[2025] JMSC Civ. 55

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2018 HCV 00863

BETWEEN	**ERROL TRACEY**	**CLAIMANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**DEFENDANT**

In Chambers Via Video Conference

Kashina Moore, Attorney-at-Law, instructed by Nigel Jones & Co., Attorneys-at-Law for the Claimant

Matthew Gabbadon, Attorney-at-Law, instructed by the Director of State Proceedings, Attorneys-at-Law for the Defendant

Heard: January 30, 2025 and May 30, 2025

CIVIL PROCEDURE: Claimant's failure to file and serve witness statement and list of documents within the relevant time - Rules 29.11 and 28.14 of the Civil Procedure Rules (CPR) - Application for relief from sanctions - Whether the relevant witness statement and list of documents were filed and served within time as prescribed or whether any sanction applies, and if so, what sanction applies - Whether the application for relief was filed promptly - Whether the application for relief, filed, is supported by evidence on affidavit - Whether the failure was unintentional - Whether there was a good explanation for the failure - Whether the claimant has generally complied with all other relevant rules, Practice Directions, court orders and directions - Whether an extension of time for filing and service of the relevant witness statement and list of documents can now properly be granted - Defendant's failure to file and serve witness statements and list of documents within the relevant time - Rule 29.11 of the CPR -

Application for relief from sanction under Rule 26.8 of the CPR - Whether the relevant witness statement was filed and served within time as prescribed or whether any sanction applies, and if so, what sanction applies - Whether the application for relief was filed promptly - Whether the application for relief, filed, is supported by evidence on affidavit - Whether the failure to comply was unintentional - Whether there was a good explanation for the failure - Whether the defendant generally complied with all other relevant rules, Practice Directions, orders and directions - Whether an extension of time for filing and service of the relevant witness statement and list of documents can now properly be granted - Whether the relevant listing questionnaire was filed and exchanged within time as prescribed, and if not, whether an extension of time may be granted - Rules 29.11, 26.8, 26.1, 28.14 of the CPR

ANDERSON K. J

BACKGROUND

Applications by the claimant and the defendant for relief from sanctions for the claimant's failure to file and serve witness statement and to provide standard disclosure, as well as the defendant's failure to file and serve witness statements and to provide standard disclosure within the respective times ordered by the court

1. On January 30, 2025, two applications were heard by the court. Those applications were unopposed.

2. Those respective applications were made by the claimant and the defendant in this claim. The claimant sought relief from sanctions, arising from his failure to file and serve the relevant witness statement, and to provide standard disclosure within the times as were earlier ordered by this court, with respect to the parties' statements and respective list of documents. I will begin by addressing the application, which was filed by the claimant, before addressing the defendant's application.

The Claimant's Application for relief from sanctions:

3. The claimant, in his notice of application for court orders for relief from sanctions, which was filed on January 30, 2025, has sought the following orders, among others:

'1. The witness statement and list of documents filed and served outside of the timelines of orders 4 and 7 of the Case Management Orders made on the 18th day of July 2022 be permitted to stand;

2. The claimant be relieved from sanctions for failing to comply with order numbers 4 and 7 of the Case Management Orders made by Justice D. Staple on the 18th day of July 2022, as it relates to the filing and serving of the witness statement of Errol Tracey and list of documents.'

4. The matter came before me on January 30, 2025, and I made the following orders, among others:

'1. The Pre-Trial Review and hearing of the claimant's application for court orders, which was filed on July 15, 2022, shall be scheduled for hearing before a Judge or Master, in Chambers, in this court, if this court believes same shall be so scheduled, after this court adjudicates on the claimant's application for relief from sanctions, which was filed on January 30, 2025, and the defendant's application for relief from sanctions, which was filed on January 27, 2025.

2. If the said Pre-Trial Review and said hearing of the claimant's application for court orders, which was filed on July 15, 2022, are hereafter, scheduled for hearing in this court upon or a later date, the same shall be scheduled to be heard before a Judge or Master, and on the said date and during the same time period.

3. The respective parties are permitted to rely on further affidavit evidence in support of their respective said applications for relief from sanctions, provided that all, such further affidavit evidence is filed by or before February 6, 2025.

4. By or before February 28, 2025, the parties shall respectively file and serve a bundle of submissions and authorities as regards their respective said application(s) for relief from sanctions.

5. The hearing before this court of the said applications for relief from sanctions shall take place on paper, and this court's ruling on those respective applications is reserved.

6. Order #2 of the orders of D. Staple J., made on July 18, 2022, is vacated and no trial date for this claim shall be scheduled, unless the claimant's said application for relief from sanctions is successful, and this court has therefore ordered a Pre-Trial Review shall be held, in which event at that Pre-Trial Review, the court shall then schedule the required trial dates.'

Whether the relevant witness statement was filed and served within time as prescribed or whether any sanction applies, and if so, what sanction applies

Was the claimant's witness statement filed and served within time?

5. The court's record indicates that the claimant's witness statement was filed on August 25, 2023 and served on August 28, 2023, which means that the claimant filed and served the said witness statement approximately two months out of time, contrary to the relevant court order, which was made by D. Staple J. (Ag.) (as he then was) on July 18, 2022, and which stipulated that the claimant's witness statements were to have been filed and served on or before June 30, 2023. It follows then that the said witness statement was both filed and served out of time.

The sanction imposed by *rule 29.11 of the CPR*

6. ***Rule 29.11 of the CPR*** provides for consequences of failure to **serve** (highlighted for emphasis) witness statement or summary 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 rule 26.8.'

