[2018] JMCC Comm. 42

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2001 CD 00003

BETWEEN	**CONCEPT DEVELOPERS LIMITED**	**CLAIMANT/ APPLICANT**
AND	**FIRST REGIONAL CO-OPERATIVE CREDIT UNION LIMITED (formerly Saint Mary Co-operative Credit Union Limited)**	**DEFENDANT/ RESPONDENT**

IN CHAMBERS

Maurice Manning instructed by Bishop & Fullerton for the Claimant/Applicant

David Johnson instructed by Samuda & Johnson for the Defendant/Respondent

Heard: 13th & 26th November, 2007, 13th December, 2007 & 7th December, 2018

Civil Practice and Procedure - Unless Order made in respect of Security for Costs - Claimant in breach of Unless Order - Claimant's claim struck out - Notice of Application for Relief from Sanctions - Rules 26.7(2) and 26.8 of the Civil Procedure Rules.

Cor: Rattray J.

[1] Concept Developers Limited (Concept) and First Regional Co-operative Credit Union Limited (First Regional), in or around 1998, entered into a contract whereby Concept agreed to provide construction management services to First Regional for the construction of service lots on lands situated at Islington in the parish of St.

Mary. Pursuant to the said contract, Concept commenced the construction work on the lands, and received payments for the completed portions of the work done. However, a dispute arose between the parties, which eventually led to this action being filed by the Claimant, Concept on the 11th December, 2001, against the Defendant First Regional.

[2] In its Writ of Summons and Endorsement, Concept sought to recover damages, as a result of the alleged rescission of contract by First Regional. The specific claims for relief sought against First Regional were as follows: -

a) The sum of $2,028,000.00 being the principal sum owed for fees;

b) The sum of $1,083,925.32 being the interest due on the principal sum as at the 28th November, 2001;

c) The sum of $1,480,000.00 for project developer's margin;

d) The sum of $325,000.00 for travelling and other re-imbursable expenses;

e) Interest on all the outstanding balance at 33% per annum until the debt is paid; and

f) Attorney's costs.

[3] The claim was served on First Regional, whose Attorney-at-Law, Mr. J. Vernon Ricketts, placed himself on record for the Defendant, by filing a Notice of Appearance and Entry of Appearance on the 2nd January, 2002. Subsequently, First Regional failed to file its Defence in the time prescribed by the **Civil Procedure Rules (CPR)**. This ultimately led to a Final Judgment in default of Defence being entered against First Regional on the 11th December, 2003, in favour of Concept.

[4] Thereafter, on the 30th March, 2004, First Regional filed an Amended Notice of Application for Court Orders, which sought to have the Final Judgment set aside, as well as all subsequent proceedings pursuant to the Judgment. That Application

was heard by this Court on the 7th March, 2005, at which time it was ordered that: -

a) The Final Judgment dated the 11th December, 2003 in favour of the Claimant is hereby set aside as being irregular;

b) All subsequent proceedings pursuant to the said Judgment is hereby set aside;

c) The Defendant granted leave to file its Defence on or before the 21st March, 2005 by 4pm;

d) Costs awarded to the Defendant to be taxed if not agreed.

[5] It cannot go without mention that when this action was commenced on the 11th December, 2001, the Attorney-at-Law on record for the Claimant was Counsel Mr. Keith N. Bishop. However, on the 12th November, 2004, a Notice of Change of Attorney-atLaw was filed by Bishop & Fullerton, Attorneys-at-Law, replacing Mr. Bishop as the Attorney-at-Law on record for the Claimant.

[6] In its Defence filed on the 10th March, 2005, by its new Attorneys-at-Law, Piper & Samuda, First Regional alleged that it was the Claimant, Concept that was in breach of the said contract, and as a result it was forced to terminate the agreement. Furthermore, it contended that the Registrar of Co-operative and Friendly Societies, which has statutory responsibilities for credit unions and co-operatives, ordered it to cease and desist with the development. In addition, First Regional insisted that it was not indebted to the Claimant.

[7] On the 21st March, 2006, Concept amended its claim by filing a Further Amended Claim Form, which sought the following reliefs: -

a) A declaration that the Defendant acted in breach of the agreement and contract between the parties;

b) A declaration that the Defendant failed and/or neglected to pay the amount due as specified by the agreement and contract between the parties;

c) The sum of $2,028,000.00 being the principal sum owed for fees and other costs allowed under the contract;

d) The sum of $3,323,838.50 being the interest due on the principal sum as at the 17th March, 2006;

e) The sum of $1,755,000.00 for loss of profit;

f) Interest on all the outstanding balances at 15% per annum until the debt is paid;

g) Costs; and

h) Attorney's costs.

