

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

COMMONWEALTH OF DOMINICA

DOMHCVAP2023/0003

BETWEEN:

KELVIN MANN

Appellant

and

LORDEN WARRINGTON

Respondent

Before:

The Hon. Mr. Mario Michel

Justice of Appeal

The Hon. Mde. Margaret Price Findlay

Justice of Appeal

The Hon. Mde. Vivian Georgis Taylor-Alexander

Justice of Appeal [Ag.]

Appearances:

Ms. Heather Felix-Evans for the Appellant

Ms. Dawn Yearwood-Stewart, holding papers for Mrs. Singoalla Blomqvist-Williams for the Respondent

2023: December 6;

2024: June 6.

Interlocutory appeal – Relief from sanctions – Extension of time – Whether an application for an extension of time can be treated as an application for relief from sanctions – Case management powers – Appeal against the exercise of judicial discretion – Appellate interference – Rule 26.8 of the Civil Procedure Rules 2000 – Non-compliance with court orders – Whether the reasons given for non-compliance with a court order were sufficient

On 10th September 2021, Stephenson J made an order at a case management hearing directing that the parties disclose all documents on which they seek to rely at trial by 15th October 2021; consider mediation with a possible mediation order to be requested by 11th February 2022; file and serve all witness statements on or before 31st March 2022; and attempt to agree on a list of issues for determination by the court by 30th April 2022, and if they could not agree, exchange their lists by 10th May 2022. The matter was thereafter fixed for pre-trial review before another judge on 3rd June 2022. The appellant complied with the order in its entirety, save that the parties did not attempt mediation. The respondent failed to file his witness statements and list of documents within the time stated in the order.

On 1st April 2022 and 13th June 2022, the respondent filed two applications headed 'Notice of Application for Relief from Sanctions'. The applications sought leave to file the witness summaries of Lorden Warrington, Sabrina Seaman, Dr. Griffin Benjamin, Ann Dequental and Merlyn Thomas, out of time and an order deeming them properly filed. The respondent filed a third application on 13th June 2022, this time seeking leave to file the list of documents out of time.

On 17th June 2022, the appellant filed an application to strike out the respondent's witness summaries and list of documents on the basis that they were improperly filed as they were filed without the leave of the court. On 23rd June 2022, the respondent filed two more applications seeking relief from sanctions with respect to the witness summaries and an order that they be deemed properly filed.

The various applications were heard by the learned judge on 18th January 2023 and 6th February 2023. In a written judgment delivered on 10th March 2023, the judge granted the respondent relief from sanctions for non-compliance with the order of Stephenson J and extended the time for the respondent to file his witness statements/summaries and to make standard disclosure. The learned trial judge also deemed the witness statements/summaries properly filed.

Being dissatisfied with the decision of the learned judge, the appellant appealed citing 9 grounds of appeal, ultimately seeking to have the witness summaries and the list of documents struck out.

Held: allowing the appeal, setting aside the order of the learned judge granting relief from sanctions for failing to file the witness summaries on time and awarding costs to the appellant, such costs to be assessed by a judge or master of the High Court if not agreed within 14 days, that:

1. Applications for extension of time, when made after the time for complying has passed, fall to be treated under CPR 26.8 as applications for relief from sanctions. The learned judge accordingly found that the applications before her were for relief from sanctions and even if she had found that they were merely applications to extend time as the appellant contended, she could have properly considered them under CPR 26.8. She was satisfied that the intention of the documents, though deficient in their averments, was for relief from sanctions and she cannot be faulted for treating with the applications as she did.

Rules 26.7(2) and 26.8 of the **Civil Procedure Rules 2000** applied; **Adam Bilzerian v Gerald Lou Weiner et al** SKBHCVP2015/0015 (delivered 27th January 2016, unreported) followed; **Kyle David v Attorney General of the Commonwealth of Dominica** DOMHCVAP2013/0004 (delivered 21st January 2014, unreported) distinguished.

2. Part 26 of the CPR gives the court wide powers of case management which allows the court to dispense with any aspect of procedure and allows the judge to deal with the case in a manner that ensures fairness to all parties involved in the matter. The

learned trial judge employed the case management powers given by Part 26 in dealing with the various applications. The applications before the court in this matter were all of similar nature and the learned trial judge in seeking to deal with the matters fairly and expeditiously made the decision to hear them together. This allowed for the proper use and allocation of judicial time, and she cannot be faulted for adopting this approach.

