

EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

**SAINT LUCIA
COMMERCIAL DIVISION**

CLAIM NO. SLUHCM2018 /0101

BETWEEN:

J.Q. CHARLES LIMITED

Claimant

And

DESMOND DU BOULAY

Defendant

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini

High Court Judge

Appearances:

Mr. Mark Maragh for the Claimant

Mr. Thomas Theobalds, for the Defendant

2019: December 4, 17

DECISION

- [1] **ST ROSE-ALBERTINI, J. [Ag]:** Before this Court are three applications for consideration, two of which concern relief from sanctions and extension of time to file witness statements. The third concerns issuance of witness summonses to employees of a third party.

- [2] The claim to which these applications relate was filed by JQ Charles Limited (“JQC”) against Desmond Du Boulay (“Mr. Du Boulay”) for specific performance of a contract dated 12th October 2018; alternatively damages for breach of contract, interest and costs. The contract concerns the sale of immovable property owned by Mr. Du Boulay to JQC. JQC alleges that at all material times it was ready, willing and able to complete the contract; however Mr. Du Boulay has refused to take steps to complete the sale, despite requests to do so. Mr. Du Boulay’s answer to the claim is that the property was encumbered by a hypothecary obligation and judicial hypothec registered in favour of the Bank of Saint Lucia Ltd (“the Bank”) and the sale was conditional upon him obtaining the Bank’s consent. The Bank refused to consent to the sale and consequently the contract is non-binding, expired, incapable of fulfillment, and/or discharged.

The Issues

- [3] The Court is required to determine the following questions:-
1. Could the parties have agreed an extension of time to file witness statements after the deadline for filing had passed?
 2. Should JQC be granted relief from sanctions and extension of time to file its witness statement?
 3. Should Mr. Du Boulay be granted relief from sanctions and extension of time to file one of his witness statements?
 4. Should the application to issue witness summonses to two employees of the Bank be granted?

Procedural Background

- [4] At a case management conference held on 11th June, 2019 the parties were permitted to file applications for specific disclosure no later than 9th July, 2019. JQC elected to call 1 witness and Mr. Du Boulay elected to call 2 witnesses. Witness statements were to be filed and served by 26th July, 2019. It was agreed that the Bank, whose consent was required for the sale to JQC, would not be added as a party to the claim but that JQC was permitted to make an application no later than 31st July, 2019 for witness summonses to be issued to two employees of the Bank, pursuant to rule **33.3(2) (b)** of the **Civil Procedure Rules**

2000 (the “CPR”). The parties were ordered to file a joint timetable by 31st August, 2019 in preparation for pre-trial review which was scheduled for 23rd September, 2019. A trial date was to be fixed at pretrial review.

- [5] On 9th July, 2019 JQC filed an application for specific disclosure. When the matter came on for pre-trial review on 23rd September, 2019 that application was still pending. JQC had not filed its witness statement and the time for doing so had elapsed. No application had been made for the issuance of witness summonses and the time for doing so had also elapsed. Mr. Du Boulay had filed two witness statements one of which was within the stipulated time and the other was deemed to be filed on 29th July, 2019 (three days after the time for doing so had elapsed). Despite JQC not having filed its witness statement, Mr. Du Boulay proceeded to serve both of his witness statements on the attorney for JQC on 30th July, 2019.
- [6] At pretrial review the parties were not in a state of readiness to proceed with the application for specific disclosure. Directions were given and a hearing scheduled for 17th October, 2019 for disposal of that application. The parties were further directed to file applications no later than 27th September, 2019 for relief from sanctions and extension of time to file and serve witness statements; and JQC to file its application for issuance of witness summonses. Both parties complied with the direction in respect of relief from sanctions and extension of time to file and serve witness statements.
- [7] On 17th October, 2019 JQC filed its application for issuance of witness summonses having failed to do so by 31st July, 2019 and 27th September, 2019 as per court orders dated 11th June and 23rd September, 2019 respectively.
- [8] The application for specific disclosure was considered on 17th October, 2019 and the Court’s decision was delivered on 7th November, 2019. On 4th December, 2019 the court heard oral submissions in relation to the three applications, which are the subject of this decision.

The Law

- [9] CPR 26.1(2)(k) permits the Court to grant an extension of time for complying with an order of the Court and says:

*“(2) Except where these rules provide otherwise, **the court may –***

...

(k) extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed;” (My emphasis)

- [10] CPR 26.7(2) provides:

“(2) 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.” (My Emphasis)

- [11] CPR 29.11 specifies the consequence of failing to comply with an order for the filing and exchange of witness statements:

“(1) If a witness statement or witness summary is not served in respect of an intended witness within the time specified by the court, the witness may not be called unless the court permits.

(2)The court may not give permission at the trial unless the party asking for permission has a good reason for not previously seeking relief under rule 26.8’
(My Emphasis)

- [12] CPR 26.8 addresses relief from sanctions and provides as follows:

“(1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –

- (a) made promptly; and*
- (b) supported by evidence on affidavit.*

(2)The court may grant relief only if it is satisfied that –

- (a) the failure to comply was not intentional;*
- (b) there is a good explanation for the failure; and*
- (c) the party in default has generally complied with all other relevant rules, practice directions, 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.

(4) The court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown."

[13] CPR 27.8 deals with variation of the case management timetable and states:

"(1) A party must apply to the court if that party wishes to vary a date which the court has fixed for –

(a) a case management conference;

(b) a party to do something where the order specifies the consequences of failure to comply;

(c) a pre-trial review;

(d) the return of a listing questionnaire; or

(e) the trial date or trial period.

(2) Any date set by the court or these rules for doing any act may not be varied by the parties if the variation would make it necessary to vary any of the dates mentioned in paragraph (1).

(3) A party seeking to vary any other date in the timetable without the agreement of the other parties must apply to the court, and the general rule is that the party must do so before that date.

(4) A party who applies after that date must apply for –

(a) an extension of time; and

(b) relief from any sanction to which the party has become subject under these Rules or any court order.

(5) The parties may agree to vary a date in the timetable other than one mentioned in paragraph (1) or (2).

(6) Where the parties so agree, they must –

(a) file a consent application for an order to that effect; and

(b) certify on that application that the variation agreed will not affect the date fixed for the trial or, if no date has been fixed, the period in which the trial is to commence; and the timetable is accordingly varied unless the court directs otherwise" (My emphasis)

[14] CPR 33.3 deals with the issuance of witness summonses and states:-

"(1) A witness summons is issued on the date entered on the summons by the court office.