[8] A Notice of Change of Attorney-at-Law was filed on the 6th March, 2007, by Samuda & Johnson, Attorneys-at-Law, replacing Piper & Samuda as the Attorneys-atLaw on record for the Defendant. It should also be highlighted that on the 13th March, 2007, another Notice of Change of Attorney-at-Law was filed by the firm Bishop & Fullerton, in effect reinforcing its representation on behalf of the Claimant.

[9] On the 15th March, 2007, on a Notice of Application for Court Orders filed by First Regional, which sought *inter alia* security for costs, this Court made, in so far as is relevant, the following Orders: -

1. By and with the consent of the parties the name of the Defendant is amended to read First Regional Co-operative Credit Union Limited (formerly St. Mary Co-operative Credit Union Limited);

2. The Claimant/Respondent shall pay One Million Four Hundred Thousand Dollars ($1,400,000.00) into an interest bearing account in the joint names of the Attorneys-at-Law for the respective parties as security for the Defendant's costs in this claim at a Financial Institution to be agreed upon by the parties, such payment to be made on or before the 30th April, 2007;

3. This action is stayed until the payment of the said security for costs;

4. If the said security is not paid by the 30th April, 2007 the Claimant's claim stands struck out;

5. Leave to appeal refused.

[10] At the adjourned Pre-Trial Review on the 11th May, 2007, it was brought to the Court's attention, that the Claimant had not complied with the Order for Security for Costs made earlier on the 15th March, 2007. It was pointed out that on the 27th April, 2007, Counsel Mr. Bishop, opened an account in his name at Dehring, Bunting & Golding, with the sum of $1,472,450.00 ($24,500.00 Canadian Dollars), and sought thereafter to have the Attorneys-at-Law for the Defendant added to the account. This act by Mr. Bishop was not in compliance with the Order of the Court, which had specified that it was an interest bearing account that ought to have been opened in the joint names of the Attorneys-at-Law for the respective parties, at a financial institution to be agreed upon by the parties.

[11] Furthermore, on the 12th November, 2004, a Notice of Change of Attorneys-at-Law was filed by Bishop & Fullerton, replacing Counsel Mr. Bishop as the Attorney-atLaw on record for the Claimant. Therefore, when Mr. Bishop opened the account in his name on the 27th April, 2007, he again failed to comply with the Order of the Court, as at that time, it was the firm of Bishop & Fullerton, and not Mr. Bishop personally, who were on the record for the Claimant. As a result of the highlighted breaches, the claim filed on behalf of Concept was struck out by this Court on the 11th May, 2007, in accordance with the sanction imposed on the 15th March, 2007.

[12] It must be mentioned that on the 12th June, 2007, the Attorneys-at-Law for the Claimant, Bishop & Fullerton, opened an account in their name with the sum of $1,551,853. 88 at Dehring, Bunting & Golding, although there was no evidence of any agreement between the Attorneys-at-Law for the respective parties for such a step to be taken, as required by the Order of the Court.

[13] Prior to that date, Concept on the 18th May, 2007, filed the instant Notice of Application for Court Orders, seeking, *inter alia*, relief from sanctions as well as the following Orders: -

1. That the Applicant be relieved from sanctions imposed in the Order of Mr. Justice Rattray made on the 15th March, 2007 and in particular: -

   a. Time be extended to open an account in the joint names of the Attorneysat-Law for the respective parties and that the Defendant's Attorneys-atLaw, within 10 days of this Order, sign on the account bearing number 0150B501994 at Dehring Bunting & Golding Limited, New Kingston Branch; and

   b. The matter be restored to the trial list and set for trial on a date to be determined by the Court;

2. That the Defendant pays the reasonable costs of the Claimant prior to the set aside Application and also the costs of the set aside as agreed by the parties;

3. That the matter be transferred from the Commercial Division (the commercial list) of the Supreme Court; and

4. Costs to be costs in the claim.

[14] The grounds on which Concept sought the aforesaid Orders are set out hereunder: -

a) That since the matter was brought to the Applicant's attention that it did not strictly comply with the Order of Mr. Justice Rattray, every effort has been made to do so;

b) That the failure to comply was not intentional and that the Applicant has applied for relief as soon as reasonably practicable;

c) That granting relief would serve the purpose of justice for both parties;

d) That the Applicant has generally complied with all other relevant Rules;

e) Pursuant to Part 71 and Part 26.8 of the **CPR**.

