[2017] JMSC Civ. 126

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2008 HCV 05693

BETWEEN	**ALLIANCE INVESTMENT MANAGEMENT LIMITED**	**CLAIMANT**
AND	**UNIVERSAL AGENCIES LIMITED**	**1st DEFENDANT**
AND	**STAFFORD SHANN**	**2nd DEFENDANT**

IN OPEN COURT

Mrs. Martina Edwards Shelton and Matthew Ricketts instructed by Shelards Attorneys-at-Law for the Claimant

Mr. Ian Wilkinson Q.C. and Mr. Lenroy Stewart instructed by Wilkinson Law for the Defendants

12th and 13th June, 20th September 2017

Notice of Application for Court Orders – Application for Relief from Sanctions – Civil Procedure Rule 26.8 – Whether the Applicant has a good explanation for failure to comply – Civil Procedure Rule 26.5 – Request for Entry of Judgment after Striking Out

McDONALD J

Introduction

[1] This matter relates to an application made by the Claimant for relief from sanctions, the Claimant having failed to comply with an Unless Order made by my brother Rattray J on 17th May 2017, with the result being that the Claimant's case stands struck out.

[2] By way of *Notice of Application for Court Orders* filed 6th June 2017 the Claimant seeks the following orders:

> 1. *Relief from Sanctions, pursuant to CPR 26.8 (1);*
> 2. *The Amended List of Documents filed herein on June 6, 2017 on behalf of the Claimant be allowed to stand as if filed in time;*
> 3. *Such further and/or other relief as the court shall deem just.*

[3] The application is supported by the *Affidavit of Matthew A. Ricketts in Support of Notice of Application for Court Orders* filed 6th June 2017.

[4] It is to be noted that when the matter came before this Court on 12th June 2017, it was listed for trial. However, the Claimant having failed to comply with the Order of Rattray J, trial was unable to proceed without relief being sought and granted. The Defendant also had an application before the Court, that application being one for the entry of Judgment against the Claimant, its case having been struck out. Notwithstanding that that application was filed first in time, this Court found it prudent to hear this application first.

[5] There was no dispute between the parties that the Claimant had failed to comply with the Order of Rattray J, and that as a result, the Claimant's case stood struck out.

[6] It is also to be noted that, before the application was made, Counsel for the Defendant, Learned Queen's Counsel Mr. Wilkinson, raised a point in *limine* objecting to the admissibility of the affidavit of Matthew Ricketts filed in support of the application. Mr. Wilkinson sought to have the affidavit struck out, primarily on the basis that it

contained hearsay and failed to comply with **rule 30.3** of the **Civil Procedure Rules (CPR)** which provides an exception permitting the admission of otherwise inadmissible hearsay into evidence where certain conditions have been met. Following lengthy submissions from both sides, this Court made a ruling on 13th June 2017, that paragraphs 7-10 of the affidavit were to be struck out on the basis that they contained hearsay and did not comply with the provisions of **CPR 30.3**, but that the remainder of the affidavit ought to remain.

[7] Thus, the affidavit in support will be considered as amended by the Court's ruling.

Procedural Background

[8] The matter came up for case management on 13th October 2015 at which time my sister Edwards J made the following orders:

> 1. *"Standard Disclosure of documents by the parties on or before November 30, 2016;*
>
> 2. *Inspection of aforesaid documents on or before December 14, 2016;*
>
> 3. *Witness Statements to be filed and exchanged on or before January 30, 2017;*
>
> 4. *The question of certification of the experts herein to be dealt with at the Pre-Trial Review if no previous application is made;*
>
> 5. *Each party to file and serve its own Statement of Facts and Issues by May 15, 2017;*
>
> 6. *Listing Questionnaires to be filed no later than March 15, 2017;*
>
> 7. *Pre-Trial Review to be held on April 5, 2017 at 10:00 a.m. for half an hour (1/2);*
>
> 8. *Trial before a Judge alone June 12 and 13 in open Court;*
>
> ***9. Specific Disclosure is to be made by the Claimant of:***
>
> ***a) All documents signed by the 2nd Defendant on behalf of the 1st Defendant and the Claimant and/ or its Representatives authorizing payments to be made directly to the Claimant***

from customers of the Defendants that are in the possession and or control of the Claimant;

b) All certified wire transfer documents from the Bank of America paid to the Claimant on behalf of the Defendants that are in the possession and or control of the Claimant.

c) ***Any contracts between the Claimant and the 1st Defendant and/or 2nd Defendant for the period February 13, 2004 to January 26, 2005 or any collateral contracts made on behalf of or for the benefit of the Defendants for the same period.***

10. Claimant's Attorneys-at-Law to prepare file and serve this Order;

*11. Costs to be cost in the claim. [**Emphasis Supplied**]*

[9] On 10th February 2017, the Claimant, having failed to comply with those orders, filed an application for extension of time within which to comply.

[10] That application came before Rattray J on 5th April 2017, the same date fixed for pre-trial review. On that same occasion, the Defendants made an oral application to strike out the Claimant's statement of case on the basis that the Claimant had failed to comply with the Case Management Conference (CMC) orders. Both applications were heard and Rattray J reserved his ruling until 17th May 2017, at which time he refused the Defendant's application to strike out and granted the extension of time as prayed by the Claimants. The learned Judge was of the view that both parties had been non-compliant with the CMC orders, and made, inter-alia, an unless order against both parties in relation to compliance with the CMC orders, failing which the case of the defaulting party would stand struck out.

[11] The complete list of orders made by Rattray J on 17th May 2017 are as follows:

1. "The Claimant's Application for extension of time to comply with the case Management Conference Orders is hereby granted.

2. The Defendants [sic] Oral Application to Strike out the Claimant's Statement of Case for non-compliance with the case Management Conference Orders is hereby refused.

3. Time for the parties to comply with the Orders made at the Case Management conference extended to the 25th May, 2017 by 4:00 p.m., failing which the Statement of Case of the parties in default to stand struck out.

4. *Skeleton Submissions together with a List of Authorities being relied on by the parties to be filed and served on or before 2nd June, 2017 by 12 noon.*

5. *Copies of the Skeleton Submissions as well as copies of the Authorities being relied on to be prepared in a Judge's Bundle by each side and a copy of the said Bundles together with the Core Bundle delivered to the Clerk of the Judge who is set to hear this matter on or before 7th June, 2017 by 4:00 p.m.*

6. *No Order as to Costs. [**Emphasis Supplied**]*

[12] Whilst the Defendant complied with the orders as stipulated, the Claimant filed the relevant documents (list of documents, listing questionnaire, statement of facts and issues, and witness statements) on 25th May 2017 before 4:00 p.m. but did not serve them on the Defendants until the following day, 26th May 2017 at 4:02 p.m. Additionally, the Claimant failed to address in its list of documents, the case management order for specific disclosure made by Edwards J, a bone of contention between the parties.

[13] On 2nd June 2017, the Defendants filed a *Notice of Application for Court Orders for Judgment without Trial after Striking Out* seeking, inter-alia, that Judgment be entered in their favour, on the basis that the right to enter judgment had arisen as the Claimant had failed tocomply with the CMC Orders as ordered by Rattray J, and as a consequence it's case stood struck out.

[14] Subsequently, on the 6th June 2017, the Claimant filed the application and the aforementioned affidavit in support which are the subject of this decision, as well as, an amended list of documents addressing the order for specific disclosure.

THE CLAIMANT'S SUBMISSIONS

[15] The essence of the Claimant's submissions is that the Claimant has satisfied all the conditions of **Civil Procedure Rule (CPR) 26.8**in order for relief from sanctions to be granted.

[16] In relation to **rule 26.8(1)(a)**, that the application must be made promptly, Counsel for the Claimant, Mrs. Edwards-Shelton, submitted that the application was

made promptly, since it was filed on 6th June 2017, ‘a mere two (2) days’ after it came to the Claimant’s attention that the order had not been complied with. The non-compliance was brought to the Claimant’s attention after they were served with the Defendant’s application for judgment on the basis of the Claimant’s non-compliance with the unless order.

[17] With regards to **rule 26.8(1)(b)**, that the application must be supported by evidence on affidavit, it is submitted that the application is supported by the affidavit of Matthew Ricketts filed 6th June 2017.

