[2024] JMSC Civ. 108

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU 2018HCV03965

BETWEEN	**JONATHAN DAVIS**	**CLAIMANT**
AND	**DENNIS TULLOCH**	**DEFENDANT/ ANCILLARY CLAIMANT**
AND	**THE PARISH COUNCIL FOR THE PARISH OF ST. CATHERINE**	**1st ANCILLARY DEFENDANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**2nd ANCILLARY DEFENDANT**

IN CHAMBERS

Monique McLeod, instructed by Roger & Associates, Attorneys-at-Law for the Claimant

Tanisha Tapper, instructed by Nigel Jones & Co., Attorneys-at-Law for the Defendant/Ancillary Claimant

Stuart Stimpson and Dimitri Mitchell, instructed by Director of State Proceedings, for the 2nd Ancillary Defendant

Heard: July 18 and September 27, 2024

CIVIL PROCEDURE: 2nd Ancillary Defendant's failure to file and serve witness statement within the relevant time - Rule 29.11 of the Civil Procedure - Application for relief from sanctions under Rule 26.8 of the CPR - Whether the relevant witness statement was filed and served within time as prescribed or whether any sanction applies, and if so, what sanction applies - Whether the application for relief was filed promptly - Whether the application for relief, filed, is supported by evidence on affidavit - Whether the affidavit in support of the application for relief is admissible - Whether the failure to comply was unintentional - Whether there was a good explanation for the failure - Whether the 2nd ancillary defendant generally complied with all other relevant rules, Practice Directions, orders and directions - Whether an extension of time for filing and service of the relevant witness statement can now properly be granted - The defendant's/ancillary claimant application for relief from sanctions - Whether the relevant list of documents was filed and served within time as prescribed or whether any sanction applies, and if so, what sanction applies - Whether the application for relief was filed promptly - Whether the application for relief, filed, is supported by evidence on affidavit - Whether the failure was unintentional - Whether there was a good explanation for the failure - Proper course to be followed by present counsel as regards allegations of inefficiencies against former counsel - Whether the defendant has generally complied with all other relevant rules, Practice Directions, court orders and directions - Rules 29.11, 26.8, 26.1, 26.7, 28.14, 30.3, of the CPR

ANDERSON K. J

BACKGROUND

Applications by defendant/ancillary claimant and 2nd ancillary defendant for relief from sanctions for the defendant's failure to provide standard disclosure and the 2nd ancillary defendant's failure to file and serve witness statement within the respective times ordered by the court

[1] On July 18, 2024, two applications were heard by the court. Those applications were unopposed.

[2] Those respective applications were made by the defendant/ancillary claimant and the 2nd ancillary defendant in this claim. The defendant/ancillary claimant sought relief from sanctions, arising from his failure to provide standard disclosure within the time as was ordered by Jackson, J., being on or before June 14, 2023. On the other hand, the 2nd ancillary defendant sought relief from sanctions for having failed to file and serve the relevant witness statement on or before January 10, 2024 as ordered by the court. I will

begin by addressing the application, which was filed by the 2nd ancillary defendant, before addressing the defendant/ancillary claimant's application.

The 2nd Ancillary Defendant's Application for relief from sanctions:

[3] The court made the following orders on July 18, 2024:

> *'1. The defendant's defence, which was filed on February 11, 2019 and which was served on said date, on the 2nd ancillary defendant, and on February 25, 2019, on the claimant, shall be deemed as if having been filed and served within time, and no sanction shall be applied to the defendant arising from his having failed to file and serve within time.*
>
> *2. This court's respective rulings as regards the 2nd ancillary defendant's amended application for court orders, which was filed on July 8, 2024, is reserved and on the defendant's application for court orders, which was filed on February 5, 2024, is reserved, and this court's rulings on each of those applications shall be announced during a hearing, which shall take place in chambers via video conference and be presided over by Anderson, J., on September 27, 2024, commencing at 10:00 a.m. for 45 minutes.*
>
> *3. The costs related to the hearing of both of the applications referred to in order number 2 above, are divided, such that for the 2nd ancillary defendant's amended application, the costs shall relate to 30 minutes of court time today and for the defendant's application, the costs shall relate to 60 min. of the court's time today, and the question as to how such costs should be ultimately addressed by the court, shall be reserved until September 27, 2024 at 10:00 a.m., when this court's order as to same will be announced.*
>
> *4.The 2nd ancillary defendant shall file and serve this order.*

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

[4] The 2nd ancillary defendant has proffered that ***rule 29.11(1) of the Civil Procedure Rules (CPR)*** provides that where a witness statement or 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. The 2nd ancillary defendant has also proffered that it is clear from the aforementioned rule that the sanction imposed, for failing to file and serve a witness statement in time, is not being able to call that witness at court. Further, the Attorney General has submitted that ***rule 26.7(2) of the CPR*** provides that, where a party has failed to comply with any rule, direction or order, any sanction for non-compliance imposed by the rule, direction, or the order has effect, unless the party in default applies for and obtains relief from the sanction. The Attorney General has also submitted that it is clear from the aforesaid rule that, unless a party, whose witness statement was not filed and served in time, applies for and obtains relief from sanctions, that party will not be able to call his/her witness at court.

