

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO: BVIHCV2019/0100

BETWEEN:

**RODNEY HERBERT
(dba 4A CAR RENTAL)**

Claimant/Applicant

and

ANDRE PICKERING

Defendant/Respondent

Appearances: Mr. John Carrington Q.C. with Pauline Mullings of Counsel for the Claimant
Ms. Marie-Lou Creque of Counsel for the Defendants

2020: June, 4th & 30th

JUDGMENT

Introduction

- [1] **SANDCROFT, M. [Ag.]**: This Ruling determines an application by Mr. Rodney Herbert [“the claimant”] for relief from sanctions, he having failed to file his Witness Statement by July 31st, 2019, pursuant to a Court order by Master Moise (as he then was). In addition, the Application seeks an extension of time to file the Witness Statement. This application was made at the Case Management Conference stage.

Background/Chronology

- [2] This is an application filed on 15th October 2019, where the claimant sought relief from sanctions and an extension of time within which to file his Witness Statements. This application was made at the stage after default judgment had been entered in favour of the claimant.
- [3] The affidavit of Ripton Jack, filed on the 23rd of May 2019, sets out that on the 24th of April 2019, the defendant was personally served with the Claim Form, the Statement of Claim and accompanying documents.
- [4] Request for Entry of Judgment in Default of Acknowledgment of Service was filed on the 24th day of May of 2019, the time for filing the acknowledgment having passed and the time for filing a defence having expired on the 23rd of May 2019.

Claimant's/Applicant's Submissions

- [5] Attorney-at-Law for the defendant, Mr. John Carrington Q.C., submitted that the application is grounded in **CPR 26.8 (2)** which sets out that:

(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.

- [6] Mr. Carrington Q.C. also submitted that the claimant acknowledged that the rules prescribe that where 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. The effect of non-compliance is automatic upon the passing of the deadline set by the court.

- [7] Mr. Carrington Q.C. further submitted that the affidavit of Rodney Herbert addressed the fact that the notifications sent to him were being sent to an email address which was and is defunct and that he was only able to respond to the correspondence two days immediately preceding the deadline for filing, so that it was impossible in that circumstance for the witness statement to be filed on time. It is clear from that evidence that the claimant's non-compliance was unintentional. He further submitted that it could not be considered as deliberate disobedience of the rule in the sense of being willful and or acting with intent to delay or frustrate the proceedings.
- [8] Counsel also pointed this Honourable Court's attention to the decision of the Court of Appeal in **Dominica Agricultural and Industrial Development Bank v Mavis Williams**¹ in which Barrow JA delivering the judgment of the Court of Appeal said

[20] The thinking behind rule 26.8 is of the same order as the court's thinking about abuse of process. A deliberate decision not to comply is a significantly different thing from a simple mistake as to compliance or even plain slackness. In their written submissions the lawyers for the appellant referred to the following passage from Bournemouth and Boscombe Athletic Football Club Ltd. v Lloyds TSB Bank Plc and I consider it especially apposite to the present discussion:

"A finding of an intentional failure to comply with the CPR in the sense of a deliberate decision not to comply is, inevitably, a highly significant finding in the context of CPR 3.9. Depending on the circumstances of the particular case, it may or may not be decisive of the question whether relief should be granted under that rule; but, to put it no higher, in deciding whether to do so the court will be likely to regard it as a factor of very considerable weight. By comparison, a finding that the failure to comply was due to a mistaken understanding of the effect of the CPR (albeit a mistake for which there may have been little or no excuse) is a much less serious finding, which will be likely to carry correspondingly less weight."

¹ CIVIL APPEAL NO.20 OF2005

[21] It is worth repeating that under rule 26.8 (2) the court *may not* grant relief from sanction if the failure to comply was intentional. The passage just cited from the Bournemouth case shows that under the English rules intentional non-compliance may be a very weighty factor, indeed, it is likely to be a decisive factor, in deciding whether to grant relief. Under our rules the consequence of intentional non-compliance is more than a matter of likelihood; intentional non-compliance is fatal. That is the meaning of rule 26.8 (2); the court may grant relief only if it is satisfied that the failure to comply was not intentional. ..”

