[2014] JMSC Civ. 225

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. CL LO53 OF 1999

BETWEEN	**WAYNE ANDREW LATTIBEAUDIERE**	**CLAIMANT**
AND	**FLAMES PRODUCTION INCORPORATION**	**1ST DEFENDANT**
AND	**PATRICK ANTHONY BARRETT**	**2ND DEFENDANT**

IN CHAMBERS

Garth McBean and Marjorie Shaw, instructed by Brown and Shaw, for the Defendants/ Applicants

Catherine Minto, instructed by Nunes, Scholefield, DeLeon and Company for the Claimant/ Respondent

HEARD: May 7, 2014

APPLICATION FOR RELIEF FROM SANCTIONS – NEED TO MAKE APPLICATION PROMPTLY – NEED TO SATISFY THE COURT THAT THERE HAS BEEN GENERAL COMPLIANCE WITH COURT ORDERS AND RULES OF COURT – NEED TO SATISFY THE COURT THAT THE FAILURE TO COMPLY WAS NOT INTENTIONAL – CIRCUMSTANCES IN WHICH RULE 26.8 (3) OF THE CIVIL PROCEDURE RULES IS TO BE CONSIDERED BY COURT

ANDERSON, K. J

The Background

[1] This matter had come up for hearing before me, in chambers, on May 7, 2014. That hearing was held in respect of the defendants' application for court orders which was filed on March 7, 2014 and amended, in a separately filed document, intituled as, 'Amended Notice of Application for Court Orders,' which was filed on March 18, 2014.

[2] That amended application of the defendants had sought relief from sanctions imposed by this court, in so far as this court had struck out the defendants' statement of case and entered judgment in favour of the claimant.

[3] That was ordered by this court, on March 6, 2014 and it is worthy of note at this juncture, that said order was made whilst the claimant was in the process of giving his evidence to this court, orally, upon the trial of this claim.

[4] That order was made at that stage of the court proceedings pertaining to this claim, because, it was only then, that it was first brought to my attention, as the Judge presiding over the trial of this claim, that the defendants had prior thereto, failed to comply with an unless order which had been made by this court, on February 9, 2006.

[5] That unless order was made by Mr. Justice R. Hibbert, upon the pre-trial review which was held in respect of this claim. At that pre-trial review, defence counsel was present, on the defendants' behalf, namely: Sandra Alcott, but the 2nd defendant, was not present in person and the 1st defendant was not represented by anyone other than their then attorney-at-law, at that hearing.

[6] That unless order required that the parties' statements of case shall stand as struck out, unless the parties complied with this court's earlier case management orders, by or before February 28, 2006. In that respect also, at that pre-trial

review, the learned Judge (Hibbert, J.) extended the time for compliance with all case management orders, until February 28, 2006.

[7] As things have evolved since that pre-trial review was held, the defendants filed the 2nd defendant's only witness statement, on April 20, 2006 and that witness statement was served on that same date. The defendants have, at all times, as far as this court is aware, intended to rely on that witness statement, at trial. The lead defence counsel, during the trial of this claim, prior to this court having ordered that the claim stand as struck out, certainly did not, at any time, even so much as indicate to this court, anything to the contrary.

[8] In the circumstances, the defendants' statement of case, would have, as of February 29, 2006, automatically stood as having been struck out, since by then, the defendants would not have complied with all case management orders, one of which, required that the parties file and serve witness statements by or before a then specified date, which was extended until February 28, 2006.

[9] On the most favourable view of things from the defendants' standpoint, there can be no doubt that once the defendants filed the 2nd defendants' witness statement on April 20, 2006, that was a breach of this court's unless order which was made on February 9, 2006.

[10] The failure to comply with this court's unless order, rendered the sanction for failure to comply, that being that the statement of case of the party in default, stood as struck out, automatically effective from as of the date of non-compliance. In that regard, see: **Dale Austin and Public Service Commission and the Attorney-General** – (2016) JMCA Civ 46, esp. at paragraph 88, per F. Williams, J.A.

[11] As such the defendants' application for relief from sanctions, has not only, not been made promptly, but indeed, has undoubtedly, been extraordinarily, unduly delayed. It will be recognized later on, from these reasons, that this was a

significant factor in this court having ruled as it did, in respect of the defendants' application for relief from sanctions.