[5] The Attorney General has asserted that ***rule 26.8 of the CPR*** provides guidance on how to apply for and obtain relief from sanctions.

[6] It is the 2nd ancillary defendant's case that it filed an application seeking relief from sanctions on January 19, 2024, approximately nine calendar days after its failure to file and serve the pertinent witness statement, by January 10, 2024.

The Court's Analysis

[7] It is important to note that the 2nd ancillary defendant did not comply with the order of the court to file and exchange the pertinent witness statement by January 10, 2024. Therefore, the sanction, per ***rule 29.11of the CPR*** was imposed from January 11, 2024, and in light of this, an application for relief from sanctions was necessary. This sanction is, as set out in ***rule 29.11 of the CPR*** and is that, since the party's witness statement was not served within time, then that witness who provides that statement, cannot be called upon to give evidence at trial, unless the court permits. I find that the 2nd ancillary defendant's counsel - Mr. Mitchell, in his written submissions, was correct in his interpretation of ***rule 29.11***. However, it must be underscored that the aforesaid rule also provides that the court ought not to permit same, unless the party asking for permission, that is the defaulting party, had a good reason for not previously seeking relief under ***rule 26.8 of the CPR***, which sets out the conditionalities to be met by a

party, who wishes to obtain via this court, relief from sanctions per ***rules 26.8(1) and (2)***. This rule goes on to specify numerous factors in ***rule 26.8(3) of the CPR***, which, if this court reaches that stage, shall be considered by this court, in determining whether relief from sanctions, ought to be granted.

[8] I agree with the 2nd ancillary defendant that per ***rule 26.7(2) of the CPR***, where a party has failed to comply with any rule, direction or order, any sanction for non-compliance imposed by the rule, direction, or the order has effect, unless the party in default, applies for and obtains relief from the sanction.

[9] In considering an application for relief from sanctions though, unless the applicant crosses the high hurdles of meeting the conditionalities as set out in ***rule 26.8(1) and (2) of the CPR***, the factors as set out in ***rule 26.8(3)***, should not even be considered by the court. A masterful court-led analysis of how a court in Jamaica, should approach and ultimately, be best positioned to resolve any application before it, for relief from sanctions, can, to my mind, be found in one of the leading cases in this area: ***HB Ramsay & Associates Ltd. and Ors. v Jamaica Redevelopment Foundation Inc. and The Workers Bank [2013] JMCA Civ. 1***.

[10] I will therefore, now look at the factors as set out in ***rule 26.8(1) and (2)***, in turn, before going on to ***rule 26.8(3)***, if I consider same to be warranted.

Whether the application for relief was filed promptly

[11] The order of Jackson, J. was that, as regards witness statements, the same were to have been, *'filed and exchanged on or before January 10, 2024.'* Therefore, having failed to serve same by then - January 10, 2024, the 2nd ancillary defendant applied for relief from sanctions. The 2nd ancillary defendant filed its application for that relief, with accompanying affidavit in support, on January 19, 2024, seven (7) 'clears days', after non-compliance. In the circumstances, I have had no difficulty in concluding that the said application was indeed, filed promptly, as was submitted to this court, by the 2nd ancillary defendant's counsel, during oral submissions on this application of theirs, which were made in this court, on July 30, 2024.

Whether the application for relief, filed, is supported by evidence on affidavit

[12] On the face of it, it appears to be so. The 2nd ancillary defendant has also filed and is also relying on the supplemental affidavit evidence of attorney, Jevaughnia Clarke, which supports its amended notice of application for court orders, both of which were filed on July 8, 2024. In that affidavit of hers, she has deponed that she is instructed by the Director of State Proceedings (DSP) and that she is authorized to swear the affidavit on behalf of the 2nd ancillary defendant. She has further deponed that: '*(Para. 2) - My knowledge of the facts and matters deponed to herein is taken from the file held at the Attorney General's Chambers, relative to the matter herein. Those facts and matters are true to the best of my knowledge, information and belief.'* This court has had though, to carefully consider this particular aspect, further.

What is a '*source'* per *rule 30.3(2)(b)(ii) of the CPR*?