Part 26 of the **Civil Procedure Rules 2000** applied.

3. The basis upon which an appellate court will interfere with the exercise of discretion by a trial judge is well established. Such an appeal will not be allowed unless the appellate court is satisfied that in exercising that discretion the trial judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations, and that as a result of the error or the degree of error in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.

Nilon Limited & anor v Royal Westminster Investments SA & ors [2015] UKPC 2 applied; **Michael Dufour et al v Helenair Corporation Limited et al** (1996) 52 WIR 188 followed.

4. All three limbs of CPR 26.8(2) must be satisfied for an applicant to succeed in an application for relief from sanctions. Failure to satisfy any one of the three limbs is fatal. The courts of this jurisdiction have taken a strict approach to ensure compliance with the rules and the preconditions have been applied in an uncompromising fashion. The court must therefore examine the evidence put before it by the applicant in order to determine whether the criteria set out in CPR 26.8(2) have been satisfied.

Ferdinand Frampton v Ian Pinard et al Dominica Civil Appeal No. 15 of 2005 (delivered 3rd April 2006, unreported) followed; **Inna Gudavadze et al v Ivane Chkhartishvili** BVIHCMAP2016/0037 (delivered 11th January 2017, unreported) followed.

5. What constitutes a good explanation for the purpose of CPR 26.8(2)(b) is fact sensitive. However, this Court has in a number of previous decisions made it clear that where the reasons given for delay in complying with orders of the court are among other things, misapprehension of law, mistake of law by counsel, lack of diligence, volume of work, difficulty in communicating with clients, pressure of work, client impecuniosity, secretarial incompetence or inadvertence, these excuses are not acceptable for the purpose of explaining away the default. The burden to satisfy the court remains on the applicant, and the party who is in default must not take the position that the obligation to provide a good explanation is trifling or treat it with scant regard and expect that a court will accept that approach and grant the relief sought.

Attorney General v Universal Products Ltd [2011] UKPC 37 applied; **Prudence Robinson v Sagicor General Insurance Inc** SLUHC VAP2013/0009 (delivered 29th September 2014, unreported) followed; **Cecil John Rose v Anne Marie Uralis Rose** Saint Lucia Civil Appeal No. 19 of 2003 (delivered 22nd September 2003, unreported) followed; **QVT Fund V LP et al v China Zenix Auto International Group Ltd et al** BVIHC(COM) No. 26 of 2014 (delivered 2nd December 2016, unreported) considered.

6. In the instant case, no particulars were given in the affidavits to explain why an error in the date of the reopening of the Registry was made and what efforts were made to find out if it had reopened for business. These were critical issues which ought to have been addressed in the affidavits. This was clearly an issue of inadvertence, a reason which has long since not sufficed for complying with CPR 26.8(2)(b). It was for the respondent to have shown that there was credible and particularised evidence in order to meet the threshold necessary for the court to grant the relief sought. The respondent here was required to show the court that the failure to file the witness statements or witness summaries was unintentional, that all reasonable steps had been taken to meet the deadline but, despite taking those steps, the deadline was not met. Despite making findings of the explanation being 'terse' and 'bare', the learned trial judge still found that there was a good explanation. There being no sufficient evidence before the learned trial judge upon which she could properly exercise her discretion, she was blatantly wrong in concluding that the explanation given by the respondent for the delay was good and adequate.

JUDGMENT

- [1] **PRICE FINDLAY JA:** This matter had its genesis in an order made by Stephenson J on 10th September 2021 giving directions in a case management hearing. The order of Stephenson J was as follows:

- "1. The Parties shall disclose all documents which they will seek to rely on in this matter on or before **15th October 2021**;
2. After disclosure the parties are encouraged to consider mediation and may apply to the court for a mediation order to facilitate same application to be made on the **11th February 2022**;
3. The parties shall file and serve all witness statements in the matter on or before the **31st March 2022**. Each party will call a maximum of 8 witnesses including expert witnesses. Each witness to attend trial of the matter to give evidence in chief and be cross examined.
4. The Parties shall seek to agree on a list of issues for determination by the Court not later than **30th April 2022** failing agreement the parties shall each party file (sic) and exchange a list of issues not later than the **10th May 2022**.

