asserted that the decision to grant an application for relief from sanctions is an exercise of discretion on an interlocutory application. In some circumstances, Mr Stewart asserted, it is permissible for a second application to be advanced even though a previous application, which sought the same relief, was heard and refused on its merits. Mr Stewart maintained that whether or not a subsequent application amounts to an abuse of the court's process or will be affected by the doctrines of res judicata or issue estoppel will depend on the reasons for which the first application was refused. Also significant, Mr Stewart submitted, is whether new material or evidence, which was not previously available, is placed before the court. To buttress these submissions, Mr Stewart referred the Court to the authorities of **Rohan Smith v Elroy Pessoa & Another**,[28] **Woodhouse v Consignia Plc**,[29] **Koza Limited and Anor v Koza Altin Isletmeleri AS**,[30] **Thevarajah v Riordan**[31] and **Nominal Defendant v Manning**.[32]

[26] [2010] JMCA Civ 4
[27] See also**, The Attorney General of Jamaica & Western Regional Health Authority v Rashaka Brooks Jnr (a minor by Rashaka Brooks Snr (his father and next friend)** [2013] JMCA Civ 16
[28] [2014] JMCA App 25
[29] [2002] EWCA Civ 275
[30] [2020] EWCA Civ 1018
[31] [2015] UKSC 78
[32] [2000] NSWCA 80

Promptitude

[32] In reliance on the authority of **Ray Dawkins v Damion Silvera**[33] and **National Irrigation Commission Limited v Conrad Gray & Marcia Gray**,[34] Mr Stewart submitted that the term 'promptly' has flexibility in its application. In the present instance, the Court was urged to exercise some degree of flexibility in light of the following: -

i. That there is only a trial period, but no trial date, set for the matter.

ii. That at least one of the Defendants/Respondents was also in breach.

iii. That the Claimant/Applicant was facing significant personal and health challenges and other challenges.

iv. That the breach has been remedied, in that, a witness summary was filed on the Claimant/Applicant's behalf, and a witness statement was also filed.

v. That the Claimant/Applicant did not gain any unfair advantage as he has not yet seen the Defendants/Respondents' witness statements.

vi. That the Defendants/Respondents will not be prejudiced by the grant of relief from sanctions.

vii. That, as a worst-case scenario, which the Claimant/Applicant is not recommending, the Defendants/Respondents can be adequately compensated by way of an Order for Costs.

The inherent jurisdiction and inherent power of the court

[33] Finally, in relation to the 10 December application, RN relies on the court's inherent power and inherent jurisdiction. In this regard, Mr Stewart referred the Court to the authorities of **Erldine Henry Brown v Jamcon Engineering Limited and Robert**

[33] [2018] JMCA Civ 25
[34] [2010] JMCA Civ 18

Murray[35] and **Fenella Kennedy-Holland et al v Joan Williams et al**.[36] Mr Stewart submitted that the Court has the tools to permit the Claimant/Applicant to advance his Claim by relying on affidavits which are already filed in the Claim and by permitting him to give viva voce evidence at trial.

The submissions advanced on behalf of the 1st Defendant/Respondent

[34] For their part, Learned Counsel Mr Emile Leiba and Learned Counsel Ms Samantha Grant, in their concise and comprehensive written submissions, asserted that the 10 December application seeks, directly or indirectly, relief from sanctions, to permit the Claimant/Applicant to file and exchange his witness statement or to rely on his witness summary, witness statement or viva voce evidence.

The doctrines of re-litigation, res judicata and issue estoppel

[35] Mr Leiba and Ms Grant submitted that the 10 December application ought properly to be struck out on the bases that: -

i. it is an abuse of the processes of the court.

ii. it runs afoul of the doctrines of re-litigation, res judicata and issue estoppel.

iii. the Court is unable to grant the Declarations and Constitutional relief which is sought by way of the 10 December application because its proper jurisdiction was not engaged or, in the alternative, that the improper forum was engaged.

[36] The issue of whether to grant the Claimant/Applicant relief from the sanction imposed by rule 29.11 of the CPR to permit him (the Claimant/Applicant) to rely on his witness statement/summary, was determined by the court in the decision of A. Thomas J, which was handed down on 24 July 2024. This issue, Mr Leiba maintained, is again being raised by the Claimant/Applicant, by way of the 10

[35] Suit No. B 323 OF 1998
[36] Claim No. 2008 HCV 01916

December application. Furthermore, the decision of 24 July 2024 was made by a court of competent and concurrent jurisdiction and is embodied in a judicial decision of the court. By seeking to raise the very same issue, by way of the 10 December application, the Claimant/Applicant is seeking to re-litigate a point which was distinctly put in issue in an earlier proceeding and is estopped from doing so again.

