IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. CD-008 OF 2004

BETWEEN	**HDX 9000 INC.**	**CLAIMANT**
AND	**PRICE WATERHOUSE (A FIRM)**	**DEFEENDANT**

Dr. Lloyd Barnett and Kent Gammon instructed by G Anthony Levy & Co for the Claimant.

Mrs. Tana'ania Small-Davis and Miguel Williams instructed by Messrs. Livingston, Alexander & Levy for the Defendant

Heard: 19th, 20th and 29th January 2015

Civil procedure and practice – Application for relief from sanctions – Application to set aside Judgment entered for the defendant after claimant failed to comply with unless orders

IN CHAMBERS

LAING J

[1] The Claimant by way of a Notice of Application for Court Orders filed on 25 September 2014 (amended on 10 December 2014) sought relief from sanctions resulting from non-compliance with Unless Orders made on 27 January 2014 and 25 February 2014.

Background

[2] On 27 January 2014 Sinclair-Haynes J (as she then was) made an unless order (hereinafter referred to as "**the 27 January 2014 Unless Order**"). This unless order was in the following terms:

"*1. The security for costs is increased by $1,700,000.00 the United States Dollar equivalent of which is to be deposited within thirty (30) days of the date hereof into a interest bearing United States Dollar Account in the Joint names of Livingston, Alexander & Levy and Gordon | McGrath.*

1. The proceeds of the deposit account in the joint names of Livingston Alexander & Levy and Nunes, Scholefield, DeLeon & Co is to be converted into United States Dollars and deposited in the same interest bearing account in the joint names of Livingston Alexander & Levy and Gordon | McGrath.

2. If the security ordered is not deposited within thirty (30) days of the date of this Order, the Claimant's claim shall stand dismissed…."

[3] On 25 February 2014 Sinclair-Haynes J made further orders (hereinafter referred to as "**the 25 February 2014 Unless Order**") which provided that:

"…3. *Unless the claimant complies with the orders made in paragraphs 2 and 7 of the Order made May 9, 2013 by February 28, 2014 the claim stands dismissed and judgment entered for the Defendant…"*

The 27 January 2014 Unless Order and the 25 February 2014 Unless Order together will be referred to as simply "**the Unless Orders**")

[4] On 9 May 2013 Sinclair-Hanes J had made an order, the relevant portions of which are set out below:

"…2. The Claimant to file and serve a Bundle of Documents in accordance with CPR 39.1 on or before 31 July 2013.

3. The Claimant shall remove all references to the letter dated 11 May 1995 to which privilege attaches which have been made in the Witness Statements filed on behalf of the Claimants.

4. The Claimant shall remove all references to the matters which took place at mediation between the parties which have been made in the Witness Statements filed on behalf of the Claimants.

5. The Claimant shall remove all references to breach of trust, breach of fiduciary duties, slander and defamation from the Witness Statements filed on behalf of the Claimant.

6 The Claimant shall remove the hearsay evidence contained in the Witness Statements filed on behalf of the Claimant and particularized in the Schedule attached hereto.

7. The Claimant shall file and serve the Witness Statements amended pursuant to paragraphs 3, 4, 5, and 6 above on or before 16 August 2013…."

It is this order to which Sinclair- Haynes J referred in the 25 February 2014 Unless Order.

The Application

[5] In the present application before me the Claimant sought, *inter alia*, the following orders:

"…1. Relief from sanctions for failure to serve a Bundle of Documents in accordance with CPR 39.1 within the time prescribed by the Order of 25th February 2014, in that the Bundle of Documents filed and indices served herein in accordance with CPR 39.1 within the time ordered and said bundles served on the Defendant outside of the time ordered, be permitted to stand as having been served.