[13] It is to be noted that, although Ms. Clarke had deponed to an earlier affidavit, which was filed on January 19, 2024, neither this earlier affidavit nor her later supplemental affidavit, discloses the *source* of her information. She has not stated the name of the person from whom she obtained the relevant information. It is important to note that a file is not a *source* - it is a physical location where the information was stored. It is imperative that when a party is relying on hearsay evidence in respect of an interlocutory application, that said party must state the *source* of the information because otherwise, the court cannot properly assess and/or determine the weight that is to be given to such evidence. ***Rule 30.3 of the CPR*** provides for the contents of affidavits as follows:

'(1) The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge.

(2) However an affidavit may contain statements of information and belief -
(a) where any of these Rules so allows; and
(b) where the affidavit is for use in an application for summary judgment under Part 15 or any procedural or interlocutory application, provided that the affidavit indicates -
(i) which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief; and
(ii) the source for any matters of information and belief. (Emphasis mine)

(3) The court may order that any scandalous, irrelevant or otherwise oppressive matter be struck out of any affidavit.

(4) No affidavit containing any alteration may be used in evidence unless all such alterations have been initialled both by the deponent and by the person before whom the affidavit was sworn.'

[14] In the case of ***Norman Williams and Gloria Townsend and Anor [2022] JMSC Civ. 228***, the court opined the following at paragraphs 18 and 19 of that judgment:

'[18] Whilst this court accepts that in respect of an application such as this, that being an application to set aside default judgment, hearsay evidence is admissible, it is a condition precedent, as prescribed by our rules of court, that in order for same to be so admitted, the deponent must provide to the court, in reference to said hearsay evidence, the source(s) of his or her, information and belief. See rule 30.3(2)(b)(ii) of the CPR.

[19] That provision of the rules of court, needs to be complied with, in order for the said evidence to be admissible. The importance of that provision lies in the fact that, in the absence of compliance with same, this court cannot properly assess what weight, if any at all, ought to be given to such evidence. In the circumstances, such evidence is far more prejudicial, than probative and as such, pursuant to what is laid down, in Section 31L of the Evidence Act, this court is excluding that evidence of the applicant from any further consideration. That section provides that: 'It is hereby declared that in any proceedings the court may exclude evidence if, in the opinion of the court, the prejudicial effect of that evidence outweighs its probative value.'

[15] In keeping with ***rule 30.3(2)(b)(ii)***, the affiant is required to provide the *source* of her information. The rule is clear that, in the absence of the named *source* or *sources* of an affiant's information and belief, that affiant has not complied with the relevant rule. Even if I am wrong in having concluded, that a 'file' is not a source, as per the relevant rule of court, nonetheless, it is not a *'source'* that can assist in enabling the applicant to prove that which the applicant wishes to have this court treat with, as having been proven, by means of the hearsay evidence as derived from that, *'source'*, which is merely, a file pertaining to the present matter. To my mind, that cannot be even basically adequate, for that purpose. To the contrary, it is manifestly inadequate that is so, because this court cannot now properly assess what weight, if any at all, ought to be given to such evidence as has been deponed to by Ms. Clarke, in support of the 2nd ancillary defendant's application for relief from sanctions.

<u>Presumption favouring purposive construction</u>

[16] According to ***Halsbury's Laws of England*** at ***paragraph 742, Statutes and Legislative Process, Volume 96, 2024***, there is a presumption favouring purposive construction. It reads:

'It is presumed that the legislature intends that the court when considering…which of the opposing constructions of an enactment corresponds to its legal meaning should find a construction which furthers every aspect of the legislative purpose (a purposive construction). It may thus be necessary to give the enactment, particularly where it is not grammatically ambiguous, a strained construction. A strained construction is a meaning other than the literal meaning or, where the literal meaning is ambiguous, a meaning other than one of the possible grammatically ambiguous meanings…The judges have referred to "the power of the courts to disregard the literal meaning of an Act and give it a purposive construction" …The need for purposive construction of statutes has been recognized since the seventeenth century.'

It must be underscored that it is this purposive construction that this court has applied to the interpretation of the word *'source'* as used in ***rule 30.3(2)(b)(ii) of the CPR*** and has drawn the conclusion that *'source'*, used in this context, does not refer to a location, like a file, but to a person, or persons, as the case might be.

[17] I must reiterate that even if a file can properly be considered as being a source as per the relevant rule of court, this court is unable to attach any weight to the evidence given by the affiant, which was derived from the file. The fact that the evidence is uncontested provides no assistance to the applicant, on the issue as to credibility and weight to be given such evidence, by the court. The respondent would not have, in any event, been in a position to contest information which only someone at the applicant's office, would, in all likelihood, have had knowledge of. The challenge for this court now, is that the court has not been made aware, with any specificity, whatsoever, as to who provided the information referred to, by the affiant, which the affiant has stated, is on the file at her office. That specificity is, to my mind, absolutely necessary. The hearsay evidence of Ms. Clarke fails to persuade the court, by virtue of its complete lack of sufficient specificity, if even it is admissible to any extent, which, in my considered view, it is not, as regards paragraphs 4 - 10 of said affidavit.