[15] In support of its Application, Concept relied on two Affidavits sworn to by its Managing Director, Mr. Paul Walker, the first of which was filed on the 18th May, 2007. The Further Affidavit of Paul Walker was filed on the 17th June, 2007. In reply, First Regional relied on the Affidavit of David Arthur Johnson filed on the 21st September, 2007.

[16] The Order for Security for Costs made on the 15th March, 2007 was in effect an Unless Order, as it indicated that if the Claimant did not pay the security by the 30th April, 2007, its claim stands struck out. In addressing the specific issue of compliance with Unless Orders, Kay LJ, in the case of **RC Residuals Ltd v Linton Fuel Oils Ltd and Another** [2002] 1 WLR 2782, at paragraph 22 stated that: -

> *"There remains, despite the efforts of the courts, a feeling that, when an order is made that something should be done by a particular day, that is interpreted as an order that it should be done on that day. The sooner parties are disillusioned from thinking that is so, the better, and one can well see why the judge was anxious to disillusion all those involved with the process from that thought.* ***The obligation on the parties is to comply with the order as soon as possible, but no later than the deadline provided by the order****. In that way the administration of justice will best be effected."*
>
> [Emphasis supplied]

[17] Rule 26.7 (2) of the **CPR** outlines the consequence of failing to comply with an Order of the Court, Rule or a Practice Direction. That Rule reads as follows: -

> *"Where a party has failed to comply with any of these Rules, a direction or any order, any sanction for non-compliance imposed by the rule, direction or the order has effect unless the party in default applies for and obtains relief from the sanction, and rule 26.9 shall not apply."*

[18] The Court's discretion to grant relief from sanction is governed by Rule 26.8 of the **CPR**, which provides that: -

> *"(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 on each party.

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

[19] All the requirements of Rule 26.8 (2) of the **CPR** must be satisfied, before the Court can properly exercise its discretion in favour of the Claimant. This was recently echoed by Edwards JA (Ag) (as she then was), in **Jamaica Public Service Company Limited v Charles Vernon Francis and Another** [2017] JMCA Civ. 2, where she stated at paragraph 54 that: -

"Contrary to the view espoused by counsel for the respondent, there is no discord between the decision in the case of ***Villa Mora Cottages*** *and the case of* ***H B Ramsay and Associates Ltd and another v Jamaica Redevelopment Foundation Inc and another****.* ***Both cases decided that the factors in rule 26.8(2) are cumulative and are threshold requirements, although using differing language in so stating****.* ***The result is that a litigant must pass the cumulative threshold requirements of rule 26.8(2) in order for the court to consider granting relief****. Having formed the view that the threshold requirements have been met, the court then determines whether to grant the relief, taking into account the factors in rule 26.8(3)."*

[Emphasis supplied]

[20] Similarly, in the case of **University Hospital Board of Management v Hyacinth Matthews** [2015] JMCA Civ. 49, Phillips JA, in delivering the judgment of the Court, declared at paragraph 36: -

"On the other hand the Jamaican counterpart, rule 26.8 of the CPR, albeit similar in the wording, is divided into three separate paragraphs. Due to the umbrella words of each paragraph, they fall for consideration at different stages when

considering whether to grant relief from sanctions. Paragraph 26.8(1) (which requires the application to be made promptly and to be supported by evidence) acts as a preliminary test which must be satisfied before the application can be considered by the court under rule 26.8(2). ***Rule 26.8(2) states three specific factors that must be in effect in order for the court to grant relief, and in circumstances 'only if it is satisfied…" As a consequence, the matters set out therein must be satisfied before the court can consider the factors set out in rule 26.8(3). Put another way, any failure to satisfy those factors precludes the consideration of the court under rule 26.8(3)****."*

[Emphasis supplied]

[21] Rule 26.8 (1) (a) of the **CPR** states that the Application must be made promptly. The word *must* in this context, indicates a mandatory element. In order to determine whether something has been done promptly, it will depend on the particular facts of each case. In the case of **H. B. Ramsay and Associates Ltd and Others v Jamaica Redevelopment Foundation Inc and Another** [2013] JMCA Civ. 1, Brooks JA at paragraph 10 noted: -

"that the word "promptly", does have some measure of flexibility in its application. Whether something has been promptly done or not, depends on the circumstances of the case."