[37] Finally, Mr Leiba submitted, the Claimant/Applicant is barred by virtue of the principles of res judicata, issue estoppel, re-litigation and abuse of process. To buttress these submissions, the Court was referred to the authorities of **Matheson v Watts**,[37] **National Commercial Bank v O'Gilvie & Ors**,[38] **Suzette Curtello v The University of the West Indies**[39] and **Kimola Merritt v Dr Ian Rodriquez & Anor**.[40]

The failure to file an appeal in respect of the Orders made on the 22 July application

[38] The Court was urged to find that the Claimant/Applicant failed to exercise his recourse in the Court of Appeal and that he has not alleged or maintained that there is a material change in circumstances since the time of the handing down of the decision of A. Thomas, J. To that end, Mr Leiba submitted, there is no basis on which the Court could be asked to vary the Order of A. Thomas, J, which was made on 24 July 2024.

[39] It was further submitted that the Claimant/Applicant, by seeking to amend his 8 March application, is attempting to circumvent the Order of the court, which was made on 24 July 2024, by seeking to re-litigate his application for relief from sanctions.

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[37] [2018] JMSC Civ 144
[38] [2015] JMCA Civ 45
[39] [2023] JMCA Civ 11
[40] [2015] JMCA Civ 31

The application for Constitutional relief

[40] In this regard, Mr Leiba asserted that it is trite that an application for constitutional relief must be made in accordance with Part 56 of the CPR. Mr Leiba maintained that the Claimant/Applicant has not alleged that the application/interpretation of Rule 29.11 of the CPR, by the learned judge, infringed his Constitutional rights, thereby engaging the appellate jurisdiction of the Court of Appeal. Rather, the Claimant/Applicant simply seeks to challenge the constitutionality of rules 29.11 and 26.8 of the CPR. In either case, Mr Leiba submitted, the application is improper, and the reliefs sought cannot be granted on an interlocutory application. In support of this submission, Mr Leiba relied on the authority of **The Attorney General v Cenitech Engineering Solutions Limited et al**.[41]

The merits of the 10 December application

[41] To succeed on the 10 December application, it was submitted that the Claimant/Applicant must satisfy the Court of the following: -

i. That there is a material change in circumstances since the 24 July 2024 decision of A. Thomas, J.
ii. That the facts on which the 24 July 2024 decision of A. Thomas, J was made had been misstated.
iii. That there was a grave mistake on the part of the learned Judge.

[42] Mr Leiba submitted that none of the foregoing have been satisfied by the 10 December application. There is no evidence before the Court to explain why the information, which is contained in the RN Affidavit, which was filed on 6 February 2025, was not previously placed before the court. Nor has the Claimant/Applicant made any averments of a change of circumstances, so as to warrant a revisiting of the decision of A. Thomas, J, which was handed down on 24 July 2024.

[43] It was further submitted that, having regard to the fact that the purported affidavit of merit was filed belatedly, on 6 February 2025, and that same was not served with the 8 March 2024 or 10 December 2024 applications, that affidavit ought not

[41] [2023] JMCA Civ 52

to be considered in any event. To substantiate these submissions, Mr Leiba relied on the authorities of **HB Ramsay & Associates Limited et al v Jamaica Redevelopment Foundation Inc and Anor**,[42] **The Administrator General for Jamaica v White Diamond Hotels & Resorts Limited**[43] and **Aston Wright v Attorney General of Jamaica**.[44]

[44] In the final analysis, Mr Leiba and Ms Grant submitted that: -

i. the Claimant/Applicant failed to exercise his recourse to appeal the decision, which was made on 24 July 2024, the only avenue which was open to the Claimant/Applicant to disturb the decision of A. Thomas, J.
ii. the 10 December application ought properly to be struck out or otherwise refused, on the basis of the applicability of the doctrines of res judicata, issue estoppel, re-litigation, and abuse of process.
iii. in any event, the Constitutional relief, which is sought therein, ought not to be granted, as the jurisdiction of this Honourable Court has not been invoked.
iv. alternatively, the 10 December application, if granted, will have the effect of revoking the Order made on 24 July 2024.
v. the 10 December application ought to be refused on the merits, the Claimant/Applicant having failed to satisfy the test of promptitude, there being no good reason/explanation for the delay, and on the basis that the Claimant/Applicant has not generally complied with the Orders of the court.