(2) A party must obtain permission from the court when that party wishes to have –

(a) a witness summons issued less than 21 days before the date of the hearing; or

(b) a summons issued for a witness to attend court to give evidence or to produce documents on any date except the date fixed for the trial or the hearing of any application.

(3) An application for permission under paragraph (2) may be without notice but must be supported by evidence on affidavit."

Should Mr. Du Boulay be granted relief from sanctions and extension of time to file one of his witness statements?

- [15] I deal first with Mr. Du Boulay's application, as it was filed first in time and unopposed.
- [16] In summary the grounds for this application are that:-
1. It was made promptly.
 2. The default in filing and serving the witness statement of Albert Lynton Lamontagne was not intentional.
 3. There is a good explanation for the failure.
 4. Mr. Du Boulay has generally complied with all orders of the court.
 5. There will be no prejudice to JQC if relief from sanction is granted and time is extended.
 6. The order sought will not affect the period in which trial is to commence.
 7. It is in the interest of the proper administration of justice that relief be granted.
- [17] The affidavit in support is deposed by Mr. Du Boulay. He stated that he intended to call two witnesses, namely Albert Lynton Lamontagne ("Mr. Lamontagne") and himself. His witness statement was filed on the E-Litigation Portal (the "portal") on Friday 26th July, 2019 at 3:37pm. However, Mr. Lamontagne gave consent to file his statement on the same day via telephone at 4:10pm and via email at 4:17pm, which fell outside of the hours permitted for filings on the portal. The statement was filed on the portal at 4:17pm, as a result of which it was deemed to be filed on Monday 29th July, 2019 at 8:30am. The delay was occasioned by unanticipated work commitments of Mr. Lamontagne who lives and works in Soufriere and was unavailable before that time. Mr. Du Boulay says the default was therefore unintentional. He deposed that JQC's attorney would have had access to the witness statement from the day it was filed, albeit that JQC's witness statement had not been filed by the ordered date. The non-filing of witness statements by JQC precluded an exchange of witness statements between the parties, but despite this, both of his witness statements were served on the attorney for JQC on 30th July, 2019. In the circumstances, he says the late service was unintentional.

[18] Mr. Du Boulay deposed further that the application was filed promptly and in accordance with the relevant court order, he has generally complied with all orders of the court and there will be no prejudice to JQC who has had access to the witness statements from 26th July, 2019 from the portal. In concluding, he repeated the grounds as contained in the application and asked that he be granted relief from any sanction.

[19] Mr. Thomas Theobalds, Counsel for Mr. Du Boulay, in his written submissions citing the relevant authorities stated that CPR 26.8(2) contains three conditions precedent which must all be satisfied before consideration can be given to the factors stipulated in CPR 26.8(3). A court is precluded from granting relief unless all three conditions are satisfied. It is only when these conditions are satisfied that the court is exhorted to have regard to the factors contained in CPR 26.8(3) in exercising its discretion to grant relief¹. He submitted that while promptness was not a prerequisite for the grant of relief, the Court should consider that the application was filed promptly in accordance with the order of 23rd September 2019 which gave permission to make the application². He stated that a finding of intentional failure would require direct or inferred evidence of some conscious deliberate decision not to comply³. Accordingly, the evidence contained in Mr. Du Boulay's affidavit must be examined to determine whether the Court is satisfied that the failure to comply was not intentional⁴.

[20] Mr Theobalds contends that all three conditions of CPR 26.8 (2) have been satisfied. The failure to comply was not a deliberate and conscious decision but was driven by Mr. Lamontagne's delay due to unanticipated work commitments, which was outside of Mr. Du Boulay's and Counsel's contemplation. There was an immediate effort to comply once consent to file the already drafted witness statement was given. The statement was in fact submitted for filing on the due date which was Friday 26th July, 2019 but in accordance with the rules, it was considered filed on Monday 29th July, 2019. Counsel submits that such conduct demonstrates that the order was being taken sufficiently seriously by uploading the statement for filing on the date ordered. By the hearing of this application,

¹ Issa Nicholas v Time Bourke Holdings GADHCVAP 2015/ 0029 (delivered on 8th December, 2016 - unreported) at para 8 & 17

² Robin Mark Darby v Liat (1974) Limited Antigua & Barbuda – HCVAP2012/ 002 –delivered on 5th June, 2012.

³ Ken Young v. AG of Saint Vincent and the Grenadines SVGHCV 2014/0226 (delivered 20th July, 2016 - unreported) at para 20

⁴ David Goldgar v Wycliffe Baird SKNHCVAP 2008/0005 (delivered on 23rd October, 2007 - unreported) at para 45

the Court and JQC had been furnished with both witness statements and Mr. Du Boulay has caused no hindrance to the progress of the claim. Counsel says this evidence is by no means indicative of a deliberate intention to disregard the order and provides a good explanation for the failure. There has been general compliance with the rules and court orders, and despite the submission of one witness statement 17 minutes after the cut off time, JQC has had access to both statements from the portal as early as 26th July, 2019 and at the latest from 30th July, 2019 through direct service. On that basis, Counsel says all the conditions of CPR 26.8 (2) are satisfied and the Court may proceed to the next step.

[21] Concerning CPR 26.8(3), Mr. Theobalds submitted that if relief is not granted Mr. Du Boulay would be restricted from presenting all matters relevant to his defence to the claim and it would be in the best interest of the administration of justice to permit him to defend himself to the fullest extent permissible. The failure has been remedied from the same date stipulated in the case management order and such failure was not occasioned by Mr. Du Boulay or his attorney. It was caused by the unavailability of the witness to give consent to an already settled witness statement which consent, once received, led to immediate filing of the statement. Granting the relief will not affect the trial date as none has yet been set.

[22] JQC offered no affidavit evidence in answer to the application. Counsel for JQC, Mr. Mark Maragh did not oppose the application and made no submissions.