2. Relief from sanctions for failure to:

(i) remove all references to breach of trust , breach of fiduciary duties, slander and defamation from the Witness Statement of Timothy Palmer and the Supplemental Witness Statement of Timothy Palmer filed herein on behalf of the Claimant;

(ii) failure to remove all references of the letter dated 11 May 1995 from the Witness Statement of Timothy Palmer and the Supplemental Witness Statement of Timothy Palmer filed herein on behalf of the Claimant; and

file and serve said witness statements as amended pursuant to the above paragraphs within the time prescribes by the Order of 25th February 2014….

5. Relief from sanctions for failure to:

(i) deposit Security for cost in the United States Dollar equivalent of $1,700,000.00 in an interest bearing United States Dollar Account in the joint names of Gordon|McGrath

and Livingston Alexander & Levy within the time prescribed by the Order of 27 January 2014, and

(ii) join the firm of Livingston Alexander & Levy on a joint account with the original deposit currently in the names of Livingston, Alexander & Levy and Nunes Scholefield & Deleon as per the order made 27 January, 2014…"

It should be noted that paragraph 2 of the 27 January 2014 Unless Order in fact requires that the proceeds of the deposit is to be converted into United States Dollars and deposited in the same interest bearing account in the joint names of Livingston Alexander Levy and Gordon|McGrath).

[6] For the sake of convenience the breaches in respect of which relief was sought are herein referred to as "***the Bundles Breach***", "***the Redaction Breach***" and "***the Security Account Breach***".

The Relevant Rule

[7] It is accepted by the parties that it is settled law that where there has been non-compliance with unless orders such as the aforementioned Unless Orders made by Sinclair-Haynes J, the Statement of Case of the party in default is automatically dismissed and the claim can only be re-instated by virtue of a grant of relief from sanctions pursuant to CPR 26.8.

Relief from sanctions

[8] The relevant rule is CPR 26.8 which provides as follows:

"26.8 (1) An application for relief from any sanction imposed for a deadline to comply with any rule, order or indirection must be –
(a) made promptly; and
(b) Supported by evidence on affidavit

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

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

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

(a) the 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 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."

Whether the application was made promptly

Submissions on behalf of the Claimant

[9] At the start of the hearing Dr. Lloyd Barnett who appeared for the Claimant helpfully provided the Court with skeleton submissions which he developed during the course of his presentation. As it related to the issue of promptitude, Dr. Barnett submitted that in all the circumstances the Claimant applied promptly and had supported the application with a comprehensive affidavit. Learned Counsel submitted that the Claimant's former Counsel who appeared when the time for compliance expired, had not appreciated that the application for relief from sanction, where a deadline had been fixed, had to be made by a separate and discrete application.

[10] Dr. Barnett submitted that, as indicated in the Affidavit of Ronald Barakat filed on 10 December 2014, it initially appeared that the application for relief from sanctions could be dealt with on what he considered would be the next necessary procedural step, that is, an application for striking out of the application by the Defendant. Unfortunately for reasons over which the parties had no control this was delayed. Once it became apparent that a separate application of the Claimant for relief from sanctions was necessary, the application was promptly filed. Dr. Barnett submitted that this was the fault of the Claimant's former Counsel, not the Claimant and accordingly the Claimant ought not to be prejudiced by the inadvertence or other conduct of his Counsel.

Submissions on behalf of the Defendant

[11] Mrs. Tana'ania Small-Davis on behalf of the Defendant, submitted that notwithstanding the fact that the claim stood dismissed pursuant to the operation of the Unless Orders by on or about 1 March 2014 (as a result of the Bundles Breach), the application for relief from sanction was only made on 22 September 2014. Counsel pointed out that whereas it was assigned a hearing date of 13 Oct 2014, the application was not pursued with any sense of urgency as it was not served on the Claimant until 22 December 2014. Mrs. Small-Davis submitted that the application for relief from sanction was therefore made in excess of 6 months, (in fact almost 7 months) after the order had taken effect. She noted that as a consequence, based on the authorities, the Claimant failed to clear the threshold requirement of CPR 26.8(1)(a) that the application must be made promptly, and accordingly the application must fail.