The submissions advanced on behalf of the 2nd Defendant/Respondent

[45] Learned Counsel Mr Neco Pagon, in his fulsome and equally comprehensive written submissions, reminded the Court that this is the Claimant/Applicant's second attempt to obtain relief from the sanction imposed for failing to file and

[42] [2013] JMCA Civ 1
[43] [2025] JMSC Civ 39
[44] [2022] JMSC Civ 25

exchange a witness statement, within the time stipulated by the relevant Order of the court. This, Mr Pagon maintained, arises from the fact of an application, which was initially filed on 8 March 2024, and a subsequent application, which was filed on 22 July 2024. These applications essentially sought the same relief. Mr Pagon asserted that, at a Pre-Trial Review Hearing, which was held on 24 July 2024, the Claimant/Applicant elected to proceed with the application, which was filed on 22 July 2024. That application was refused by A. Thomas, J on the same day.

[46] The Claimant/Applicant now seeks to resurrect the application, which was made on 8 March 2024, to include a challenge to the Constitution, by the assertion that rules 29.11(1) and 26.8 of the CPR are unconstitutional. This because their operation infringes on the Claimant/Applicant's right to a fair hearing, as guaranteed by section 16(2) of the Constitution of Jamaica. Mr Pagon submitted that this application is procedurally improper, without merit and amounts to an impermissible collateral attack on the Order of A. Thomas, J. The Court was urged to dismiss the application in its entirety, with costs against the Claimant on an indemnity basis.

[47] Further, Mr Pagon submitted that the application filed on 8 March 2024 constitutes an abuse of process on two distinct but related bases: -

(i) the Claimant/Applicant pursues an application for relief from sanctions in circumstances where there has been no significant change of circumstances.

(ii) the Claimant/Applicant seeks to invoke the Constitution of Jamaica instead of pursuing the normal procedures for challenging the decision of A. Thomas, J, who refused the application for relief from sanctions.

[48] Mr Pagon maintained that the Court is precluded from permitting the Claimant/Applicant to testify at trial unless he (the Claimant/Applicant) has satisfied the requirements of rule 26.8 of the CPR. To that end, regardless of how the

Claimant/Applicant seeks to classify the 8 March application, it is a successive application for relief from sanctions.

[49] With regard to the second basis, Mr Pagon submitted that the Claimant/Applicant is seeking to obtain relief under the Constitution of Jamaica, in circumstances where there is no apparent or discernible bona fide basis on which to do so. To substantiate this submission, Mr Pagon referred the Court to section 19(4) of the Constitution and the authority of **Bengal Development Company Limited v Wendy A. Lee and Ors**.[45]

[50] It was further submitted that section 16(2) of the Constitution of Jamaica guarantees the right to a fair hearing in the determination of a person's civil rights and obligations. Rules 29.11(1) and 26.8 of the CPR do not infringe upon this Constitutional right, as they are designed to ensure procedural fairness, efficiency and the proper administration of justice, while preserving the Claimant/Applicant's ability to access the court. The right to a fair hearing is not absolute as it is expressly limited by section 13(2) of the Constitution, which permits limitation of the right where it is demonstrably justified to do so. To buttress this submission, Mr Pagon referred to the authorities of **Dale Virgo and ZV (by her mother and next friend, Sherine Virgo) v Board of Kensington Primary School, Ministry of Education, Attorney General of Jamaica and Office of the Children's Advocate**[46] and **Julian Robinson v Attorney General of Jamaica**.[47]

[51] Mr Pagon asserted that rule 29.11 of the CPR enables the establishment of a procedural timeline in respect of the obligation which a litigant has to present the evidence upon which he intends to rely at trial and to notify the opposing party of same. This rule, Mr Pagon maintained, applies equally to both a claimant as well as a defendant.

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[45] [2025] JMCA Civ 9
[46] [2024] JMCA Civ 33
[47] [2019] JMFC Full 04

[52] The Court of Appeal, in the authority of **Al-Tec Inc Limited v James Hogan and Renee Lattibudaire**[48] and the Full Court, in the authority of **Kevin Simmonds v Minister of Labour and Social Security & the Attorney General**,[49] explored the scope of the right to a fair hearing, a fair hearing within a reasonable time and a fair hearing by an independent and impartial court or authority, as is guaranteed by section 16(2) of the Constitution of Jamaica. The principles to be distilled from these authorities are that a civil proceeding is considered 'fair' in the following circumstances: -

a. if the parties have been given the opportunity to be heard.
b. when it is conducted within a reasonable time.
c. when it is conducted in a manner that provides the parties with a reasonable opportunity to present their case to the court, under conditions that do not place one party at a substantial disadvantage in comparison to the other (the principle of equality of arms).
d. when it is conducted by an independent and unbiased tribunal.