[9] Mr. Carrington Q.C. also posited that the reason advanced for his failure to comply with the terms of the order amounted to a good explanation for his failure to comply with the rule, order and direction of the court. The difficulty experienced by the claimant was borne out of extenuating circumstances. The claimant had faithfully complied with all other orders made by the court and has been the sole litigant involved in the proceedings since the inception of the matter, whilst the defendant had failed to file an acknowledgment of service or defence in this matter or to otherwise participate in the proceedings despite the claimant’s service of the documents upon him.

[10] Counsel further posited that the court is also required to consider, in determining whether to grant the relief, the effect which the granting of relief would or would not have on either party. The claimant had set out in his affidavit that default judgment was granted in his favour in relation to the Claim on the 24th of June 2019, which had not been set aside. Conversely, the defendant would suffer no prejudice or loss because of the inadvertent failure of the claimant to file the witness statement on time. The defendant had not been and would not be deprived of an opportunity to file witness statements should he wish to do so, or be heard by the court on the matter of quantum.

[11] Mr. Carrington Q.C. also submitted that the interests of the administration of justice would therefore be served by allowing the claimant an opportunity to enjoy the fruits of his judgment by being allowed to file and serve the witness statement addressing the matter of special and general damages. The overriding objective was also furthered by the granting of the order granting relief as it would assist in the just disposal of the case; otherwise the judgment in the applicant’s favour would be rendered nugatory.

[12] Counsel further submitted that the claimant’s failure to comply with the terms of the order could be

remedied within a reasonable time. A draft of the witness statement had been appended to the claimant's affidavit seeking relief from sanctions and an extension of time. Hence, if the court was satisfied with the relevant matters the claimant was able to serve the witness statement within a relatively short window of time.

[13] Mr. Carrington Q.C. finally submitted that the court's attention was drawn to its case management powers under part 26.1 of the Rules, by which the court maintains a broad discretion to manage its cases including the power to extend or shorten the time for compliance with any rule, practice direction or other direction of the court even if the application for an extension is made after the time for compliance has passed. The claimant therefore prays that the court grant an order granting relief from sanctions and an extension of time within which to file its witness statement.

Defendant's/Respondent's Submissions

[14] Ms. Creque submitted that Mr. Herbert was proposed to be the sole witness and his affidavit referred to numerous exhibits, including e-mail exchanges between his counsel Ms. Mullings, notwithstanding counsel's attempts to have Mr. Herbert provide a witness statement from as early as 4th July 2019², by the 23rd of July 2019, Mr. Herbert acknowledged receipt of what was needed. Further, by his e-mail of 29th July 2019, it was apparent that he had no intention of directly providing any information as the claim was a subrogation claim but there was no supporting statement from the insurers.

[15] Counsel also submitted that it was clear from the proposed Witness Statement that Mr. Herbert was not present at the time of the accident and that he sought to rely on hearsay evidence of Ms. Ventura³ which could not be challenged. The alleged caution statement of Carmen Ventura was not signed and was thus of no moment.

Issue

[16] The issues for consideration are:

- (i) whether the failure to comply with the court's previous Orders was not intentional and also, whether the claimant had offered a good explanation for the failure; and

² MD1 as exhibited by M Watt daSilva

³ Paragraph 6 of the proposed Witness Statement, exhibit RH2 and

- (ii) whether relief of sanctions should be granted to the claimant and an extension of time also, in order for the claimant to file his Witness Statement.

Law and Analysis

Rule 26.8 (3) of the Civil Procedure Rules

[17] In the **Dale Austin and Public Service Commission and the Attorney-General** – (2016) JMCA Civ 46 though, the Jamaican Court of Appeal had, in its judgment, concluded that, in considering such an extension of time application, this court must apply the considerations required by rule **26.8 of the Civil Procedure Rules** which address specifically the factors to be considered by a court in adjudication upon an application for relief from sanctions. See paragraphs 79- 101 of the **Austin** case (op. cit.), in that regard, per Edwards, JA (Ag.).