[12] What then, was the outcome of the defendants' application for relief from sanctions? That application was denied and the costs of that application were awarded in favour of the claimant. I had then promised to put my reasons for the denial of that application, in writing. These reasons now constitute the fulfillment of that promise.

[13] The applicants/defendants filed several grounds, in support of their application for relief from sanctions. Those grounds were as follows:

(i) **Pursuant to rules 26.1, 26.6, 26.7 and 26.8 of the Civil Procedure Rules, 2002**.

(ii) The defendants' failure to comply was not intentional.

(iii) The defendants have generally complied with all other relevant rules, order and directions.

(iv) The failure to comply was not caused by the defendants, themselves. The failure to comply can be remedied within a reasonable time.

(v) The proceedings are at an advanced stage, great expense has been incurred in the preparation of the matter for adjudication by the court and the over-riding objective of the court will best be served by the grant of the relief from sanctions.

(vi) The balance of justice dictates the court's favourable consideration of the defendants' application for relief from sanction having regard to the exercise of discretion in the claimant's favour, after the commencement of the trial, permitting the filing of a revised witness statement of the claimant, duly certified by the claimant as being truthful.

[14] The analysis underlying this court's orders in respect of the defendants' application for relief from sanctions, will now be addressed in some detail, using sub-headings for each of the pertinent considerations.

Whether default can be remedied within a reasonable time

[15] The defendants were in default in complying with an extension of time order which had required that the parties to comply with this court's case management orders, by or before February 28, 2006. The 2nd defendant's witness statement, upon which the defendants wished to rely, was not filed until April 20, 2006. That extension of time order, was made by Hibbert, J during the pre-trial review and along with that order, the unless order was also then made.

[16] The further default of the defendants in that regard therefore, which resulted in the automatically imposed sanction having taken effect, has been sought to be remedied. The same can only though, hereafter be actually remedied, if this court grants the defendants' application for relief from sanctions and therefore, allows the 2nd defendant's witness statement to stand as if it had been filed within time. As things now stand therefore, since the defendants' application for relief from sanctions was extremely delayed, in terms of when said application was made, as against when it was that the applicable sanction took effect, the defendants' default certainly, cannot be remedied within a reasonable time.

[17] **Rule 26.8 (1) (a) of the Civil Procedure Rules** requires that an application for relief from any sanction imposed for a failure to comply with any rule, order or direction, must be made promptly.

[18] It is certainly my view, that **rule 26.8 (1) (a)** ought to be construed as a mandatory, rather than a directory requirement. This is because of the nature of an application for relief from sanctions and the overall need to ensure that court orders are complied with promptly, so as not to result in undue delay. In circumstances wherein a sanction has been imposed, arising from failure to comply with a court order, that situation can only properly be remedied in a prompt manner, if an application for relief from sanctions, is made promptly.

[19] The extent of the delay surrounding the making of the application which is now under consideration, is, to my, mind in and of itself, a sufficient basis upon which the defendants' application ought to be denied.

[20] The delay period, is not the period between when the order granting judgment in the claimant's favour was made and when the application for relief from sanctions was filed, but rather, the delay between when the sanction took effect and when the application for relief from that sanction was filed.

[21] It could hardly be otherwise, since if so, then the automatic nature of the sanction would not, in reality, actually be automatic, but rather, instead, dependent on when the order following upon that sanction, is perfected by the court, or perhaps, when it comes to the realization of the parties or their counsel, that a sanction has in fact been imposed from as of the date by which it can properly be concluded, that there has been non-compliance with the court's unless order.

The application for an extension of time

[22] As an alternative order being sought by the defendants, as part and parcel of their said amended application for court orders, the defendants have sought an extension of time for compliance with the orders of Mr. Justice Hibbert and/or Mr. Justice Anderson (R. Anderson, J).

[23] For present purposes, this court need not give any consideration as to whether or not the time for compliance with any prior order made by R. Anderson, J., ought now to be extended.

[24] That is so because, the defendants' statement of case was struck out on the ground of the defendants having admitted that the 2nd defendant's witness statement was filed outside of the time limit as was prescribed by Hibbert, J.