5. This matter is fixed for Pre-Trial Review before another judge on the **3rd June 2022**.

6. The Claimant shall have carriage of this order.” (emphasis added)

- [2] The appellant complied with the order in its entirety, save that the parties did not attempt mediation. The respondent failed to file his witness statements and list of documents within the time stated in the order.
- [3] On 1st April 2022, the respondent filed an application with the High Court headed ‘Notice of Application for Relief from Sanctions’; this application was supported by an affidavit sworn by the respondent’s attorney. The application requested leave to file the witness statements out of time and for them to be deemed properly filed. Attached to the application were the witness summaries of Lorden Warrington, Sabrina Seaman and Griffin Benjamin.
- [4] On 13th June 2022, the respondent filed another application, again headed ‘Notice of Application for Relief from Sanctions’. This application was supported by an affidavit of Raquel Kitwanie, a clerk in the office of the respondent’s attorney. Attached to this application were the witness summaries of Ann Dequental and Merlyn Thomas. This application sought leave for the witness summaries to be filed out of time and for them to be deemed properly filed.
- [5] Also, on 13th June 2022, the respondent filed a further application for leave to file his list of documents out of time. The accompanying affidavit in support was sworn by Raquel Kitwanie and a list of documents was exhibited to the application.
- [6] On 17th June 2022, the appellant filed and served an application to strike out the respondent’s witness summaries and list of documents which he claimed were improperly filed, as they were filed without leave of the court. This application was supported by the affidavit of Kelvin Mann.
- [7] On 20th June 2022, the appellant filed his submissions in support of the said application to strike out, along with his list of authorities.

- [8] On 23rd June 2022, the respondent filed an application entitled 'Notice of Application for Relief from Sanction for Witness Summaries of Lorden Warrington, Dr. Griffin Benjamin and Sabrina Seaman be filed out of time and to deem them properly filed'. This application was supported by the affidavit of Raquel Kitwanie. The relief sought was for the witness summaries to be deemed properly filed. No witness summaries were exhibited to this application.
- [9] Also, on 23rd June 2022, a similar application identical in its terms as the one mentioned above was filed with respect to the witness summaries of Ann Dequental and Merlyn Thomas. The affidavit accompanying this application was also sworn to by Ms. Kitwanie. As before, the relief prayed for was that leave be granted to file the witness summaries out of time and that they be deemed properly filed.
- [10] The witness summaries of Lorden Warrington, Griffin Benjamin, Sabrina Seaman, Ann Dequental and Merlyn Thomas were all exhibited to this second application.
- [11] On 1st July 2022, the respondent filed written submissions in support of the applications.
- [12] The various applications were heard by the learned trial judge on 18th January and 6th February 2023, and she delivered a written judgment on 10th March 2023, wherein she granted the respondent relief from sanctions for non-compliance with the Order of Stephenson J, and extended the time for the respondent to file his witness statements and summaries and to make standard disclosure. The learned trial judge also deemed the witness statements and summaries properly filed.
- [13] It is from this decision of the learned trial judge that the appellant appeals. There are 9 grounds of appeal, and they are as follows:

- (i) The learned judge misdirected herself and erred in law when, in the absence of any of the applications, affidavits in support or draft orders requesting relief from sanctions, she determined that the application before her was an application for relief from sanctions and not for extension of time;
- (ii) The learned judge misdirected herself and erred in law when she failed to treat and consider the respondent's various applications as separate applications, and instead treated and considered them as one and the same application or interchangeably;
- (iii) The learned judge misdirected herself and erred in law when she relied on the affidavit evidence of counsel on record for the respondent in determining the applications;
- (iv) The learned judge misdirected herself and erred in law when she determined that the respondent's application(s) had satisfied each of the three mandatory and conjunctive requirements of CPR 26.8(2);
- (v) The learned judge misdirected herself and erred in law when she failed to apply or properly apply the settled principles of law in our OECS jurisdiction on the quality of evidence required for the grant of relief from sanctions and the kinds of reasons which do not qualify as a good explanation;
- (vi) The learned judge's determination that the claimant had satisfied the three mandatory and conjunctive requirements of CPR 26.8(2) on his application(s) was perverse;

- (vii) The learned judge misdirected herself and erred in law when she made findings of fact which were not open to her on the evidence and which influenced her decision;
- (viii) The learned judge in granting relief from sanctions erred in principle as she took into account or was influenced by irrelevant factors and considerations and/or failed to take into account or gave too little weight to relevant factors and considerations and as a result her error or degree of error exceeded the generous ambit within which reasonable disagreement is possible; and
- (ix) The learned judge misdirected herself and erred in law when she failed to consider and determine the appellant's application to strike out the respondent's Witness Summaries and List of Documents improperly filed.