[18] **Rule 26.8 (3) of the Civil Procedure Rules**, which addresses matters pertinent to an application for relief from sanctions, states as follows: ‘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.

[19] Most of the grounds that are being relied on, in support of the claimant’s/applicant’s application for relief from sanctions, are specifically pertinent to the grounds which this court is to consider, pursuant to rule 26.8 (3). As a reminder, those grounds have been set out in full, at paragraph 5 of these reasons.

[20] **Rule 26.8 (1) (a) of the Civil Procedure Rules 2000** requires that an application for relief from any sanction imposed for a failure to comply with any rule, order or direction, must be made promptly.

[21] It is respectfully my view, that **rule 26.8 (1) (a)** ought to be construed as a mandatory, rather than a directory, requirement. This is because of the nature of an application for relief from sanctions and the overall need to ensure that court orders are complied with promptly, so as not to result in undue

delay. In circumstances wherein a sanction has been imposed, arising from failure to comply with a court order, that situation can only properly be remedied in a prompt manner, if an application for relief from sanctions, is made promptly.

[22] The delay period, is not the period between when the order granting judgment in the claimant's favour was made and when the application for relief from sanctions was filed, but rather, the delay between when the sanction took effect and when the application for relief from that sanction was filed.

[23] It could hardly be otherwise, since if so, then the automatic nature of the sanction would not, in reality, actually be automatic, but rather, instead, be dependent on when the order following upon that sanction, is perfected by the court, or perhaps, when it comes to the realization of the parties or their counsel, that a sanction has in fact been imposed from as of the date by which it can properly be concluded, that there has been non-compliance with the court's order.

The interaction between rules 26.8 (1) (2) and (3) of the Civil Procedure Rules and what should be this court's legal approach, in addressing an application for relief from sanctions.

[24] In considering an application for relief from sanctions, this court is required to first consider whether the requirements of rule **26.8 (1) and (2)** have been met by the applicant. It is only if those conditions have been met that this court can properly next go on to consider the overall interests of justice, as per **rule 1.1 of the Civil Procedure Rules 2000**, in the context of all of the other considerations set out, in rule **26.8 (3) of the Civil Procedure Rules 2000**.

[25] If therefore, a party applying for relief from sanctions, has not overcome the hurdles mounted by the provisions of **rule 26.8 (1) and (2) of the Civil Procedure Rules 2000**, then it is unnecessary for this court to give any consideration to any of the provisions of **rule 26.8 (3) of the Civil Procedure Rules 2000**. That was laid down by the Court of Appeal of Jamaica, in the case: **H.B. Ramsay and Associates Ltd and Caledonia Hardware Ltd and Harold B. Ramsay and Janet Ramsay and Jamaica Redevelopment Foundation Inc and The Workers Bank** – [2013] JMCA Civ 1, especially at paragraphs 29-32. Most recently, the Court of Appeal of Jamaica emphasized this, in the case: **Mirage Entertainment Ltd. and Financial Sector Adjustment Co. Ltd. and ors.** – [2016] JMCA App. 30.

[26] The Court of Appeal in Jamaica thus, now takes a different approach to applications for relief from sanctions, than used to be taken in the past – particularly in the transitional time period, between the application of the old rules and the new rules having come into effect. This was commented on

by Brooks, J.A., at paragraph 13 of the court's judgment in the **Ramsay** case (op. cit.), where the court noted the distinction between the past approach, which is what was applied by the Court of Appeal in the cases: **Hyman v Matthews** – SCCA Nos. 64 and 73 of 2003 and **International Hotels Jamaica Limited v New Falmouth Resorts Limited** – SCCA Nos 56 and 95 of 2003. The Court of Appeal's judgment in the **Ramsay** case (op. cit.) has made it pellucid that it is a different approach that will now be adopted by the Court of Appeal and the present approach is one which is informative to this court. A different approach is now taken, because the transitional period has now long passed.