[25] That being so, this court can only properly consider whether any extension of time for compliance with a prior order of R. Anderson, J., ought to be granted if, the sanction imposed, arising from the failure to comply with the unless order of

Hibbert, J., has been set aside. The application for relief from sanctions is therefore, what these reasons for ruling, are primarily intended to address, because, that application was, during the hearing in Chambers on May 7, 2014, denied.

[26] It has been laid down by the Court of Appeal, in the case: **Dale Austin v Public Service Commission and the Attorney General** (*op. cit.*) that in respect of an application for an extension of time being made arising from the failure to comply with an unless order, this court can grant such an extension of time, even after the time for compliance has passed. In that regard, see **rule 26.1 (2) (c) of the Civil Procedure Rules**.

[27] In the **Austin case** (*op. cit.*) though, the Court of Appeal has, in its judgment, concluded that, in considering such an extension of time application, this court must apply the considerations required by **rule 26.8 of the Civil Procedure Rules** which address specifically, the factors to be considered by a court in adjudication upon an application for relief from sanctions. See paragraphs 79-101 of the **Austin** case (*op. cit.),* in that regard, per Edwards, JA (Ag.).

[28] Accordingly, this court has given consideration, most significantly, to the defendants' application for relief from sanctions, for the purposes of these written reasons.

[29] In that regard also, this court has paid most careful regard to the provisions of **rule 26.8 (1) an (2) of the Civil Procedure Rules**. It was because this court formed the view that the defendants had not met the stringent requirements of **rule 26.8 (1) and (2) of the Civil Procedure Rules**, that their application for relief from sanctions and for extensions of time, was denied.

Whether rules 26.6 and 26.7 of the Civil Procedure Rules can assist with respect to the defendants' amended application

[30] Suffice it to state **that rules 26.6 and 26.7 of the Civil Procedure Rules** cannot at all, provide any assistance to the defendants, in seeking to set aside the sanction which was imposed upon them, arising from the failure to comply with the unless order which was made by Hibbert, J.

[31] **Rule 26.7 of the Civil Procedure Rules** makes it clear that the sanctions imposed by an unless order, shall take effect, unless the defaulting party obtains relief from sanctions. Indeed, it is that very provision of the rules which makes it clear that the sanction imposed, arising from a failure to comply with an unless order, is an automatic one.

[32] **Rule 26.6 of the Civil Procedure Rules**, is only applicable, in circumstances wherein the right to enter judgment, arising from a failure to comply with an unless order, has not arisen. Thus**, rule 26.6 (1)**, reads as follows: '*A party against whom the court has entered judgment under rule 26.5 when the right to enter judgment had not arisen may apply to the court to set it aside.'*

[33] In respect of this matter, the defendants are not now contending and have never contended that the judgment entered against them, arising from their failure to comply with the unless order, should not have been entered, because the right to enter judgment had not arisen. It was wise for defence counsel not to have so contended, since it is indisputable, that the right to enter judgment had arisen, from as long ago, as ten years approximately!

Rule 26. 8 (3) of the Civil Procedure Rules

[34] ***Rule 26.8 (3) of the Civil Procedure Rules***, which addresses matters pertinent to an application for relief from sanctions, states as follows: '*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.'

[35] Most of the grounds as are being relied on, in support of the defendants' amended application for relief from sanctions, are specifically pertinent to the grounds which this court is to consider, pursuant to **rule 26. 8 (3)**. As a reminder, those grounds have been set out in full, at paragraph 13 of those reasons.

The interaction between rules 26.8 (1) (2) and (3) of the Civil Procedure Rules and what should be this court's legal approach, in addressing an application for relief from sanctions.

[36] In considering an application for relief from sanctions, this court is required to first consider whether the requirements of **rule 26.8 (1) and (2)** have been met by the applicant. It is only if those conditions have been met that this court can properly next go on to consider the overall interests of justice, as per **rule 1.1 of the Civil Procedure Rules**, in the context of all of the other considerations set out, in **rule 26.8 (3) of the Civil Procedure Rules**.

