[2020] JMSC Civ 145

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. 2016HCV00911

BETWEEN	**ROBERT DALE BRODBER**	**CLAIMANT**
AND	**E.W. ABRAHAMS & SONS LIMITED**	**1ST DEFENDANT**
AND	**MAXWELL ORMSBY**	**2ND DEFENDANT**

IN CHAMBERS

Mrs. Caroline Hay Q.C. and Ms. Tereece Campbell instructed by Caroline P Hay Attorneys-at-Law for the Respondent/Claimant.
Mr. Leonard Green and Mr. Makane Brown instructed by Chen, Green & Company for the Applicants/Defendants.

Heard June 15, July 3 and 6, 2020.

Civil procedure – Application for relief from sanctions after statement of case struck out and judgment entered against the defaulting party – whether applicants have provided a good explanation for non-compliance with case management orders – Rule 26.8 of the Civil Procedure Rules, 2002, as amended.

N. HART-HINES, J (Ag.)

BACKGROUND

[1] By notice of application for court orders filed on February 20, 2020, the claimant sought that the defendants' statement of case be struck out for non-compliance with the orders made at the Case Management Conference ("CMC") held on September 21, 2017. The application also pointed to the defendants' failure to comply with the Civil Procedure Rules 2002 as amended ("CPR"). Specifically, the defendants' failed to comply with CPR rule 27.11 (to apply for variation of case management timetable), rule 28.14 (to make standard disclosure), rule 29.11 (to serve witness statement or summary), and rule 26.8 (to apply for relief from sanctions). No "unless order" was made at the CMC.

[2] During the Pre-Trial Review ("PTR") held on February 24, 2020, a judge heard the claimant's notice of application and made orders in terms of the reliefs sought in the said application. The claimant had filed and served all the relevant documents as directed by the CMC orders, but the defendants had not complied with a single order up to the PTR hearing date. Prior to and during the PTR hearing on February 24, 2020, no application was made by the defendants for relief from sanctions pursuant to rule 26.8, even though the defendants' Attorneys-at-law had notification that the claimant was disgruntled by the defendants' non-compliance. This notification was given in the form of a letter from the claimant's Attorneys-at-law dated February 17, 2020, which was sent to the defendants' Attorneys-at-law on the same day at 11:10 a.m. Further, the claimant filed its application on February 20, 2020. However, it is unclear when the application was served on the defendants' Attorneys-at-law.

[3] The application before this court for its consideration is an application by the defendants, filed on March 4, 2020, for relief from sanctions pursuant to rule 26.8 of the CPR.

[4] On March 3, 2020, one day prior to filing their application for relief from sanctions, the defendants filed several documents. The defendants' Listing Questionnaire indicated that the court's directions at CMC had not been

complied with, but could be complied with by March 9, 2020. Counsel for the parties agree that the documents which were filed on March 3, 2020 were served on the claimant's Attorneys-at-law shortly thereafter, but that these were returned. I have set out in tabular form, the case management orders made on September 21, 2017, the date of compliance by the claimant, and the date of purported compliance with those orders by the defendants as follows:

Date for compliance with CMC order	**Date of compliance by claimant**	**Date of purported compliance by defendants**
Standard disclosure was to be made on or before March 16, 2018.	The claimant's List of Documents (with Notice to Inspect) was filed on March 15 and served on March 16, 2018.	The defendants filed their List of Documents on March 3, 2020, indicating that Standard disclosure had been complied with and giving a description of various documents.
Inspection was to be made on or before March 30, 2018.	No request was made or inspection of documents.	The claimant's Attorneys-at-law did not request inspection of the defendants' documents, since judgment had been entered for the claimant on February 24, 2020.
Witness statements were to be filed and exchanged by June 1, 2018.	The claimant's witness statements were filed and served on June 1, 2018.	The defendants filed three witness statements on March 3, 2020.
An agreed Statement of facts and issues was to be filed and served on or before February 22, 2019.	The claimant's Statement of facts and issues was filed and served on February 22, 2019.	The defendants filed their statement of facts and issues on March 3, 2020.
Each party's Listing Questionnaire was to be filed and exchanged by February 10, 2020.	The claimant's Listing Questionnaire was filed and served on February 10, 2020.	The defendants filed their Listing Questionnaire on March 3, 2020.
Each party's Pre-Trial Memorandum was to be filed and served by February 17, 2020.	The claimant's Pre-Trial Memorandum was filed and served on February 17, 2020.	The defendants filed their Pre-Trial Memorandum on March 3, 2020.