Ground 1

- [14] The appellant submitted to the Court that the applications of the respondent were all headed 'Relief from Sanctions' but the affidavits and draft orders all spoke to witness statements or summaries filed out of time and requested that they be deemed properly filed.
- [15] The sanction for failure to file witness statements or summaries is governed by rule 29.11(1) of the **Civil Procedure Rules 2000** ("CPR") which states as follows:

"If a witness statement or witness summary is not served in respect of an intended witness within the time specified by the court, the witness may not be called unless the court permits."
- [16] The sanction for failure to make full disclosure by the ordered date is to be found at CPR 28.13(1):

"A party who fails to give disclosure by the date ordered, or to permit inspection, may not rely on or produce at the trial any document not so disclosed or made available for inspection."

[17] Further CPR 26.7(2) states:

“If a party has failed to comply with any of these rules, a direction or any order, any sanction for non-compliance imposed by the rule, direction or the order has effect unless the party in default applies for and obtains relief from the sanction, and rule 26.9 does not apply.”

[18] The appellant further submitted that the proper application to be made where the time for filing witness statements or summaries has expired is an application for relief from sanctions and not for an extension of time.

[19] The appellant posited that there is a clear distinction between an application for an extension of time and an application for relief from sanctions. He submitted that different rules apply and the requirements to satisfy the two applications are different. He further submitted that where the application is made to extend time before the sanction has bitten, an application for extension of time is all that is required, however, if the time has expired and the sanction has already bitten (as was the case here) then the application ought to be for relief from sanctions and for an extension of time.

[20] The appellant complained that the learned trial judge erred when she stated that she took a broad view of the respondent's application and evidence and took into account the prospects of success in the respondent's case and the effect of a refusal to grant relief from sanctions on the respondent's case. The appellant posited that the learned trial judge failed to look at what was sought by the application and the relief asked for by the respondent.

[21] The appellant further complained that the learned trial judge misapplied the reasoning in **BBL Limited v Canouan Resorts Development Limited**¹ as that case was distinguishable on the facts from this case.

¹ SVGHCVAP2019/0006 (delivered 12th January 2021, unreported).

- [22] The appellant submitted that the learned trial judge erred in finding that ‘the intention of the document, though deficient in its averments, is for Relief from Sanctions of the documents annexed and filed therein’. He complained that the respondent’s application did not request relief from sanctions, and that by taking prospects of success into consideration the learned trial judge took cognisance of an irrelevant factor and made a material error in law. He further posited that the determination by the learned trial judge that the application before her was for relief from sanctions and not for an extension of time was irrational and unreasonable, and the court’s decision amounted to a disregard of CPR 26.7(2) and CPR 27.8(4).
- [23] The respondent conceded that although the applications were entitled ‘relief from sanctions’, that relief was not specifically sought in the affidavits or the draft orders that were attached to the applications.
- [24] The respondent argued that the learned trial judge was correct in her finding that the applications were for relief from sanctions as the deadline for filing the witness statements or summaries had passed and that was the only logical application that the respondent could make.
- [25] In this matter, the applications were made 1 day after the deadline for filing (the 1st April application), 10 ½ weeks after (the 13th June application), and 3 months after (the 23rd June application), and they were all headed ‘relief from sanctions’. The 23rd June application was headed ‘relief from sanctions and extension of time’.
- [26] It is accepted by both parties that the applications were all made after the deadline for filing witness statements or summaries had passed.
- [27] In the case of **Adam Bilzerian v Gerald Lou Weiner et al**,² Pereira CJ stated:
“The Extension Application was not made before the deadline for filing of the witness statements expired but some six weeks thereafter, which meant that the sanction imposed by CPR 29.11 had already bitten. The sanction

² SKBHC VAP2015/0015 (delivered 27th January 2016, unreported).

was that the appellant would be unable to call those witnesses in respect of whom he had failed to file the witness statements or summaries by the deadline ordered at the trial of the claim unless the court granted permission at the time of trial. The court however may not grant permission at trial unless that party has a good explanation for not seeking prior relief from the sanction in accordance with CPR 26.8. The Extension Application fell to be treated pursuant to CPR 26.8 as the trial date had not arrived, nor does it seem that one had been at that time fixed.”

