[2018] JMSC Civ.100

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2010 HCV 04362

BETWEEN	**DENTON DOWNER**	**CLAIMANT**
AND	**SOLID GENERAL INSURANCE BROKERS LIMITED**	**1ST DEFENDANT**
AND	**ADVANTAGE GENERAL INSURANCE COMPANY**	**2ND DEFENDANT**
AND	**SOLID LIFE GENERAL**	**ANCILLARY CLAIMANT**
AND	**ADVANTAGE GENERAL INSURANCE COMPANY**	**2ND ANCILLARY CLAIMANT**
AND	**AIM FINANCIAL CORPORATION**	**ANCILLARY DEFENDANT**

IN CHAMBERS

Ms. Debbie Samuels for the Claimant.

Ms. Jodian Carter instructed by Caribbean Legal Suite for the 1st Defendant/ Ancillary Claimant.

Ms. Suzette Campbell Instructed by Burton Campbell and Associates for the 2nd Defendant/2nd Ancillary Claimant.

Mr. Francis McKnight Instructed by Nunes, Scholefield, Deleon and Company for the Ancillary Defendant.

Heard 3rd and 24th May, 2018

Applications for relief from sanction trial commenced - at trial judge ruled statements of case had been struck out - trial aborted - applications made after

trial - whether delay inordinate, whether there are good explanations for the delay - Rule 26.8.

THOMAS, J. (AG)

Introduction

[1] The Claim in relation to the instant matter is to recover indemnity under an insurance policy from the 1st and 2nd defendant arising from a motor vehicle accident in which the Claimant was involved.

In the instant applications the Claimant, Denton Downer and the 1st Defendant/ Ancillary Claimant, Solid Life General Insurance Brokers Ltd are seeking relief from sanctions in relation to an unless order made by His Lordship Mr. Justice Rattray on the 3rd of April 2017.

History

[2] It is necessary for me to give a brief history of the matters leading up to the order. The claim was filed on the 8th of September 2010. All the parties having filed their statements of case, Case Management Conference (CMC) was scheduled for the 7th of January 2016. On that date the following CMC orders were made by his Lordship Mr. Justice Rattray:

> "(i) Standard Disclosure on or before March 2, 2016.
>
> (ii) Inspection of documents on or before May 24, 2016.
>
> (III) Witness statement to be filed and served on before September 20, 2016.
>
> (iv) Each party to file and serve their statements of fact and issues on or before November 6, 2016.

(v) Trial by Judge alone in open court set for July 17, 2017 for three days.

(vi) Pre-trial review set for hearing on April 3, 2017 at 11:00 a.m. for half hour.

(vii) Listing of Questionnaire to be filed and served on or before February 27, 2017.

[3] When the matter came up for pre-trial review on the 3rd of April 2107 none of the parties had fully complied with the CMC orders made on the 7th of January 2016. On that date his Lordship Mr. Justice Rattray made several orders. However, the order that is relevant to these proceedings is order number two (2). It states:

> *"Time for the parties to comply with Orders made at Case Management Conference extended to the 29th of May 2017 by 4:00 p.m., failing which the Statement of Case of the party or parties in default to stand struck out".*

[4] The Claimant's list of documents, statement of facts and issues, and listing of questionnaires were filed in time. However, in breach of the unless order, they were served on the other parties on the 31st of May 2017. The 1st Defendant/ Ancillary Claimant's list of documents, statements of facts and issue listing of questionnaire and witness statements were filed in time. However, in breach of the unless order, they were served on the Claimant at 5:00 p.m. on the 29th of May 2017. The other parties were served on time.

The matter duly came up for trial on the 18th of July 2017. On the second day of trial her Ladyship Mrs. Justice Dunbar Green made the following orders:

"1. The Claimant's statement of case stands struck out in accordance with order (2) of pre-trail review orders of The Honourable Mr. Justice Rattray dated 3rd April. 2017.

2. The 1st Defendant/Ancillary Claimant's statement of case stands struck out in accordance with order two (2) of pre-trail

review orders of The Honourable Mr. Justice Rattray dated 3rd April, 2017.

3. Cost of the Claim to the 2nd Defendant against the Claimant.

4. The Claimant to indemnify 2nd Defendant/Ancillary Claimant against any and all cost arising from the Ancillary Claim against the Ancillary Defendant.

5. Costs to the Ancillary Defendant against the 1st and 2nd Defendant/Ancillary Claimant.

6. All cost to be agreed or taxed.

7. Order to be prepared, filed and served by the 2nd Defendant/Ancillary Claimant's Attorney-at-law.

[5] All the parties have agreed to the following facts:

The trial commenced on the 17.7.17. During the trial issues were raised with regards to service. Consequent upon enquires which of necessity involved the cross examination of Mr. Curtis Miller the process server for the Claimant, her Ladyship Mrs. Justice Dunbar Green found that the Applicants were in breach of the unless order made on the 3rd of April 2017.