[37] If therefore, a party applying for relief from sanctions, has not overcome the hurdles mounted by the provisions of **rule 26.8 (1) and (2) of the Civil Procedure Rules**, then it is unnecessary for this court to give any consideration to any of the provisions of **rule 26.8 (3) of the Civil Procedure Rules**. That was laid down by the Court of Appeal, in the case: **H.B. Ramsay and Associates Ltd and Caledonia Hardware Ltd and Harold B. Ramsay and Janet Ramsay and Jamaica Redevelopment Foundation Inc and The Workers Bank** – [2013] JMCA Civ 1, especially at paragraphs 29-32. Most recently, the Court of Appeal emphasized this, in the case**: Mirage Entertainment Ltd. and Financial Sector Adjustment Co. Ltd. and ors.** – [2016] JMCA App. 30.

[38] The Court of Appeal thus, now takes a different approach to applications for relief from sanctions, than used to be taken in the past – particularly in the transitional time period, between the application of the old rules and the new rules having come into effect. This was commented on by Brooks, J.A., at paragraph 13 of the court's judgment in the **Ramsay** case (*op. cit.),* where the court noted the distinction between the past approach, which is what was applied by the Court of Appeal in the cases: **Hyman v Matthews** – SCCA Nos. 64 and 73 of 2003 and **International Hotels Jamaica Limited v New Falmouth Resorts Limited** – SCCA Nos 56 and 95 of 2003. The Court of Appeal's judgment in the **Ramsay case** (*op. cit.)* has made it clear that it is a different approach that will now be adopted by the Court of Appeal and that present approach is one which is of course, binding on this court. A different approach is now taken, because the transitional period has now long passed.

[39] The **Ramsay case** (*op. cit.)* pertained to a procedural appeal, arising from a ruling of Fraser J, refusing an application for relief from sanctions and a judgment delivered by a three (3) judge panel of the Court of Appeal., comprised of Panton P., Morrison J.A.(as he then was) and Brooks J.A. The judgment, with which the other judges on that panel concurred, was the judgment of Brooks J.A.

[40] This court had, in rejecting the defendants' application for relief from sanctions, relied on and applied that which was laid down in that judgment of our Court of Appeal, as that judgment was cited to this court and relied on, by counsel for the claimant- Ms. Catherine Minto, in opposition to the defendants' application for relief from sanctions. In the circumstances, it would be best for this court to set out in full, the provisions of **rule 26. 8 (1) and (2) of the Civil Procedure Rules**. This court had, it should be recalled, earlier addressed in these reasons, the issue as to whether or not the defendants' amended application and initial application were made promptly and concluded that they were not.

[41] **Rule 26.8 (1) of the Civil Procedure Rules**, states: '*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.'*

[42] The applicants have supported their present application with evidence on affidavit. As already stated though, their present application was certainly not made promptly. Whilst the word *'promptly'* ought not to be immutably defined, since, what is *'prompt'* in one situation, will not necessarily be *'prompt'* in another situation; barring something completely extraordinary, ten (10) years can hardly be, 'prompt.' In the **Hyman v Matthews** case (*op. cit.),* the Court of Appeal concluded that a period of three (3) months between the filing of an application for relief from sanctions and the imposition of the sanction was not 'prompt.' In any event, the applicants have not given evidence of any extraordinary situation which applies to the present case, such that this court can properly conclude that their present application was made, *'promptly.'*

[43] The fact that parties and/or their counsel were for whatever reason, unaware that the relevant sanction applies automatically, once there has been default in compliance with this court's unless order, cannot properly be taken by this court, as constituting an extraordinary factor, such that it was not until the judgment order was made by this court that time began to run against the applicants for the purpose of deciding as to whether they acted, 'promptly' in making their present application. It is my considered view, that the law could hardly be interpreted properly, if it were to be otherwise applied.

[44] In the event that I am wrong in that respect though, the provisions of **rule 26.8 (2)** must now be considered. That rule provides as follows: '*The court may grant relief only if it 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.'*

These will be addressed, seriatim, after the issue of burden and standard of proof has been addressed.