[53] To substantiate these submissions, Mr Pagon relied on the authority of **Karen Teshira v Attorney General of Trinidad and Tobago and Ors**.[50]

ANALYSIS AND FINDINGS

The sanction for failing to file and exchange a witness statement or a witness summary within the time stipulated by the court

[54] In civil litigation, the filing and exchanging of witness statements or witness summaries, within the time stipulated by the relevant Order of the court, are of utmost importance. This is particularly so because a party who fails to do so may find himself precluded from calling or otherwise relying on that witness' evidence.

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[48] [2019] JMCA Civ 9
[49] [2022] JMFC FULL 02
[50] Claim No. CV2011-03941 (unreported) (Trinidad and Tobago High Court) judgment delivered on May 16, 2012

[55] In this regard, the regulatory framework, as established by the CPR, is designed to ensure procedural fairness, efficiency and the proper administration of justice, while preserving a litigant's ability to access justice through the court. For example, rule 29.11 of the CPR enables the establishment of a procedural timeline in respect of the obligation which a litigant has to present the evidence upon which he intends to rely at trial and to notify the opposing party or parties of the same. The rule applies equally to both a claimant as well as a defendant.

[56] Sanctions for non-compliance with the rules of the CPR, or with the directions and/or Orders of the court take immediate and automatic effect upon the failure to comply and will remain in place until the defaulting party applies for and successfully obtains relief from the court.[51] Rule 29.6 of the CPR establishes the regulatory framework and provides, in part, as follows: -

> "*29.6 (1) A party who is –*
>
> *(a) required to serve; but*
>
> *(b) not able to obtain,*
>
> *A witness statement may serve a witness summary instead.*
>
> *…*
>
> *(5)* ***A witness summary must be served within the period in which a witness statement would have had to be served.***
>
> *(6) Where a party provides a witness summary, so far as practicable, rules 29.4 (requirement to serve witness statements), 29.7 (procedure where party does not serve witness statements) and 29.8 (witness to give evidence) apply to the summary.*
>
> *…"*

[57] Rule 29.11 of the CPR reads as follows: -

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[51] Rule 26.7(2) of the CPR states: "*Where a party has failed to comply with any of these Rules, a direction or any order, any sanction for non-compliance imposed by the rule, direction or the order has effect unless the party in default applies for and obtains relief from the sanction, and rule 26.9 shall not apply*."

> *"29.11 (1)* ***Where a witness statement or 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 rule 26.8****."*
>
> ***[Emphasis added]***

The applications for relief from sanctions

[58] In the present instance, the record of the court reflects that RN failed to comply with the Order of the Learned Master, Miss R. Harris, which was made on 15 February 2022, which required the parties to file and exchange their respective witness statement(s) on or before 30 June 2023.

[59] In respect of that failure, RN made two (2) applications for relief from sanctions. The first application was made on 8 March 2024, approximately seven (7) or eight (8) months after the sanction was automatically imposed, as a direct consequence of his failure to comply.

[60] By virtue of the 8 March application, RN sought the following Orders of the court: -

> *"1. That the Applicant be granted relief from sanctions for failing to file his Witness Statement on or before the 30th day of June 2023.*
>
> *2. That there be an extension of time within which to file and serve his Witness Statement and pre-trial Memorandum.*
>
> *3. That the time for filing and serving this application be abridged.*
>
> *4. No order as to costs.*
>
> *5. Such further and other orders as this Honourable Court deems just."*

[61] The 8 March application was supported by the Affidavit of Antonio Davis, which was also filed on 8 March 2024. At paragraph 5 of that affidavit, the reasons

provided for RN's non-compliance with Master Harris' Order were stated as follows: -

> *"5. I have been informed by Mr Lenroy Stewart and do verily believe that the applicant's challenges included, illness, extreme stress, the sickness of a close relative, and a lack of resources necessary to progress his matter."*

[62] The 8 March application was scheduled to be heard by the court at the Pre-Trial Review Hearing, which was fixed for 24 July 2024. Two (2) days prior to that hearing date, RN filed the 22 July application, seeking similarly framed Orders. RN also filed a witness summary. In the 22 July application, RN prayed the following relief: -

> *"1. The Court grants relief from sanctions for the Claimant's failure to file his Witness Statement within the time stipulated by this Honourable Court.*
>
> *2. The Court abridges the time for filing and serving this application.*
>
> *3. The Claimant's Witness Summary be permitted to stand as filed within time.*
>
> *4. Such further relief that this Honourable Court deems just.*
>
> *5. No order as to costs."*