[22] His Lordship at paragraph 31 concluded that: -

"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 has to clear is that he must meet all the requirements set out in rule 26.8(2). Should he fail to meet those requirements then the court is precluded from granting him relief. There would, therefore, be no need for a court, which finds that the applicant has failed to cross the threshold created by rule 26.8(2), to consider the provisions of rule 26.8(3) in relation to that applicant."

[23] In **National Irrigation Commission Ltd. v Conrad Gray and Marcia Gray** [2010] JMCA Civ. 18, the issue was whether the Claimants/Respondents had acted promptly in compliance with Rule 26.8 (1) (a) of the **CPR**, when they applied for relief from sanction. At paragraph 14, Harrison JA, opined: -

"We do have the authority of ***Regency Rolls Limited v Carnall*** *[2000] EWCA Civ. 379, where Arden L.J pointed out that the dictionary meaning of "promptly" was with alacrity and quoted with approval Simon Brown L.J., and comment;*

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

[24] The learned Judge of Appeal went on to opine at paragraph 16 that: -

"…Promptness, in our view, is the controlling factor under rule 26.8. It is plainly a very important factor, as is evident from the fact that it is singled-out in the rule as a matter to which the court must have regard. In our judgment, it is a very important factor because there is a strong public interest in the finality of litigation. Put simply, people are entitled to know where they stand."

[25] In this matter, I find that the Claimant's Application was made promptly. The said Application was filed one week after the Claimant's claim was struck out, and there was no evidence to indicate that it acted in a dilatory manner in approaching the Court for relief.

[26] The Court must next consider whether the failure by the Claimant to comply with the Order for Security for Costs was intentional. Mr. Walker in his Affidavit in Support of

Notice of Application for Court Orders, averred in so far as is relevant: -

"3. That my knowledge of the facts and matters herein is derived from personal knowledge of the matter for several years and so far as they are within my knowledge are true and so far as they are not within my knowledge, they are true to the best of my information and belief.

4. That at the start of this matter in court, the Claimant's Attorney-at-Law was Keith N. Bishop of counsel having conduct of the matter. That in this affidavit reference to the Claimant's Attorney-at-Law is reference to Keith N. Bishop unless otherwise stated.

…

41. That although the time given to come up with the $1,400,000.00 was short and unreasonable having regard to the fact that this matter was filed and served in 2001, I made my best efforts to secure the required sum and sent it in Canadian Dollars to my brother who was advised to make contact the Claimant's Attorneys-at-Law. In preparing to open the account I have been advised by the Claimant's Attorneys-at-Law and do verily believe that the lawyers on both side exchange letters as to the institution that the account should be opened. That to the best of my knowledge, Dehring, Bunting & Golding was one of the choices made by the Defendant and copies of relevant letters from the Attorneys-at-Law for both parties have been produced and shown to me and I exhibit them hereto marked "PW18" for identification.

42. That I have been advised by the Claimant's Attorneys-at-Law and do verily believe that the account was opened on the 27th April, 2007, that is to say three

clear days before the stile(sic) out was to take effect, with the sum of $24,500 Canadian Dollars or the equivalent in Jamaican Dollars of J$1,472,450.00 and the account was an interest bearing account.

…

52. That if the matter is returned to the list for trial all that would be required is for the Defendant's Attorneys-at-Law to sign the relevant documents at Dehring, Bunting & Golding to have their names on the account and for the court to set a date for trial and make the relevant Pre-Trial Review Orders. That to the best of my knowledge, a copy of the attested order with respect to security for costs was provided to Dehring, Bunting & Golding at the time when the account was being opened.

…

57. That I have been advised by the Claimant's Attorneys-at-Law and do verily believe that the Claimant has done all that it could do to comply with the order of Mr. Justice Rattray and despite the challenges with my residing out of the jurisdiction, the application for relief has been made promptly and in the shortest possible time to indicate the seriousness of the Claimant to pursue the matter to trial.

58. That any failure to comply with the order of Mr. Justice Rattray was not intentional as every effort was made to secure the required sum and then to have it wired to Jamaica."

[27] Mr. Paul Walker in his Further Affidavit stated at paragraph 4: -

"That I refer to my first affidavit for relief and say that recently a new account was opened in the name of Bishop & Fullerton, Attorneys-at-Law with a sum above what was ordered by the court and also indicating that the account is interest bearing. That a copy of a letter along with a Capital Management Certificate have been produced and shown to me and is exhibited hereto marked "PW22" for identification."