Burden of proof

[18] It is important to note that, on an application such as the present one, it is the applicant who has the burden of proof, and it is therefore, the applicant that must prove

that the conditionalities as set out in ***rule 26.8(1) and (2) of the CPR***, have been met. Same must be proven, on a balance of probabilities. Furthermore, on an application for relief from sanctions, even though such an application may not be, or is not being opposed by any opposing party to the claim, that does not and cannot mean that this court is obliged to grant relief from sanctions. If that were to be so, it would drive an armoured car and a horse carriage, through the relevant rules of court, in particular, ***rule 27.11***, read along with ***rule 26.8, of the CPR***. In this case, the defaulting party, who is the Attorney General, has not satisfied the court that the affidavit in support of this application for relief, contains credible evidence, to which the court should attach weight and properly consider, in order to determine whether to grant the relief sought. As a result, it is clear that the applicant has failed to discharge this burden because there is no affidavit evidence before the court to support the relevant application. It is settled law that ***rule 26.8(1)*** provides: *'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.'* As per the ***Ramsay case (op. cit.)***, the conditionalities outlined in ***rule 26.8(1) and (2) of the CPR***, are mandatory.

[19] Since there is no sufficient admissible affidavit evidence to support the relevant application, it is clear that the applicant has not met the burden cast upon the Attorney General/applicant, to prove any of the issues referred to, in ***rule 26.8(2) of the CPR***. In that prevailing context, the 2nd ancillary defendant's application for relief from sanctions, must fail.

The sanction imposed by *rule 29.11 of the CPR*

[20] The 2nd ancillary defendant has not, up to the point of this hearing of that office's relief from sanction application, filed the witness statement of Norman Biggs. This court was informed by lead counsel for the 2nd ancillary defendant - Mr. Stimpson, that same has not yet been done, because at this stage, the Attorney General would need to obtain permission from the court to do so, in order to properly be able to file and/or serve same. I must address this point for the purpose of providing guidance to legal practitioners in particular, since that view as expressed to this court by Mr. Stimpson, as

immediately aforementioned, seems to me, to be a widely prevailing one presently, within this nation's local, legal community. With respect, I must state that it is not a view that I presently hold, as being a sound one, from a legal standpoint. That is for the following reasons: Firstly, the relevant sanction as imposed in ***rule 29.11 of the Civil Procedure Rules (CPR)***, arises, not from the failure to file a party's witness statement within time, but rather, from the failure to serve same, within time. Accordingly, same can be filed, out of time, without the need for a prior order of this court to be obtained, permitting same. Of course though, once filed out of time, same will also be served, out of time.

[21] Furthermore, there is no sanction, which prevents a party from serving a witness statement intended to be relied upon, by that party, out of time. The failure to serve the witness statement within time, is what results in the sanction being applied, and that sanction is that the party, who has served a witness statement out of time, will not be permitted to rely on that witness' evidence, unless the court permits. Therefore, to my mind, a party cannot be lawfully prevented from serving a witness statement, out of time. There will though, be an automatically imposed, potentially, seriously negative consequence for that party, if that party's witness statement(s) has/have been served out of time. That being said, that party may be precluded from relying on that intended evidence, in respect of which, witness statements exist, unless this court permits. It will always be very difficult to obtain such permission, whether before trial, or during trial, according to the present wording of ***rule 29.11***, if and when, correctly applied.

[22] Permit me to reiterate though, a witness statement can be filed and served, out of time, without the need for a prior order of this court, to be obtained, permitting same to be filed and served, out of time. Indeed, I will also go a bit further, by stating that it behoves a party, who has been late in the filing and service of witness statement(s), to file and serve same, as soon as possible, after the expected time for compliance, as was stipulated by order of the court, has passed. That will go in that party's favour if**,** albeit only if, the overall interests of justice are required to be considered by this court, upon an application by the party in default, for relief from sanctions, since it will then, if so done, serve to satisfy this court, upon the hearing of such an application, that no

further delay whatsoever, will result, in compliance, as regards the date for service of witness statement(s), if relief from sanctions is granted and an extension of time is ordered by this court, for the filing and service of witness statement(s), by that party.

[23] In any event though, had I proceeded to analyze the applicant's present application further, I am satisfied beyond all doubt, that this present application could not and would not, have been successful, not only for the reason that I have adumbrated above, but for other, equally compelling reasons, which I will now address, in the event that I may be wrong, in having concluded as I stated earlier.