THE APPLICATION

[5] The applicants seek the following orders:

1. *That there be an abridgement of the time within which to serve this Notice of Application for Court Orders.*
2. *That there be relief from sanctions on the part of the Defendant.*

3. *That the List of Documents, Defendants' Statement of Facts and Issues, Listing Questionnaire, Pre-Trial Memorandum and Witness Statements of Donald Oliver Deans, Michael David Powell and Jean Fraser filed on the 3rd day of March, 2020 stand as being filed.*
4. *No Order as to Costs.*
5. *Such further and/or other relief as this Honourable Court deems just.*

[6] The grounds of the application are as follows:

a. *The failure to comply was not intentional.*
b. *That the Defendants have filed the requisite documents.*
c. *The failure to comply has been remedied.*
d. *The Defendants have now complied with all other relevant rules, practice directions orders and directions.*
e. *It is in the interests of the administration of justice to have the Defendants' Statement of Case stand for the proper adjudication of the issues between the parties.*
f. *The delay in complying with the Case Management Orders does not in any way prejudice the Claimant as there are three (3) months before the trial date.*
g. *In the circumstances there would be extreme prejudice were this Honourable Court to strike out the Defendants' application for an extension of time to file the defence and not grant relief from sanctions as the Defendants would not [have] the opportunity to present their case.*

[7] The application is supported by an affidavit sworn by Mr. Michael Abrahams and filed on March 4, 2020. Therein, at paragraph 6, Mr. Abrahams, Managing Director of the 1st defendant company said that he had been informed by his Attorneys-at-law and believed that all the case management orders had been complied with, and he exhibited the documents filed on March 3, 2020.

[8] At paragraph 7 of the affidavit, Mr. Abrahams sought to explain the reason for the defendants' non-compliance with the CMC orders, and stated that:

> *"the delay in complying with the Case Management Conference Orders arose because my Attorneys-at-Law did not have complete instructions from my company in relation to the relevant information to complete the documents required for compliance. We have now provided them with the relevant information and I am advised that they are proceeding to file and serve the documents on the Claimant's counsel as a matter of urgency".*

[9] At paragraphs 8 and 9 of his affidavit, Mr. Abrahams in essence stated that the failure to comply with the CMC orders was not intentional or done with little regard for the court's orders. He stated this:

"8. The isolated failing which caused my Defence to be struck out has not significantly affected the overall efficiency with which this case is being conducted because the Claimant has been made aware through Affidavit Evidence and the Submissions of Counsel on my Company and Agent's pleadings and the likely evidence that will be brought before the court.

9. I appreciate that the court will also consider the impact of the default on the court system and therefore on other litigants and as to that I say that the court will not need to vacate the trial date 4th, 5th and 6th days of May, 2020 as the parties will be in a position to proceed to trial with adequate time to seek any additional instructions required."

SUBMISSIONS

[10] Counsel for the applicants/defendants Mr. Leonard Green relied on CPR rule 26.1(2)(c) and submitted that the court has a discretion to extend the time for compliance with any order even if an application for an extension is made after the time for compliance has passed. He further submitted that an application for relief from sanctions might be made even after a judgment had been entered against the party in default. Learned counsel relied on the authority of ***Leymon Strachan v Gleaner Company Ltd and Dudley Stokes*** (unreported), Supreme Court, Jamaica, Motion No 12/1999, judgment delivered on December 6, 1999, which considered the powers of the court and which guided the exercise of the Court's discretion. Reliance was also placed on the Privy Council authority of ***Mason v Desnoes and Geddes Ltd*** (1990) 2 A.C. 729, for the position that a court may set aside its own orders in certain circumstances where the action has never been heard on the merits.

