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NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISIONS
CLAIM NO. C.L. 2002/R 031

BETWEEN	ELENARD REID	FIRST CLAIMANT
AND	SHANTI NATHTALI ABDALLA	SECOND CLAIMANT
AND	NANCY PINCHAS	FIRST DEFENDANT
AND	ISRAEL PINCHAS	SECOND DEFENDANT
AND	HONORA BARBARA SAMPSON	THIRD DEFENDANT

IN CHAMBERS
Garth McBean instructed by Carl Dowding of Pickersgill Dowding and Baley Williams for the claimants
Shaun Henriques for the defendants

January 15 and February 27, 2009

RELIEF FROM SANCTION - FAILURE TO COMPLY WITH UNLESS ORDER - RULE 26.8 OF THE CIVIL PROCEDURE RULES - EXERCISE OF DISCRETION

SYKES J.

1. This is an application for relief from the sanction imposed by an unless order made by Mangatal J. on March 4, 2008. I dismissed the application and these are my reasons.

2. The specific paragraph of her Ladyship's order that is of immediate relevance to this application states:

> The claimants are granted until the 18th of March 2008, to file and serve a reply to the amended defence. Unless the claimants comply with this order in the time stipulated the claim stands struck out.

3. The background to this order is this. On April 16, 2002, the claimants filed a suit for specific performance in respect of an agreement for sale executed in respect of property located at 11B Waterloo Avenue, Kingston

10. The defendants filed a defence on July 19, 2002. An amended defence was filed on January 13, 2005.

4. The case management conference was held before Daye J. on July 18, 2005. Among the orders made by Daye J. was an order permitting the claimants to file an amended reply to the amended defence. Daye J. also ordered that:

> **(a)** claimant be allowed to file an amended reply to the amended defence;
>
> **(b)** defendant to disclose documents showing refund of $2,500,000.00 as alleged in paragraphs 6, 7 and 8 of the amended defence dated July 16, 2002 on or before 22nd August 2005;
>
> **(c)** there be mutual exchange of a list of all the relevant documents in either party's possession on or before September 30, 2005;
>
> **(d)** the parties be allowed to inspect documents and exchange on or before 30th October 2005;
>
> **(e)** there be mutual exchange of witness statement (sic) in the possession of the parties on or before 30th November 2005;
>
> **(f)** trial by judge alone;
>
> **(g)** pre - trial review set for March 4, 2008 at 10:00am for one hour;
>
> **(h)** listing questionnaire to be filed and served by each party on or before 3rd May 2008;
>
> **(i)** trial set for June 3rd - 5th (sic) 2008;
>
> **(j)** ...
>
> **(k)** ...

5. I should point out that the defendants were not present or represented at the case management conference before Daye J.

6. After this case management conference the defendants went on the offensive and sought to deliver the decisive blow. On October 25, 2005 they filed an application to strike out the claim. They relied on a number of bases including abuse of process and the absence of reasonable grounds to bring the claim. For some inexplicable reason, this application did not make it to the hearing list until January 26, 2007 when it was adjourned to June 6, 2007. Brooks J. dismissed the application on June 6, 2007. In addition to dismissing the striking out application and making a costs order in favour of the claimant, Brooks J. ordered that the "dates for compliance on (sic) orders for case management extended to corresponding dates in 2007". What this meant in practical terms was that:

> **(a)** the reply to the amended defence should be filed and served;
>
> **(b)** the documents showing the refund should be disclosed by the defendant on or before August 22, 2007;
>
> **(c)** the list of documents should be exchanged by September 30, 2007;
>
> **(d)** the inspection and exchange of documents should take place on October 30, 2007;
>
> **(e)** witness statements should be exchanged by November 30, 2007;

7. Not satisfied with the outcome of the application before Brooks J. the defendants initiated another attempt to end the proceedings without a trial. On February 26, 2008, they filed an application for striking out the claimants' case. In the alternative, they asked for summary judgment. It does not appear that this application was heard.