Whether the failure to comply was not intentional

[24] ***Rule 26.8(2)*** provides as follows:

'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.' (Emphasis Mine)

In their oral and written submissions, counsel for the 2nd ancillary defendant, proffered reasons, which to their estimation, indicate that the 2nd ancillary defendant's failure to comply with the relevant court order was not intentional. They claimed that there was a difficulty in obtaining a witness, and that, the 2nd ancillary defendant has no ability to forecast the availability of a witness. Also, he asserted that the witness is not an individual and that no corporation sole can control its servants. Further, it is the 2nd ancillary defendant's case that *'the person(s), who were employed to the National Work Agency ("The Agency") and could stand as witnesses for the Attorney General in the matter are no longer employed to the National Works Agency ("The Agency"), and as such, a process was engaged to find someone within the agency to stand as witness.' (Para. 7 of affidavit of Jevaughnia Clarke filed January 19, 2024)*

The Court's Analysis

[25] I shall examine the first conditionality outlined at ***rule 26.8(2)(a) of the CPR*** and apply same to the facts of this case. The aforesaid rule requires this court to consider, upon an application such as this, whether the failure to comply was not intentional. It must be stated at this juncture, by this court, that this court, in determining whether the failure to comply was intentional or not, should not determine same, based on an acceptance of that which has been deponed to, as a conclusion, by an affiant, in support of, an application such as this. That must, of necessity, be even more so, the approach of this court, in considering an application such as this, in a context wherein, the affidavit evidence, which is being relied on, by the applicant, is not deponed to, by anyone who can speak or who is able to speak 'first-hand', as to why the applicant, failed to comply with the relevant rule or order of this court, which resulted in the relevant court sanction, having been applied. Thus, the customary assertion, based on hearsay evidence, in an affidavit, which has been filed by an applicant, in support of an application such as this one, that the failure to comply was unintentional, carries with it, at least in my mind, little, if any weight at all.

[26] This court should, instead, based on the admissible evidence of the particular circumstances of the particular case then before it, infer, whether the failure to comply, was intentional or unintentional.

[27] Of course, the party who/which bears the burden of proof in that regard, is the applicant. Typically, the best person/party to specifically address whether the failure to comply was, or was not intentional, must be the party in default, as distinct from the attorney of that party. Everything in that regard though, depends on the particular circumstances, of each particular case.

[28] Attorney, Jevaughnia Clarke, deponed in her initial affidavit, which was filed on January 19, 2024, at paragraphs 4 and 5, that:

'4. That I am advised and do verily believe that on or about September 2023, Counsel who had conduct departed from the Chambers, consequently her files were boxed up and a process was engaged for said files to be reassigned within the Litigation Division, and at the point of Counsels departure the said Case Management Orders were not complied with.

5. That I am advised and do verily believe that the said file was recently reassigned to Mr. Stuart Stimpson and Mr. Dimitri Mitchell on the 29th of September 2023.'

Based on the information above, I would think that the prior counsel, who had conduct of this matter, had more than enough time - approximately one year and two months - to prepare, file and serve the relevant witness statement before she departed chambers, especially since the case management orders were made by Jackson, J. on July 25, 2022. In addition, I would think, in the circumstances, that the pertinent parties at the Director of State Proceedings' office, would have been aware that counsel would be departing chambers at the aforementioned time, and would therefore have acted in a timely way to put measures in place to ensure that this matter would be properly addressed in counsel's absence. This would include ensuring that the outgoing counsel and the replacement counsel, exchange relevant information and further steps necessary to advance this matter. That should have been done, before counsel left work at the office of the Director of State Proceedings. Only death or severe illness, on the part of one or the other of those parties, should have resulted in any other course of action, having been taken.

[29] Ms. Clarke has also deponed that the 2nd ancillary defendant's failure to comply with the case management orders was not intentional as *'the person(s) who were employed to the National Work Agency ('the Agency") and could stand as witnesses for the Attorney General in the matter are no longer employed to the National Works Agency ('the Agency")'* and *'both Counsels with conduct acted as soon as they became aware of the Case Management Orders.'* To my mind, this is unacceptable, since the pertinent counsel (both outgoing and replacement) at the chambers, had more than enough time to prepare, file and serve the relevant witness statement. This failure appears to have stemmed from what could be considered as administrative inefficiencies. See: ***The Attorney General (Appellant) v Universal Projects Limited (Respondent) [2011] UKPC 37***.

[30] The facts indicate that that the replacement counsel had over three months to comply with the germane court order. Furthermore, when it was clear to replacement counsel that they were having a difficulty securing a witness for trial, they could have

sought an extension of time from the court before the deadline, in order to prepare, file and serve the witness statement. I am of the view that, if the appropriate information-sharing and efforts were made in a timely way, the 2nd ancillary defendant could have complied with the germane case management order. Accordingly, the applicant's office has failed to meet its burden of proof, as regards the need to satisfy this court, that the failure to comply was unintentional.