[63] Like the 8 March application, the 22 July application was supported by an Affidavit of Antonio Davis and the same reason for the non-compliance was advanced. Mr Davis averred as follows: -

> *"5. I have been advised by the said Mr Stewart, one of the Claimant's Attorneys-at-law, and do verily believe that the Claimant has had challenges including financial, personal, family and health challenges, which have prevented him from instructing his Attorneys-at-law. Due to these challenges, the Witness Statement of the Claimant was not filed within the time stipulated by this Honourable Court."*

[64] On 24 July 2024, at a Pre-Trial Review Hearing, A. Thomas, J refused the 22 July application.

[65] On 10 December 2024, RN filed the amended application for relief from sanctions.

[66] In his affidavit evidence which supports the 10 December application, RN avers that the 8 March application is extant, having not been heard and determined on its merits. He further avers that the 10 December application is an amended version of the same and that it subsumes the 8 March application.[52]

[67] The only direct and uncontroverted evidence before this Court, in relation to what transpired at the Pre-Trial Review Hearing, which was held on 24 July 2024, is contained in the Affidavit of Samantha Grant, which was filed on 11 February 2025. Ms Grant avers that: -

> *"7. On July 24, 2024, both applications were brought to the attention of the Honourable Ms Justice A. Thomas, who refused relief from sanctions and further refused leave to appeal….*
>
> *8. I was present at the Pre-Trial Review on July 24, 2024, and rely on my notes in this regard. At the hearing on July 24, 2024, the Claimant raised the Second Application for Relief although it was the First Application for Relief that was set for hearing. The Learned Judge enquired whether Counsel for the 1st and 2nd Defendants opposed hearing the Second Application on that date notwithstanding the short service. Both Counsel for the 1st and 2nd Defendants consented to hear the Second Application for Relief, though short served.*
>
> *9. The Learned Judge found issue with the Affidavit of Antonio Davis in support of the Application filed on July 22, 2024, and found that the threshold requirements of Rule 26.8 of the Civil Procedure Rules 2002 were not met. The Claimant's Attorney, Mr Lenroy Stewart, then offered to file a supplemental affidavit, which was refused by the Learned Judge on the basis that it is improper to do so during the hearing of the application. Her Ladyship then denied the Claimant's Second Application for Relief.*
>
> *10. Counsel Mr Stewart then raised that the Claimant has previously filed another Affidavit of Antonio Davis in Support of the First Application for Relief filed March 8, 2024, which he asked the Learned Judge to consider. Counsel for the 1st*

[52] See – Paragraphs 7 – 10 inclusive of the Affidavit of RN in Support of Application for Court Orders, which was filed on 6 February 2025.

Defendant opposed raising the First Application for Relief on the basis that the 1st Defendant was not served.

11. …

12. The Learned Judge indicated that she considered and refused the application that was later in time and further found that in any event the same principles would apply to the March 8 Affidavit, as it essentially mirrors the July 22 Affidavit, and no other affidavits were filed in support of that (March 8) application. The Learned Judge found, inter alia, that the Claimant failed the promptitude test, that the explanation given for the reason for the delay was "woefully below the standard to assist the Claimant with the issue of promptitude". The Learned Judge further found that having failed the issue of promptitude, applying Rule 26.8 and the cases under the rule, the Claimant's Applications for Relief must fail. The Learned Judge cited as the leading case under the rule, ***HB Ramsay & Associates Ltd et al v Jamaica Redevelopment Foundation Inc and Anor*** *[2013] JMCA Civ 1."*

The applicability of the doctrines of res judicata, issue estoppel and abuse of process

[68] The 1st and 2nd Defendants oppose the granting of the 10 December application. They contend that the application ought properly to be struck out or refused on the basis of the doctrines of res judicata, issue estoppel and abuse of process.

[69] In this regard, the following pronouncements of F Williams JA, in the authority of **Suzette Curtello v The University of the West Indies (Board for Graduate Studies and Research)**,[53] [54] are instructive: -

[53] [2023] JMCA Civ 11

[54] See also **Kimola Merritt (Suing by her mother and next friend Charm Jackson) and Now Continuing as 1st Plaintiff Upon the Death of the 1st Plaintiff by Order of the Court made on the 20th day of January 1997 The Said Charm Jackson v Dr Ian Rodriquez & Anor** [2015] JMCA Civ 31, see paragraphs 71 – 82. At paragraph 82, McDonald-Bishop JA (Ag) (as she then was) stated: "[82] *The authorities have established that for issue estoppel to apply there are certain conditions that must exist. They are as follows: (i) the issue in question must have been decided between the same parties (or their privies) in a court of competent jurisdiction; (ii) the issue must have been once "distinctly put in issue"; (iii) the issue must have been "solemnly and with certainty determined" against the party in relation to whom the estoppel is being invoked; and (iv) the issue must be embodied in a judicial decision that is final*."