[18] In relation to the requirements of **rule 26.8(2)(a) and (b)**, the Claimant submits that that the failure to comply was not intentional and that there is a good explanation for the failure. It is submitted that these requirements are addressed at paragraphs 12 and 13 of the affidavit of Matthew Ricketts, wherein it is deponed that the failure to comply with the order for specific disclosure was due to a clerical error that occurred whilst the documents were being drafted and that in those circumstances the error was not intentional. Paragraph 13 goes on to outline the circumstances that led to the error, those being that the documents were prepared in a very short window of time, that is, eight (8) days from the date of Rattray J’s orders. Mrs. Shelton asksthe Court to examine the List of Documents filed by the Claimant, and consider the sheer volume of documents that had to be scrutinized in the preparation of their case in order to comply with the orders of the learned judge. Counsel also asked the Court to also consider that the original case management conference (CMC) orders gave the Claimant one (1) year to comply with the order for standard disclosure, and one (1) year and six (6) months to comply with the order in relation to the filing of witness statements. These time frames, it is submitted, were condensed into eight (8) days, albeit under an application for an extension of time

[19] The Claimant also asks the Court to consider that the Claimant is a limited liability company, and not an individual, and as such there are channels through which the Claimant would have needed to go in order to comply with the CMC orders. The Claimant would have to examine which of its officers would be the best officer to tender

as a witness on its behalf, and whether such an officer has the relevant documents in his or her possession to prove its case, and where the relevant documents would be located. Therefore, the Claimant submits, it would take a limited liability company a greater amount of time to comply with orders such as these, than it would a lay person. Thus, the Claimant asserts, the failure was not intentional and a good explanation has been offered for the failure to comply.

[20] In relation to **rule 26.8(2)(c)**, the Claimant submits that it has complied with all other relevant rules and orders made by this Court, in that, all the CMC orders were complied with by May 25, 2017 before 4:00 p.m., save and except for the order for specific disclosure, which was complied with on 6th June 2017. The Claimant asserts that there are no other outstanding orders for which the Claimant is in breach.

[21] In relation to **rule 26.8(3)**, the Claimant submits that the failure to comply was the fault of the Claimant's attorney and not that of the Claimant itself; that the breach was remedied when the Claimant filed its amended list of documents on 6th June 2017; that the trial date could have been met because the relevant CMC orders were complied with in time for trial on the 12th and 13th June 2017, notwithstanding that the Claimant would have needed relief from sanctions before embarking upon a trial. Such an application, it is submitted, would have had to be made on the morning of the trial, and if that application was successful then it would be possible for trial to have commenced within the days set for trial. However, the Claimant submits alternatively, that, if the Court disagrees that the date could have been met, then "another trial date could still be met, given that there are no outstanding orders to comply with".

[22] In dealing with **rule 26.8(3)(e)**, as to the effect the granting of relief or not would have on each party, the Claimant relies on the authorities of **Adele Shtern v Villa Mora Cottages Ltd & Monica Cummings** [2012] JMCA Civ 20, **Sherine Blake v LDCosta Loans and Financial Management Ltd and Anor** [2015] JMSC Civ. 14 and **Branch Developments Ltd (trading as Iberostar Rose Hall Beach Hotel) v The Bank of Nova Scotia Jamaica Ltd.** [2014] JMSC Civ 003.

[23] In relation to ***Villa Mora*** *[supra]*, which the Claimant submits is very similar to the one at hand, it is noted that upon examining the factors and the reasons given for non-compliance in the case, being that the Defendants were having problems locating the witnesses, and finding that the grant of relief would not in anyway cause undue prejudice to the respondent, the Court of Appeal granted the relief sought.

[24] On the basis of ***Villa Mora***, the Claimant submits that the grant of the relief being sought in the present case would not in any way prejudice the respondents, because the nature of the disclosure is such that if the Claimant had complied with the order for specific disclosure on 25th May 2017 as ordered, there would still be no documents to disclose, as the Claimant's position is that it is not in possession of the documents being requested. Therefore, in those circumstances, it is submitted, the failure to comply has no grave effect on the Defendant's case. Further, the orders made by Edwards J for specific disclosure required the Claimant to disclose certain specified documents if the documents were in the possession and or control of the Claimant. The Claimant's position is that the documents being requested therein are not in its possession or control. It is submitted that the documents requested in the order for specific disclosure, particularly number three, would have been disclosed under standard disclosure and as such, the Claimant would have no additional documents to disclose under order number three. The Claimant therefore submits that the failure of the Claimant to specify in the list of documents filed 25th May 2017 that it did not have the documents requested could not have affected or prevented this matter from proceeding to trial, and would not have prejudiced the Defendants. Further, it is argued that the Defendant cannot compel the Claimant to disclose documents which the Claimant does not have. The Claimant argues that Edwards J did not state in her orders that if the Claimant did not disclose the documents the matter could not go further, nor did she say that if the Claimant did not disclose the documents its statement of case would be struck out. It is submitted she could not have said so, as rule 28.2(b) is very clear that disclosure is limited to, among other things, documents that the party has, or has had a right to possession of. Counsel argued that there is no evidence before this Court that the documents

requested under the order for specific disclosure were in the Claimant's control or possession.

[25] In relation to ***Sherine Blake*** *[supra]*, a case in which the Claimant therein sought relief from sanctions in respect of non-compliance with an unless order seven (7) days following the breach, the Claimant noted the comments made by Batts J at paragraph 9in considering to grant the relief, which the Claimant submits are very instructive, emphasizing the last three (3) sentences wherein Batts J stated the following:

> *"A just cause ought not to be defeated by mere technicalities. Litigation is not, as a great judge once said, a game of "snap" in which a party wins because the other has "tripped" over a rule."*

[26] The Claimant further wished to holistically adopt the following comments made by Batts J at paragraph 16 of the same judgment:

> *"As regards consideration of the matters listed in rule 26.8(3) I say as follows:*
>
> *a) Excluding the Claimant from litigating her case may well undermine confidence in the administration of justice. It will deprive her unreasonably of the opportunity to have her case heard.*
>
> *b) It was the attorney's failure not the litigant's as she had delivered to her lawyers the material to be considered for disclosure. This is an ameliorating circumstance.*
>
> *c) The breach has in fact been corrected as the list was filed and served.*
>
> *d) The trial date can still be met and I will make Orders accordingly.*
>
> *e) The grant of relief will have no detrimental effect on the Defendant or its case."*

[27] In relation to the case of ***Iberostar*** *[supra]*, the Claimant submits that it is also very similar to the case at hand, in that that Claimant's case had been struck out owing to its failure to comply with an unless order having to do with specific disclosure. It is submitted that the circumstances in that case are distinguishable to those at hand in thatthat Claimant had a general history of non-compliance, and did not even bother to seek relief from sanctions in relation thereto.In spite all of this, it is submitted that the Court was still not minded to strike out the Claimant's claim, and instead allowed the

matter to proceed to trial. The Claimant specifically relies on paragraph 34 of that ruling, which is described as very instructive, wherein, it is submitted, McDonald-Bishop JA adopted some principles laid down by the Caribbean Court of Justice (CCJ) in dealing with cases of non-compliance with an unless order as is the case here. This Claimant wished to adopt in particular paragraphs 34(2), (6), (7) and (9) and 42. The Claimant in the instant case submits that this case is distinguishable from ***Iberostar***, in that this Claimant was, at best, guilty of non-compliance with the CMC orders and seeking an extension of time, as well as not complying with the order for specific disclosure. Although Mrs. Edwards-Shelton admitted that the documents were served late (26th May, 2017 at 4:02 p.m.) she argued that this was only by a day, and therefore is *de minimis*, and that there is no dispute that the documents were filed in time. Counsel further argues that to strike out or refuse the Claimant the opportunity to pursue its claim on the basis that all the documents, which were filed in time, were served 1 or 2 days late would be a grave injustice, and that, in all the circumstances of the case, it would be contrary to the authorities and provisions of the overriding objective for this case to be dismissed and judgment entered on that basis.

[28] The Claimant also relies on the ***Iberostar*** case in relation to the requirement as to whether there is a good explanation, highlighting paragraphs 67 -73 of the decision. Counsel noted that McDonald-Bishop J (as she then was) examined the explanation given, which involved the acceptance of responsibility for the breach by the defaulting party's attorney, as has been done in this case. It is noted that the explanation given by that attorney entailed that he had been out of office and had family emergencies that prevented him from complying with the order for specific disclosure, which the learned judge ultimately found to be an unacceptable excuse. In attempting to distinguish that case from the instant case, Counsel submitted that although the attorneys in ***Iberostar*** had indicated that the breach was an administrative error on their part, the explanation in this case is different. Counsel asks this Court not to find the explanation in this case wanting or inadequate, as was found in ***Iberostar***.

[29] The Claimant submits further that the authority of ***Iberostar*** is also very instructive on how this Court should assess the said failure. The Claimant wished to

adopt the approach taken by the learned judge at paragraph 77 of the judgment, and submitted that in examining the non-compliance with the order for specific disclosure by the date specified by Rattray J, this Court should consider the type, nature, and importance of the documents to which the order relates as set out by the learned judge in ***Iberostar*** at paragraph 77. The Claimant submits that this Court should be mindful in making its deliberation that the order for specific disclosure has been complied with albeit late, and that there is no evidence before the Court to say that the Claimant has or has had the documents in question. It is submitted that even when the order for specific disclosure was being made it was not definitively known that the documents did exist and were or had been in the possession of the Claimant.