Issues

[6] WHETHER the Applicants have satisfied the requirements in order for the court to exercise its discretion to grant them relief from sanctions. These requirements are expressed in the ***SUPREME COURT OF JAMAICA CIVIL PROCEDURE RULES (***herein after refer to as the Rules) That is:

1. Whether these applications have been made promptly;

2. Whether a good explanation has been given by each applicant for the failure to comply with the unless order, and;

3. Whether the applicants had generally complied with all other rules, orders and directions.

The Law

[7] ***Rule 26*.8** directs the court when and how to exercise its discretion in considering whether or not it should grant any applicant relief from sanctions.

RULE 26.8 states:

> *"(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.*

Submissions

On Behalf of the Claimant

[8] Ms Samuels in reference to ***Rule 28*** submits that the fact that this application was filed the day after the trial commenced there was obviously no delay on the part of the claimant. She suggests that the matter was stuck out by Justice Dunbar Green on the 17th of July 2017. Therefore, from that time to the filing of the application there was zero delay. She further suggests that it is only on some interpretation of the Rules, that time runs from the time of the unless order.

[9] She argues that the court has an obligation to pay regard to all the provisions of ***Rule 28*** and that the effect of ***Rule 28*** is cumulative. She further submits that the court must examine all the circumstances in order to decide whether the application was made promptly. She relies on the authorities of ***Villa*** **Mora Cottage Ltd v. Adelle; Hyman v. Matthews** SCCA Nos. 64 and 73/2003 (delivered 8 November 2006), **International Hotels Jamaica Ltd v. New Falmouth Resorts Ltd.** SCCA No 56 and 95/2003 (delivered 18 November 2005)

On Behalf of the First Defendant/Ancillary Claimant

[10] Ms. Jodian Carter made the following submissions on behalf of the Ancillary Claimant /1st Defendant:

> "Promptly does not necessarily mean immediately. There can be a certain amount of elasticity in meaning. The more far removed one is from the date the sanction takes effect, the less prompt the application is with the corresponding need to explain more fully, the reason for the delay in applying for the relief. The word 'promptly' has some measure of flexibility in its application. Whether an application was promptly done depends on the circumstances. The 1st Defendant/Ancillary Claimant's application for relief was made a little more than one month and half after the unless order took effect. Counsel for the 1st Defendant/Ancillary Claimant made every attempt to serve the Claimant within

the time stated in the unless order that day. However, there was a fault with the fax machine. Therefore, counsel who had conduct of the matter that day found it prudent to send the documents by email. She was not counsel with conduct of the matter at the time of the breach. In spite of the breach the court cannot apply a broad brush to the situation. The court cannot follow precedent blindly. ***Rule 28*** must be applied cumulatively. (She refers to the cases of ***H.B.*** **Ramsay & Associates Ltd. and Ors. v. Jamaica Redevelopment Foundation Inc. and Anor** [2013] JMCA Civ and **Hyman v. Matthews** SCCA Nos. 64 and 73 of 2003.)"

[11] In resisting the Claimant's application, she made the following submissions:

She received the Claimant's bundle 3 days before trial. At the trial the Claimant's attorney-at-law attempted to put in an amended witness statement that was not served. Based on the objections raised at the trial the judge conducted an enquiry and found that there was default in relation to compliance with the unless order made on the 3rd of April 2017. The Claimant was very late in complying with the unless order. The more far removed from the date for compliance less prompt the application is. Therefore the application of the Claimant should be denied. She refers to ***H.B. Ramsay & Associates Ltd. and Ors. v. Jamaica Redevelopment Foundation Inc., and Anor*** (supra) **Hyman v. Matthews (supra), Reid v. Abdula** (par. 37).

On behalf of the Second Defendant/Ancillary Claimant

[12] Ms. Suzette Campbell, in resisting the applications made the following submissions on behalf of the 2nd Defendant/Ancillary Claimant.