Burden and standard of proof

[45] The burden of proof, in respect of their present application, rested squarely on the applicants' shoulders. It therefore was for them to have satisfied, this court, if they could have, that it is more probable than not, that they have met all of the requirements of **rule 26.8 (1) and (2) of the Civil Procedure Rules**. It was my conclusion, that they failed to meet that burden. A careful consideration of the requirements of **rule 26.8 (2) of the Civil Procedure Rules** and all of the affidavit evidence being relied on, in support of their present application, will make this, abundantly clear.

Whether there had otherwise been compliance by the defendants/applicants, with this court's other orders

[46] The case management orders in the present claim, were made by Ms. Justice N. McIntosh (as she then was), on March 10, 2004.

[47] Separate and apart from the defendants'/applicants' non-compliance with the unless order, they had also, failed to comply with several orders made by N. McIntosh, J., at the case management conference. So for instance, the defendants had not provided disclosure, by means of the filing of a list of documents, by November 1, 2004, as was ordered. The defendants had not filed or served any witness statements, by January 31, 2005, as had been ordered. An agreed statement of facts and issues had not been filed by the parties, by March 1, 2005, or alternatively, as was also permitted by the said case management orders, the defendants did not file their own statement of facts and issues, by March 1, 2005. The defendants' listing questionnaire was not filed by December 5, 2005, as was ordered.

[48] It is correct to recognize that the claimant had also failed to comply with several of those case management orders. That, no doubt, is what prompted Hibbert, J., upon a pre-trial review hearing which was held, after other pre- trial review hearings had also been held and then adjourned, to impose the unless order which he then did. It is to be recalled that said unless order was imposed in respect of both parties. I have no doubt also, that when he made that unless order, it would have been weighing heavily on the judge's mind, that the trial was then scheduled to take place between May 29 and June 2, 2006. The unless order was in all probability, made, so as to ensure that those trial dates could be maintained. As things evolved though, alas, that was not to be.

[49] What is important for present purposes is that it is apparent that the defendants had not, separate and apart from their non- compliance with the relevant unless order, generally complied with other court orders. Whilst it is true that the claimants had also, prior to February 9, 2006, failed to comply with various court orders made in respect of this claim, the claimant was not, unlike the defendants, in default of compliance with the unless order of Hibbert J. That is why judgment has been awarded in favour of the claimant and it is the defendants' statement of case that was struck out.

Whether the failure to comply was unintentional ('not intentional') and whether there is a good explanation for the failure to comply

[50] For the sake of convenience, these two issues can and will be addressed jointly, rather than separately.

[51] In that respect, it will be the affidavit evidence adduced by the applicants/ defendants, in support of their application for relief from sanctions, which will be most pertinent. The applicants/ defendants filed an affidavit of urgency, on March 17, 2014, which was deponed to, by attorney Marjorie Shaw. That affidavit did not address any of the pertinent issues which are presently under consideration and therefore, no further mention will be made of same.

[52] The only other affidavit evidence filed by the applicants/defendants, in support of their application for relief from sanctions is the affidavit of the 2nd defendant, which was filed on March 14, 2014.

[53] In opposition to the defendants' application for relief from sanctions, the claimant has filed two (2) affidavits, one (1) of which was deponed to, by the claimant and filed on April 1, 2014. That affidavit has been carefully considered by this court, but this court has determined that the evidence provided in same, is not worthy of any further mention herein, as it has provided no information which has been of any help in enabling this court to resolve the pertinent issues which must now be addressed and resolved and which are, in fact, the pertinent issues of dispute between the parties, for present purposes.

[54] The other affidavit being relied on by the claimant/respondent, was deponed to, by attorney Catherine Minto and also filed on April 1, 2014. Once again, that affidavit does not provide any evidence which is useful to this court, for present purposes, as it is nearly altogether limited to describing what took place while the trial was actually underway, leading to this court having then concluded that arising from the defendants' failure to comply with the unless order of Hibbert, J., the defendants' statement of case, stands as struck out.

[55] This court is therefore now left to carefully consider and analyze the 2nd defendant's affidavit, in deciding as to whether the defendants have satisfied the burden of proof, as legally cast upon them, to meet the requisite standard of proof, that being on a balance of probabilities, that the failure to comply with the unless order, was not intentional, or in other words unintentional and that there exists good explanation for the failure to comply with the unless order.