Whether there was a good explanation for the failure

[31] It is the 2nd ancillary defendant's case that the Attorney General's reason for non-compliance is a good explanation. The reason is outlined in this ruling and it is that, they have had a difficulty in finding a suitable witness. Counsel for the 2nd ancillary defendant has further asserted, in his oral submission that they have secured a witness and that the non-compliance can be remedied by the end of the court term, that is, July 31, 2024. I reject this explanation and I reiterate my position as adumbrated in paragraphs 28 to 30 of this ruling because the 2nd ancillary defendant had over one year and five months to prepare, file and serve the witness statement. Therefore, to say that they had a difficulty in securing a witness up to the time of this hearing, is unacceptable. In the case of ***The Attorney General (Appellant) v Universal Projects Limited (Respondent) (op. cit.)***, 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…'* To my mind, the applicant's office, has also failed to meet the burden of proof, in respect of this particular factor.

Has the 2nd ancillary defendant generally complied with all other relevant rules, Practice Directions, orders and directions?

[32] It is important to note that legal practitioners would be well advised to ensure that, at the very least, proper instructions are taken from any witness(es) expected to be relied on, by the party whom/which, they represent. Those instructions should, of

course, specify what it is, that is expected to be testified to, by that witness/those witnesses. Preferably, those instructions should then be signed to, both by the attorney taking same, as well as by the witness(es) providing same. The names of those persons, should be below their respective signatures.

[33] That will then readily allow for any attorney, who may take over legal conduct of the said court matter thereafter, to know where those instructions emanated from and so, even if the whereabouts of a particular witness, or witnesses is/are later unknown, at the very least, a witness summary or witness summaries for said witness(es) can be filed and served, within the relevant time period as prescribed by this court, at a Case Management hearing. By doing so, sanction will be avoided. See ***rule 29.11(1) of the CPR***, in that regard.

[34] In his oral submissions, lead counsel for the 2nd ancillary defendant submitted that they had complied with all other court orders within time. However, he later admitted that their Pre-Trial Memorandum and Listing Questionnaire were not filed nor served on or before January 12, 2024, per orders 8 and 10 of the case management orders made by Jackson J., on July 25, 2024. In fact, both of the aforementioned documents were filed on July 17, 2024, more than six months after the court's deadline. I find that, then, counsel made a patently false assertion regarding compliance. Therefore, along with their failure to file their witness statement within time, they failed to comply with other relevant rules, Practice Directions, orders and directions. I find that the 2nd ancillary defendant has been generally non-compliant with other relevant rules, Practice Directions, orders and directions.

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

[35] An extension of time for filing and service of the witness statement of Norman Biggs 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

[36] Ultimately, each case involving an application for relief from sanctions, must be considered, on its own facts. In the circumstances, based on the particular facts of this particular case, the 2nd ancillary defendant's application, fails. Since that application was not opposed, there will be no order as to costs of that application. I will now proceed to address the defendant's application for relief from sanctions, in detail.

The defendant/ancillary claimant's application for relief from sanctions:

Whether the relevant list of documents was filed and served within time as prescribed or whether any sanction applies, and if so, what sanction applies

[37] The defendant/ancillary claimant failed to comply with the order of this court, made by Jackson J. at Case Management Conference on July 25, 2022, to provide standard disclosure on or before June 14, 2023. As a result, a sanction was automatically imposed on June 15, 2023 per ***rule 26.8 of the CPR***. This sanction is clearly outlined in ***rule 28.14(1) of the CPR***, which reads: ***'A party who fails to give disclosure by the date ordered or to permit inspection may not rely on or produce any document not so disclosed or made available for inspection at the trial.'*** Therefore, if the court finds that the applicant has not satisfied the conditionalities outlined in ***rule 26.8***, then the applicant will not be able to rely on or produce the document or documents, which were not disclosed, or made available for inspection, at the trial of this matter. Defence counsel accepted, without any prompting from this court as presided over by me, that such sanction applies, and that is why she has sought relief from sanctions.

Whether the application for relief was filed promptly

[38] Counsel for the defendant, Ms. Tanisha Tapper, has submitted that the application was filed promptly since the application was filed on February 5, 2024, albeit there was an eight-month delay. Counsel has further submitted that they had filed an initial list of documents on June 21, 2023, and a second list of documents on January 10, 2024 and that, although there was a delay in the filing of this application, the delay was not egregious.

The Court's Analysis

[39] In the case at bar, an eight-month delay may be considered a lengthy one. However, it is noteworthy that the ***HB Ramsay case (op. cit.)*** opined that 'promptly' as is used in ***rule 26.8(1)(a)*** carries with it a measure of flexibility. In that case, the Court of Appeal stated: *'if the application has not been made promptly, the court may well, in the absence of an 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.'* In the circumstances, I am prepared to accept that the pertinent application has been made promptly.