The Authorities

[12] In ***National Irrigation Commission Ltd v Conrad Gray and Marcia Gray,*** **Supreme Court Civil Appeal No. 22 /2009** an appeal from an order granting relief from sanctions, Harrison J at paragraph [14] expressed the view that the meaning was plain and obvious but the dictionary meaning of "promptly" is "with alacrity" as was pointed out by Arden LJ in ***Regency Rolls Limited v Carnall*** **[2000] EWCA Civ. 379** (an appeal against an order dismissing an application to set aside orders made on a preliminary issues hearing). Harrison JA also referred to the statement made by Simon Brown, LJ in the same case that:

> *"I would accordingly construe "promptly here to require, not that an applicant has been guilty of no needless delay whatever, but rather that he has acted with all reasonable celerity in the circumstances."*

[13] Paragraphs 15 and 16 of Harrison JA's Judgment in ***National Irrigation Commission*** (supra) is instructive and is reproduced hereunder.

> *"[15] The issue here is whether the respondents did act promptly or with all reasonable celerity. The claim in this matter had been automatically struck out on 21 July 2008 yet it took the respondents some (6) months before the application was made for relief from sanctions. In Harrison v Hockey [2007] All ER 9 D) 336 Mann, J opined that a period of four-and-a-*

half months between judgment and an application under CPR 39.3 was likely to be too long in the vast majority of cases where an application under that provision was made. This is not a setting aside judgment situation but we do believe that similar principles in terms of time would be applicable to an application for relief from sanction.

[16] In our judgment, the application plainly could, and reasonably should, have been issued well before it was done. Six months was altogether too long a delay before making this application. Promptness, in our view, is the controlling factor under rule 26.8. It is plainly a very important factor, as is evident from the fact that it is singled out in the rule as a matter to which the court must have regard. In our Judgment, it is a very important factor because there is a strong public interest in the finality of litigation. Put simply people are entitled to know where they stand."

[14] In ***HB Ramsay & Associates Limited and others v Jamaica Redevelopment Foundation Inc and another,*** **Supreme Court Civil Appeal No 88/2012** Brooks JA in the judgment at paragraph [9] stated that:

"…It is without doubt that the current thinking is that if an application for relief from sanction is not made promptly, the court is unlikely to grant relief. Rule 26.8 states that the application "must" be made promptly. This formulation demands compliance…"

[15] Brooks JA at paragraph [10] accepted that the word "promptly" does have some measure of flexibility in its application and whether something had been done promptly depends on the circumstances of the case.

[16] In the instant case the Claimant and its former Counsel were well aware of the Unless Orders made by Sinclair-Haynes J and the far reaching penalty and potentially disastrous consequences of non compliance with those Unless Orders. As was the case in the ***HB Ramsay Case***, in this case, an earlier order of the court (the 9 May 2013 order of Sinclair-Haynes J) had already been disobeyed necessitating the 25 February 2014 Order and accordingly the sanctions ought to have been in the forefront of the directing mind or minds of the Claimant and its Counsel.

[17] The eventual failure to comply with the Unless Orders should have been immediately obvious to Counsel for the Claimant and immediate steps taken to seek

relief at the earliest opportunity when the Claimant could be heard by the Court. In all the circumstances of this case, it is the view of the Court that that the application for relief from sanction was not made promptly, and the Claimant has failed to cross the first hurdle which is the requirement of 26.8 (1)(a).

