[2020] JMSC Civ 178

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016 HCV 02949

BETWEEN	**MARLON BROWN**	**CLAIMANT**
AND	**IOLA BROWN**	**1ST DEFENDANT**
AND	**MORRIS HILL**	**2ND DEFENDANT**
AND	**KELVIN HILL**	**3RD DEFENDANT**

IN CHAMBERS

Nicholas Kellyman, of counsel, for the claimant

Shantel Jarrett, instructed by Zavia Mayne and Co. for the 1st defendant

Olivia Derrett, instructed by Oswest Senior Smith and Co. for the 2nd and 3rd defendants

July 20 and September 18, 2020

Application for relief from sanction after statement of case struck out –- Whether the application was made promptly – Whether the claimant's failure to comply was unintentional – Whether the claimant's alleged impecuniosity is a good explanation for his non-compliance – Whether the claimant has generally complied with all other relevant rules, practice directions, orders and directions – Rule 26.8 of the Civil Procedure Rules

ANDERSON, K.J

BACKGROUND

The history of this matter

[1] The claimant filed this claim on July 14, 2016, seeking several orders, against the defendants, which in substance, are as follows:

a. That the agreement for sale of the property, located at Volume 1186 Folio 27 of the Register Book of Titles be set aside;

b. A declaration that the 1st defendant has breached her fiduciary duty as an administrator of the estate of Karl Evans Brown;

c. A declaration that by the doctrine of proprietary estoppel, the claimant is entitled to an equitable interest in four (4) buildings on the said property and that an order be made, setting out the extent of said interest;

d. The 1st defendant be removed as the administrator of the estate of Karl Evans Brown;

e. In the alternative, the 1st defendant shall notify the claimant and his siblings of whatever she plans to do with all of the real properties a part of the estate of Karl Evans Brown; and

f. The 1st defendant shall provide to the claimant and other beneficiaries of the estate of Karl Evans Brown, a statement of account regarding all dealings with the properties of the said estate and pay over any monies due to the beneficiaries of the estate.

[2] The claimant also, on July 14, 2016, filed a notice of application for court orders which sought an injunction and was supported by affidavit evidence.

[3] The defendants, filed affidavit evidence, refuting the claimant's claim. The interim injunction sought by the claimant, was granted by this court, and was later discharged on March 2, 2017.

[4] The claimant's then attorneys at law, sought and were granted, an order on July 11, 2018, that their names be removed from the record. The first hearing of the fixed date claim form was then scheduled for October 22, 2018.

[5] On that date, an adjournment order was made, to April 1, 2019, owing to the absence of the claimant. On that further adjourned first hearing, the matter was adjourned to May 21, 2019.

[6] On that 2nd further adjourned first hearing, the hearing was adjourned to November 13, 2019, owing to the claimant needing to settle legal representation. Among the orders made, Thomas J stipulated that the final hearing date shall be January 22, 2020 and that, any additional affidavit evidence being relied on, ought to be filed and served, on or before September 30, 2019 and '*if [the] claimant is not ready to proceed to the final hearing on the next first hearing date, his statement of case, stands struck out,'* (hereinafter referred to as the 'unless order').

[7] On that 3rd further adjourned first hearing date, the claimant attended and was represented by counsel. He was not however, ready to proceed. His counsel then sought to make an oral application for relief from sanction, which the court scheduled to be heard on December 13, 2019.

[8] Also, on November 13, 2019, the claimant filed three (3) affidavits, being the affidavits of his siblings, in support of his case, against the defendants.

The Application

[9] The claimant filed this application for relief from sanction, on December 2, 2019, seeking two orders, namely: that relief from sanction be granted for the non-compliance with the 'unless order' made on May 21, 2019 and an extension of time, within which to file affidavits and/or documents, from the witnesses for the claimant and handwriting expert. It is that application, which is now awaiting adjudication and is that to which, these reasons pertain.

[10] In support of the said orders, the claimant particularized twenty seven (27) grounds. Many of those substantial grounds, when examined, can be recognized to be duplicative. Thus, in the circumstances, and for convenience, I will refer to the grounds, as being:

i. The pre-requisite grounds in Civil Procedure Rules ('CPR') 26.8 (1) and (2), (which I will set out below).

ii. That the legal proceedings surrounding this claim has placed the claimant in financial hardship, which has resulted in him being unable to retain counsel.

iii. The claimant was unrepresented at the hearing which the 'unless order' was made.

iv. The length of time may not be considered as being unduly lengthy, since the application for relief for sanction was first made orally.

v. There is no prejudice to the defendants, in granting the relief sought, whereas the claimant would be deprived of his right to a fair hearing, if the relief he seeks, is denied.

vi. The merits of the claimant's case are very strong, as the preliminary opinion letter of the expert witness, points to a clear breach of the fiduciary duty by the administrator.

vii. The extension of time would allow for all affidavits and documents from the beneficiaries whose signatures were allegedly forged, to be before this court.

viii. The effect of the delay on public administration of justice is not detrimental, as the affidavits can be filed and served before the prospective trial date.

