

THE EASTERN CARIBBEAN SUPREME COURT

**IN THE HIGH COURT OF JUSTICE
CIVIL DIVISION**

COMMONWEALTH OF DOMINICA

Claim No.: DOMHCV2019/0037

BETWEEN

LORDEN WARRINGTON

Claimant

-and-

KELVIN MANN

Defendant

Before the Hon. Mme. Justice Jacqueline Josiah-Graham

Appearances: Mrs. Noelize Knight-Didier for the Applicant/Defendant; and
Mrs. Singoalla Blomqvist-Williams for the Respondent/Claimant

2023: January 18
 February 6
 March 10

JUDGMENT

[1] **JOSIAH-GRAHAM, J:** Before the Court is the Claimant's application for relief from sanctions and an extension of time to comply with the case management directions given in the order made on September 10, 2021. This application is opposed by the Defendant. The Defendant also opposes the Claimant's application to deem two of his witnesses' experts in this claim. Together there are twelve applications.

[2] For this decision, the applications for relief from sanctions are addressed, these being the interlocutory applications to progress the matter. The applications for appointment of expert witnesses were adjourned to be dealt with separately.

[3] To put the applications into perspective a brief background relevant to determination is set out.

Background

[4] The claim, filed on 19th February 2019, concerns disputing the validity of a document presented as the Last Will and Testament of Elaine Warrington dated 2nd May 2015. Ms. Warrington died on 19th October 2017 and was 83 years old hereinafter referred to as 'the deceased'. The Claimant is the

nephew of the deceased who resides in the United States of America, while the Defendant is her former friend/driver/caretaker and resides in Dominica at the former residence of the deceased.

- [5] The Claimant alleges in the statement of claim that the deceased's Last Will and Testament (The Will) is invalid because the document purporting to be the Last Will and Testament of the deceased dated 2nd May 2015, was presented devising all of her property and monies to the Defendant and his daughter only. The relative, who disputes the validity of this document also claims that it is invalid for want of execution because the deceased did not sign the will in the joint presence of the attesting witnesses; the document was executed when the deceased was suffering from severe dementia as diagnosed by Dr. Griffin Benjamin in December 2015; the deceased could not recognize the immediate persons in her life in 2015; in 2015 the deceased believed that she was employed by the Prime Minister to mark exams in the school; the deceased was not able to care for herself and a receiver was appointed; the execution of the will by the deceased was obtained by the undue influence of the Defendant.
- [6] According to the Statement of Claim¹, based on the findings of Dr. Benjamin's 2015 psychiatric report of the deterioration in her mental condition, one of the deceased's nephews applied to the court for receivership over her financial and personal affairs on 29th July 2016. The Court² ordered the Welfare Division to conduct a Social Enquiry Report³ and to prepare this report, dated 1st March 2017 interviews were conducted including with the deceased, Kelvin Mann, Ann Dequential, Helen Hamlet, Lorden Warrington, Terry Warrington, Glenroy Warrington and Merlyn Thomas. Following the deceased brother, Mr Warrington's, demise on 19th October 2017, the Claimant alleges that the Defendant assumed full control of her affairs "to the extent of preventing her relatives from participating in the funeral and burial of the deceased"⁴.
- [7] In his Defence filed on 1st April 2019, the Defendant denied all of the allegations made in the claim including that the document presented as the deceased's Last Will and Testament was not properly executed and obtained by his undue influence.
- [8] At the first hearing of the Fixed Date Claim Form held September 10, 2021, the Court ordered as follows –

"IT IS HEREBY ORDERED THAT:

¹ Located in File #1, Statement of Claim, pages 3-4, paras 4, 5,

² Claim no.: DOMHCV2016/0403, located in File #1, Statement of Claim, from page 2, Exhibit "B"

³ Located in File #1, Statement of Claim, from page 2, Exhibit "A", para 4

⁴ Located in File #1, Statement of Claim, page 3, para 7

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 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.

[9] By the 11th February, 2022 neither party made an application for a Mediation Referral Order as the Court had encouraged. However, the Defendant complied with the previous order and made standard disclosure by October 15, 2021. On the 16th March 2022 the Defendant made an application under Part 32 of the CPR 2000 for permission to call Dr Dirk Burkhardt as an expert witness. On the 24th March 2022 the Defendant also filed a further application to extend time for filing the Report of the proposed Expert Witness. The Claimant was served notice of these applications on the 6th April, 2022.

[10] The witness statements were scheduled to be filed on or before 31st March, 2022 pursuant to the Court's case management order. On 30th March, 2022 the Defendant filed his witness statement in a sealed envelope and thereafter notified the Claimant Counsel by letter on 31st March 2022 at 3:30pm. This correspondence seems to have reminded Counsel for the Claimant of the 31st March 2022 deadline. The Claimant's counsel in receipt of correspondence near the end of the business day on the said 31st March, 2022, wrote the Defendant's solicitor seeking consent to an extension of time. The Defendant's Counsel refused to consent.