[27] In **H.B. Ramsay & Associates Ltd et al v Jamaica Redevelopment Foundation Inc et al**,⁴ Brooks JA interpreted this rule as creating a step-by-step process. That is, a judge must consider whether an applicant has satisfied Rules 26.8 (1) and 26.8 (2) before considering the factors listed in Rule 26.8 (3). The learned Justice of Appeal said:

An applicant who seeks relief from a sanction, imposed by his failure to obey an order of the court, must comply with the provisions of rule 26.8(1) in order to have his application considered. If he fails, for example, to make his application promptly the court need not consider the merits of the application. Promptitude does, however, allow some degree of flexibility and thus, if the court agrees to consider the application, the next hurdle that the applicant has to clear is that he must meet all the requirements set out in rule 26.8(2). Should he fail to meet those requirements then the court is precluded from granting him relief. There would, therefore, be no need for a court, which finds that the applicant has failed to cross the threshold created by rule 26.8(2), to consider the provisions of rule 26.8(3) in relation to that applicant.⁵

[28] In the aforesaid case, Master Lindo (as she then was) had ordered HB Ramsay and Associates Ltd and the other applicants (collectively, "the Ramsay Applicants") to pay certain costs to the Jamaica Redevelopment Foundation Inc. and the Workers Bank. They failed to obey that order and at a later hearing, Master Lindo, in response to the non-compliance, made an unless order, requiring the Ramsay Applicants to pay the costs on or before June 18th, 2010 at 2:00 p.m., or have their statement of case stand struck out. The Ramsay Applicants paid their attorneys-at-law the money

⁴ [2013] JMCA Civ 1.

⁵ At paragraph [31].

to settle the costs on June 16th (two days before the deadline) but the attorneys inadvertently did not do so until July 14th, 2010 (a month after the deadline). The Ramsay Applicants filed the application for relief from sanction on July 15th, 2010. The application came before Fraser J. He did not consider it a prompt application in accordance with 26.8 (1) and, therefore, dismissed it.

[29] The decision was appealed, but the Court of Appeal agreed with Fraser J that the application did not satisfy the need for promptness. In his judgment, Brooks JA advocated for a more stringent approach to dilatory applications,⁶ and applied that stringent approach to the situation at hand. He said:

It is inconceivable that it should have taken almost a month (15 July 2010) for the application for relief from sanctions to have been filed. The appellants' attorneys-at-law should have been eagerly expecting the monies and anxious to turn them over to their counterparts, on or before 18 June 2010. They should have been pressing their clients for the funds. In addition, the appellants, having made the payment, should have been anxious to have word from their attorneys-at-law, that the sum had been remitted and that their claim had been saved from the fatal axe... ... In the circumstances, I find that the application was not made promptly and, for that reason, should not be considered. It should, therefore, fail.”⁷

[30] Although Brooks JA did not need to consider whether any other pre-requisites had been satisfied, he went on to do so anyway. He held that the application also failed to comply with Rule 26.8 (2) because the Ramsay Applicants did not give a good explanation for non-compliance. He accepted the respondents' argument that the mere statement in the affidavit that the non-compliance was inadvertent was not an explanation. He then added that while an oversight by one's attorneys could be an explanation, it was not likely to be a good one.

[31] This approach was also followed in the recent Jamaican Court of Appeal decision [2017] JMCA Civ 2 **Jamaica Public Service Company Ltd v Charles Vernon et al** where Morrison JA (as he then was) in considering their Rule 26.8 which is identical/similar to our CPR 26.8, underscored that it is only if the threshold requirements are met that other considerations provided for in the CPR must then be taken into account. He said:

⁶ At paragraph [13].

⁷ Paragraphs [16] to [18].

“In this jurisdiction, a first instance judge faced with an application for relief from sanctions must begin from a point of principle that (a) the orders of the court must be obeyed; (b) all the requirements of rule 26.8 (1) and 26.8(2) must be met; (c) once those requirements have been met, it is the duty of the judge to have regard to the interest of the administration of justice and ensure that justice is done in accordance with the overriding objective, without resort to needless technicalities, in keeping with the factors set out in rule 26.8(3); (d) a litigant is entitled to have his case heard on the merits and should not lightly be denied that right; and (e) the court must balance the right of the litigant against the need for timely compliance.” [Emphasis added]