[28] Applying this reasoning to these issues in this matter, it would appear that even if the respondent had applied for an extension of time (as contended by the appellant) it was open to the learned trial judge to treat such an application as one to be determined under CPR 26.8. As in the **Bilzerian** matter, no trial date had been fixed for the hearing of the matter.

[29] However, in the case of **Kyle David v Attorney General of the Commonwealth of Dominica et al**,³ Mitchell JA opined:

“CPR 29.11 (1) provides that the sanction of not being able to call the witness at trial comes into effect immediately upon the expiration of the time limit, and continues until it is either lifted pursuant to CPR 26.8 which deals with relief from sanctions, or is revoked at the trial where the Court gives permission... The appellant made no application for relief from sanctions. An application for an extension of time simpliciter is not an application for relief from sanctions.”

[30] Clearly, by the dicta expounded in the **Adam Bilzerian** case, such applications (extension of time applications) when made after the time for complying has passed fall to be treated under CPR 26.8 as applications for relief from sanctions.

[31] In this matter, the learned trial judge found that the applications before her were for relief from sanctions and, on the basis of the reasoning in **Bilzerian**, even if she had found that they were merely applications to extend time, she could have properly considered them as she did under CPR 26.8, and made findings in accordance with that rule under the CPR.

³ DOMHCVAP2013/0004 (delivered 21st January 2014, unreported).

[32] The learned trial judge in finding that 'the intention of the document though deficient in its averments is for relief from sanctions of the documents annexed and filed herein', then proceeded to examine the applications and the content of the affidavits in accordance with the requirements set out in CPR 26.8. The learned trial judge cannot be faulted for treating with the applications as she did.

Ground 2

[33] The appellant further complained that applications are to be heard on a first in time basis, and that the learned trial judge ought to have carefully considered the various applications to determine whether they could be heard as one application or interchangeably and if not, the order in which the various applications ought to have been heard.

[34] The appellant posited that the learned trial judge made her determination to grant the relief sought in respect of all the applications by relying on the first application only, even though she stated that that particular application had been withdrawn.

[35] The respondent submitted that all of the applications were in relation to witnesses and the circumstances giving rise to the need for the application were the same. The respondent argued that the learned trial judge in an exercise of her discretion decided to deal with all of the applications at the same time to save judicial time and expense. He further argued that there was nothing precluding the learned trial judge from determining how the applications ought to have been dealt with.

[36] A trial judge is given the power to manage proceedings which come before him or her, and to determine the procedure which ought to be adopted for the hearing of a particular matter. The court must strive to ensure that all persons are given a fair hearing and that the court's resources are used efficiently. What is required is that the court ensures that there is fairness to all parties in the procedure adopted.

[37] Part 26 of the CPR gives the court wide powers of case management that allows it to dispense with any aspect of procedure and allows the judge to deal with the case in a manner that ensures fairness to all parties involved in the matter. The learned trial judge employed the case management powers given by CPR 26 in dealing with the various applications. The applications before the court in this matter were all of similar nature and the learned trial judge in seeking to deal with the matters fairly and expeditiously made the decision to hear the three applications together. This allowed for the proper use and allocation of judicial time, and I can find no fault with the approach adopted by the learned trial judge.

Grounds 4, 5, 6 and 8

[38] These grounds are dealt with together as they all deal with the learned trial judge's application of CPR 26.8 to the applications.

[39] The question of whether to grant relief from sanctions calls upon a court to exercise its discretion. The legal principles which guide an appellate court in reviewing the exercise of a trial judge's discretion are trite, and this Court has long applied the principles set out in **Michael Dufour et al v Helenair Corporation Limited et al**.⁴

[40] The basis upon which an appellate court will interfere with the exercise of discretion by a trial judge is well established. Such an appeal will not be allowed unless the appellate court is satisfied that in exercising that discretion the trial judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations, and that as a result of the error or the degree of error in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.

⁴ (1996) 52 WIR 188.

[41] Further, the Privy Council in **Nilon Limited & anor v Royal Westminster Investments SA & ors**,⁵ stated:

“It is also trite law that in appeals from the exercise of a discretion an appellate court should not interfere with a decision of a lower court which has applied the correct principles and which has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the appellate court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion which has been entrusted to the court.”