[11] The next day, April 1, 2022 the Claimant filed and served an application for relief from sanctions. Attached to this application were witness summaries for three witnesses, Dr. Griffin Benjamin, Lorden Warrington, and Sabrina Seaman attached. This application headed relief from sanctions

prayed for leave of the court to file the witness statements out of time and to deem them properly filed. The grounds of the application are:

1. "On the 10th day of September 2021, the court ordered that Witness Statements be filed by the 31st day of March 2022 should attempt at mediation fail. We have not had a mediation session.
2. The Registry was closed from the 25th March, 2022 to 29th March 2022.
3. I was of the view that the Registry was closed until the 1st April 2022 and was only reminded that it had opened when I received the letter from Counsel for the Defendant informing me that she had filed the Witness Statements on the 31st March 2022.
4. It was too late to file Witness Statements in time as the Registry closes at 3:30 p.m.
5. I therefore wrote to Counsel seeking her consent to file one day out of time. Counsel has refused. She did not even have the courtesy to receive the covering letter asking for the extension.
6. I therefore seek [sic] this Court's leave to file the Witness Statements out of time and to deem them properly filed.
7. No Prejudice will be caused by the late filing of the Witness Statements."

[12] The affidavit in support basically recited the grounds stated in the application.

[13] The matter came up before the Court on 20th May, 2022. The Court made an order that the pending applications were to be heard on 23rd June, 2022. This hearing did not take place. On the 13th June, 2022, the Claimant filed the following –

- i Notice of Application for Relief from Sanction with accompanying affidavit for the witness statements of Ann Dequental and Merlin Thomas to be filed out of time and to deem them properly filed and the witness summaries of Ann Dequental and Merlin Thomas;
- ii Application for leave to call Sabrina Seaman as an expert witness and to put the report by her in evidence;
- iii Application, with accompanying affidavit, for leave to call Dr Griffin Benjamin as an expert witness and to put a report by him in evidence;
- iv Application, with accompanying affidavit, for leave to file List of Documents/ standard disclosure documents out of time;
- v List of Documents

- [14] The body of the Notice of Application for Relief and the affidavit in support filed June 13, 2022 was similar to the one dated April 1, 2022 except that the affidavit of April 1, 2022 was sworn to by Counsel for the Claimant. This new affidavit was deposed by a Clerk in the Chambers of Counsel for the Claimant.
- [15] The Defendant indicated on June 17, 2022 that both applications were opposed on the grounds that the Claimant has not obtained relief from sanctions, the stated sanctions in the CPR 2000 having taken effect.
- [16] This wholly unsatisfactory state of affairs continued. On 23rd June, 2022 the Claimant again filed Notice of Application for Relief from Sanctions for Witness Summaries of the claimant, Dr Griffin Benjamin and Sabrina Seaman. Again, in the Relief from Sanctions application, the claimant sought leave to file the summaries out of time and to deem them properly filed.
- [17] On the 29th June, 2022 the Claimant also filed a Notice Opposing the Application for the appointment of Proposed Expert Dr Dirk Birkhead with an Affidavit in Support.
- [18] On the 1st July, 2022 these applications for relief from sanction and striking out came on for hearing before Roberts J following there being no court on June 23, 2022. At that hearing, the Claimants had filed submissions on their application filed on the 23rd June, 2022. The court ordered Counsel for the Defendant to file her own submissions on the applications filed by the Claimant on the 23rd June, 2022 and her own application filed on the 29th June, 2022. That Court also noted that by now there were 12 interlocutory applications filed in this matter dating back to March 16, 2022 to be heard.
- [19] It is against this background that the application to strike out the Claimant's application for relief from sanctions, came on for hearing before this court as currently constituted on January 19, 2023. For convenience, the parties addressed the court on the applications for relief from sanctions. The hearing of the other applications sought is listed for a subsequent hearing.

SUBMISSIONS ON BEHALF OF THE APPLICANT/DEFENDANT

- [20] At the hearing, the Defendant's Counsel contended that the applications as filed by the Claimant for relief from sanctions to file witness summaries and list of documents and call expert witnesses should all be refused because the applications though headed "relief from sanctions", that relief is not sought therein. Counsel argued that the application is instead an application for an extension

of time since in the body of the application the Claimant's prayer is for the court's leave to file the statements and documents out of time and to deem them properly filed.

