

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

SAINT VINCENT AND THE GRENADINES

SVGHCVAP2019/0006

BETWEEN:

**[1] BBL LIMITED
[2] IRINA SAVELIEVA**

Appellants

and

**[1] CANOUAN RESORTS DEVELOPMENT LIMITED
[2] CANOUAN REALTY LIMITED**

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mr. Davidson Kelvin Baptiste
The Hon. Mr. Gerard St. C. Farara, QC

Chief Justice
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Keith Scotland and Ms. Maia Eustace for the Appellants
Mr. Joseph A. Delves for the First Respondent
Mr. G. Grahame Bollers for the Second Respondent

2020: September 18;
2021: January 12.

Interlocutory appeal — Appeal from refusal of application for relief from sanctions and extension of time to comply with unless order — Failure to file witness statements in compliance with unless order — Application for extension of time and relief from sanctions made before sanction took effect — Whether learned judge erred in dealing with application as one for relief from sanctions and not for extension of time — Whether application made before sanction takes effect ought properly to be for an extension of time or for relief from sanctions — Rules 26.1(2)(k) and 26.8 of Civil Procedure Rules 2000 — Considerations for grant of an extension of time — Length of delay — Reasons for delay — Prejudice to respondents — Chances of success

In 2010, the appellants filed a claim in the High Court against the respondents for damages for breach of contract and for aggravated damages. The respondents filed a defence and counterclaim, and the appellants filed a reply to counterclaim. In February 2016, at the first case management conference, the parties were ordered to file and serve their witness statements by 30th June 2016. Neither party complied with that order. The appellants accordingly applied to the court for an extension of time. At the second case management conference in October 2017, the parties were granted further time to file their witness statements. Again, the parties did not file their witness statements as ordered. On 4th October 2018, with the consent of the parties, a learned judge of the High Court made an unless order further extending the time to 5th November 2018 for the filing and exchange of the witness statements by the parties, failing which the statement of case of the defaulting party would be struck out.

The respondents filed their witness statements in compliance with the unless order. However, 5 days prior to the time fixed in the unless order, the appellants filed another application seeking to extend the time to file and exchange their witness statements and for relief from sanctions. The application was argued by the parties as one for relief from sanctions under rule 26.8 of the Civil Procedure Rules 2000 (“CPR”) and the judge dealt with the application as such. On 16th November 2018, the learned judge refused the application and concluded that the appellants did not satisfy the requirements under CPR 26.8(2) based on the affidavit evidence and the history of the appellants’ prior applications to extend time to comply with directions for the filing and exchange of witness statements.

The appellants appealed and, one day before the hearing of the appeal, filed the witness statements in relation to which the extensions of time were sought. The appeal raised two issues for the Court’s consideration: (i) whether the learned judge erred in treating the application as one for relief from sanctions and not for an extension of time to comply with the unless order, the application having been filed before the sanction specified in the unless order took effect; and (ii) whether the learned judge ought to have granted the relief or extension sought by the appellants in the court below.

Held: allowing the appeal; setting aside the order of the learned judge dated 16th November 2018; granting the appellants’ application to extend the time for filing the witness statements; deeming the witness statements properly filed; ordering the appellants to serve the witness statements on the legal practitioners for the respondents within 7 days of the delivery of this judgment following which the parties shall exchange witness statements; ordering the appellants to pay the respondents’ costs of the application and hearing below, to be assessed by a judge or master of the court, if not agreed within 21 days; and ordering the appellants to pay the respondents’ cost in the appeal to be assessed by a judge or master of the court, if not agreed within 21 days, that:

1. The court has wide case management powers. These include the power pursuant to CPR 26.1(2)(k) to 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 and to take any step,

give any direction, or make any other order for the purpose of managing the case and furthering the overriding objective pursuant to CPR 26.1(2)(w). On the other hand, CPR 26.7 and 26.8 provide that where a party has failed to comply with a rule, direction or order which specifies a sanction for non-compliance, that sanction takes effect unless the party in default applies for and obtains relief from the sanction. As to the timing of the application for relief from sanctions, the rules do not differentiate between circumstances where the application for relief from sanction is filed before or after the sanction takes effect. However, it is pellucid that rule 26.8 of the CPR applies only where a sanction has already taken effect.

Rules 26.1(2), 26.7 and 26.8 of the **Civil Procedure Rules 2000** considered.

2. An application to extend the time for compliance with an order, practice direction or rule which specifies a sanction for non-compliance (including an unless order) made prior to the expiration of the stipulated time for compliance, falls to be considered by the court pursuant to CPR 26.1(2)(k) and the overriding objective, and not CPR 26.8 pertaining to relief from sanctions. This is so even where the application is not heard and determined by the court until after the time stipulated in the order, practice direction or rule for the sanction to take effect. It cannot be correct as a matter of principle, nor is it just and in keeping with the overriding objective of the CPR, for an application for extension or variation of an order (including an unless order), filed before the expiry of the date upon which the sanction would take effect and which, if heard before a sanction bites, would be governed by CPR 26.1(2)(k) and the overriding objective, to be somehow transformed into or treated in accordance with the more stringent requirements of CPR 26.8(2) applicable to relief from sanctions, simply because the court is unable to deal with the application prior to the expiration of the time stipulated for compliance or prior to the sanction taking effect. In this case, the appellants' application for extension of time and relief from sanctions, having been filed before the sanction took effect, therefore fell to be determined as an application for an extension of time. The learned judge accordingly erred in treating with the application as one for relief from sanctions and the basis upon which the learned judge exercised her discretion was plainly wrong.

Adam Bilzerian v Gerald Lou Weiner and Kathleen Ann Weiner [2016] ECSCJ No. 9, delivered 27th January 2016 considered; **Vanroy Romney v Sheridan Smith AXAHCVP2015/0002** [2016] ECSCJ No. 149, delivered 14th September 2016 applied; **Everwarm Limited v BN Rendering Limited** [2019] EWHC 2078 (TCC) followed; **Robert v Momentum Services Ltd** [2003] EWCA Civ. 299 considered; **Kaneria v Kaneria** [2014] EWHC 1165 (Ch) considered; **Hallam Estates Ltd. V Teresa Baker** [2014] EWCA Civ 661 considered; **Nilon Limited and another v Royal Westminster Investments SA** [2015] UKPC 2 applied.

3. The court has a wide discretion to extend the time to comply with any order, rule or practice direction, and to do so even where the application to extend time was

made after the time for compliance has expired. This discretion is not to be exercised in a vacuum, but in accordance with well-established principles, and with a view to giving effect to the overriding objective. It is trite that in determining an application to extend time or to vary the time imposed in an order of the court for compliance, the court must consider the following factors which are not exhaustive: (i) the length of the delay, (ii) the reasons for the delay, (iii) any prejudice to the respondent; and (iv) whether the applicant's pleaded case is, in any event, a hopeless one - the chances of success.

Carleen Pemberton v Mark Brantley [2011] ECSCJ No. 229, delivered 14th October 2011 applied.

4. While there is not much to commend the cogency and persuasiveness of the appellants' reasons why they would not have been in a position to comply with the unless order, this Court must take a broad view of the appellants' application and evidence in determining whether it ought, in the exercise of its discretion *de novo*, to permit the extension sought by the appellants. In doing so, the Court took into account that (i) no trial date had been fixed at the time, and therefore a further extension of time for the appellants to comply with the unless order would have had no impact on any trial date; (ii) there are profound consequences to be visited upon the appellants if an extension of time for compliance with the unless order is not granted; (iii) the promptitude with which the appellants applied to the court to extend time (i.e. before the stipulated time expired); and (iv) that the respondents themselves had failed to comply with previous orders of the High Court in this matter, and only complied when the unless order was made. In all the circumstances, the justice of the case requires that this Court grants the appellants' October 2018 application to extend the time stipulated in the unless order for the appellants to file and exchange witness statements.

JUDGMENT

- [1] **FARARA JA [AG.]**: This is an interlocutory appeal against the oral decision and order of a learned judge of the High Court ("the learned judge") made on 16th November 2018 (collectively "the dismissal decision") by which the learned judge dismissed the appellants' application filed on 31st October 2018 ("the appellants' October 2018 application") to further extend the time for filing and exchanging witness statements and for relief from sanctions imposed by an unless order of the High Court made on 4th October 2018 ("the unless order") in claim SVGHCV2010/0398. In dismissing the appellants' October 2018 application, the learned judge also adjourned the pre-trial review ("PTR") to 18th January 2019. By the unless order, the learned judge extended the time for the filing of witness

statements by the parties to 5th November 2018, failing which the pleading of the defaulting party (claimants or defendants) would be struck out. This was the second such extension granted on the application of the appellants in the claim. On 1st February 2019, the learned judge granted the appellants leave to appeal the dismissal decision.

Procedural Background

- [2] This matter is of some vintage, the claim having been commenced in November 2010, some 8 years before the dismissal decision. I set out below, in brief, some of the important milestones in the procedural history of this matter which are of some relevance to the determination of this appeal.
- [3] Claim SVGHCV2010/0398 (“the claim”) was commenced by the appellants against the respondents by fixed date claim form on 5th November 2010. By the claim, the appellants claim damages for breach of contract and aggravated/punitive damages arising from alleged breaches by the respondents of a construction contract. A defence and counterclaim was filed by the respondents on 2nd February 2011, and a reply and defence to counterclaim filed by the appellants on 24th March 2011. Thereafter, the claim was ripe for case management.
- [4] However, it was not until 4th February 2016 that the first case management orders were made by the High Court (Cottle J). This first case management order provided for standard disclosure on or before 29th April 2016 and for the parties to file and serve their respective witness statements by 30th June 2016. Pre-trial review was also fixed for 14th July 2016 with the court office to fix a trial date after the PTR. However, at the time of the making of the unless order on 4th October 2018, some 2 years and 8 months later, neither the appellants nor the respondents had complied with the case management orders with regard to the filing and exchange of witness statements. Equally so, none of the parties had filed their witness statements at the time of the making of the unless order, and no trial date had yet been fixed at the time of the dismissal decision.

- [5] On 29th June 2016 the appellants applied for the timelines stipulated in the first case management order, including the time for the filing and exchange of witness statements, to be extended. This was due, in part, to the second appellant having sustained serious injuries in an unfortunate accident on 13th March 2016. The hearing of the appellants' said application was adjourned to be dealt with at a PTR on 9th December 2016. However, the PTR was adjourned to 24th February 2017 on the application of the appellants filed on 8th December 2016, on account of the unavailability of their counsel; and subsequently to 7th April 2017 and to 29th September 2017. At a hearing on the latter date, Cottle J ordered that claim SVGHCV2010/0398 be heard together with claim SVGHCV2011/0157.
- [6] At a second case management conference on 20th October 2017, the learned judge ordered that there be disclosure of documents by 10th November 2017; witness statements were to be filed and exchanged by 15th December 2017; and the PTR was then scheduled for 19th January 2018. This was followed on 4th December 2017 by the appellants filing an application to adduce expert evidence at the trial.
- [7] The appellants filed their list of documents on 10th November 2017 in compliance with the order of the court made 20th October 2017 at the second case management conference. However, on 14th December 2017, a day before witness statements were due to be filed and exchanged by the parties, the appellants filed a second application to extend the time for the filing and exchange of witness statements. The stated grounds of this extension application were the 2nd appellant's spinal injury, and the illness and family emergency of their then legal counsel Mr. Scotland, who resides in the Republic of Trinidad and Tobago. In their second extension application, the appellants stated that they would be in a position to file and exchange witness statements on or before 12th January 2018.
- [8] After several adjournments, the High Court on 18th May 2018, denied the appellants' application to adduce expert evidence and the PTR was set for 28th September 2018. At the PTR held on this date, the learned judge invited the

parties to make representations on 4th October 2018 as to why she ought not to strike out the claim and counterclaim pursuant to rule 26.2 of the **Civil Procedure Rules 2000** (the “CPR” or “ECSC CPR”) for failure by the parties to file and exchange witness statements.

- [9] On 4th October 2018, the learned judge made the unless order requiring the parties to file and exchange their witness statements by 5th November 2018, failing which the claim and counterclaim (as the case may be) would be struck out. It is the evidence of the respondents’ witness Lanique Lewis, in her affidavit filed on 19th May 2020, that, on the information of learned counsel Mr. Delves who had appeared for the 1st respondent at that hearing, the unless order was made by the learned judge at the invitation of counsel for the appellants and, ultimately, with the consent of the parties. The learned judge also made a wasted costs order against all counsel to be paid on or before 8th October 2018. The unless order was in the following terms:

“...parties are to file witness statements by 5th November, 2018, failing which the Fixed Date Claim Form filed on 5th November, 2010, Defence and Counter Claim of the 16th February, 2011, and Reply and Defence to Counter Claim filed on 24th March, 2011, stand struck out.”

- [10] The respondents filed their witness statements in compliance with the unless order. However, during the extended period granted by the court in the unless order for the filing and exchange of witness statements, the appellants filed a supplemental list of documents on 31st October 2018. On the same day (some 5 days prior to the time fixed in the unless order) the appellants filed the October 2018 application seeking to extend the time to 15th January 2019 for them to file and exchange their witness statements and for relief from sanctions.
- [11] The appellants’ October 2018 application was opposed by the respondents. On 16th November 2018, the learned judge dismissed the said application with costs. No transcript of the learned judge’s decision has been provided to this Court upon the hearing of the appeal.

- [12] By the third affidavit of Madonna Barbour filed by the appellants on 17th September 2020 (the day before the hearing of this appeal), it was deposed that the appellants had in fact filed the witness statement of the 2nd appellant, Irina Savelieva, on 10th January 2019; the witness statement of Georgios Triarchou a.k.a. John Travis on 23rd January 2019; the witness statement of Paul Brown on 23rd January 2019; and the affidavit of Maia Eustace sworn and filed on 17th September 2020. These witness statements and affidavit were all filed without the court's permission.

Appellants' October 2018 Application

- [13] As already indicated, the appellants' October 2018 application was filed some five days before the time stipulated in the unless order for the filing and exchange of witness statements was due to expire. The application was filed together with the affidavit of Madonna Barbour, a legal secretary in the law firm of Cato and Cato, legal practitioners for the appellants. In her affidavit, Ms. Barbour deposed to information she had received from Ms. Maia Eustace, one of the claimants/appellants' legal practitioners. She addressed at paragraph 4, *inter alia*, the reasons for the anticipated delay in complying with the date stipulated in the unless order, the promptitude of the application, and the alleged lack of prejudice to the respondents. I will refer to these factors and her evidence in greater detail when I come to address the burden and requirements to be satisfied by an applicant for an extension of time to comply with an order of the court, and the question of whether the strict requirements for an application for relief from sanctions were in play with respect to the appellants' October 2018 application.

The Judge's Decision on the October 2018 Application

- [14] No transcript of the hearing and oral decision of the learned judge dismissing the appellants' October 2018 application was produced by the appellants in this appeal. However, a copy of the order dated 16th November 2018 and entered 27th February 2019 was exhibited to an affidavit of Ms. Barbour filed on 15th January 2020 in this appeal ("Barbour 1").¹ The dismissal order recites that the court below, in deciding

¹ See paragraph 3 of Barbour 1.

to dismiss the said application, had determined that 'the supporting evidence does not meet the threshold to pass any of the requirements under Part 26.8(2)'. Further, and in an attempt to remedy the deficiency or defect in their failure to provide this Court with the reasons for the learned judge's decision (or their attempt to obtain a record of such reasons), the appellants, the day before the hearing of the appeal, also filed, without the Court's permission, the second affidavit of Madonna Barbour ("Barbour 2"). At paragraph 3 of Barbour 2, the deponent sets out what she had been told by counsel for the claimant/ appellants, Ms. Maia Eustace, as to what had transpired at the said hearing; and exhibited thereto as "MB B" what purports to be a true copy of Ms. Eustace's contemporaneous handwritten notes and her WhatsApp messages to lead counsel for the appellants, Mr. Scotland, shortly thereafter.

[15] Before this Court, the appellants' reliance on these affidavits and on their appellants' reply submissions filed on 17th September 2020, all filed without the Court's permission, was not opposed by learned counsel, Mr. Delves and Mr. Bollers, appearing for the 1st and 2nd respondents respectively. Accordingly, the Court, having deprecated the conduct of the appellants, permitted learned counsel Mr. Scotland to rely on the said affidavits and reply submissions in support of the appellants' appeal. In the circumstances, the summary and handwritten notes of Ms. Eustace of the learned judge's decision and reasons therefor, as set out in Barbour 2, remained unchallenged.

[16] Paragraphs 3.5 to 3.9 of Barbour 2 are apposite. In summary, it is recorded there that the learned judge:

- (i) referred to the appellants' prior applications to extend the time for the filing and exchanging witness statements (all of which were granted) and concluded that these applications demonstrate that the appellants' failure to file their witness statements in compliance with the unless order was intentional and, therefore, a breach of CPR 26.8(2)(a) and (b);

- (ii) agreed with the submission of Mr. Delves, learned counsel for the first respondent, that the claimants/appellants had demonstrated a 'laissez-faire approach' to the prosecution of their claim, and had been quite dilatory in doing so since 2011, in breach of CPR 26.8(2)(a) and (c);
- (iii) found that the claimants/appellants had failed to give a good reason for their failure to comply with the unless order, and that the affidavit of Ms. Madonna Barbour in support of the appellants' October 2018 application '...contained mere bald assertions and could not amount to a good excuse for the failure of compliance in breach of CPR 26.8(2)(b)';
- (iv) concluded, accordingly, that the court could not go on to consider the requirements of CPR 26.8(3) which were obviated because the claimants/appellants had not satisfied the cumulative requirements of CPR 26.8(2); and
- (v) stated that '[the claimants] have not met [the] threshold to meet any of the requirements of [CPR] 26.8(2)'.

[17] It is clear from the recitals to the dismissal order and from the notes exhibited to Barbour 2 that, in arriving at her decision, the learned judge concluded that the appellants did not satisfy the requirements under CPR 26.8(2) based on the affidavit evidence and the history of the appellants' prior applications to extend time to comply with directions for the filing and exchange of witness statements, and therefore that the application ought to be dismissed. It is also clear that the learned judge approached the appellants' application on the basis that the appellants had argued it before her as an application for relief from sanctions under CPR 26.8.

The Appeal

[18] The appellants now challenge the approach adopted by the learned judge in determining the appellants' October 2018 application. Counsel for the appellants now submit (differently to their position below) that the application ought properly to have been treated as an application for an extension of time to comply with the unless order. On the other hand, counsel for the respondents contended that the sanction would have already bitten (or taken effect) before the appellants' October 2018 application was heard and, accordingly, the appellants needed to satisfy all the requirements of CPR 26.8(2).

[19] From the notice of appeal, oral arguments and written submissions, the central issue for determination by this Court is whether, given that the appellants' October 2018 application, having admittedly been filed prior to the stipulated date when the sanction in the unless order would bite, the appellants needed to satisfy the requirements in CPR 26.8 (which applies to relief from sanctions) or the less stringent requirements under the CPR for obtaining an extension of time or variation of the timetable stipulated in the unless order.

Should the appellants' October 2018 application to be treated as an application for relief from sanctions or an application to extend time for compliance with the unless order?

[20] The appellants' October 2018 application, filed 5 days before the time stipulated in the unless order for the filing and exchanging witness statements, which would have expired on 5th November 2018, was not heard and determined until 16th November 2018, some 11 days after the said date for compliance. Although, at the time of applying for the extension, the sanction prescribed in the unless order had not yet taken effect, the appellants nevertheless also sought, in their application, relief from the sanction in the unless order.

[21] Pursuant to CPR 26.1(1) and (2), the court has very wide case management powers. These powers apply except where a rule provides otherwise. They include the power to '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' pursuant to CPR 26.1(2)(k) and to 'take any step, give any direction, or make any other order for the purpose of managing the case and furthering the overriding objective' pursuant to CPR 26.1(2)(w). Specifically, the court has the power to make an unless order in circumstances where a party has failed to comply with any rule or order of the court where no sanction is provided for or imposed.² By CPR 26.4(7), 'If the defaulting party fails to comply with the terms of any 'unless order' made by the court that party's statement of case shall be struck out.' In such circumstances, the court does not have the power under CPR 26.9 to rectify matters or to put matters right where there has been a procedural error.³ This is simply because CPR 26.9 applies to and can be relied upon where the rule or order does not specify a sanction for non-compliance. Where the rule or order specifies a sanction, the defaulting party must apply under CPR 26.8 for relief from sanctions.

[22] Significantly, CPR 26.7 provides that where a party has failed to comply with a rule or order which specifies a sanction for non-compliance, that sanction takes effect 'unless the party in default applies for and obtains relief from the sanction, and rule 26.9 does not apply'. As to the timing of the application for relief from sanctions, CPR 26.8(1) merely stipulates that the application for relief from sanctions must be made 'promptly' and must be supported by evidence on affidavit. CPR 26.7 does not differentiate between circumstances where the application for relief from sanction is filed before or after the sanction takes effect. Likewise, CPR 26.8 dealing with relief from sanctions, does not make any such differentiation. However, it is pellucid that rule 26.8 of the CPR applies only where the sanction has already taken effect.

[23] In the instant matter, the learned judge made the unless order on 4th October 2018 which provided for the filing and exchange of witness statements by the parties by

² See CPR 26.4(1).

³ See CPR 26.4(8).

5th November 2018, failing which the claim or counterclaim (as the case may be) is to be struck out. Neither party appealed or sought to have the unless order set aside. Accordingly, the unless order remained binding on the parties and any failure to comply would evoke the said consequences. This much is not in dispute.

[24] CPR 29.11 specifies the consequences or sanction for a party failing to comply with an order of the court for filing a witness statement. The consequence is that the defaulting party cannot call that witness at the trial of the claim, unless the court permits. In such circumstances, the court cannot give its permission at the trial unless the defaulting party seeking such permission 'has a good reason for not previously seeking relief (from sanction) under rule 26.8'.⁴ This sanction in CPR 26.11 is separate from any sanction imposed by an unless order of the court where CPR 26.4(7) expressly provides that the defaulting party's statement of case shall be struck out.

[25] What is in issue in this appeal is whether the court below, in considering the appellants' October 2018 application, ought to have dealt with it under CPR 26.1(2)(k) as an application for extension of time for compliance, the application having been filed before the sanction bit; or whether the learned judge ought, as she did, to have treated with the application as one for relief from sanctions, since by the time the application was heard and determined the date for compliance had passed, the sanction had already bitten, and the appellants' claim and defence to counterclaim stood struck out.

[26] In **Adam Bilzerian v Gerald Lou Weiner and Kathleen Ann Weiner**⁵ the judge at first instance dismissed the appellant's application, filed some six weeks after the deadline stipulated in a case management order, for an extension of time to file his witness statements and relief from sanctions. On appeal, this Court dismissed his appeal against the said order on two grounds. Firstly, that the application having

⁴ See CPR 29.11(2).

⁵ [2016] ECSCJ No. 9, delivered 27th January 2016.

been filed 6 weeks after the date specified in the case management order for compliance, the sanction imposed by CPR 29.11 had already bitten at the time the application was filed; and secondly, on the evidence adduced by the appellant/applicant in support of his application for relief from sanctions, where the burden rests on the applicant to show that that he had met the threshold conjunctive requirements under CPR 26.8(2) for the grant of relief, he had failed to discharge that burden. In coming to its decision, this Court held that the evidence adduced by the applicant/appellant consisted predominantly of bald and unparticularised assertions, had failed to detail the steps he had taken to comply with the rule, and did not account for the period of delay in filing the application or explain why the application was made out of time. Accordingly, the application fell woefully short of the requirements stipulated for the granting of relief from sanctions.

- [27] In addressing the consequences of making an application for relief from sanctions after the date for compliance in the order, Pereira CJ stated at paragraph 10:

“The Extension Application was not made before the deadline for filing of the witness statements expired but some six weeks thereafter, which meant that the sanction imposed by CPR 29.11 had already bitten. The sanction was that the appellant would be unable to call these witnesses in respect of whom he had failed to file the witness statements or summaries by the deadline ordered at the trial of the claim unless the court granted permission at the time of the trial. The court however may not grant permission at trial unless that party has a good explanation for not seeking prior relief from the sanction in accordance with CPR 26.8. The Extension Application fell to be treated pursuant to CPR 26.8 as the trial date had not arrived, nor does it seem that one had been at that time fixed.”

- [28] The decision of the Court of Appeal in **Adam Bilzerian** illustrates the position under Part 26 of CPR that where the sanction imposed by a rule or order has already bitten, the defaulting party may apply for relief from sanctions under CPR 26.8, and the burden is on the defaulting party to put before the judge sufficiently detailed and cogent evidence which would invoke the court’s consideration of the conjunctive requirements of CPR 26.8(2). Further, that any failure to do so would be fatal to

such an application. This decision also illustrates that even where the defaulting party does not apply under CPR 26.8 for relief from sanctions, in circumstances where the failure was in relation to the filing and exchange of witness statements by a specified date, the defaulting party has one last opportunity under CPR 29.11 at the trial to seek permission from the court to rely on such witness statements, but only where the defaulting party puts before the court evidence satisfactory to demonstrate 'a good reason' why he had not made a prior application under CPR 26.8 for relief from sanctions. The ability to rely, as a last resort, on the provisions of rule 29.11 would only apply where there is no unless order providing for the defaulting party's statement of case to be struck out.

- [29] In **Vanroy Romney v Sheridan Smith**⁶ this Court had to consider the effect of an unless order which stated that should the respondent fail to disclose by a stipulated date the documents specified in a prior disclosure order to which he had not complied, his defence would be struck out and judgment entered against him, with costs to be assessed. Four days before the date for compliance stipulated in the said unless order, the respondent filed an application to vary the earlier order for specific disclosure and the date for compliance in the unless order, and for relief from sanctions. The master, having heard the application in the absence of counsel for the appellant, granted the application to vary the disclosure order and relief from sanctions. The master later dismissed the appellant's application to set aside the order made in her absence. On 14th September 2016, this Court dismissed the appellant's appeal from the order refusing to set aside the order granting relief from sanction. This Court held, *inter alia*, that an application for relief from sanctions ought only to be made after the sanction has taken effect, as it is only after it has bitten that the court can consider the factors set out in CPR 26.8(2) and (3) upon which such an application ought to be determined. Furthermore, the Court went on to hold that although the application for relief from sanction had been made prematurely, that is, before the sanction had taken effect, this was not fatal to the respondent's application, since the application for relief from sanctions

⁶ [2016] ECSCJ No. 149, delivered 14th September 2016.

was coupled with an application for variation of the prior specific disclosure order, which latter application had been properly made before the sanction had taken effect.

[30] Instructively, at paragraphs 40, 42 and 43 of the judgment of the Court, Michel JA opined:

“[40] The application for relief from sanctions in this case, having been made on 26th September 2014, for relief from sanctions taking effect on 1st October 2014, was in fact made prematurely and ought properly to have been made on a date after 30th September 2014. Having regard to the fact though that it was not a stand-alone application, but was appended to an application for variation of another order of the court, which variation application was properly made before the sanction had taken effect, and the relief from sanctions application having come up for hearing only after the sanction had taken effect, the premature making of the application is not sufficiently material in this case to constitute a basis for interfering with the master’s order.

[41]...

[42] It would be useful for legal practitioners to note that applications for extension of time or for variation of an order specifying a date for doing something should generally be made before the time for compliance has elapsed, in which case they need not be filed together with an application for relief from sanctions. On the other hand, applications for relief from sanctions ought properly to be filed after the sanction had taken effect. In the case of applications for relief from sanctions, they should generally be accompanied by an application for an extension of time to comply with the order, or for variation of the order, stipulating a date with respect to which the applicant was sanctioned.

[43] The third issue which arises in relation to the ‘unless order’ is the effect of the grant of relief from sanctions on the obligation for which the sanction was imposed. When relief is granted from the sanction, in this case the striking out of the respondent’s defence for his failure to disclose certain documents, the obligation to disclose at the time originally ordered remains, **but the sanction date is effaced**. There would, in such cases, normally be an application for an extension of the time for compliance with the original order or for the sanction taking effect, which would have to be granted if the relief from sanctions is to have any meaning. In the present case, the application was for variation of the specific disclosure order, the violation of which led to the making of the ‘unless order’.” (Emphasis added)

[31] Further, at paragraph [44](5) of the judgment, the learned Justice of Appeal stated:

“... an application for relief from sanctions imposed by an ‘unless order’ ought properly to be made after the sanction has taken effect and so there can be no issue about an application made 5 days before the sanction takes effect being a delayed one.

...

In the circumstances, the grant of an application to vary the disclosure order made within the period for disclosure (as per the ‘unless order’) does not in my view suggest any error of the master in the exercise of her discretion in granting the application for variation of the order.” (Emphasis added)

[32] These passages from **Vanroy Romney** illustrate the important principle that where the sanction imposed by a rule or an order has not yet bitten, a party who is likely to be in default or in non-compliance by the date specified for compliance, ought properly to apply to extend or to vary the time for compliance. Furthermore, a court cannot properly consider and apply the principles applicable to relief from sanctions under CPR 26.8 in circumstances where the sanction has not yet bitten and, generally, an application for relief from sanctions ought properly to be made after the sanction has taken effect and, of course, promptly thereafter. In passing, I observe that, were it otherwise, this would place applicants who apply for an extension of time to comply or for variation of the order specifying the date for compliance with certain consequences flowing from such non-compliance, in an invidious position. I say this for the obvious reason that should they fail to also include in their application for extension of time, a claim for relief from the sanction, and the stipulated sanction takes effect by the time their application for extension of time or variation is heard by the court, their application would stand to be dismissed since they would not have invoked the court’s power and jurisdiction to grant relief from the sanction.

[33] In the present matter, the appellants, being aware that they would not be able to comply with the date specified in the unless order for the filing and exchange of witness statements, properly applied to vary or to extend that period for compliance, and prior to the specified sanction taking effect. However, contrary to the guidance in **Vanroy**, they also sought relief from sanctions when, at the time of

filing their application, neither the sanction stipulated in the unless order or imposed by rule 26.11 of the CPR had taken effect.

- [34] The decisions in **Vanroy** and **Adam Bilzerian** both support to the view that, in circumstances where one seeks to extend time to comply with an unless order (or any rule to which a sanction is attached), and the sanction has not yet bitten, the relevant application ought properly to be one for extension of time. However, neither decision goes as far as saying, in clear terms, that when an application for extension of time is filed before the sanction bites, but determined after the sanction has bitten, the application falls to be considered by the court solely as an application for extension of time, and not having regard to CPR 26.8 which applies to relief from sanctions.

The decision in *Everwarm Limited v BN Rendering Limited*⁷

- [35] During the course of the hearing of this appeal, the Court drew the attention of counsel for the parties to the first instance decision of the Queen's Bench Division in England in **Everwarm Limited v BN Rendering Limited**. At the conclusion of the hearing, counsel for the parties were granted leave to file short written submissions on the effect (if any) of this decision on the determination of this appeal. The parties have done so. Counsel for the respondents filed joint submissions on 25th September 2020, and counsel for the appellants filed submissions in reply on 1st October 2020.
- [36] The respondents submit that the decision in **Everwarm** is not binding on this Court and can be distinguished from the instant matter. Further, an application to extend time to comply with an order does not stop time running for compliance and so the sanction in the unless order bit on 5th November 2018. Accordingly, CPR 26.8 and the conjunctive requirements thereon for granting relief from sanction applied.

⁷ [2019] EWHC 2078 (TCC).

[37] On the other hand, the appellants submit that the relevant rules in the English CPR and ECSC CPR, while they differ in their respective approaches to an application for relief from sanction are, in all relevant respects, in *pari materia* with the provision at ECSC CPR 26.1(2)(k) to extend time for compliance with an order, rule or practice direction. The appellants submit, accordingly, that the decision, reasoning in **Everwarm** is apposite in deciding this matter. The appellants further submit that the reasoning in **Everwarm** ‘finds sibling in the reasoning of this Court... in [Vanroy] and in particular at paragraph [43] thereof’.⁸ They accept that a sanction takes effect once the date for compliance has passed and not before there has been a failure to comply with the order, rule or practice direction in which the sanction is stipulated.⁹ Specifically as regards the effect of an unless order and the correct test to be applied under the CPR, the appellants rely on the dicta of Dyson LJ in **Robert v Momentum Services Ltd**,¹⁰ which was relied on by the judge in reaching his decision in **Everwarm**.

[38] At paragraph 33 in **Robert v Momentum** Dyson LJ opined, *inter alia*, as follows:

“...I see no reason to import the rule 3.9(1) [relief from sanction] checklists by implication into rule 3.1(2)(a) where an application for an extension of time is made before the expiry of the relevant time limit. There is a difference in principle between on the one hand seeking relief from a sanction imposed for failure to comply with a rule, practice direction or court order, where such failure has already occurred, and on the other hand seeking an extension of time for doing something required by a rule, practice direction or court order before the time for doing it has arrived. The latter cannot sensibly be regarded as, or even closely analogous to, a relief from sanctions case. If the draftsman of the rule had intended that the checklist set out in rule 3.9(1) should be applied when the court is exercising its discretion under CPR 3.1(2)(a) in such a case, then he could and, in my judgment, would have said so. By not spelling out a checklist in rule 3.1(2)(a), it seems to me that the draftsman was intending that the discretion should be exercised by simply having regard to the overriding objective of enabling the court to deal with cases justly including, as far as practicable, the matters set out in rule 1.1(2).”

⁸ Paragraph 8 appellants' written submissions filed 1st on October 2020.

⁹ Paragraph 20 of the appellants' written submissions file on 1st October 2020.

¹⁰ [2003] EWCA Civ. 299.

[39] The appellants in their written submissions also refer to the first instance decision in **Kaneria v Kaneria**,¹¹ also relied on by the judge in his reasoning in **Everwarm** and, in particular, the dicta of Nugee J at paragraphs 31 and 32 where the judge also relied on the passage from Dyson LJ cited above; and on the reasoning and decision of Jackson LJ at paragraphs 26 and 27 of **Hallam Estates Ltd. v Teresa Baker**.¹² At paragraph 26, Jackson LJ opined:

“An application for an extension of the time allowed to take any particular step in litigation is not an application for relief from sanctions, provided that the appellant files his application notice before expiry of the permitted time period.”

[40] In summary, the appellants argue that an application to extend time for compliance with a rule, practice direction or court order made prior to the expiry of the time for compliance, and hence prior to the date on which the sanction would take effect, is an ‘in-time application’, and is to be treated as an application for extension of time, and not one for relief from sanction. Furthermore, where such an application is heard and determined after the date for compliance has arrived (and the sanction would normally have bitten), it is to be treated in the same way as an application made and determined before the compliance date.¹³ Accordingly, the applicable provisions are CPR 26.1(2)(k) and CPR 1.1, and not CPR 26.8.

[41] In **Everwarm** the judge, Mr. Alexander Nissen QC, had to consider the effect of an unless order, and whether an application made prior to the sanction taking effect ought properly to be treated as an application for relief from sanctions under the English CPR 3.9, or an application for extension of time to comply under rule 3.1(2) and the overriding objective under CPR 1.1. In arriving at his decision, the judge considered and applied the English Court of Appeal decisions in **Robert v Momentum Services Ltd**¹⁴ and **Hallam Estates Ltd v Teresa Baker** and, at paragraphs 37 to 39 of his judgment, concluded:

¹¹ [2014] EWHC 1165 (Ch).

¹² [2014] EWCA Civ 661.

¹³ See paras. 24 and 28 of the appellants’ submissions filed on 1st October 2020.

¹⁴ [2003] EWCA Civ 299.

“37. Where an extension of time is sought in respect of an ‘unless’ order, it is not an application which should be treated either as, or akin to, an application for relief from sanctions case pursuant to Rule 3.9 even if, as is likely, the date for the sanction to be engaged will have passed by the date upon which the application for further time is heard. An in-time application to extend time for compliance with an ‘unless order’ which was in fact heard before the expiry of the time limit could not properly be regarded as one for relief from sanctions. It therefore makes no sense to treat the same application differently because the hearing of it takes place after the sanction would otherwise have bitten.

38. The principles which I have outlined above are not intended to reduce the undoubted importance which must be attached to the need for compliance with ‘unless’ orders.

39. If an application is in time, that determines Rule 3.1(2) applies, however brief may be the period between the application for more time and the expiry of the time limit (see *Kaneria*). However, once the correct rule has been identified, the lateness of the application may well be a relevant matter. An in-time application made shortly after the ‘unless’ order was first imposed is likely to be treated differently from one made just before the time allowed for compliance was about to expire. However, that factor may carry less significance in a case where the period for compliance was already short.”

[42] In considering the decision and dicta in **Everwarm**, which are not binding on this Court, one must be mindful that the relevant English CPR provisions relating to relief from sanctions are not on all fours with rule 26.8 of the ECSC CPR. The English rule 3.9 relating to relief from sanctions, is less stringent in its terms than rule 26.8 of the ECSC CPR. Under ECSC CPR 26.8, an applicant for relief from sanction must satisfy the conjunctive requirements of rule 26(2), that is: (a) that 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. Any failure to satisfy one of these three requirements must result in the dismissal of an application for relief from sanctions. Additionally, as mentioned above, the burden is on the applicant for relief from sanctions to put before the court detailed and cogent evidence in relation to each of these mandatory requirements, including the steps they have taken to comply.

- [43] By contrast, the corresponding English rule 3.9(1) gives the court a much broader discretion when exercising its power on an application for relief from a sanction imposed for failure to comply with any rule, practice direction or order. In doing so, the court will consider ‘all the circumstances of the case, so as to enable it to deal justly with the application’. These factors are stated to include ensuring that litigation is conducted efficiently and at proportionate costs; and enforcing compliance with rules, practice directions and orders. There are no conjunctive requirements which must be satisfied.
- [44] However, I observe that ECSC CPR 26.1(2)(k) which empowers the court to extend the time for compliance with any rule, practice direction or order, and which expressly permits a court to exercise that power even where the application is made after the time for compliance, is in *pari materia* with the provisions of the English CPR 3.1(2).
- [45] Having reviewed the supplemental submissions received from both the respondents and the appellants in relation to the decision in **Everwarm**, I find the argument and reasoning of the appellants more compelling on this issue. Further, I am in agreement with the reasoning of the judge in **Everwarm** which, in my judgment, is apposite to the position under the ECSC CPR, and in keeping with the proper interpretation of Part 26 and the overriding objective under the rules for the court to deal with cases justly.
- [46] In my view, the decision in **Everwarm** is not at variance with the decisions of this Court in **Vanroy** and **Adam Bilzerian**. In **Vanroy**, Michel JA made clear that a party to civil litigation who realises or concludes, that it will, or likely will not, be in a position to comply with the time prescribed by a rule or order for doing something before the expiration of the period for compliance, including where, as in the instant matter, the applicable order is an unless order, ought properly to apply, as promptly as possible, either to extend time or to vary the time stipulated for compliance (as the case may be), and not for relief from sanction. As the learned Justice of Appeal reasoned, the court hearing the application cannot consider and apply the

requirements for relief from sanction under rule 26.8(2) in circumstances where the sanction has not taken effect when the application for relief is filed. This is very different from a situation where, as in **Adam Bilzerian**, the application was made after the deadline stipulated in the case management order for the filing and exchange of witness statements. There, Pereira CJ opined that, as the sanction in CPR 29.11 had already bitten by the date the application was filed, the applicant/appellant ought to have applied CPR 26.8 for relief from sanctions as no trial date had yet been set, and the residual power of the court under CPR 29.11 to give permission at the trial, had not yet arisen.¹⁵

[47] Accordingly, in my judgment, an application to extend time for compliance with an order, practice direction or rule which specifies a sanction for non-compliance by a party to civil litigation, including an unless order, made prior to the expiration of the stipulated time for compliance, falls to be considered by the court pursuant to CPR 26.1(2)(k) and the overriding objective at CPR 1.1, and not CPR 26.8 for relief from sanctions, even where the application is not heard and determined by the court until after the time stipulated in the order, practice direction or rule for the sanction to take effect.

[48] It cannot be correct as a matter of principle, nor is it just and in keeping with the overriding objective under the CPR, for an application for extension or variation of an order (including an unless order) filed before the expiry of the date upon which the sanction would take effect and which, if heard before the sanction bites, would be governed by CPR 26.1(2)(k) and CPR 1.1, to be somehow transformed into or treated properly as one to be considered under the more stringent requirements of CPR 26.8(2) applicable to relief from sanctions, because the court is unable to deal with the application prior to the expiration of the time stipulated for compliance or prior to the sanction taking effect. This is especially so since, as decided in **Vanroy**, an applicant for an extension of time to comply filed before the sanction takes effect, ought not to apply for relief from sanctions under CPR 26.8, and the more

¹⁵ See paragraph 10 of *Adam Bilzerian*.

stringent conjunctive requirements of CPR 26.8(2) cannot be applied by the court to its determination of the application, as the sanction had actually bitten at the time of filing the said application. Put simply, a party ought properly and correctly in its application, seek relief from sanction under CPR 26.8 only in circumstances where the sanction has already bitten. As mentioned above, were it otherwise, that would put applicants for an extension of time or to vary the period stipulated in an order for compliance, who have acted promptly and timely in filing their application (as the applicable rules emphasise and require), in a most invidious and unjust position, whereby the outcome of their application is directly dependent upon the court's availability to hear and to determine the application. In my view, this was not the intention of Part 26, and the timing of the application is determinative of whether CPR 26.1(2)(k) and CPR 1.1 apply, or whether CPR 26.8 (relief from sanction) applies, as was decided in **Everwarm**.¹⁶

- [49] Furthermore, where an application to extend time for compliance with an order or rule is made before the prescribed sanction has bitten, is dismissed by the court after the date for compliance, the sanction in the order, practice direction or rule will have taken effect, since pursuant to CPR 26.7(2) the sanction takes effect unless and until the non-compliant party obtains relief from the sanction. In such circumstances, it is for the defaulting party to apply for relief from sanctions pursuant to CPR 26.8; and, further, in the case of a failure to file and exchange witness statements, the defaulting party would have one last opportunity at the trial to apply for and to obtain the permission of the trial judge for them to be able to rely on the said witness statement at the trial. At this last stage, the burden is even greater on the defaulting party since CPR 29.11 also requires them to provide to the trial judge a good reason for not previously seeking relief from sanctions under rule 26.8, failing which the court must dismiss the application.

¹⁶ See also Blackstones' Civil Practice and Procedure (2019) at pg. 2669.

[50] Alternatively, where, on application prior to the sanction taking effect, an extension of time for compliance by the party is granted by the court, the sanction does not bite or take effect since the time for compliance and the triggering of the sanction has been extended, with the consequence that it is to be treated as if the sanction had never bitten.

[51] This above stated interpretation and effect of Part 26 is in keeping with the position applicable where the application was made after the sanction has taken effect and the court grants relief from sanction under CPR 26.8, the effect of which order is that the sanction (which had already taken effect) is treated by virtue of the court's order granting relief and extending the time for compliance as if it had never taken effect. Similarly, where there has been a failure to file and exchange witness statements in compliance with an order of the court (not being an unless order), the trial judge at trial exercises the court's discretion pursuant to CPR 29.11 to permit the defaulting party to rely on the witness statements not previously filed and exchanged in compliance with the order, the sanction prescribed by CPR 29.11 is thereby lifted. This is the meaning and effect of rule 26.7(2) which states:

“If a party 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 29.6 does not apply.” (Emphasis added)

[52] CPR 27.8(1)(b) and (4) provide:

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

(a)....

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

...

(4) A party who applies after the 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.”

[53] The provisions of CPR 27.8 were considered by this Court in **C.O. Williams Construction (St. Lucia) Limited v Inter-Island Dredging Co. Ltd.**¹⁷ The Court had to consider, *inter alia*, whether, in the particular circumstances of that case, CPR 27.8 was engaged such that the appellant's application for extension of time within which to file their defence to the claim ought to have been accompanied by an application for relief from sanctions. This Court held that the circumstances envisaged by CPR 27.8 did not exist for the applicant/appellant as there was no express sanction to which the applicant/appellant had become subject either under the CPR or any court order and, further, the applicant/appellant had not become subject to any implied sanction within the meaning of **Sanders v Clarke Walker (a firm)**,¹⁸ because the case did not present any complex circumstances 'as to cause an invocation of CPR 26.8 where the Sayers approach is applied'. At paragraph 21 Edwards JA opined:

"...Rule 27.8 stipulates the circumstances that must exist for a party to apply for extension of time and relief from sanctions... . It is only where those circumstances exist, and the party seeks to vary a date set in the timetable after the deadline date has passed that CPR 28.8(4) requires that the party must apply for an extension of time and relief from sanctions to which the party has become subject under these Rules or any court order."

[54] The kernel of this aspect of the decision in **C.O. Williams** is that where the rule or court order specifies the sanction for non-compliance, a party who filed his application before expiry of the time therein specified for compliance (and the date upon which the sanction would take effect) must apply for an extension of time or for variation of the time for compliance, and not for relief from sanctions, since rule 27.8(4) is not engaged. I am therefore of the considered opinion that CPR 27.8 properly construed further illustrates that the timing of the application is decisive as to whether CPR 26.8 (relief from sanctions) becomes engaged, or whether the application is simpliciter an application to extend the time for compliance under CPR26.1(2)(k) in keeping with the overriding objective under CPR 1.1.

¹⁷ [2012] ECSCJ No. 74, delivered 19th March 2012.

¹⁸ [2002] EWCA Civ 645.

[55] In my judgment the appellants' October 2018 application filed 5 days before the date for compliance, fell to be considered by the learned judge not in accordance with rule 26.8 (relief from sanctions), but in accordance with rule 26.1(2)(k) and the overriding objective. Although the appellants' said application was to vary a date which the court had fixed in an unless order for the parties to file and exchange their witness statements, and the said order had specified the sanction for non-compliance, as the application was filed by the appellants before the date fixed for compliance, the appropriate application was for an extension of time to comply with or to vary the time for compliance imposed by the unless order, and not an application for relief from sanctions as required by CPR 26.8(4). In my view, the learned judge erred when she treated the application as one for relief from sanctions and applied to her consideration and determination thereof, the more stringent requirements of CPR 26.8. This was a fundamental error of principle committed by the learned judge, not surprisingly, since both the appellants and respondents had proceeded on the erroneous assumption that CPR 26.8 (relief from sanctions) applied to the judge's determination of the appellants' October 2018 application.

[56] In this regard, the learned judge was led astray by the parties in their respective submissions and at the hearing of the appellants' October 2018 application. The applicants/appellants, who had firstly erroneously applied in their application for relief from sanctions, also erroneously treated with their application before the learned judge as one made pursuant to CPR 26.8 applicable to relief from sanctions. This error on the appellants' part, was repeated by them before this Court in their written submissions in support of the appeal and, to some extent, in their oral arguments. Accordingly, the basis upon which the learned judge exercised her discretion, though understandable in the circumstances, was plainly wrong. It is therefore open to this Court to consider *de novo* the appellants' application to extend time for compliance with the unless order, and to come to its

own decision thereon, based upon the evidence and explanations adduced by the appellants in support of their application, and the applicable principles.¹⁹

Principles applicable to applications for extension of time/CPR 26.1(2)(k) applications

[57] Under CPR 26.1(2)(k) the court has a wide discretion to extend the time to comply with any order, rule or practice direction, and to do so even where the application to extend time was made after the time for compliance has expired. As Pereira JA (as she then was) very helpfully stated at paragraph 12 of the judgment in **Carleen Pemberton v Mark Brantley**,²⁰ this discretion is not to be exercised in a vacuum, but in accordance with well-established principles, and with a view to giving effect to the overriding objective. It is trite that in determining an application to extend time or to vary the time imposed in an order of the court for compliance, the court must consider (i) the length of the delay, (ii) the reasons for the delay, (iii) any prejudice to the respondent; and (iv) whether the applicant's pleaded case is, in any event, a hopeless one - the chances of success.²¹ However, these four considerations or factors, which to some extent are reflected at CPR 26.8(2), are not exhaustive of the matters to be taken into account by the court in determining an application to extend or to vary time for compliance.

[58] It is also accepted that a court must approach an application to extend time to comply with an interlocutory order made prior to case management on a somewhat different basis from applications to extend time in relation to case management orders.²² Most importantly, in the context of the application in this case, this Court's approach to the exercise of its discretion *de novo* must also take particular account of the fact that we are dealing here with an application to extend time to comply with an unless order, by which the court granted a further extension of the time

¹⁹ See *Nilon Limited and another v Royal Westminster Investments SA* [2015] UKPC 2 at para. 16.

²⁰ [2011] ECSCJ No. 229, delivered 14th October 2011.

²¹ See also *John Cecil Rose v Anne Marie Uralis Rose* [2003] ECSCJ No. 66, delivered 22nd September 2003; *C.O. Williams Construction (St. Lucia) Limited v Inter-Island Dredging Co. Ltd* supra at n.17, per Edwards JA at paras. 49 and 54; and *America 2030 Capital Limited et al v Sunpower Business Group PTE Ltd et al* [2020] ECSCJ No. 361, delivered 30th October 2020.

²² See *C.O. Williams*, supra at n.17.

stipulated in two prior case management orders for the parties to file and exchange their witness statements; and which unless order was, apparently, made by the learned judge at the invitation of the appellants and, ultimately, with the concurrence of all parties, in circumstances where both the appellants and respondents had failed to file and exchange their respective witness statements in a claim commenced some 8 years prior to the making of the unless order. Further, the unless order imposed the ultimate sanction for failure to comply, that is, that the statement of case filed by the defaulting party (as the case may be) would be struck out. I now move to a consideration of the appellants' October 2018 application on its merits.

(i) Length of the Delay

- [59] This question of the length of the delay is not, in my view, in issue in this case, as the appellants' October 2018 application was filed some 5 days prior to the expiration of the time imposed in the unless order for the filing and exchange of the witness statements. The appellants acted with promptitude when they realised they would not be in a position to file their witness statements within the period of approximately 1 month granted by the learned judge, and they did so before the sanction would bite.

(ii) Reasons for Delay

- [60] The appellants relied on the evidence at paragraph 4 of the affidavit of Madonna Barbour filed on 31st October 2018. The respondents did not file any evidence in opposition but relied at the hearing below on the inadequacy of the appellants' evidence in meeting the conjunctive requirements of CPR 26.8(2), and on their legal submissions in opposition to the application. At paragraphs 4.1 to 4.3 of the Barbour affidavit, it is deposed that the appellants and their counsel have 'tried assiduously to prepare and file their witness statements on or before 5th November 2018'. To this end, they prepared and filed a supplemental list of 390 documents and photos on 22nd October 2018 (14 days before the time imposed in the unless order for filing and exchanging witness statements), and a further amended list of

documents on 31st October 2018 (5 days before expiry of the stipulated period) to include another 118 documents and photos. They also averred that, to date, the respondents have not filed any supplemental list of documents as had previously been foreshadowed by learned counsel Messrs. Delves and Eustace.

[61] In my judgment these matters at paragraphs 4.1 to 4.3 of the Barbour affidavit do not provide any good or cogent reason for the delay in filing the appellants' witness statements, such that they could not meet the deadline of 5th November 2018 imposed by the unless order. To the contrary, these statements serve to demonstrate that the appellants and their lawyers did not focus their attention on compliance with the terms of the unless order, but instead focused on preparing supplementary lists of documents, which was not the subject of the unless order or any sanction which would prevent them from prosecuting their claim and defending the respondents' counterclaim.

[62] The gravamen of the appellants' reasons for delay is to be found at paragraph 4.4 of the Barbour affidavit, which states:

"However, notwithstanding the collective efforts of the Claimants, their local and overseas counsel and witnesses, it is impossible for the Claimants to comply with the said Unless Order on or before the 5th November 2018. This failure of compliance is unintentional and is due to the considerable documentary evidence, disparate locations of counsel and witnesses, and the temporary unavailability of lead counsel, Mr. Keith Scotland, while he was before the Trinidad & Tobago Court of Appeal."

[63] It is this statement of reasons for the delay and inability to meet the filing deadline in the unless order, which the learned judge, in her oral decision, and counsel for the respondents, before this Court, correctly in my view, characterised as a mere bald assertion. Counsel for the respondents submit that it is precisely this sort of evidence which Pereira CJ disapproved of in **Adam Bilzerian**. There, the Court was dealing with an application under CPR 26.8 for relief from sanctions which had already bitten when the application was filed. Dealing specifically with the legal and evidential burden placed on applicants for such relief, and the quality of evidence

which an applicant ought to put before the court in support of such an application, the learned Chief Justice opined (in part) at paragraph 15:

“The onus was on the appellant to show by credible and particularized evidence that he had met the threshold warranting consideration of the grant of relief. He was required to clearly demonstrate to the court that his failure to file his witness statements was not intentional – in essence that he had taken all reasonable steps to meet the timeline and then to show why notwithstanding taking such reasonable steps, that he was unable to meet it. I agree with the learned judge that the information that the appellant chose to put forward for the judge’s consideration was woefully inadequate... .The court must be given a clear, detailed and accurate picture of what occasioned the failure and what was done in seeking to remedy it. 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.”

[64] In considering whether the appellants had put before the learned judge evidence which provided a reasonable explanation for the delay and their inability to meet the stipulated deadline in the unless order for the filing and exchange of witness statements, I am mindful that when the court is considering an application under CPR 26.1(2)(k) to extend time for compliance with an order or rule, it is not applying the more stringent requirements of CPR 26.8(2). It is not called upon necessarily to determine whether the failure was or would have been intentional, but whether the appellants have proffered evidence amounting to a good explanation for the delay. However, where the evidence shows a blatant disregard for the applicable court order or rule this would be a relevant factor in the exercise of the court’s discretion.

[65] Having considered paragraph 4.4 of the Barbour affidavit, and bearing in mind the principles and guidance set out in **Adam Bilzerian**, one is driven inexorably to the conclusion that the reasons for the delay advanced by the appellants are inadequate and lacking in both detail and particularity. I say this being cognizant that, in this matter, the Court is not dealing with an application for relief from sanction, but with an in-time application to extend the time to comply with the unless order. I am also cognizant of the degree of importance and seriousness which a court must attach to unless orders, the inherent duty of the parties to strictly comply with such an order and, more generally, with the case management orders

of the court, each of which, in accordance with the overriding objective, is intended to enable the court to manage the case justly, to ensure that the parties to the litigation are on an equal footing, and to ensure that the case is dealt with expeditiously. It stands to reason that the more serious the consequence of non-compliance the more cogent and convincing the circumstances must be to warrant the court's indulgence. Moreover, I wish to make clear that making an in-time application ought not to be viewed or treated as a 'get-around' of the sanctions regime in CPR 26.8, which rule has long been recognized as the device in the CPR aimed at discouraging the lax and *laissez faire* approach to litigation which plagued the court system in the region prior to CPR.

- [66] While the appellants, at paragraph 4.4 of the Barbour affidavit, did not place any blame for the delay on the lawyers representing them in this matter, the ordinary residence of lead counsel Mr. Keith Scotland in the Republic of Trinidad and Tobago, and his temporary unavailability due to a commitment before the Court of Appeal in that State, is not, without more, a cogent or acceptable reason for or explanation of the appellants' delay in the preparation of their witness statements. Further, the appellants' reasons for the delay on this occasion must be considered in the context of a case which was commenced some 8 years prior (albeit Mr. Scotland only became counsel in the proceedings below on 29th June 2016), and in which there have been at least 2 prior case management orders for the filing and exchange of witness statements. Moreover, any residue of cogency one may have attributed to such an explanation evaporates in the face of the prevalence and convenience of modern high-speed internet communication, rendering any such explanation difficult to accept without further and more detailed explanation being proffered in the supporting evidence. Furthermore, and in any event, any favourable treatment a court may have been given to such an explanation necessarily dissipates in the face of the total absence of any detail or particularity as to what steps or efforts had been made to contact the witnesses, and to obtain sufficient information from them to properly prepare their respective witness statement. In the end, one is left with the distinct impression that the preparation of

the appellants' witness statements were left for the last days of the stipulated period in the unless order, resulting in far less time than perhaps was needed to properly prepare and have them filed in time. Certainly, no detail of the steps taken and efforts made to achieve them were put before the learned judge in the Barbour affidavit, and the only detail condescended to related only to the preparation and filing of two supplemental lists of documents and photographs which were not the subject of the unless order and its sanction.

- [67] However, the matter does not end there because, even where an applicant for relief pursuant to CPR 26.1(2)(k) has failed to satisfy one of the considerations for the grant of an extension of time to comply with an order of the court, such failure is not immediately fatal to the application, as is the case where a defaulting party fails to satisfy any one of the conjunctive criteria for relief from sanctions under CPR 26.8(2). In discharge of its duty to do justice to the parties, the court must consider all the factors and circumstances put before it, including the effect which a refusal will have on the applicant and its case; whether the failure can be remedied within a reasonable time; what effect the extension sought would have on the litigation including on any trial date; what, if any, prejudice an extension would cause to the other party or parties to the litigation; the proportionality of refusing to grant the extension sought in relation to any failure to comply with the court's order; and that, in the interest of the proper administration of justice, the orders of a court, especially unless orders, must be obeyed, unless there is some good reason for excusing the non-compliance. Put another way, the court must apply the overriding objective in determining which way to exercise its discretion and, in doing so, the relevance of the factors relied on and the weight to be attached to each such factor, is a matter for the court to decide in all the circumstances. In **Roland James and The Attorney General of Trinidad and Tobago**,²³ Mendonca JA stated:

“...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 relevant factors. The weight to be

²³ Civil Appeal No. 44 of 2014.

attached to each factor is a matter for the Court in all the circumstances of the case.”

Prejudice to the Respondents

- [68] The appellants argue strenuously that there would be no prejudice to the respondents in extending the time for compliance with the unless order for the filing and exchange of witness statements; and that the period of extension sought to 15th January 2019 was short and would have no adverse effect on any trial date, since none had been fixed by the court at the time of hearing the application. By contrast, the effect of a refusal to extend the time to comply with the unless order would be catastrophic for the appellants, who would be unable to prosecute their claim and to defend against the respondents’ counterclaim. At paragraphs 4.8 and 4.9 of her affidavit, Ms. Barbour deposes:

“4.8 Denial by the honourable court of the Claimant[s]’ application... would be fatal to the Claimants’ claim and would render the Defendants successful in their counterclaim. The Claimants would be put to incurable disadvantage.

4.9 The failure of compliance may be remedied within a reasonable time and would not result in disturbance of the trial date as none has as yet been set.”

- [69] It is correct that no trial date had been set in claim SVGHCV2010/0398 at the time of the filing and determination of the appellants’ October 2018 application. In their application the appellants sought an extension to 15th January 2019 to file and exchange their witness statements, a delay of some 2 months and 10 days. It is clear that the period of extension, though not a short one, was not inordinately long and, if granted, would have had no adverse effect on or result in a postponement of the trial date or likely trial date, to the prejudice of the respondents. However, it must also be borne in mind that the respondents, who, apart from being defendants are also counterclaimants in the proceedings, would have an interest in receiving, as early as possible, the witness statements of the appellants’ witnesses, so as to be in a position to prepare to address or to rebut any factual matters raised in any such witness statement or to seek discovery of documents or further and better particulars. More generally, the respondents would have an interest in advancing

the case (and their counterclaim) toward a trial on the merits, ever mindful that the claim had been filed some 8 years before and no trial date had yet been set. Moreover, while the extension of time sought was not inordinately long, the court must also consider the fact that it would have been the third such extension granted to the appellants from the original date specified in the first case management order, and be cognizant of the impact which a further delay can or may have on the interest of the administration of justice, and on the court's duty to deal with cases justly and proportionately.

Chances of Success

- [70] In the court below, no submissions were made on the 'chances of success' of the appellants' pleaded claim or defence to counterclaim and, accordingly, the learned judge did not consider this factor in rendering her decision to dismiss the appellants' October 2018 application. Likewise, neither party addressed or relied on the strength or weakness of the appellants' pleaded case in their written submissions before this Court. This is undoubtedly because, both in the court below and before this Court, the parties erroneously treated the appellants' October 2018 application as an application for relief from sanctions.
- [71] During the course of oral argument before us, Mr. Delves, learned counsel for the second respondent alluded to the necessity for the court to be satisfied as to the chances of success of the appellants' pleaded case. In doing so, he did not submit that the appellants' pleaded case was hopeless or very weak and did not positively rely on any failure of the appellants to adduce evidence to the satisfaction of the court as a basis for not granting an extension of time. In reply, to Mr. Delves, Mr. Scotland asserted that the chances of success of the appellants' pleaded claim and defence to counterclaim was not a relevant consideration for deciding whether to extend time for compliance. He argued that the chances of success were relevant only where a party was seeking an extension of time to appeal or leave to appeal, and not to an application for extension of time to comply with an unless order.

[72] As to Mr. Scotland's submissions on this point, it suffices in the circumstances to say that it is now well-established that the 'chances of success' is a factor which the court will ordinarily consider when determining whether to grant an extension of time.²⁴ However, I observe from prior decisions of this Court in cases such as **Quillen v Harneys, Westwood and Riegels (No.1)**²⁵ and **Joseph Hyacinth v Allen Joseph**,²⁶ that significant weight ought only be attached to the chances of success where it is shown that the applicant's case is either hopeless, even where there are substantial reasons for the delay, (in which case the court should refuse to exercise its discretion to extend time) or where the chances of success are very strong (in which case the court has an admittedly broad discretion to extend time). The position in England seems to be the same. In the English Court of Appeal case of **Robert v Momentum Services Ltd**, Dyson LJ at paragraph 42 opined as follows:

"First, it seems to me that it will rarely be appropriate to dismiss an application for an extension of time on the grounds that the claim is weak unless the court is able to conclude that an application to strike out the claim under rule 3.4(2)(a) or (b), or an application for summary judgment by the defendant under rule 24.2 would succeed. To refuse a prospective application for an extension of time on the grounds that the claim is weak, where neither the rule 3.4(2)(a) or (b) nor the rule 24.2 threshold is met would be a truly draconian step to take..."

At paragraph 43, Dyson LJ continued:

"This brings me to the second point. If a defendant does wish to pray in aid the overall merits of a claim as a reason for refusing an extension of time, notice should be given to the claimant. This will enable the claimant to submit evidence directed to the point."

[73] As already indicated, the respondents' counsel did not make any positive assertion, whether in oral argument or in written submissions before us, that the appellants' claim is hopeless. Moreover, we were not taken by counsel for the parties to the pleaded case of the appellants; and copies of the claim form, statement of claim,

²⁴ See paragraphs 55 and 56(9) of the C.O. Williams decision, *supra* at n.17 and *Joseph Hyacinth v Allan Joseph* (2016) 89 WIR 303.

²⁵ (1999) 58 WIR 143.

²⁶ (2016) 89 WIR 303.

defence and counterclaim, and the defence to counterclaim were not included as part of the record of appeal in this matter. In the circumstances, this Court can only infer that the respondents were not relying on an assertion that the appellants' pleaded case was hopeless or unlikely to succeed, as a ground in opposition to the appellants' October 2018 application or, more specifically, as a basis for not extending the time for them to comply with the terms of the unless order. Accordingly, while this aspect of the matter was most unsatisfactory, this Court cannot give any weight to this being a ground upon which the Court ought properly to refuse to exercise its discretion not to extend the time for the appellants to file their witness statements.

Whether in all the circumstances the court ought to grant the extension

- [74] The appellants say that their default can be put right within a reasonable time and that they have been generally compliant with prior orders of the court. They submit that while the respondents would suffer no prejudice if the extension of time to file the appellants' witness statements is granted, the result of a refusal to extend the time for them to comply with the unless order would have a devastating impact on them and on their ability to prosecute their claim and to defend against the counterclaim. On the latter point, the appellants submit that the unless order and its stipulated sanction for non-compliance was 'draconian', and the dismissal of their application for extension of time to comply tantamount to using a 'hammer to kill the proverbial fly'.²⁷ However, it must be noted that CPR 26.4(7) stipulates the consequences of a party's failure to comply with an unless order, that the party's statement of case shall be struck out. It also brings into sharp focus, the sanction at CPR 29.11 whereby the appellants would not be permitted to call and to rely on their witnesses at trial, unless the court, at trial, grants permission to do so, and only where the appellants were able to provide a good explanation for not previously applying for relief from sanctions.

²⁷ See paras. 20 and 21 appellants reply submissions.

[75] However, the consequences of the appellants' failure to comply with the unless order were well-known to the appellants, whose counsel had invited the learned judge at the hearing 4th October 2018 to make an unless order. Yet the appellants and their lawyers chose not to focus on ensuring that they were in a position to meet the stipulated timeline in the unless order, by diligently going about preparing and filing the appellants' witness statements on or before the 5th November 2018 deadline. Instead, as is apparent from their evidence, they utilized a great deal of the allotted one-month period on preparing and filing supplementary lists of documents, with no explanation or no proper explanation as to why they chose this course. Furthermore, CPR 26.6(1) provides that a party who is required to provide a witness statement but is unable to do so, may serve a witness summary instead. This option was available to the appellants, particularly in relation to overseas witnesses.

[76] Before us, learned counsel Mr. Delves for the 1st respondents questioned, in essence, the veracity of one of the reasons advanced by the appellants in their evidence and argument. The gravamen of this explanation was that the appellants and their lawyers set about the preparation and filing of supplemental lists of documents and photographs to disclose many additional documents, references to which would have been incorporated in the witness statements or some of them. Mr. Delves, having received the witness statements for the appellants filed without the permission of the court (three in January 2019 and one affidavit on 17th September 2020) attached as exhibits to Barbour 3 in this appeal, indicated in oral argument before us that the witness statements of Paul Brown filed on 23rd January 2019 and of Georgios Triarchou a.k.a. John Travis filed also on 23rd January 2019 had no documents or photographs attached, and the delay in their preparation and filing could not be explained on the basis of adding many additional documents to the disclosure lists. Further, while the witness statement of the 2nd appellant, Irina Savelieva, filed on 10th January 2019, has attached thereto some 26 documents, one is a piece of legislation, and the other 25 are documents included in the appellants' original list of documents filed back in 2017.

[77] In my view, while there is not much to commend the cogency and persuasiveness of the appellants' evidence and explanations in the affidavit of Ms. Barbour as to why they were not or would not have been in a position to comply with the unless order of the court with regard to the filing and exchange of witness statements, this Court must take a broad view of the appellants application and evidence in determining whether it ought to exercise its discretion *de novo* to permit the extension sought by the appellants. This exercise involves looking at all relevant factors and attaching the appropriate weight to them. In doing so, this Court takes into account that no trial date had been fixed at the time in this matter, and therefore a further extension of time for the appellants to comply with the unless order would have no impact on such a date. Indeed, we were informed during the course of the oral argument that a trial date was set subsequent to the learned judge's dismissal of the appellants' October 2018 application, which date is well after the filing by the appellants of their witness statements without the permission of the court. This Court must also be mindful of the profound consequences to be visited upon the appellants if the extension of time for compliance with the unless order is not granted, to which mention has been made above. These are, in my view, along with the promptitude in which the appellants applied to the court to extend time, the only salutary factors which favour this Court exercising its discretion to extend the time for compliance. I say this not in any way intending to diminish or to detract from the special importance of unless orders which are usually made by a court only after there has been some history of non-compliance by a party, as has been the case with the appellants in this matter who have thrice applied for extensions to comply with the case management order to file and exchange witness statements. In this regard I also bear in mind that the respondents themselves had failed to comply with at least two such previous orders of the High Court in this matter, and only complied once the unless order had been made.

Conclusion

[78] In my judgment, and with some degree of reluctance, I conclude that the justice of the case in this instance requires this Court to grant the appellants' October 2018 application to extend the time stipulated in the unless order dated 4th October 2018 for the appellants to file and exchange witness statements in claim SVGHCV2010/0398, and I would accordingly do so.

[79] For the reasons set out above I would grant the appellants' application filed on 31st October 2018 to extend the time stipulated in the unless order of the court dated 4th October 2018 for the appellants to file their witness statements in claim SVGHCV2010/0398. Accordingly, the period in the said order for filing the said witness statements is extended to 23rd January 2019. The appellants' witness statements, namely, the witness statement of the 2nd appellant, Irina Savelieva, filed on 10th January 2019, the witness statement of Georgios Triarchou a.k.a. John Travis filed on 23rd January 2019, and the witness statement of Paul Brown filed on 23rd January 2019 are each deemed properly filed on the said dates. The appellants shall serve the said three witness statements on the legal practitioners for the respondents within 7 days of the delivery of this judgment and, thereupon, the parties shall exchange witness statements.

Costs

[80] On the issue of costs, learned counsel for the appellants accepted during the course of his submissions before us, that in the event this Court allowed the appeal and set aside the order of the judge below, the appellants ought to bear the respondents' costs of the application in the court below. This position was accepted by both learned counsel for the respondents. With this position, I am in full agreement. However, I am also of the view that because of how the appellants presented their application both below and before us, in which they conflated, incorrectly, the application for extension of time with an application for relief from sanctions under CPR 26.8, which error this Court drew to the attention of their counsel and to the decision in **Everwarm**; and also mindful of the requirements of CPR 65.11(3)(b) in dealing with an application to extend time and their being no

special circumstances warranting a departure from that rule, the appropriate order is that the appellants shall also pay the respondents' costs of the appeal to be assessed by a judge of the court below or a master, unless agreed within 21 days.

Order:

[81] For all the above reasons, I would make the following orders:

- (i) The appeal is allowed.
- (ii) The order of the learned judge dated 16th November 2018, dismissing the appellants' notice of application filed on 31st October 2018, is set aside.
- (iii) The appellants' application to extend the time for filing the witness statements of Irina Savelieva, Georgios Triarchou a.k.a. John Travis and Paul Brown, is granted.
- (iv) The witness statements of Irina Savelieva, Georgios Triarchou a.k.a. John Travis and Paul Brown are deemed properly filed.
- (v) The appellants shall serve the said three witness statements on the legal practitioners for the respondents within 7 days of the delivery of this judgment following which the parties shall exchange witness statements.
- (vi) The appellants shall pay to the respondents' costs of the application and hearing below to be assessed by a judge or master of the court, if not agreed within 21 days.
- (vii) The appellants shall pay the respondents' cost in the appeal to be assessed by a judge or master of the court, if not agreed within 21 days.

I concur.

Dame Janice M. Pereira, DBE

Chief Justice

I concur.

Davidson Kelvin Baptiste

Justice of Appeal

By the Court

Chief Registrar