Analysis

[23] The practice to be adopted by the courts when dealing with applications for relief from sanctions is well established. It is outlined in the decision of the Court of Appeal in **Issa Nicholas v Time Bourke Holdings**⁵. There, court said CPR 26.8 comprises the following three components: (i) CPR 26.8(1) requires that the application be made promptly and must be supported by affidavit evidence; (ii) CPR 26.8(2) requires the court to embark upon a stepped approach to ascertain whether the defaulting party has satisfied each of the three conjoined conditions stated therein and imposes a fetter on the exercise of the

⁵ Supra note 1

court's discretion, such that a failure to satisfy all three preconditions is fatal to the application; and (iii) once these conditions are satisfied the court is exhorted to have regard to the considerations contained in CPR 26.8(3) in exercising its discretion.⁶

[24] If the application is successful and relief is granted the Court is empowered by CPR 26.1 (2) (k) to extend or shorten the time for compliance, albeit that the application for extension is made after the time for compliance has elapsed.

[25] CPR 26.8(1) does not contain mandatory pre-conditions for the granting relief. It is simply that the application should be made promptly and must be supported by affidavit evidence. The necessity for the application only became apparent to both Counsels at pretrial review on 23rd September, 2019 by which time the sanction in CPR 29.11 had already taken effect some 2 months prior. The courts have generally considered periods of 5 to 6 weeks inordinate⁷. Consequently, 2 months from the date of default, may be considered inordinate.

[26] Nonetheless, it is settled law that lack of promptitude in applying for relief is not a prerequisite to the grant of relief.⁸ It was also said in the **Adam Bilzerian v Gerald Lou Weiner and another**⁹ that lack of promptitude is not fatal to the application, but rather a factor to be weighed generally in the exercise of the discretion.¹⁰ In that regard I note that the application was filed by the court ordered date, is supported by affidavit evidence and properly before the Court; thus there is really no need to overstate the issue of promptitude.

[27] I now consider whether the conjoint conditions of CPR 26.8 (2) are satisfied.

[28] Was the failure to comply intentional: The phrase "intentional" is to be taken in its natural or ordinary meaning which connotes something done deliberately or by conscious design

⁶ See also *The Attorney General v Keron Matthews* 2011 UKPC 38 at paragraph 17 and *Robin Mark Darby v Liat (1974) Limited* Antigua & Barbuda – HCVAP2012/ 002 – delivered on 5th June, 2012.

⁷ *Adam Bilzerian v Gerald Lou Weiner and another* - Claim No. SKBHCVAP2015/0015; *Ken I Young v The Attorney General of Saint Vincent and the Grenadines* - Claim No.: BVIHCV2014/0226

⁸ *Robin Mark Darby v Liat (1974) Limited* – supra note 2

⁹ Supra note 7

¹⁰ See paragraph 12 of the judgment.

or purpose. It does not contemplate laxity or inaction. The point is best illustrated in the Trinidadian case of **The Attorney General of Trinidad and Tobago v Universal Projects Ltd.**¹¹ in which Jamadar JA writing for the Court of Appeal said:

*"However, it is one thing to say that the Appellant in pursuance of that intent delayed, defaulted and ultimately ran fatally afoul of the CPR, 1998, but it is quite another to say that the Appellant intended the consequences of its inaction and laxity and that the State intended the consequences caused in this case... Inaction or laxity in relation to compliance with a court order can be caused by many things, including carelessness, ignorance of the rules, bad legal advice, negligence or even poor judgment (choice). None of these necessarily means that a party intends not to comply with the order. All of these reasons may be assessed as not providing any good explanation for the breach of the order, but it is, in my opinion, inconsistent with Part 26.7 to ascribe such a meaning and intent to Part 26.7 (3) (a) in the context in which it appears, linked as it is to the two other criteria in Part 26.7 (3) and wedded to all of the requirements of Part 26.7."*¹²

[29] He then went on to say:

*"...what must be shown is that the motive for the failure to comply was a deliberate intent not to comply. It is accepted that this positive intention can be inferred from circumstances, but ... it is I think important to distinguish between intentionality and responsibility. It is simply not true that the consequences of every action or omission taken or choice made are intended. However, because the consequences of actions or omissions or choices are not intended, does not necessarily exempt one from taking responsibility for them."*¹³

[30] This reasoning was upheld by the Privy Council and it is now generally accepted that a finding of intentional failure to comply with a rule or order requires evidence which is direct or inferred, of some conscious, deliberate decision not to comply.¹⁴

[31] On the facts presented, it cannot be said that Mr. Du Boulay's failure to comply was intentional. The record clearly shows that the witness statement was submitted on 26th July, 2019 at 4:17 pm, a mere 17 minutes outside of the hours set by the rules. It being a Friday, the rules dictate that the filing date would fall on the next business day, which meant Monday 29th July, 2019. On the totality of this evidence, there is nothing to suggest

¹¹ Civil Appeal No. 104 of 2009 (Trinidad and Tobago) delivered on the 26th February 2010.

¹² At paragraphs 67-69; See also: *Ken I. Young v The Attorney General of Saint Vincent and the Grenadines* Claim No.: BVIHCV2014/0226 at paragraph 18.

¹³ At paragraphs 69 & 70.

¹⁴ *Ken I. Young v The Attorney General of Saint Vincent and the Grenadines* Claim No.: BVIHCV2014/0226 at paragraph 20.

that there was a conscious or deliberate decision on the part of Mr. Du Boulay to disregard the order to file the statement by the stipulated date. I therefore conclude that the first limb of the CPR 26.8 (2) is satisfied.

[32] Was there a good explanation for the failure: Mr. Du Boulay's explanation was that Mr. Lamontagne lives and works in Soufriere, and due to an unexpected work commitment, he was unavailable earlier to give his consent to file the already prepared statement. He gave his consent at 4:10 pm and as soon as that was obtained, the statement was filed albeit a few minutes after the cut off time on the day in question.

[33] In the Privy Council decision in **The Attorney General of Trinidad and Tobago v Universal Projects**¹⁵, the Board rejected the appellant's submission that:

*"..... To interpret "good explanation" as requiring absence of fault would impose an unreasonably high test, because in practice virtually all breaches are the result of some fault. Rather, ... a "good explanation" is one which "properly explains how his breach came about, which may or may not involve an element of fault such as inefficiency or error in good faith."'*¹⁶

[34] The Board held:

*"The Board cannot accept these submissions. First, if the explanation for the breach i.e. the failure to serve a defence by 13 March connotes real or substantial fault on the part of the Defendant, then it does not have a "good" explanation for the breach. To describe a good explanation as one which "properly" explains how the breach came about simply begs the question of what is a "proper" explanation. Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly, if the explanation for the breach is administrative inefficiency."*¹⁷

[35] From the above, it can be deduced that a good explanation entails a consideration of whether the reason for the failure connotes real or substantial fault and whether it is excusable or inexcusable.