"[50] Although the principles of res judicata, cause of action estoppel and issue estoppel have been by now well traversed, it may be helpful, by way of reminder, to briefly set out the law at this point. All three principles were discussed by Morrison JA in the Belize Court of Appeal in the case of ***Belize Port Authority v Eurocaribe Shipping Services Limited and Another*** *Civil Appeal No 13/2011, judgment delivered 29 November 2012 at para. [43]. This is what, after a review of several authorities, was said:*

> *'[43] On the basis of these authorities, I would therefore conclude that the doctrine of res judicata in the modern law comprehends three distinct components, which nevertheless share the same underlying public interest that there should be finality in litigation and that a party should not be twice vexed in the same matter. The three components are: (i) cause of action estoppel, which, where applicable, is an absolute bar to relitigation between the same parties or their privies; (ii) issue estoppel, which, where applicable, also prevents the reopening of particular points which have been raised and specifically determined in previous litigation between the parties, but is subject to an exception in special circumstances; and (iii)* ***Henderson v Henderson*** *abuse of process, which gives rise to a discretionary bar to subsequent proceedings, depending on whether in all the circumstances, taking into account all the relevant facts and the various interests involved, 'a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before' (per Lord Bingham, in* ***Johnson v Gore Wood & Co (a firm),*** *at page 499). There can be no doubt, in my view, that, in* ***Johnson v Gore Wood (a firm),*** *the House of Lords was concerned to circumscribe somewhat more closely the limits of* ***Henderson v Henderson*** *abuse of process and to confine its applicability to cases of real misuse or abuse of the court's processes, or oppression.'"*

[70] In the authority of **Kea Investments Ltd v Watson and Ors**,[55] [56] Nugee J is quoted as follows: -

> *"44. As those citations illustrate, I accept (as Ms Jones submitted) that an issue estoppel arises only where an issue has been determined as part of the determination of a claim. As explained by Lord Sumption in his extended treatment of this area of law in Virgin at [17] - [25], there are a number of legal principles which all have the same underlying purpose, that of limiting abusive and duplicative litigation, but they are juridically different, and it is helpful for the purposes of analysis to keep them conceptually distinct. Thus, cause of action estoppel applies where a cause of action has been held to exist or not to exist – that is where it has been finally determined. Similarly, as I understand the law, issue estoppel applies where an issue arising in claim A has been finally determined and the same issue then arises between the same parties (or their privies) in claim B. It will usually have been finally determined as part and parcel of the determination of claim A itself; once that has happened, the decision is binding on the parties and prevents them relitigating the same issue as part of claim B.*
>
> *45. …*
>
> *46. The reference by Coulson J to issue estoppel arising in relation to interlocutory matters was a reference to what Diplock LJ had said in* ***Fidelitas Shipping Co Ltd v V/O Exportchleb*** *[1966] 1 QB 630 at 641. In that case an arbitrator had made an interim award, and it was held that this gave rise to an issue estoppel, as the award had determined a particular issue, even though it was not a final award… Diplock LJ explained what he meant in his judgment by an "issue" at 641F-642A as follows:*
>
> > *'**The final resolution of a dispute between parties as to their respective legal rights or duties may involve the determination of a number of***

[55] [2020] EWHC 472 (Ch)

[56] See Footnote 5, contained in paragraph 1588 of Volume 11 (2020) of the Civil Procedure, Halsbury's Laws of England, which states: "*Cf* ***Kea Investments Ltd v Watson*** *[2020] EWHC 472 (Ch) (principles of issue estoppel did not apply to discretionary decisions made at an interlocutory stage of an action before any of the facts had been found, as opposed to the trial and determination of one or more issues that arose as part of a cause of action)*."

different "issues," that is to say, a number of decisions as to the legal consequences of particular facts, each of which decisions constitutes a necessary step in determining what are the legal rights and duties of the parties resulting from the totality of the facts. To determine an "issue" in this sense, which is that in which I shall use the word "issue" throughout this judgment, it is necessary for the person adjudicating upon the issue first to find out what are the facts…'.