[30] In relation to the issue as to whether prejudice would be caused to the Defendant, counselhighlighted paragraphs 80, 95 – 98, 107 – 108, 121, and 173 – 177 of the ***Iberostar*** judgment, noting that the learned judge therein discussed the effect the failure to comply would have on theDefendant's case, in light of its contention that it was being prejudiced in the preparation of its case. It is submitted that in making her decision, her ladyship contemplated whether the documents were directly relevant, and in paragraph 21, concluded that the Claimant's breach was not gross and did not appear to affect the fairness of the trial of the issues between the parties. The Claimant asks this Court to do same and adopt the reasoning of the learned judge in ***Iberostar***, on the basis that there is no evidence from the Defendants to demonstrate how their case will be affected by the absence of these documents. It is further submitted that there is no proven effect of any non-disclosure of the documents.

[31] In concluding, Counsel for the Claimant submitted that the breaches complained of in the ***Iberostar*** case, as compared with the breaches complained of in the present case, were far greater. Nevertheless, the judge did not impose the most draconian measure, stating in her ruling, 'the punishment should fit the crime'. The Claimant submits that all the orders have been complied with by the Claimant, the Claimant is in a position to proceed to trial. The issues at stake concern the late compliance with the order for specific disclosure and also the late service of the documents. It is submitted that those two issues should not be viewed by this Court as being so grave as to bar the

Claimant from proceeding to trial. There is no allegation that the Claimant's case has no prospect of success, and therefore it is submitted that the Court should grant the relief being sought.

THE DEFENDANT'S SUBMISSIONS

[32] The essence of the Defendant's submissions is that the application must fail because the Claimant has failed to satisfy the dictates of rule 26.8 in order to get relief.

[33] In particular, it is submitted that the Claimant has failed to provide evidence on affidavit in support as is required by **rule 26.8(1)(b)**, in that the affidavit sworn by Mr. Matthew Ricketts is lacking, particularly in light of the parts that were struck out by this Court. It is submitted that the key parts of the affidavit are gone, and these parts that related to the Bank of America documents were critical to the case. Counsel for the Defendant, learned Queen's Counsel Mr. Ian Wilkinson, repeated his previous position, that that information ought to have been provided by an officer of the claimant company, and that, since this Court has no such evidence before it, the application is left without evidence.

[34] Counsel further submits that this material is vital as rule 26.8(2)(b) stipulates that the Court may only grant relief if satisfied that there is a good explanation for the failure. In the absence of that evidence, Mr. Wilkinson Q.C. submitted that there is no explanation for the absence of the Bank of America documents, and that in extenso, there is no explanation given for the failure to comply with the order for specific disclosure.

[35] Counsel noted that the salient paragraphs of Matthew Rickett's affidavit are chiefly paragraphs 12 and 13, which explain that the reason for the non-compliance was that there was a 'clerical error, and that this error was actuated by the pressure of time, having only eight (8) days. It is submitted that the Court ought not to accept this evidence for the following reasons:

i. The Claimant has not identified what the clerical error was. A clerical error is normally something done by a clerk, sometimes attributed to a secretary. The Claimant ought to have elaborated and explained fully what the error was, so that a Court of competent jurisdiction can properly assess and find that there was indeed a clerical error and how that error affected the proceedings. If, for example, the Claimant had come before the Court in supplication and said'the truth is that in the rush we simply forgot to include the list under the pressure', that would be more tenable, that would be more understandable. However, it is submitted, there is not one iota of evidence in the affidavit what this clerical error was. Therefore, the Claimant submits, that is not a good explanation.

ii. The supporting affidavit purports to give only one explanation for the Claimant's failure and that explanation is in relation to the clerical error, but that clerical error related only to the disclosure. It is submitted that Rattray J's order was that by 4:00 p.m. on May 25, not 4:01 p.m. or 4:02 p.m., but 4:00 pm., certain things should be done. Counsel quite commendably conceded that the Claimant failed to meet this deadline in terms of service of the relevant documents. It is asserted that Mrs. Shelton sought to say this was *de minimis* and sought to minimize the significance of this failure, saying it was only one (1) day. Mr. Wilkinson, however, submitted that the default was in fact two (2) days, owing to the practice of this Court to regard service after 4:00 p.m. as service on the next day. Therefore, service would have been on the 26th and not the 25th, in a context where the trial was June 12th, less than two (2) weeks away. Further, it is submitted that no inspection had taken place at this stage, and that is why the list of documents was so crucial. In this vein, Counsel noted that the witness statement of Mr. Shann makes it clear that his defence has been compromised because he has not been able to inspect the Claimant's documents. So, it is in that context that the Defendants argue that the late service by two (2) days is critical.

[36] Thus, it is submitted, whilst the Claimant has spoken of a clerical error which has not been elucidated, the dagger in the Claimant's case is that there is no affidavit

evidence giving a good explanation as to why the documents were not served by 4:00 p.m. on May 25th. The Defendants argue that the Claimant has ignored the other matters dealt with by the relevant order and this is fatal to the Claimant's application. It is submitted that there must be an explanation so that a Court of competent jurisdiction canbe placed in a position to exercise its discretion. The Claimant, by failing to provide this explanation for not serving the relevant documents within the specified time, has not given any explanation at all, so that the Court is not in a position to determine whether it is good or bad. On this basis, Counsel submitted that the application must indubitably fail.

[37] In relation to Mrs. Shelton's assertion that the trial date could have been met because the Claimant had done all it needed to have done, Mr. Wilkinson wholeheartedly disagreed. He submitted that that could not have been so, chiefly because inspection had not taken place, but also, because there were two applications before the Court, including the very one which he was now submitting on. This is so because the sanction stipulated in an unless order takes effect automatically once the pre-requisites have been met, and that in this case, the pre-requisites had been met once the Claimant had failed to do what it ought to have done. It is asserted that when the Claimant served the relevant documents late the unless order was triggered. The Claimant sought to correct the omission regarding the specific disclosure by filing an amended list of documents on 6th June, a mere few days before the trial. The Defendant notes that the very problem the Claimant faces started with its failure to meet the November 30th 2016 deadline in relation to filing its list of documents, which prompted an application by the Claimant 10th February 2017, three (3) months late. It is submitted that this is significant because when Edwards J made her order for disclosure on the 13th October 2015, she gave the parties an extended period of thirteen (13) and a half months to comply. This deadline the Claimant missed, and it is asserted, did not contact the Defendants to say they were having a problem with disclosure. It is further asserted that the Claimants did not even realize that they had failed to comply with the disclosure requirements until the 2nd of June when the Defendants brought it to their attention in their application for judgment. In the circumstances, and having regard to the fact that

the claim is approximately ten (10) years old, Counsel questions whether this Claimant is a litigant who is serious and to whom the Court should grant clemency. To that question Counsel answers no, and argues that too much latitude has already been given to the Claimant, given that the unless order made by Rattray J was the Claimant's last opportunity. Having failed to file their list, it is submitted there should be absolutely no relief.

[38] In relation to **rule 26.8(3)(e)**, the effect the grant of relief would have on the parties, it is submitted that it would have a deadly and terrible effect on the Defendant, but hardly any effect on the claimant. Mr. Wilkinson argued that the Defendant has been brought to Court by a Claimant who is a financial institution, who, on its face, has far more resources than the Defendant, and has been forced at great cost, not only for attorneys' costs but also the services of a well accomplished accounting firm, and has had this case hanging over his head like the 'sword of damacles'. It is submitted that the Defendant stands to lose a lot more than the Claimant, and that the evidence before the Court is that there are signed hypothecation agreements in respect of funds that were frozen to protect the loan or credit facility to the Defendants. Therefore, the Defendants submit that if this application is dismissed, the Claimant will not be left without some source of comfort, as these hypothecated funds will be there for it to fall back on.

[39] Counsel for the Defendants strongly disagreed with Mrs. Edwards-Shelton's submission that the Bank of America wire transfers were insignificant, and referred the Court to the Claimant's own application before Rattray J on 10th February 2017, on which the unless order was made. Counsel highlighted paragraph 16 of the application in which it is alleged that the Claimant had noted that it needed 3-5 weeks to obtain the Bank of America documents, and paragraph 19, in which it was stated that the matter could not properly be heard without these documents. In this regard, Counsel submitted that it is wrong and misleading for Mrs. Edwards-Sheltonto assert that the Claimant was ready for trial and that this matter could proceed in the absence of these documents.

[40] In those circumstances, Learned Queen's Counsel submitted that this application for relief must fail and that judgment should be entered for the Defendants in

accordance with its application filed 2nd June 2017. Even though that application is not properly being heard by the Court at this time, the Defendants submits that if the Court rules in the Defendant's favour, as a necessary corollary, judgment should be entered in the Defendants' favour, as that application is based on the same facts and submissions.