[18] Notwithstanding the Court's finding that that application was not made promptly, I will go on to consider the elements of 26.8(2) following the approach of Brooks JA in the ***HB Ramsay Case*** at paragraph 31 where he concluded as follows:

> *"An applicant who seeks relief from 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 fails, for example, to make his application promptly the court need not consider the merits of the application. Promptitude does, however, allow some degree of flexibility and thus, if the court agrees to consider the application, the next hurdle that the applicant has to clear is that he must meet all the requirements set out in rule 26.8(2). Should he fail to meet those requirements then the court is precluded from granting him relief. There would, therefore, be no need for a court, which finds that the applicant has failed to cross the threshold created by rule 26.8(2), to consider the provisions of rule 26.8(3) in relation to that applicant."*

Whether the failure to comply was intentional and whether there is a good explanation for the failure

[19] The requirements of 26.8(2)(a) and 26.8(2)(b) although separate and distinct can conveniently be dealt with together because of the efficient way in which Dr. Barnett approached these issues. In summary, he submitted that the failure to comply with the Unless Orders was not intentional and the failure was largely a result of the uncooperative conduct of the Defendant and its Counsel. Since the Claimant had done all that it reasonably could in the circumstances to comply, the Claimant has provided good reasons for the failure to comply with the Unless Orders.

The Bundles Breach

[20] Dr. Barnett submitted that there were documents which were required to be included in the bundles in order to comply with CPR which the Defendant failed to disclose. He asserted that in a case of this complexity, it was critical that all the documents to be used by either side be included in the bundle. He submitted that even

the sequence of documents might be important. It may not therefore have been sensible to deal with the bundles in a piecemeal way, such as by filing bundles to be supplemented by other bundles if and when the allegedly undisclosed documents were produced. In the circumstances he says the Claimant's Counsel had done all that was reasonable to comply with the order.

[21] Mrs. Small-Davis submitted that there were no undisclosed documents on the part of the Defendant, albeit there were documents which were disclosed but which were no longer capable of being produced by the Defendant for reasons which had already been explained to the Court and the Claimant. She said that the issue of such non-disclosure was one which was repeatedly raised by the Claimant notwithstanding the Judgment of Rattray J dated 3 August 2010 which she says sufficiently addressed and disposed of the issue of the alleged non-disclosure. In that Judgment Rattray J stated at paragraph 35 that he did "…*not find on the evidence that there had been any deliberate or calculated intention on the part of the Defendant to conceal or suppress or withhold documents or information in this matter."*

[22] A considerable amount of time was spent by Counsel on both sides addressing this issue of whether there was a non-disclosure of documents by the Defendant. I do not find it necessary for me to make a finding on this issue. I find that even if there was non-disclosure of documents by the Defendant, that was not a good reason for the Claimant not to have filed bundles as required by the 25 February 2014 Unless Order. If in fact the Defendant was in beach of its disclosure obligations this could be addressed by the Court subsequently with appropriate sanctions. Further, if documents were in fact produced by the Defendant subsequently, these could have formed the contents of a supplemental bundle.

[23] The filing of supplemental bundles, where it becomes necessary as a result of further disclosure, or availability of new documents is not unusual. Of course, it is prudent to aim for a single set of consolidated bundles, filed at the same time, sensibly indexed and arranged in a logical manner for ease of use at the trial, but in the face of a unless order the intransigent position of the Claimant that the bundles could not be filed

until the documents which were allegedly not disclosed were produced for inclusion, was in the circumstances, intentional and unreasonable.

[24] The Court notes that in the e-mail of the Claimant's former Counsel to Miguel Williams dated 26 February 2014 and time-stamped 5:37 pm at page 11 of the exhibits to the Fourth Affidavit of Leighton McKnight filed 22 July 2014, Counsel stated that "*We will file the majority , if not all bundles tomorrow. You should have received the draft Indices from Kereene by now"*. As it turns out, the Court was advised by the parties that bundles had in fact been filed since the time for filing has expired, and filed without the allegedly non-disclosed documents. There was nothing preventing this being done within the time ordered with the objective of complying with the 25 February 2014 Unless Order. I have therefore come to the conclusion that the Claimant has not provided a good explanation for the Bundles Breach.