[11] In respect of the delay in complying with the CMC orders, counsel submitted that the affidavit of Mr. Abrahams provided a good explanation and demonstrated that there was no intent to fail to comply with the CMC orders. It was submitted that the defendants had now complied with the CMC orders and justice required that the case be decided on its merits, and there was an issue to be determined at a trial. Further, it was submitted that there was no prejudice to the claimant by the non-compliance as at February 24, 2020, as the matter was fixed for trial in early May 2020 during the period of the Novel

Coronavirus. However, it was submitted that the defendants would be prejudiced if they were not granted relief from sanction.

[12] In the written submissions filed in support of the application, it was submitted that where there is non-compliance with the court's orders, the court has the unfettered discretion to extend the time for compliance, save that the court should exercise its powers in furtherance of the overriding objective. Reliance was also placed on the dicta in the Court of Appeal decision in ***Fiesta Jamaica Limited v National Water Commission*** [2010] JMCA Civ 4 that the court should give consideration to factors such as the length of the delay, the explanation for the delay, the prejudice to the other party, the merits of the case, the effect of the delay on public administration, and the importance of compliance with time limits.

[13] Counsel for the respondent/claimant, Mrs. Caroline Hay Q.C., submitted that a party seeking relief under CPR Rule 26.8 (2) must first establish compliance with CPR rule 28.6 (1) and then demonstrate compliance with all aspects of the Rule in order to ground the exercise of the court's discretion to relieve a party from the effects of disobedience of a court order. Learned Queen's Counsel further submitted that a judge hearing the application is unable to consider CPR rule 28.6 (3) if CPR rule 28.6 (2) is not strictly complied with, and for this position, counsel relied on the decisions of ***University Hospital Board of Management v Hyacinth Matthews*** [2015] JMCA Civ 49 and ***HB Ramsay & Associates Limited v Jamaica Redevelopment Foundation Inc. et al*** [2013] JMCA Civ 1.

[14] It was submitted that there was no explanation offered for the defendants' failure to obey the orders or why they only instructed their Attorneys to seek to comply with the orders in March 2020. Further, it was submitted that there was no circumstance set out by the defendants to demonstrate that the failure to comply was not intentional. It was further submitted that Mr. Abrahams' statement that the non-compliance was an "isolated failing" was inaccurate as there were multiple deadlines missed, and, in the absence of an explanation, the failure to comply with CMC orders was intentional and contemptuous. It

was submitted that the contumelious non-compliance with the CMC orders demonstrated a disregard for the court.

[15] Counsel for the defendants requested further time to respond to the authorities relied on by the claimant. Permission was granted and a response filed on June 17, 2020. During the hearing on July 3, 2020, learned counsel Mr. Brown submitted that at paragraph 14 of the Court of Appeal's decision in ***HB Ramsay***, the Court seemingly drew a distinction between an application made after a sanction was applied pursuant to an "unless order", and one where a sanction was imposed where the party affected was not forewarned of the penalty for non-compliance. Mr. Brown submitted that where the CMC order did not seek to impose a sanction, the sanction did not bite until the learned judge granted the claimant's application to strike out the defendants' statement of case. In essence, counsel suggested that the failure to comply with the CMC order was less egregious than a failure to comply with an "unless order" and consequently the defendants' application could be granted, having regard to the overriding objective of ensuring that matters are dealt with fairly and determined on their merits.

THE ISSUES

[16] The issues for the court's consideration are:

(1) whether the applicants have satisfied the threshold requirements in rule 26.8(1) and (2); and if so,

(2) whether they have demonstrated that it is in the interests of justice to restore their case and have the matter proceed to trial.

THE LAW

[17] CPR rules 26.7 and 26.8 provide:

> *"**26.7** (1) Where the court makes an order or gives directions the court must whenever practicable also specify the consequences of failure to comply.*

(2) 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.

(3) Where a rule, practice direction or order –
(a) requires a party to do something by a specified date; and
(b) specifies the consequences of failure to comply, the time for doing the act in question may not be extended by agreement between the parties.