[36] I accept Counsel's submission that the date and time of submitting the statement as recorded on the portal bolsters the credibility of the explanation because at the very least,

¹⁵ [2011] UKPC 37

¹⁶ At paragraph 21

¹⁷ At paragraph 23

it confirms that the statement was already prepared and ready for filing by the due date. But for the delay occasioned by the unavailability of Mr. Lamontagne, the failure could perhaps have been averted. I also accept that these were circumstances which were outside the control of Mr. Du Boulay and his Counsel and could not impute any element of fault, inefficiency or error which was inexcusable. I agree that the reason provided constitutes a good explanation for the late filing, thus the second limb of the sub-rule has been satisfied.

[37] Has Mr. Du Boulay generally complied with all rules, practice directions, orders and directions: On this point, Mr. Du Boulay says he has generally complied except in relation to the late filing, by a few minutes, of Mr. Lamontagne's witness statement. However, the record also shows that the defence was filed one day late and just a few hours ahead of JQC's request for judgment in default¹⁸. It is trite that the only restriction on the late filing of a defence is the risk or possibility that a claimant may request judgment in default. Needless to say, it was still non-compliance with a relevant rule. As the law does not require that the Court find strict compliance, I am of the view that apart from these two infractions, Mr. Du Boulay has generally complied. The three conjunctive requirements of CPR 26.8(2) have been satisfied and that opens the doorway to address the considerations contained in CPR 26.8 (3) in deciding whether to exercise discretion to grant the relief.

[38] In a nutshell, my examination of the considerations under CPR 26.8(3) weigh in favour of granting the relief sought for the following reasons:- (i) not granting the relief would have the effect of hampering Mr Du Boulay from fully ventilating his case at trial; (ii) the administration of justice requires that a litigant be provided the opportunity to have his case adjudicated fully on the merits whenever possible; (iii) the failure was remedied some 17 minutes after the time for doing so had expired and both statements were served 4 days later, although there was no obligation to do so, as JQC had not filed and served its witness statement; (iv) the failure to comply was not due to the party or his legal

¹⁸ See CPR69C.5 (1) – Part 10 applies to claims on the commercial list.

practitioner but rather to the extenuating circumstances of a third party serving as a witness; and (v) no trial date has yet been set.

- [39] In the circumstances, the application succeeds. Mr. Du Boulay is relieved from the sanction imposed by CPR 29.11 and time is extended to 29th July, 2019 to file Mr. Lamontagne's witness statement.

JQC's Applications

- [40] The application for relief from sanctions and extension of time was contested. I have reproduced the grounds as stated in the notice of application, as follows:-

1. CPR 29.11 stipulates that if a witness statement or summary in respect of an intended witness is not served within the time specified by the Court, the witness may not be called unless the Court permits.
2. The court has jurisdiction to grant relief from sanctions and ought to do so as JQC has made its application promptly; the failure to comply was not intentional; there is a good explanation for the failure and JQC has generally complied with all other relevant rules, orders and directions.
3. The court is required by CPR 26.8 to have regard to the effect granting relief would have on each party; the interest of administration of justice; whether the failure to comply can be remedied within a reasonable time; whether the failure was due to the party or the party's legal practitioner; and whether any likely trial date can still be met if relief is granted.
4. It would be disproportionate and against the interests of administration of justice if relief was refused, in that JQC would be denied its day in Court where no trial date has been set; and there is a pending application before the court relevant to the preparation of its witness statements and the case as a whole, and JQC is innocent of the failure which can be remedied before any trial date is set.
5. The Court has jurisdiction to grant an extension of time having regard to the length of the delay, the reasons for the delay, the chance of success if the extension is granted and the degree of prejudice if the application is granted.

6. The court ought to grant the extension of time as the delay in filing the application for extension of time from the discovery of the default to the date of the deadline for filing is not inordinate in that a trial date has not yet been fixed and the default can be remedied without prejudice to Mr. Du Boulay.
7. There is still pending before the court an application for specific disclosure which is necessary to dispose fairly of the claim and allow JQC to properly prepare its witness statements.
8. There is a good reason for the failure and the applicant has a strong chance of success at trial.
9. Should the extension of time not be granted, the prejudice to JQC would outweigh any prejudice to Mr. Du Boulay, which could be remedied by an appropriate cost order.
10. Rule 27.8 of the CPR allows the parties to agree an alteration of the date for filing of witness statements if the change would not affect the trial date and no trial date has been fixed in the matter. It is the Court that has ordered JQC to file an application for extension of time to file its witness statements.
11. It is in the interest of the overriding objective and the administration of justice that time be extended for filing JQC's witness statements.

The Evidence

- [41] Two affidavits in support were deposed by Ms. Catty Renee, Legal Assistant to Mr. Maragh, and Mr. Gordon Charles, CEO and Director of JQC. An affidavit in reply was deposed by Ms. Lianna Venturi, Office Manager at Amicus Legal Chambers.
- [42] Ms. Renee deposed that at case management conference various orders were made but no date had been set for trial. She states that JQC duly filed and served its application for specific disclosure by the date stipulated, in which it requested information relevant to the issues in dispute and vital to the just disposal of the case. The information was also meant to inform JQC's witness statements. Mr. Du Boulay filed a reply to the application for specific disclosure on 20th September 2019, a few days before pre-trial review and Mr.

Maragh only became aware that the deadline for filing JQC's witness statements had elapsed on 21st September 2019 while preparing his matters for the following week.

[43] Ms. Renee deposed further that the delay was not inordinate and the application was made promptly upon realizing the default. Further, the default was not intentional and there is a reasonable excuse. She says the firm's protocol is to immediately enter deadlines in the firm's calendar and set a reminder. She recalls entering the information in the calendar; however, for some unexplained reason, neither she nor Mr. Maragh received the reminder, and the entry does not appear in the calendar. She goes on to say that following the separation with one of the firm's former attorneys in early July, Mr. Maragh bore the full workload of the firm. There was also disruption to the firm's normal operations occasioned by the separation, including loss of data. Further, Mr. Maragh travelled out of state in July for a meeting, and again from late August to mid-September for medical reasons. Immediately upon becoming aware of the default Mr. Maragh informed JQC and immediately sought the consent of counsel for Mr. Du Boulay for an extension of time. Thus failure to comply was not JQC's fault.