- [21] The Defendant's Counsel observed that the sanction having bitten (or taken effect) before the Claimant filed his witness statements the Claimant is required to satisfy the requirements of CPR2000 Part 26.8 further to the requirement of CPR Part 26.7(2) for non-compliance imposed by the Court's rules and court order, the application for relief from sanction being an appropriate application for the Court to consider, the date for compliance having passed. Further, that in the absence of an application for relief from sanctions, the court cannot consider an application for an extension of time to deem the witness statements properly filed.
- [22] The Defendant also contended that the content of the affidavit is bare, simply asking for leave to file witness statements out of time and to deem them properly filed without providing any evidence to satisfy the court that the preconditions set out in Rule 26.8(2) have been met. The Defendant thereof urged the court that the applications should be refused on the further ground that the contents of the applications and affidavits for relief from sanctions are bare assertions, pointing to an extension of time to deem the witness statements properly filed which is inadequate for the grant of the relief. Counsel for the defendant also pointed to the draft of the court orders submitted with the applications to ground the case made, that the applications though labelled "Notice of Relief from Sanctions" are for an extension of time and not relief from sanctions.
- [23] The Defendant relies on the case of **Kyle David v AG of Dominica**⁵ for the proposition that none of the applications which request relief from sanctions is the appropriate application to be made when there has been non-compliance with a court order or with the rule for which a sanction is imposed by the CPR pursuant to Rule 26.7(2). With respect to the content of the affidavit evidence reliance was placed on **Prudence Robinson and Sagicor General Insurance Inc. SLUHCVP2013/0009**. Other authorities relied on include **Avonelle Caragliano v Cable and Wireless (Anguilla) Ltd (dba Flow AXAHCVP2020/0041**; **Evelyn Campbell v Floyd Campbell SVHHCVP2014/0002 [5]**; **Issa Nicholas (Grenada) Limited v Time Bourke Holdings (Grenada); Limited GDAHCVP2015/0029 [9]&[17]**; **Attorney General v Keron Matthew [2011] UKPC 38 [17]**; **Adam Bilzerian v Gerald Lou Weiner et Anor SKBHCVP2015/0015 [15] to [18]**; **Marcianno Devon Pickering v Enid Geraldine Pickering et Anor BVIHCVP2021/0010 [10]** and **South Asia Energy Limited v Hycarbex-American Energy Inc SKBHCVP2017/0016**.

⁵ DOMHCV2013/0004

[24] With respect to the list of documents, at the hearing, the Court pointed out Parts 28.16(1); 28.17; 33 (2) and 33 (3) as routes by which the documents already before the Court can be admitted in the trial bundle. Counsel for the Defendant conceded that the application for the List of Documents can be admitted but maintained with respect to the relief for sanctions, that the application is improper, it being one for an extension of time based on its content and form.

SUBMISSIONS ON BEHALF OF THE RESPONDENT/CLAIMANT

[25] Counsel for the Claimant admits that the breach had occurred, but argued on behalf of the Claimant that the applications filed are for relief from sanctions which includes the prayer for an extension of time to file the witness statements, disclosure and list of documents. Counsel contended that these meet the criteria for relief from sanction as outlined in Rule 26.8 of the CPR 2000. She relied on the authorities of **Auto Trade T/A Island Car Rental v Kimani Casimir⁶**, **Antonio Gellizeau v The State⁷**, **Robin Darby v Liat⁸**, **(Ken) Ormiston Arnold Boyea v Luke Boyea⁹** and **Tota v Jarman¹⁰** and argued that the Claimant satisfies the requirements of Rule 26.8(2) on the following grounds:

- i. This application is being made promptly;
- ii. The failure to comply is not intentional;
- iii. There is a good explanation for the failure to comply;
- iv. The Claimant has generally complied with all other relevant orders;
- v. The granting of the relief would be in the interest of the administration of justice;
- vi. The failure can be remedied within a reasonable time;
- vii. The trial date can still be met if relief from sanctions is granted;
- viii. The granting of the relief would not prejudice the Defendant; and
- ix. The interests of justice will not be adversely affected by the granting of the relief.

[26] With respect to the explanation for failure to comply Counsel deposed that due to an inadvertence and an oversight there was a misunderstanding as to the date for the reopening of the High Court after the period of its closure for its relocation. In oral arguments Counsel explained that it was believed that the Court Registry would be reopened on 1st April, 2022 after it was closed for relocation why the documents were not then filed. Counsel argued that the Claimant's failure to file witness statements in keeping with the order of the court was not intentional and there are good reasons for the non-compliance.

⁶ DOMHCV2014/0249 (Decision 26th June, 2021)

⁷ SVGMCRAP2013/0058

⁸ [2012] ECSCJ No 150 9Antigua and Barbuda, Decision 5th June, 2012)

⁹ SVGHCV2019/0175 (Decision December 2nd, 2020)

¹⁰ [2006] EWCA Civ 1028

- [27] Counsel contended that the trial date has not yet been fixed and therefore there is no prejudice to the defendant. Counsel also argued, if there is no relief the claimant will be driven from the seat of judgment which will be counter to the interest of justice. She referred to the reasons given in the affidavit of April 1, 2022 which she swore. Counsel for the Claimant further submitted that the application was first made by the Claimant only one day late after the imposition of the sanction, and that in light of the circumstances at the relevant time, the application was made promptly.
- [28] In the written submissions and authorities filed by both parties pursuant to the Order of Roberts, J dated July 1, 2022 Counsel for the Claimant set out the arguments under six headings as issues for determination and argued them seriatim. Counsel for the Defendant has also made her submissions along the same lines.
- [29] The Court has considered the submissions of Counsel including oral arguments in relation to the applications as well as in line with the relevant provisions of the CPR 2000 as amended and provide below an analysis of my decision on the application to strike out. The appropriate rules to guide the analysis are set out first. A chronology of the applications filed is set out at Appendix 1 of this decision.

ISSUE

- [30] It is this court's view that the central issue for determination is whether the claimant's application titled Relief from Sanction should be allowed for the filing of the witness statements and summaries, list of documents and for there to be standard disclosure.