[42] The learned trial judge treated the applications as applications to be governed by CPR 26.8, the sanction for failure to file witness statements having already bitten by the time the first application was made. The sanction being that the respondent would be unable to call those witnesses for whom he had failed to file witness statements or summaries by the deadline imposed by the CPR unless granted permission by the court at the time of the trial.

[43] The court, however, may not grant permission unless the applicant has a good explanation for not seeking prior relief from sanctions in accordance with CPR 26.8.

[44] CPR 26.8(1)⁶ provides as follows:

“An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –
(1) made promptly; and
(2) supported by evidence on affidavit.”

[45] Further CPR 26.8(2) states:

“The court may grant relief only if it is satisfied that –
(1) the failure to comply was not intentional;
(2) there is a good explanation for the failure; and
(3) the party in default has generally complied with all other relevant rules, practice directions, orders and directions.”

⁵ [2015] UKPC 2, para 16.

⁶ Rule 26.8 has since been amended by the Civil Procedure Rules (Revised Edition) 2023.

[46] The first application in this matter was made on 1st April 2022, one day after the imposed deadline. The second and third applications filed on 13th June and 23rd June 2022, were some 10 ½ weeks and 12 weeks beyond the deadline.

[47] The first application is the only one which could properly be said to have been filed promptly. The respondent was certainly aware that the deadline was 31st March 2022. However delay or lack of promptitude is not fatal to an application under this rule.

[48] In **Dominica Agricultural and Industrial Development Bank v Mavis Williams**,⁷ Barrow JA stated:

“[19]...Rule 26.8 ordains that sanctions imposed for non-compliance shall not be relieved against unless the defaulter is able to satisfy the criteria for relief that the rule lays down. It bears repeating that the rule restricts the court from exercising its discretion if the applicant does not satisfy the criteria...

[21] ...Under our rules the consequence of intentional non-compliance is more than a matter of likelihood; intentional non-compliance is fatal.”

[49] There was no evidence that the non-compliance in this matter was intentional.

[50] In **Irma Paulette Robert v Cyrus Faulkner et al**,⁸ Edwards JA [Ag.] stated:

“It is important to note that our CPR 26.8(1)(b) establishes no criterion for granting an application for relief from sanctions, unlike Rule 2.9(1)(b) of the English CPR. CPR 26.8(1) does not create a sanction for failing to make an application for relief from sanction promptly... CPR 26.8(1) does not preclude the Court from hearing an application for relief from sanction that has not been made promptly.”

[51] Where there is no order invalidating an application for relief from sanctions that has not been made promptly, the Court is entitled to proceed to hear and deal with the application on the merits, and has to do so in accordance with the stated criteria set out in CPR 26.8 (2) and (3), keeping the overriding objective in mind at all times.

⁷ Dominica Civil Appeal No. 20 of 2005 (delivered 18th September 2006, unreported).

⁸ Saint Lucia Civil Appeal No. 29 of 2007 (delivered 25th October 2007, unreported).

[52] There is a long line of cases from this jurisdiction which have settled the law, that all three limbs of CPR 26.8(2) must be satisfied for an applicant to succeed in an application for relief from sanctions. Failure to satisfy any one of the three limbs is fatal. The courts of this jurisdiction have taken a strict approach to ensure compliance with the rules and the preconditions have been applied in an uncompromising fashion.

[53] In **Ferdinand Frampton v Ian Pinard et al**,⁹ Barrow JA opined:
“...The rule is uncompromising that the court is prohibited from exercising its discretion to grant relief from sanctions if these conditions are not satisfied...The failure of the applicants to comply with the requirements of the rule puts the applicants in a hopeless position.”

[54] Further, Pereira CJ in **Inna Gudavadze et al v Ivane Chkhartishvili**¹⁰ stated:
“...CPR 26.8 requires that an application for relief from sanctions be made promptly and must be supported by evidence on affidavit. It clearly requires more than a mere exercise by the court of correcting or putting right some procedural irregularity for which no sanction attaches using CPR 26.9....A failure to satisfy any one of the three conditions set out therein is fatal to the grant of relief. As has been stated in other cases, rule 26.8 is uncompromising.”

[55] Additionally, CPR 26.8(3) does not indicate that the court must not have regard to the issue of the promptness of the application for relief from sanctions, it is a factor that would be taken into account generally in the exercise of the court's discretion.