[41] The Defendant relies on the authorities of **Jamaica Public Service Co. Ltd v Charles Vernon Francis and Columbus Communications Jamaica Ltd. (trading as Flow)** [2017] JMCA Civ 2, **Juliet Brown and Orville Black v Henry Moncrieffe** [2014] JMCA App 15 , and **Thevarajah v Riordan et al** [2015] UKSC 78.

[42] In relation to the **Jamaica Public Service** case, the Defendant relies specifically on paragraph 69 wherein the Court upheld the order of Rattray J refusing to grant relief from sanctions, on the basis that, having found that there was no good explanation for the failure to comply, that was fatal to the application, and the learned judge had been precluded from granting the relief sought.

[43] In relation to the ***Juliet Brown*** case, which involved an application for relief where a notice of appeal had been filed late, it is submitted that that case is similar to the instant case, in that an unless order was involved. The Defendants rely on paragraph 34 of Mangatal J's judgment, and emphasize the point that the Claimant has not put the Defendants in a position where they could have had inspection properly before trial. Having filed the relevant document on June 6th, it is argued there was not enough time, and the document was not properly before the Court. It is noted that the Court considered rule 26.8 and essentially concluded that there was no real prospect of success.

[44] In relation to ***Thevarajah***, the appellants had at first instance failed to give disclosure, and subsequently failed to comply with an unless order in relation thereto, resulting in their case being struck out. The appellants were granted relief from a deputy judge, which was subsequently overruled by the Court of Appeal. When the matter came before the Supreme Court, the original order striking out the case was re-instituted. Counsel averts the Court's attention to paragraph 5 of that judgment, and

submits that the circumstances were parallel to those at hand in this case, in that they involved an order for disclosure in relation to documents from the Bank of Cyprus. Counsel further relies on paragraph 23, and asserts that what the appellant in that case had sought to do was comply after the case had been struck out. It is argued that, in this case, the Claimant has still not given specific disclosure, and that in ***Thevarajah,*** notwithstanding that the appellants had a stronger case, it still failed.

[45] In relation to the cases cited by Counsel for the Claimant, Mr. Wilkinson Q.C. sought to distinguish them. Firstly, Queen's Counsel submitted that the ***Villa Mora*** case was easily distinguishable as, on the facts there was clearly a good explanation for the failure unlike in this case. Secondly, Counsel contends that, in ***Sherine Black***, the breach had been corrected, however in this case the breach has not been corrected as there has still been no specific disclosure as ordered. Further, it is asserted that in that case the trial date could still be met, whilst in the instant case it could not. Finally, it was noted that in ***Sherine Black***, no detriment would have been caused to the Defendant, however, in this case there would clearly be detriment to the Defendant.Thirdly, Queen's Counsel seeks to distinguish the ***Iberostar*** case on the bases that (1) the non-disclosure was found to be insignificant; (2) the non-disclosure did not prejudice the Defendant substantially; and (3) the case could proceed to trial without the documents which were not disclosed. It is submitted that in the instant case, unlike in ***Iberostar***, the omission by the Claimant as it relates to specific disclosure is crucial for the reasons already stated; the Defendants will be seriously prejudiced by the absence of this specific disclosure including the Bank of America documents and the matter cannot be tried without the specific disclosure.

[46] For those reasons the Defendants have asked the Court to dismiss the application and enter judgment in the Defendants' favour.

THE CLAIMANT'S RESPONSE

[47] In relation to the authorities relied on by Mr. Wilkinson Q.C., Mrs. Shelton submitted the following:

i. The ***Jamaica Public Service*** case is distinguishable because the instant case does not deal with failure to file a witness statement as was done in that case. The effect of the ruling was not such as to result in the entire case being struck out, and the Court of appeal, in upholding the order to refuse relief, was not turning the appellant away from the judgment seat.

ii. The ***Juliet Brown*** case can also be distinguished from the case at bar in that the appellant's were guilty of several breaches and inordinate and inexcusable delay. The application for relief was not made promptly, and it was against the background of that behaviour that relief was refused in that case. It is submitted that this is not the behaviour of the Claimant in the case at bar, and this Claimant is not guilty of the kind of inordinate and inexcusable behaviour referred to in that case.

iii. The case of ***Thevarajah*** is also distinguishable and bears no resemblance to the case at bar as the appellant was making a second application for relief. Mrs. Shelton disagrees with opposing Counsel's assertion that this application was in effect a second application for relief, and submits that that is not so. It is submitted that an application for extension of time is not to be equated with an application for relief from sanctions, and that prior to the sanctions imposed by Rattray J, there were no previous sanctions imposed in this matter. Further, the extension of time was granted to both parties, given that both parties had not complied with the CMC orders. Therefore, whereas there was a second application for relief being considered in that case, that is not the case here. Moreover, it is submitted that ***Thevarajah*** involved the failure to disclose documents pursuant to a freezing order, and that although an unless order was made, it was different from the type of unless order made in the case at bar. Mrs. Shelton disagrees with Mr. Wilkinson Q.C's inference that the documents that were to be

disclosed, and the failure to disclose in that case were similar to those of the instant case. She also disagreed with the submission that, the Court having refused to grant relief in that case after finding that there was no good explanation, the same fate should be meted out to the Claimant. Mrs. Shelton asserted that what is crucial in this case is that the order of Edwards J ordered specific disclosure of documents "that are in the possession and or control of the Claimants". Therefore, the obligation on the claimant was to disclose only if the documents were in the possession or control of the Claimant. Thus, it is argued, the amended list of documents filed 6th June 2017 by the Claimant complies with the order of Edward's J, albeit that it was late.

[48] In her reply, Counsel also wished to point out what she called inaccuracies made by Mr. Wilkinson Q.C. Firstly, Mrs. Shelton submitted that the impression being given to the Court by Queen's Counsel that the Defendants were denied inspection is grossly misleading as inspection would have been the Defendant's responsibility, and there was no order made for inspection on a specific date. The order for inspection would have been premised on Edwards J's order from 2016 and that order was in relation to standard disclosure only, with inspection to take place on or before the 14th December 2016. It is noted that when Rattray J made his orders he indicated that all the orders which would include the order for inspection were to be complied with by 25th May 2017. So, it is submitted, any inspection would have had to take place before the trial date, and if the Defendants had wanted to do inspection there is nothing to have precluded them from doing so.

[49] Secondly, Mrs. Shelton submitted that, Queen's Counsel's contention that the Claimant had admitted in its Notice of Application filed 10th February 2017 that the matter could not go to trial without the Bank of America documents is a very serious inaccuracy and that the Claimant made no such admission. She asserted that the documents mentioned were the documents that the Claimant intended to rely on and that these documents had nothing to do with the Bank of America documents. The Bank

of America documents to which Counsel referred are not documents on which the Claimant is relying.

LAW AND ANALYSIS

[50] There is no dispute that the Claimant failed to comply with the unless order (order 3)made by Rattray J, and would need to seek relief from sanctions for its case to be able to move forward. The extent of the breach, however, is disputed. Mrs. Edwards-Shelton argued that the Claimant is only seeking relief in relation to the amended list of documents that was filed out of time on 6th June 2017, as well as for late service of the relevant documents, since Mr. Wilkinson is taking issue with them. On the other hand, Mr. Wilkinson asserts that the Claimant, not only failed to address the order for specific disclosure in its list of documents filed 25th May 2017, but also served the relevant documents two (2) days late, and has still failed to give specific disclosure.

[51] Order 3 of Rattray J's order required both parties to comply with the orders made by Edwards J at CMC, failing which the defaulting party's case would stand struck out. The evidence before the Court is that the Claimant has failed to comply with those CMC orders, in that, although the Claimant filed its list of documents, listing questionnaire, statement of facts and issues, and witness statements in time on 25th May 2017, the Claimant served those documents late, the documents having been served on the Defendants on Friday, 26th May 2017 at 4:02 p.m. I agree with Mr. Wilkinson Q.C. that, service after 4:00 p.m., is to be treated by the Court as service on the following business day [see **Civil Procedure Rule (CPR) 6.6(2)**], which would have been the following Monday, 29th May 2017. Therefore, the Claimant would have effectively served the Defendants two (2) days later than the date stipulated by the order. I am of the view that, based on the wording of Edwards J's orders, compliance in respect of orders 1, 3, 5 and 9 would have required service by the relevant date and time, that being the extended date and time given by Rattray J of 25th May 2017 at 4:00 p.m.

[52] Further, the Claimant failed to address, in its list of documents filed 25th May 2017, the order for specific disclosure made by Edwards J. Although, this was corrected by an Amended List of Documents filed by the Claimant 6th June 2017, outlining that the Claimant does not have possession of these documents, the parties join issue as to whether the order for specific disclosure has been complied with. The Claimant says yes, whilst the Defendant argues that the order has still not been complied with.I will address this issue, further on in this judgment.