LAW

- [31] The requirements of the relief from sanctions regime are well settled. To determine whether the applications should be granted the Court considered Part 26.8 of the CPR 2000 as amended which provides the threshold requirement and the factors a Court must consider in granting relief from sanctions. A party must first satisfy the threshold requirements of promptness, intentionality, good reason and general compliance before the Court can exercise its discretion pursuant to Part 26.8.
- [32] It is undisputed that there is an express sanction for failure to make disclosure and file witness statements as ordered. It is also undisputed that the Claimant did not make standard disclosure or file witness statements by the date ordered or that the sanctions had bitten. The relevant threshold to be satisfied is therefore the test for the grant of relief from sanctions and not the simple test for an extension, the application for relief being made after the sanctions had taken effect.

[33] The relief from sanctions Rule 26.8 which sets out the requirements for obtaining relief provides:

Relief from sanctions

26.8 (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, orders and directions.

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

- (a) the effect which the granting of relief or not would have on each party;
- (b) the interests of the administration of justice;
- (c) whether the failure to comply has been or can be remedied within a reasonable time;
- (d) whether the failure to comply was due to the party or the party's legal practitioner; and
- (e) whether the trial date or any likely trial date can still be met if relief is granted.

[34] Part 26.8 is properly to be understood as follows – an application must be made promptly and supported by evidence. Determination of this issue is critical. Where the Court finds that the application was not made promptly and not supported by evidence on affidavit then the application must fail without need to consider the other limbs of the test set out in rule 26.8. If successful, the Court must be satisfied that the party's failure to comply was unintentional, that there is a good explanation for the breach and there was general compliance with other rules, practice directions before the court can grant relief from sanctions imposed under the Rule.

[35] In **Trincan Oil Ltd v Schnake**¹¹ and **Trincan Oil Ltd v Martin**¹² the Trinidad and Tobago Court of Appeal construed the equivalent provision of their Rules to Rule 26.8 and held that, to avoid the effects of a sanction, the affected party must apply for and obtain relief from sanctions after

¹¹ Civil Appeal No 91 of 2009, TT 2010 CA 3.

¹² Civil Appeal No 91 of 2009, TT 2009 CA 22.

the sanction has taken effect. Particularly in **Trincan Oil Limited v Chris Martin**, Civ. Appeal No. 65 of 2009, Jamadar, JA stated that an application for relief from sanction must fail if the threshold requirements of promptness, good explanation and intentionality have not been passed. Once the threshold requirements are satisfied, the court should only then move on to consider the factors at Parts 26.8(3). [Emphasis mine]

COURT'S CONSIDERATION

Promptitude

[36] The issue of promptitude is “fact driven and contextual” and is to be determined in the “circumstances of each case”.¹³ In the Jamaican case of **National Irrigation Commission Limited v Conrad Gray and Marcia Gray** [2010] JMCA Civ 18, Harrison JA at paragraph 14, stated the following in relation to this criterion of promptitude:

“Promptly is an ordinary English word which we would have thought had a plain and obvious meaning, but if we need to be told a bit more about what it means, we do have the authority of *Regency Rolls Limited v Carnall* [2000] EWCA Civ. 379, where Arden, L.J. pointed out that the dictionary meaning of 'promptly' was 'with alacrity'. Simon Brown, L.J. said: "I would accordingly construe "promptly" here to require, not that an applicant has been guilty of no needless delay whatever, but rather that he has acted with all reasonable celerity in the circumstances."

Harrison JA, at paragraph 16 opined further that:

“Promptness, in our view, is the controlling factor under rule 26.8. It is plainly a very important factor, as is evident from the fact that it is singled out in the rule as a matter to which the court must have regard. In our judgment, it is a very important factor because there is a strong public interest in the finality of litigation. Put simply, people are entitled to know where they stand.”

[37] In the case of **H.B. Ramsay & Associates Ltd & Another v Jamaica Redevelopment Foundation Inc. & The Workers Bank**¹⁴, the Court of Appeal examined the question of promptitude within the context of an application for relief from sanction. At paragraph 10, Brooks J.A. (as he then was), stated that “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.”

[38] In the instant claim, the parties were directed by Stephenson J on 10 September 2021 to disclose all documents that they will seek to rely on before 15 October 2021, and file witness

¹³ Paragraph 13 of *The Attorney General of Trinidad and Tobago v Miguel Regis* Civil Appeal No 79 of 2011. Rule 26.7(1)

¹⁴ [2013] JMCA Civ 1

summaries/statements on or before 31 March 2022. It must be noted that this order of the court dated 10 September 2021 was issued in respect of the first hearing of the Fixed Date Claim Form and that no trial date had yet been scheduled. At this First Hearing the parties were encouraged to attend mediation.

[39] The evidence before the Court is that the claimant's made an application for relief from sanction to file the witness statement first on the next day, 1st April, 2022 after the imposition of the sanction. The sanction had taken effect on the 31st March 2021, the date for compliance. The application is clearly headed 'Notice of Application for Relief From Sanction and the three witness statements were attached. It was supported by evidence on affidavit, however, neither the notice of application nor the affidavit in support of the Claimant state whose witness summaries the application is made in respect of.