[56] The court must then examine the evidence put before it by the applicant in order to determine whether the criteria set out in CPR 26.8(2) have been satisfied. These criteria all have to be satisfied if an applicant is to succeed in their application for relief.

⁹ Dominica Civil Appeal No. 15 of 2005 (delivered 3rd April 2006, unreported).

¹⁰ BVIHCP2016/0037 (delivered 11th January 2017, unreported).

[57] The affidavits in support of the various applications in this matter are all similar in content.

[58] The first affidavit sworn by the appellant's counsel dated 1st April 2022 stated as follows:

"10. The Registry was closed from the 25th March 2022 to 29th March 2022.

11. I was of the view that the Registry was closed until Friday the 1st April 2022 and was only reminded that it had opened when I received the letter on 31st March 2022 from Counsel for the Defendant informing me that she had filed her Witness Statements on the 31st March 2022."

[59] The second application dated 13th June 2022 was supported by an affidavit sworn by Raquel Baron, a clerk in the Chambers of Counsel. The relevant portions were as follows:

"3. I filed these witness statements on the 1st April 2022 which was one day out of time, however two of them are experts in their field and we sought the courts permission to deem them as experts.

4. The Statement of the Welfare Officer Ms. Sabrina Seaman mentions all the witnesses named and in order to avoid transgressing the hearsay rule, it is necessary to have them give their evidence."

[60] The third application filed on 23rd June 2022 was also supported by the affidavit of Raquel Baron. The relevant paragraphs are as follows:

"3. Further the Registry was closed up to the 29th March 2022.

4. On the 1st April 2022 the Witness Summaries were filed.

5. The Witness Summaries were not filed on time because the Registry was closed during the first part of the last week in March 2022 and through inadvertence the Witness Summaries were not filed by 31st March 2022 as I was mistaken in the belief that the Registry would be closed until the following week."

[61] This was the evidence before the learned judge relevant to satisfying the requirements set out in CPR 26.8(2).

[62] What constitutes a good explanation for the purpose of CPR 26.8(2)(b) is fact sensitive. In **QVT Fund V LP et al v China Zenix Auto International Group Ltd et al**,¹¹ the learned judge stated:

“...the quality of the explanation has to be viewed against all the circumstances and not simply by reference to the question of whether all was done that could have been done. A ‘good explanation’ is a universal standard, in the same way that the duty of care in negligence is, but what is required to discharge that standard will depend on the particular facts and circumstances.”

[63] Further, I look to the dicta of Lord Dyson in the **Attorney General v Universal Products Ltd**,¹² where he said:

“Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly if the explanation for the breach is administrative inefficiency.”

[64] This Court has in a number of previous decisions made it clear that where the reasons given for delay in complying with orders of the Court are among other things, misapprehension of law, mistake of law by counsel, lack of diligence, volume of work, difficulty in communicating with clients, pressure of work, client impecuniosity, secretarial incompetence or inadvertence, these excuses are not acceptable for the purpose of explaining away the default.

[65] In **John Cecil Rose v Anne Marie Uralis Rose**,¹³ Byron CJ observed that:

“...the lack of diligence of an attorney is not a good reason for delay, whether it is explained in terms of the volume of work the attorney is maintaining, or as in this case the difficulties experienced in communications... In my judgment therefore there was no acceptable reason for the inordinate delay.”

[66] It is clear that an applicant who has fallen afoul of the rules and who is requesting that the court exercise its discretion in its favour must supply the court with bona fide and cogent reasons for that failure to comply with the rule or order. Discretion

¹¹ BVIHC(COM) No. 26 of 2014 (delivered 2nd December 2016, unreported).

¹² [2011] UKPC 37.

¹³ Saint Lucia Civil Appeal No. 19 of 2003 (delivered 22nd September 2003, unreported).

cannot be exercised in a vacuum. For the court to do so there must be some evidence upon which the court can justify the exercise of that discretion.

[67] The learned trial judge in her reasoning found that a good explanation for the failure to comply was a prerequisite to the exercise of the court's discretion, and she considered each of the limbs of CPR 26.8(1) and CPR 28.6(2). Further, the learned trial judge correctly concluded that the failure to comply was not intentional.

[68] The learned trial judge found the explanation for the failure to comply to be 'bare and rather terse'. She further found that the affidavit lacked pertinent particulars, especially with respect to the failure to attempt mediation.