The Redaction Breach

[25] Dr. Barnett submitted that given the very specific requirement of the 9 May 2013 Order of Sinclair-Hanes J for the redacting of documents, the Claimant was obliged to comply by taking the action ordered with respect to the original filed documents (relying on ***Middlemas v Wilson*** **(1875) 10 Ch. App 230**). He further submitted that Counsel was therefore acting reasonably in taking the position that the offending portions of the original documents that were on the Court's file had to be redacted to comply with the 25 February 2014 Unless Order (which Dr Barnett submitted was the procedure he had in fact seen employed in a number of cases). Due to the difficulty obtaining the original documents from the file, Dr. Barnett said the order could not have been complied with.

[26] I am unable to accept this submission. In the face of the 25 February 2014 Unless Order, one would have thought that since the Registrar was unable to locate the documents, an alternative and more practical approach to the one intended should have been taken with the objective of compliance. By way of example there could have been the re-filing of fresh copies of the documents with the offending portions redacted, such re-filed documents to stand as the correct documents for purposes of the claim. I find it difficult to see how a Court would not have viewed that as compliance in all the

circumstances. If the original filed documents were subsequently located they also could then be redacted. Redacting the original could not have reasonably been seen as the only method of compliance. I am therefore of the view and find, that the explanation for the Redaction Breach is not at all a good explanation, in the circumstances.

[27] Counsel for the Defendant submitted and I find some force in that submission, that the explanation being proffered by the Claimant, that the failure of the Registrar to locate the documents was the cause of the delay, does not appear to be accurate or genuine. This is because the evidence suggests that there was never an intention on the part of the Claimant's then Counsel to comply with the order by redacting the originals on file.

[28] In aid of her submission on this issue, Mrs. Small-Davis pointed the Court to the letter from the Claimant's Counsel dated 5 September 2013 addressed to "*Mrs. Jemilia Davis, The Commercial Registrar*", referring to the Original Witness Statement of Timothy Palmer filed on 8 December 2006 and requesting "*assistance in locating this document and making it available for our perusal.*" The letter from Claimant's Counsel which followed dated 10 February 2014 and addressed to "*Deputy Registrar, Commercial Division*" stated that the Witness Statement was critical for compliance with a Court order as well as preparing the bundles and requested an early response "*so that we may view and obtain a copy of the said Witness Statement".* Absent from this letter is any indication that the original filed Witness Statement needed to be located so that it could be redacted in compliance with the Court's Order as was submitted was the intention of the Claimant's then Counsel. One would have expected this if such redaction of the original Witness Statement had in fact been seen as necessary for compliance based on the construction he placed on the Order.

The Security Account Breach

[29] Dr. Barnett for the Claimant submitted that blame for the breach of the 27 January 2014 Unless Order requiring the opening of a United States Dollar denominated account in the joint names of the parties Counsel, is to be placed squarely at the feet of Counsel representing the Defendant.

[30] It appears to the Court however, that the seeds of the eventual breach were sown when the Claimant's former Counsel waited until 15 February 2015 to begin correspondence with the Defendant's Counsel in respect of the opening of the new account. The 27 January 2014 Order Unless required an account in the names of the Counsel for both parties and as a natural consequence, the Claimant's Counsel required the cooperation of opposing Counsel in order to comply with the order.

[31] Mrs. Small-Davis for the Defendant took the Court through the chain of letters and e-mails exhibited to the fourth affidavit of Leighton McKnight filed on 22 July 2014. I do not find it necessary to reproduce that evidence in any great detail, but it is clear from the correspondence that the efforts of the Claimant's Counsel ought to have commenced earlier, bearing in mind the widely known stringent due diligence requirements of some banks for the opening of new accounts, in compliance with the Proceeds of Crime Act and current due diligence best practices. Notwithstanding this finding, I also find that the Defendant's Counsel, having initially agreed to the opening of an account at Sagicor Bank, contributed to the delay in the opening of the account by not providing the due diligence information within a reasonable time of being called upon to do so.