[28] As indicated earlier, the Order for Security for Costs was made on the 15th March, 2007, and by the 20th March, 2007, the Attorneys-at-Law for the parties were in discussions trying to agree on the financial institution in which the account would be opened. However, it would appear that those discussions bore no fruit, and in an effort to comply with the Order of the Court, Counsel Mr. Bishop went ahead and opened the account in his name. He then tried to have the Attorneys-at-Law for First Regional added to the account, before the 30th April, 2007, the final date for compliance with the Order of the Court. This attempt, no matter how well intended, was a clear breach of the Order of the Court.

[29] I am satisfied that the Claimant's failure to comply with the Order of the Court was not deliberate, as its actions showed an intention to comply with the Order for Security for Costs. Although I am of that view however, it must be noted that from the account was opened on the 27th April, 2007 by Mr. Bishop, the Claimant was in breach of the Order of the Court, as that Order specifically indicated that the account to be opened was to have been in the joint names of the Attorneys-at-Law for the respective parties. There was also non-compliance with the Order of the Court when Mr. Bishop opened the account in his name, as at that time, he himself was not on the record as the Attorney-at-Law for Concept. The unchallenged evidence before this Court is that at that time, the firm of Bishop & Fullerton were the Attorneys-at-Law on record for the Claimant.

[30] Another important requirement to consider is whether there was a good explanation for the failure to comply with the Order for Security for Costs. In his Affidavit in Support of Notice of Application for Court Orders, Mr. Walker endeavoured to offer the following explanation, at paragraph 59 where he deponed: -

> *"That I recall that the money was sent in the middle of the last week of April 2007 and I am advised by my brother who received the money and do verily believe that he advised the Claimant's Attorneys-at-Law on or about the Wednesday, the 25th April 2007 that the money was ready to open the account.* ***That I am advised by the Claimant's Attorneys-at-Law that he opened the account on or about Thursday the 26th April 2007 to ensure that the account was opened and he advised his secretary to inform the Defendant's Attorneysat-Law to sign on the account but I am further advised by the Claimant's Attorneys-at-Law that this was not done by the Secretary.*** *That I am further advised by the Claimant's Attorneys-at-Law and do verily believe that he left the jurisdiction for the United States on the first flight early on Friday, the 27th April 2007 and did not return to Jamaica until Monday, the 30th April 2007 and return to work on the 1st May 2007. That in all the circumstances, the failure to comply could not be put solely at the feet of the Claimant. That I am advised by the Claimant's Attorneys-at-Law and do verily believe that the difficulties experienced by the Claimant's Attorneys-at-Law was told to Mr. Justice Rattray by the Claimant's Attorneys-at-Law."*
>
> [Emphasis supplied]

[31] Lord Dyson in **Attorney General v Universal Projects Ltd** [2011] UKPC 37, expressed at paragraph 23 that: -

> *"… if the explanation for the breach … 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."*

[32] In **Alliance Investment Management Limited v Universal Agencies Limited and Anor** [2017] JMSC Civ. 126, McDonald J at paragraph 69 articulated that: -

> *"**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."*
>
> [Emphasis supplied]

[33] The case of **B & J Equipment Rental Limited v Joseph Nanco** [2013] JMCA Civ. 2, which involved an Application to set aside a Default Judgment, is instructive and relevant to the circumstances of the present case. There, McDonald-Bishop J (as she then was), found *inter alia* that there was no good explanation for the failure to file a Defence, and accordingly she dismissed the Application. Counsel in that case, who previously represented the Appellant, did not provide any evidence explaining the failure to file the Defence in time, or at all. On appeal Morrison JA (as he then was) stated: -

> *"[60] Rule 13.3(2)(b) speaks to the explanation given for the appellant's failure to file a defence. The learned judge noted (at para. [83]) that the primary explanation given by the appellant was that it had given instructions to its counsel and, based on his assurances, it was "labouring under the impression that all was well, so to speak". There was no evidence from Mr Pearson himself giving any explanation for the failure to file the defence in time, or at all…*
>
> *[61] **McDonald-Bishop J concluded (at para. [89]) that the reasons advanced by the appellant for not filing a defence "amounts to no good reason at all, particularly so, in the absence of any explanation forthcoming from Mr Pearson". I agree. In the absence of any explanation from Mr Pearson, it seems to me, there was in fact no explanation at all**..."*
>
> [Emphasis supplied]