8. The matter came on for pre trial review on March 4, 2008, as ordered by Daye J. all the way back in July 2005, before Mangatal J. By the time

of the pre-trial review of March 4, 2008, this was the state of the case that confronted her Ladyship:

> **(a)** the reply to the amended defence had not been filed;
>
> **(b)** defendants had filed their witness statement (a single statement for all defendants) on December 7, 2007, but had not served it because the claimants had not yet filed theirs in accordance with the orders of Brooks J. made on June 6, 2007;
>
> **(c)** one of the claimants' two witness statements was filed on March 4, 2008 (the other was filed on March 11);
>
> **(d)** the defendants had filed their pre-trial memorandum on February 29, 2008;

9. Thus, by the time of the March 4, 2008, case management conference before Mangatal J. the claimants and the defendants had kept strictly to the timetable set by Daye J. and Brooks J. There was late compliance in some instances. This explains why Mangatal J. stated in a paragraph of her order that the "parties respective late compliance with the time deadlines on the case management orders is hereby extended." So, on March 4, the claimants had not filed and served the reply to the amended defence. The trial date was still June 3 to 5, 2008, some twelve weeks away. This was sufficient time to remedy this omission provided they acted with due haste.

10. It appears that the claimants' explanation for the omission to file the reply did not impress Mangatal J. It was now two years and eight months after the case management conference, and the amended reply had not been filed. I should indicate that Daye J.'s order did not specify a date by which the document should be filed, but one would have thought that with a pre-trial review conference approaching, as well as a trial date, that the claimant would make haste to comply with the order. I should point out that there was no submission before me that her Ladyship's sanction for the breach of the unless order was disproportionate. In fact had the claimants' thought that Mangatal J.'s imposition of an unless order was

wrong, the remedy was to appeal or apply to have the order varied. I start from the position that the unless order was properly made.

The Submissions

11. Mr. Henriques submitted, with great force, that the sanction imposed by the unless order ought to stand. He went through all the criteria listed in rule 26.8 of the Civil Procedure Rules ("CPR") and concluded that there was no good reason to grant relief from the sanction.

12. Litigants and their legal advisers ought to have at the forefront of their collective minds, that an unless order is a peremptory order that is expected to be obeyed. Usually an unless order is made after repeated breaches of an existing order, or there has been long delay in complying with an outstanding order. Either way, when a party is staring down the barrel of an unless order it is fool hardy not to make a serious attempt to comply with the order. It is a dangerous thing to delay and hope for some form of judicial benevolence. With the trial date approaching, there was not much time for the claimants in this case to get their tackle in order. This was clearly a case in which there was long delay in complying with an order.

13. Not even the unless order and its drastic remedy focused the minds of the claimants and their legal advisers. What was clearly a leisurely approach to the claim became a saunter. According to the affidavit of Miss Shanti Nathali Abdalla (dated June 17, 2008), filed on behalf of the claimants, it was not until March 14, 2008, that she signed the reply to the amended defence. The Supreme Court Registry's stamp on the reply showed that it was filed on March 14, 2008. The claimants thus had three more days to have the document served in order to be on the right side of the unless order. What did the claimants do? They decided to serve the reply by ordinary post. The reply was posted on March 17, 2008.

14. Although the CPR preserves traditional methods of service it also is forward looking. It is encouraging use of other forms of service (see part 6). Rule 6.2 of the CPR states where the rules require a document other than a claim form to be served on any person to be served, it may be served either by (a) any means of service specified in part 5 of the CPR; (b) courier or (c) fax.

15. Significantly, rule 6.6 (1) expressly provides that where the document is served by Fax a business day before 4:00 pm then service is deemed served the day of transmission and in any other case, service is deemed after the business day after the day of transmission.

16. For the purposes of this case, what this means is that had the claimants transmitted the reply by fax before 4:00 p.m. on March 14, service would have been deemed to have occurred on the same day. Had they transmitted the reply after 4:00 p.m., it would be deemed served on March 15. By substituting, the dates of March 15, 16, 17 and 18, it is clear that the claimants had more than ample opportunity to transmit the reply. Even if they had delayed until March 18 but had they sent the fax before 4:00 p.m. they would be within the unless order.

17. In this case, the claimants were realistically left with one method of service to be within the order. That was service by fax. March 14 was a Friday. Had the claimants chosen to serve the reply by courier they would have missed the March 18 deadline because the rules say that where service takes place by courier, the deemed date of service is three business days after the date indicated on the courier's receipt (see rule 6.6 (1)).

18. Implicit in Mr. Henriques' submission, is the view that the decision to send it by ordinary post on March 17 was not a serious attempt to comply with the unless order of Mangatal J. It is difficult not to agree with this submission. The CPR has gone out of its way to bring to the attention of practitioners, that they are to use modern technology, but somehow the legal advisers in this case, under a time constraint, chose the slowest possible method when the sole single fastest method available in the time left (by fax), if utilised would have ensured full compliance with the unless order. Another option open to the claimants was to seek an extension of the order. They could have done this on March 17 or 18.