7. It is important to note that, in light of the fact that the witness statement was not served within time, the sanction per ***rule 29.11 of the CPR*** was imposed from July 1, 2023, and therefore, an application for relief from sanctions was necessary. This sanction is, as set out in the aforementioned rule, and is that, since the party's witness statement was not served within time, then that witness, who provides that statement, cannot be called upon to give evidence at trial, unless the court permits. See: ***Jamaica Public Service v Charles Vernon Francis and Anor [2017] JMCA Civ 2***. It must be underscored that the relevant sanction as imposed in ***rule 29.11 of the CPR***, arises, not from the failure to file a party's witness statement within time, but rather, from the failure to **serve** (highlighted for emphasis) same, within time. Of course though, once filed out of time, same will also be served, out of time.

8. Noteworthy is that it behoves a party, who has been late in the filing and service of witness statement(s), to file and serve same, as soon as possible, after the expected

time for compliance, as was stipulated by order of the court, has passed. That will go in that party's favour if**,** albeit **only if** (highlighted for emphasis), the overall interests of justice are required to be considered by this court, upon an application by the party in default, for relief from sanctions, since it will then, if so done, serve to satisfy this court, upon the hearing of such an application, that no further delay whatsoever, will result, in compliance, as regards the date for service of witness statement(s), if relief from sanctions is granted and an extension of time is ordered by this court, for the filing and service of witness statement(s), by that party.

9. ***Rule 26.8*** of the CPR provides for relief from sanction 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 and orders and directions.

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

a) the interests of the administration of justice;

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

c) whether 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 be still be met if relief is granted; and

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

(emphasis added)

Burden of proof

10. It is important to note that, on an application such as the present one, it is the applicant who has the burden of proof, and it is therefore, the applicant that must prove that the conditionalities as set out in ***rule 26.8(1) and (2) of the CPR***, have been met. Same must be proven, on a balance of probabilities. Furthermore, on an application for relief from sanctions, even though such an application may not be, or is not being opposed by any opposing party to the claim, as is the case with these two applications before the court, that does not and cannot mean that this court is obliged to grant relief from sanctions. Quite rightly, neither of the two parties' counsel, in respect of either of the presently relevant applications, ever suggested otherwise.

11. In considering an application for relief from sanctions though, unless the applicant crosses the high hurdles of meeting the conditionalities as set out in ***rule 26.8(1) and (2) of the CPR***, the factors as set out in ***rule 26.8(3)***, should not even be considered by the court. A masterful court-led analysis of how a court in Jamaica, should approach and ultimately, be best positioned to resolve any application before it, for relief from sanctions, can, to my mind, be found in one of the leading cases in this area: ***H.B. Ramsay & Associates Ltd. and Ors. v Jamaica Redevelopment Foundation Inc. and The Workers Bank [2013] JMCA Civ. 1***.0

12. I will therefore, now look at the factors as set out in ***rule 26.8(1) and (2)***, in turn, before going on to ***rule 26.8(3)***, if I consider same to be warranted.

The Court's Analysis

Whether the application for relief was filed promptly

13. The court's record shows that the application for relief from sanctions was filed on January 30, 2025, which is approximately one year and seven months after the court's stipulated deadline for compliance. This reflects an inordinate delay. The claimant's present counsel, Ms. Kashina Moore, has submitted that the concept of promptness is not rigid, but that it is flexible, per the case of ***Meeks v Meeks [2018] JMSC Civ 37***. Additionally, counsel has relied on the case of ***Oneil Carter and others v Trevor South and others [2020] JMCA Civ 54***, with respect to the concept of promptness in

applications for relief from sanctions, where Dunbar-Green JA (Ag) opined, at paragraph 40, that:

'The first consideration is whether the defaulting party had been prompt in bringing an application. If that party fails to do so, the court is unlikely to grant relief (see Brooks JA in ***H.B. Ramsay and Associates Ltd and others v Jamaica Redevelopment Foundation Inc and Anor*** *paragraph [9]). The defaulting party is also mandated to put evidence before the court, on which there can be a determination as to whether the non-compliance was unintentional and otherwise excusable by good explanation for failure to comply, and that there was general compliance with all other rules, orders and directions. These are the threshold requirements (per Phillips JA, in* ***University Hospital Board Management v Hyacinth Matthews [2015] JMCA Civ 49)****.'*

14. I concur with the court's findings in the aforementioned cases regarding the interpretation of ***rule 26.8(1) of the CPR*** when contemplating relief from sanctions applications. Notably, the court opined in the ***H.B. Ramsay case (op. cit.)*** that the term *'promptly'* as is used in ***rule 26.8(1)(a)*** carries with it a measure of flexibility. The Court of Appeal in that case, at page 5, paragraph 10, stated: *'if the application has not been made promptly, the court may well, in the absence of an application for extension of time, decide that it will not hear the application for relief…the word 'promptly', does have some measure of flexibility in its application. Whether something has been promptly done or not, depends on the circumstances of the case.'* This court, is not, in the particular circumstances of this particular case, prepared to accept that the application for relief was filed promptly. Evidence of the pertinent circumstances must be given. No such evidence was led by counsel. This court should not be expected to seek to presume same. This court ought not and therefore, will not, do so. Moreover, it is highly improbable that the applicant would be able to proffer to this court, compelling reasons for this court to find that the application for relief from sanction, was filed promptly, in light of the excessive delay. Accordingly, the claimant/applicant has not overcome the hurdle presented in ***rule 26.8(1)(a) of the CPR***. The claimant has not met his burden of proof. Notwithstanding, I shall go on to consider the other aspects of the application, in the event that I may be deemed to have reached an incorrect conclusion in that regard.

