IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

CLAIM NO. CL C130/1997

BETWEEN	**LAMBERT CARR**	**FIRST CLAIMANT**
AND	**COLLEEN CARR**	**SECOND CLAIMANT**
AND	**DUDLEY BURGESS**	**DEFENDANT**

IN CHAMBERS

Miss Carol Vassel for the claimants

Mr. Laurence Jones instructed by DunnCox for the defendant

January 24, 30, March 10 and April 19, 2006

APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO FILE DEFENCE

SYKES J

The application

1. This is an application by the defendant for an extension of time within which to file his defence in circumstances where his opponent has not agreed to the extension and the application is made out of the time prescribed by the old rules as well as the new to file a defence. He alleges that he has a good defence to the claim. The claim against him is for (i) specific performance; (ii) damages for breach of contract in addition to specific performance and (iii) further or other relief as well costs. The defendant rests his application on rules 10.3(9) and 26.1(2) (c) of the Civil Procedure Rules (CPR). The claim against the defendant was filed nine years ago and having entered an appearance did not file a defence.

2. Rule 10.3(9) of the CPR permits the defendant to apply for an extension of time for filing defence. Rule 26.1(2) (c) permits the court to extend or shorten time for compliance with any rule even if the application for an extension is made after the time for compliance has passed. The issue then is not whether the court has the power to extend the time for the defendant to file his defence but whether the court's discretion should be exercised in favour of the defendant in this particular case. The chronology of events is important. Let us now examine the history to see what accounts for this extraordinary delay in filing a defence.

The chronology

3. This is the history:

a. the writ of summons was issued on April 25, 1997 seeking the remedies outlined above. This was in respect of land registered at volume 1190 folio 90 of the register book of titles;

b. the statement of claim was filed on May 7, 1997;

c. the writ of summons and statement of claim were served personally on Mr. Dudley Burgess on May 24, 1997 by Mr. Lueslin Graham;

d. Ballantyne, Beswick and Company, attorneys for the defendant at the time, entered an appearance on June 3, 1997;

e. on July 20, 1998, Dukharan J (Ag) (as he then was) granted an amendment to the statement of claim to include the reliefs sought by the claimants since these were omitted from the statement of claim filed on May 7, 1997;

f. the amended statement of claim was filed on July 23, 1998 and served on the defendant's attorneys Ballantyne, Beswick and Company on September 9, 1998;

g. on May 12, 1999, Mr. Lawrence Haynes, attorney at law, filed a notice of appearance for and on behalf of Mr. Dudley Burgess;

h. no defence was filed between September 9, 1998 and May 12, 1999;

i. on April 26, 2000, the claimants filed a notice of motion seeking that land registered at volume 957 folio 333 be transferred to them; that they be declared the true owners of land registered at volume 957 folio 333 and that the Registrar of the Supreme Court be empowered to sign and execute all such documents that are necessary to effect the transfer;

j. on July 27, 2000, Mr. Haynes filed a notice of change of attorney in respect of the defendant;

k. on September 21, 2000, Mr. Haynes filed yet another notice of change of attorney;

l. no defence was filed between May 12, 1999 and September 21, 2000;

m. also on September 21, 2000, the defendant filed a summons for extension of time to file and serve defence out of time;

n. the claimants, on February 14 and 16, 2001, filed two affidavits in opposition to the defendant's summons;

o. the notice of motion was reissued on March 31, 2001 and on August 7, 2001;

p. the fate of the notice of motion and summons for extension of time is as follows:

i. the first date for the hearing of the motion was July 27, 2000. On that date Mr. Haynes appeared and the matter was adjourned sine die. Both sides were represented;

ii. the summons was set for hearing on November 28, 2000 and on that date, the matter was adjourned sine die for the claimants to file affidavit in response. Both parties were represented on November 28, 2000. This they did by February 14 and 16, 2001;

iii. on May 31, 2001, the motion was adjourned sine die. Only the claimants were represented;

iv. on October 10, 2002, the summons for extension of time was adjourned sine die because the file could not be located in the Supreme Court registry. The defendant was not represented;