In relation to whether the applicants acted with reasonable alacrity in the circumstances, time should be measured from the time the unless order expired. The gravity of the order is of such that the Applicants should have dropped everything to ensure they did what was required of them to do. Counsel for the Claimant was present when the order was made. Counsel for the Applicants

knew that the order expired on the 29th of May 2017 at 4:00 p.m. The duty was on them to ensure that all the documents were filed and served in time. They allowed one month to pass before making their applications. The matter came up for trial on the 17th of July 2017. In assessing the matter of promptitude the court should look at the date for compliance and not when the attorney is said to have discovered the breach. The unless order was not made effective by her Ladyship Mrs. Justice Dunbar Green. It was incumbent on all the attorneys to dot all their "I"s and cross all their "T"s. Normally the order for the closing of the door is for the protection of other litigants and to safeguard the fair administration of justice bearing in mind that justice must be balance towards all the parties and not skewed towards any particular litigant. That is a litigant who has complied with the order of the court should not be placed at a disadvantage by the failure of another litigant to comply. She refers to **National Irrigation Commission Ltd. v. Conrad Gray & Anor.** and **H.B. Ramsay and Associates Ltd. & Ors. v. Jamaica Redevelopment Foundation Inc. and Anor** [2010] JMCA Civ. 18.

On Behalf of the Ancillary Defendant

[13] Mr. McKnight made the following submissions on behalf of the Ancillary Defendant:

The Ancillary Defendant takes issue with promptitude and good explanation. The trial date has passed. One will not be available before 2022. If the Applicants took the matter seriously enough it would have been disposed of. The Ancillary Defendant has incurred further legal cost because of the failure of the Applicants to comply with the unless order and their failure to make the application promptly. The overall objective of the Rules has been abused by litigants. It should be weighed both ways. Where an unless order is made it should be uppermost in Applicants' mind. The cases previous to **H.B. Ramsay** (supra) dealt with a transitional period. In **H.B. Ramsay** the delay was under 1 month. In the case of **Attorney General of Trinidad and Tobago** the delay was only 10 days. The courts found that those applications were not made promptly. In this case the

application was made (seven) 7 weeks after the statements of case stood struck out. Even if the delay was not inordinate, the explanations are inadequate. The Applicants cannot succeed. Every litigant could blame their lawyer for the failure to comply with an unless order. This is not the new culture that is being promoted by the law as it currently stands. The Applicants' case stood struck out at 4:00 p.m. on the 29th of May 2017. Inadvertence is not an adequate explanation for failure to comply. The Applicants should have been on the highest alert for non-compliance. He refers to **George Freckleton v. Aston East** [2013] JMCA Civ 39, **Marcan Shipping (London) Ltd v. Kefalas and Another** [2007] EWCA 463**, H.B. Ramsay & Associates Ltd and Ors. v. Jamaica Redevelopment Foundation Inc. and Another** (supra), **The Attorney General v. Universal Projects Ltd.** [2011] UKPC 37.

Analysis

[14] Each counsel has referred to a number of authorities for which I am grateful. However, having reviewed these authorities, in the interest of time I will discuss only those that I find relevant to the issues that I must decide.

[15] On a proper construction of the Rules it is clear that the applicants must satisfy a two prong test before the court can begin to consider the exercise of its discretion in their favour. If they fail, the first prong the applications fail. Where the applicants meet the requirements for first prong, the court will go on to consider whether or not they have satisfied the second prong. Where the court is satisfied that they have met all the conditions in prong 1 and prong 2, it is then that the court goes on to consider whether it should exercise its discretion in their favour. When the court is exercising its discretion it must take into consideration the factors listed in **Rule *26.8.3***. However, if any of the Applicants fail to satisfy ***Rule 26.8.1 and 2*** there is no need for the court to go on to consider ***Rule 26.8.3.*** There are two elements that must be satisfied in the first prong. In accordance with ***Rules 26.8. 1 (a***) and **(b)** the application must be made promptly and be supported by evidence on affidavit.

[16] In the second prong the court must be satisfied that the Applicants have met all the conditions in **Rule 26.8 .2** before it can decide to exercise its discretion.

This Rule states:

> *"(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."*

[17] Where the conditions in **Rules 26.8.1** and **Rule 26.8.2** have been satisfied, the grant of relief is not automatic. The court is now required to exercise his discretion in light of the factors outline in **Rule 26.8.3.**

That is,

> *"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".*

[18] Affidavits have been filed in support of these applications. Therefore, the next hurdle that the applicants must surmount to satisfy the provisions of ***Rule 26.8.1*** is to convince the court that their applications have been made promptly. In the case of **H.B. Ramsay & Associates Ltd. and Ors. v. Jamaica Redevelopment**

Foundation Inc., and Anor [2013] JMCA Civ His Lordship Mr. Justice Brooks. JA at paragraph 9 states that:

> *"It is without doubt that the current thinking is that if an application for relief from sanctions is not made promptly, the court is unlikely to grant relief".*

He further stated:

> *"that Rule 26.8 states that the application "must" be made promptly. This formulation demands compliance".*

And further that*:*

> *"the context of rule 26.8(1) does suggest a mandatory element".*

Were These Applications Made Promptly

[19] All parties have agreed that the date and time for compliance with the unless order made by his Lordship Mr. Justice Rattray was at 4:00 p.m. on the 29.5.17. Therefore any failure on the part on any of the parties to comply with any of the terms in the order by that date and time in the absence of any order to extend time would result in that party's statement of case being stuck out as at that date and time. Based on the evidence presented, there is no dispute that the Claimant and the Ancillary Claimant failed to fully comply with the unless order made on the 3rd of April 2017. There is also no dispute on the evidence that there was no order extending the time for compliance with that unless order. Therefore, their statements of case stood struck out on the 29th of May 2017 at 4:00 p.m.