[32] The reason for this delay on the part of the Defendant's Counsel (collating the numerous documents required) has been explained to the Court and the Court does not find that there was an intention on the part of the Defendant's Counsel to cause or contribute to the delay. However, unfortunately, such was the effect of their conduct. Furthermore, although the time for compliance had passed by then, Counsel for the Defendant on 30 April 2014 by, in effect, reversing their earlier agreement to the opening of the United States Dollar Account at Sagicor Bank and proposing a new solution to the requirements of the Order, namely a time deposit, only managed to further complicate the issues resulting in additional delay (albeit post-breach). I should point out that it was explained to the Court that the suggestion of the time deposit arose because that was the mode employed in respect of the earlier security deposit which was denominated in Jamaican Dollars and the Defendant's Counsel were of the view

that a time deposit would provide a more favourable interest rate and would be in compliance with the 27 January 2014 Unless Order.

[33] In the circumstances, I find that the failure to comply with the 27 January 2014 Unless Order in respect of the account lies at the feet of Counsel for both parties. I do not, therefore, find that the Security Breach was intentional, although, having regard to the delay of the Claimant's former Counsel in commencing the process it was always going to be difficult to meet the stipulated deadline. The Claimant being the party at risk of a sanction and holding the proverbial "blade" ought to have been more proactive, but I accept that the Claimant has provided a good explanation for this particular breach. The result of the parties being unable to agree on the appropriate "account" to be opened was that, up to the time of the hearing of this application the additional security for costs was still not placed in any kind of interest bearing account in the joint names of the parties' Counsel, as had been ordered by the Court.

[34] Following on my findings above that the Claimant had not satisfied the requirements of rule 26.8(1) (a) generally, and the threshold requirements of rule 26.8 (2)(a) and rule 26.8(2)(b), certainly as it relates to the 25 February 2014 Unless Order, it begs the question as to whether it is necessary for me to proceed to consider rule 26.8(2)(c). The Court of Appeal has clearly stated in the ***HB Ramsey Case*** at paragraph [22] that:

> *" Where there is no good explanation for the default, the application for relief from sanction must fail. Rule 26.8(2) stipulates that it is a precondition for granting relief, that the applicant must satisfy all three elements of the paragraph. The Privy Council in* ***The Attorney General v Universal Projects Ltd*** *[2011] UKPC 37, in considering a similarly worded rule, used in the Civil Procedure Rules of Trinidad and Tobago, held that the absence of a "good explanation" within the meaning of the rule , was fatal to the application. Their Lordships, in that context, said at paragraph 18 of their opinion:*
>
> > *'The Board has reached the clear conclusion that there is no proper basis for challenging the decision of the courts below that there was no "good explanation" within the meaning of [the rule equivalent to rule 26.8(2)(b) of the CPR] for the failure to serve a defence by 13 March.* ***That is fatal to the Defendant's case in relation to*** *[the rule equivalent to rule 26.8(2)(b) of the CPR]* ***and it***

is not necessary to consider the challenge to the other grounds on which the Defendant's appeal was dismissed by the Court of Appeal.' *(Emphasis supplied)."*

[35] For the reasons given above, I find that the Claimant has not presented a good explanation for the Bundles Breach and the Redaction Breach and by extension, the breach of the 25 February 2014 Unless Orders (the Claimant not having taken reasonable steps to comply with the 25 February 2014 Unless Orders in the all the circumstances). Notwithstanding these findings, I will adopt the approach of the Court of Appeal in the ***HB Ramsey Case*** and consider the remaining rule 26.8(2)(c).

Whether the Claimant had generally complied with other relevant rules, practice directions orders and directions.