19. Mr. Henriques, quite rightly in my view, was very critical of the conduct of the claimants as outlined in the affidavit of Miss Abdalla. He pointed out that in paragraph 4 of her affidavit, she states quite clearly the terms and effect of the unless order. She knew that failure to comply would result in the claim being struck out. The minute of order indicates

that the litigants themselves were absent but it is important to note that Miss Abdalla is not saying that she did not know of the order and its terms and effect. I cannot assume that her legal advisers did not tell her the nature, scope and effect of the order. She has not said so. I take it that she knew of the order from at least March 4 or very soon thereafter.

20. Miss Abdalla states that "the failure to comply with the said order was not intentional but was due to inadvertence on the part of my Attorneys-at-law (sic) who did not serve the Reply (sic) by the 18th March 2008" (see paragraph 9 of affidavit). She also states that she and her lawyers turned up at court, on June 3, 2008, for the trial, only to discover that the defendants and their lawyer were absent (see paragraph 7 of affidavit).

21. Mr. Henriques submitted that in light of a clear expression and apparent understanding of the terms and consequences of the order, the claimants ought to have ensured that their legal advisers acted with alacrity. He added that the legal advisers could not have failed to grasp the significance of an unless order. He submitted that there is no actual explanation coming from the legal advisers themselves, explaining why the reply was not presented to the claimant before March 14, 2008, and equally important, why they chose to serve the document by ordinary post instead of, for example, fax. Added to this, Mr. Henriques submitted, the claimants were left in no doubt, arising from previous applications to strike out the claim, that the defendants would seek every available opportunity to get rid of the claim without a trial. In short, Mr. Henriques was submitting that a claimant faced with an unless order and a very hostile defendant who left no stone unturned to dismiss the claim, must act with due haste. In my view, these are very telling observations.

The Public Good of Judicial Time and Unless orders

22. No country has unlimited resources to provide all the courts and judges it may want. What this means, is that efficiency and reduction of waste are of great significance. Judicial time is a public good that has to be used effectively. As Beldam L.J. observed in ***R.G. Carter (West Norfolk) Ltd. v. Ham Gray Associates Ltd.*** (unreported), 21 June 1996; Court of Appeal (Civil Division) Transcript No. 922 of 1996:

> *The time of the courts and judges has become a most important resource and a scarce one in the administration of justice today and, as the defendant pointed out in this case, delay is the enemy of justice.*

23. This was stated in 1996, before the introduction of the new procedural rules in England and Wales. If the comment was pertinent then, it is even more so now, and particularly in Jamaica where delay is chronic. Undoubtedly, things have improved since the introduction of the CPR but we are not where we need to be in terms of timeliness of hearing and disposition of matters in the court. The new procedural code introduced in Jamaica on January 1, 2003, was designed to go a far way in changing the legal culture of bench and bar. Encouraged by the reluctance of the courts to strike out cases, some litigants have apparently formed the view that the courts are all bark but no bite.

24. Mr. Henriques relied on the case of ***Hytec Information Systems v Coventry City Council*** [1997] 1 W.L.R. 1666 in support of his submission, that unless orders are a class apart, and stand on a different footing from other types of orders. He submitted that I should approach the unless order and the application for relief from sanction imbued with the spirit and letter of ***Hytec***. The facts are, that the claimant brought an action against the defendant for moneys due under a contract. The defendant filed a defence and counter claim seeking recovery of part of the money paid. The claimant sought further and better particulars of the defence. The defendant repeatedly either did not comply with any specific order or with a series of orders to supply the particulars requested. The point was reached where the court made an unless order which stated that unless the defendant supplied the information by a particular time, the defence would be struck out. In response to this last order the defendant supplied some particulars but not all. The defendant's counsel formed the view that the council had complied with the order. The claimant disagreed and applied for the striking out. The judge agreed with the claimant and struck out the defence. After the judge had perfected the order, the defendant applied to set aside the striking out and to extend time within which to comply with the order. The judge refused and the defendant appealed.

Ward L.J. delivered the leading judgment which was concurred in by the other two judges including Lord Woolf M.R. (as he then was).