[53] **Rule 26.4(7)** provides that "where the defaulting party fails to comply with the terms of any "unless order" made by the Court that party's statement of case shall be stuck out".

[54] Further, pursuant to **rule 26.7**, the sanction contained in the order of Rattray J would have effect when the failure to comply occurred until and unless the Claimant obtains relief from sanctions. Suffice it to say that the Claimant must obtain relief for its case to be revived and for the Claim to continue.

[55] The Court's discretion to grant relief from sanctions is governed by **Civil Procedure Rule (CPR) 26.8** which provides as follows:

> *"26.8 (1)An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –*
>
> *(a) made promptly; and*
>
> *(b) supported by evidence on affidavit.*
>
> *(2) The Court may grant relief only if it is satisfied that –*
>
> *(a) the failure to comply was not intentional;*
>
> *(b) there is a good explanation for the failure; and*
>
> *(c) the party in default has generally complied with all other relevant rules, practice directions 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 n each party.*
>
> *(4) The court may not order the respondent to pay the applicant's costs in relation to any application for relief or not would have on each party."*

[56] This rule has been interpreted time and time again by our Court of Appeal, suffice it to say that the approach that the Court should take is sufficiently clear. In **Jamaica Public Service Co. Ltd v Charles Vernon Francis and Columbus Communications Jamaica Ltd. (trading as Flow)** [2017] JMCA Civ 2, Edwards JA (Ag.), in giving the unanimous decision of the Court of Appeal, confirmed and reiterated that Court's previous decisions of ***Villa Mora Cottages***and***H. B. Ramsay and Associates Ltd et al v Jamaica Redevelopment Foundation Inc and another***[2013] JMCA Civ 1, wherein it was decided that the factors in rule 26.8(2) are to be considered cumulatively and are threshold requirements, so that, 'a litigant must pass the cumulative threshold requirements of rule 26.8(2) in order for the Court to consider granting relief' [**paragraph 54**]. It is thereafter that the Court would then go on to consider the factors in rule 26.8(3) [***ibid***].

[57] It is to be noted that the parties have approached this matter with much focus on the factors in **rule 26.8(3)**. Whilst these are important, these factors are to be considered after the Court is satisfied that all the threshold requirements of **rule 26.8(1)** and **(2)** have been met. The authorities indicate that the application must be made promptly and supported by affidavit evidence in order for the Court to even consider the application, and thereafter, the Court will determine whether the failure was intentional, whether there is a good explanation for the failure and whether the party has generally

complied with all other rules, directions and orders of the Court. Where an applicant fails to satisfy any of these conditions the application must fail.

[58] In ***Jamaica Public Service***, after considering the relevant CPR provisions and various authorities, Edwards JA (Ag.) went on to outline the approach that the Court ought to take in matters of this nature. At paragraph 57 she stated the following:

> *"…In this jurisdiction, a first instance judge faced with an application for relief from sanctions must begin from a point of principle that (a) the orders of the court must be obeyed; (b) all requirements of rule 26.8(1) and 26.8(2) must be met; (c) once those requirements have been met, it is the duty of the judge to have regard to the interest of the administration of justice and ensure that justice is done in accordance with the overriding objective, without resort to needless technicalities, in keeping with the factors set out in rule 26.8(3); (d) a litigant is entitled to have his case heard on the merits and should not lightly be denied that right; and (e) the court must balance the right of the litigant against the need for timely compliance. Taking all that into consideration, the approach to the application of the rule should be that taken in* ***H B Ramsay and Associates Ltd and another v Jamaica Redevelopment Foundation Inc and another****.*

[59] Edwards JA concluded in **paragraph 67** that there is no basis for considering the overriding objective or any of the factors in **rule 26.8(3)** where the applicant has not met the threshold requirements. Where there is no good explanation for the failure to comply, this is fatal to the application for relief and the Court is precluded from granting the relief sought [**paragraphs 46, 63 and 69**].

[60] In ***H. B. Ramsay and Associates****[supra]*, the Court of Appeal, per Brooks JA, in refusing the appeal on the basis that the application for relief at first instance was not made promptly and provided no explanation for the default, said the following at paragraph 31 as to the requirements for relief:

> *"An applicant who seeks relief from a sanction, imposed by his failure to obey an order of the court, must comply with the provisions of rule 26.8(1) in order to have his application considered. If he 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 had 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.*

[61] In assessing this application, I alsobear in mind the balancing act that the Court has to perform in the administration of justice, ensuring on the one hand that parties are treated fairly and given a fair chance to ventilate issues on the merits, whilst on the other hand ensuring compliance with its rules and preventing abuse of its processes by litigants and attorneys. This Court is cognizant that it is usually preferable, and in the best interests of fairness and justice, to have cases adjudicated on the merits. However, the Court ought not to sit idly by and allow litigants, attorneys and other stakeholders to flout its rules, orders and directions. Harris JA in ***Villa Mora*** at page 10 stated the following:

> *It cannot be disputed that orders and rules of the Court must be obeyed. A party's non-compliance with a rule or an order of the Court may preclude him from continuing litigation. This, however, must be balanced against the principle that a litigant is entitled to have his case heard on the merits. As a consequence, a litigant, a litigant ought not to be deprived of the right to pursue his case.*
>
> *The function of the Court is to do justice. "The law is not a game, nor is the Court an arena. It is…the function and duty of a judge to see that justice is done as far as may be according to the merits" per Wooding, C.J. in Baptiste v. Supersad [1967] 12 W.I.R. 140 at 144. In its dispensation of justice, the Court must engage in a balancing exercise and seek to do what is just and reasonable in the circumstance of each case, in accordance with Rule 1 of the C.P.R.*

[62] It is to be noted that In ***Jamaica Public Service***, Edwards JA (Ag.), who had regard to the aforementioned quote made by Harris JA in ***Villa Mora***, in performing this balancing act, still went on to find that the rules and circumstances dictated that relief be refused.

[63] Finally, I consider that McDonald-Bishop J (as she then was), in **Branch Developments Ltd. T/A Iberostar Rose Hall Beach Hotel v The Bank of Nova Scotia Jamaica Ltd.** [2014] JMSC Civ. 003, at paragraph 34, summarized the approach of the Caribbean Court of Justice (CCJ) in the case of **Barbados Redifussion Service Ltd. v Asha Mirchandeni and Others (no.2)** (2006) 69 WIR 52 in relation to striking out after non-compliance with an unless order as follows:

> *"(1) Broadly speaking, strike-out orders should be made either when that is necessary in order to achieve fairness or when it is necessary in order to maintain respect for the authority of the court's orders. In this context 'fairness' means fairness not only to the non-offending party but also to other litigants who are competing for the finite resources of the court.*

(2)…

(5) While the general purpose of a strike-out order in such circumstances may be described as punitive, it is to be seen not as retribution for some offence but as a necessary and to some extent symbolic response to a challenge to the court's authority, in circumstances in which failure to make such a response might encourage others to disobey court orders and tend to undermine the rule of law. This is the type of disobedience that may properly be categorised as contumelious or contumacious.

(6) What is required is a balancing exercise in which account is taken of all the relevant facts and circumstances of the case. For one thing, it must be recognised that, even within the range of conduct that may be described as contumelious, there are different degrees of defiance which cannot be assessed without examining the reason for the non-compliance.

(7) The fact that what has been breached is an 'unless' order has a special significance, as such an order is framed in peremptory terms which makes it clear to the party to whom it is directed, that he is being given a last chance.

(8) The previous conduct of the defaulting party will obviously be relevant, especially if it discloses a pattern of defiance. It is also relevant whether the non-compliance with the order was total or partial.

(9) Normally it will not assist the party in default to show that the non-compliance was due to the fault of his lawyer since the consequences of the lawyer's acts or omissions are as a rule visited on his client. There may be an exception made, however, when the other party has suffered no prejudice as a result of the non-compliance.

(10) other factors

Was the application made promptly?

[64] In relation to **rule 26.8(1)(a)**, as to whether the application was made promptly, Mrs. Edwards-Shelton lamented that the application was made a mere two (2) days after it was discovered that the Claimant had been in breach of the unless order. However, when considering whether an application has been made promptly, 'the starting point should be the point at which the breach occurred and the matter cannot proceed without reference to the Courts' [**Phillip Hamilton v Frederick Flemmings & Another** [2010] JMCA Civ 19, paragraph 41], and should depend on the circumstances of the case [***H.B. Ramsay & Associates Ltd*** *[supra]]*. Further, in the latter case, the Court of Appeal dismissed the submission by the Applicant that the question of promptitude should take into account the time at which the applicant became aware of

the default, and not the time at which the default occurred, and found that such submission does not have much force in the context of a sanction that is applied pursuant to an "unless order" [paragraph 14]. In that regard, in the instant case, the Claimant breached the order on 25th May 2017, and filed its application on the 6thJune 2017, twelve (12) days after the breach. Notwithstanding that the trial was set for 12th June 2017, I do not think the delay is substantial. Thus, I find that the application was made promptly.