[69] The learned trial judge in her judgment also described the explanation as 'bare', and at paragraph 69 of the judgment stated:

“...In this case the delay is not significant and **the absence of a good explanation** should not outweigh the considerations that favour the grant of the application.” (emphasis added)

[70] The learned trial judge in examining the reason, examined the Notice from the Court Registry, a document which did not form part of the respondent's documents before the court below, something about which the appellant also complains.

[71] Nothing however turns on this point, and the learned trial judge in my opinion could have properly taken judicial notice of a publication issued from the Registry.

[72] Further, the learned trial judge opined at paragraph 56 of the judgment:

“Nevertheless, it is the Court's view that the explanation shows the failure of compliance. Counsel being mistaken in believing that the courthouse was closed and so could not get the statements filed on time, and therefore sought the consent of Counsel for the Defendant to extend the time for filing same, while mistaken and **plainly not an excuse**, given the circumstances at the time when the courthouse was being relocated is a sufficient explanation.” (emphasis added)

[73] The learned trial judge correctly stated at paragraph 57 of her judgment that ‘the reasons advanced for the delay need not be perfect, the reasons need only be good and acceptable. The requirement for CPR, rule [26.8(2)(b)] to be fulfilled, is that the explanation must be a good one and not infallible.”

[74] Yet, despite making findings of the explanation being ‘terse’ and ‘bare’, the learned trial judge found that there was a good explanation. The burden to satisfy the court remains on the applicant, and the party who is in default must not take the position that the obligation to provide a good explanation is trifling or treat it with scant regard and expect that a court will accept that approach and grant the relief sought.

[75] In **Prudence Robinson v Sagicor General Insurance Inc**¹⁴ in which the application made was similar in terms to the present application under consideration, Baptiste JA said:

“Having found that Sagicor relies on bald assertions in its application for relief, the judge was plainly wrong in granting relief. The judge’s reasoning illustrates that he did not pay proper regard to the inadequacy of the affidavit evidence in respect of being satisfied that there was a good explanation for the delay.”

[76] In that case, as in this case, no particulars have been given in the affidavit to explain why the error in the date of the reopening of the Registry was made, what efforts were made to find out if the Registry had reopened for business on the 29th (the date on the Notice) if there was some doubt as to when that was going to occur. These questions to my mind were critical issues which ought to have been addressed in the affidavits. This was clearly an issue of inadvertence, a reason which has long since not sufficed for complying with CPR 26.8(2)(b). Looking at all the circumstances, it cannot be said that there was a good explanation for the failure. As a result, the pre-condition in CPR 26.8(2)(b) has not been met, this failure is fatal to any application under the rule.

¹⁴ SLUHCVP2013/0009 (delivered 29th September 2014, unreported).

[77] It was for the respondent to have shown that there was credible and particularised evidence in order to meet the threshold necessary for the court to grant the relief sought. The respondent here was required to show the court that the failure to file the witness statements or witness summaries was unintentional, that all reasonable steps had been taken to meet the deadline but, despite taking those steps, the deadline was not met. I borrow the words of Pereira CJ in **Adam Bilzerian**, at para 15:

“I agree with the learned judge that the information that the appellant chose to put forward for the judge’s consideration was woefully inadequate.”

[78] I am of the view that the respondent failed to address the issues that ought to have been addressed in affidavit evidence which would have allowed the learned trial judge to exercise her discretion. There being no sufficient evidence before the learned trial judge upon which she could properly exercise her discretion, she was blatantly wrong in concluding that the explanation given by the respondent for the delay was good and adequate. These grounds of appeal are therefore upheld, and the grant of relief by the trial judge is overturned.

[79] The appellant filed three further grounds of appeal, however, considering the conclusion arrived at with respect to grounds 4, 5, 6 and 8, I do not think it necessary to consider those grounds.

[80] It is hereby accordingly ordered that:

- (1) The appeal is allowed.
- (2) The learned trial judge’s order granting relief from sanctions for failing to file the witness summaries and witness statements on time is set aside.
- (3) The costs order in the court below remains in place and the appellant will have the costs of this appeal, such costs to be assessed by a Judge or Master of the High Court if not agreed within 14 days of this judgment.

I concur.

Mario Michel
Justice of Appeal

I concur.
Vivian Georgis Taylor-Alexander
Justice of Appeal [Ag.]

By the Court

Chief Registrar