[2025] JMSC Civ. 27

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU 2020CV04877

BETWEEN	**OWAYNE WEIR**	**CLAIMANT**
AND	**DWAYNE WILLIAMS**	**DEFENDANT**

IN CHAMBERS

Sharon Gordon, Attorney-at-Law, instructed by Gordon & Associates, Attorneys-at-Law for the Claimant

De-Andra Butler and Faith Gordon, Attorneys-at-Law, instructed by Samuda & Johnson, Attorneys-at-Law for the Defendant

Heard: January 13 and 31, 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 statement 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 - 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 statement and to provide standard disclosure within the respective times ordered by the court

1. On January 13, 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 and extension of time, which was filed on November 7, 2024, has sought the following orders, among others:

'1. That the claimant/applicant be granted relief from sanctions for failing to file the witness statement of Owayne Weir no later than the 20th of May 2024, in compliance with the order

made on the 7th day of November 2022.

2. That the claimant/applicant be granted relief from sanctions for failing to file the list of documents no later than the 30th day of November 2023, in compliance with the order made on the 7th day of November 2022.

3. That the witness statement of Owayne Weir filed on the 10th day of October 2024 be permitted to stand.

4. That time for filing and serving the claimant's witness statement and list of documents be extended until the 10th day of October 2024.'

4. The court made the following orders, inter alia, at the hearing of the respective applications, on January 13, 2025:

'1. Practice Direction No. 8 of 2020 and the requirements therein, with respect to the filing of a judge's bundle and a bundle of submissions and authorities re court applications, are waived by this court, as regards the claimant's application for court orders, which was filed on November 7,2024.

2. The defendant's application for relief from sanction, which was filed on November 15, 2024, shall be heard on paper, by Anderson, J. and this court's ruling on that application is reserved.'

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 October 10, 2024, which means that the claimant filed the said witness statement, just over four and a half months out of time, contrary to the relevant court order, which was made by Justice Jarret (Ag.) on November 7, 2022, and which stipulated that the claimant's witness statements were to have been filed and served on, or before May 20, 2024. Counsel for the claimant, in her oral submissions, proffered that the germane witness statement was served even later, on October 15, 2024. 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 29.11of the CPR*** was imposed from May 21, 2024, 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, 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: ***HB Ramsay & Associates Ltd. and Ors. v Jamaica Redevelopment Foundation Inc. and The Workers Bank [2013] JMCA Civ. 1***. That case confirmed that ***rule 26.8(3)*** has no relevance, if an applicant seeking relief from sanction(s), has not overcome the high hurdles of the conditionalities as set out in ***rules 26.8(1) and (2) of the CPR***.

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 November 7, 2024, which is approximately five and a half months after the court's stipulated deadline for compliance. It was suggested, 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. This court should not be expected to seek to presume same. This court ought not and therefore, will not, do so. Therefore, 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

14. The claimant's application for relief from sanctions is supported by evidence given by both the claimant and his attorney-at-law from the law firm, Gordon & Associates. These affidavits were both filed on November 7, 2024. Accordingly, it is my view that the claimant/applicant has overcome the hurdle as set out in ***rule 26.8(1)(b) of the CPR***.

Whether the failure to comply was not intentional

15. 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 most cases, based on the admissible evidence of the particular circumstances of the particular case then before it, 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.

16. The claimant, in his affidavit, deponed that he had, in fact, collected his draft witness statement from his attorneys-at-law in early May 2024, and that, he had wanted some time to review same. He also deponed that subsequently, he experienced phone issues because he had forgotten to put call-credit on his personal cellular phone, which led him to lose that number. In addition, he claims that his work phone (Closed User Group/CUG) was stolen, and that, this resulted in a lack of communication between him and his attorneys-at-law. He further claims that he was unaware that his witness statement was due in May of 2024 because he had the pre -trial review date in mind.

17. Anika Townsend, the claimant's counsel, has deponed, in her affidavit, that the claimant's non-compliance was not contumacious, in the circumstances. She has also claimed that the delay in filing the witness statement was not intentional, but that it was due to the claimant's inability to execute the documentation promptly. In addition, Ms. Townsend has deponed that the claimant experienced phone issues, which prevented his attorneys-at-law from contacting him directly, and that, the claimant did not fully understand the urgency of executing the documents. She has further stated that the claimant has complied with all other orders, rules, and Practice Directions to date, as well as, that the claimant has made his application for relief promptly, and that he has a good explanation for the delay.

18. Although counsel for the claimant has submitted that the delay in the filing of the applicable witness statement was not intentional, the evidence she has proffered, being that there was a lack of communication between the claimant and his counsel, and that, the claimant was unaware that time was of the essence with respect to the execution of the material witness statement, 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. The claimant and Ms. Townsend have both stated that there was a challenge in terms of communication, and that, that led to their non-compliance. However, I cannot see why the claimant could not communicate 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, corresponded by electronic mail or by letter. There is no evidence that he even so much as attempted to contact his counsel during that time period. Further, there is no evidence that the applicant's attorneys had tried to contact him. In any event, his counsel could and should have prepared, filed and serve 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, could not have even arisen.