Whether the application for relief from sanctions is supported by evidence on affidavit

15. The claimant's application for relief from sanctions is supported by evidence given by his attorneys-at-law from the law firm, Nigel Jones & Company. These affidavits were filed and served on January 30, 2025 and February 6, 2025 respectively. Consequently, it is my view that the claimant has overcome the hurdle as set out in ***rule 26.8(1)(b) of the CPR***.

Whether the failure to comply was not intentional

16. It must be stated by this court, that this court, in determining whether the failure to comply was intentional or not, should not determine same, based on an automatic acceptance of that which has been deponed to, as a conclusion, by an affiant, in support of, an application such as this. This court can, instead and actually should, in all cases, based on the admissible evidence of the particular circumstances of the particular case then before it, assuming that such evidence exists, infer, whether the failure to comply, was intentional or unintentional. Typically, the best person/party to specifically address whether the failure to comply was, or was not intentional, must be the party in default, as distinct from the attorney of that party. Everything in that regard though, depends on the particular circumstances, of each particular case. Notably, in the instant case, the claimant has not led any evidence from himself, as to whether his failure to comply with the requisite CMC order, was unintentional. However, his attorneys-at-law have proffered evidence in that regard.

17. Ms. Kenisha Gordon of Nigel Jones and Company, in her affidavit, which was filed and served on January 30, 2025, has deponed that she was advised by Rykel Chong, counsel who had conduct of the matter from the same firm, that the claimant's witness statement was filed and served on August 25, 2023 and August 28, 2023 respectively. Ms. Gordon has also deponed that Ms. Chong had advised her that there was a difficulty in obtaining contact with the claimant for a period of time, that is, between March and August 2023, as his phone was lost. In addition, she has deponed that the firm regained contact with the claimant in or around August 23, 2023, and thus was able

to finalize instructions to facilitate the claimant's execution of the relevant documents on August 24, 2023, and the filing of the said documents on August 25, 2023. Further, it is the affiant's view that the non-compliance has been remedied within a reasonable time, even though the claimant is not email or technologically savvy, and that the documents were filed well in advance of the trial date.

18. Ms. Gordon has deponed that there will be no prejudice to the defendant if the court were to grant the orders sought in the claimant's application, since the defendant has equally failed to comply with the order for standard disclosure, the exchange of witness statements as well as the exchange of listing questionnaires. It is also her view that since the respective documents were served on the defendant, then he will be able to adequately prepare for trial in *'good time'*. Furthermore, she has deponed that, it would be in keeping with the overriding objective of the court, and in the interest of justice, for the trial to proceed, and the matter determined on its merits. Lastly, she has deponed that the trial date can still be met, if relief from sanctions is granted.

19. Ms. Rykel Chong, in her affidavit, which was filed on February 6, 2025, has deponed that counsel, Mr. Jovell Barrett had conduct of the matter at hand up to April 30, 2024, and that he had failed to file the application for relief from sanctions as an administrative oversight. She has also deponed that she had received conduct of the matter at hand on May 26, 2024. Additionally, she has deponed that she could not locate the relevant file, and that, she had indicated that predicament at the pre-trial review, which was conducted on September 19, 2024. She has further deponed that she located the said file in or around January 15, 2025, but that, she had failed to file an application for relief from sanctions because she had not noted the need for same. Moreover, she has deponed that this error was on the part of the claimant's counsel, and that, the claimant is not at fault in the circumstances.

20. In view of the foregoing, the claimant's legal representatives have proffered two main reasons for their delay in filing for relief from sanctions, namely: administrative oversight, including poor communication between their office and the claimant, and that, the relevant file could not be located. The evidence that Ms. Gordon and Ms. Chong

have led does not satisfy the burden placed upon the claimant in applications such as these. It is my view that counsel and their clients have a responsibility to ensure that they organize their matters, so that they will be able to meet court ordered deadlines. Counsel would have the court accept that the claimant had lost his phone and that he is not technologically savvy, and that, that caused the breach in communication, which led to the claimant's tardy execution of the pertinent documents. However, I cannot see why the claimant could not have communicated with his attorneys-at-law, by visiting their office. If he had truly wanted to communicate with his attorneys during the relevant time period, when he allegedly did not have access to a phone, then he certainly could and should have visited his attorneys' office or corresponded by letter. There is no evidence that he even so much as attempted to contact his counsel during that time period.

21. Further, there is no evidence that the applicant's attorneys had tried to contact him in person or by letter. The communication difficulty, as presented by counsel, was not one, which could be described as insurmountable. There were other means of communication at their disposal; however, they chose not to utilize same. It is my considered view that this kind of administrative inefficiency is one that could have been easily circumvented. In any event, his counsel could and should have prepared, filed and served a witness summary within time. Had that been done, then the automatic sanction, which otherwise applies when ***rule 29.11(1) of the CPR*** is not complied with, would not have even arisen.

22. Ms. Chong has submitted that she could not locate the applicant's file until in or around January 15, 2025, and that, at that time her focus was on the pre-trial review hearing, which was scheduled for January 30, 2025. This court believes that to be, likely in and of itself, unintentional. Notwithstanding, no evidence has been led by her or members of staff of that firm, as to who searched for the file, at what times the search or searches were undertaken, or where it was found. I have found the evidence proffered by the claimant's counsel to be very inadequate. From the available evidence, it does not and cannot properly follow, that this means that this court must also conclude that the failure to comply was unintentional.