25. Ward L.J. stated these propositions in relation to unless orders at pages 1674 - 1675:

> *In the light of my observations that each case really should be cited upon its own facts, it may be otiose to try and encapsulate what I understand to be the philosophy underlying this approach. It seems to me it is as follows.*
>
> *(1) An unless order is an order of last resort. It is not made unless there is a history of failure to comply with other orders. It is the party's last chance to put his case in order. (2) Because that was his last chance, a failure to comply will ordinarily result in the sanction being imposed. (3) This sanction is a necessary forensic weapon which the broader interests of the administration of justice require to be deployed unless the most compelling reason is advanced to exempt his failure. (4) It seems axiomatic that if a party intentionally or deliberately (if the synonym is preferred) flouts the order then he can expect no mercy. (5) A sufficient exoneration will almost inevitably require that he satisfies the court that something beyond his control has caused his failure to comply with the order. (6) The judge exercises his judicial discretion in deciding whether or not to excuse. A discretion judicially exercised on the facts and circumstances of each case on its own merits depends on the circumstances of that case; at the core is service to justice. (7) The interests of justice require that justice be shown to the injured party for the procedural inefficiencies caused by the twin scourges of delay and wasted costs. The public interest in the administration of justice to contain those two blights upon it also*

weighs very heavily. Any injustice to the defaulting party, though never to be ignored, comes a long way behind the other two.

26. I dare say that these seven observations by the learned Lord Justice, captures the essence of the matter when it comes to unless orders. It establishes that unless orders are treated quite differently from other orders. It indicates that time is running out for the erring litigant and he really needs to do what is required of him by the order. The observations by Ward L.J. indicate the weight to be given to some matters, for example, whether the failure was deliberate, or whether the failure to comply was the result of matters beyond the control of the litigant. He stated that the imposition of a sanction is a necessary forensic weapon which the administration of justice requires unless some compelling reason is advanced to exempt the lack of compliance. Importantly, Ward L.J. indicates that the injustice to the defaulting party comes behind that of the innocent party albeit that it was not to be ignored.

27. While I am in general agreement with Ward L.J., I also have to take account of the fact that I am now dealing with a civil procedure rule which lays down, not only how the application for relief is to be made, but also circumscribes the exercise of the discretion. To this extent I am not relying on judge-made law but interpreting and applying a code. The case referred to in paragraph 32 picks up on this point.

Rule 26.8

28. Assuming the threshold requirements have been met I have to bear in mind, that when it comes to granting relief under rule 26.8, it is a question of balance and proportionality, even in the case of unless orders.

29. Rule 26.8 requires that I go through the list in a systematic way, weighing the factors in order to arrive at a decision. In undertaking this exercise I am mindful of Arden L.J.'s warning in ***Stolzenberg v CIBC Mellon Trust*** [2004] EWCA Civ. 827 (delivered June 30, 2004). Her Ladyship said, in speaking of the similar English rule (rule 3.9), at paragraph 155:

... that although the court must go through each of

the matters in the list in CPR 3.9 as a separate and distinct exercise the result is not ascertained by adding up the "score" of either side on each point. If that were the right method, there would be a danger of double-counting. The object of CPR 3.9 is to ensure that all the right questions are asked. That produces "structured decision-making". In addition to going through the subparagraph of CPR 3.9, the court must ask itself if there are any other circumstances that need to be taken into account. However, having done all this, the court is then also required to stand back and form a judgment to the aggregate of the relevant circumstances that have been identified in going through the list to see whether it is in accordance with the overriding objective in the CPR to lift the sanction. This overall "look see" is simply the overriding objective in action.

30. Arden L.J. makes it quite clear, that the judge is required to carry out an assessment having regard to all the relevant facts of the case in light of the criteria stated by the rule. It is important to note however, that the listed criteria are not exhaustive, and other factors are relevant such as whether it is possible to have a fair trial in the future. However, the fact that a fair trial is possible does not mean the relief must be granted (see paragraph 171). What does fair trial mean in this context? I respectfully adopt and apply the approach indicated by de la Bastide P. in ***Barbados Rediffusion v Mirchandani*** (2006) 69 W.I.R. 52, para. 39. The learned President adopted the following passage from Chadwick L.J. in ***Arrow Nominees Inc v Blackledge*** [2000] 2 BCLC 167, paragraph 55:

Further, in this context, a fair trial is a trial which is conducted without an undue expenditure of time and money; and with a proper regard to the demands of other litigants upon the finite resources of the court.