[40] On the authorities, from the assessment of the timeline, I am of the view that within the context of the delay and regard to all the prevailing facts and circumstances it can be said that the application for relief from sanction has met the threshold of being made promptly. There was clearly confusion in the mind of counsel as to the workings of the Court in that period; one with which Counsel should be careful not to be careless with the matters affecting their clients.

[41] The instant case is distinguished from the case of *Kyle David* in that the Appellant, Kyle David, did not file and serve any witness statements in the prescribed time but did so **11 days before the date fixed for the trial to commence and four months late**. So that in *Kyle David* where a trial date had already been fixed, that does not arise in the instant claim. In the case at bar the Application for Relief is made long before the trial date and in circumstances where it could cause no prejudice to the parties nor delay the trial. Such considerations are relevant and form an essential part of the context in which promptness must be considered. When those considerations are taken into account it is not possible to regard the Application as not having been made promptly.

[42] In the case of **Woodward v Finch**¹⁵ the claimant had failed to serve his witness statements in accordance with directions of the court. The court made an unless order expiring on 29 July. On 2 August the claimant applied for relief from the striking out sanction, attributing his delay to a change of solicitors and problems in transferring his legal aid certificate. He served the witness statements the day before the application was to be heard. It was held that relief against the sanction should

¹⁵ [1999] CPLR 699

be granted, on the grounds that although there had been a history of delay and the excuse for non-compliance with the unless order was not a good one, the relief had been applied for promptly, the default was the product of inefficiency rather than willfulness, and the trial date could still be met.

- [43] Having passed the first hurdle of CPR 26.8(1); the court can now go on to consider whether the criteria under rule 26.8(2) have been met.

Was the failure to comply intentional

- [44] In the Court's view, on the question of intentionality, from circumstances I cannot find any motive on the part of the Claimant for the failure to comply or that there was a deliberate intent not to comply. First, the evidence shows a misunderstanding of the closure date at the courthouse. As is the practice among many counsel, they wait until the last minute to file their matters, and this counsel clearly under a misapprehension about the arrangements put in place during the Courthouse relocation, missed the date. This cannot be construed as intentional. There is no doubt that Counsel ought to ensure that arrangements are made by their office for the day to day demands of their work, but this misunderstanding is not enough to deem the failure intentional.
- [45] The evidence shows the very afternoon when Counsel realised after receipt of the correspondence from the Defendant's Counsel of the issue, she set about seeking Counsel's consent for an extension pursuant to the Rules of Court. That consent if agreed, would in any event not have been appropriate; the sanction having taken effect, the application had to be made. Counsel on the very next day filed the Application and the witness statements.
- [46] Concerning the List of documents, this was remedied much later, but again, there is also no evidence that the Claimant sought to subvert the litigation process or to flout or ignore the order. In fact, the many applications before the court and the various court dates leads this court to the conclusion that Counsel for the claimant sought at every turn, albeit, confusingly and somewhat carelessly in the prosecution of the case, to put the documents in legitimately.
- [47] Relying on the first application for relief from sanction for the filing of witness statements, it is clear that the breach was not intentional, Counsel had in mind the breach quite early and made the request. Counsel even indicated that she sought the consent of Counsel for the Defendant from the day before the sanction took effect to cure the breach, but that the Counsel refused. In addition,

it is to be noted that three additional applications for Relief from Sanctions were made. This cannot be seen as indifference to compliance: **Associated Electrical Industries Ltd v Alstom UK**¹⁶.

[48] In the case of **The Attorney General of Trinidad and Tobago v Universal Projects Limited**¹⁷ submitted by the Applicant/Claimant is instructive. In this case Justice Jamadar JA discussed Rule 26.7 (3) (a) and stated, “In my opinion, to satisfy intentionality in Part 26.7 (3) (a) a more positive intention not to comply is required. That is to say, what must be shown is that the motive for the failure to comply was a deliberate intent not to comply. “

[49] The Court, therefore, finds that the efforts by the Claimant to engage the court for relief, albeit confusing, demonstrate that the non-compliance was not intentional. Accordingly, the explanation provided by Counsel for failure to comply not being intentional is accepted. It’s in the claimant’s interest to pursue their claim. Claimant Counsel also kept her applications in the face of the court albeit it appears confusing the many instances relief was sought – April 1, June 13, June 23, 2022.

[50] A note is taken of the case of **Re Jokai Tea Holdings Ltd**,¹⁸ where Browne-Wilkinson VC stated that “the court should not be astute to find excuses for such failure since obedience to orders of the court is the foundation on which its authority is founded. But if a party can clearly demonstrate that there was no intention to ignore or flout the order, and that the failure to obey was due to extraneous circumstances, such failure is not to be treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have enjoyed.”

Good explanation for the breach

[51] In relation to the affidavit evidence, the reasons are bare and rather terse. They do not say whose witness summaries the application is made in respect of though the witness summaries of the intended witnesses were attached to the application and filed and served thereof. There were no reasons advanced for the failure to attend mediation or whether any attempts were made. These are critical questions which had to be addressed in the affidavit evidence.