[44] Mr. Charles deposed that the reason for failure to comply is that he had wrongly formed the impression that they were awaiting Mr. Du Boulay's reply to the application for specific disclosure in order to finalize JQC's witness statement. This seemed logical to him as a layperson, however, he has since been informed and understands that his witness statement should have been filed, and once Mr. Du Boulay filed his reply to the application for specific disclosure, leave may have been sought to file additional witness statements. He notes that JQC's application for specific disclosure had been made well in advance of the deadline for filing witness statements so as enable JQC to file its statement on time. On the matter of delay, he says that less than 7 days from the date of discovering the default and just over 2 months from the deadline for filing JQC's witness statements is not inordinate, especially when no date has been set for trial.

[45] Mr. Charles stated further that it is in the interest of the administration of justice that JQC be relieved from sanction and the time to file its witness statements be extended because the delay was not inordinate or intentional, but rather was the result of an administrative

issue on the part of JQC's attorney and through no fault of JQC. There is a reasonable explanation for the failure and the reason for the delay is valid. He says also that JQC has a strong chance of success on the claim, which can only be resolved at trial and JQC has generally complied with all other rules, orders and directions, save for the filing of its application to issue a witness summons and the joint timetable for pre-trial review, which appears to have slipped both sides. Mr. Charles points out that Mr. Du Boulay is also culpable in failing to respond to the application for specific disclosure in a timely manner and also filed one of his witness statements late. The degree of prejudice to be suffered by JQC if the application is refused would be disproportionate to any prejudice Mr. Du Boulay would suffer, which could not be compensated in an appropriate cost order.

[46] The affidavit of Ms. Venturi spoke to the circumstances surrounding the departure of Mrs. Shervon Pierre, Legal Practitioner, from Amicus Legal Chambers and the perceived impact on the failure to file JQC's witness statement by the due date. Several exchanges of emails between Mr. Maragh and Mrs. Pierre were exhibited with this affidavit.

[47] Mr. Du Boulay filed an affidavit in answer, stating that JQC was at fault for not seeking leave for extension of time to file its witness statement pending the determination of the application for specific disclosure, knowing that it would have required information from the outcome of that application. He deposed that the appropriate procedure would have been to file the witness statement on time and with leave of the Court, file an additional statement.

[48] In response to Mr. Charles stating that he only became aware of the default when he received a call from Mr. Maragh on 22nd September 2019, Mr. Du Boulay says Mr. Charles, as JQC's representative, was present at case management conference and would therefore have had notice of the timelines set in the case management order. That order was perfected by JQC's attorneys since 18th June 2019. Further, his witness statements were filed on 26th July 2019 and notwithstanding that the witness statement of Mr. Lamontagne was submitted at 4:17pm on that date, JQC would have had access to the statements from the time it was filed and then served on JQC's attorneys. Even at that time, there was no communication from Mr. Maragh on reasons for delay or an intention to

apply for an extension of time and relief from sanctions. Additionally, the Registry issues a cause list in advance of any scheduled hearing date such that Mr. Maragh would have had notice in advance of the hearing of 23rd September 2019.

[49] Mr. Du Boulay contests Mr. Charles' averment that delay starts to run from the date of discovery of the default and was not inordinate. He contends that it runs from the deadline for filing the witness statements, such that 74 days elapsed. There is no evidence of the unavailability of Mr. Charles, who is JQC's sole witness, during the period leading up to and after the deadline. Mr. Du Boulay notes that the reason for delay is stated to be administrative inefficiency, the enlarged workload of Mr. Maragh and his absence from the state for an unspecified period in July. The period for which Mr. Maragh was out of state from late August to mid-September was after the deadline for filing witness statements and no reference was made to the availability of other attorneys in the firm to assist in his absence.

[50] Further, he says that JQC has failed to comply with several orders of the Court, including late filing of standard disclosure (by 1 day); failure to file its application for a witness summons by 31st July 2019 and again by 27th September 2019 and failure to file its witness statement on time, which has still not been filed some 74 days after the deadline. On the other hand, Mr. Du Boulay says he has complied with all directions given at the hearing of 23rd September 2019.

[51] Mr. Du Boulay expressed strong disagreement with Mr. Charles' suggestion that the degree of prejudice suffered can be adequately compensated with costs. He notes that JQC has not attached a draft of the proposed witness statement, despite the application seeking an extension of time to 30th September 2019 which has now passed. Further, the fact that JQC has had access to the witness statements filed on his behalf since 26th July 2019, is highly prejudicial to him in the substantive claim.

[52] Mrs. Pierre as former attorney of Amicus Legal Chambers filed a supplementary affidavit on behalf of Mr. Du Boulay, addressing the allegations concerning her conduct on departing the firm, which was implied to have affected the timely filing of JQC's witness

statement. She exhibited her resignation letter and several exchanges of emails between Mr. Maragh and herself.

Analysis

Could the parties have agreed an extension of time to file witness statements after the deadline for filing had passed?

- [53] Mr. Maragh has argued on behalf of JQC that these are not circumstances which require an application for relief from sanctions. He submits that pursuant to CPR 27.8 (5) the parties are allowed to agree to vary the date for filing of witness statements if the change would not affect the trial date and no trial date has been fixed. Upon becoming aware of the default on 21st September 2019 he promptly sought the consent of Mr. Theobalds for an extension of time to file the witness statement via email exchange which was exhibited. Upon examination, I note that Mr. Maragh's email was sent on 23rd September 2019 the date set for pretrial review. Mr. Theobalds responded on the same morning indicating that he would need an opportunity to take instructions from his client, who was unavailable at the time.
- [54] CPR 27.8(5) provides that the parties may agree to vary a date in the timetable other than one mentioned in subparagraphs (1) and (2). In my view even if the parties could have agreed an extension of time in these circumstances, Mr. Theobalds' response to Mr. Maragh's email does not disclose that agreement was reached. It was simply that he needed to take instructions and nothing more. This cannot be said to amount to agreement and there is nothing more to say that there would have been accommodation from the other side, particularly in circumstances where JQC's application was being vigorously opposed. CPR 27.8 (5) does not assist JQC.
- [55] Where the parties agree to a variation before the time has elapsed, it is necessary to file a consent application for an order to that effect and the application must certify that the variation will not affect the trial date, or if the date has not been set, the period within which

trial is likely to commence.¹⁹ Had JQC sought and obtained Mr. Du Boulay's consent before the date for filing had elapsed, and made the relevant consent application there would have been no need to apply to the court for relief from sanction. No sanction would have taken effect as the witness statement would not have been filed out of time or in breach of the case management order. However, Mr. Maragh only sought agreement to vary the date after the deadline for filing had elapsed.