[20] The application on behalf of the 1st Claimant was filed on the 20th of July 2017. That is (nine) 9 days short of two months after the sanction under the unless order became effective. This application on behalf of the Ancillary Claimant was filed on the 25th of July 2017. That is four (4) days short of two months after the sanction took effect. However, with regard to the issue of promptitude counsel for the Claimant is suggesting that computation of time should commence from the 18th of July 2017. That is the date on which Her Ladyship Mrs. Justice Dunbar Green, J. having heard from the parties regarding the issue of service

made the order that the statements of case of the Applicants stood struck out in accordance with the orders made by Justice Rattray on the 3rd of April 2017.

Rule 26.7 states:

> *"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".*

This Rule indicates that the Applicants having failed to effect service of the relevant documents on all the parties by 4:00 p.m. on the 29th of May 2017 the statements of case of both Applicants, stood struck out as at that date and time.

In the case of **George Freckleton v. Aston East** [2013] JMCA Civ. 39, one of the issues that the court had to determine was whether the service of certain documents on the respondent's attorneys-at-law at 4:02 p.m. on 18th of July 2012, could be excused on the basis that service was only two minutes after the time for compliance with the order. A term of the order was that service should have been effected by 4:00 p.m. that day. Morrison JA at paragraph 23 restated the principle that was expounded in the case of **Marcan Shipping (London) Ltd v. Kefalas and Another** *[2007] EWCA 463*. He stated that:

> *"….. it should now be clearly recognized that the sanction embodied in an unless' order in traditional form takes effect without the need for any further order if the party to whom it is addressed fails to comply with it in any material respect."*

I take note of the fact that the Ancillary Claimant contends that they were not served until the 8th of June 2017. I don't believe it is necessary for me to make a finding as to whether or not the Ancillary Claimant was served on the 31st of May, 2017 or the 8th of June 2017. The fact of the matter is, they were served after 4:00 p.m. on 29th of May, 2017. Therefore in any event the Claimant would still be in breach of the unless order, bringing into operation the effect of the sanction. Additionally, whether the Claimant was served by the Ancillary Claimant with the

outstanding documents at 5:00 p.m. on the 29th of May 2017 or the deemed date of service in accordance with the Rules, that is the 30th of May 2017 the Ancillary Claimant would still be in breach of the unless order.

[21] In seeking relief from sanctions counsel for the Claimant Ms. Samuels seeks solace in the pronouncements of his Lordship Mr. Justice Sykes as he then was, in the case of **George Bryan v Grossett Harris** (Supra). The relevant statement is that "the door is not closed forever on an Applicant". However I must first point out that in that case there was no application before Sykes J as he then was for relief from sanction. In that case the trial had commenced. On the face of it there was compliance with the CMC and Pre-trial Review Orders. All statements were served within the stipulated period. However, during the course of the trial it was discovered that, a witness, whose statement was served, could not read. His statement was not recorded in the manner outlined in ***Rule 29.4 (2***). This rule reads:

> *"Where the person making the statement is illiterate or blind the statement must be made in the presence of a witness who must certify that –*
>
> *(a) The statement was read to the person making the statement in the presence of the witness; and*
>
> *(b) The person making the statement*
>
> *(i) appeared to understand it; and*
>
> *(ii) signed the statement or made his or her mark in the presence of the witness."*

Sykes, J as he then was ruled that, the statement, not being a statement in the proper form was tantamount to non-service. He therefore found that ***Rule 29.11*** was applicable in the circumstances. This Rule states:

> *(1) Where a witness statement or witness summary is not served in respect of an intended witness within the time specified by the court then the witness may not be called unless the court permits.*

(2) The court may not give permission at the trial unless the party asking for permission has a good reason for not previously seeking relief under rule 26.8.

[22] It was in that context that Sykes J as he then was refused to accede to an application to strike out the party's statement of case. He decided that the party should be given the opportunity to make an application under ***Rule 26.8*** for relief from sanction***.***

This was the reason for the observation that the door was not closed forever. This was due to the fact that an opportunity for an application under ***Rule 26.8*** was still available to the party. In the circumstances of the case at hand ***George Bryan v. Grossett Harris*** does not assist the Claimant.