Whether the application for relief, filed, is supported by evidence on affidavit

[40] Yes, it is. The defendant/ancillary claimant has filed and is relying on the affidavit evidence of attorney - Rykel Chong, an associate at the firm of Nigel Jones & Co., which represents him. This affidavit was filed on February 5, 2024. In that affidavit Ms. Chong deponed, among other things, that:

'…Mr. Jonathan Moncrieffe the Attorney with previous conduct of this matter, left the firm on or about October 6, 2023…I was informed by Ms. Kashina Moore [Partner at the Firm], that the firm had recruited someone to take over the desk but that did not materialize…(Para. 5)

I was advised by Ms. Moore and verily believe that she took conduct of the file in or around the ending of December 2023, which was when she saw that the Defendant's Ancillary Claimant List of Documents was not filed within the time and had not been served on the other parties. I am not sure why Mr. Jonathan Moncrieffe did not file the List of Documents on time and why he did not serve it all. I was also advised by Ms. Moore that she sought to rectify the error of serving once she saw that the List of Documents was not served.' (Para. 6)

[41] The requirements of ***rule 26.8(1) of the CPR***, have therefore been met, by the applicant. I will now move on to address whether the defendant has overcome the hurdles as set out in ***rule 26.8(2) of the CPR***.

Whether the failure to comply was not intentional

[42] According to Ms. Chong's affidavit, Mr. Moncrieffe, who initially had conduct of the matter, demitted office on October 6, 2023, and Ms. Moore, who took conduct of the file in December 2023, sought to rectify the non-compliance.

The Court's Analysis

[43] Based on the submissions of counsel for the defendant, I find it quite curious that Mr. Moncrieffe left the firm more than three months after the last day for compliance, yet, it appears, the other members of the firm were unaware that the requisite matter needed to be addressed. Further, I find it even more curious that no one took control of the file until December of 2023. Ms. Chong deponed that she was advised that the firm had recruited someone to take over Mr. Moncrieffe's desk, but that, that did not happen. This is suggestive of administrative inefficiencies per ***The Attorney General (Appellant) v Universal Projects Limited (Respondent) case (op. cit.).*** I further find that counsel has not proffered any evidence to indicate that the non-compliance was unintentional. In fact, in her oral submissions, counsel admitted that she has provided no such evidence. It is clear that the applicant's office has failed to meet its burden of proof, as regards the need to satisfy this court, that the failure to comply was unintentional.

Whether there was a good explanation for the failure

[44] In her oral submissions, Ms. Tapper asserted that the explanation she had proffered to indicate that the non-compliance was not intentional, also formed the basis for what she considered to be a good explanation for said non-compliance. In her written submissions, Ms. Tapper further asserted that the defendant ought not to be punished because of the oversight and mishap of his advisors.

The Court's Analysis

[45] It must be noted that the court has no record of any affidavit evidence from the defendant, outlining any reason or reasons for the non-compliance. I must reiterate that counsel for the defendant had admitted, in her oral submissions, that she has provided no evidence to prove that the non-compliance was not intentional. Therefore, the court is left with no reason nor good explanation for said non-compliance, and in the absence of same, the applicant has not met the burden of proof for this component of ***rule 26.8(2)***. In the ***HB Ramsay case (op. cit.), at pages 9 - 10, paragraphs 22 - 23***, the court stated:

'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.'

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

[46] Ms. Chong's affidavit implies that the previous counsel, Mr. Moncrieffe, who had conduct of the matter, for whatever reason or reasons, did not act to file and serve the relevant list of documents within time. In the absence of there being any evidence to the contrary, this suggests that he was inefficient, negligent or incompetent in his duties, concerning this matter, at the time that he was employed to the applicant's firm, Nigel Jones & Co. 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 analyzed. 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.

[47] In the case at bar, the court has been presented with allegations of negligence and/or incompetence made by the firm, which represents the defendant, with respect to their former employee/counsel. However, what is not before the court is the firm's former employee's response(s)/answer to the said allegations. What is worse, is that in the matter at hand, the firm on record for the defendant, has never even sought to obtain their former employee's response(s)/answer to the said allegations. It is imperative that the court be given the opportunity to hear both the present counsel and their former attorney 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 defendant had a responsibility to approach the allegations proffered by her firm objectively. The firm, including the current attorney-at-law, has a duty to communicate these allegations to former counsel to ensure that he is aware of said allegations and to allow him 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.)***. Interestingly enough, I had similarly addressed similar allegations made against former counsel by counsel from Nigel Jones & Co., in the case: ***Len Cunningham and Leroy Cunningham v Victor Hall and Sonia Hall [2024] JMSC Civ. 27***. Surprisingly, counsel - Ms. Tapper, from the firm - Nigel Jones & Co., is apparently unaware of that earlier written ruling of mine, which the law firm that she presently is employed to - Nigel Jones & Co., was provided with a copy of, via its counsel, in that case.