19. The communication difficulty, as presented by the claimant and his 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. Moreover, the claimant and his counsel have both expressed that the claimant did not know that time was of the essence with respect to the execution of the relevant witness statement - this further suggests a more serious communication dilemma between counsel and client. In any event, per ***rule 29.11(1)***, counsel had the option of preparing, filing and serving a witness summary, if it was not possible to file and serve the claimant's witness statement at the material time. The court would, then, be hard-pressed to find that the delay was not intentional, since the claimant's counsel chose not to exercise the aforesaid option in the circumstances. The evidence proffered by the affiants in support of their position that the delay was not intentional, is insufficient. In fact, they are suggestive of administrative inefficiencies per ***The Attorney General (Appellant) v Universal Projects Limited (Respondent) [2011] UKPC 37*** case. It is evident that the claimant has failed to meet his burden of proof, as regards the need to satisfy this court, that the failure to comply was unintentional.

Whether there was a good explanation for the failure

20. The claimant's counsel has submitted 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 the claimant and his attorney, when assessing whether the failure to comply, was unintentional. 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, oversight and other administrative errors are 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).

21. 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

22. The claimant's counsel has boldly deponed that the claimant has, at least as far as I have been able to discern, complied with all other orders, rules, and Practice Directions to date. However, upon my review of the court's record, I have noted that the claimant has not complied with a number of the case management orders, which were made by A. Jarrett J. (Ag.) (as she then was) on November 7, 2022, in addition to the non-compliance, which is the subject of this application. Firstly, the claimant's attorneys-at-law have not filed or served the written questions and answers thereto, which was to have been filed and served on or before January 23, 2023, per court order number 4. Secondly, the claimant has failed to file and serve notice of objection, which was to have been filed and served, on or before January 10, 2025, per court order number 12. Thirdly, the claimant has not filed and served the listing questionnaire, which was to have been filed and served on or before January 10, 2025, per court order number 13. 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 that application, nor any submissions or authorities, related to same. Based on the preceding, I find that, the claimant's counsel, unfortunately, made a patently 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.

23. 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 other orders of this court. It is clear that the claimant has failed to prove, on a balance of probabilities, that he has met this burden. The legal consequences of the failure of the claimant's attorneys to have been efficient, will, 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.'

24. 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 all three elements of the relevant paragraph. Consequently, the court cannot grant relief in the circumstances.

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

25. 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

26. The claimant filed his list of documents on December 7, 2023. However, the list of documents was to have been, filed and served, on or before November 30, 2023, per the applicable court order. Therefore, the requisite list was filed seven (7) calendar days late. It follows exorably that, since the list of documents was filed out of time, then the said list of documents was also served out of time. It is important to note that the sanction as laid down per ***rule 28.14(1)***, is imposed as result of the requisite list of documents having been **served** out of time. Therefore, even if the germane list of documents was filed within time, but same was served out of time, then the sanction would still apply. As a result of the claimant's non-compliance of serving the list of documents out of time, a sanction was imposed per ***rule 28.14(1) of the CPR***, which reads: '***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.'*** This sanction took effect on December 1, 2023. Consequently, an application by the claimant for relief from sanctions was necessary. It is to be recalled that the claimant's application for relief, was filed on November 7, 2024, this therefore being over eleven (11) months after the relevant sanction took effect.

The Court's Analysis

Whether the application for relief was filed promptly

27. Prima facie, the delay of approximately eleven (11) months, appears to be 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

28. The two (2) affidavits, which are referenced in paragraphs 16 - 18 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

29. Counsel for the claimant, in her oral submissions, proffered that the delay in the filing of the list of documents was unintentional. Having perused and assessed her affidavit evidence, however, I find that her claim that the delay in filing the germane list of documents was as a result of the claimant's work constraints, which hindered timely execution of the documentation, to be quite inadequate. She has also highlighted the fact that the said list was filed seven days past the stipulated date, which, I find, does nothing to support her claim that the delay was not intentional. The claimant has deponed that due to the work demands and pressures of his job, he was unable to attend his attorneys'-at-law office to execute the list of documents. I have concluded that, based on the claimant's evidence, he did not prioritize the execution of his required list of documents.

30. 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

31. The claimant and counsel for the claimant 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 20 - 21 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

32. 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 paragraphs 22 - 23 herein.

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

33. 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 25 of this judgment.

Conclusion

34. Ultimately, each case involving an application for relief from sanctions, must be considered, on its own facts. 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

35. The defendant, in his notice of application for court orders for relief from sanctions, which was filed on November 15, 2024, has sought the following orders, among others:

'1. The applicant be granted relief from sanctions.