[36] The Defendant asserted that the Claimant has breached a number of earlier Court orders, which were identified in paragraph 32 of the Affidavit of Leighton McKnight filed 15 January 2015 and to which Counsel for the Defendant referred. By way of example, other than the breaches which resulted in the sanctions, it was alleged that the Claimant had had an appeal dismissed due to non compliance with the Court of Appeal Rules, and had repeatedly substituted its expert. In the end it had failed to file its expert report on time. It was also asserted that the trial dates set for September 2013 and March 2014 were vacated at the request of the Claimant. It was also asserted that the redactions had still not been properly made. It cannot therefore be accurately said that the Claimant had not breached other relevant rules, practice directions and orders. Of particular relevance is the fact that the 25 February 2014 Unless Order was necessary in part because of the Claimant not having complied with the referenced 9 May 2013 order of Sinclair-Haynes J.

The provisions of Rule 26.8(3) and the application of the Overriding Objective

[37] The Court of Appeal in the ***HB Ramsay Case*** suggested that where an applicant failed to satisfy the provisions of rule 26.8 (1) and 26.8 (2), the Court does not have to consider the provisions of 26.8 (3), but I do not interpret this case to decide that the Court may not do so in certain circumstances. In this case I feel constrained to consider

the mitigating factors of 26.8 (3) and the overriding objective given the circumstances of this case and in particular the effects of the Claimant's former Counsel's handling of it.

[38] Dr. Barnett for the Claimant submitted that the Court ought to apply the overriding objective in this case and give the relief being sought. I consider these submissions particularly in light of the fact that I have found any failure to comply with the Unless Orders were in part as a result of the conduct of the Claimant's former Counsel. In support of his submission Dr. Barnett relied on the cases of ***Paul White v Homel Grant and Carlos Daley*** **Suit No C.L. 1993/ W 127** as well as ***Anwar Wright v the Attorney General*** **[2013] JMSC Civ 128.**

[39] I find the case of ***White v Grant*** to be distinguishable on the facts since in that case the Court at page 3 of the judgment treated the terms of rule 26.8 (1) as having been complied with. The Court also found that the applicants had satisfied the requirements of rule 26.8 (2) and then proceeded to examine the elements of rule 26.8 (3) in order to determine whether the Court's discretion should be granted in the Claimants favour. It is therefore easily understood why, on those facts being considered by Brooks J in ***White v Grant****,* at page 8 of the Judgment, the learned Judge concluded that despite the previous defaults of the Claimant, the interests of justice and the overriding objective of dealing with cases justly required that they be afforded an opportunity to present their defence at trial. In that particular case all defaults had been cleared and the trial date could still have been met. I still find it to be of assistance in its approach to the application of the overriding objective since I have not independently identified nor have I been directed to any authority which suggests that that the Claimant's inability to satisfy some or all the provisions of 26.8 would preclude the Court from applying the overriding objective.

[40] The case of ***Anwar Wright*** was an application to set aside a default judgment and to extend time within which to file a defence pursuant to rule 26.1(2)(b). The Court applied the overriding objective, and confirmed the willingness of our Courts to excuse delay in appropriate cases, in the interest of doing justice between the parties.

[41] Mrs. Small-Davis has provided the Court with a number of UK authorities, three of which were post ***Mitchell v News Group Newspapers Limited*** **[2013] EWCA Civ 1537** the case in which the UK Court of Appeal delivered its decision and guidance on the amended UK CPR 3.9(1). As Counsel acknowledged the wording of the UK CPR 3.9 which has been in effect in the UK since 1 April 2013 is different than our equivalent rule 26.8. As stated by Lord justice Richards in the UK Court of Appeal in one of the cases submitted by Mrs. Small-Davis, ***Bianca Durrant v Chief Constable of Avon & Sommerset Constabulary*** **[2013] EWCA Civ 1624 at paragraph 3*:***

> ***"…****We do not propose to engage in extensive repetition of what was said in Mitchell. We simply note at this point the judgment's clear endorsement of a tougher more robust approach towards enforcing compliance with rules, practice directions and orders and thus towards relief from sanctions...*"

[42] As I indicated to Mrs Small-Davis and to Dr. Lloyd Barnett when they addressed these cases, I am firmly of the view that in various decisions, our local courts have clearly set out the approach to be followed and I am unable to obtain any assistance from these UK cases, nor I am I prepared to apply a tougher regime which departs from that given by our Courts thus far.