[48] The allegation of negligence and/or incompetence of counsel must be raised in a fair way by the firm, which represents the party that has made that allegation, but it is important to note the counsel against whom that allegation has been made, be afforded a fair opportunity to rebut that allegation. He or she may not avail himself or herself that opportunity, but nonetheless, that would have been fair. To do otherwise, is manifestly

unfair. 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 relevant firm, has proffered assertions on the matter; while, the other party, being the firm's former counsel, has not. To my mind, Nigel Jones & Co. had a duty to contact their former associate, if they were experiencing difficulties with the file and/or if they had questions concerning his performance in this matter. In fact, that should have been done before Mr. Moncrieffe demitted office. By accusing him of negligence or inefficiency, the firm is really levelling accusations against itself, since the former associate's performance represented the performance of the firm. That is why proper supervision and management are key in the successful operation of a firm or any organization. It is imperative that the party, who makes an assertion of negligence, as regards prior counsel, presents all relevant information before the court. The court has not been presented with any evidence and/or representations from the defendant's former counsel, who is also the firm's former employee, concerning these accusations. In the circumstances, this court is, just as present counsel for the defendant, unable to address the allegations of negligence made against Mr. Moncrieffe, objectively. Accordingly, I have no choice but to reject these allegations and the firm's contentions on this issue.

Has the defendant/ancillary claimant generally complied with all other relevant rules, Practice Directions, orders and directions?

[49] Ms. Tapper has not addressed this element, either in her oral, or written submissions. From my review of the court's record though, it appears that the defendant has complied with all other relevant rules, Practice Directions, orders and directions of the court. Consequently, to my mind, there has been general compliance with all other relevant rules, Practice Directions, orders and directions.

Conclusion

[50] The defendant has failed to establish that he had a good reason for having failed to comply with the relevant court order, and he has also failed to establish that his failure to comply with that order, was unintentional. The ***HB Ramsay case (op. cit.)*** aptly outlined that for an applicant to succeed in an application for relief from sanctions, that applicant must satisfy all three ingredients enshrined in ***rule 26.8(2)***. Of course, that applicant would have to have first overcome the requirements in ***rule 28.6(1)***. It is clear that, although the defendant has overcome the hurdles of ***rule 26.8(1)***, he has failed to satisfy all three elements in ***rule 26.8(2)***. As a result, the defendant's application has failed, so there is no need to consider the constituents of ***rule 26.8(3)***. Since the defendant's application was not opposed, there will be no order as to costs of that application. At the trial of this claim, the defendant will not be allowed to rely on or produce the documents, which he had not disclosed, nor permitted the opposing party to inspect, within the time ordered by the court. Therefore, the court cannot properly permit the defendant's list of documents to stand as filed and served in time.

[51] 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, or to rely on or produce documents at a trial.

[52] In view of the fact that the defendant/ancillary claimant's application for relief from sanction, will be unsuccessful, I will now go on to make several orders, among which will be an order that there shall be heard on paper and same shall be presided over by me. The following:

'Should an order now be made, awarding summary judgment in favour of the 2nd ancillary defendant against the defendant/ancillary claimant, bearing in mind that the defendant/ancillary claimant will not be able to rely on any document at trial, in proof of his ancillary claim?' I will order that a bundle of submissions and authorities as regards same, be filed and served, by or before October 31, 2024, and that when same have respectively been filed, they shall be passed on to the Registrar assigned to Anderson J. on October 31, 2024.

Disposition

[53] The court, therefore, now orders as follows:

1.The orders sought in the 2nd ancillary defendant's amended notice of application for court orders, which was filed on July 8, 2024, are refused.

2. The orders sought in the defendant's notice of application for court orders, which was filed on February 5, 2024, are refused.

3. The ancillary defendant is not permitted to rely on the evidence of Norman Biggs upon the trial of this claim.

4. The defendant/ancillary claimant is not permitted to rely on or produce the documents, which he had not disclosed nor permitted the opposing party to inspect within time, upon the trial of this claim.

5. There shall be heard on paper and presided over by Anderson J., the following: 'Should an order now be made, awarding summary judgment in favour of the 2nd ancillary defendant against the defendant/ancillary claimant, bearing in mind that the defendant/ancillary claimant will not be able to rely on any document at trial in proof of his ancillary claim?' This court's ruling on the hearing of same, is reserved.

6. The 2nd ancillary defendant and the defendant/ancillary claimant are to file and serve their respective bundles of submissions and authorities, as regards the issues raised by order number 5 above, by or before October 31, 2024.

When the respective parties have filed the relevant bundles of submissions and authorities, they are to be passed to the Registrar assigned to Anderson, J.

7. No order as to costs.

8. The claimant shall file and serve this order.

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Hon. K. Anderson, J.