[34] In applying his Lordship's reasoning, Mr Walker's Affidavit does not offer any explanation as to why the joint account was not opened in the names of the Attorneysat-Law for the respective parties, by or before the date set for compliance

with the Order for Security for Costs. Mr. Walker indicated that he was advised that the account was opened by Mr. Bishop, and that Mr. Bishop advised his secretary to inform the Attorneys-at-Law for the Defendant to sign on the account. However, this was not done by the secretary. There was no explanation from the secretary by way of an Affidavit, as to why this was not done, nor was any explanation tendered on her behalf. What was required in the circumstances, was for the Claimant to state the reason or reasons, or the circumstances why the joint account was not opened in the names of the Attorneysat-Law for the respective parties. The Court then would have been able to consider whether the reasons or circumstances outlined were satisfactory. Mr. Walker's Affidavits do not explain the reason for the failure, and so I am therefore of the view that no good explanation has been advanced before the Court.

[35] The last threshold requirement to be contemplated by the Court, is whether Concept has generally complied with all other relevant rules, practice directions, Orders and directions. Mr. Walker in his Affidavit in Support of Notice of Application for Court

Orders said, in so far as is relevant: -

> *"39. That the matter came for Pre-Trial Review on the 25th September, 2006 before Mr. Justice Rattray. Prior to the Pre-Trial Review, the Claimant filed for relief to have all its witness statements and reports filed and served out of time be taken to be filed in good stead. That to my certain knowledge, the Defendant did not file and serve its witness statements on time nor did the Defendant file and serve a Notice of Application for Relief…"*
>
> *…*
>
> *53. That in all the circumstances, it would be unfair and unjust for the matter to remain struck out when from time to time the Defendant has disobeyed the order of the court without sanction. For instance, the time the Defendant took to file a Defence, the fact that the Defendant was also late to comply with the case management orders and the fact that the Defendant although having a change of name refused and/or neglected to advise the court of this fact. In fact, this information was brought to the court's attention by the Claimant's Attorneys-atLaw at the Pre-Trial Review on the 15th March 2007 when the consent order was made. That I note that the Defendant was not even reprimanded for refusing and or neglecting to change the name on record although it was widely in the news and the head of the Defendant's firm and the representative of the Defendant in court on most occasions was the president and a senior person in the Credit Union movement in Jamaica and the Caribbean.*

> *54. That on most occasions, even when adjournments are entertained, I journeyed from Canada to attend court in Jamaica and to ensure that the Claimant complies with the Civil Procedure Rules, which require that the Claimant should be represented. That from my observation, the Defendant is hardly ever represented and to the best of my knowledge was never sanctioned for being absent."*

[36] At the Case Management Conference held on the 25th March, 2006, Jones J made, in so far as relevant the following Order: -

> *"5. Witness statement limited to four for the Claimant and four for the Defendant to be filed and served on each party on or before the 30th day of June 2006;"*

[37] As highlighted from Mr. Walker's Affidavit, the Claimant failed to file and serve its witness statements by the 30th June, 2006, as ordered by Jones J. As a result of this, it sought an extension of time by way of Notice of Application for Court Orders filed on the 22nd September, 2006, to have its witness statements filed out of time stand. The matter then came before this Court for Pre-Trial Review on the 25th September, 2006, at which time it was ordered *inter alia* that: -

> *"1. The time for compliance of Orders on Case Management Conference extended to the 2nd October, 2006 by 4pm;"*

[38] The history of this matter has therefore shown that at least on one occasion, Concept, was in breach of the Order of the Court, by failing to file and serve its witness statements by the time specified by the Court. Nevertheless, I am of the view that Concept has generally complied with all other relevant rules, practice directions orders and directions. Mr. Walker in his evidence, has placed heavy emphasis on how First Regional has conducted its case. I must indicate that in the instant Application, the conduct of First Regional is not under scrutiny by this Court, and as I understand it, no

Application was made in that regard. The purpose of the instant Application is to ascertain whether relief from sanction should be granted to the Claimant, for having breached an Unless Order of the Court.