***26.8** (1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –*
(a) made promptly; and
(b) supported by evidence on affidavit.

(2) The court may grant relief only if it is satisfied that –
(a) the failure to comply was not intentional;
(b) there is a good explanation for the failure; and
(c) the party in default has generally complied with all other relevant rules, practice directions orders and directions.

(3) In considering whether to grant relief, the court must have regard to –
(a) the interests of the administration of justice;
(b) whether the failure to comply was due to the party or that party's attorney-at-law;
(c) whether the failure to comply has been or can be remedied within a reasonable time;
(d) whether the trial date or any likely trial date can still be met if relief is granted; and
(e) the effect which the granting of relief or not would have 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."

ANALYSIS

[18] I have reviewed the authorities cited by counsel. I am satisfied that on a proper construction of CPR rule 26.8, the mandatory threshold requirements in rules 26.8(1) and (2) are cumulative, and the applicants must satisfy these requirements before the court can consider the factors in rule 26.8(3) and exercise of its discretion in the applicants' favour. I accept the submissions of learned Queen's Counsel in respect of the law on this area.

[19] The consequences of the failure to comply with the CMC orders was not expressly stated by the judge at the CMC hearing, but the parties' Attorneys-at-law ought to be well aware of the consequences as provided by the respective CPR rules. In ***Attorney General of Trinidad and Tobago v Keron***

Matthews [2011] UKPC 38, the Privy Council said at paragraph 16 that "*sanctions imposed by the rules are consequences which the rules themselves explicitly specify and impose*".

[20] This is not an instance where the defendants' case was struck out in default of compliance with an "unless order". The failure to comply with the CMC orders is less egregious than a failure to comply with an "unless order". However, as stated by rule 26.7(2) the failure to comply with court orders will result in a sanction having effect unless the defaulting party obtains relief. While an application for relief from sanctions might be heard and granted at a Pre-Trial Review, depending on the circumstances of the case, a court might equally refuse such an application and exercise its discretion to strike out a statement of case for non-compliance with the CMC orders.

[21] In ***Biguzzi v Rank Leisure plc*** [1999] 4 All ER 934, Lord Woolf MR said that the striking out of a litigant's statement of case must be a last resort. He said:

> *"Under r 3.4(2)(c) [the English CPR equivalent of rule 26.3(1)(a)] a judge has an unqualified discretion to strike out a case such as this where there has been a failure to comply with a rule. The fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of case. … In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out."*

[22] It should be noted that it is possible to apply for relief from sanctions even at "the eleventh hour", at, or during a trial. In ***George Bryan v Grossett Harris*** (unreported) Supreme Court, Jamaica, Suit No CL 2000 B/089 judgment delivered October 21, 2005, his Lordship Mr. Justice Sykes (as he then was) refused to grant the defendant's application to strike out the claimant's statement of case when it was discovered that the claimant was illiterate but signed a witness statement without the requisite certification as required by CPR rule 29.4(2). Instead, Sykes J decided that the claimant should be given the opportunity to make an application for relief from sanction. At paragraph 16 of the judgment, he said this:

> *"A textual analysis of rule 29.11 suggests that the door is not closed forever on a claimant who fails to comply with a court order for witness statements. This being so it would be wrong to apply rule 29.11 to produce the effect desired by Mr. Johnson at this point. An appropriate order as to costs, at this stage, is the proportionate response."*

[23] The basis of the judge's decision to strike out the defendants' statement of case on February 24, 2020 is not stated in the minute of order. However, the application to strike out the defendants' statement of case indicates that the claimant believed that the trial dates would have to be vacated because of the non-compliance with the CMC orders less than three (3) months before the trial.[1]

[24] Though the CPR is aimed at achieving greater efficiency in the administration of justice, courts must always bear in mind the overriding objective of achieving fairness. Consequently, it has been repeatedly said in cases both here and in England, that courts must be reluctant to deprive a litigant of the opportunity of having the case determined on the merits and must be reluctant to shut out a litigant through some technical breach of the rules.