2. The applicant be granted an extension of time to file and serve his list of documents and witness statement.

3. The Case Management Conference Orders complied with out of time be permitted to stand.'

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

36. Per the court's record, the defendant's witness statement was filed on November 14, 2024, which was almost six months out of time. I find that the delay of almost six months in that regard, is significant. Of course, it stands to reason that since the

material witness statement was filed out of time, it was also served out of time. Accordingly, the sanction per ***rule 29.11 of the CPR*** took effect on May 21, 2024. Consequently, it became necessary for the applicant to apply for relief from sanction, per ***rule 26.8 of the CPR***.

37. In addition, the defendant's list of documents was also filed on November 14, 2024, which amounted to a delay of over eleven months. 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 December 1, 2023. As a result, the defendant was constrained to apply for relief from sanction per ***rule 26.8 of the CPR***.

38. The defendant's affidavit in support of his application for relief from sanction(s) was filed on November 15, 2024, and deponed to by Mr. Joerio Scott, attorney-at-law for and on behalf of the claimant/applicant. The evidence, which is that the defendant's file had been mislaid, appears to be paltry, insufficient and woefully inadequate.

Whether the application for relief was filed promptly

39. The eleven-and-a-half-month delay with respect to the defendant's application for relief from sanction for failure to file and serve the list of documents is an inordinate delay. 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.'* It is important to note that counsel for the defendant claimed that the application was filed as soon as he could so, however, he has not led any evidence to indicate who had custody of the file, or the efforts expended to locate same, or when it was found. 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 this 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

40. 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, as indicated in paragraph 38 of this ruling. Accordingly, the claimant 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

41. The defendant's counsel has deponed that the failure to comply with the case management orders within time, was not the fault of the defendant. He has further submitted that the failure came about because the applicant's file was misplaced, and that as soon as the said file was located, steps were taken to comply with the relevant orders. The court notes that two attorneys-at-law, representing the defendant/applicant, were present at CMC; therefore, they were in a position to take notes and prioritize the relevant deadlines ordered by the court. Defence counsel contends that they could not locate the relevant file. That was, this court believes, likely in and of itself, unintentional. No evidence has been led on the defendant's behalf, either by defence counsel, or any member of defence counsel's staff, as to who searched for the file, at what times the search or searches were undertaken, or when the file was found. Further, the defence could have reached out to opposing counsel in order to access the relevant information and/or documents to facilitate compliance. Moreover, defence counsel could have contacted the court in order to procure a copy file and the requisite orders. From the available evidence, 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 also conclude that the failure to comply was unintentional.

42. 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 statement 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.

43. 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.

Whether there was a good explanation for the failure

44. 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 the applicant's file was misplaced. In the case of ***The Commissioner of Lands case (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…'

45. I also reject the applicant's explanation as not being sound or acceptable in the circumstances. The misplacement of a file in a law office cannot be a good reason for

failing to comply with court orders. Counsel for the defendant has not led evidence to indicate that the firm had tried to make contact with the defendant, with a view to take instructions again, in order to comply with the relevant CMC orders. See: ***The Universal Projects 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'.* I also reject the explanation advanced by counsel, for the reasons I advanced in paragraphs 42 - 43 of this ruling. 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

46. Counsel for the defendant did not address whether the defendant has generally complied with all other relevant rules, Practice Directions, orders and directions in her oral or written submissions. However, from my review of the court's record, I observed that the applicant has not complied with several CMC orders, made by A. Jarrett J. (Ag.) (as she then was) on November 7, 2022, in addition to the non-compliance, which is the subject of this application. Firstly, the applicant has not filed notice of intention to tender hearsay documents, which was to have been filed and served on or before December 9, 2024. Secondly, he has not filed and served notice of objection, which was to have been filed and served on or before January 10, 2025. Thirdly, he failed to file and serve listing questionnaire, which was to have been filed and served on or before January 10, 2025. 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 statement and list of documents can now properly be granted

47. An extension of time for filing and service of the claimant'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.)***.

Conclusion

48. 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 ***HB 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***. 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, there is no need for the court to consider ***rule 26.8(3) of the CPR***, in any depth, as both applicants' applications have failed. 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 statement or list of documents, to stand as filed and/or served in time.

Disposition

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

1.The claimant's application for relief from sanctions, which was filed on November 7, 2024 and the defendant's application for relief from sanctions, which was filed on November 15, 2024, are respectively denied.

2. No order is made as regards the costs of either of the said applications.

3. A further case management conference for this claim shall take place before a Judge or Master, in Chambers, on May 7, 2025, commencing at 11:00 a.m. for one hour and at that hearing, it shall be for this court to decide on whether this claim shall proceed any further and to make the appropriate orders in the circumstances.

4. The claimant shall file and serve this order.

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Hon. K. Anderson, J.