[23] In these applications before the court both applications were filed in excess of one month after the sanction took effect. In ***Hyman v Matthews***, (Supra), the application for relief from sanctions was made three months after judgment was entered. The Applicant had failed to comply with the terms of an unless order. The Court of Appeal, despite its finding that the application was not made promptly, did not agree with the trial judge's decision to deny relief from sanction. One of the factors that it took into consideration was that the legal vacation fell within the three-month period that the application was made. Additionally, the court applied the principle in the case of **International Hotels Jamaica Ltd v. New Falmouth Resorts Ltd.** (Supra) in which it was decided that the provisions of ***Rule 26.8,*** should be read cumulatively.

[24] In case of **Villa Mora Cottage Ltd v Adele Stern. Supreme Court Civil Appeal** No. 49/2006 the defendants were to file and serve list of documents on or before the 25th of July 2005 failing which their defence stood struck out. The defendants failed to comply with the unless order. Consequently their defence was struck out. On April 20th 2006 they filed an application requesting inter alia, the restoration of their defence. The court below and the Court of Appeal did find that the application was made promptly. The Court of Appeal also stated that in examining the factors under **Rule 28.2** due attention must be given to **Rule 28.3.**

In arriving at its decision it also relied on the principle sated in **International Hotels Jamaica Ltd v. New Falmouth Resorts Ltd** in which it was stated that a court considering the granting of relief from sanction is mandated to consider the factors numerated in ***Rule 26.8.3.***

[25] However in ***the*** case of **H.B. Ramsay and Others v Jamaica Redevelopment Foundation Inc. and Another** [2013] JMCA Civ 1 the Court of Appeal has deviated somewhat from the rulings in the above mentioned authorities. In that case the terms of the unless order were that *"unless the costs awarded to the [respondents] on March 2, 2010 are paid on or before June 18, 2010 by 2:00 pm, the statement of case stand as struck out."* The application for relief from sanctions was made 27 days after the sanction was activated. The court found that it was "inconceivable that it should have taken almost a month for the application for relief from sanctions to have been filed". Brooks JA at paragraph 10 stated:

> "*In my view, if the application has not been made promptly the court may well, in the absence of an application for extension of time, decide that it will not hear the application for relief*"

However, he went on to say:

> ***"****I do accept, however, 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."*

At paragraph 13 he further stated, that

> *"In my respectful opinion,* ***Hyman v Matthews*** *should be regarded as belonging to the period of transitional cases where "particular care should [have been] taken to give ample time to the parties to adjust to the new requirements" (per Panton, JA (as he then was*) in ***International Hotels Jamaica Ltd v New Falmouth Resorts Ltd*** *(at page 8). I find that that era has already passed. In its wake, the court may well take a more stringent approach to dilatory applications".*

[26] In that case the learned Judge of Appeal found that the application was not made promptly. Based on that finding Brooks JA considered that, that application should fail.

It my view that the current approach should be as that stated in the above mentioned authority.

[27] I am also aware of the recent decision in the case of **Marlan Higgins (Executor of Estate of Egbert Higgins v Paul Reid and William Hinds** [2018] JMCA Civ 8. The court found that a period of 26 days from the date the sanction took effect to the date of the application was prompt in the circumstances. However the court sought to distinguish the circumstances in that case from that in the case of **H.B. Ramsay and Others v Jamaica Redevelopment Foundation Inc *and Another*** (Supra). In ***Marlan Higgins (Executor of Estate of Egbert Higgins v Paul Reid and William Hinds*** (Supra) the defences of the respondents had been filed before the making of the unless order on the 15th September 2016.

[28] However, at the time the order was made and after the deadline for service, that is 11th November 2016, the respondents had still not served the defences. On the 7th of December 2016, 26 days after the sanctions took effect the respondents filed a notice of application seeking:

> "(i) relief from the sanction of the unless order;
>
> (ii) an extension of time of one day to effect service of their defences and;
>
> (iii) that the defences stand as having been properly served".

[29] One of the grounds in their notice of application was that the respondents' process server had sought to effect service on the appellant on at least two occasions, but that the appellant and his representatives had evaded service, which resulted in the failure to serve the defences.

[30] At paragraph 26 of the Judgment His Lordship Williams JA stated:

> *"However, bearing in mind that a consideration of the issue of "promptness" requires an examination of the particular facts of each case, I find the case of* ***H.B. Ramsay & Associates Ltd and Others v Jamaica Redevelopment Foundation Inc and Workers Bank*** *to be distinguishable. In* ***H.B. Ramsay & Associates Ltd and Others v Jamaica Redevelopment Foundation Inc and Workers Bank,*** *the unless order was made by the Master in an effort to compel obedience by the appellants after the appellants had breached an initial order of the court. It was of especial significance in that case that the appellants had breached both orders. In those circumstances, "promptness" would have necessitated swifter action in making the application for relief from sanctions. There was no similar factor in the instant case which would open to attack the decision of the learned judge when he found the period of 26 days in this matter to have been prompt in the circumstances".*

[31] In light of the decisions in the aforementioned cases it is my view that the approach outlined **H.B. *Ramsay and Associate*** is still the applicable law in matters of this nature in Jamaica currently.