[56] Without agreement, the relevant rule would have been CPR 27.8(3), which provides that where a party wishes to vary any date in the timetable without agreement of the other parties, that party must apply to the court and must do so before the date sought to be varied. JQC did not comply with that rule.

[57] After the date sought to be varied has elapsed, CPR 27.8(4) requires the party to apply to the court for an extension of time and relief from any sanction to which that party has become subject. CPR 29.11 stipulates that where a party fails to file and serve a witness statement within the time specified by the court, the witness may not be called unless the court permits. That the witness may not be called is a sanction²⁰ which takes effect immediately and automatically on the date ordered for filing of the witness statement, if not so filed.²¹ CPR 26.7(2) provides that such a sanction has effect unless the party in default applies for and obtains relief from it.

[58] The rules are unambiguous. JQC became subject to the sanction on 26th July 2019. In order to be relieved from that sanction, an application pursuant to CPR 26.8 is compulsory²² and that is consonant with CPR 27.8(4). No agreement or consent could absolve JQC of that sanction imposed by the rules.

¹⁹ CPR 27.8(6)

²⁰ David Goldgar et al v Wycliffe H. Baird Civil Appeal No.: 13 of 2007 (St. Christopher and Nevis) at paragraphs 17-20; The Attorney General v Keron Matthews 2011 UKPC 38 at paragraph 15

²¹ David Goldgar et al v Wycliffe H. Baird Civil Appeal No.: 13 of 2007 (St. Christopher and Nevis) at paragraphs 22-23, Lloyd Charles and another v North West Regional Health Authority and another Claim No. CV2008-02668 HCA 1454 of 1999 at paragraph 23.

²² Adam Bilzerian v Gerald Lou Weiner and another SKBHC VAP2015/0015 at paragraph 10; David Goldgar et al v Wycliffe H. Baird Civil Appeal No.: 13 of 2007 (St. Christopher and Nevis) at paragraphs 17-28; Issa Nicholas (Grenada) Limited v Time Bourke Holdings (Grenada) Limited GDAHC VAP2015/0029 at paragraph 6, Lloyd Charles and another v North West Regional Health Authority and another Claim No. CV2008-02668 HCA 1454 of 1999 at paragraphs 23-26; The Attorney General v Keron Matthews 2011 UKPC 38 at paragraph 15.

[59] In the circumstances, it is imperative that I proceed to consider whether JQC has met the criteria for relief from the sanction and should be granted an extension of time to file its witness statement.

Should JQC be granted relief from sanctions and extension of time to file its witness statement?

[60] Mr. Maragh submitted that the three requirements of CPR 26.8(2) have been met and the considerations in CPR 26.8(4) favour JQC. He contends that the application ought to be granted taking into account that no trial date has yet been set and he is yet to come across any authority where relief was refused when no trial date had been set. Even if such a case does exist, he says it would be draconian and not in keeping with overriding objective of the rules. He stated that there are other orders which a court can make when dealing with such default, but did not say what they were. Further, he relied upon the pending application for witness summonses and the application for specific disclosure which has now been determined and which he says may have to be revisited, based on the defendant's response to the Court's order.

[61] Counsel submitted further that it would be entirely disproportionate to refuse the application and effectively shut JQC out of judgment seat given the pending applications and that no trial date had been set. For this, he relied on the case of **Irma Paulette Robert v Cyrus Faulkner and another**²³ at paragraphs 46 - 47. In particular, he emphasized the ruling at paragraph 47 where the court said:

"The interests of the administration of justice dictated that this case be determined on its merits. In this case, both sides had breached the rules and the case management order. To date, the respondents had not served their witness statements on the claimant or given the required notice to the claimant under CPR 29.7 (2) (b). It would, in my view, be unjust to prevent the claimant from adducing evidence at trial in circumstances where the trial date could have been met. The non-compliance was not intentional, the defendants were also in breach of the Rules and Court Order, and the defendants would not be significantly prejudiced where the claimants were allowed to serve the witness statements filed within a reasonable time before the trial date. I also took into account the fact that the case presented issues of public importance concerning the duty of care owed by the

²³ Civil Appeal No 29 of 2007 (Saint Lucia)

State to its wards in Public Institutions, Places of Safety and, more particularly, in the Boys' Training Centre."

[62] Mr. Maragh went on to say that the degree of prejudice to be suffered by JQC if the application is refused would be disproportionate to any prejudice to Mr. Du Boulay, as such prejudice could be compensated by an appropriate cost order but the same could not be said for JQC. He stated that if the application is refused, it does not preclude JQC from filing a new case on the same facts, but that would be counterproductive to the overriding objective of the rules for avoiding a multiplicity of proceedings and saving cost and time. Counsel submitted that JQC would essentially be deprived of the opportunity to have its case determined on the merits and the consequence of this would be grave.

[63] In summary, Mr. Theobalds countered by stating that JQC has not satisfied the prescribed conditions of CPR 26.8 (2) to enable the Court to address the considerations in CPR 26.8 (3). He submits that the onus is on JQC to adduce evidence to satisfy the Court that the preconditions have been met. At case management conference, the Court was already apprised of the evidence to be contained in Mr. Charles witness statement which concerned JQC's allegation that consent had been obtained from the Bank and the reasons why Mr. Du Boulay is seeking to avoid the sale, amongst other things. It cannot now be said that he has to await the outcome of specific disclosure to be in a position to file the witness statement. If that were the case, JQC ought to have made the proper application to the court to remedy the situation. He submitted that it was entirely improper for JQC to seek rely on a pending application as a basis to grant the relief sought, which application was only pending due to JQC's own default in complying with orders of the Court to file the application in a timely manner and by the dates ordered. In addition, Mr. Theobalds says JQC has not indicated in its evidence whether the witness statement has been prepared and is ready for filing pending the outcome of this application or that the witness statement can be prepared, filed and served within a reasonable time. Further the overriding objective may not be used to extend the rules of litigation and JQC is unable to advance such considerations in attempting to address its failures.