v. on October 24, 2002, the claimants were absent and not represented. The matter was adjourned sine die because no bundle was filed and the file was missing;

q. nothing happened until September 7, 2005, when the claimants again reissued the notice of motion for hearing on October 6, 2005;

r. between October 10, 2002, and September 17, 2005, nothing happened to the summons to extend time for filing the defence;

s. on September 17, 2006, Mr. Astley Smith served on Mr. Dudley Burgess a notice of application for court orders filed by Mr. Haynes, attorney at law for Mr. Burgess, asking that his name be removed from the record. The application was set for hearing on September 27, 2005;

t. it appears that the application to remove Mr. Haynes' name was granted;

u. on October 6, 2005, the notice of motion was adjourned to November 24, 2005, to permit Mr. Garth McBean to file documents indicating his formal appearance for Mr. Burgess. It seems that between October 6, 2005 and October 13, 2005, Mr. Burgess changed attorneys yet again;

v. on October 13, 2005, DunnCox files a notice of change of attorneys for and on behalf of Mr. Burgess;

w. there is no challenge to the assertions of Mr. Haynes in any of the affidavits filed by Mr. Burgess in support of his application. Mr. Haynes' affidavit contains the following assertions. I use his paragraph numbers:

> **2.** *That some time in the month of May 1999 the Defendant (sic) herein came to my office with a Writ of Summons (sic) and Statement of Claim (sic) and gave me instructions to Enter an Appearance on his behalf.*
> **3.** *That I duly entered An Appearance (sic) on May 12, 1999, and I have been appearing for the Defendant (sic) on numerous occasions when the Notice of Motion was set for hearing.*
> **4.** *That over the last few years I have not been in receipt of any instructions from the Defendant (sic).*
> **5.** *That in the circumstances the Attorney/Client relationship has broken down and I respectfully pray that the Orders sought in the Notice herein be granted.*

The affidavits of Mr. Dudley Burgess

4. Mr. Burgess filed two affidavits in support of support of the summons for extension of time. The first affidavit is dated September 21, 2000. He denied any knowledge of any agreement between himself and the claimants. He denied receiving any money from them. He asserted that in July 1983 he did not own any of the parcels of land in question. The affidavit admits that Mr. Bonner was his attorney at some point but that Mr. Bonner referred him to Mr. Ballantyne of the firm Ballantyne, Beswick and Company after the service of the writ of summons and statement of claim. According to Mr. Burgess when he did not hear anything from either Mr. Bonner or Mr. Ballantyne, he instructed Mr. Haynes.

5. It seems that Mr. Burgess was served with the pre-amended statement of claim because he has stated that Mr. Haynes told him that he need not file a defence because the statement of claim did not have any remedial request. He swore that the next time he heard from Mr. Haynes was in July 2000 when Mr. Haynes told him that a notice of motion for summary judgment had been served on him (Mr. Haynes).

6. The next affidavit filed by Mr. Burgess is dated January 23, 2006. This was in response to Miss Vassal's affidavits dated February 14 and 16, 2001, respectively. His affidavit made not attempt to explain his many years of inactivity or to address the charge by Mr. Haynes that instructions were not forthcoming. In this affidavit, he states that he bought the land registered at volume 957 folio 333, in 1985, from Mr. Rudolph Miles. He swore that he subsequently received a certificate of title registered at volume 1199 folio 90 on or about March 1986 being a part of the land registered at volume 957 folio 333.

7. He said that he subdivided the land registered at volume 1199 folio 90 into five lots. He claims that he did not instruct Mr. Bonner to sell any of these lots but he did ask Mr. Bonner to secure titles for four lots for land registered at volume 1199 folio 90. Finally he says that he never signed the receipt and would wish that it be subject to handwriting analysis.

The affidavits of Miss Carol Vassal

8. Miss Vassal filed two affidavits in this matter. The first is dated February 14, 2001. The second is dated February 16, 2001. The first one details the long pre-writ history in this matter. It is alleged, in the affidavit, that the claimants paid $14,000 to the defendant to purchase a plot of land known as lot 4 part of land registered at volume 957 folio 333 of the register book of titles. The affidavit has exhibited numerous letters going between Miss Vassal and Mr. Richard Bonner, attorney at law, for Mr. Burgess. These letters concerned the strenuous efforts by the claimants to complete the purchase of land. There is even a letter dated May 8, 1990, signed by Miss Vassal on behalf of the firm of Daley, Walker and Lee Hing, addressed to Mr. Dudley Burgess. That letter alleges quite specifically that the claimants bought land measuring 1 acre, 4/10 perches for $14,000 which was paid in full. The claimants wrote, through their attorney, another letter dated June 26, 1990, to the same effect and referred to the earlier letter of May 8, 1990. A third letter to the same effect of the previous two, dated September 4, 1990, was sent to Mr. Burgess. The letters also raised the issue of sub-division approval which the tenor of the letters suggests, Mr. Burgess was to obtain. Mr. Burgess did not reply to any of these letters and neither was there any suggestion that he did not receive them until Mr. Burgess filed his affidavit of January 23, 2006.

9. When Mr. Burgess did not reply the claimant commenced their own investigations concerning the grant of sub-division approval. The claimants then wrote to the St. Thomas Parish Council asking whether sub-division approval was granted. The Council replied indicating that approval was granted on September 18, 1990. Thereafter a number of letters were written to Mr. Richard Bonner concerning the completion of the sale. The first of these letters was dated May 21, 1991. Three more letters were written to Mr. Bonner, dated August 7, 1991, October 29, 1991 and January 8, 1992, respectively.

10. By letter dated December 4, 1991, Mr. Bonner wrote a most telling letter. In that letter he apologised for the delay in not responding to Miss Vassal's letters and then comes these words:

I am now pleased to say that all the relevant documents pertaining to the sale has been replaced and I am now in a possession to proceed with the sale. I am presently in touch with the Vendor (sic) Mr. Dudley Burgess, to get the relevant details pertaining to the transfer as I was not a party to the actual sale and passing of Money (sic).

11. Mr. Bonner wrote another letter dated January 22, 1992, in which he asked for the details of the purchasers in order to complete the transaction. Mr. Bonner wrote a letter dated July 24, 1992, in which he stated that he is in the process of drafting the instrument of transfer.

12. By letter dated September 8, 1993, Mr. Bonner wrote to Daley, Walker and Lee Hing asking for the names, addresses, occupation, amount of purchase prices and type of tenancy in order to complete the transfer. Miss Vassal supplied the information by letter dated September 13, 1993, except the tenancy by which the land would be held.

13. When I examined all documents exhibited to Miss Vassal's affidavit there is reference to land registered at volume 1190 folio 90 and land registered at volume 957 folio 333. However there is a document known as pre-checked plan no. 220298. This document was sent along with a letter dated October 29, 1991 to Mr. Bonner by the claimants' attorneys. This would suggest that the specific bit of land that the claimants intended to purchase was indeed identified. I make this point because Mr. Jones sought to say that an order for specific performance could not be granted because of the uncertainty of the subject matter. This is decidedly not the case.

14. From my examination of all the evidence it appears that there was a large parcel of land registered at volume 957 folio 333 of the register book of titles that was and apparently at the time of the alleged agreement was registered in the name of Rudolph deSouza Miles. There is nothing before me to indicate that the land was transferred to Mr. Burgess. If this is so, this may explain why Mr. Burgess, through his attorney Mr. Richard Bonner was unable to transfer the land, assuming of course that the claimants indeed paid the $14,000 as they allege.

15. To bolster their assertion, the claimants exhibit a receipt, dated July 4, 1983, allegedly signed by Dudley Burgess. This receipt is in the sum of $927.50. Miss Vassal has stated that the original of this receipt cannot now be found by her or her clients.

16. The second affidavit of Miss Vassal does not add much to what is already known about the transaction.

The case law

17. Having examined the matter and rules relied by Mr. Jones I do not think that those rules are the only ones implicated on this application. I fully accept that this case began under the old rules and that sometime should be afforded litigants to adjust to the new rules (see Panton J.A. in ***International Hotels Jamaica Ltd v New Falmouth Resorts Ltd*** SCCA Nos. 56 & 95/2003 (November 18, 2005). It is now 2006 and the period of adjustment must have passed by now. The rules have in operation over three years. It is my view that the considerations in rule 26.8 apply here. This is the rule dealing with relief from sanctions.

18. The considerations of rule 26.8 apply for the reasons I am about to state. Under the CPR the general rule is that defendant has 42 days to file his defence. Should the defendant fail to file his defence within the time, under rule 10.3 he has two options. Option one is to secure the agreement of his opponent (see rule 10.3 (6)). In this situation, the parties do not need the sanction of the court. The rule requires, in cases where the parties agree to extend time, that the defendant files details of the agreement struck (see rule 10.3 (8)). The parties cannot agree to extend time longer than 56 days (see rule 10.3(7)). Option two is found in rule 10.3(9). This rule permits the defendant to apply for an order extending time for filing a defence. It necessarily follows from this that where the parties do not agree and the time within which to file the defence has passed, then the defendant must apply to the court. The reason why he must apply is that the failure to agree means that he does not have the right to file a defence without court approval. The practical effect is that the defendant cannot move forward in his defence. The rule does not say so in terms but it operates as if the rule had expressly so stated. If this is so, then it is appropriate to treat this as an automatic sanction imposed by the rules barring the defendant from filing his defence once the time has passed and he cannot secure agreement of his opponent for an extension of time. This rule-imposed necessity to seek curial approval means that he is seeking relief from what in effect is an automatic sanction imposed by the rules. The sanction is automatic because it operates by operation of the rule, without an application by anyone. Thus the application to file a defence out of time where agreement of the opponent has not been secured is not just an application under rules 10.3(9) and 26.1(2)(c), it is in reality an application for relief from the automatic stay imposed by the rules. Therefore, the criteria set out in rule 26.8 become applicable. Let me hasten to add that what I have just said applies only to the situation where the application to extend time within which to file the defence is made **after** the time to file the defence has passed. If the application is

made **before** the time to file the defence has passed, different considerations apply. In this latter situation, there is no need to take account of rule 26.8. The case before me is one in which the time to file the defence has passed and the application is made outside of that time.

19. Support for the position I have taken is to be found in the case of ***Robert v Momentum Services Ltd*** [2003] 1 W.L.R. 1577. In that case, the claimant applied for an extension of time to serve particulars of claims **within** the time stated to serve the particulars. The defendant opposed the application. The claimant applied under rule 3.1(2) (a) of the English Civil Procedure Rules, which is the equivalent of rule 26.1(2) (c) of the Jamaican CPR. In considering the matter at first instance, the judge took into account matters set out at rule 3.9(1) of the English rules which is similar to rule 26.8 of the Jamaican rules. Dyson L.J. said at paragraph 33:

> *I see no reason to import the rule 3.9(1) 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.*

20. Dyson L.J. referred to an earlier decision of the English Court of Appeal. This is the decision of ***Sayers v Clarke Walker*** [2002] 1 W.L.R. 3095. In that case, there was an application for extension of time within which to file an appeal. The application was out of time. Rules 3.1(2) (a) and 3.9(1) of the English rules were considered. Brooke L.J. stated at paragraphs 20 – 23

> ***20*** *The philosophy underpinning CPR Pt 3 is that rules, court orders and practice directions are there to be obeyed. If a sanction is imposed in the event of non-compliance, the defaulting party has to seek relief from the sanction on an application made under CPR r 3.8, and in that event the court will consider all the matters listed in CPR r 3.9, so far as relevant. Similarly, if an application is made under CPR r 3.6 to set aside a judgment obtained under CPR r 3.5, the court will consider all the matters listed in CPR r 3.9 unless it is shown that the right to enter judgment had not arisen at the time when it was entered: see CPR r 3.6(3) and (4).*
>
> ***21*** *In my judgment, it is equally appropriate to have regard to the check-list in CPR r 3.9 when a court is considering an application for an extension of time*

for appealing in a case of any complexity. The reason for this is that the applicant has not complied with CPR r 52.4(2), and if the court is unwilling to grant him relief from his failure to comply through the extension of time he is seeking, the consequence will be that the order of the lower court will stand and he cannot appeal it. Even though this may not be a sanction expressly "imposed" by the rule, the consequence will be exactly the same as if it had been, and it would be far better for courts to follow the check-list contained in CPR r 3.9 on this occasion, too, than for judges to make their own check-lists for cases where sanctions are implied and not expressly imposed.

***22** It follows that when considering whether to grant an extension of time for an appeal against a final decision in a case of any complexity, the courts should consider "all the circumstances of the case" including (a) the interests of the administration of justice; (b) whether the application for relief has been made promptly; (c) whether the failure to comply was intentional; (d) whether there is a good explanation for the failure; (e) the extent to which the party in default has complied with other rules, practice directions and court orders; (f) whether the failure to comply was caused by the party or his legal representative; (h) the effect which the failure to comply had on each party; and (i) the effect which the granting of relief would have on each party. In the case of a procedural appeal the court would also have to consider item (g), "whether the trial date or the likely trial date can still be met if relief is granted."*

21. I agree with Brooke L.J. when he makes the analogy between a rule or order stating the sanction and a breach of rule which results effectively in a sanction being imposed even though the rule does not, in terms, so state. Brooke LJ refers to cases of complexity but that description could not possibly be a qualification for consideration under rule 3.9 because it would be ludicrous to suggest that cases of complexity would fall to be considered under rule 3.9 but not non-complex cases when, experience and common sense suggests that cases of complexity are more likely to run afoul of the time limits than ordinary cases. From these two cases the principle which I accept is this: where an application is made for extension of time before the time for doing the act has passed then one applies rule 26.1 (2) (c) in a common sense way to the facts of the particular case bearing in mind rule 1.1. There is no need and it would indeed be undesirable to develop a judicial checklist in these situations. This approach should satisfactorily deal with most applications made before the time has passed. On the other hand, if the application is made outside of time and the rule breached has the practical effect of preventing the party in breach from proceeding without court approval then it would be appropriate to use rule 26.8. I now turn to the cases cited by Mr. Jones.

22. The first case cited by Mr. Jones is that of ***Linda Finnegan v Parkside Health Authority*** [1998] 1 W.L.R. 411. This case must be read with care. The claimant's case was struck out for want of prosecution. She served a notice of appeal 57 days late. Her application

for extension of time was dismissed and she appealed against that dismissal. The principle Mr. Jones sought to extract was that if Mr. Burgess failed to give a good reason for his inactivity, that fact alone, should not mean that his application ought to be refused. According to Mr. Jones, the claimants are not prejudiced in any way because they knew from the time of Mr. Hayne's application what the defence was likely to be and this they knew from 2000.

23. The English Court of Appeal in ***Finnegan*** set about the task of reconciling a number of decisions on Order 3 rule 5 of the Rules of the Supreme Court. The Court concluded that the terms of the rule conferred the widest possible discretion on the court in application for extensions of time. It also said that the absence of a good reason is not, without more, fatal to the exercise of the discretion. In reversing the judge, the Court stated that the judge had erred in ignoring the question of prejudice and concentrating solely on whether a good reason was advanced for the delay. Hirst L.J. who delivered the leading judgment said "*each application must be judged on its own facts, and where, as here, there is very considerable delay, with no explanation of the critical period, the Court will apply the guidelines laid down in Mortgage Corporation, including guideline 1 stressing that the rules are to be observed*". This case dealt with a delay of 57 days which was regarded as considerable. If 57 days was thought to be considerable, how much more two years, that is to say, the period between September 1998 and September 2000? The sense of this judgment is the greater the period of delay in making the application the greater the pressure on the party seeking the extension to offer some explanation. Hirst L.J. concluded his judgment with this ominous observation: *Consequently Mrs. Finnegan is by no means out of the wood, and even on an overall view, taking into account all relevant considerations including prejudice (if any), it by no means follows that she will succeed in gaining her extension.* The case was sent back to the Queen's Bench Division for reconsideration in accordance with the law declared by the Court of Appeal. It should be noted that the appeal was allowed on the point of principle, namely that the judge had misdirected himself in law and not on the merits. I would also observe that at the time of ***Finnegan*** the greater emphasis on the impact on the courts resources and other litigants was not of paramount consideration though they would have figured in the court's assessment even at a subconscious level.

24. His next port of call was the case of ***Coll v Tattum*** (delivered November 21, 2001) (Ch D). In that case, the claimant filed for judgment in default of acknowledgement of service or service of defence. The defendant resisted by filing immediately before the claimant's

application was heard, an acknowledgement of service and a defence. The defendant did not apply for an extension of time within which to file either document. Neuberger J. (as he then was) held the defendant should be allowed to file his defence even if he advanced no satisfactory reason for the delay once there was a bona fide valid defence. He held that it would be disproportionate to allow the claimant to enter judgment. In that case, the reason advanced by the defendant was that the solicitors were either ill or too busy. Needless to say, since this was case under the new English CPR Mr. Jones found greater delight in it than in ***Finnegan***. The learned judge posed this question, "Do the defendants need permission to acknowledge service out of time and to file their defences out of time?" He begins his answer by saying that the rules are less than clear on this issue and the footnotes to the Rules appear to point in different directions. Despite this, he was able to say that the general thrust of the CPR is that "if a party to litigation wants to do something after the prescribed time, then he must obtain the consent of the other side if possible (unless the Rules forbid it) or he must obtain the leave of the court" (see slip op 5). His Lordship added at page 6 that "it is a little difficult to see the point of the time limits for acknowledging service and filing a Defence (sic) if they can be disregarded by a defendant with impunity, or at least without any sanction." Thus far I am in total agreement with Neuberger J. This is consistent with the view I have taken in the case I have to decide.

25. His Lordship then went on to say that assuming that the defendants needed the court's permission to extend time for acknowledging service and for serving their defences he would consider it unjust to allow the claimant to enter judgment. In my view Neuberger J. did not have in mind the distinction between making an application for an extension of time within the time required to act and making an application for extension of time after the expiration of the time limit and the possible consequences of that distinction. One of the possible consequences is that the principles applicable to relief from sanctions were applicable. His Lordship focused almost exclusively on whether the defence filed was arguable and the question of proportionality. Additionally, the English rule is structured differently from the Jamaican equivalent. In Jamaica, certain of the considerations are mandatory and must be made before the other criteria are considered (see ***International Hotels*** case). This feature of the English rule undoubtedly has more flexibility than the Jamaican rule. In any event, there is not a single line in the judgment indicating how late the defendant was in filing his acknowledgment of service and defence. Despite this, I do not get the impression that the court there was dealing

with an application made two years after service with the amended statement of claim as in the case I have to decide.

26. ***Allied Dunbar Assurance Plc v Christine Julie Ireland*** [2001] EWCA 1129 (delivered June 12, 2001) was cited by Mr. Jones. The report handed to me is too brief to be of any value. Finally, there was the case of ***Equant SAS (UK Branch) v Stephen James and others*** [2002] EWHC (delivered October 4, 2002). The claimant applied for summary judgment and/or striking out of the defendants' defences as well as for an interim payment. The defendants sought to amend their defences in response to the striking out application. The striking out application was precipitated by the laconic and less that direct response by the defendants to the claimant's allegations. Mr. Leslie Kosmin, Q.C. sought refuge in the phrase "in the interests of justice" and held that the case should go to trial despite the fact that he had "considerable doubts as to the truth and accuracy of parts of the Defendants' case" (see para. 52).

27. The other three cases cited by Mr. Jones do not show that the courts there gave any consideration of the impact on other litigants who are waiting for their cases to be heard. As far back as 1998, before the new rules came into effect in England, the English Court of Appeal indicated in ***Arbuthnot Latham Bank v Trafalgar Holdings Ltd*** [1998] 1 W.L.R. 1426, at page 1436 said, through Lord Woolf M.R., that:

> *Litigants and their legal advisers, must therefore recognise that any delay which occurs from now on will be assessed not only from the point of view of the prejudice caused to the particular litigants whose case it is, but also in relation to the effect it can have on other litigants who are wishing to have their cases heard and the prejudice which is caused to the due administration of civil justice. The existing rules do contain time limits which are designed to achieve the disposal of litigation within a reasonable time scale. Those rules should be observed.*

28. Lord Woolf was speaking of the future which is now here. Those words were spoken in the context of an application to strike out proceedings for want of prosecution. It is my view that they are valid when any application for extension of time to comply with any rule, order or practice direction is made particularly if the application is made after the time within which the person is required to act has passed. Rule 26.8 (3) does not state the only matters to be taken into account. The rule states that the court should have regard to the matters there and not that those were the only matters the court should consider. Other considerations include those in rule 1.1. Rule 1.1 (2)(e), for example, enjoins the court to allot an appropriate share of the court's resources to any given case while taking into account the need to allot resources to other cases.

The analysis

29. I should point out that during the hearing of this matter the claimants have abandoned their claim for specific performance. It follows then that the arguments raised by the defendant on the bars to specific performance have suddenly become irrelevant and shall not be considered any further.

30. Just from the chronology, it is clear that Mr. Burgess was not prevented or hindered in any way from filing a defence. I am prepared to assume in Mr. Burgess' favour that his then attorneys filed no defence to the unamended statement of claim because it had no claim for relief. However on July 20, 1998, the statement of claim was amended and served on his attorneys on September 9, 1998. There is nothing on the record to indicate that those attorneys filed any defence in response to the amended statement of claim. Mr. Burgess said that he did not hear from either Mr. Bonner or Mr. Ballantyne so he decided to retain Mr. Haynes. Significantly, he omits to say whether he made any attempts to contact them, what those efforts were and the result of those efforts. In short, there is no satisfactory explanation accounting for the failure to file a defence between the time of service of the amended statement of claim and the retention of Mr. Hayes. To put it bluntly, there is no satisfactory explanation indicating why the defence was not filed in the time permitted under the old rules and there is no adequate explanation for the failure to make such an application between May 12, 1999, and September 21, 2000, when the application was filed. The defendant has not explained the failure to pursue the application between September 2000, when it was filed and September 2005, when Mr. Haynes applied to remove his name from the record on the basis that for years he has not been able to receive instructions from Mr. Burgess. Mr. Haynes' assertion that he failed to receive instructions has not been denied by Mr. Burgess. In fact, he has not even referred to that allegation of Mr. Haynes in his affidavit of January 2006. It seems that Mr. Burgess has accepted Mr. Haynes' assertions. What this means is that even on Mr. Jones' proposition founded on ***Finnegan***, a two year delay required an adequate explanation. It is my opinion that the silence of his attorneys, if this is true, is not a good reason. I would have thought that the silence would have injected some urgency in him. Worse yet, having filed the application for an extension of time I would have thought that the defendant would be unstinting in his efforts to have the summons heard. Even if I were to say that Supreme Court contributed to the delay on October 10, 2002, when the file was missing and again on October 24, 2002, when the file was also missing, the fact of the matter is that there is no evidence that

he sought to have the application heard between October 24, 2002, and 2005. The three years of slumber were brought to an end when the claimants reissued their notice of motion to be heard on October 6, 2005. It is this that has spurred him into action rather than a genuine desire to have his application heard. This is a case in which I can infer that the defendant filed the application but had no intention of diligently pursuing it. It seemed to have been designed as a stalling tactic rather borne out of genuine attempt to put his version before the court for adjudication. Where a litigant is out of time and he has filed an application for extension of time and he does not pursue that application with any degree of diligence, there will come a time when a court will be entitled to conclude that he had not genuine desire in pursuing the application and conclude that application was an abuse of process. This is an argument derived from ***Grovit v Doctor*** [1997] 1 W.L.R. 640 in which it was held that a claimant who launched an action with no intention of pursuing it has abused the process of the court. By parity of reasoning, there can be not logical opposition to the proposition that the same kind analysis can be applied to a defendant who has filed an application seeking some form of relief. This conclusion of abuse is not one that can usually be arrived at the time of the filing of the action or application unless there is compelling evidence showing this to be the case. Often times one will have to rely on the passage of time, an examination of the conduct of the litigant over time and an examination of all the circumstances of the case, including the nature, type and complexity of the case and then draw an inference from the facts established. In the case before me, the conduct of the defendant, the complexity of the case (meaning that this particular case was not complex by even the most generous definition of the word), his years of inactivity, the complaint by Mr. Haynes, his lack of explanations all point in the direction of abuse. It is time the abuse comes to an end.

31. The application filed in September 2000 could hardly be regarded as prompt even under the old rules. I accept that by the time the CPR came into force the application was before the court so it could conceivably be said that the application was made promptly and supported by an affidavit. However the explanations advanced are inadequate. The only other rule he could have complied with would be the time within which to file an appearance, which he did within the required time. I conclude that no satisfactory explanation has been advanced by Mr. Burgess for his conduct between 1998 and 2005. I also conclude that he had no bona fide intention of proceeding with application to extend time. This would mean that the defendant

has failed to meet the criteria of rule 26.8 (2) and so there is no need to go on to consider subparagraph (3) of the rule.

32. In the event that I am wrong in my conclusions concerning sub paragraph (2), I shall consider rule 26.8 (3) as well as rule 1.1. The interests of the administration of justice demand that litigation be pursued with diligence and resolution brought about as quickly as possible. It follows that litigants must play their part in meeting this objective. The failure in this case to pursue the application filed by Mr. Haynes is attributable solely to the defendant. He has had more than ample time to pursue his application. The remedy sought can indeed bring the defendant in compliance with the rules but that fact is not in itself a sufficient reason to grant the application because it is undoubtedly true that every failure to meet time limits can indeed be remedied by an extension of time. It could not be that this was the intention of the framers of the rules. They could not expect that extensions of time would be granted as a matter of course regardless of the reasons for the delay and the impact on other litigants in the particular case and other litigants generally.

33. No trial date has been set in this case. It means that it can be said that there is no trial date that can be affected. I have to consider the impact on any future trial date. The effect of granting permission would be to condemn the claimants to a possible two or three year wait to have the matter heard whereas if the application is denied they can pursue their remedy within weeks. Not granting the relief would bar the defendant from filing his defence. This is a vital consideration since litigants should not be readily barred from litigating their claims but in this case, the defendant has had more than ample opportunity to file and pursue his application. It would be wrong to convey the impression that breaches of timetables will be looked at benignly regardless of circumstances. The interests of the administration of justice, in this particular case, demand a robust response. His own lawyer complained about lack of instructions from him. This lawyer waited five long years. Then there was the two-year lapse between the amended statement of claim and the filing of the application itself. We are therefore looking at a seven-year delay. Why should the claimants wait another possible three years or even two years when the defendant has had all the time in the world to get his house in order?

34. Rule 1.1 (2) (e) is a recognition of the obvious, namely, that no country has infinite resources. Dealing with any case justly cannot mean dealing with another case unjustly because the previous case has taken up more than its share of the court's resources. This case has been allotted more than its fair share of resources. It has been before the court on numerous

occasions. The defendant has had since 2000 to pursue this application. This he has failed to do without even an attempt at an explanation. Were I to grant an extension of time I would not be contributing to the expeditious and fair disposition of cases. The amount of money involved is not very great. At this point, it may well be that the cost of litigation so far has exceeded the sum sought to be recovered. A costs order may not always provide adequate solace; at least not in a country where devaluation of the local currency is not an infrequent event. The application for extension of time to file defence is dismissed with costs to the claimants to be agreed or taxed.