[25] This court is not asked to review the decision made by the judge on February 24, 2020. This court cannot first consider the overriding objective, as urged by counsel for the applicants. Instead, I am to strictly apply rule 26.8 and assess whether the applicants/defendants have satisfied the requirements thereof.

[26] The Court of Appeal decision in ***Jamaica Public Service Company Limited v. Charles Vernon Francis and Colombus Communications Jamaica Limited (Trading as Flow)*** [2017] JMCA Civ 2 is instructive. Edwards JA (Ag) (as she then was) stated at paragraph 57:

> *"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*

[1] Due to the Covid-19 pandemic, the usual operations of the Supreme Court of Jamaica were affected in May 2020. Although matters were still being heard in the first week of May 2020, trials did not resume until May 11, 2020. The trial fixed for May 4, 2020 would therefore have been vacated.

> *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. … [T]he 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****". (My emphasis)*

Was the application made promptly?

[27] Learned Queen's Counsel indicated that she did not challenge whether or not the defendants' application was made promptly, as it was filed nine (9) days after the orders made on February 24, 2020, striking out the defendants' statement of case. I will therefore only briefly address this issue.

[28] I have noted that in ***Attorney General of Trinidad and Tobago v Universal Projects Limited*** Civ. App No.104/2009 (unreported), Court of Appeal, Trinidad and Tobago, Civ. App No. 104/2009, judgment delivered 26 February 2010, the Trinidad and Tobago Court of Appeal held that a ten (10) day delay in the filing of the application (deemed to be an application for relief from sanctions) did not satisfy the requirement that the application must be made promptly. Nonetheless, in this instance, I am satisfied that rule 26.8(1)(a) has been satisfied since nine (9) days is not long, particularly when considers that there was a public holiday in that period (Ash Wednesday, on February 26, 2020). The defendants also filed an affidavit in keeping with rule 26.8(1)(b).

Has there been general compliance with all the CMC orders?

[29] The applicants have now filed all documents which they were directed to file pursuant to the Case Management Orders. As regards standard disclosure and inspection, I am of the view that standard disclosure was done when the list of documents was served, but the the claimant's Attorneys-at-law did not request inspection of the defendants' documents, since judgment had been

entered for the claimant on February 24, 2020, and they therefore sent the papers back. However, if disclosure was an issue for the claimant, he would have made an application for specific disclosure. The applicants have complied generally with the Case Management Orders.

Have the defendants put forward a good explanation?

[30] As previously indicated, Mr. Abrahams averred that the reason for non-compliance with the CMC orders was that his Attorneys-at-Law did not have complete instructions with the relevant information to complete the documents required to be filed. However, the explanation given does not seem adequate since the "reason" for the failure to give sufficient instructions to counsel is not explained. It is not clear if this is because the witnesses or counsel were unavailable or were ill, for example. I believe that what is required of Mr. Abrahams is a more comprehensive explanation, covering the entire period of non-compliance.

[31] I am guided by the approach of Sykes J (as he then was) in ***Elenard Reid and others v Nancy Pinchas and others*** (unreported) Supreme Court, Jamaica, Suit No CL 2002 R/031 judgment delivered on February 27, 2009. There, the claimants' statement of case was struck out due to their failure to comply with an order to file a reply to the amended defence by a stipulated date, and the claimants sought relief from the sanction and put forward an explanation that the omission was due to "inadvertence". His Lordship said at paragraph 54:

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

[32] This court has had regard to the reason for the stringent approach of rule 26.8 and the CPR in general. The coming into effect of the CPR in January 2003 was expected to herald the end of an era of delay in litigation, through judge-

driven case management. In ***Port Services Limited v Mobay Undersea Towns*** Court of Appeal, Jamaica, SCCA No 18 of 2001, judgment delivered on March 11, 2002, Panton JA said at pages 9 and 10:

> *"In this country, the behaviour of litigants, and, in many cases, their attorneys-at-laws, in disregarding rules of procedure, has reached what may comfortably be described as epidemic proportions…. "*
> *For there to be respect for the law, and for there to be the prospect of smooth and speedy dispensation of justice in our country, this Court has to set its face firmly against inordinate and inexcusable delays in complying with rules of procedure…"*

[33] In ***Alcan Jamaica Company v Herbert Johnson & Idel Thompson-Clarke*** Court of Appeal, Jamaica, SCCA 20 of 2003, judgment delivered on July 30, 2004, Cooke JA, after citing Panton JA in the ***Alcan*** case, went on to say at page 26, that "*[t]hese rules are the antidote to the epidemic of delay against which Panton, J.A. so rightly inveighed*."