[52] Here the question is whether these excuses can be considered a “good explanation” and whether the application headed Notice for Relief from Sanctions as filed by the claimant could be dismissed out of hand as an application for extension of time instead of relief from sanction.

¹⁶ [2014] EWHC 430 (Comm)

¹⁷ Civ App No. 104 of 2009, paragraph 70

¹⁸ [1992] 1 WLR 1196, CA

- [53] The Defendant's submission is that the Claimant cannot satisfy this condition precedent. Both parties made submissions on this condition. The Claimant submitted that in this case there was a good explanation being her misapprehension regarding the closure of the court office. The Defendants queried an explanation for the period between the grant of the Order and the date for compliance and the content of the title and content of the application for relief and the affidavit in support of same. There was nothing in the evidence of the Claimant about what was being done to comply with the order and what was being done by the attorney to meet the deadline between September 11th 2020 when the order for filing witness statements was made and the 29th March, 2021 when the witness statements were due. Even the deadline for filing Standard Disclosure and List of Documents which became due on October 15 was flouted. The Claimant contended that the reason for the breach is a good explanation and is not one that runs afoul of the law.
- [54] In relation to the relocation of the court office, can this constitute a good explanation, in the context of this case, which facts and circumstances are distinguishable from the case of **Prudence Robinson and Sagicor General Insurance Inc.**¹⁹ I have examined the notice from the Court Registry and find that the notice has inferred a likely delay in reopening to March 31, 2022, however, it is quite clear that arrangements were put in place for the continuous operations of the court albeit there was a relocation exercise on-going.
- [55] There is the fact that the submission filed first on April 1, 2022 were witness summaries signed by Counsel for the Claimant and not by the Claimant himself. Though this application was withdrawn, it is worth reminding Counsel of the authority of **Adam Bilzerian v Gerald Lou Weiner et Anor**²⁰ which deems this wholly unacceptable.
- [56] 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.
- [57] Here this court is mindful of the several authorities all in the same vein on the subject including in the Eastern Caribbean Supreme Court (ECSC), but in the interest of speed, I am guided by the decisions of the Trinidad and Tobago Judiciary. In **Reed Monza (Trinidad) Limited v Price**

¹⁹ SLUHCVP2013/0009.

²⁰ SKBHCVP2015/0015

Waterhouse Coopers Limited CA 2011-15 and **Rawti Roopnarine v Harripersad Kisson** Civil Appeal No. 52 of 2012 which posits that the reasons advanced for the delay need not be perfect, the reasons need only be good and acceptable. The requirement for CPR, Rule 2.8.2(b) to be fulfilled, is that the explanation must be a good one and not infallible. This is a question of fact to be determined in all the circumstances of the case. When considering the explanation for the breach it must not, therefore, be subjected to such scrutiny so as to require a standard of perfection”: **Attorney General of Trinidad and Miguel Regis**.²¹

[58] Secondly, given the strictures regarding the relief from sanctions application, the Court is of the view that it would have been different if the Claimant’s application was headed “Extension of Time”. In such a case, that would have been fatal as that application would have been pursuant to Part 26.7(2) instead of Part 26.8 which is not the correct application once the sanctions take effect. Here while there is not much to commend the baldness of the explanations provided, this Court must take a broad view of the appellants’ application and evidence: **BBL Limited and Irina Savelieva v Canouan Resorts Development Limited And Canouan Realty Limited**.²² Accordingly, the court finds the intention of the document, though deficient in its averments, is for Relief from Sanctions of the documents annexed and filed therein. Moreover, the relevant consideration for the Court is whether the application as filed shows that he has some substantial interest which has been adversely affected by which he is seeking the court’s discretion to obey. The Court also finds that despite the explanations for the delay being bare, when weighed prima facie against the prospects for success in this case a refusal to grant the relief on the ground that the document is headed “relief for sanction, but the content does not speak to relief” might result in a miscarriage of justice for both sides.

[59] In **R C Residuals Ltd v Linton Fuel Oils Ltd**,²³ the claimants sought relief from a sanction imposed on account of breach of an unless order by late service of certain expert evidence which was crucial to their claim. The sanction prevented the claimants from relying on the evidence at trial. The lower court judge had refused the relief on account the claimants had previously been in breach of court orders, and he had been conscious of the need, in the interests of justice, to avoid giving the impression to litigants that the court would readily grant relief to those failing to comply with unless orders. In allowing the appeal Kay LJ, in the English Court of Appeal, considered that while the judge had been right to attach importance to ensuring that the parties realised the

²¹ Civil Appeal No. 79 of 2011, paragraph 22,

²² SVGHC VAP2019/0006 (delivered 2021: January 12.)

²³ (2002) *The Times*, 22 May. Brooke LJ said that where, in an emergency, solicitors refused formal service by e-mail, as they were strictly entitled to do, they might have difficulty resisting an application for relief from sanctions by a defaulting party. Followed by Sykes J in *Findlay v Francis* (2005) Supreme Court, Jamaica, no F045 of 1994 (unreported).

necessity, in the furtherance of the efficient administration of justice, of complying precisely with unless orders, other factors when weighed would have deprived the claimant of the chance of pursuing a substantial part of the claim.'