He then said at 642B-D:

*'**In the case of litigation, the fact that a suit may involve a number of different issues is recognised by the Rules of the Supreme Court which contain provisions enabling one or more questions (whether of fact or law) in an action to be tried before others. Where the issue separately determined is not decisive of the suit, the judgment upon that issue is an interlocutory judgment and the suit continues**. Yet I take it to be too clear to need citation of authority that the parties to the suit are bound by the determination of the issue. They cannot subsequently in the same suit advance argument or adduce further evidence directed to showing that the issue was wrongly determined.'*

He went on to hold that the same applied to an interim award that finally determined a particular issue: see at 643C-E.

*'47. **These citations make it clear that what Diplock LJ meant by an interlocutory judgment was the trial and determination of one or more issues that arose as part of a cause of action. He was not dealing with the question of discretionary decisions made at an interlocutory stage of an action before any of the facts had been found.** Nor was Coulson J in Seele Austria. In my judgment therefore the February 2019 ruling, not being the final determination of an issue in the sense used by Diplock LJ, did not give rise to an issue-estoppel properly so called.'"*

[Emphasis added]

[71] It is clear from a reading of the authorities to which the Court has referred above that the doctrines of cause of action estoppel, issue estoppel and res judicata do not apply in the present instance. The authorities make it clear that these doctrines do not apply to the question of discretionary decisions which are made at an interlocutory stage of an action and before any findings of fact have been made.

[72] In determining whether the doctrine of issue estoppel applies, this Court must consider whether the conditions for issue estoppel are readily apparent. In that regard, the dicta of McDonald-Bishop JA (Ag.) (as she then was), in the authority of **Kimola Merritt**,[57] bears repeating: -

i. The issue in question must have been decided between the same parties (or their privies) in a court of competent jurisdiction.
ii. The issue must have been once "distinctly put in issue".
iii. The issue must have been "solemnly and with certainty determined" against the party in relation to whom the estoppel is being invoked.
iv. The issue must be embodied in a judicial decision that is final.

[73] The Court is however constrained to find that the conduct of the Claimant/Applicant, in the present instance, is concerning and amounts to an abuse of the process of the court. The Court makes this finding in the context of the underlying factual substratum of this case. The Claimant/Applicant made two (2) applications for relief from sanctions, the first of which was filed on 8 March 2024. The second application was filed on 22 July 2024. Both applications seek the same relief and on the same bases. At the Pre-Trial Review Hearing, which was conducted on 24 July 2024, the Claimant/Applicant elected to advance the 22 July application for relief from sanctions, which was heard and determined by A. Thomas, J, on that same date. The 22 July application for relief from sanctions was refused on its merits.

[74] By way of the 10 December application, the Claimant/Applicant seeks to amend the 8 March application, by including an application for Declarations that certain

[57] supra

specified provisions of the CPR are unconstitutional and cannot be justified in a free and democratic society. Significantly, the Claimant/Applicant renews his application for relief from sanctions on the basis that there has been a material change of circumstances since the Order of A. Thomas, J, which was made on 24 July 2024, and that there is new or 'fresh' material or evidence which is to be placed before the Court for its consideration.

[75] Regrettably, the Court is unable to so find. This Court is of the view that the doctrine of abuse of process does apply in the present circumstances, so as to give rise to a discretionary bar to subsequent proceedings. The Court finds that the Claimant/Applicant is misusing or abusing the process of the Court by seeking to raise before it issues which could have been raised before and which were raised and determined on the 22 July application for relief from sanctions.

[76] Additionally, the Court finds that the Claimant/Applicant has failed to demonstrate, on a preponderance of the evidence, that there is or has been a material change in circumstances since the Order of A. Thomas, J, which was made on 24 July 2024.

[77] In making that finding, the Court has carefully considered the affidavit evidence of RN, which is contained in the Affidavit in Support of Application for Court Orders, which was filed on 6 February 2025 and which bears repeating: -

REDACTED

[78] Undoubtedly, the circumstances described by RN must have been arduous and frustrating. The evidence does not however demonstrate a change in circumstances, much more a material change in circumstances. The thrust of his evidence in relation to his health challenges, his financial challenges, his displacement, his experience of violence, his brushes with the law, together with the other challenges and disruptions which he describes, is that that occurred during the period of 2022 to the middle of the year 2024. This is material which must have been known to RN at the time that he filed his applications for relief from sanctions in 2024. Furthermore, this is material which could have been

included in an affidavit in support of those applications at the time of the filing of the same.

[79] Additionally, the Court also finds that the conduct on the part of the Claimant/Applicant raises serious questions in relation to the bona fides of the evidence contained in his affidavit which was filed on 6 February 2025. It is significant that the Claimant/Applicant does not purport to provide a reason for his failure to adduce this evidence at the time that the 8 March application and the 22 July application were filed.