[56] Essentially, what the 2nd defendant has done in his affidavit, to the extent that the evidence given therein, is relevant for present purposes, is nothing other than used same to make excuses for the blameworthiness that must rest squarely on the defendants' shoulders.

[57] Accordingly, he has deponed to having been unaware that an unless order was made against the defendants, by Hibbert, J. on February 8, 2006. That unless order was in fact though made by Hibbert, J. on February 9, 2006. The 2nd defendant therefore appears to have mistakenly deponed to an incorrect date in that regard. Of course, he was unaware of same, because neither he, nor the defendants' then attorney-at-law – Ms. Sandra Alcott, were then present, whereas the claimant's attorney – Ms. Catherine Minto, instructed then, as she is now, by the law firm – Nunes, Scholefield, DeLeon and Co., was then present. The claimant was also then present.

[58] The court's records though, which this court has taken judicial notice of, has disclosed that the pre-trial review hearing date was scheduled at the case management conference, which was held, from long before then, on March 10, 2004.

[59] At that case management conference hearing as is generally required, pursuant to the provisions of **rule 27.8 of the Civil Procedure Rules**, the claimant was then present and the then defence attorney – Sandra Alcott, was also then present, whereas, the 2nd defendant and the 1st defendant's representative were not then present.

[60] Attorneys have a duty to inform their clients, who are parties to claims, as to the legal requirements imposed upon them, arising from such legal processes. If attorneys fail to carry out, or fail to competently carry out their duties in that respect, then not only can they be made subject to legal disciplinary proceedings, but also, they can be made subject to a claim for damages for negligence. See: **Saif Ali v Sydney Mitchell and Co.** – [1980] AC 198.

[61] For present purposes, in the absence of there being any evidence that the defendants' former attorney was even requested to comment on the assertions being made by the 2nd defendant which undoubtedly impact upon her then relationship as an attorney-at-law with her then clients – the defendants, this

court should not be expected to accept assertions made by the 2nd defendant, which, arising from the relationship of confidentiality which exists between attorney and client, can only properly either be accepted or refuted by the defendants' former attorney – Ms. Alcott. In present circumstances, it is highly likely, that Ms. Alcott does not even know that very unfavourable allegations have been made against her, in terms of her conduct as an attorney-at-law, by her former clients, via the 2nd defendant.

[62] This court has adopted in that regard, the approach taken by the Court of Appeal of Jamaica, in criminal cases, in circumstances wherein neglect is alleged by a convicted party against his former counsel and it is sought to use that alleged neglect as a ground upon which that convicted party's conviction, ought to be over-turned on appeal to an appellate court. That, to my mind, is the correct approach to be adopted in both civil and criminal cases.

[63] The 2nd defendant has also deponed that he was not aware, prior to March 6, 2014, of the meaning and/or implications of an, 'unless order' for the same reason as given above, this court has given no weight to that particular assertion of his.

[64] Accordingly, what the defendants have put forward, by means of the 2nd defendant's affidavit evidence, as to why it was that they failed to comply with the unless order that was made, is that they were unaware of same and also, unaware of the consequence of same. For the reason given above, this court has been unable to properly conclude, one way or the other, as to whether it accepts or rejects that particular assertion of his.

[65] In the circumstances, the defendants/ applicants have failed to meet their burden of proving that the failure to comply was unintentional, or that there is a good explanation for the failure to comply.

[66] In any event though, it should be noted that even in circumstances wherein it is the exclusive fault of a party's attorney-at-law, which has ultimately resulted in the failure of a party to comply with a court order, or a rule of court will not always, in and of itself constitute a good reason for a party having failed to comply with an unless order, or a requirement of a rule of court. See, in that regard: **Glass v Surrendran, Sub-Nom-Collier v Williams** – [2006] 1 WLR 1945; and **Mirage Entertainment Ltd. and Financial Sector Adjustment Co Ltd. and ors.** – *(op. cit.),* esp. at paragraphs 26-28, per P. Williams, JA.