[32] In 2010 the automatic effect of the sanction where Witness Statements or Summaries are not filed on time was emphasised by the Privy Council in JCPC No. 0068 of 2010 **AG of Trinidad and Tobago v Keron Mathews** at paragraph 15. Accordingly in **CV 2013-04300 Lakhpatiya Barran v Balmati Barran et al**, it was said at paragraph 24 that **“The Court’s discretion to grant Relief from Sanctions only arises after the conditions precedent in Rule 26.7(3) CPR have been satisfied. A Court is precluded from granting relief unless all three conditions are satisfied.”**

[33] My position now is that, as it relates to the witness statement lodged in the Registry on October 15th, 2019, the strict approach of not considering anything else if the threshold requirements were not met is the test to be applied.

[34] Kokaram J, in a June 2017 Ruling delivered in **Claim No. CV2016- 02213 Wayne Greaves v Joseph Wilson et al**. Citing prior authorities he set out the test at paragraph 11 and 12 of his Ruling, as follows:

“11. Roland James v The Attorney General of Trinidad and Tobago Civ App No. 44 of 2014 laid down the factors which should be considered in determining whether to grant an extension of time on an application. Mendonca JA had this to say: “In my judgment on an application for an extension of time, the factors outlined in rule 26.7(1), (3) and (4) would generally be of relevance to the application and should be considered. So that the promptness of the application is to be considered, so too whether or not the failure to comply was intentional, whether there is a good

explanation for the breach and whether the party in default has generally complied with all other relevant rules, practice directions, orders and directions. The Court must also have regard to the factors at rule 26.7(4) in considering whether to grant the application or not. In an application for relief from sanctions there is of course a threshold that an applicant must satisfy. The applicant must satisfy the criteria set out at rule 26.7(3) before the Court may grant relief. In an application for an extension of time it will not be inappropriate to insist that the applicant satisfy that threshold as the treatment of an application for an extension of time would not be substantially different from an application for relief from sanction. Therefore on an application for extension of time the failure to show, for example, a good explanation for the breach does not mean that the application must fail. The Court must consider all the relevant factors. The weight to be attached to each factor is a matter for the Court in all the circumstances of the case. Apart from the factors already discussed the Court should take into account the prejudice to both sides in granting or refusing the application. However, the absence of prejudice to the claimant is not to be taken as a sufficient reason to grant the application as it is incumbent to consider all the relevant factors. Inherent in dealing with cases justly are considerations of prejudice to the parties in the grant or refusal of the application. The Court must take into account the respective disadvantages to both sides in granting or refusing their application. I think the focus should be on the prejudice caused by the failure to serve the defence on time.”

[35] It is to be noted, that the aforementioned case is a case where the test that was applied to the Witness Statements in relation to the extension of time was sought before the automatic sanction took effect.

[36] Also in **Dr. Keith Rowley v Anand Ramlogan** Civ App No. P215 of 2014, delivered on the same day of Roland James, Rajnauth-Lee J.A noted at paragraph 13:

“13. In the above cases, the Court of Appeal was disposed to the view, and I agree, that the trial judge's approach in applications to extend time should

not be restrictive. In such applications, there are several factors which the trial judge should take into account, that is to say, the Rule 26.7 factors (without the mandatory threshold requirements), the overriding objective and the question of prejudice. These factors, however, are not to be regarded as "hurdles to be cleared" in the determination of an application to extend time. They are factors to be borne in mind by the trial judge in determining whether he should grant or refuse an application for extension of time. The trial judge has to balance the various factors and will attach such weight to each having regard to the circumstances of the case. Of course, not all the factors will be relevant to every case and the list of factors is not exhaustive. All the circumstances must be considered. In addition, I wish to observe that this approach should not be considered as unnecessarily burdening the trial judge. In my view, when one examines the principles contained in the overriding objective, it is not difficult to appreciate the relevance of the rule 26.7 factors." [Emphasis added]

[37] There is an express sanction provided for in the CPR 2000 and therefore where a party has not met the deadline and the deadline has passed they must apply to obtain relief from the sanction. If the party recognizes that they cannot meet the deadline and decides to act before it has passed, the provision requiring an application for relief from sanctions may not become applicable. Instead the court may be approached to extend the time pursuant to its general case management powers at **CPR 26(1) (d)**.