[34] When the Rules Committee began drafting the CPR, they elected not to adopt the wording of the 1998 English Civil Procedure Rules rule 3.9, which stated:

> *"**3.9**—(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including—*
>
> *a) the interests of the administration of justice;*
> *b) whether the application for relief has been made promptly;*
> *c) whether the failure to comply was intentional;*
> *d) whether there is a good explanation for the failure;*
> *e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol(GL);*
> *f) whether the failure to comply was caused by the party or his legal representative;*
> *g) whether the trial date or the likely trial date can still be met if relief is granted;*
> *h) the effect which the failure to comply had on each party; and*
> *i) the effect which the granting of relief would have on each party.*
>
> *(2) An application for relief must be supported by evidence."*

[35] Sykes, J proffered a reason for this in ***Kristin Sullivan v Rick's Café Holdings Inc T/A Rick's Café (No 2***) Supreme Court, Jamaica, Suit No CL

2007HCV03502 judgment delivered on April 15, 2011, at paragraph 21:

> *"The great virtue of rule 26.8 (1) and (2) of the CPR is that it sets out mandatory criteria which must be met before the discretion is exercised. It ensures greater consistency in outcome. This fundamental shift is perhaps the clearest indication that the Rules Committee comprising eminent judges of the Court of Appeal, the Supreme Court as well as distinguished practitioners at the public and private bar were dissatisfied with the way judges were exercising their discretion to extend time under the CPR. The Committee had before it the English CPR rule 3.9 which does not have the same strict preconditions but chose to reject that approach and introduce mandatory conditions before the discretion can be exercised."*

[36] I am mindful that refusing the defendants' application will deprive them of the opportunity to have the case decided on the merits. However, the law is clear that where a sanction has been imposed, it cannot be set aside unless the threshold requirements in CPR rule 26.8(1) and (2) have been met.

[37] The defendants have not stated why they failed to comply with each CMC order which required compliance over a period of two (2) years. It is noted that a representative of the 1st defendant company, Mr. Donald Deans attended the CMC hearing. Consequently, the onus was on both counsel for the defendants and the defendants themselves to make a note of the various dates for the courts orders to be complied with, and to seek to ensure that there was compliance with the orders. There ought to be some explanation for missing the six (6) deadlines set in the CMC orders over the nearly two (2) year period. Unfortunately, I do not find the explanation provided to be adequate.

Has it been demonstrated that the failure to comply was unintentional?

[38] I would like to believe that the defendants/applicants do not fall into the category of the "recalcitrant litigant" to which Panton JA referred in the ***Port Services Limited*** case (supra) when he said at page 10:

> *"Once there is a situation such as exists in this case, the Court should be very reluctant to be seen to be offering a helping hand to the recalcitrant litigant with a view to giving relief from the consequences of the litigant's own deliberate action or inaction."*

[39] As the explanation provided is inadequate, I cannot assess whether the failure to comply with the CMC orders was unintentional or deliberate. However, I will say that the defendants should have been jolted into action on each occasion that the claimant complied with an order and served their Attorneys-at-law with the requisite documents between 2018 and 2020.

The considerations under CPR rule 26.8(3)

[40] The applicants having failed to meet all the requirements in rule 26.8(2), it is unnecessary for the court to give consideration to the considerations under rule 26.8(3).

DECISION AND ORDERS

[41] There ought to be a good explanation for delay or non-compliance with the CMC orders, and in the absence of same, the application fails. In the circumstances, I make the following orders:

1. The application for relief from sanction is refused.
2. Costs of the application to the respondent/claimant.
3. Leave to appeal granted.
4. The applicants' Attorneys-at-law are to prepare, file and serve this order.