



[2026] JMSC Civ 76

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. 2014HCV03999**

|                |                              |                  |
|----------------|------------------------------|------------------|
| <b>BETWEEN</b> | <b>MARCIA BENNETT</b>        | <b>CLAIMANT</b>  |
| <b>AND</b>     | <b>PANTON ALEXANDER TODD</b> | <b>DEFENDANT</b> |

**Mrs. Denise Senior Smith instructed by Oswest Senior-Smith & Company for the claimant**

**Mr. Ashton Spencer for the defendant**

**HEARD 15 and 21 May 2026**

*Civil Procedure — Relief from sanctions — Application in respect of List of Documents and Witness Statement filed out of time — Application filed five and a half months after non-compliance brought to counsel’s attention by the trial judge — List of Documents omitted from first application and added only on amendment — Whether application made promptly under rule 26.8(1)(a) — Pattern of repeated non-compliance with case management orders — Whether good explanation for default — Whether general compliance with other rules and orders — Unless order in force — Importance of Listing Questionnaire - CPR Rules 26.8, 28.14 and 29.11.*

**MASTER MCNEIL (AG)**

**Introduction**

- [1] This is an application by the defendant for relief from sanctions pursuant to Rule 26.8 of the Civil Procedure Rules, 2002 (“the CPR”). The relief sought is in respect of two distinct defaults: the late filing of the defendant’s list of documents and the

late filing of the witness statement of Panton Alexander Todd. The sanction in respect of the list of documents arises under Rule 28.14, which provides that a party who fails to disclose a document, or to permit inspection, may not rely on that document save with the permission of the court. The sanction in respect of the witness statement arises under Rule 29.11, which provides that where a witness statement is not served within the time specified by the court, the witness may not be called to give evidence at trial unless the court permits.

- [2] I am wholly unpersuaded by the defendant's arguments, as set out in the written submissions filed on 14 May 2026 and supplemented by oral submissions advanced on 15 May 2026. There is nothing in the application as amended, nor in the affidavit evidence as amended, that meets the threshold of Rule 26.8 of the Civil Procedure Rules. I therefore dismiss the application for the reasons that follow.

### **The procedural history**

- [3] The claim form was filed on 8 August 2014. The defence was filed on 13 June 2016, nearly two years out of time, and only after the court granted an extension.
- [4] On 27 November 2024, the court made case management orders requiring, among other things, that the parties file and serve their lists of documents by 14 March 2025 and their witness statements by 25 April 2025. The trial was fixed for 4 and 5 November 2025.
- [5] The defendant did not comply. His list of documents was filed on 24 June 2025, more than three months out of time. His witness statement was filed on 28 July 2025, three months out of time. No listing questionnaire was filed. No skeleton arguments were filed.
- [6] On the day fixed for trial, 4 November 2025, the defendant was not ready to proceed. The claimant too was not ready. Documents were missing. Skeleton submissions were missing. Counsel for the defendant was unable to locate his client. The trial was adjourned to 22 June 2026.

- [7] The learned judge, Mott-Tulloch Reid J, who adjourned the trial, recorded, in plain terms, that although the defendant had filed a witness statement and list of documents out of time, no application for relief from sanctions had been made. The need for such an application was thus expressly drawn to the attention of the defendant's counsel at the commencement of the trial on 4 November 2025.
- [8] The learned judge also made an unless order, the effect of which is that if a party is not ready to proceed at the adjourned trial on 22 June 2026, its statement of case will stand struck out.
- [9] Notwithstanding the express judicial notification of 4 November 2025, the present application for relief from sanctions was not filed until 23 April 2026, a period of five months and nineteen days later. The defendant's counsel, who is the affiant in support of the application, deponed that the application was made "as soon as reasonably practicable having reviewed the file on or around April 10, 2026 and discovering that the application was not made". No explanation was offered for the silence between November 2025 and April 2026. Counsel described the failure to file earlier as an "oversight".
- [10] A further procedural feature requires mention. The application, as first filed, sought relief only in respect of the witness statement. The list of documents was not addressed. It was only by amendment, made in response to issues identified at the adjourned pre-trial review, that relief was sought in respect of the list of documents. No good reason has been advanced for the omission of the list of documents from the original application, nor for its inclusion only when the deficiency was raised by the court. The amendment, in short, was not the product of fresh reflection by the defendant but of further judicial prompting.