This view was also expressed by the Court of Appeal in the case of **Jamaica Public Service Company Limited v. Charles Vernon Francis and Colombus Communications Jamaica Limited (Trading as Flow)** [2017] JMCA Civ 2. At paragraph 57 of that Judgment Edwards JA (Ag) stated that:

> *" A reliance on English authorities to interpret the proper application of rule 26.8(2) should best be avoided or approached with caution because the English rule is not only laid out differently but has also been interpreted differently from ours by the English courts. 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 the 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".***

Therefore I will now decide whether or not there is any special feature about the instant case that will take it outside of the approach in **H.B. Ramsay and Associates Ltd and another v Jamaica Redevelopment Foundation Inc. and Another**. I find that instant case cannot be distinguished from the above mentioned case. There is no evidence that the parties to be served were avoiding service. Both Applicants would have failed to obey two orders. That is the CMC orders made on the 7th of January 2016 and the unless order of the 3rd of April 2017. The unless order of the 3rd of April 2017 was to compel all the parties to comply with the orders made on the on the 7th of January 2016. Therefore the principles laid out in the case of **H.B. Ramsay and Associates Ltd and Another *v. Jamaica Redevelopment Foundation Inc. and Another***, are applicable to the instant case.

[32] In light of the evidence before me the attorney-at - law for the Claimant has intimated to this court that up to the 17th of July 2017 she believed that the Claimant was in compliance with the unless order. This belief was based on what she was told by her process server Mr. Curtis Miller. Significantly, however, there was no documentary proof to this attorney-at law from Mr. Miller of him duly serving the documents. I take note of the fact that an Affidavit of service from Mr. Miller was filed as late as July 17, 2017. In that affidavit he indicated that he served the relevant documents on the parties on the 11th of May 2017.

Rule 6.7 states that:

> *"Where proof of service of any document is required this may be done by any method of proving service set out in Part 5."*

Rule 5 .6 (2) states that:

> *"Where a claim form is sent to a party's attorney-at-law who certifies that he or she accepts service on behalf of the defendant, the claim is deemed to have been served on the date on which the Attorney-at-law certifies that he or she accepts service."*

[33] The responsibility was that of counsel to ensure that she had the relevant certification in accordance with this rule. It is my view that it was the duty of counsel for the Claimant not only to take the necessary steps to comply with the orders but also to do all that was in her powers in order to ensure that the steps taken culminated in the compliance with the unless order. Those necessary steps include providing the process server with sufficient admit copies, this being the accepted practice with regard to evidence of service on attorneys-at-Law. Having failed to do so, when the process server indicated to her that he did not have the evidence of service, she was further obligated to make contact with the attorneys-at- law for the parties in order to confirm whether service was in fact effected.

[34] There was ample time to fulfil this obligation from 11th of May 2017 and before the 29th of May 2017 at 4:00 p.m. This is what the court would expect of a party who takes an unless order, and in fact any order of a court seriously. However even if I were to accept that, up until the 30th of May 2017 counsel for the Claimant maintained the belief that the documents were served by Mr. Miller before 4:00 p.m. on 29th of May 2017, on the evidence there is an indication that as at the 31st of May 2017 she was not so convinced.

[35] I make this observation against the background that in her affidavit evidence, she indicates that she effected service of the relevant documents via email on all the parties on the 31st of May 2017. The other parties with the exception of the 1st Defendant/Ancillary Claimant confirm that they were served by email on the 31st of May 2017. The attorney-at law for 1st Defendant/Ancillary Claimant indicates that they were serve on the 8.6.17. There is no explanation from the attorney-at -

law for the Claimant as to why she saw the need to effect service on the 31st of May 2017. It is my view that had she been truly convinced that the parties were served prior to 31st May, 2017 she would not have found it necessary to serve them on that date.

[36] In accordance with the Rules and decided cases time would have started running from the 29.5.17 at 4:00 p.m. However, in light of the fact that the cases also say promptitude can be flexible, depending on the circumstance of each case, I would expect that at least from the 31st of May 2017 counsel for the Claimant would have started moving with alacrity. In light of the fact that she found it necessary to serve by email on the 31st May, 2017 I would expect that in those very emails she would have sought confirmation as to whether or not service was effected on the 11th of May. Additionally, I would also have expected that in light of the fact that it became necessary for reasons not disclosed to effect service on the 31st May, 2017 that is, after the 29th of May 2017 4:00 p.m. she would have moved speedily to make this application. This is in light of the fact that all parties were aware that the trial date was set for the 17th of July 2017.