[38] The claimant/applicant having failed to meet the threshold requirements for relief from sanctions as they relate to the filing of the Witness Statement, there is no need to consider the other factors as they relate to that application, which is dismissed.

[39] A laxative approach to meeting **CPR 2000** requirements and complying with Court directions is not in the interests of the administration of justice. It would be unfortunate if even one litigant, in this case Andre Pickering, left Court with the impression that despite the seismic shift from the laissez-faire approach intended by the **CPR 2000**, such a laxative approach would be condoned to his detriment.

[40] The introduction of automatic sanctions was intended as an antidote to prior maladies of delay in civil proceedings. The concern that there not be a return to the pre CPR litigation topography has

been addressed in many Judgments. In a Ruling delivered on August 17, 2017 in **CV2015-04245 Tri-Star Caribbean Inc. v Republic Bank Ltd** at para 30 Rampersad J voiced the concern that **“any order in favour of the defendant’s application may seem to be a license to return to the olden and often maligned days of failure to adhere to timelines – a return to the ‘cancerous laissez-faire approach’ referred to by Des Vignes J in Soodhoo v Epitome CV 2007-01678”**

[41] Analogously, it is my view that, as unpalatable and insalubrious as the results of a sanction may be, upholding its automatic effect in appropriate circumstances is necessary to prevent a reversion to pre CPR malady of inefficiencies that caused great hardship to litigants and their Legal practitioners.

[42] As it relates to the failure to file Witness Statement(s) herein, the position as stated before is that the claimant/applicant did not stave off the automatic effect of sanctions by applying for an extension of time before the sanctions were activated. In all the circumstances of this case however, I maintain the view that the claimant’s/applicant’s delay in filing witness statements is not in the interests of the administration of justice.

Rule 26.8 (1)

[43] **Rule 26.8 (1) of the Civil Procedure Rules 2000**, states: **‘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.’**

[44] The applicants have supported their present application with evidence on affidavit. Whilst the word ‘promptly’ ought not to be immutably defined, since, what is ‘prompt’ in one situation, will not necessarily be ‘prompt’ in another situation; barring something completely extraordinary. In the **Hyman v Matthews** case (op. cit.), the Court of Appeal of Jamaica concluded that a period of three (3) months between the filing of an application for relief from sanctions and the imposition of the sanction was not ‘prompt.’

[45] The fact that parties and/or their counsel were for whatever reason, not cognizant that the pertinent sanction applies automatically, once there has been default in compliance with this court’s unless order, cannot properly be taken by this court, as constituting an extraordinary factor, such that it was not until the judgment order was made by this court that time began to run against the claimant/applicant for the purpose of deciding as to whether he acted, ‘promptly’ in making his

present application. It is my considered view, that the law could hardly be interpreted properly, if it were to be otherwise applied.

[46] In the event that I am wrong in that respect though, the provisions of **rule 26.8 (2)** must now be considered. That rule provides as follows: ‘The court may grant relief only if it 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.

[47] These will be addressed, seriatim, after the issue of burden and standard of proof has been addressed.

Burden & Standard of Proof

[48] The burden of proof, in respect of his present application, rested squarely on the claimant’s/applicant’s shoulders. It therefore was for him to have satisfied this court, if they could have, that it is more probable than not, that he has met all of the requirements of **rule 26.8 (1) and (2) of the Civil Procedure Rules 2000**. It is my conclusion that he failed to meet that burden. A careful consideration of the requirements of **rule 26.8 (2) (a) & (b) of the Civil Procedure Rules 2000** and all of the affidavit evidence being relied on, in support of his present application, will make this abundantly clear.

Whether the failure to comply was unintentional (‘not intentional’) and whether there is a good explanation for the failure to comply

[49] For the sake of convenience, these two issues are and will be addressed jointly, rather than separately.

[50] In that respect, it will be the affidavit evidence adduced by the claimant/applicant, in support of his application for relief from sanctions, which will be most pertinent.