31. I wish to indicate, despite, my agreement with Arden L.J., I am applying the Jamaican CPR and not the English rules. Rule 3.9 of the

English rules which inspired rule 26.8 is markedly different from the Jamaican equivalent. The English rule states:

> *On an application for relief from any sanction imposed for failure to comply with any rule, practice direction or court order the court will consider all the circumstances including -*
>
> ***(a)*** *the interests of the administration of justice;*
>
> ***(b)*** *whether the application for relief has been made promptly;*
>
> ***(c)*** *whether the failure to comply was intentional;*
>
> ***(d)*** *whether there is a good explanation for the failure;*
>
> ***(e)*** *the extent to which the party in default has complied with other rules, practice directions and court orders and any relevant pre-action protocols;*
>
> ***(f)*** *whether the failure to comply was caused by the party or his legal representative;*
>
> ***(g)*** *whether the trial date or the likely date can still be met if relief is granted;*
>
> ***(h)*** *the effect which the failure to comply had on each party; and*
>
> ***(i)*** *the effect which the granting of relief would have on each party.*

32. By way of contrast the rule 28.6 of the Jamaican CPR reads:

(1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction ***must*** *(my emphasis) be -*

(a) made promptly; and

(b) supported by evidence on affidavit.

(2) The court may grant relief ***only if*** *(my emphasis) 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 (sic) 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.

33. The Jamaican rule is far more stringent than the English rule. Rule 28.6 (1) requires that the application is made promptly. The rule does not define promptly and neither does the CPR. There must be affidavit evidence. Rule 28.6 (2) requires that all three paragraphs are met before the exercise of the discretion can arise. In my view this provision is to be read conjunctively. Were it otherwise, then it would not be intelligible. A court could not sensibly proceed to rule 26.8 (3) if the applicant only met rule 26.8 (2) (3). In other words, if the applicant fails any of these paragraphs then that is the end of the matter for him.

34. What I have just stated is supported by Barrow J.A. in the case of ***Nevis Island Administration v La Copropriete du Navire J31*** (St. Christopher and Nevis Civil Appeal No. 7 of 2005) (delivered April 3, 2006) at paragraph 5:

> *An undoubted advantage that is to be gained from relying on the criteria for granting relief from sanction that CPR 2000 prescribes is certainty. There is no longer need to rely on judge made criteria with the uncertainties that attend varying judicial viewpoints as to what those criteria should be and what emphasis should be given to which of them. For example, in the* ***Quillen*** *[emphasis in original] case Singh JA stated that the appearance of "some chance of success"4 of the proposed appeal trumped both inordinate delay (six months) and the clear absence of good reason for delay.5 It was emphasized that the discretion to extend time was unfettered. In contrast, certain of the criteria that are set out in rule 26.8 are made conditions precedent to the grant of relief and the court is expressly precluded from granting relief if certain of them are not satisfied. Therefore, the discretion to grant relief under CPR 2000 is distinctly fettered and, it may be noted, this is in sharp contrast to the open discretion that is found in the comparable English rule 3.9 (1).*

35. Barrow J.A. was dealing with rule 26.8 of the CPR of the Eastern Caribbean Supreme Court. That rule and the Jamaican rule are identical in every respect, even in respect of the number of the rule.

36. I now turn to the systematic analysis of the evidence under each head ever mindful that I am not totting up a score card and awarding points under each head. What I am required to do is to give the appropriate weight to each factor listed once the threshold requirements are met; stand back and look in light of the overriding objective to see if what I have decided is proportionate and consistent with fairness to (a) both sides, (b) other users of the court who are waiting their turn to gain access to the public good of judicial time and (c) the overall interests of justice. Rule 26.8 enables the court to achieve maximum flexibility when dealing with a breach of an unless order. It is not a mechanical exercise of the discretion (see ***Barbados Rediffusion Services Ltd v Mirchandani (No. 2)*** at paragraph 36).

The factors

Considerations under rule 26.8 (1)

37. I begin by looking at the threshold requirements under this part of the rule which are that the application must be made promptly and supported by affidavit evidence. This application was supported by affidavit evidence. The big question here is whether the application was made promptly. While I accept that the adverb "promptly" does not necessarily mean immediately, and that there can be a certain amount of elasticity in meaning, clearly the more removed one is from the date the sanction takes effect the less prompt the application is with the corresponding need to explain more fully, the reasons for the delay in applying for relief.

38. Mr. McBean submitted that time begins to run from June 4. The application was made on June 18. Therefore the application was made promptly within the meaning of the rules. I disagree with Mr. McBean on this point. I explain why I do not accept this submission, and in doing so I place the matter in full context.