### **The governing rule**

- [11] The law on relief from sanctions under Rule 26.8 of the CPR is well settled. I have considered the arguments and the authorities to which counsel referred. Given that the governing principles are not in controversy, I see no need to rehearse counsel's

respective submissions at length in order to render this judgment intelligible. Rule 26.8 of the CPR establishes a structured framework. Rule 26.8(1) imposes two preconditions: the application must be made promptly and must be supported by affidavit evidence. Rule 26.8(2) imposes three further threshold conditions which must all be satisfied: the failure must not have been intentional; there must be a good explanation for the failure; and the party in default must have generally complied with all other relevant rules, practice directions, orders and directions. Only if all of those conditions are met does the court turn to the discretionary factors in Rule 26.8(3). The conditions are conjunctive: a failure on any one is fatal: See **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1, per Morrison JA; **H.B. Ramsay & Associates Ltd v Jamaica Redevelopment Foundation Inc.** [2013] JMCA Civ 11, per Brooks JA.

#### **Promptness under Rule 26.8(1)(a)**

- [12] I begin, as I must, with promptness. The Court of Appeal has explained that promptness has “some measure of flexibility in its application”, but it requires the applicant to act “with all reasonable celerity in the circumstances”: See **National Irrigation Commission Ltd v Conrad Gray** [2010] JMCA Civ 18, per Harrison JA, at paragraph [14], adopting Simon Brown LJ in **Regency Rolls Ltd v Carnall** [2000] EWCA Civ 379. In the recent decision of the Court of Appeal in **Oneil Edwards v Jamaica Public Service Company Limited** [2025] JMCA Civ 13 (“**Oneil Edwards v JPS**”), Foster-Pusey JA held that, where a default has been undiscovered, promptness falls to be assessed from the date of discovery.
- [13] Counsel for the defendant argued that the application was made as soon as the non-compliance was discovered. This discovery referred to the timing of the application, not to the date of the failure to file in the first instance. The Court of Appeal’s decision in **Oneil Edwards v JPS**, with respect, therefore, does not assist the defendant. The discovery rule in this decision applies where the default has been genuinely undetected. That is not the case. The default was expressly brought to the defendant’s attorney’s attention by the trial judge on 4 November

2025. From that date, no question of discovery arose. The defendant's attorney was on notice that an application was required, especially where an "unless order" was imposed.

- [14] The applicable principle in relation to "unless order" stated by Brooks JA in **H.B. Ramsay** at paragraph [14]:

*"Where such orders are made, the party affected is given notice of the requirement and the penalty for non-compliance. The deadline for compliance should, therefore, be uppermost in his mind."*

- [15] The case at bar is, if anything, stronger than the unless-order context to which that passage was directed. The defendant's attorney was not merely on notice through a written rule or order. He was told, in open court, by the very judge who had to adjourn a trial because of the defendant's lack of readiness, that an application for relief was required. To delay five months and nineteen days thereafter, and to describe that delay as an "oversight", does not satisfy any standard of promptness known to the authorities.

- [16] The closer analogue is the recent decision in **Deputy Superintendent John Morris v Desmond Blair** [2023] JMCA Civ 45. There, the respondents knew of their breach but withheld the application for relief pending the outcome of settlement discussions. The Court of Appeal held that, although the application could be viewed as having been made promptly in response to the application to strike out, "there was an inordinate delay in relation to when the breach had occurred" (per P Williams JA at paragraph [67]). The application was held not to have been made promptly.