23. Moreover, counsel for the claimant, Ms. Chong, who subsequently took conduct of the matter, expressed that she did not note that an application for relief from sanctions was not made. Ms. Chong should have properly reviewed the pertinent file and taken the necessary steps to facilitate the progression of same. That is expected of any responsible, dutiful and attentive counsel. This court cannot and will not accept administrative inefficiencies as a proper excuse for the claimant's non-compliance in the circumstances of this case. See: ***The Attorney General (Appellant) v Universal Projects Limited (Respondent) [2011] UKPC 37***.

24. In the absence of cogent and compelling evidence that the claimant's counsel's failure to comply with the requisite court order was unintentional, the court cannot form the view that the failure to file and serve the germane witness statement, was unintentional, as there is not enough evidence to enable the court to reach such conclusion. The court is called upon to be the final determinant - neither counsel nor applicant can conclude for the purposes of this court's determination, that the failure was unintentional. The evidence must be sufficient. There is nothing before the court to properly enable this court to draw the conclusion, that the failure to comply was unintentional. I have found, then, that the claimant has not, on a balance of probabilities, proven his case, in respect of his present application.

Whether there was a good explanation for the failure

25. The claimant's counsel, the affiants, have not submitted any evidence that there is a good explanation for the failure to comply with the applicable court order. Therefore, the court has to consider the affidavit evidence of both counsel as outlined in paragraphs 17 - 19 herein, when assessing whether there was good reason(s) for failure to comply with the germane court order. In the case of ***The Attorney General v Universal Projects case (op. cit.)***, the Board found that *'a party cannot rely on such things as administrative inefficiencies, oversight or errors in good faith. A good explanation is one which properly explains how the breach came about, which may or may not involve an element of fault such as inefficiency or error in good faith. Any other interpretation would be inconsistent with the overriding objective of dealing with cases*

justly and should therefore be avoided…' I am of the view that an explanation, which reveals a lack of or poor communication and administrative oversight, is not enough to discharge the burden placed on the applicant, especially since the claimant/applicant and his attorney-at-law were present at the Case Management Conference (CMC).

26. Moreover, in the ***H.B. Ramsay case (op. cit.)***, at pages 9 - 10, paragraphs 22 - 23, the court stated:

'…where there is no good explanation for the default, the application for relief from sanctions must fail. Rule 26.8(2) stipulates that is a precondition for granting relief that the applicant must satisfy all three elements of the paragraph…Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation.'

To my mind, the claimant has also failed to meet the burden of proof, in respect of this particular conditionality.

Whether the claimant has generally complied with all other relevant rules, Practice Directions, orders and directions

27. Ms. Gordon and Ms. Chong have both deponed that the claimant is not in breach of any other orders and has been generally compliant with all other rules, Practice Directions, orders and directions to date. Upon my review of the court's record, I have noted that the claimant's listing questionnaire was filed within time, that is, on March 4, 2024, which is in keeping with order number 9 of the case management orders, that were made by D. Staple J (Ag) (as he then was). However, it is also important to note that, unlike the defendant in respect of his application for relief from sanctions, the claimant has utterly failed to comply with Practice Direction No. 8 of 2020, in so far as the claimant filed no Judge's Bundle pertaining to his application for relief from sanctions. Further, it is imperative to note that, although a pre-trial review hearing was scheduled to be held, to date, no pre-trial memorandum has been filed or served by the claimant. See ***rule 38.5 of the CPR*** in that regard. Therefore, the claimant has not complied with **all** other orders, rules, and Practice Directions. I find, then, that the claimant's counsel made a false assertion regarding compliance, but I hasten to add at this stage, that I am not at all, suggesting, or even implying that she did so, intending to deceive.

28. It is my view that the claimant has proven to be generally non-compliant in the circumstances, since, along with his failure to file and serve his witness statement and list of documents within time, he also failed to comply with Practice Direction No. 8 of 2020. Additionally, he has failed to file a pre-trial memorandum, which ought to have been done, since this hearing which is now being presided over by me, is also scheduled as a pre-trial review hearing. Consequently, the claimant has failed to prove, on a balance of probabilities, that he has met this burden. It must be emphasized that the legal consequences of the failure of the claimant's attorneys to have been efficient, will, at least as a general rule, it should be noted carefully by all legal practitioners, for future reference, be visited upon those attorneys' clients. Paragraph 52 of the case, ***The Commissioner of Lands v Homeway Foods Limited and Stephanie Muir [2016] JMCA Civ 21*** is instructive:

'Normally, it will not assist the party in default to show that non-compliance was due to the fault of the lawyer since the consequences of the lawyer's acts or omissions are, as a rule, visited on his client. There may be an exception made, however, when the other party has suffered no prejudice as a result of the non-compliance.'

29. I must underscore that a precondition for granting relief from sanction(s) is that the applicant must satisfy all three (3) elements of ***rule 26.8(2) of the CPR***. See: ***Len Cunningham & Anor v Victor Hall & Anor [2024] JMSC Civ. 27***. For this application, the claimant has failed to satisfy the elements of ***rule 26.8(1)(a)*** and also, of ***rule 26.8(2) (a), (b) and (c)***. Consequently, the court cannot grant relief to the claimant in the circumstances.