[51] This court is therefore now left to carefully and judiciously consider and analyze the claimant’s/applicant’s affidavit, in deciding as to whether the applicant has satisfied the burden of proof, as legally cast upon him, to meet the requisite standard of proof, that being on a balance of probabilities, that the failure to comply with the order, was not intentional, or in other words unintentional and that there exists good explanation for the failure to comply with the order.

- [52] Essentially, what the claimant/applicant has done in his affidavit, to the extent that the evidence given therein is relevant for present purposes, is nothing other than used same to make excuses for the blameworthiness that must rest squarely on the claimant's shoulders.
- [53] The claimant's/applicant's affidavit though, which this court has taken judicial notice of, has disclosed that efforts made by his counsel to contact him between June and late July at the email address provided to her by the insurers proved futile as after the passage of Hurricane Irma in the BVI he no longer used the same contact details. The claimant/applicant was eventually contacted by telephone and the relevant correspondence which was forwarded to his defunct email address about the outcome of the case and the need to provide witness were forwarded to his new email address on 23rd July 2019.
- [54] The claimant/applicant further stated that by the time he saw the attorney's email and was in a position to give a substantive response it was the 29th of July 2019, which was two days prior to the deadline for filing.
- [55] At the case management conference hearing as is generally required, pursuant to the provisions of **rule 27.8 of the Civil Procedure Rules 2000**, the claimant was then present and the defence attorney was also then present.
- [56] Attorneys also have a duty to inform their clients, who are parties to claims, as to the legal requirements imposed upon them, arising from such legal processes. If attorneys fail to carry out, or fail to competently carry out their duties in that respect, then not only can they be made subject to legal disciplinary proceedings, but also, they can be made subject to a claim for damages for negligence. See: **Saif Ali v Sydney Mitchell and Co.** – [1980] AC 198.
- [57] Accordingly, what the claimant/applicant has put forward, by means of his affidavit evidence, as to why it was that he failed to comply with the court's order that was made, is that he was unaware of same and also, not cognizant of the consequence of same. For the reason given above, this court has been unable to properly conclude, one way or the other, as to whether it accepts or rejects that particular assertion of his.
- [58] Furthermore, the claimant/applicant advanced that his case and the rights of the insurer under the laws of subrogation would be severely affected should the court decline to allow him to rely on his witness statement in a case where liability has already been determined in his favour. The claimant/applicant would therefore have a judgment in his favour that would be rendered nugatory.

[59] In the circumstances, the claimant/applicant has failed to meet his burden of proving that the failure to comply was unintentional, or that there was a good explanation for the failure to comply.

[60] It is difficult to extricate the failure to comply issue from that of a good explanation for non-compliance, so the court found it a more efficient use of time to deal with them together. The court is also guided by the Jamaican Court of Appeal decision in **Jamaica Public Service Company Limited v Charles Vernon Francis** Civil Appeal No 126/2015 where President Morrison found that difficulty finding witnesses was a good explanation. He advised at paragraph 42 that:

“the paramount issue was not whether the explanation covered all the period limited for compliance. Certainly it would have been better for the appellant if it did, but the fact that it did not, by itself, should not have prevented the learned trial judge from considering it. What mattered was whether he considered it to be a good explanation for failing to comply in the time limit. Rule 26.8(2) of the CPR requires the learned judge to be satisfied that there is a good explanation for the failure to comply in order to exercise his discretion to grant relief from sanctions. Being currently off island or traveling out of the parish simply means they are not available.”

[61] He continued at para 45:

“In my view, the essence of the explanation, in the instant case, was that the appellant’s witnesses were not available to give witness statements before the period expired. The learned judge ought to have understood and accepted it to mean just that. His restrictive approach sought to punish the appellant for not complying at the earlier stage of the period limited for doing so. This approach fails to take into account the fact that the appellant could have complied on the last day of the period specified and there would be no need for an explanation as to why there was no earlier compliance. Certainly, a litigant who acts in this way does so at his own peril, if for some reason he misses that deadline. There may be a good explanation for missing that deadline but there may be an even better explanation for not being able to meet it earlier in the period. However, in my view, the fact that the explanation for missing the deadline did not cover the earlier period,

important though it may be, by itself should not automatically result in the explanation which was in fact proffered, being dismissed out of hand.”