[43] This Court recognizes the unfortunate position in which the Claimant has found itself and finds that this has been largely a result of the conduct of its former Counsel. Furthermore, I have already found that the Defendant's Counsel had contributed to the failure to comply with the 27 January 2014 Unless Order. The Court in applying the overriding objective is reminded of the often quoted dictum of Lord Denning in ***Salter Rex & Co v Ghosh*** **[1971] 2 All E.R. 865** where he stated "*We never like a litigant to suffer by the mistake of his lawyers".* This is a sentiment which has survived the advent of the CPR.

[44] These are parties that have been trying to resolve their dispute for a number of years. The former claim number C.L. 1996/H-195 reflects its vintage. It has occupied countless man-hours of the court's time and a considerable share of the Court's limited resources. The issues to be resolved are undoubtedly of tremendous importance to the parties who have clearly expended huge sums, (based on the Court's non scientific

assessment of the likely number of billable hours involved in getting the matter to this stage). The Court must also consider the application before it against the backdrop of the nature of the dispute and the complexity of the issues involved and the sheer volume of documents which will have to be reviewed in properly resolving the dispute in the context of a trial.

[45] Counsel for the Defendant had suggested that this case had taken more than its fair share or an appropriate share, of the Court's resources and that in recognition of the need for finality in litigation the application of the Claimant ought not to be granted. I do not agree that in this particular case the Claimant ought to be deprived of the relief it seeks. I am compelled to add that this decision is not to be viewed in any way as diminishing the overarching requirement that litigants must comply with unless orders or expect to face the natural and sometimes harsh consequences of their default.

[46] The Claimant is clearly still desirous of pursuing this claim in which it has invested considerable resources. Whereas the Court is fully cognizant of the need for finality in litigation, in my view dealing justly with this case should not involve depriving the Claimant of the opportunity to have its day in court because of the conduct of its former counsel. I am influenced in reaching this conclusion by the fact that compliance with the 25 February 2014 Unless Order did not need any further significant input by the Claimant, Counsel could have done the redactions and bundles as suggested earlier in this judgment.

[47] The Claimant has moved on and has changed its team of legal representatives, which I find further evinces its intention to take the case to trial and conclusion in the usual manner. In all the circumstances of this case, I find that the interests of justice and the overriding objective of dealing with cases justly, require that the Claimant be afforded an opportunity to present its case at a trial and that a just result will be achieved by granting the relief from sanctions as sought.

[48] There of course might be some degree of prejudice to the Defendant which will now have to muster resources and renew its efforts at litigating a matter which it may have reasonably held to be at an end, but I find that this does not outweigh the justice

and fairness in having the matter proceed to trial. The timetable of the Commercial Division is able to accommodate a trial date being set which would be within a relatively short period (and this ought to be so for the near to medium future).

[49] I also find that the circumstances of this case can be considered exceptional and I will order that the Claimant compensate the Defendant for the costs of this application.

[50] In light of the Court's decision I find it necessary to consider and grant the Claimants oral application pursuant to 26.8 to set aside the judgment against the Claimant which has been entered by the Defendant following the dismissal of the claim, consequent upon the Unless Orders taking effect. Accordingly the Court makes the following orders:

1. The Claimant is relieved from any previous sanction arising from its breaches of the 27 January 2014 and 25 February 2014 orders of Sinclair-Haynes J.

2. Judgment entered against the Claimant is hereby set aside.

3. The claim is set for a further case management conference on a date to be fixed by the Registrar.

4. Costs of this application to be cost to the Defendant to be assessed if not agreed within 30 days of the date of this order.

5. The parties are to agree an order of variation of the order dated 27 January 2014 for security for costs within twenty-one (21) days of the date of this judgment.