- [60] Therefore, notwithstanding that the content of the affidavit is bare, the Court finds the application is for relief from sanction and not for an extension of time.

General Compliance

- [61] The Defendant has contended that there was not general compliance with the general rules, practice directions orders and directions. This factor is fact driven and dependent on the circumstances of each case and is also within the ambit of judicial discretion:(see **Attorney General of Trinidad and Miguel Regis**). The court is not satisfied that there has not been general compliance with the court rules by both parties. This factor is therefore even.

- [62] Both parties failed to attend mediation and advanced no reasons for such failure. It loomed large in the Order even as the parties were ordered to file disclosure. Counsel, in order to edge their case, waited until the last minute, on the one side to file documents and on the other side to serve correspondence of the filing. The mediation Order was flexible leaving it up to the parties to encourage their clients to attend and to then apply for an order, if they had agreed. This did not happen. In circumstances such as the mediation order and the notice of recusal without precise dates will see each counsel seeking to ambush the other, to the detriment of what is just.

- [63] On the point of seeking the consent of counsel and counsel refusing, this evidence cannot be considered. It was a miscalculation, as in a relief from sanctions application, counsel cannot choose instead of filing the witness statements and list of documents in the courthouse to instead seek counsel's consent. Part 26.7 (2) provides that "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." That counsel filed the applications from the next day shows promptitude. The witness summaries and application were filed one day late, withdrawn and then again around two and a half months later.

- [64] Here the Court pause to observe that a telephone call with business like content passing between officers of the court, (since an Attorney at law owes a duty to the court above all other duties) may have averted this situation and saved costs to the litigants. That telephone call would be a clear indication to the court that parties are fulfilling their obligations in assisting the court in furthering

the overriding objective of justice. In addition, both sides must bear some blame for not attempting or even discussing about mediation, as ordered by the court. No effort appears to have been taken to follow the encouragement of the Court in this regard and could very well have resulted in failure to be vigilant with the timeline for compliance.

[65] There was compliance with the other rules. The Order of Court was in relation to the First Hearing of the Fixed Date Claim Form. Case Management 2 and PreTrial Review are case management activities yet to be fixed. The trial window has not yet been determined and there is no prejudice to the Defendant. In fact, the Defendant has a strong case and should allow the claim to take its course for the allegations to be ventilated.

[66] With these two limbs firmly passed, I turn now to Part 26.8(3) to assess the third limb of the threshold that an applicant must satisfy.

Other factors

[67] The third stage of the Court's assessment should not be viewed as a 'get out of jail free card', with the Court being clear that the old lax culture of non-compliance is not to be tolerated. A non-defaulting party should not, however, unreasonably oppose a relief from sanctions application: **Viridor Waste Management v Veolia Environmental Services**²⁴.

[68] The Court has considered the factors outlined under rule 26.8(3) of the CPR and have found that in relation to the interests of the administration of justice, this is properly served by allowing the Claimant to have his day in Court in circumstances where he has demonstrated a keen interest in pursuing his claim and was largely compliant with the orders of the Court. Indeed, the Court has observed that the Claimant filed his list of documents some eight (8) months after the due date. I have noted that the failure to comply with the order for the filing of witness statements, standard disclosure and list of documents was due to the Claimant's attorneys-at-law and within such a context the interest of justice is best served if the claimant is granted the relief sought.

[69] The weight to be attached to the relevant factors is a matter for the Court in each case depending on the circumstances. In determining that aspect it is relevant to adopt a calibrated approach to the question of delay and the failure to provide a good explanation. The greater the delay the greater the weight to be attached to the absence of a good explanation. 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.

²⁴ [2015] EWHC 2321 (Comm)

- [70] The Court considered the history of this matter and the fact that there is a serious dispute regarding the validity of the will in contest and also considered the Claimant's unfortunate circumstances of not being here in Dominica to properly police his claim. The Court considered the effect and operation of Part 28.2 of the CPR and formed the view that the said rule even though the claimant had sought the consent of her colleague counsel which consent was refused, had sought to file the applications promptly albeit confusingly before the second case management conference for further directions; the pretrial review being some months away.
- [71] On the evidence, while the delay was not negligible and the explanation for the delay is bare and is due to the fault of counsel, an evaluation of the prejudice to both sides, shows a critical prong of the claimants' case would be largely unsupported since it requires the Court to make a finding of fact relative to the mental capacity of a now deceased person. This is a conclusion that any Court would be reluctant to make in the absence of appropriate testimony. Conversely, given the still early stage of the proceedings, the matter is now at PreTrial review with the pleadings in the matter only recently having been closed, the Court is satisfied that there is no prejudice to the Defendant which could not be compensated in costs.
- [72] The Court observed that the Claimant has sought to remedy the failure well in advance of the hearing of this application since April 1, 2022. More importantly, Counsel for the Claimant sought a prospective extension of time prior to expiry of the deadline by asking her colleague Counsel for consent. This cannot be seen as indifference to compliance: **Associated Electrical Industries Ltd v Alstom UK**.²⁵
- [73] In addition, the Court has had regard to the issues of dispute raised in this claim; it could not be said that the case had taken up any disproportionate share of the Court's resources having only had a first hearing. I regard these issues as important factors in the context of this case. The court ought not to deprive itself of that assistance in all reasonable efforts towards real justice demanded of our judiciaries.
- [74] Applying these considerations, the Court finds that given the orders to be complied with and the pleadings of the issues in the case, there is no trial date, the Defendant's witness statements have not been exchanged and expert reports are still to be determined that the application for Relief from Sanction with its supporting affidavit first for relief and also to deem the witness statements therein filed as properly filed, relief should be granted. The Court also considered that refusal of