[62] This court, having considered the explanation presented finds it not to be a good one, there is no difficulty in holding that the delay was intentional.

[63] Also, in any event though, it should be noted that even in circumstances wherein it is the exclusive fault of a party's attorney-at-law, which has ultimately resulted in the failure of a party to comply with a court order, or a rule of court will not always, in and of itself constitute a good reason for a party having failed to comply with a court's unless order, or a requirement of a rule of court. See, in that regard: **Glass v Surrendran, Sub-Nom-Collier v Williams** – [2006] 1 WLR 1945; and **Mirage Entertainment Ltd. and Financial Sector Adjustment Co Ltd. and ors.** – (op. cit.), esp. at paragraphs 26-28, per P. Williams, JA.

[64] As was made clear by Phillips, J.A. in **Murray-Brown v Harper and Harper** – JMCA App 1, it is necessary, in every case, to examine the facts with care before arriving at the conclusion that counsel's knowledge is the client's knowledge. This was reiterated by Morrison, J.A (as he then was), in **B and J Equipment Rental Ltd. v Joseph Nanco** – [2013] JMCA Civ 2, at paragraphs 58 and 59.

[65] In the **B and J Equipment** case (op. cit.), the appeal was against the order of McDonald-Bishop, J. (as she then was), at first instance, refusing an application to set aside default judgment, which had been entered, arising from the defendant's failure in that case, to file a defence. That appeal was unsuccessful and thus, it was the first instance ruling of McDonald-Bishop, J. (as she then was), which was upheld by the Court of Appeal. The attorney who had, in respect of the claim which was the subject of the appeal in that case, been called into question, in respect of his conduct as an attorney-at-law, particularly in so far as he had failed to file any defence to the claim, notwithstanding that it was alleged that he had received instructions in a timely way, such that he should have done so.

Conclusion

[66] It is therefore, for all of the reasons given above, that I concluded that it was unnecessary for this court to consider the factors set out in **rule 26.8 (3) of the Civil Procedure Rules 2000** that consideration would only have been necessary if the claimant/applicant had clearly been able to

overcome the high hurdles that were placed in front of him, with respect to his application for relief from sanctions and extension of time.

[67] The claimant/applicant, to my mind, certainly failed to overcome one of those hurdles, as set out in rules **26.8 (1) and (2) of the Civil Procedure Rules** and perhaps even failed to overcome either of them. In that context, it followed inexorably, that his application had to be denied, as no relief from sanction, or extension of time could properly have been granted.

[68] There is just one other issue, pertaining to the claimant's/applicant's application for relief from sanctions, which I will make mention of. It is that it is very clear that the claimant was not cognizant of the automatic effect of the failure to comply with the unless-order.

[69] The fact that that is so though, does not in any way diminish the legal fact, that in the event of a party's failure to comply with an unless order, the consequential sanction, is automatically imposed and takes effect, not when the parties actually become aware that same has taken effect, but rather from whatever is the date when it can properly be concluded that the relevant party failed to comply with a court's unless order.

[70] Accordingly, whilst the parties and perhaps even this court's unawareness as to the sanction having taken effect automatically from as of the date of noncompliance with the unless order, would undoubtedly be a relevant factor to be considered in deciding on the overall interests of justice, as regards whether relief from sanctions ought to be granted, that factor can only properly be considered by this court, if **rule 26.8 (3) of the Civil Procedure Rules 2000** can properly be considered. For the reasons as given above, **rule 26.8 (3) of the Civil Procedure Rules 2000**, to my mind, has no applicability in the present scenario.

[71] In the final analysis therefore, the claimant's/applicant's application is refused and these are the orders then made:

Order

[72] I hereby order as follows:

1. Application for relief from sanction as made by the claimant in the Application for relief of sanctions and extension of time which was filed on October 15th, 2019 is denied.
2. The claimant shall file and serve this order.

Ricardo Sandcroft
High Court Master [Ag]

By the Court

Registrar