[37] In relation to both applications the issue at this stage is not simply the seriousness of the breach but the failure of the counsel for the Applicants to act promptly to apply for the relief from sanction before the commencement of the trial and the consequence of this failure in relation to the other parties. There is simply no excuse for ignoring the breach and waiting for it to be discovered. Counsel for the 1st Defendant/Ancillary Claimant has indicated that she was not counsel with conduct of the matter at the time of the breach. She has proffered the excuse that she inherited the file. However it was counsel within the same firm that appeared in the matter previously. It is not the responsibility of the court to go behind the walls of the firm in order to dissect the task assign to each attorney and to determine which individual attorney is to be blamed for the failure of the firm to act in accordance with the Rules. However, even if peradventure the court decides to be sympathetic with regards to that particular position that counsel has put forward, having inherited the file it is expected that counsel

would have properly perused the file in preparation for the trial. Therefore while she may not be the person to be blamed for the failure to comply with the unless order the court cannot absolve counsel of her tardiness in acting before the trial commenced to apply for relief from sanction. Additionally, she has given no explanation as to why she waited until the 25th of July 2017 that is six (6) days after the trial had commenced and had been aborted to make this application.

[38] Therefore I can only conclude that what prompted this application on the part of both Applicants is not their recognition that they ought to have taken an order of the court seriously, but the fact that their default was discovered. The fact that they allowed the trial to commence before making an application or even indicating an intention to make the application suggest to me that they were hoping that the default would have gone unnoticed. The gravity of the order meant that the trial date should have been foremost in their minds. They being, the defaulting parties, up to commencement of trial did nothing to prevent the derailment of the trial. The approach seems to be, despite the fact we have failed to comply, it is so trivial an issue that we can simply ignore it. This kind of nonchalance and inefficiency cannot be condoned. This is especially in light of the fact that there is an excessive demand on the resources of the court.

[39] Having secured a trial date, it was the responsibility of the Applicants to do all that was in their power to be prepared and ready for trial. They could have avoided a colossal waste of the resources of the court. That is resources that could have been assigned and effectively used for the trial of other cases. In this regard it not even so much the time lapse in terms of the number of days which concern this court but the greater concern is the fact that the trial had to be aborted because the Applicants failed to act when they should have.

[40] Therefore, I find that both Applicants were not prompt in their application. I find that in relation to the issue of promptitude, that this delay on the part of both applicant is so egregious that their application must fail. However, despite the fact that I find that the application fails at this stage, for completeness I will go on

to consider whether or not the Applicants would have satisfied the requirements under what I described as prong two.

Whether the Failure to Comply was Intentional

[41] Ms Samuels indicates that on 3rd of April 2017 she walked with every single document and filed them the very same day. She further indicated that she started complying with the order that day, that is, twenty-six (26) days before order took effect. She explains that the witness statement of the Claimant was not filed that day because it had to be signed. It was signed and filed on May 1, 2017. She is asking the court to find that based on this evidence the failure to comply was no intentional on the part of the Claimant or his attorney at law. Ms. Carter explains that counsel for the 1st Defendant/Ancillary Claimant attempted to comply with the unless order but the failure to comply was as a result of failure in the fax machine.

[42] Therefore there is nothing before me on which I can conclude that the failure to comply on the part of any of the Applicants or their attorneys-at-law was a deliberate attempt to flout the terms of the unless order.

Are there good explanations for the failure of the applicants to comply with the Unless Order?

[43] Counsel for the Claimant explains that on the 3rd of April 2017 she handed to her bearer, list of documents, listing of questionnaire, statement of facts and issues, and witness summary and which were filed on same day. She further indicated that the witness statement of the Claimant was filed on May 1, 2017 and that she gave the documents to her bearer for service of the documents. She has stated that the bearer advised her that he served all the parties and that because the parties were multitudinous he did not have extra copies for service to be admitted thereon.

[44] However, I find that the explanation on the part of the attorney-at-law for the Claimant amounts to a lack of diligence on her part and may be tantamount to administrative inefficiency. The process server was employed to her. She had the responsibility to provide him with the necessary resources in order to ensure that he complied with her instructions. That is extra copies of the documents on which the attorneys-at law or their agents would admit service. Having failed to do so, she was further obligated to make contact with the attorneys-at-law for the parties in order to confirm whether or not service was effected. There was nothing preventing her from doing so from 11th of May 2017 and before the 29th of May 2017 at 4:00 p.m.

[45] In the case of The ***Attorney General v. Universal Projects Ltd*** [2011] UKPC *37*, the Privy Council in considering a rule, used in the Civil Procedure Rules of Trinidad and Tobago which is similarly worded as ***Rule 26.8*** of the ***Supreme Court of Jamaica Civil Procedure Rules***, held that the absence of a "good explanation" within the meaning of the rule, was fatal to the application".

At paragraph 23 of the Judgment their Lordships said:

> *"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."*

[46] That case dealt with the conduct of counsel in the Attorney General's Department. In the instant case counsel for the Claimant is responsible for proper oversight of her employee. It is my view that her failure to properly exercise this oversight amounts to administrative efficiency.

[47] Counsel for the 1st Defendant/Ancillary Claimant explains that attempts were made at approximately 2:00 p.m. to serve the Claimant with the relevant documents by fax. However there was a failure in the fax machine based on the transmission message received. She asks the court to find that she has a good

explanation for the failure as it was due to circumstances beyond counsel's control.

[48] On this issue I will say I do not agree with Ms. Carter that the circumstances were beyond counsel's control. When an unless order is imposed on any party, the weight and gravity of such order should be at the forefront of the party's mind. It is a known fact that technology by its very nature can malfunction at any moment. Therefore where the party intends to rely on technology, I would not expect that, that party would wait until two (2) hours before the sanction takes effect to seek to comply with the order.

[49] In essence the failure to comply could have been avoided had counsel for both applicants been more diligent. However even if I were to accept the explanations for the failure to comply I would still have to go on to consider whether or not the applicants have satisfied ***Rule 26.8.2 (c)***.

Have the Parties in Default Generally Complied with All Other Relevant Rules, Practice Directions Orders and Direction

[50] On this limb both applicants have failed. All parties including the Applicants failed to comply with the CMC orders made on the 7th of January 2017. It was as a result of this failure to comply with those orders that the unless order was made on the 3rdof April 2017. Both Applicants have submitted that since at the 3rd of April 2017 all parties were not in compliance with the CMC orders made on the 7th of January 2017 I should find that they generally complied with all other relevant rules, practice directions orders and direction.

[51] However I am constrained to disagree with this position. My reading of the rules does not in any way suggest that this is the correct approach. The use of the words "general" and "all other" in the same clause is suggesting to me that the

Applicants would have to demonstrate compliance with all others not some of the other relevant rules, practice directions, orders and directions.

[52] The court can in fact find that there was general compliance where parties adhered to the general terms of all of the previous orders but there may have been failure in terms of specific particulars. For example, procedural defect as happened in the case of ***George Bryan v. Grossett Harris***. (Supra). Another example of general compliance, is a situation where service of all documents is effected on the dates and times stipulated in the order. However a page of a document may have become detached by accident prior to service and unknown to the party effecting service. The fact that the Applicants in the instant case failed to file and serve the relevant documents on the dates and times stipulated in the CMC orders that were made on the 7th of January 2017 means they have not generally complied with all other relevant rules, practice directions, orders and direction. It is no excuse to say all other parties were also in breach.

[53] Therefore having failed to satisfy ***Rules 26.8.1*** and ***26.8.2*** there is no need for me to consider the applications of the Applicants under ***Rule 26.8.3.***

[54] In **H.B. RAMSAY** at paragraph 39 the court stated that:

> *"In any event, rule 28.6(2) requires an applicant to comply with all three of its requirements. It states that the "court may grant relief only if it is satisfied that" the three requirements have been satisfied".*

Conclusion

[55] The Applicants have failed to demonstrate to this court that they have satisfied provisions of ***Rule 26. 8.1***. and ***Rule 26.8.2*** which would allow for the invocation of the exercise of the court's discretion under ***Rule 26.8.3.*** I find the attitude of both counsel for the Applicants to be quite nonchalant to say the least. The fact the trial commenced and then, had to be aborted due to the failure of the applicants to comply with the unless order or to apply for an extension of time in my view is quite inexcusable.

[56] Additionally, the compliant parties after waiting for some many years were entitled to the legitimate expectation that the matter would be determined on the date set for trial. This is especially in light of the fact there had been no notice or indication served on them prior to the trial date that there was or would have been any application that would affect the matter being finally determined on the trial dates. Consequently, I find that with regard to the issue of promptitude the failure on the part of both applicants was egregious. Therefore, for reasons outlined that I am constrained to say their applications must fail.

ORDER

[57] (1) Application of the Claimant refused.

(2) Applications of the 1st Defendant/Ancillary Claimant refused.

(3) Cost to the Second Defendant and the Ancillary Defendant to be borne equally by the Claimant and the 1st Defendant/Ancillary Claimant.

(4) Cost to be agreed or taxed.

(5) Leave to apply granted.