Is the application supported by evidence on affidavit?

[65] In relation to ***rule 26.8(b)***, as to whether the application is supported by evidence on affidavit, the Court has regard to the aforementioned affidavit of Matthew Ricketts. However, although the affidavit provides evidence to explain the reason for its failure to address the documents listed in the orders for specific disclosure, the affidavit fails to provide an explanation as to why the Claimant failed to serve the relevant documents at the time stipulated in Rattray J's order. In light of my finding earlier in this judgment that the Claimant was also in breach of the order due to its late service, I am in agreement with Queen's Counsel that the Claimant has provided no explanation in that respect, and as a result, there is no explanation for the Court to assess as good or bad. Rule ***26.8(1)(b)*** provides that the application must be supported by evidence on affidavit. The inevitable consequence of the Claimant's failure to meet this threshold requirement, as espoused by the aforementioned Court of Appeal authorities, as harsh as it may seem, is that the Claimant cannot be granted relief.

[66] This Court finds it necessary to make note of the indifferent attitude of the Claimant in relation to the late service of the documents in breach of the order, so much so that not only did Counsel neglect to address it in the affidavit in support of the application for relief, but also, did not seek to address the issue at all before this Court, until Counsel for the Defendant took issue with it. The Court recalls Mrs. Edwards-Shelton's submissions on the point to the effect that the late service is *de minimis* and that for the Court to refuse the Claimant the opportunity to pursue its claim based on late service would be a great injustice. It would be remiss of this Court if it failed to

reiterate that the Court will not give approval such an attitude by Counsel and litigants to compliance with timelines set by rules, orders and directions of the Court. This Court does not view the order of the Court and the breach thereof as *de minimis*.

[67] Notwithstanding the absence of affidavit evidence as to the late service, I will go on to consider the other factors.

Is there a good explanation for the failure to comply and was it intentional?

[68] The explanation proffered in the affidavit of Matthew Ricketts is that the failure to comply was not intentional and was due to 'a clerical error that occurred whilst the list of documents was being drafted', and further, "…due in part to the preparation of the documents in compliance with the Orders made by the Honourable Mr. Justice A. Rattray made on May 17, 2017, a mere eight (8) days prior to the deadline set out in the Orders…" [paragraphs 12 and 13]. In that regard, the Court accepts that the breach was not intentional.

[69] The rules do not outline what is to be considered a good explanation or how the Court should go about determining what amounts to a good explanation. Therefore, such a determination is within the discretion of the judge, and in my view, ought to be based on what is fair and just in the circumstances of each case. Notwithstanding this, this Court is guided by various judicial decisions in which the Courts have had to grapple with this issue of what amounts to a good explanation. These authorities demonstrate that the Court will not ordinarily countenance inadvertence or administrative inefficiency, whether it be that of the litigant or counsel.

[70] In the recent decision of **Mirage Entertainment Limited v Financial Sector Adjustment Company Limited et al** [2016] JMCA App 30,per Williams JA stated the following in relation to the issue of inadvertence by counsel:

> *"[26]…The reason offered by the applicant was the often used excuse of the inadvertence of its attorney.*
>
> *[27] As often as this excuse is used, is as often as this court has expressed its displeasure of having it being relied on. Indeed in* ***Anthony Powell v The***

Attorney General for Jamaica *[2014] JMCA Appeal 33, Panton P expressed it thus: at paragraph [8]:*

> *"In my view, the statement as to inadvertent neglect is one that has been overworked in these courts and ought to be given short shrift. Legal representation is a very serious matter, and there is no place for inadvertent neglect when the court has set firm timelines, especially often there what been earlier disregard of the rules and orders made under those rules".*

[71] In ***Mirage*** the Court of appeal was concerned with an application for Court orders to, inter-alia, restore the applicant's appeal, the appeal having been struck out for want of prosecution. The Court considered the application for relief under **rule 26.8** of the CPR pursuant to its discretion under **rule 2.15(1)** of the **Court of Appeal Rules** which allows it to exercise all the powers of the Supreme Court. In assessing whether there was a good explanation for failure to file the record of appeal and skeleton arguments, the Court considered that the applicant had done nothing since filing the notice and grounds of appeal four years earlier, and that the applicant had previously been granted an extension of time to file the documents.

[72] The Court found that the explanation given, that the delay 'was not the fault of the appellant but that of the appellant's attorneys who through inadvertence did not act in accordance with the extension of time granted by the Court', could 'hardly be regarded as anything close to an explanation and even less one that could be considered good' [**paragraph 28**].

[73] In ***Jamaica Public Service,*** again, the court of appeal rejected a similar explanation from the appellant, which was deemed to be one of administrative inefficiency. The matter involved an appeal from a decision of the lower Court refusing relief from sanctions, in circumstances where the appellant had failed to file its witness statements in the time allotted. The explanation given was that the witnesses were travelling outside of the parish and island for an extended period due to work related commitments and so were unavailable. In refusing relief, Edwards JA (Ag.) considered that the witnesses were employees of the appellant company and were under its direction and control, and no explanation had been provided as to why they were nor

directed to make themselves available to give statements or rostered in such a way as to allow them to be available for statements to be taken from them. The learned justice of appeal concluded that the appellant's conduct in failing to comply amounted to 'administrative inefficiency' which in her view did not amount to a good explanation.

[74] The Court in ***Jamaica Public Service*** relied on the decision of the Privy Council in **The Attorney General v Universal Projects Limited** [2011] UKPC 37, an appeal from the Court of Appeal of Trinidad and Tobago, wherein the board dismissed what was deemed to be an application for relief from sanctions following the defendant's non-compliance with an unless order extending time for it to file its defence. The explanation given was that it had been decided that the Attorney General's Chambers should retain outside counsel, authorisation for which would need to be obtained from the Solicitor General, and there was a delay because there was no Solicitor General at the time. In considering whether the defendant had a good explanation for its failure, the board stated the following at paragraph 23:

> *"The Board cannot accept these submissions. First, if the explanation for the breach ie the failure to serve a defence by 13 March connotes real or substantial fault on the part of the defendant, then it does not have a "good" explanation for the breach. To describe a good explanation as one which "properly" explains how the breach came about simply begs the question of what is a "proper" explanation. Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly if the explanation for the breach is administrative inefficiency.*

[75] The Board then went on to remark at paragraph 24, that, in circumstances where the defendant had been granted an extension of time of three (3) weeks to comply, 'it was incumbent on the defendant to do everything that it reasonably could to meet the extended timetable'.

[76] The case of ***H. B. Ramsay*** is another case in which the Court of Appeal refused to countenance inadvertence for failure to comply. That case is quite similar to the instant case in that the appellant's case was struck out following its failure to comply with an unless order that it pay costs awarded to the respondents by the date stipulated. This was somewhat of a second chance to the appellants, given that it had breached a previous order requiring same. Application for relief from sanctions was refused. The

failure was attributed to the appellant's attorneys-at-law, however no explanation was given by the attorneys in the form of affidavit evidence. Instead, the affidavit in support by Mr. Harold Ramsay, one of the appellants, notes that he paid the required sum to his attorneys two (2) days before the deadline and he had been informed by his attorneys that, 'as a result of inadvertence', the sums were not paid over. The attorneys did not dispute this allegation. In disposing of the matter, the Court accepted the submission of opposing counsel that the term "inadvertence" was not an explanation in itself, but rather, a conclusion to be drawn from an explanation [**paragraph 21**]. The Court went on to say the following:

> *"Without speculating what explanation the attorneys-at-law would have given, it would seem, accepting Mr. Ramsay'suncontroverted testimony about having paid over the monies, that at best, their explanation would have been "oversight". Based on the situation described above, and the expected action that it demanded, I would describe such oversight as "inexcusable" and consequently, reject that explanation as being a good one."* ***[paragraph 21]***

[77] In the instant case, the explanation given is that of a "clerical error" that occurred whilst the documents were being drafted, an explanation that was provided by one of the claimant's attorneys, who have quite admirably taken the blame for the non-compliance. Not only does that explanation fail to address the late filing as I have already found above, but also, it fails, as Mr. Wilkinson Q.C. has pointed out, to say exactly what the nature of the error was, for example, whether it was an error made by a secretary or other person whilst typing or whether the attorneys simply just forgot, or whatever other reason there could have been. This, in my view, is unacceptable and can in no way be deemed a 'good explanation'. It is inconceivable to this Court as to how the attorney for the Claimants, after having gone before Rattray J for an extension of timeseveral months after breaching the CMC Orders, and in the face ofa vociferous application to strike out the Claimant's case, that counsel for the claimant could cause or allow this state of affairs to unfold. Having been given a second chance, and in the face of an unless order that threatened the drastic consequence of seeing the Claimant's case struck out, compliance with the disclosure order should have been at the forefront of the minds of counsel, particularly where specific disclosure was being hotly pursued by counsel for the Defendant, who had taken the unrelenting position that

the matter could not proceed without it. A simple proof reading of the document by any one of the claimant's attorneys ought to have revealed the error. In the premises, this Court is of the view that the oversight amounts to inexcusable neglect on the part of the Claimant's attorneys and is not a good explanation for the failure to comply. It is quite unfortunate that the Claimant will have to suffer for the error of its attorneys, however the law on this point is clear. The explanation must be a good one regardless of where it emanates from.