[80] In assessing the credibility and reliability of the Claimant/Applicant as well as that of his evidence, the Court must assess:

a. whether the Claimant/Applicant is a truthful or untruthful person.

b. whether the Claimant/Applicant, though a truthful person, is telling something less than the truth on this issue.

c. whether the Claimant/Applicant, though an untruthful person, is telling the truth on this issue.

d. whether the Claimant/Applicant's memory has correctly retained the information to which he averred in his affidavit evidence, which was filed on 6 February 2025.

e. the reason(s) for the failure to provide this evidence at the time of the filing of the 8 March application and the 22 July application, in circumstances where the evidence which was filed on 6 February 2025 was alluded to at that time.

All of this, the Court finds, is entailed when a judge assesses the credibility and reliability of a witness.

[81] The Court finds that the Claimant/Applicant has not provided the Court with a basis on which it can accept him as a credible and reliable witness or on which it can accept his evidence as being both credible and reliable.

[82] The Court is strengthened in its position by the established principle that a court of concurrent jurisdiction will not revisit an Order, which was made on an interlocutory application, unless there has been significant changes in a party's circumstances. In the authority of **Thevarajah v Riordan & Ors**,[58] an authority which was relied on by all three (3) parties to this action, the United Kingdom's Supreme Court stated as follows: -

> *"18. However, even if that were not right, it appears to me that, as a matter of ordinary principle, when a court has made an interlocutory order,* ***it is not normally open to a party subsequently to ask for relief which effectively requires that order to be varied or rescinded, save if there has been a material change in circumstances since the order was made****. As was observed by Buckley LJ in* ***Chanel Ltd v FW Woolworth & Co Ltd*** *[1981] 1 WLR 485, 492-493:*
>
> > *'****Even in interlocutory matters a party cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter.****'"*
>
> ***[Emphasis added]***

[83] In the result, the 10 December application for relief from sanctions is refused.

The application for Constitutional relief

[84] By way of the 10 December application, RN contends that the operation of rules 26.8(1)(a), 26.8(2) and 29.11(1) of the CPR, breach the rights afforded him under Jamaica's Constitution to a fair hearing.

[85] Part 56 of the CPR establishes the procedure by which a claim for constitutional and administrative relief may be made. Specifically, rule 56.9 of the CPR mandates that: -

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[58] supra

"56.9 (1) An application for an administrative order must be made by a fixed date claim in form 2 identifying whether the application is for –

(a) judicial review;

(b) relief under the Constitution;

(c) a declaration; or

(d) some other administrative order (naming it),

And must identify the nature of any relief sought.

(2) The claimant must file with the claim form evidence on affidavit.

(3) The affidavit must state –

(a) the name, address and description of the claimant and the defendant;

(b) the nature of the relief sought identifying –

(i) any interim relief sought; and

(ii) …

(c) in the case of a claim under the Constitution, setting out the provision of the Constitution which the claimant alleges has been, is being or is likely to be breached;

(d) the grounds on which such relief is sought;

(e) the facts on which the claim is based;

(f) the claimant's address for service; and

(g) giving the names and addresses of all defendants to the claim.

(4) …

(5) …

(6) On issuing the claim form the registry must fix a date for a first hearing which must be endorsed on the claim form."

[86] The language of the rule is mandatory. It requires that a litigant who seeks a Declaration (in this case of the unconstitutionality of specified rules of the CPR) files a fixed date claim form in form 2. The Court finds that the Claimant/Applicant has failed to comply with the requirements of rule 56.9 of the CPR. Further, this Court is of the view that rule 56.10 of the CPR was not engaged to permit the Court to grant Constitutional relief in the absence of a claim for that relief. Consequently, the application for Declaratory relief under the Constitution of Jamaica must fail.

DISPOSITION

[87] It is hereby ordered that: -

1. The Amended Notice of Application for Court Orders for Relief from Sanctions and Extension of time to comply with Court Orders, which was filed on 10 December 2024, is refused.

2. The Costs of the Amended Notice of Application for Court Orders for Relief from Sanctions and Extension of time to comply with Court Orders, which was filed on 10 December 2024, are awarded to the 1st and 2nd Defendants/Respondents against the Claimant/Applicant and are to be taxed if not sooner agreed.

3. The Claimant/Applicant is refused Leave to Appeal.

4. The 2nd Defendant/Respondent's Attorneys-at-Law are to prepare, file and serve these Orders.