[39] The Court is cognizant of the significant prejudice that would be occasioned to the Claimant, if its Application is refused. Its claim could not be revived and would therefore remain struck out. Nevertheless, the Court cannot exercise its discretion to grant relief, in circumstances where Rule 26.8 (2) (b) of the **CPR**, which require

a good explanation for a party's failure, has not been complied with. Concept has not advanced any or any sufficient explanation before the Court, for its failure to comply with the Order for Security for Costs. Consequently, the Court is precluded from considering the factors outlined in Rule 26.8 (3) of the **CPR**, which outline the other issues the Court ought to consider on an Application for Relief from Sanctions, as indicated earlier by Edwards JA (Ag) in the case of **Jamaica Public Service Company Limited v Charles Vernon Francis** (supra). In the circumstances, the Court must respectfully refuse to grant the Application by the Claimant for relief from sanctions. There is therefore no proper substratum placed before the Court by the Claimant for it to grant any extension of time to comply with the Order for Security for Costs. As such, that Application is also refused.

[40] The instant Application also sought an Order that the Defendant pay the reasonable costs to the Claimant prior to the set aside Application, and also the costs of the set aside as was agreed by the parties. The relevant portions of Mr. Walker's Affidavit in Support of Notice of Application for Court Orders, which support this aspect of the Application reads as follows: -

> *"29. Prior to the hearing of the Application to Set Aside, the Defendant changed Attorney-at-Law to Piper & Samuda who made an agreement with the Claimant and gave an undertaking to pay costs reasonable incurred, including the costs to set aside the application. That copy of letters which speak to the agreement mentioned herein has been produced and shown to me and I exhibit them hereto marked "PW12A" for identification.*
>
> *…*
>
> *31. That with respect to the order for costs against the Claimant, it was vigorously opposed by the Claimant's Attorneys-at-Law but the learned Judge in his wisdom allowed the application by the Defendant without any limitation or special reason why the Claimant should be penalized for obtaining a Final Judgment approved by the Registrar of the Supreme who had a duty and responsible to sign or not to.*
>
> *…*
>
> *34. That my understanding of the Judge's order is that the Registrar of the Supreme Court who signed the Final Judgment was not careful enough to ensure that the matter should have gone instead for assessment instead of a Final Judgment. That in all the circumstances, I have been advised by the Claimant's Attorneys-at-Law and do verily believe that any costs award against the Claimant should have been limited to costs of the day, if any, having regard to the conduct of the Defendant."*

[41] Mr. Johnson in his Affidavit at paragraph 15a. and b. indicated that: -

> *"a. The agreement and undertaking to pay the costs referred to in paragraph 29, contemplated the setting aside of a regularly entered Default Judgment, with leave being granted to the Defendant to file a Defence. This is confirmed by the release of the funds which were previously paid over to the Claimant's Attorneyat-Law to be held in escrow, pending the outcome of the application to set aside the said Default Judgment.*
>
> *b. The costs awarded at the hearing of the application to set aside the default judgment, was not vigorously opposed by the Claimant's Attorney-at-Law and at no time was any previous agreement between the parties advanced by the Claimant's Attorney-at-Law as a basis for refusing the Defendant's application for costs."*

[42] The Final Judgment entered against First Regional was set aside by this Court on the 7th March, 2005, because it was irregular in nature. It was on that basis that costs were awarded to First Regional. The alleged agreement in respect of costs that Concept made with First Regional, was never raised at the time the Final Judgment was set aside. That particular agreement is now being brought to the Court's attention.

[43] A costs Order has already been made by this Court in respect of the setting aside of the Final Judgment, and that Order is still in effect, as it has not been varied nor set aside. The Order now being sought by the Claimant, does not seek a variation or a setting aside of that costs Order. In the absence of an Application seeking such an Order, and the provision of evidence indicating the specific reason why the request is now being made, this Court is not prepared to grant the Claimant an Order for costs on the Application setting aside the Final Judgment.

[44] Furthermore, on the 27th May, 2005, the Claimant filed a Notice of Appeal, seeking to have the Order of this Court setting aside the Final Judgment entered against First Regional, and the Order granting it costs, set aside. If that appeal is alive, it would be inappropriate to now award costs to Concept on the Application setting aside the Final Judgment, in circumstances where there is already a costs Order in favour of First Regional, which is the subject of Concept's appeal.

[45] In the premises the Court makes the following Orders: -

a) Concept Developers Limited's Notice of Application for Court Orders filed on the 18th May, 2007, is refused;

b) Costs of the Application to First Regional Co-operative Credit Union Limited, such costs to be taxed if not agreed.