[78] The argument by Mrs. Shelton that due to the large volume of documents that had to be prepared to comply with the orders, and that the period for compliance had been condensed into eight days cannot be countenanced by this court. The claimant had well over a year to comply with the CMC orders but chose not to for whatever reason. If the claimant failed to make the relevant steps and preparation to comply with the CMC orders prior, and found it difficult to do so in eight (8) days, that would have been its own doing, the consequences of which it must accept. As stated by Jamadar JA in the Court of Appeal of Trinidad and Tobago decision of **Attorney General v Universal Projects Limited** (*supra*), a statement which was later approved by the Privy Council in its appeal (as cited by Edwards J at paragraph 66 of ***Jamaica Public Service***):

> *"A party cannot in the face of a court order pursue a course that it knows or reasonably anticipates will lead it afoul of that order and then pray in aid of relief from the sanctions of the order the circumstances that it was aware could lead to default. In such circumstances a party must act promptly to either comply with the court order or to secure further directions so as to avoid default…"*

[79] Further, the argument that it would take the claimant as a company more time and effort than it would a lay person and that it would be more difficult for the company to comply with an order I find to be without merit. It is the claimant who has initiated this case and has brought the defendant before this Court. It is the claimant's duty to have had all its ducks in a row and all the arsenal it would need to support its case. If the claimant was not in such a position that would be its own fault and to its own peril. This Court does not believe that, the Claimant as a financial institution who is claiming in respect of loans issued would be so hard pressed to figure out what documents to

submit and what witnesses to call. There must have been records available to the claimant to have caused it to form the view that the defendant was in breach of the loan in the first place, and that legal action was necessary. In any event, this argument is rejected.

[80] Of the other cases cited by the parties I find the case of **Juliet Brown and Orville Oniel Black v Henry Moncrieffe** [2014] JMCA App 15 to be useful.

[81] In the case of ***Juliet Brown*** [*supra*], the Court dealt with an application for extension of time to file Notice and Grounds of Appeal after judgment was entered for the respondent/claimant consequent on the applicant/defendants' case having been struck out for failure to comply with an unless order in respect of compliance with CMC orders. The applicants were deemed to have failed to give standard disclosure having failed to serve their list of documents after filing them. In deciding whether to grant leave, the Court of Appeal examined **rule 26.8** in determining whether the application had a real chance of success. Similar to the case at hand, the failure was attributed to the applicants' attorneys, in that they had appeared to have acted under the mistaken belief that an order for standard disclosure was fulfilled upon filing, without the needfor service. The Court of Appeal concluded this was not a good explanation for the failure. In coming to this decision, the Court noted that there had been inordinate and inexcusable delay that was compounded by 'inadvertence of counsel or administrative bungling'. The Court rejected the submission of counsel that a litigant ought not to suffer for the mistake of his attorneys, stating as follows:

> *"Whether through inadvertence of counsel or administrative bungling the episodes of such default take the matter well outside the situation that the court in **Salter Rex** alluded to when it indicated that courts do not like litigants to suffer for the faults of their lawyers". [**paragraph 32**]*

[82] The above reference to ***Salter Rex*** is in respect of the often-cited principle enunciated by Lord Denning in the case of **Salter Rex & Co. v Ghosh** [1971] 2 All E.R. However, notwithstanding this, the Court of Appeal found that the blunder of counsel was not a good explanation under ***rule 26.8***.

[83] The case of***Villa Mora*** (supra), which was relied on by the Claimant, involved an appeal from the decision of the Court below refusing an application for leave to extend time to file witness statements and to restore the appellant's defence which had been struck out pursuant to non-compliance with an unless order. In looking at the question of whether there was a good explanation, Harris JA noted that the failure to comply could be largely attributed to the appellant's attorneys, but found that this in itself would not be sufficient to bar the appellants from the proceedings. It was ultimately concluded that, the explanation proffered by the attorney that the failure was in part due to his transferral of his practice and difficulty locating some of the witnesses, was plausible and not rendered nugatory or inadequate (page 17). I do not find this case to be of much assistance to the case at bar for two reasons. Firstly, the explanation given in that case was very different in nature from the one in the instant case, in that, the reason proffered was not one of inadvertence or inefficiency, as is in this case. Secondly, Harris JA came to her decision to allow the appeal and grant relief with much consideration to the factors set out in rule 26.8(3), particularly that the trial date could still be met and that no prejudice would be caused to the respondent by the granting of the relief. As I have already stated above, the 2017 Court of Appeal decision of ***Jamaica Public Service***, which is much later in time than ***Villa Mora***, has decided that, as found in ***H.B. Ramsay and Associates Ltd***, if there is no good explanation there is no need to consider the factors in rule 26.8(3).

[84] I am also of the view that the case of ***Sherine Blake v Ldcosta Loans and Anor*** [2015] JMSC Civ. 14, offers no assistance to the Claimant. That case turned in large part on the circumstances and the view that my brother Batts J took as to whether the explanation proffered was a good one. The facts are that the Claimant sought relief from sanctions after having its case struck out for failure to comply with an unless order requiring standard disclosure. The claimant filed its list of documents seven days after the date stipulated, triggering the unless order, and then made its application for relief a day later. The Claimant in that case proffered a similar explanation to the that proffered in the instant case, attributing the default to its attorneys owing to the 'massive volume of documents' it was required to 'examine, label, log and subsequently compile a list

thereof'. Batts J intimated that there could be circumstances in which 'excusable oversight', which was an example of administrative inefficiency, could be an acceptable explanation. However, he found that in the circumstances before him the explanation did not relate to oversight or administrative inefficiency, but rather, the misjudgement and under estimation of time necessary to comply with the unless order in respect of disclosure. He then concluded that this was perfectly understandable and in his view, was an acceptable explanation. Whilst it was within the purview of my brother to so find, I must say, respectfully, that I am of a different view. In the instant case, the explanation given is that of a clerical error whilst the list of documents was being prepared, as well as the preparation of the documents for compliance in the short period of eight (8) days. This in my view would undoubtedly amount to oversight and administrative inefficiency. Although not included in the affidavit in support, Mrs. Shelton-Edwards asked this Court to consider the sheer volume of documents that the Claimant would have had to scrutinize in preparing the list of documents, the inference being that this is what occurred in the preparation of the documents. Whatever occasioned this clerical error, whether it was mismanagement due to volume of documents, or that the attorneys simply forgot to include it, or whatever other reason there could be, I am still of the view that a clerical error, in light of the circumstances, particularly the unless order, amounts to oversight and administrative inefficiency. The question that would then arise is whether in the circumstances such an error is excusable and sufficient to rise to the standard of being a good explanation. In my view, as I have stated before, it is not.

[85] I also find that the authority of ***Thevarajah*** *[supra]* relied on by the Defendants is of no assistance to this Court in that what was before the Supreme Court of the United Kingdom was an appeal from the Court of Appeal overturning the grant of a second relief application made by the Appellants, after relief had already been refused by a lower Court judge. The Supreme Court rejected the appeal on the basis that it was improper for relief to have been granted as there had been no material change in circumstance as required by the rules of Court for a previous decision of the Court to be reconsidered.

Has the Claimant generally complied with all other rules, orders and directions?

[86] I am of the view that the Claimant has not generally complied with the rules and orders of the Court, the Claimant having breached the CMC orders, requiring it to seek an order for extension of time. The Claimant breached not just one or a few of those orders, but all of them. Further, the Claimant waited over three months before seeking an extension of time for compliance. Whilst, as Mrs. Edwards-Shelton submitted, no sanctions had been meted out to the Claimant previously, the fact still remains that the Claimant has previously been non-compliant.

Rule 26.8(3)

[87] Notwithstanding that I have found that there is no affidavit evidence in relation to one aspect of the breach, no general compliance and no good explanation, I will nonetheless go on to consider the factors outlined in **rule 26.8(3)**.

[88] Counsel for the Claimant made heavy weather of the fact that the failure to comply was the fault of her firm and that, in her view, the breach was remedied and the trial date could still have been met. Counsel for both parties made extensive submissions as to the issue of prejudice that would be caused by the decision to grant or not to grant the relief sought, as well as its effect on the administration of justice.

[89] In relation to the trial dates, it is obvious to this Court that they could not have been met. Trial was set down for two days, being the 12th and 13th of June 2017, the occasion on which this application was heard. Submissions in respect of the application and the preliminary objection thereto utilized the entirety of those two days. At that time the Claimant's case was struck out and dependent on a successful ruling in respect of the application from this Court in order to proceed. Therefore, this Court is puzzled as to how counsel could argue that the trial dates could have been met, unless it is that Counsel assumed that the Court would have simply granted the relief. The trial dates have clearly been lost, and due to the large volume of cases before the Court, it is unlikely that another trial date will be available until the next two to three (2-3) years. This delay will be a direct consequence of the Claimant's failure to comply with the

relevant orders. This, in my view, would definitely cause prejudice to the Defendants, which I will discuss later.

[90] As to the question of whether the breach has been remedied, it is my view that this has been so only partially. The Claimant's failure to serve the relevant documents at the time stipulated in Rattray J's order has been remedied by the subsequent service of the documents, albeit late. Mrs. Shelton argued that the failure has been remedied by the filing of the amended list of documents in which it is stated that the Claimant does not have possession or control of the documents. Whilst Mr. Wilkinson Q.C. has argued that the documents have still not been disclosed and has inferred that the filing of the amended list of documents, if allowed to stand, I surmise, would be insufficient. This is connected to his submission that the matter cannot be properly heard without specific disclosure of the documents stated in the order.

[91] **CPR rule 28.1** provides that a party **"discloses"** a document by revealing that the document exists or has existed, and **rule 28.2 (1)** limits a party's duty of disclosure to 'documents which are or have been in the control of that party'. The procedure for compliance with disclosure requirements generally is set out in **rule 28.8** and provides as follows:

> *"28.8 (1) Paragraphs (2) to (5) set out the procedure for disclosure.*
>
> *(2) Each party must make, and serve on every other party, a list of documents in form 12.*
>
> *(3) The list must identify the documents or categories of documents in a convenient order and manner and as concisely as possible.*
>
> *(4) The list must state –*
>
> *(a) what documents are no longer in the party's control;*
>
> *(b) what has happened to those documents; and*
>
> *(c) where each such document then is to the best of the party's knowledge, information or belief.*
>
> *(5) It must include documents already disclosed.*
>
> *(6) A list of documents served by a company, firm, association or other organisation must –*
>
> *(a) state the name and position of the person responsible for identifying individuals who might be aware of any document which should be disclosed; and*

> *(b) identify those individuals who have been asked whether they are aware of any such documents and state the position of those individuals.*

[92] Taking those provisions together, I am of the view that the order for specific disclosure would be complied with upon the filing of a list of documents either revealing the existence of the relevant documents, or indicating that the documents are not or have never been within the Claimant's control or possession. I agree with Mrs. Edward-Shelton's submission that, as per the rules and Edward J's order, the Claimant is only obligated to disclose documents within its possession and control. Therefore, the failure to comply with the order for specific disclosure will, in my view, only be remedied if it is that this Court were minded to permit the amended list of documents filed 6th June 2017 to stand as if filed in time. Having found that there is no good explanation for the failure, this Court is not so minded.

[93] In relation to the issue of the effect of the grant of relief, the Claimant submits that the Defendants will suffer no prejudice if relief is granted as the nature of the disclosure is such that had the Claimant complied with the order for specific disclosure as ordered, there would still be no documents to disclose. Whilst the position of the Defendants is that the matter cannot proceed without the disclosure of the relevant documents and that they will suffer great harm as they would be unable to properly defend the claim without the documents, and that the Defendants have expended a great amount of resources in defending a claim from a financial institution that has already spanned a period of approximately ten (10) years before the Courts. The Defendant further submits that if the Court decides not to grant relief this will have little to no effect on the Claimant as the Claimant has recourse in funds that were hypothecated by it.

[94] I disagree with Counsel for the Defendants that the matter would not be able to continue without the disclosure of the documents. As I have already found, the Claimants would only be required to disclose what was in their possession and control, and no evidence has been presented showing that the Claimant does in fact have the documents requested. Further, as I also have already stated, the question of whether

the absence of those documents would compromise the Claimant's ability to prove its case, as is being contended by Mr. Wilkinson Q.C., is a matter for a summary judgment application, which is certainly not before this Court at this juncture. I am also not sure why the Defendants would argue that the Claimant has other recourse via hypothecated funds when their stance is that they owe nothing to the Claimant, but nonetheless I reject that argument. If it is that some right has arisen to the Claimant based on a debt that it is owed, then the Claimant would be well within its right to seek relief from the Court from the perceived debtor. It is not for the Defendants to dictate to the Claimant how to recover debt it is owed.

[95] Notwithstanding the foregoing, I am in agreement that the resultant delay from the Claimant's non-compliance, in light of the ten (10) years that this matter has been before the Court, will indeed cause great prejudice to the Defendants. As Mr. Wilkinson rightly said, the Claimant brought the Defendants before this Court. This is their right. However, having done so, the Claimant has a responsibility in driving the case and ensuring that there is compliance with Court orders so that the case can move forward. It is unfair for the Claimant to have dragged the Defendants before the Court, and continually fail to comply with orders and rules of the Court that will enable the case to move forward. As I have already stated, the volume of cases before the Court is that it is likely that it will be at least two (2) years before another trial date will be available. I therefore reject the submission that another trial date can be met, on the basis that, whilst this is indeed so, this would cause great prejudice to the Defendants.

[96] In relation to the argument that the failure to disclose would cause no prejudice, I find the case of ***Juliet Brown*** useful. In dismissing the applicant's submission that the respondent would not have been prejudiced by the non-service of the list of documents because the defendants had nothing to disclose, the Court in ***Juliet Brown*** noted at paragraph 34, that the main objective of disclosure is to bring to the attention of the opposing party, documents on which that party intends to rely, as well as the material documents within the control of the party providing disclosure. The Court then went on to conclude that it would not be accurate to state that there would be no prejudice to the other party in such a circumstance, as the mere fact that there are no material

documents is valuable information that will assist the other party in knowing what is the nature of the evidence to be presented against them. Whilst the Court was addressing disclosure from the standpoint of standard disclosure, I am of the view that the same applies here.

[97] Therefore, I find that the grant of relief will cause prejudice to the Defendants.

REQUEST FOR JUDGMENT

[98] Having decided not to grant relief, I am in agreement with the submission of Mr. Wilkinson Q.C. that the logical consequence is that judgment should be entered in favour of the Defendants. **Rule 26.5** provides that where a party against whom an unless order is made fails to comply with that order with the result that that party's case is struck out, the other party may obtain judgment by filing for a request for judgment in accordance with the conditions specified. **Rule 26.5(4)** requires that:

> *"The request must –*
>
> *(i) Prove service of the "unless order";*
>
> *(ii) Certify that the right to enter judgment has arisen because the court's order was not complied with; and*
>
> *(iii) State the facts which entitle the party to judgment.*

[99] The above requirements having been fulfilled, notwithstanding that the parties did not go into submissions pertaining to the request, I am of the view that judgment should be entered for the Defendants.

CONCLUSION

[100] The Claimant made this application for relief after having its case struck out for non-compliance with an unless order that was made in respect of the Claimant's previous failure to comply with all the orders made at CMC almost two (2) years ago. Not having served the relevant documents within the time stipulated for compliance, and

not having made specific disclosure as required by the relevant order, Counsel for the Claimant admirably took responsibility, providing affidavit evidence indicating that the failure to address the order for specific disclosure was due to a 'clerical error' on their part. However, what Counsel failed to do was to provide any explanation as to why the relevant documents were served on the Defendants late. The requirements of **rule 26.8(1)** are threshold requirements and ought to be satisfied for the application to even be considered, much less granted. Notwithstanding this, having gone on to consider the other requirements, this Court further finds that the explanation proffered of a 'clerical error' fails to meet the standard of a good explanation, and that the Claimant has not generally complied with other rules, orders and directions of the Court as required by **rule 26.8(2)**.

[101] The authorities are clear that these are also threshold requirements that must be met for relief to be granted, and that if a party fails to satisfy them, there is no need to consider the factors in **rule 26.8(3)**. Nevertheless, I have gone on to look at those factors, and they are not in favour of the granting of relief to the Claimant. The trial date has been lost due solely to the Claimant's non-compliance, with the prospect of a new date somewhere in the distant future. This, in my view, will cause great prejudice to the Defendants, who have been brought before the Court to defend this claim for a period of approximately ten (10) years.

[102] Thus, the Claimant has failed in several respects to satisfy the conditions required for it to be granted relief.

ORDER

1. Application is refused and costs of the application are awarded to the Defendants, to be agreed or taxed.

2. Judgment is entered for the Defendants, and costs of the claim are awarded to the Defendants, to be taxed pursuant to CPR 26.5(7).