²⁵ [2014] EWHC 430 (Comm).

the relief will have the devastating impact on the Claimant making the consequences unfair. On the contrary, the court considered that the Defendant has in its possession the Claimant's witness summaries since April 1, 2022 when they were filed and served. The Claimant has not yet had the liberty of having an equal and fair opportunity to answer the case brought against him since the Defendant's Witness Statements have not been served. If there was any prejudice, it is the Claimant who suffers significant prejudice.

CONCLUSION

- [75] For these reasons the Claimant is granted relief from sanction for failing to file and serve his witness statement by March 31, 2022 and the witness statements filed on his behalf on April 1, 2022 and refiled on June 13, 2022 are deemed properly filed.
- [76] The Court thanks counsel for their submissions made in this matter. On the issues for resolution, I wish to say that I have taken account of all the arguments made by each party in coming to my conclusions though all the submissions made by Counsel to resolve or to decide the main issues in the case at bar may not appear in the decision.

COSTS

- [77] On the issue of cost, the general rule is that costs follow the event. In the case **Harripersad Kisoosoon and ors** Civil Appeal No: 52 of 2012, paragraph 50 Mendonca J.A. stated²⁶ "with respect to costs, I think as a general rule on an application for relief from sanctions, the applicant should pay the respondent's costs even if successful on the application". And in the case of **Forrester v Holiday Inn (Jamaica)**,²⁷ a case in which there was an application for an extension of time for compliance with an unless order, Sykes J as he then was, observed that under the more flexible approach indicated by the CPR, the court could show its displeasure in many ways including, for example, by making a summary assessment of costs payable immediately or in the near future.
- [78] The application has been resolved in favour of the Claimant, but the objections raised and pursued were far removed from being unmeritorious or unreasonable. In this regard, the Defendant will have his costs of this application.

**Jacqueline Josiah-Graham
High Court**

²⁶ Harripersad Kisoosoon and ors Civil Appeal No: 52 of 2012, paragraph 50

²⁷ (2005) Supreme Court, Jamaica, no CL 1997/F-138 (unreported).

Disposition:

[79] In the circumstances, Counsel for the Claimant shall show cause within (7) days from today in writing why the order for costs in favour of the Defendant should not be made against her personally or alternatively why an order for wasted costs ought not to be made against her.

[80] In the circumstances, I therefore order –

- a. The Claimant is granted relief from sanctions for non-compliance with the order of Stephenson J made on 10th September, 2021;
- b. Time is extended for the Claimant to file his witness summaries/statements on or before 22nd March, 2023 and all witness summaries/statements filed on his behalf before today are deemed properly filed;
- c. Time is extended for the Claimant to make standard disclosure to on or before 22nd March, 2023 and the list of documents filed on his behalf on 13th June, 2022 is deemed properly filed;
- d. The parties are to exchange their witness statements within 7 days from today; i.e. on or before 16th March, 2023; and
- e. The Claimant's Counsel shall show cause in writing within 7 days from today why she should not be ordered to pay the Defendant's costs of this application personally or alternately why an order for wasted costs ought not to be made against her in respect of the Defendant's costs.
- f. This matter is adjourned to 1st June 2023 for further case management; and
- g. The Claimant shall have carriage of this order.

By the Court,

Registrar

APPENDIX 1
Applications pending as at January 18, 2023

1.	Name of Application	Date Filed
2.	Without Notice Application for Evidence by Deposition before an Examiner	26 th October 2021
3.	Notice of Application	16 th March 2022
4.	Defendant's Application to extend time for filing	24 th March 2022
5.	Notice of Application for Relief from Sanctions	1 st April 2022
6.	Notice of Application to call Sabrina Seaman as expert witness (Claimant)	13 th June 2022
7.	Notice of Application to call Dr. Benjamin as an expert witness	13 th June 2022
8.	Notice of Application for Relief from Sanction	13 th June 2022
9.	Defendant's Application to Strike out Claimant's Witness Summaries and List of Documents	17 th June 2022
10.	Notice of Application for Relief from sanctions for witness summaries of Ann Dequental & Merlyn Thomas	23 rd June 2022
11.	Notice of Application for Relief from sanctions for witness summaries of Lorden Warrington, Dr. Benjamin and Sabrina Seaman	23 rd June 2022
12.	Notice Opposing the Application of Proposed Expert	29 th June 2022