Whether an extension of time for filing and service of the relevant witness statement can now properly be granted

30. An extension of time for filing and service of the claimant's witness statement cannot now properly be granted in accordance with ***rule 26.1(2)(c) of the CPR***, which allows this court, except where those rules provide otherwise, to*, '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 has passed.'* To my mind, our rules of court provide otherwise in ***rule 29.11 of the CPR***. An extension of

time cannot be granted in circumstances wherein a sanction has been imposed, unless relief from sanction has been granted. See: ***Dale Austin v The Public Service Commission [2016] JMCA Civ 46, at pages 37 & 43, paras. 88 & 101***, per Edwards (JA)(Ag.) (as she then was). This is exactly why, it does not matter that a sanction is not being opposed, for the purpose of an application such as this. Whereas extensions of time can be agreed to, it seems clear to me that avoiding a sanction, which has been imposed by either a rule of court, or a court order, cannot arise by means of agreement as between opposing parties to a claim. See ***rule 27.11 of the CPR***, in that regard.

Whether the claimant's list of documents was filed and served within time as prescribed or whether any sanction applies, and if so, what sanction applies

31. Per the court's record, the claimant's list of documents was filed on August 25, 2023 and served on August 28, 2023, which means that the claimant filed the said list of documents over four months out of time, and served same, five months out of time. This was contrary to the relevant court order, which was made by D. Staple J. (Ag.) (as he then was) on July 18, 2022, and which stipulated that standard disclosure of documents was to have been done on or before March 31, 2023. It follows then that the claimant's list of documents was both filed and served out of time.

32. It is important to note that, since the claimant's list of documents was filed out of time, it follows, inexorably, that it was also served out of time. Consequently, the sanction per ***rule 28.14(1) of the CPR*** was imposed from April 1, 2023, and therefore, an application for relief from sanctions was necessary. This sanction is, as set out in the aforementioned rule, per paragraph 8 herein, and is that: ***'a party who fails to give disclosure by the date ordered or to permit inspection may not rely on or produce any document not so disclosed or made available for inspection at the trial'.*** It must be underscored that the sanction as laid down per ***rule 28.14(1) of the CPR***, arises from the failure of the requisite list of documents having been **served** out of time. Accordingly, even if the germane list of documents was filed within time, but served out of time, then the sanction would still apply. The court notes that the claimant's application for relief was filed on January 30, 2025, this being almost one year and ten

months after the requisite sanction took effect. See: ***Jonathan Davis v Dennis Tulloch [2024] JMSC Civ. 108***; ***Owayne Weir v Dwayne Williams [2025] Civ. 27***.

33. It should be noted that, while ***rule 28.13 of the CPR*** allows for the duty of disclosure to be continuous, in order to reconcile that rule with ***rule 28.14(1)***, it must mean that the sanctions imposed in ***rule 28.14(1)*** cannot apply in a context wherein new evidence comes to light during court proceedings, which would necessitate litigants and their counsel to reveal same to opposing counsel and the court, immediately. Although ***rule 28.13*** provides for ongoing disclosure in the foregoing circumstances, the sanctions imposed in ***rule 28.14(1)*** arise from a party's non-compliance with the court's order for disclosure. Further, the only way in which that party can overcome those sanctions, is if the court grants relief from same.

The Court's Analysis

Whether the application for relief was filed promptly

34. Prima facie, the delay of almost one year and ten months, appears to be very significant; however, the ***H.B. Ramsay case (op. cit.)*** enunciated that the term 'promptly' as is used in ***rule 26.8(1)(a)*** carries with it a measure of flexibility in its application. I am not prepared to accept that the pertinent application has been made promptly, because there has not been any evidence provided to this court, as to why the delay in having filed same, was as significant, as it patently was. There is flexibility, but that should not be taken as meaning that any length of delay will be treated with, by this court, as acceptable. Everything must, of necessity, depend on the particular circumstances of each case. It is the applicant, who has the burden of proof. Therefore, it is the applicant, who must, of necessity, lead the evidence needed to establish the circumstances that will be used, in order to justify the delay in the filing of the application for relief. If that evidence has not been led, for and on behalf of the applicant, the court will not properly be put in a position to properly conclude that the relevant application for relief from sanction(s) was filed promptly. Therefore, the claimant has not overcome the hurdle presented in the aforementioned rule.

Whether the application for relief from sanctions is supported by evidence on affidavit

35. The two (2) affidavits, which are referenced in paragraphs 17 - 19 of this ruling, support the claimant's application for relief. Accordingly, the claimant has overcome the hurdle as set out in ***rule 26.8(1)(b) of the CPR***.

Whether the failure to comply was not intentional

36. Counsel for the claimant, in their affidavits, deponed that the delay in the filing of the list of documents was unintentional. Having perused and assessed their evidence, however, I find that their claim that the delay in filing the germane list of documents was as a result of poor communication between their firm and the claimant, which hindered timely execution of the documentation, to be quite insufficient. I also find Ms. Chong's submission that she could not locate the file, without more, to be rather paltry and inadequate. Furthermore, her submission that, after she took conduct of the matter, she was not aware or did not know that a relief from sanction application was not made, is unacceptable. It is my considered view that the preceding do nothing to support her claim that the delay was not intentional, as they are akin to administrative inefficiencies.