- [17] The position here is similar in substance and worse in degree. The defendant's counsel was directly told by the court that an application was required. He did nothing for over five months. The explanation tendered — that he reviewed the file in April 2026 and discovered the omission — cannot displace the fact of judicial

notification in November 2025. The application was not made promptly. On that ground alone, and consistent with the authorities, the application must fail.

- [18] Were I to stop there, that would be a sufficient basis for refusing the application. The Court of Appeal has repeatedly emphasised that where the application is not made promptly, the court need not consider the merits further. I shall nevertheless address the other limbs, given the seriousness of the consequences for the defendant.

**Good explanation under Rule 26.8(2)(b)**

- [19] The good explanation limb must be considered separately in respect of each of the two defaults for which relief is sought.
- [20] As to the list of documents, no explanation was offered. The defendant's evidence is silent as to the reason for the lateness. The list of documents was due on 14 March 2025; it was filed on 24 June 2025, three months and ten days out of time. The affidavit in support advanced no account of why that occurred. An absence of explanation cannot constitute a good explanation. The limb is not satisfied in respect of the list of documents.
- [21] As to the witness statement, the explanation tendered by counsel for the defendant is that the defendant resides overseas and that documents were misplaced at a courier's office, necessitating fresh preparation. In the first affidavit no timelines were given. In an amended affidavit, timelines are asserted but no contemporary documentation is exhibited. No correspondence with the courier is produced. No copy of any tracking, no receipt, no email, no invoice. The court is asked to accept the assertion on faith.
- [22] I do not accept the explanation. An applicant for relief from sanctions bears the burden of placing material before the court sufficient to establish a good explanation. Bare assertion is not enough, particularly where the explanation is one which would, by its nature, generate documentary trace. Where a courier has misplaced documents, one would expect correspondence, an incident reference,

a service report, or some other contemporary record, to include some electronic means of communication. None is before the court. Curiously, the “further amended” affidavit sought to address a concern raised by this court at the adjourned pre-trial review hearing that the affidavit evidence was bereft of any supporting and contemporaneous material. Counsel deponed, conveniently, that “the DHL package was inadvertently thrown out by the former provider of janitorial services for the office”. It is not made clear to which office counsel refers, and in any event, I reject the evidence, as it amounts to no more than a further administrative oversight. Had counsel taken any care whatsoever in the preparation of the matter, these “errors” could not have gone unnoticed and unaddressed for so prolonged a period.

- [23] Counsel is duty-bound to assist the court in furthering the overriding objective. I regret to observe that counsel for the defendant has failed, in every material respect, to discharge that duty, both to the court and to his client. The amendment to the affidavit, supplying timelines for the first time, deepens rather than allays my concern: it suggests reconstruction rather than recollection.
- [24] As to the lateness of the application itself, I have observed that the explanation offered is “oversight”. Counsel candidly so described it. I accept the candour. But I cannot accept that an oversight extending over five months and nineteen days, in circumstances where the need for the application had been expressly drawn to counsel’s attention by the trial judge, can constitute a good explanation. Oversight and good explanation are not the same thing. The rule contemplates a standard higher than the mere absence of bad faith: *MacKay* (supra). What has been tendered does not meet that standard. The good explanation limb is not satisfied in respect of either default.

#### **General compliance under Rule 26.8(2)(c)**

- [25] The third threshold condition requires that the party have generally complied with other relevant rules, practice directions, orders and directions. The defendant’s history in these proceedings does not permit such a finding.