- [64] I have given due consideration to the contending arguments as advanced in Mr. Theobald's written and oral submissions and Mr. Maragh's oral submissions.
- [65] Regarding promptitude the circumstances are similar to Mr. Du Boulay's. Although JQC says that the application was filed within 7 days of becoming aware of the default, the fact is it was filed some 2 months from the date of the failure but in line with the Courts direction that it be filed by 27th September, 2019. It is supported by affidavit evidence and properly before the Court.
- [66] Was the Failure Intentional: Mr. Theobalds submitted that Ms. Renee's reference to the application for specific disclosure as an avenue to inform JQC's witness statement and Mr. Charles' statement that he was awaiting Mr. Du Boulay's reply to the application for disclosure before finalizing his witness statement give rise to a natural and irresistible inference of intent to breach the case management order. Thus, the failure to comply with the deadline was a deliberate and conscious decision. In support, he relied on the case of **Dominica Agricultural and Industrial Development Bank v Mavis Williams**²⁴ in which the Court of Appeal found that where there was a deliberate disregard for the rules and its consequences and concluded that the failure to comply was intentional. The appellant in that case had made a conscious decision to await the outcome of assessment of damages before filing an application for leave to appeal, as a result of which the application was filed some 9 months after the time for appealing had expired.
- [67] I agree that these averments could be interpreted as a deliberate choice to forego filing the witness statements until the information sought on the application for specific disclosure became available. In such a case it would be comparable to the circumstances in **Dominica Agricultural and Industrial Development Bank v Mavis Williams** where the Court of Appeal found that because the appellant had sought legal advice and decided to wait until after damages were assessed to determine whether to appeal, the failure to comply was intentional."²⁵

²⁴ Civil Appeal No. 20 of 2005 (Dominica; delivered 18th September 2006)

²⁵ Claim No.: BVIHCV2014/0226 at paragraph 19.

[68] However on the totality of the evidence, I do not accept that the true reason for failure to file the witness statement in time was a deliberate and conscious decision to flout the order in preference for awaiting the outcome of the specific disclosure application. These averments seem more akin to excuses and pointing blame. I am more persuaded that the true reason concerned oversight by Counsel and therefore inclined to find that the failure was not intentional.

[69] Was there a Good Explanation for the Failure: The reasons proffered for the failure are that: (i) information required for the preparation of the statements were the subject of a pending application for specific disclosure; (ii) counsel's enlarged workload due to separation between the firm and one of its former attorneys; (iii) loss of data due to the said separation between the firm and the former attorney; and (iv) counsel travelling out of state on two occasions: once in July for an unspecified period and again from late August to mid-September for medical reasons.

[70] Mr. Maragh sought to resile from the reasons which pointed to administrative inefficiency, stating that administrative inefficiency had not been made out on the evidence. He submitted that the explanation was not the enlarged workload but the deletion of the reminder from his calendar and the disruption to his firm from the separation. He explained that the timelines and reminders were recorded in Microsoft Office Calendar yet inexplicably the reminder did not flag the deadline. He urged the court to take notice of '*how these things sometimes are*'. He stated that the explanation for the default in the **Irma Paulette Robert case** was that counsel's office was in disarray due to relocation on account of termite infestation and noted that such default was not that of the party but of the legal practitioner. He says that court agreed that the explanation for delay or non-compliance had merit, and in the absence of any evidence that there was deliberate flouting of or flagrant disregard for the order, the explanation was regarded as a good one.

[71] I accept that the law places the onus on JQC to adduce evidence to support its application and persuade the Court to decide in its favour. In the **Adam Bilzerian case**, the court observed:

“The onus was on the appellant to show by credible and particularized evidence that he had met the threshold warranting consideration for the grant of relief..... Up to the time of the hearing, there was no evidence produced that the witness statements had been signed and were ready for exchange, far less exhibited in an effort to demonstrate diligence.”²⁶

[72] Awaiting a reply to and/or the outcome of the specific disclosure application is also not a good explanation. It should have been apparent to Counsel, in giving due attention to the matter, that the application for specific disclosure would likely have been heard and determined after the deadline for filing witness statements. If the outcome of that application was so crucial to the preparation of JQC’s witness statement, the diligent course of action would have been to file an application for extension of time to file the witness statement at the same time that the application for specific disclosure was filed.

[73] Furthermore it should have been obvious to Counsel that he could not await the outcome of the application for specific disclosure to prepare and file the witness statement. The deadline for filing was prior to the date set for pre-trial review, at which the specific disclosure application would likely have been heard in the absence of any earlier date set by the court. This was an oversight which is inexcusable, especially as Counsel had actively participated in arriving at the timelines which were ordered.

[74] Mr. Charles would have been aware of the deadline for filing witness statements having been present at case management conference. He is a sophisticated businessman and ought to understand the rigid nature of court proceedings and should have made the necessary inquiries to ensure that his claim was handled with the necessary diligence. He ought not to have assumed that despite the date ordered for filing the witness statement JQC could choose to file it at a time convenient to it. In that regard I adopt the reasoning of Jamadar JA in **The Attorney General v Universal Projects Limited**²⁷ that:

“A party cannot in the face of a court order pursue a course that it knows or reasonably anticipates will lead it afoul of that order and then pray in aid of relief from the sanctions of the order the circumstances that it was aware

²⁶ At paragraph 15; See also: *Nevis Island Administration v La Copproprete Du Navire Civ. App. No. 7 of 2005*, at paragraphs 7 and 19.

²⁷ Civil Appeal No. 104 of 2009 (Trinidad and Tobago) delivered on the 26th February 2010

could lead to default. In such circumstances a party must act promptly to either comply with the court order or to secure further directions so as to avoid default.²⁸

[75] I do not agree that administrative inefficiency is not made out on the evidence, as set out in the affidavits of Ms. Renee and Mr. Charles. The reasons stated therein must be given due weight and consideration. Certainly, missing the deadline due to travelling and a heavy workload is the result of administrative inefficiency. It connotes a real fault which is inexcusable. I note, as Mr. Theobalds pointed out, the extended period of travel from late August to mid-September for medical purposes, was after the deadline for filing.