37. It is important to note that the claimant's counsel had a duty to advise and remind her client of important court dates, as well as how to, and when, to prepare the various documents required in an ongoing court action. Accordingly, the evidence before this court cannot properly discharge the claimant's burden of proof, since the applicant's office's failure appears to have flowed from administrative inefficiencies. See: ***The Attorney General v Universal Projects case (op. cit.)***. The court would be hard-pressed to find that the delay was unintentional because the claimant's counsel had the option of executing the list of documents for and on behalf of the claimant, per ***rule 28.10(3)***. That rule provides: ***'Where it is impracticable for the maker of the list to sign the certificate required by paragraph (1) it may be given by that party's attorney-at-law.'*** Of course, ***rule 28.10(1)*** provides: ***'The maker of the list must certify in the list of documents - (a) that he or she understands the duty of disclosure; and (b) that to the best of the maker's knowledge the duty has been***

carried out (emphasis added)'. Since the claimant's counsel was having a difficulty getting the claimant to execute the list, in the circumstances, she should have exercised the aforementioned option. It is evident that the applicant has failed to prove, on a balance of probabilities, that his failure was not intentional.

Whether there was a good explanation for the failure

38. The claimant's counsel have relied on the same evidence, which supported their contention that the delay was not intentional, as a good explanation for the failure. I must reiterate that a lack of or poor communication between counsel and client, poor time management, and/or sub-standard office procedures cannot suffice as a good explanation. In determining whether there was a good explanation, I have also considered the reasons already outlined in paragraphs 17 - 19 of this ruling. See: ***The Attorney General v Universal Projects case (op. cit.)***; the ***H.B. Ramsay case (op. cit.)***. The applicant has failed to prove, on a balance of probabilities, that there was a good explanation or reason for the failure.

Whether the claimant has generally complied with all other relevant rules, Practice Directions, orders and directions

39. The court has found that the claimant has been generally non-compliant with all other relevant rules, Practice Directions, orders and directions, for the reasons earlier adumbrated in paragraph 27 herein.

Whether an extension of time for filing and service of the relevant list of documents can now properly be granted

40. I find that an extension of time for filing and service of the relevant list of documents cannot now be properly granted by the court for the reasons earlier outlined in paragraph 30 of this judgment.

Conclusion

41. Ultimately, each case involving an application for relief from sanctions, must be considered, on its own facts. I must reiterate that the court, in assessing the present application for relief from sanctions, shall not consider the conditionalities as set out in

rule 26.8(3) of the CPR, since the applicant has failed to surmount the great burdens as set out in ***rules 26.8 (1) and (2) of the CPR***. In the circumstances, based on the particular facts of this particular case, the claimant's application, fails. Since that application was not opposed, there will be no order as to costs of that application. I will now proceed to address the defendant's application for relief from sanctions, in detail.

The defendant's application for relief from sanctions: Background

42. The defendant, in his urgent application for relief from sanctions and extension of time, which was filed on January 27, 2025, has sought the following orders, among others:

'1. Time is abridged for the hearing of this application.

2. The defendant is granted relief from sanctions for failing to file and serve his witness statements, and list of documents, in time.

3. The defendant is granted an extension of time to file and serve his witness statements, list of documents, and listing questionnaire.

4. Costs of this application are in the claim.

5. Such further and/or other relief as the court deems just.'

Whether the relevant witness statements and list of documents were filed and served within time as prescribed or whether any sanctions apply, and if so, what sanctions apply

43. Per the court's record, at least as far as I am able to discern, the defendant had neither filed nor served any witness statements in the matter at hand, up to the date of the relevant court hearing. The said witness statements were to have been filed on or before June 30, 2023, and from that date to January 30, 2025, amounts to one year and seven months. Accordingly, as at the date of the hearing, there was an inordinate delay on the part of the defendant regarding compliance. Of course, since the witness statements had not yet been filed, it also follows, inexorably, that they had not been served as at the time of the hearing. Accordingly, the sanction per ***rule 29.11 of the***

CPR took effect on July 1, 2023. Consequently, it became necessary for the applicant to apply for relief from sanction, per ***rule 26.8 of the CPR***.

44. In addition, the defendant's list of documents was filed on March 14, 2025, which amounted to a delay of almost two (2) years, since it was to have been filed on or before March 31, 2023, per the relevant court order. Accordingly, since the list was filed out of time, it follows then, that it was also served out of time. Therefore, the sanction ***per rule 28.14 of the CPR*** took effect on April 1, 2023. As a result, the defendant was constrained to apply for relief from sanction per ***rule 26.8 of the CPR***.

45. The defendant's affidavit in support of his application for relief from sanction(s) was filed on January 27, 2025, and deponed to by Mr. Robert Clarke, attorney-at-law for and on behalf of the defendant/applicant. The evidence proffered by Mr. Clarke is that the counsel, who initially had conduct of the matter, Ms. Kamau Ruddock, had taken ill and had continued to suffer from a prolonged illness, and thus, was unable to comply with the requisite CMC orders.

Whether the application for relief was filed promptly

46. As at the date of the hearing of the application herein, the defendant's delay for his failure to apply for relief from sanctions to file and serve his witness statements, amounted to approximately one year and seven months. This reflects an inordinate delay. Similarly, a delay of approximately one year and ten months with respect to the defendant's filing and service of his list of documents, is excessive. I must reiterate that the ***H.B. Ramsay case (op. cit.)*** opined that: *'It is without doubt that the current thinking is that if an application for relief from sanctions is not made promptly, the court is unlikely to grant relief...Whether something has been done promptly or not, depends on the circumstances of the case.'*

47. The defendant's present counsel, Mr. Matthew Gabbadon, has relied on the Court of Appeal case of ***Norman Washington Burton v The Director of Public Prosecutions [2023] JMCA Civ 30***, where the court provided guidance on how the

conditions and factors in ***rule 26.8***, should be interpreted. At paragraph 55, D Fraser, JA stated:

'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…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…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…'

This court concurs with the findings of that court, and has applied the said principles in its assessment of the applications for relief, now before it.