[67] As was made clear by Phillips, J.A. in **Murray-Brown v Harper and Harper** – JMCA App 1, it is necessary, in every case, to examine the facts with care before arriving at the conclusion that counsel's knowledge is the client's knowledge. This was reiterated by Morrison, J.A (as he then was), in **B and J Equipment Rental Ltd. and Joseph Nanco** – [2013] JMCA Civ 2, at paragraphs 58 and 59.

[68] In the **B and J Equipment case** (*op. cit.),* the appeal was against the order of McDonald-Bishop, J. (as she then was), at first instance, refusing an application to set aside default judgment, which had been entered, arising from the defendant's failure in that case, to file a defence. That appeal was unsuccessful and thus, it was the first instance ruling of McDonald-Bishop, J. (as she then was), which was upheld by the Court of Appeal. The attorney who had, in respect of the claim which was the subject of the appeal in that case, been called into question, in respect of his conduct as an attorney-at-law, particularly in so far as he had failed to file any defence to the claim, notwithstanding that it was alleged that he had received instructions in a timely way, such that he should have done so, is one Mr. Pearson.

[69] Morrison, J.A. (as he then was), opined at paragraph 61 of the court's judgment in the **B and J Equipment case** (*op. cit.),* as follows:

> *'McDonald-Bishop J concluded (at paragraph 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 forthcoming from Mr. Pearson, it seems to me, there was in fact, no explanation at all. Although Ms. Bennett in her first affidavit stated, somewhat laconically, that Pearson and Co. had been provided 'with relevant documentation' by letter dated 4 March 2009, there is absolutely no indication of any steps taken by the appellant to follow up the matter at any time over the nearly two year period that elapsed between that date and the arrival of the bailiff in January 2011.'*

[70] For my part, I would respectfully adopt and apply the dicta above, with suitable modifications as are apposite for the particular facts of this particular case, but in particular, would wish for it to be carefully noted that both the Court of Appeal and at first instance, the Supreme Court, had concluded that in the absence of any explanation from attorney- Mr. Pearson, there really existed no explanation at all.

Conclusion

[71] It was therefore, for all of the reasons given above, that I concluded that it was unnecessary for this court to consider the factors set out in **rule 26.8 (3) of the Civil Procedure Rules** that consideration would only have been necessary if the defendants had clearly been able to overcome the high hurdles that were placed in front of them, with respect to their application for relief from sanctions and extension of time.

[72] The defendants, to my mind, certainly failed to overcome both of those hurdles, as set out in **rules 26.8 (1) and (2) of the Civil Procedure Rules** and perhaps even failed to overcome either of them. In that context, it followed inexorably, that their application had to be denied, as no relief from sanction, or extension of time could properly have been granted.

[73] There is just one other issue, pertaining to the defendants' application for relief from sanctions, which I will make mention of. It is that it is very clear that counsel were unaware of the automatic effect of the failure to comply with the unless order and it seems also, that various judges may have been either unaware that the sanction was automatic, or that the defendants had failed to comply with the unless order which was made on February 9, 2006.

[74] The fact that that is so though, does not in any way diminish the legal fact, that in the event of a party's failure to comply with an unless order, the consequential sanction, is automatically imposed and takes effect, not when the parties actually become aware that same has taken effect, but rather from whatever is the date when it can properly be concluded that the relevant party failed to comply with the unless order.

[75] Accordingly, whilst the parties and perhaps even this court's unawareness as to the sanction having taken effect automatically from as of the date of non-compliance with the unless order, would undoubtedly be a relevant factor to be considered in deciding on the overall interests of justice, as regards whether relief from sanctions ought to be granted, that factor can only properly be considered by this court, if **rule 26.8 (3) of the Civil Procedure Rules** can properly be considered. For the reasons as given above, **rule 26.8 (3) of the Civil Procedure Rules**, to my mind, has no applicability in the present scenario.

[76] In the final analysis therefore, the defendants' application was refused and these were the orders then made:

1) Application for relief from sanction as made by the defendants in the Application for Court Orders which was filed on March 7, 2014 and amended in Amended Application of Court Orders filed on March 18, 2014 is denied.

2) Costs of said Application and Amended Application for Court Orders is granted to the claimant/respondent to said application and amended application.

3) Claimant shall file and serve this Order.

4) The defendants are granted leave to appeal this case.

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Hon. K. Anderson, J.