[76] With respect to the allegation of unauthorized deletion of data by a former attorney of the firm, I consider this to be a serious allegation. I have considered the affidavit evidence of Ms. Renee, wherein the allegations are made, the affidavit in reply from Mrs. Pierre in which she denies the allegations and the affidavit in reply of Ms. Venturi filed on behalf of JQC on 4th December 2019 (the date of the hearing and outside the time ordered by the court for filing of further affidavits in respect of the application). Mr. Maragh submitted that it was entirely improper for an attorney, who had appeared as counsel for JQC in this matter to file the affidavit seeking to oppose its application. He made this submission despite agreeing at the previous hearing that permission may be given for Mrs. Pierre to file the said affidavit, so long as he was given the opportunity to respond. He further stated that it was improper for Mrs. Pierre to depart from the directive of court to restrict her evidence to responses to paragraphs 11 and 12 of Ms. Renee's affidavit and go into the merits as if she were a party. He stated that her affidavit was unprofessional and unethical and ought to be disregarded.

[77] The tone of Ms. Renee's evidence leads to an inference that the reminder to file the witness statement was deleted by Mrs. Pierre. However, she does not expressly say so, and there is no proof of that. What she says is: *"For some reason that the reminder did not flag in the firm's calendar for either Mr. Maragh or myself. I recall entering the information but I cannot explain why it does not appear in the calendar."* Mrs. Pierre's affidavit in reply

²⁸ At Paragraph 56

exhibited a multitude of emails with Mr. Maragh concerning her departure from the firm and the various arrangements she was prepared to make and had made to facilitate the transition. In her affidavit, she vehemently denies the conduct attributed to her and the deletion of any work-related data from the firm's devices or software. In the circumstances, I place very little weight on these unproven allegations.

[78] In the circumstances I am persuaded that the reasons advanced by JQC connote exactly the kind of fault, oversight and administrative inefficiency that the Board in **The Attorney General of Trinidad and Tobago v Universal Projects** envisaged as not constituting a good explanation for the failure. Based on the foregoing, I conclude that JQC has not given a good explanation for the failure to file its witness statement in time. As the preconditions of CPR 26.8(2) are conjunctive, failure to satisfy this condition is fatal to the application. Nevertheless, for completeness I will address the remaining condition.

[79] Has JQC generally complied with all other relevant rules, practice directions, orders and directions: Mr. Maragh submitted that what the rules require is general compliance and not strict or even substantial compliance. He says despite JQC's failure to file its application to issue witness summonses and joint timetable, the court ought to find that it has been generally compliant. The claim was filed promptly, JQC has attended all hearings and previous applications and complied with other case management orders. He also submitted that the rules require the court to put the parties on equal footing and to treat the parties equally. In this regard he reminded the court that Mr Du Boulay also filed his defence out of time and also had to apply for extension of time to file a witness statement.

[80] I note that the infractions by JQC are as follows: (i) list of documents for standard disclosure was filed one day late; (ii) the witness statement of the sole witness was not filed by the due date, without seeking to rectify this in accordance with the rules; (iii) failure to file the application to issue witness summonses by 31st July and 27th September, 2019 respectively; and (iv) failure to file and serve a reply to Mrs. Pierre's affidavit by 22nd November, 2019 and doing so on the morning of the hearing, which gave the Court and the other side no time to peruse same.

[81] In my view, the flagrant breach of two orders of the court to file its application to issue witness summonses, without cogent explanation is unacceptable. These orders were made to assist JQC in advancing its case and the breach demonstrates an entirely blasé attitude towards this litigation. Based on the above infractions, it cannot be said that JQC has been generally compliant and that precondition is not satisfied.

[82] While Mr. Maragh placed much emphasis on the court's pronouncements in paragraph 47 of the **Irma Paulette Robert case**, I am of the view that the considerations there could only arise had JQC satisfied the three preconditions in CPR 26.8(2). There was also an added dimension to that case which concerned issues of great public importance. The same cannot be said here as this is a purely private matter between the parties which has no bearing on matters of public interest or the greater good. As JQC has not prevailed in relation to CPR 26.8 (2), I make no further inquiry into the considerations under CPR 26.8(3).

[83] In concluding this point, I consider the words of Edwards JA in **David Goldgar v Wycliffe Baird**²⁹ very instructive where she said at paragraph 24 of the judgment:

*"Having regard to the overriding objective, Lord Justice **Peter Gibson in Michael Vinos v Marks & Spencers** aptly observed and I agree with him, that: "The language of the rule to be interpreted [in the Civil Procedure Rules] may be so clear and jussive that the Court may not be able to give effect to what it may otherwise consider to be the just way of dealing with the case, though in that context it should not be forgotten that the principal mischief which the Civil Procedure Rules were intended to counter were excessive costs and delays. Justice to the defendant [or claimant] and to **the interest of other litigants may require that a claimant [or defendant] who ignores time limits prescribed by the rules forfeits the right to have his claim tried...**" (My emphasis)*

[84] Having failed on the application for relief from sanction, JQC is not entitled to an extension of time to file its witness statement.

²⁹ Civil Appeal No.: 13 of 2007 (St. Christopher and Nevis)

Should the Application to Issue Witness Summonses be granted?

[85] That application was unopposed and intended to assist the Court in the evidence gathering process leading up to trial. It is not a procedure which is intended to inform the witness statement of JQC. In any event, if it turned out that JQC wished to put further evidence before the Court after the process under Part 33 was completed, the rules provide a mechanism for doing so. To say that JQC was not in a position to file its initial witness statement until after the Part 33 process had concluded is completely unacceptable. JQC has filed its claim and is now saying it is not in a position to substantiate its own pleadings by filing a witness statement, until it has interrogated a third party. I do not believe this to be the intent of Part 33. As JQC has failed to file any evidence to substantiate its claim, I conclude that there is no basis to consider granting the application to issue witness summonses and that application is refused.

Conclusion

[86] In concluding, I make the following orders:-

1. Mr. Du Boulay is granted relief from the sanction imposed by CPR 29.11 and time is extended to 29th July, 2019 to file the witness statement of Mr. Lamontagne.
2. JQC's applications for (i) relief from sanction and extension of time to file witness statement and (ii) to issue witness summonses are dismissed.
3. The parties will each bear their own cost of these applications.
4. Counsels will address the Court on 23rd January, 2020 on the proposed course to be taken in relation to the claim.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar