[2024] JMSC Civ. 27

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU 2019 CV 00533

BETWEEN	**LEN CUNNINGHAM**	**1ST CLAIMANT**
AND	**LEROY CUNNINGHAM** **By and through their agent Joyce Bunting**	**2ND CLAIMANT**
AND	**VICTOR HALL**	**1ST DEFENDANT**
AND	**SONIA HALL**	**2ND DEFENDANT**

IN CHAMBERS

Jovell C. Barrett, Attorney-at-Law, instructed by Nigel Jones & Company, Attorneys-at-Law, for the Defendants

Yvonne D. Ridguard-Harris, Attorney-at-Law, of counsel, for the Claimants

Heard: December 11, 2023, January 22, 2024 and March 5, 2024

Failure to serve witness statement within the relevant time - Rule 29.11 of the Civil Procedure Rules (CPR) - Application for relief from sanction under Rule 26.8 of the CPR - Application made after trial had begun - Legal effect of irregular order granting extension of time - Whether the relevant witness statement was served within time as prescribed and whether any sanction applies, particularly if the relevant witness statement was filed within time - Whether a sanction applies and, if so, what is that sanction? - Whether the defendants had served the application for relief from sanction promptly - Whether the defendants' failure to comply was unintentional - Failure to comply with rules of court, attributed to previous defence counsel's alleged inefficiencies - Proper course to be followed by present counsel as regards such an allegation - Whether the defendants have provided a good reason for their failure to serve the relevant witness statement on time - Whether the defendants have good reason for not having applied for

relief from sanction, prior to the trial having commenced - Whether the party in default has generally complied with all other relevant rules, Practice Directions and court orders and directions - Whether an extension of time for service of the relevant witness statement can properly be granted if relief from sanction is not granted

ANDERSON K. J

BACKGROUND

The application before the court

[1] On the 13th day of December 2023, the defendants filed and served a notice of application of court orders for relief from sanction pursuant to ***rule 26.8 of the Civil Procedure Rules (CPR)*** for failing to file witness statements per court orders made at case management conference held on November 3, 2021. At the said conference, the learned Master, Miss Pamela Mason, had limited the number of witness statements to four (4) for the claimants and three (3) for the defendants and she ordered that the parties file and exchange witness statements on or before the 29th day of July, 2022. However, the defendants had only filed and served witness statements for themselves within time. Therefore, any other witness statement they wished to rely on for trial was neither filed nor served within time.

[2] The defendants made an application on the 15th day of December 2022 for an extension of time to file and serve other witness statements on which they intended to rely. Upon the hearing of that application, the court ordered that the defendants file and serve within thirty (30) days of that date, that is, on or by the 14th day of January 2023, two (2) additional witness statements from Lebert Rodgers and Errol White. However, the defendants failed to adhere to the order of the court because they filed the witness statement of Mr. Errol White on the 16th day of January 2023 and thereafter, served the said statement on the 20th day of January 2023.

[3] The defendants had made no application to obtain relief from sanction and to regularize the said witness statement until after the court (K. Anderson, J.) pointed out, at the trial on the 11th day of December 2023, that the defendants' witnesses - Lebert Rodgers and Errol White, would not be allowed to give evidence, unless the court

granted permission, per the case of ***Jamaica Public Service v Charles Vernon Francis and Anor [2017] JMCA Civ 2***. Counsel for the defendants then informed the court that the defence will no longer seek to rely on the witness statement of Lebert Rodgers, but that they still do wish to rely on the witness statement of Errol White. It is upon this premise that the defendants filed their pertinent notice of application, on December 13, 2023.

ISSUES

[4] The following issue and sub-issues are now before the court for determination:

Issue: Whether the court should exercise its discretion pursuant to ***rule 26.8 of the CPR*** to grant relief from sanction to the defendants for failure to comply with the order of the court as regards the serving of the witness statement of Errol White and, if not, what is the sanction that applies?

Sub-Issues:

a. Whether the relevant witness statement was served within time as prescribed and whether any sanction applies, particularly if the relevant witness statement was filed within time.
b. Whether a sanction applies, and if so, what is that sanction?
c. Whether the defendants have provided a good reason for not previously seeking relief under ***rule 26.8 of the CPR***.
d. Whether the application for relief from sanction was made promptly.
e. Whether the application for relief from sanction is supported by evidence on affidavit.
f. Whether the failure to comply with the court order, which was not complied with, was unintentional.
g. Whether the defendants provided a good reason for not serving the witness statement of Errol White within the time ordered by the court.
h. Whether the party in default has generally complied with all other relevant rules, Practice Directions and court orders.

i. Whether an extension of time for service of the relevant witness statement can properly be granted.

In these written reasons, the issues as aforementioned, will not necessarily be treated with herein, in the order as specified, immediately above.

LAW AND ANALYSIS

[5] The defendants' grounds for their application are outlined in the affidavit of Victor Hall, the first defendant, filed on December 13, 2023. The relevant sections are as follows:

> *'9. The witness statement of Mr. Errol White will assist the court and provides further evidence of my ownership and occupation of the disputed property from 1977 onwards.*
>
> *10. Master Miss Pamela Mason made case management conference orders on November 3, 2021, limiting the number of witnesses to four (4) for the claimants and three (3) for the defendants. That Master Mason ordered that the witness statements were to be filed and exchanged on or before the 29th day of July 2022.*
>
> *11. That though the witness statement of myself and my wife were filed and served within the time ordered, my attorney-at-law at the time, Mr. Rauol Lindo, who was instructed by the firm Robinson, Phillips and Whitehorne, was not very communicative and he did not request that we produce our other witnesses for a statement to be prepared for them. We changed our attorneys-at-law to the firm Usim, Williams & Co. in October 2022 and he advised us of the need to have the witness statement of my other witnesses filed and served and that an application for permission to file additional witness statements was required. I subsequently spoke to Mr. Errol White and Mr. Lebert Rodgers, who are well aware of the history of the land as well as my ownership of same and the occupation of the land by myself, my father and mother from the late 1970s. The witnesses, including Mr. White, confirmed their willingness to participate in the trial, after the date fixed for filing witness statements.*
>
> *12. That my then attorneys-at-law filed an application on November 24, 2022 for permission to file the witness statements of Mr. Errol White and Lebert Rodgers and same was granted by Master Ms. R. Harris on the 15th day of December 2022.*
>
> *13. The witness statement of Mr. Errol White dated January 13, 2023, was given to my attorneys-at-law on the said January 13, 2023*

and was filed by my then attorneys-at-law on January 16, 2023, and subsequently served on the claimants' attorney-at-law.

14. *That up to the pre-trial review on March 23, 2023, my wife and I were represented by Usim, Williams & Company, attorneys-at-law, and we were of the view that the proper application was made to allow us to rely on the witness statement of Errol White and that the order in relation to the filing of the said witness statement was complied with and that we would be permitted to rely on evidence from Mr. Errol White.*

15. *That subsequent to the termination of the retainer with Usim, Williams & Company, I was able to retrieve some of the documents on my file and same was turned over to the defendants' current attorneys-at-law, Nigel Jones & Company.*

16. *That it was not until December 11, 2023, that the issue of the current application of rule 29.11 was raised by his lordship, the honourable Mr. Justice K. Anderson, that we realized that the proper application for relief from sanction was not made by our previous attorneys-at-law as they had only asked for permission to file the witness statement of Errol White and for an extension of time to file the said witness statement. Since the order was granted by Master R. Harris, I was genuinely of the view that all was in order for us to rely on evidence from Mr. Errol White.*

17. *I have been advised by my current attorneys-at-law that an application for relief from sanctions is required to regularize the filing and service of the witness statement of Errol White. The failure to comply with the orders of the court was not intentional as every effort was made by my wife and I to comply with the orders of the court.*

18. *That this application for relief from sanction is being made promptly and as soon as reasonably practicable after realizing the need for the filing of this application. The application was not made at pre-trial review as we were unaware of the need for the filing of this application in light of the orders made by Master R. Harris on December 15, 2023.*

19. *We have a reasonable likelihood of successfully defending the claim and it would, therefore, not be in the interests of justice for us not to be allowed to call Mr. Errol White as a witness at the trial of the matter herein.*

20. *We have a good explanation for failing to file the witness statement within the time fixed by Master Pamela Mason at the case management conference hearing and for failing to file this application for relief from sanction prior to the commencement of the trial herein.*

21. *The witness statement of Errol White was filed on January 16, 2023 and subsequently served, prior to the last set of witness statements filed by the claimants on February 15, 2023, and as a result, the failure to comply with the case management conference orders has already been remedied.*

22. *That the claimants will suffer no prejudice if the application is granted. The witness statement of Errol White has been included in the judge's bundle and the claimants would have prepared to cross examine Mr. White.*

23. *To save time and costs and to allow for the effective use of the court's resources to achieve a just outcome in the circumstances, we humbly ask that this honourable court to grant our application for relief from sanction.*

24. *That we, the defendants, have generally complied with the other case management conference orders and the subsequent orders of this honourable court. That it would be in keeping with the overriding objectives and the interest of justice for the trial to proceed and the matter determined on its merits, after hearing from all the relevant witnesses for all the parties…'*

The Civil Procedure Rules (CPR)

[6] ***Rule 29.11*** provides for consequences of failure to serve witness statement or summary as follows:

> ***'(1) Where a witness statement or a witness summary is not served in respect of an intended witness within the time specified by the court then the witness may not be called unless the court permits.***
>
> ***(2) The court may not give permission at the trial unless the party asking for permission has a good reason for not previously seeking relief under rule 26.8.'***

[7] ***Rule 26.8*** of the CPR provides for relief from sanction as follows:

> ***'(1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be -***
>
> ***a) made promptly; and***
>
> ***b) supported by evidence on affidavit.***
>
> ***(2) The court may grant relief only if it is satisfied that -***

a) the failure to comply was not intentional;

b) there is a good explanation for the failure; and

c) the party in default has generally complied with all other relevant rules, practice directions and orders and directions.

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

a) the interests of the administration of justice;

b) whether the failure to comply was due to the party or that party's attorney-at-law;

c) whether the failure to comply has been or can be remedied within a reasonable time;

d) whether the trial date or any likely trial date can be still be met if relief is granted; and

e) the effect which the granting of relief or not would have on each party.

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

The Defendants' Submissions - A Summary

[8] The defendants have relied on the case of ***Hyman v Matthews SCCA Nos. 64 and 73/2003 (delivered 8 November 2006)*** to highlight that the court should not necessarily refuse an application for relief from sanction on the basis that the application was not made promptly. In ***Hyman (op. cit.)***, the application for relief from sanction was made three months after judgment was entered. The applicant had failed to comply with an unless order. The Court of Appeal, despite its findings that the application was not made promptly, did not agree with the trial judge's decision to deny relief from sanctions. One of the factors that the court took into consideration was that the legal vacation fell within the three-month period that the application was made.

[9] The defendants have further relied on the case of ***Villa Mora Cottage Ltd v Adele Shtern*** *SCCA No. 49/2009* where the defendants were to file and serve a list of

documents on or before the 25th of July 2005, failing which, their defence would stand struck out. The defendants failed to comply with the unless order. Consequently, their defence was struck out. On April 20th 2006 (approximately nine months after the defence was struck out), they filed an application requesting, inter alia, the restoration of their defence. The Supreme Court and the Court of Appeal did find that the application was made promptly. The Court of Appeal also held that, in examining the factors under rule 26.8(2), CPR, due attention must be given to rule 26.8(3). In arriving at its decision, the court also relied on the principle stated in ***International Hotels Jamaica Ltd v New Falmouth Resorts Ltd SCCA Nos. 56 and 95/2003*** that, a court considering the granting of relief from sanction is mandated to consider the factors numerated in ***rule 26.8(3)***. It is the defence's case that ***International Hotels v New Falmouth (op. cit.)*** sheds light on how the court should weigh the considerations. The defence further contend that the principle from the aforementioned case is that the court must have regard to **all** matters stipulated in ***rule 26.8(3)*** and those considerations must be read cumulatively.

[10] It is the defence's case that because the witness statement of Errol White was to be filed and served within thirty (30) days from the date of the order of Master R. Harris on December 15, 2022, the final date for filing and serving the said statement was January 14, 2023. The defence further contends that January 14, 2023 was a Saturday and, therefore, the next day that the Supreme Court Registry would be open would be Monday, January 16, 2023. The defence submits that ***rule 3.2(5) of the CPR*** states that:

> ***'3.2 (5) When the period specified by –***
>
> ***a) these Rules;***
>
> ***b) a practice direction; or***
>
> ***c) any judgment or order,***
>
> ***for doing any act at the registry ends on a day on which the registry is closed, it shall be in time if done before close of business on the next day on which the registry is open.'***

The defence further submits that, in light of the above, the witness statement of Errol White was, in fact, filed within the time permitted by Master R. Harris.

[11] The defence have proffered what they consider to be a good reason for not previously seeking relief under ***rule 26.8***. They have submitted that the information outlined in the first defendant's affidavit, filed on December 13, 2023, establishes a good explanation for non-compliance with the aforementioned rule. They claim that they were not properly advised by their former attorneys-at-law of the need for their other witnesses and/or statements. It is their contention that, in keeping with ***rule 3.2(5)***, having filed the witness statement of Errol White on January 16, 2023, they were partially compliant with the order of the court so they had believed that they would be allowed to rely on Mr White's evidence. The defendants maintain that they were unaware of the non-service of Mr. White's witness statement within the time required. The defence also contend that they were unaware that an application for relief from sanction was the appropriate application to be made in the circumstances and not an application for an extension of time. However, they further contend that when they became aware of the appropriate application, they filed for relief from sanction promptly.

[12] It is the defence's submission that what amounts to promptness is significantly dependent upon the circumstances of the particular case. The defence have relied on the case of ***Ray Dawkins v Damion Silvera [2018] JMCA Civ 25*** where the Court of Appeal opined as follows:

> *'[66] If the assessment of whether the application was made promptly should be dependent solely upon the time at which the breach occurred, the respondent's application was made approximately a year after the deadline for compliance and that could be viewed as amounting to inordinate delay. However, the fact that there had been partial compliance and that there was in effect no negative delays to the matter proceeding to trial, were circumstances which ought to be taken into consideration.*
>
> *[67] Further, the circumstances under which the breach was brought to the attention of the court at the time of trial ought also to be considered. In the factual circumstances of this case, the reaction of the respondent in applying for relief from sanction can then be regarded as prompt. Thus, in the peculiar*

> *circumstances of this matter, the learned judge cannot be faulted for having concluded that the first hurdle to the making of the application had been sufficiently met.'*

[13] The defence submit that similar to the ***Ray Dawkins (op. cit.)*** case, there was partial compliance in the case at bar and that there have been no negative delays to the trial on account of the defendants' non-compliance. The defence further submit that the defendants received an order extending the time to file two additional witness statements and were of the view that the court order was valid. In addition, the defendants maintain that they had provided the witness statement of Errol White to their former attorneys within the time allowed and were of the view that their attorneys had complied with the relevant court order.

[14] The defence maintain that they had no intention of failing to comply with the order issued by the court at case management conference or the further extension they had been granted. They claim that the failure to file and serve additional witness statements was due to the failure of their former attorneys-at-law to properly advise the defendants and to make arrangements for the statements from the additional witnesses to be taken, filed and served. The defence further claim that after the defendants obtained new legal representation, the witness statement of Errol White was given to the defendants' former attorneys-at-law on January 13, 2023. The defendants, therefore, claim they were of the view that they were compliant.

[15] It is the defence's case that they have generally complied with all other orders and directions up to the trial of this matter.

[16] The defence claim that it would be in the interests of justice to grant the application for relief from sanctions as there is a reasonable likelihood of successfully defending the claim. The defence further claim that the evidence proffered by the claimants show that they were never in possession of the land in dispute. The defence maintain that what was allegedly being done on the land by the claimants' alleged agent was being done without the permission of the claimants. It is the defence's case that the claimants have failed to provide evidence that they had a sufficient degree of physical custody and control ('factual possession') and an intention to exercise such custody and

control on their own behalf and for their own benefit ('intention to possess'). This court has rejected this particular contention, for present purposes, since it is not relevant, unless this court is considering applying ***rule 26.8(3) of the CPR***. This court though, for reasons which will become apparent, upon further reading of this written ruling and the reasons for that ruling, as expounded herein, will not need to consider and therefore has not considered ***rule 26.8(3) of the CPR***. The defendants have failed to overcome the hurdles for them, as set out in ***rule 26.8(1) and (2) of the CPR***, which must be considered, collectively.

[17] It is the defence's case that from the affidavit evidence of Mr. Victor Hall that the defendants' failure to comply with the orders of the court was not due to the fault of the defendants, but rather, was due to the fault of the defendants' then attorneys-at-law, who it should be carefully noted, are not their present attorneys-at-law.

[18] Notwithstanding, the defence maintain that the failure to comply with the order of the court has been remedied and did not affect the trial dates for the case at hand. They further maintain that the trial has been part-heard and the claimants' evidence is still being taken. The defence claim that the trial dates fixed in this matter were met without any issues and that the further dates set in this matter can be met without any issue as the witness statements were served from January 20, 2023 and included in the court's bundle. The defence also claim that the matter would have likely proceeded and evidence taken from the defendants' witnesses without any objection from the claimants. The defence maintain that the claimants were prepared to deal with evidence from the defendants' witnesses and that this can be seen from the fact that their witness statements were included in the court's bundle.

[19] It is the defence's case that the claimants will suffer no prejudice by the granting of the application. The defence further contend that the defendants will be severely prejudiced if the court does not grant the application as it will have the consequence of leaving the defendants without supporting witnesses to confirm their occupation and possession of the disputed land.

[20] Additionally, the defence counsel has contended that the defendants had a good

reason for not previously seeking relief under ***rule 26.8 of the CPR***, that being, that they were not aware, prior to when I had brought it to their attention in court, during the trial itself, that such an application may by then, have been necessary. This court has rejected this particular contention of the defendants entirely, because ignorance of the law is no excuse. Further, that issue had, by the time when the trial of this claim began, been frequently litigated and adjudicated on, both in this court and in the Court of Appeal. Law, just as most other important aspects of life generally, evolves over time. Legal practitioners who fail to keep up with the evolution of same, do so, not only at their own peril, in terms of the risk of negligence - liability for themselves, but also, to the peril of their clients.

The Claimants' Submissions

[21] It is the claimants' case that the defendants have provided no good reason for having filed and served the witness statements out of time. Further, the claimants contend that the defendants have provided no good reason for having filed the application for relief from sanction after so much time has elapsed. The claimants have relied on the Court of Appeal case of ***Oniel Carter and others v Trevor South and others [2020] JMCA Civ 54*** and they maintain that, based on the aforesaid case, the court should not exercise its discretion to grant relief from sanction without any explicit and good reason for the filing of the witness statement out of time. Further, the claimants submit that, based on the said case, the court should not exercise its discretion to grant relief from sanction without any explicit and good reason having been provided by the defendants, for their not having, prior to the commencement of trial, sought relief under ***rule 26.8 of the CPR***.

[22] The claimants have submitted that the court should not be left to imply the reason or reasons for the late filing of the witness statements and/or be made to assume the reason or reasons for the defendants' attorneys' failure to comply with the court order. The claimants have also submitted that the records indicate that the attorneys, who filed the witness statements on behalf of the defendants, were the said attorneys who represented the defendants at the pre-trial review in March 2023. In addition, the

claimants have submitted that the defendants' current attorneys were on record for six (6) months prior to the hearing of 11th day of December 2023; however, no application for relief from sanction was made by either set of attorneys.

[23] The claimants claim that, had the court not brought the issue of the appropriate application to the attention of the parties at the hearing, the defendants' witnesses may have been called without opposition from the claimants. It is part of their contention though, that, since the court has raised the issue, the court must be provided with a good reason to exercise its discretion in the circumstances.

The Court's Analysis:

Whether the relevant witness statement was served within time as prescribed and whether any sanction applies, particularly if the relevant witness statement was filed within time

[24] It is the defence's case that by filing the relevant witness statements on Monday, January 16, 2023, they have complied with the order of Master Harris since the time for compliance with the said order had expired on Saturday, January 14, 2023 and ***rule 3.2(5) of the CPR*** permits compliance '*before the close of business on the next day on which the registry is open when the period specified by the rules or a practice direction or any judgment or order for doing an act at the registry ends on a day on which the registry is closed'*. This is an accurate interpretation of the aforementioned rule. However, there is a distinction to be made between the act of filing witness statements and serving them. ***Rule 29.11*** provides for consequences of failure to **serve** witness statements. Accordingly, while the defence filed the witness statements within the prescribed time, **they failed to serve the said witness statements within time**. In fact, the defence served the witness statement of Mr. Errol White on January 20, 2023, four (4) days after the time had expired. In light of these circumstances, an application for relief from sanction per ***rule 26.8***, was necessary, unless the defendants were of the view that they could successfully rely on ***rule 29.11(2) of the CPR*** to assist them. That last cited rule, allows a party who or which was not served a witness statement within time, at the trial of the claim, to nonetheless, seek and possibly, then obtain the court's

permission to call the said witness to give evidence. The court can only then give that permission though, if the party in default, has a good reason for not previously seeking relief under ***rule 26.8 of the CPR*** (relief from sanction).

[25] The facts of the case at bar indicate that the defence did not comply with the initial order made by Master Mason in case management conference on November 3, 2021. Likewise, the defence did not comply with the second order made on December 15, 2022 providing them with an extension of time to file the relevant witness statement within thirty (30) days of the date of the order. It is worthy of note that, having failed to comply with the initial order of the court, the defence should have acted timely to apply for relief from sanction under ***rule 26.8*** instead of applying for an extension of time to file the said witness statement. The court should have directed the parties to the proper course of action since the defence's initial failure triggered the sanction inherent in rule ***29.11(1)*** and the defence were therefore obliged to apply for relief from this sanction. Consequently, an extension of time to file the relevant witness statements, at that juncture, was improper. It would seem that the order of extension of time granted, in these circumstances, was irregular, pursuant to the rules of court.

[26] It is my considered view that, although this court's orders granting, on a separate occasion, an extension of time re some of the defendants' intended witness statements was irregular, as a court of co-ordinate jurisdiction, this court cannot overturn or over-rule the order or orders granted by another judge. According to the case, ***Strachan v Gleaner Company Limited and Anor [2005] UKPC 33, at page 269, paras. f, g and h:***

> *'The Supreme Court of Jamaica is a superior court of unlimited jurisdiction, that is to say, it has jurisdiction to determine the limits of its own jurisdiction. From time to time, a judge of the Supreme Court will make an error as to the extent of his jurisdiction. Occasionally, his jurisdiction will have been challenged and he will have decided (after argument) that he has jurisdiction; more often, he will have exceeded his jurisdiction inadvertently; its absence having passed unnoticed. But whenever a judge makes an order, he must be taken implicitly to have decided that he has jurisdiction to make it. If he is wrong, he makes an error whether of law or fact which can be corrected by the Court of Appeal. But he does not exceed his jurisdiction by making the error; nor does a judge of co-ordinate jurisdiction have power to correct it. As*

> *between the parties, and unless and until reversed by the Court of Appeal, his decision is res judicata.'*

[27] Furthermore, the Privy Council case of ***Isaacs v Robertson (1984) 43 WIR, page 129, paras. b and c,*** held, per Robotham, JA (Ag.), citing the passage in the judgment of Romer, LJ in ***Hadkinson v Hadkinson [1952] P 285 at page 288***, that:

> *'it is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void…A party who knows of an order, whether null and void, regular or irregular, cannot be permitted to disobey it…'*

Therefore, though the order of December 15, 2022 was irregular, the parties, and in this case, particularly the defence, had to obey the order unless or until it was set aside by the Court of Appeal, which in this claim, did not happen. However, since the defence disobeyed the order, they should have been prepared to apply for relief from sanction at the earliest opportunity.

The Court's Analysis:

Whether a sanction applies and, if so, what is that sanction?

[28] In the case at bar, the defendants had filed and served their personal witness statements, within time. However, the first defendant claims that the failure to file and serve the additional witness statement was due to their initial attorney's lack of communication, inter alia. The defendant, in his affidavit, claims that the defendants had changed attorneys and that Usim, Williams & Co. began to represent them in October 2022. He further claims that this second firm applied to the court for permission to file the witness statements of both Mr. Errol White and Lebert Rodgers and said permission was granted by Master R. Harris on December 15, 2022. However, the facts show that, though the witness statement for Errol White was filed within time, the said statement was not served until after the extended time had expired.

[29] The defence claims that the final day for filing, based on the time period ordered by the court for the extension, fell on January 14, 2023, and since January 14,

2023, was a Saturday, they were partially compliant when they filed the said statements on the following Monday because the Registry is not open on weekends. It is correct to state that the defendants were partially compliant with that particular court order. Nonetheless though, such partial compliance can be of no assistance to them given the nature of their present application and the reason why same is necessary. That is so, because of the specific wording of ***rule 29.11(1) of the CPR***. That rule, as earlier quoted herein, refers to the **service** of a witness statement within the time as specified by the court. That particular rule was not complied with and there exists a sanction which has automatically been imposed on the defendants, arising from that non-compliance. That sanction is that the witness whose witness statement was not served within the time ordered by the court, cannot be called on, to give evidence at trial, unless the court permits that, during trial. The circumstances in which this court can do that, are severely circumscribed by the wording of ***rule 29.11(2)***.

The Court's Analysis:

Whether the application for relief from sanctions is supported by evidence on affidavit

[30] It is clear from the documents submitted to the court in the case at bar that the defence has provided affidavit evidence to support their application for relief from sanction. Accordingly, it is my view that the defence has overcome the hurdle as set out in ***rule 26.8(1) (b) of the CPR***.

The Court's Analysis:

Whether the application for relief from sanctions was made promptly

[31] The facts in the case at hand indicate that the defendants had filed their application for relief from sanctions on December 13, 2023, two days after the court had directed the parties as to the appropriate application to be brought in the circumstances. Thus, it appears that the defence acted promptly, at least, at that stage, to apply for relief. It is to be noted, however, that time in the context of the present application began to run against the defendants from as of the date when this court's order of

December 15, 2022, was breached. That date is January 17, 2023, which would be the next work day after the last date for compliance. The defence claim that they had thought that they had, through their attorneys-at-law, complied with the order of extension for filing and serving the witness statements, and that their additional two witnesses could be called to give evidence, until the court directed otherwise on December 11, 2023. I am of the view that, while the defendants' application for relief appears, on the face of it, to have been made after an inordinate delay, it was made promptly in the particular circumstances of this particular case. It is noteworthy that, in the case of ***H.B. Ramsay & Associates Ltd and others v Jamaica Redevelopment Foundation Inc and anor [2013] JMCA Civ 1***, it was suggested that the term "promptly" as is used in ***rule 26.8(1)(a)*** carries with it a measure of flexibility. The Court of Appeal in the ***H.B. Ramsay Case (op. cit.), at page 5, paragraph 10,*** stated: *'if the application has not been made promptly, the court may well, in the absence of an application for extension of time, decide that it will not hear the application for relief…the word "promptly", does have some measure of flexibility in its application. Whether something has been promptly done or not, depends on the circumstances of the case.'*

The Court's Analysis:

Whether the failure to comply with the court's order was unintentional

[32] In so far as the witness statement of Errol White was filed within time, it also could and should have been served within time. The defendants' present counsel have submitted to this court that the said non-compliance was unintentional. There exists, though, absolutely no evidence whatsoever, as could properly serve to justify this court, in reaching that conclusion. No affidavit evidence exists, either stating explicitly or implicitly, that the said non-compliance was unintentional. Evidence would have been required to have been provided to this court, by, at the very least, a member of staff - whether attorney or otherwise, stating what was/were the reason(s), as to why the relevant witness statement was not served within time. It is the law firm of Usim, Williams & Co. that ought to have done that, as that firm was the one which was representing the defendants at the relevant time of non-compliance. An evidentiary

burden existed on the defendants' shoulders, for the purposes of their present application, to have led that evidence. Having not done so, this court has concluded that the relevant non-compliance, was intentional.

[33] This court has so concluded, because, in respect of an application such as this, the burden of proof has, at all times, rested on the shoulders of the applicants. That is also why the evidentiary burden just referred to, rested on their shoulders. The defendants have not met, much less overcome, either of those burdens, in respect of their bold contention, that their failure to comply with the court's order re service of the witness statement of Errol White, was unintentional.

The Court's Analysis:

Whether the defendants provided a good reason for not serving the witness statement of Errol White within the time ordered by the court

[34] In the Privy Council case of ***The Attorney General (Appellant) v Universal Projects Limited (Respondent) [2011] UKPC 37***, a claim, which was filed and served on December 16, 2008, was brought against the appellant for a sum in excess of $31Million pursuant to a contract between the appellant and the respondent. The appellant claimed that the attorneys, who had conduct of the matter, were unaware of the claim as a result of administrative inefficiencies. The respondent applied to the court to obtain a judgment in default of appearance and defence. The application was served on the appellant on January 23, 2009.

[35] On February 2, 2009, the appellant assigned the matter to another attorney in the department, after which, the matter was reassigned to the initial attorney. Thereafter, the department entered notice of appearance. By then, the time for filing a defence had expired; however, the attorney for the department happened to be in court on February 20, 2009, when she discovered that the matter was listed that same day for an application for judgment in default of appearance and defence. The attorney made an oral application for an extension of time to file a defence and the judge granted an

extension until March 13, 2009 adding that *'in default leave is granted to the claimant to enter judgment against the defendant'*.

[36] The department decided to retain external counsel to conduct the matter. On March 13, 2009, the department wrote to the court explaining that they needed more time to properly instruct external counsel and make submissions. On March 16, 2009, the claimant entered judgment. On the said date, the court granted the defendant permission to amend its application to include an application for an order for the default judgment to be set aside; however, the court directed the defendant that what was required was an application for relief from sanctions under rule 26.7, CPR. The court treated the defendant's application as though it had been made under the aforementioned rule and dismissed it. Thereafter, the Court of Appeal dismissed the defendant's appeal. The defendant appealed to the Privy Council.

[37] The Privy Council found that the defendant had not provided any good explanation within the meaning of ***rule 26.7(3)(b) of the CPR of Trinidad and Tobago*** for the failure to serve a defence by March 13, 2009 and that was fatal to the defendant's case. The board found that *'a party cannot rely on such things as administrative inefficiencies, oversight or errors in good faith. A good explanation is one which properly explains how the breach came about, which may or may not involve an element of fault such as inefficiency or error in good faith. Any other interpretation would be inconsistent with the overriding objective of dealing with cases justly and should therefore be avoided…'*

[38] It is my considered view that, similar to ***The Attorney General v Universal Projects (op. cit.)*** case, the defendants, in the case at bar, have proffered no good explanation for not serving the additional witness statements on time. It is quite alarming that the defence failed to serve the said witness statements within time, even after they were granted an extension of time to do so, after the first court order had expired. The first defendant's affidavit mentioned change of attorneys, inadequate communication between the defendants and their attorneys, ignorance of the rules of court and his ability to retrieve only some of the documents on his file before retaining Nigel Jones &

Company. Further, Mr. Hall's affidavit has made it clear that he arranged to have the other witnesses give evidence on his behalf after he changed attorneys and upon the advice of his second set of attorneys in October 2022, that is, after the earliest date for filing and serving said statements had passed. This shows that the defendants contributed to the default. The foregoing embodies what the defence considers to be a good explanation for the failure. To my mind, those reasons do not, even when considered in aggregate, as distinct from individually, amount to a good explanation.

[39] In ***HB Ramsay & Associates and others v Jamaica Redevelopment Foundation and another (op. cit.), at page 7, paragraph 15***, the court found, that:

> *'The learned Master's original order had already been disobeyed so it ought to have been a matter of priority for the appellants and their attorneys-at-law to ensure that the extended time was met.'*

The court also found, ***at pages 9 -10, paragraphs 22 - 23****,* that:

> *'where there is no good explanation for the default, the application for relief from sanctions must fail. Rule 26.8(2) stipulates that is a precondition for granting relief that the applicant must satisfy all three elements of the paragraph … Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation.'*

[40] The principles outlined in ***HB Ramsay (op. cit.)*** were affirmed in the cases advanced by the claimants, being ***Jamaica Public Service Company Limited v Charles Vernon Francis (op. cit.)*** and ***Oneil Carter v Trevor South (op. cit.)***.

[41] The defence have submitted that, like the case of ***Ray Dawkins (op. cit.)***, they had partially complied with the (second) order of the court; however, the case at bar must be distinguished from the former, in that, in the ***Dawkins case (op. cit.)***, the court stated, ***at page 26, paragraph 71***, that:

> *'the fact that the witness statement for the respondent was filed even before the case management conference…supports the contention of the attorney-at-law that this failure to serve was due to oversight and not so much inefficiency. This then is one circumstance where oversight is excusable. In these circumstances, it cannot be said that the learned judge can be faulted for finding that the respondent provided a good explanation.'*

However, in the case at bar, the defence counsel then on record, filed the witness statement of Errol White on the final day of the deadline, then waited until four days thereafter, to serve same. That clearly, to my mind, suggests inefficiency, as distinct from oversight, especially bearing in mind, the context, in that, there had been earlier non-compliance and that is why the extension of time was granted.

The Court's Analysis:

Proper course to be followed by present counsel as regards allegations of inefficiencies made by defendants against former counsel

[42] The defendants have submitted that their former attorney-at-law, Mr. Raoul Lindo, was not very communicative and that he did not request that they produce their other witnesses for their statements to be prepared. Further, the defendants have submitted that they had changed attorneys to the firm, Usim, Williams & Co., in October 2022, and that up to pre-trial review on March 2023, they were of the view that the firm had made the proper application to allow them to rely on the witness statement of Errol White. It appears that the defendants are implying that their previous attorneys-at-law have been negligent or have demonstrated some level of incompetence while they acted on the defendants' behalf. The Caribbean Court of Justice case of ***Cadogan v. The Queen, [2006] CCJ 4 (AJ), at paragraph 14*** of that judgment, ruled on the issue of incompetence of counsel. The court relied on the statement of Sir David Simmons CJ in ***Weekes v The Queen - Criminal Appeal No 4 of 2000 (unreported)*** that:

> *'All attorneys-at-law will do well to take to heart the advice of Judge LJ in **Doherty and Mc Gregor [1997] 2 Cr App R 218, [1997] EWCA Crim 556**: "Unless in the particular circumstances it can be demonstrated that, in the light of information available to him at the time, no reasonably competent counsel would sensibly have adopted the course taken by him at the time when he took it, these grounds of appeal [based on criticisms of former counsel] should not be advanced." There are difficulties which face counsel under the immediate pressure of the trial process and those difficulties should be carefully analysed. At all times newly instructed counsel should approach the matter with a reasonable degree of objectivity.'*

It is be noted that, the court, in considering the issue of incompetence of counsel, is

concerned with whether the particular counsel in question had acted or failed to act in a way that was, or which occasioned, a miscarriage of justice. Where a party contends that his or her counsel's acts or omissions amount to or have occasioned a miscarriage of justice, that party bears the burden of proving that assertion.

[43] In the case at bar, the court has been presented with allegations of negligence and/or incompetence made by the defendants with respect to their former counsel. However, what is not before the court is the defendants' former attorneys' response(s) in answer to the said allegations. What is worse, is that the in the matter at hand, the present attorneys on record for the defendants, have never even sought to obtain their former attorneys' response(s) in answer to the said allegations. It is imperative that the court be given the opportunity to hear both the defendants and their former attorneys on the issue in order for the court to be in a position to determine whether there was any actual incompetence. Further, current counsel for the defendants had a responsibility to approach the allegations proffered by their clients objectively. The defendants' current attorneys-at-law have a duty to communicate these allegations to former counsel to ensure that they are aware of said allegations and to allow them time to respond to same. In this way, newly instructed counsel would be approaching the matter with *'a reasonable degree of objectivity'* per ***Cadogan v. The Queen (op cit.)***. The issue of negligence and/or incompetence of counsel must be raised in a fair way and not just by the litigant and his/her current attorney. The principles of natural justice dictate that every person, against whom allegations have been made, should be given the opportunity to be heard, inter alia. Also, the court must always act as an impartial tribunal and in good faith. Therefore, it would be irregular and improper for the court to consider this issue on the basis that only one party, being the defendants, have proffered assertions on the matter; while, the other party, being the defendants' former counsel, have not. That those prior attorneys have not done so, is not due to any omission on their part. If that had been so, that would be entirely different from the situation in the matter at hand and therefore, could have led to a different outcome for the defendants, as regards this issue. It is imperative that the party who makes an assertion of negligence, as regards their prior counsel, presents all relevant information before the court. The court has not been presented with any evidence and/or

representations from the defendants' former counsel concerning these accusations. In the circumstances, this court is, just as present counsel for the defendants, unable to address the allegations of negligence made against the defendants' prior counsel, objectively. Accordingly, I have no choice but to reject these allegations and the defendants' contentions on this this issue, which the defence has raised.

The Court's Analysis:

Whether the party in default has generally complied with all other relevant rules, Practice Directions and court orders

[44] There has been, to my mind, general compliance with all other relevant rules, Practice Directions and court orders on the part of the defence. There has been some non-compliance but to my mind, it would be inappropriate to describe same as constituting, general non-compliance with other orders, rules and/or Practice Directions.

The Court's Analysis:

Whether an extension of time for service of the relevant witness statement can now properly be granted

[45] An extension of time for service of the witness statement of Errol White cannot now properly be granted in accordance with ***rule 26.1(2)(c) of the CPR*** which allows this court, except where those rules provide otherwise, 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.'* To my mind, our rules of court provide otherwise in ***rule 29.11 of the CPR***. An extension of time cannot be granted in circumstances wherein a sanction has been imposed, unless relief from sanction has been granted. See: ***Dale Austin v The Public Service Commission [2016] JMCA Civ 46, at pages 37 & 43, paras. 88 & 101***, per Edwards (JA) (Ag.) (as she then was).

CONCLUSION

[46] The defendants have failed to establish that they had a good reason for having failed to comply with the relevant court order and they have also failed to establish that

their failure to comply with that order, was unintentional. Added to those failures, the defendants have also failed to establish that they had a good reason having not, prior to trial, applied for relief from sanction. In the particular context, of this particular claim, the defendants needed to have satisfied this court, of that, in accordance with ***rule 29.11(2) of the CPR***. In view of the foregoing, the defendants' application for relief from sanction must fail for they have not satisfied all three elements of ***rule 26.8(2)***. Since they have failed to satisfy all three threshold requirements set by the said rule, it is unnecessary for me to consider the provisions of ***rule 26.8(3)***. An applicant who seeks relief from a sanction imposed by his failure to obey an order of the court, must comply with the provisions of ***rule 26.8(1)*** in order to have his application considered. If he overcomes that hurdle, he has to satisfy all three provisions of ***rule 28.6(2)***. If he does not satisfy the said three elements, there is no need for the court to consider the provisions of ***rule 26.8(3)*** in relation to the applicant's application. It is incumbent upon attorneys and their clients to be mindful of how they conduct their matters in court and they should bear in mind the effect of non-compliance. It is not sufficient to advance that the parties will be prejudiced if they are not able to call witnesses at a trial.

DISPOSITION

[47] This court, therefore, now orders as follows:

1. The orders sought in the defendants' notice of application for court orders, which was filed on December 13, 2023, are refused.

2. The costs of that application are awarded to the claimants, and such costs shall be taxed, if not sooner agreed.

3. The witness statement of Errol White, which was filed on January 16, 2023, is not permitted to stand as properly served, and the defendants are not permitted to rely on the evidence of the said Errol White upon the trial of this claim.

4. The claimants shall file and serve this order.

.....
Hon. K. Anderson, J