39. By the terms of Mangatal J.'s order the claimants' statement of case was struck out, once the reply was not filed and served by March 18, 2008.

It is common ground that there was filing before March 18 but there was no service on or before March 18. It is interesting to note that when the matter came before Beckford J. on June 3, 2008, it was adjourned to June 4. The minute of order reads:

> *Matter adjourned to 4th June 2008 at 10:00am for claimant's attorney at law to provide proof of the reply to the amended defence filed on 14th March 2008 was served.*

40. The minute of order also indicated that Miss Daniella Gentles appeared and was holding for Mr. Henriques. Mr. Henriques has explained that he did not attend court, because, from his understanding of the order, the matter was struck out, because he was not served by March 18. It was when he received a telephone call that he asked Miss Gentles to go to court for him. I should point out that Mr. Henriques practices in Montego Bay which is at least 150 kilometres from Kingston where the matter was to be tried.

41. Given the knowledge that the legal representatives of the claimants must have had, namely, that they posted the reply by ordinary mail on March 17, 2008, which meant that the deemed date of service was after March 18, the minute of order is inexplicable, unless the judge was led to believe by the legal representatives of the claimants, that such proof was possible. There is no affidavit from the claimants or the defendants, setting precisely what happened before Beckford J. on June 3, but it seems fair to say, that had rule 6.6 (1) been brought to her Ladyship's attention along with full disclosure of the fact that the reply was only posted on March 17, it is virtually impossible for her Ladyship to have made the order that she did. Rule 6.6 states that where the method of service is by post, the deemed date of service is 21 days after posting. In light of the deemed date of service, if service is being effected by ordinary post, it is difficult to see what proof could have been furnished to the court on June 4.

42. It is extremely unlikely that Miss Gentles would have been of much help to the court, given that she was appearing at extremely short notice - notice received the very morning of the first day of the trial - and would

be unlikely to have had full command of the procedural history of the matter.

43. The matter came back before Beckford J. on June 4, 2008. The minute of order reads:

> *Matter to stand struck out on 18 - 3 - 08. Application to relief from sanction to be filed by claimant's attorney at law.*

44. By June 4, 2008, Mr. Henriques was in court, and undoubtedly explained the full circumstances to the court. This explains why the minute of order of June 4 reads in the way that it does. Beckford J. had before her counsel for the defendants who was fully seized of the matter, and once the full picture was presented, her Ladyship merely confirmed what should have been obvious to the claimants' legal advisers. The application for relief from sanction was filed on June 18, 2008. Beckford J. was not imposing a sanction. She was confirming that the sanction indeed took effect.

45. I make two observations at this stage. It must have been clear to the legal representatives when they arrived in court on June 3, 2008, that they were in breach of the order of Mangatal J. It must have been clear that the claim was struck out from March 18. The legal representatives, on June 3, 2008, should, at the very least, been applying for relief from sanctions. Instead, they either, perhaps inadvertently, led the court to think, or did nothing to dispel the view of the court, that it was possible for them to prove that the defendant was served with the reply, when they ought to have known that such proof was, by virtue of the text of the rules, an impossibility - the deemed date of service according to rule 6.6 (1) would be well past March 18.

46. Mr. Henriques made the pointed observation, that since the claimants' legal advisers are expected to know the rules relating to service of documents other than the claim form, and they knew that they posted the reply on March 17, they would have known that the sanction took effect on March 18. His point is that the time begins to run from March 18 and not June 3, the date of trial or even, June 4, when the striking was confirmed.

He added that even as late as June 3 or June 4, the claimant could have filed an application for relief from sanctions but they chose not to do so until June 18, three months after the sanction, to the certain knowledge of the claimants' legal advisers, took effect.

47. Mr. McBean is counting the time as beginning on June 3 or 4, 2008. This submission does not meet Mr. Henriques' point which is, that the claimants were represented by counsel at the March 4 pretrial review before Mangatal J. Counsel knew the effect of the order and what would follow if there was a breach. Counsel knew that posting on March 17 by ordinary post would with 100% certainty breach the order. Therefore counsel, and by extension, the client knew that the claim was struck out from March 18. I agree with Mr. Henriques.