48. Mr. Clarke deponed that Mr. Gabbadon filed an urgent application for relief from sanctions and an extension of time, after he realized that the relevant application had not been made. He further deponed that the germane application was made promptly in the circumstances. It is important to note that neither Mr. Clarke, nor Mr. Gabbadon, has led any evidence as to when Mr. Gabbadon took conduct of the matter, or when he came to the realization that an application for relief was necessary in the circumstances. There is no evidence before the court to indicate that counsel for the defendant had, in fact, filed the germane application promptly. All of that evidence was needed to demonstrate to the court that he had filed the application as soon as he was able to do so. In the absence of that evidence, this court is not in a position to find that the application was filed promptly. Therefore, the defendant has not overcome the hurdle as set out in the aforementioned rule. This is sufficient to dispose of this application.

Nevertheless, I shall consider the other aspects of the application, in the event that I may be wrong in having reached this particular conclusion.

Whether the application for relief from sanctions is supported by evidence on affidavit

49. The application for relief from sanction for failure to file and serve the witness statement and the list of documents is supported by an affidavit, deponed to by Mr. Clarke, as outlined in paragraph 45 above. Accordingly, the defendant has overcome the hurdle as set out in ***rule 26.8(1)(b) of the CPR***.

The Court's Analysis

Whether the failure to comply was not intentional

50. The court notes that the applicant has not led any evidence as to whether his failure to comply with the requisite CMC orders, was unintentional. Mr. Clarke has deponed that the defence's failure to comply was not intentional. It must be noted, though, that neither Ms. Ruddock, Mr. Clarke, nor Mr. Gabbadon has provided a medical certificate or report corroborating the claim that Ms. Ruddock had taken ill, and that her illness had persisted beyond the dates for compliance with the relevant CMC orders. Therefore, no evidence was led by counsel to demonstrate to the court that the non-compliance was as a result of former counsel's incapacity, due to her illness. Of course, Ms. Ruddock's illness, in and of itself, could not be considered to be intentional. However, evidence needed to be led by counsel as to when she became ill, for how long she was ill, who was subsequently given conduct of the file, and any other relevant information, which could lead the court to make a determination that counsel's non-compliance was unintentional. No such evidence is before the court, instead, what is before the court appears to be paltry, insufficient and woefully inadequate. I am of the view that, if Ms. Ruddock was unable to act due to incapacitation because of illness, her office had a duty to reassign the matter to other competent counsel within the said office, within a reasonable time, in order to facilitate the progression of the matter. This would be necessary in the circumstances, and any competent, efficient office would and should so act. It appears that the office of the Director of State Proceedings did not act

accordingly, and this inaction is akin to administrative inefficiencies, per ***The Universal Projects case (op. cit.)***. From the available evidence, therefore, this court has been left with the irresistible inference, that the defence counsel either carelessly, chose not to so act, or perhaps deliberately, for whatever reason or reasons, chose not to so act. It does not though and cannot properly follow, that this means that this court must conclude that the failure to comply was unintentional.

51. Additionally, the court notes that neither Ms. Ruddock, nor Mr. Gabbadon, has sworn to any affidavit evidence in support of the defendant's application for relief. Therefore, the court does not have the opportunity to assess the direct evidence of counsel, who had previous conduct of the matter, or counsel who has present conduct of the matter. In the absence of the above, the court cannot form the view that the failure of the defence to file and serve the germane witness statements and list of documents, was unintentional, as there is not enough evidence to enable the court to reach such conclusion. The court is called upon to be the final determinant - neither counsel nor applicant can conclude for the purposes of this court's determination that the failure was unintentional. The evidence must be sufficient. There is nothing before the court to properly enable this court to draw the conclusion, that the failure to comply was unintentional. I have found, then, that the defence has not, on a balance of probabilities, proven their case.

52. I am of the view that some of our legal practitioners have taken a much too cavalier, relaxed approach to the practice of law, and this results in too many instances of non-compliance and a general disregard for the court. I concur with the Privy Council case of ***The Attorney General (Appellant) v Keron Matthews (Respondent) [2011] UKPC 38***, at *paragraph 19*, where the Board expressed commendations to the Court of Appeal for its *'desire to encourage a new litigation culture…to rid Trinidad and Tobago of the "cancerous laissez-faire approach to civil litigation".'* I believe that we should take a similar approach to our Jamaican, litigation culture.

<u>Whether there was a good explanation for the failure</u>

53. It is worthy of note that the defence has relied on the same evidence, that has formed the basis of his argument that the delay was unintentional, to mount a good explanation. That evidence is that counsel, who had previous conduct of the matter, fell ill for a prolonged period, and was, therefore, unable to comply with the CMC orders. Even if the court accepts that evidence, in respect of which, it should be noted, there exists no medical report whatsoever, proffered in independent medical support of her. There is, nonetheless, no excuse for the office of the Director of State Proceedings not to have reassigned the matter herein to other competent counsel, while Ms. Ruddock was ill. In the case of ***The Commissioner of Lands (op. cit.)***, the Jamaican Court of Appeal rejected the appellant's counsel's submissions concerning her reasons for non-compliance. Among the reasons she proffered were that she had to prioritize other legal matters of which her office had conduct, and that her office faced human resources challenges. In that case, the court opined, at paragraph 78, that:

'The administrative inefficiency…should not be entertained or taken as constituting a good excuse for the appellant's failure to obey the orders and rules of the court. This is not an excuse available to the ordinary litigant or his legal representative…'

54. I reject the defendant's explanation, same is neither sound nor acceptable in the circumstances. Further, counsel having deponed that the non-compliance was the fault of the defendant's attorney-at-law does not assist the defendant's case. See: ***The Commissioner of Lands case (op. cit.)***. I reiterate what was enunciated in the ***H.B. Ramsay case (op. cit.)***, that *'where there is no good explanation for the default, the application for relief from sanctions must fail'.* It is clear that the applicant has not met the requisite standard of proof and has failed to meet the burden of proof, in respect of this criterion.

Whether the defendant has generally complied with all other relevant rules, Practice Directions, orders and directions

55. Counsel for the defendant has deponed that the defence has generally complied with all other relevant rules, orders, and directions of the court. However, the defendant also failed to file and serve his list of documents within time, and his application for relief indicates that his listing questionnaire, which was to have been filed on or before March

5, 2024, was, in fact, filed on March 14, 2025. Consequently, the listing questionnaire was filed over one year out of time. Moreover, the defence failed to file and serve a pre-trial memorandum, ***per rule 38.5 of the CPR***, despite the fact that a pre-trial review hearing was scheduled to be held. Therefore, the defendant has not generally complied with **all** other relevant rules, Practice Directions, orders and directions. It is my view that the claimant has proven to be generally non-compliant in the circumstances. It is evident that the defendant has failed to prove, on a balance of probabilities, that he has generally complied with all other relevant rules, Practice Directions, orders and directions.

Whether an extension of time for filing and service of the relevant witness statements and list of documents can now properly be granted

56. An extension of time for filing and service of the defendant's witness statement and list of documents cannot now properly be granted in accordance with ***rule 26.1(2)(c) of the CPR***, since an extension of time cannot be granted in circumstances wherein a sanction has been imposed, unless relief from sanction has been granted. See: The ***Dale Austin case (op. cit.)***.

Whether the relevant listing questionnaire was filed and exchanged within time as prescribed, and if not, whether an extension of time may be granted

57. It is important to highlight that, while the defendant was non-compliant in filing the listing questionnaire per the pertinent court order, unlike non-compliance with respect to a witness statement or list of documents, there is no sanction imposed per the ***CPR*** for the failure to file or exchange listing questionnaires within time. ***Rule 27.12(1) of the CPR***, however, provides that '*each party must file the completed listing questionnaire in form 11 at the registry by the date directed under rule 27.9(5).'* The latter rule simply refers to the date by which a listing questionnaire is to be filed at court by the parties. Therefore, in the circumstances, the court is empowered to grant an extension of time for the filing and exchange of the defendant's listing questionnaire in accordance with ***rule 26.1(2)(c) of the CPR***, which allows this court, except where those rules provide otherwise, to*, '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 has passed.' In the circumstances of this particular case, the court will grant the defendant an extension of time within which to file and exchange his listing questionnaire.

Conclusion

58. Both the claimant and the defendant have failed to establish all three conditionalities, as prescribed in ***rule 26.8(2) of the CPR***, in order for their applications for relief from sanctions to succeed. The ***H.B. Ramsay case (op. cit.)*** aptly outlined that for an applicant to succeed in an application for relief from sanctions, that applicant must satisfy all three ingredients enshrined in ***rule 26.8(2) of the CPR***, and also, both requirements of ***rule 26.8(1)***. That case further reinforces that, so long as an applicant cannot furnish the court with a good explanation for his or her non-compliance, then the application for relief automatically fails. In the circumstances, the respective litigants' applications have failed, and therefore, there is no need for the court to consider ***rule 26.8(3)***. Since both applications were not opposed, there will be no order as to costs of the applications. At the trial of this claim, neither the claimant nor the defendant will be allowed to call witnesses to give evidence. Further, the applicants will not be able to rely on or produce the documents, which they had not disclosed, or permitted the opposing party to inspect, within the time ordered by the court. Similarly, the court cannot properly permit the claimant's witness statement or list of documents, nor the defendant's witness statements or list of documents, to stand as filed and/or served in time.

Disposition

59. The court, therefore, now orders as follows:

1.The orders sought in the claimant's notice of application for court orders, which was filed on January 30, 2025 are refused.

2. The orders sought in the defendant's notice of application for court orders, which was filed on January 27, 2025 are refused.

3. The claimant is not permitted to rely on his evidence upon the trial of this claim.

4. The claimant is not permitted to rely on or produce the documents, which he had not disclosed nor permitted the opposing party to inspect within time, upon the trial of this claim.

5. The defendant is not permitted to rely on the evidence of his witnesses upon the trial of this claim.

6. The defendant is not permitted to rely on or produce the documents, which he had not disclosed nor permitted the opposing party to inspect within time, upon the trial of this claim.

7. The defendant's listing questionnaire, which was filed on March 14, 2025, is permitted to stand as filed and served within time.

8. A pre-trial review shall be held before a Judge or Master, in Chambers, on a date to be scheduled by the Registrar in consultation with the parties, and at that pre-trial review hearing, the court shall then, among other things, consider whether the trial can proceed, or instead if summary judgment should be granted in favour of the defendant.

9. Leave to appeal is granted to the respective parties.

10. No order as to costs.

11. The claimant shall file and serve this order.

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Hon. K. Anderson, J.