- [26] The defence was filed almost two years out of time and only after an extension was sought and granted. The list of documents was filed more than three months out of time. The witness statement was filed three months out of time. The listing questionnaire was not filed at all until 13 May 2026. The importance of filing a listing questionnaire does not escape this court's observation. Parties are required to prepare and file the questionnaire, which asks specific questions, including whether the party has complied with all orders of the court and whether any application for relief from sanctions is required. It is an important document because it assists the court in determining, before the hearing, whether the matter is ready for trial. Care must be taken to answer the questions in the form, as the court relies on it to determine how to marshal the scarce resources of the court.
- [27] A properly completed listing questionnaire focuses the matters for discussion at the pre-trial review and promotes the efficient use of judicial time. The absence of a listing questionnaire from the defendant is part of the explanation for why the trial collapsed on 4 November 2025. Had it been filed, the deficiencies in disclosure, the lateness of the witness statement, the unavailability of the defendant, and the absence of skeleton arguments would have been visible to the court weeks earlier, and either remedied or addressed in advance.
- [28] The defendant was not ready to proceed at trial. Counsel was unable to locate his client. The present application was itself filed five and a half months after the need for it was identified by the court. The first iteration of the application omitted the list of documents; it was added only on amendment, again without good reason.
- [29] This is not the record of a party which has generally complied. It is the record of a party which, on the evidence before me, has treated the court's directions as suggestions. The third threshold condition is plainly not satisfied.
- [30] The threshold conditions in Rule 26.8(1) and (2) being conjunctive, the failure of any one is dispositive. Here, the application fails on three: promptness, good explanation, and general compliance. The court in all the circumstances has no jurisdiction to grant relief.



**Discretionary factors (in the alternative)**

- [31] Were I wrong on the threshold question, I would in any event refuse relief in the exercise of the discretion under Rule 26.8(3). My reasons are set out below.
- [32] First, the interests of the administration of justice under Rule 26.8(3)(a) weigh decisively against relief. As Harrison JA observed in **National Irrigation Commission** at paragraph [16], there is a strong public interest in the finality of litigation. People are entitled to know where they stand. This is a claim filed in 2014. The defence came in 2016. Case management took place in November 2024. The trial fixture was lost in November 2025 because of the parties' want of readiness. The matter is now fixed for June 2026. To grant relief on the present application is to reward, and so to encourage, the very pattern of conduct which has consumed more than a decade of court time on a single claim. The administration of justice is not served by that course.
- [33] Secondly, the unless order made by the learned judge who adjourned the trial in November 2025 supplies its own answer. The defendant is now under a sanction that, if it is not ready on 22 June 2026, its statement of case will stand struck out. Granting relief at this stage would undermine the discipline of that order. Refusing relief preserves it.
- [34] Thirdly, the rule itself directs attention, at Rule 26.8(3)(b), to whether the failure to comply was due to the party or his attorney-at-law. On the evidence before me, the failures are uniformly those of the attorney: the affidavit in support is sworn by counsel himself, and the conduct of the file from November 2025 to April 2026 lies at his door. I observe, however, that even where the failure is the attorney's, the consequences fall on the party. That is the structure of the rule. The client's remedy, if any, lies elsewhere.
- [35] Fourthly, I have weighed the prejudice to the defendant of refusing relief. It is significant. The defendant will be debarred from leading the evidence of its witness and may face the consequences of the unless order. But that prejudice is the

inevitable consequence of the rule, and the rule is in place precisely so that parties and their attorneys appreciate the cost of non-compliance. The Court of Appeal has repeatedly cautioned against treating the prejudice of refusal as a reason for granting relief in cases where the conditions are not met.

### **Disposition**

[36] For these reasons, the application is refused on each of the three threshold limbs and would in any event have been refused in the exercise of the court's discretion.

[37] I make the following orders:

- (1) The Defendant's Further Amended Notice of Application for Court Orders for Relief from Sanctions filed 13 May 2026 is refused in its entirety.
- (2) The defendant is debarred from calling Panton Alexander Todd to give evidence at the trial of this matter, the witness statement filed on 28 July 2025 not standing as having been filed in time.
- (3) The defendant may not rely at trial on any document disclosed in the list of documents filed on 24 June 2025, save with the permission of the trial judge.
- (4) Costs of the application to the claimant, to be taxed if not agreed.
- (5) Leave to appeal is refused.

**Master Miss McNeil (Ag)**