48. The non-distinction between the lawyer and his client is based on sound reason. Mr. Henriques relies on this passage from Ward L.J. in ***Hytec*** at page 1675:

> *Ordinarily this court should not distinguish between the litigant himself and his advisers. There are good reasons why the court should not: first, if anyone is to suffer for the failure of the solicitor it is better that it be the client than another party to the litigation; secondly, the disgruntled client may in appropriate cases have his remedies in damages or in respect of the wasted costs; thirdly, it seems to me that it would become a charter for the incompetent (as Mr. MacGregor eloquently put it) were this court to allow almost impossible investigations in apportioning blame between solicitor and counsel on the one hand, or between themselves and their client on the other. The basis of the rule is that orders of the court must be observed and the court is entitled to expect that its officers and counsel who appear before it are more observant of that duty even than the litigant himself.*

49. The point Mr. Henriques is making here is that the attorney who is representing a litigant is expected to advise his client appropriately and act accordingly to comply court orders. This passage from Ward L.J. is of strong general application but rule 26.8 (3) (b) requires the court to consider whether the failure to comply with the order was due to the litigant or his lawyer. The strong general rule is supported by the Caribbean Court of Justice (see ***Barbados Rediffusion Services Limited v Mirchandani (No. 2)*** at paragraph 47).

50. The claimant says in her affidavit that she did not know that the matter was struck out until June 3, 2008 because the reply was filed in time but not served by March 18, 2008 (see affidavit at paragraph 8). It is difficult to see how the claimant could have failed to have appreciated that the matter was struck out on March 18, if she and her legal advisers were in dialogue with each other. I cannot imagine what the legal advisers may have told her before June 3, when the legal advisers knew that they did not post the reply until March 17. I have no desire to speculate but I must confess that I am unable to think of what the claimants could have been told other than the bald truth that the claim was indeed struck out from March 18. It is almost incomprehensible that she would not have known this between March 18 and June 3 – a period exceeding two months.

51. I hold that the relevant time here begins on March 18. This was known to the claimants and their legal advisers. The claimants' affidavit is very clear that they appreciated that failure to meet the March 18 deadline would be fatal to the case (see paragraph 4 of the affidavit).

Considerations under rule 26.8 (2)

52. The claimant states that it did not intentionally fail to comply with the order. I prefer the alternative formulation by Ward L.J. in ***Hytec***. His Lordship asked, "Was the failure deliberate?" The claimants say in the affidavit, that the failure to comply with the order "was due to inadvertence on the part of my attorneys-at-law who did not serve the reply by the 18th March 2008" (see affidavit at paragraph 9).

53. If I may say with the greatest of respect to the deponent, what she has stated is a conclusion. What is required of her is to state the reasons why the reply was not filed and then it is for the court to make a determination of whether the reasons advanced show inadvertence or deliberate breach of the order. It is not for her to classify the breach as arising from inadvertence. In the absence of an affidavit explaining the facts that led to the breach, I have no material before me to decide whether the failure was intentional or not.

54. The affidavit does not explain the reason for the failure and so no good reason has been advanced for the failure. Is it that the attorneys removed from one location to the next? Is it that the attorney who had conduct of the matter left the chambers? Was there a flood or fire at chambers which caused the matter to be mislaid? Is it that there was difficulty in contacting the claimant to secure the signature? The affidavit does not attempt an explanation other than ask the court to accept that the omission was due to inadvertence.

55. I now turn to the claimants' conduct to see if they have generally complied with orders made in the case. Daye J. ordered that witness statements should be filed and exchanged by November 30, 2005. The claimants' filed only one witness statement by March 4, 2008. Its second witness statement was filed after the pre-trial review date. The witness statements were not served until June 5, 2008. This was after Brooks J., on June 6, 2007, had ordered that the date for compliance with orders on case management be extended to corresponding dates in 2007, that is to say, the witness statements were to be filed by November 30, 2007. On the other hand the defendants filed their witness statement on December 7, 2007 - seven days outside of the extended time granted by Brooks J.

56. Mr. Henriques also made an important point. He said that because the claimants had not filed and served the witness statements on him, he filed his, but did not serve it on them. This, he submitted, meant that the bundle for trial which ought to have been prepared for trial by the claimant would not have had the defendants' witness statement and as such, any bundle prepared would necessarily be incomplete - a further example of non-compliance with part 39, which places the responsibility of preparing the trial bundle on the claimant.

57. He made this point to rebut the suggestion that the case was ready to proceed on June 3, as hinted at by the claimants, and would have proceeded but for the absence of the defendants counsel on that date. Mr. Henriques is really saying, that when the claimants appeared before Beckford J., they would have known that they did not have the defendants' witness statement and so could not have prepared a complete bundle for trial. Implicit in this submission is that the trial court was left, apparently, with the impression that the matter was ready for trial and would proceed if proof of service of the reply was forthcoming when, the reality of the matter was that, the trial could not proceed because the defendants' witness statement was not disclosed to the claimants, a fact which they must have known.

58. It would have been helpful if Mr. Henriques had filed an affidavit setting out the facts on which he intended to rely. He has made assertions during the hearing, which were not really disputed by the claimants. He asserted that the claimants' witness statements and list of documents were not served on him until June 5, 2008. He also asserted that the claimants' listing questionnaire was not filed until May 2008.

59. From this record it cannot be said that the claimants have generally complied with the court orders and other relevant rules. From what I have said, this conclusion as well as other conclusions arrived at in relation to the promptness of the application and absence of good reasons for the failure to comply means that I need not go further to consider the factors under rule 26.8 (3). However, I do so in the event that my interpretation of the rule is incorrect.

Considerations under rule 26.8 (3)

60. The interests of the administration of justice are best served by compliance with court orders by litigants and their legal advisers. There must be proper use of judicial time which is both valuable and limited. Litigants have a responsibility to see that their attorneys act promptly when the court gives orders. Attorneys have an obligation to see that their clients do what is necessary to comply with court orders. From the claimants' affidavit, there can be no doubt that they appreciated that the attorney needed to file the reply promptly. The claimants only signed the

reply on March 14. With the deadline looming, I would have expected the claimants to be on the backs of the lawyer to make sure that service took place to meet the March 18 deadline.

61. It is not entirely clear from the affidavit of the claimants, whether the failure to comply was due to their attorneys or themselves. The claimants' affidavit does not make it clear why the reply was signed only on March 14, given that the unless order was made on March 4. There is no clear explanation from the attorneys indicating why they only presented the reply for signature on March 14, and why they did not send it by fax, the only remaining method of service that would have enabled them to meet the March 18 deadline.

62. It can now be said that since the document eventually reached the defendants any future trial date can be met. This is an important consideration.

63. I now consider the effect of granting or denying relief on each party. If I were to grant relief, it would mean that the defendant would now be subject to claim that he is now rid of, and has from the beginning been contending, has no legal foundation. If I were to grant relief, the defendant would have to retain counsel and engage in other expense to prepare for a trial. The claim is six years old and must have consumed a great deal of time and money of the defendants. This failure by the claimant cannot in any way be attributed to the defendant.

64. The claimants would undoubtedly have their day in court and denying them relief would bar them from the opportunity of establishing their case. This is an important consideration because courts exist to resolve disputes and litigants should not be readily barred from access to the court.

Consideration of other factors

65. I have already stated that rule 26.8 is not exhaustive. Rule 1.1 of the CPR requires, among other things, "allotting to [the case] an appropriate share of the court's resources, while taking into account the need to allot resources to other cases". This case has had a fair share of the courts resources allocated to it. It has been through case management, pre trial

review and had a trial date. The particular failure by the claimants continued for over two years. The claimants were given one last opportunity to remedy the situation and they did not. I take into account the claimants' conduct on June 3 and 4, and I must say that the approach that they took to the breach was curious to say the least.

66. It has not been said that a fair trial is impossible or very difficult. This is a significant consideration, because, as far as possible litigants should have their matters determined by properly constituted courts. This is indeed a constitutional right. The right is not absolute. It cannot be right that a defendant is subject to unnecessarily prolonged anxiety over whether he will be held liable or exonerated. Undue delay imposes costs on other parties to the claim. They have to retain counsel longer than necessary. They have to be setting aside resources to take care of the other costs of litigation that cannot be recovered under a costs order. Their lives are disrupted. They may wish to travel, pursue studies but cannot do so because they do not know the extent of their liability.

67. The right of access to the courts cannot mean that litigants can ignore court orders, and when the sanction bites, expect the court to grant relief without giving consideration to, or even greater weight, to the effect on the other parties, than to the effect on the offending party. Further, other parties are waiting to use the public good of judicial time and resources. In this case, no reasonable person can even begin to suggest that the claimants were not given more than a full, fair and ample opportunity to prepare and present their case. I am unable to see what is unfair or unjust about upholding the sanction.

Conclusion

68. Application for relief from sanctions is dismissed with costs to the defendants to be agreed or taxed.