[11] There is one affidavit which has been filed in support of the claimant's application for relief from sanction. That affidavit, was deponed to, by the claimant and was filed on the same date on which the relevant application was filed, which, as should be recalled, is: December 2, 2019. The 1st defendant has filed an affidavit in opposition to the defendant's application. No other affidavit evidence has been filed by either party, either in support of, or in opposition to, the pertinent application.

[12] The trial of this claim, was scheduled for January 22, 2020 and same has been vacated, as the application did not proceed as scheduled on December 13, 2019, and is now, before this court, at this time.

ISSUES

[13] The following issues are now before this court, for determination:

a. Whether the claimant's application was made promptly.

b. Whether the claimant's failure to comply was unintentional.

c. Whether the claimant has a good explanation for his failure to comply with the court's orders made on May 21, 2019.

d. Whether the claimant has generally complied with all other relevant rules, practice directions, orders and directions**.**

Burden and Standard of proof

[14] Before addressing each of these issues in turn, it is now pertinent to address the issues of burden and standard of proof, as regards the claimant's present application, and also the CPR, as regards said application. The burden of proof, rests solely on the claimant's shoulders in that regard and the requisite standard of proof is, as applied, proof on a balance of probabilities.

The applicable CPR

[15] CPR 26.8 governs the discretion of the court in granting relief from sanctions. Those paragraphs read as follows:

> *' 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 the 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.'*

[16] The claimant's application is supported by evidence on affidavit, so the court will next have to consider, whether the application was made promptly and even if so, whether the listed requirements of CPR 26.8 (2), have been met. CPR 26.8 (1) and (2), must always be applied, conjunctively.

[17] There is dispute as to whether the claimant's application has been made promptly; and also as to whether there is good explanation for the failure to have complied

with the pertinent 'unless order'; and further, as to whether the claimant has generally complied with all other relevant rules, orders and directions of this court.

The approach of the court

[18] Brooks JA, in **H.B Ramsay and Associates Ltd and Ors. v Jamaica Redevelopment Foundation Inc. and Anor [2013] JMCA Civ 1,** ('the HB Ramsay case') expounded on the principles governing the court's discretion in granting relief from sanctions. At paragraph 31, he pronounced that an applicant who seeks relief from a sanction, imposed as a consequence of his failure to obey an order of the court, must comply with the provisions of CPR 26.8 (1), in order to have his application considered. If the applicant satisfies this threshold, then the court should go on to consider, whether the applicant has crossed the threshold in CPR 26.8 (2) and if so, the court should then go on to consider the factors in CPR 26.8 (3). If though, the applicant does not cross the thresholds as set by CPR 26.8 (1) and (2), then CPR 26.8 (3), does not fall for consideration by this court, in the context of an application such as this.

[19] What is therefore now to be determined by this court, in light of this application and the pertinent submissions, is whether those pre-requisite grounds, as set out in CPR 26.8 (1) and 2, have been complied with, by the claimant.

Whether the claimant's application was made promptly

[20] At paragraph 10, of **the HB Ramsay case,** the court pronounced that the word 'promptly,' does have some measure of flexibility in its application. The question as to whether something has been done promptly, depends on the circumstances of the case.

[21] 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 delay of ten (10) days, in the filing of the

relevant application (deemed to be an application for relief from sanctions) did not satisfy the requirement that the application must be made promptly.

[22] The court took into consideration the history of the matter. The applicant had obtained an order for the extension of time, within which to file their defence. They however, did not file same by the specified date in the order. The respondent, on the expiry of said date, pursued and received a judgment in default. The applicant, then applied to set aside the default judgment. In those circumstances, that court found that the applicant had not acted promptly in having filed the relevant application.

[23] The parties, in this case, have rightly outlined that what constitutes promptitude, is a question of fact. This court observed that, from the facts of this case, it ought to be considered whether the application can be deemed prompt, in circumstances wherein, it was filed eighteen (18) days after the claimant's statement of case stood as, struck out.

[24] The claimant's counsel has contended that the application was first made orally on November 13, 2019, which is to be recalled as the day that the claimant's statement of case was struck out. This court observed however, that CPR 26.8 (1) (b) stipulates that an application for relief from sanction, must be supported by affidavit evidence and thus, the application was only properly made on December 2, 2019. (See: **Tingles Distributors Limited v Liquid Nitro Beverages and Ors. [2020] JMCA Civ 24,** per Williams JA at paragraph 85). Thus, that assertion by the claimant's counsel, does not aid in the claimant's case, presently before this court.

[25] Additionally, Brooks JA in the **HB Ramsay case,** noted that in considering whether an application, of this nature, is made promptly, the court should consider the explanation given, based upon the circumstances of that case. He stated that in some instances, at first, it may appear that the application is not prompt. Based

however, on the explanation given, when considered in those circumstances, the application may be deemed as prompt.

[26] The claimant has not proffered any explanation to this court, as to why the application took eighteen (18) days to be made before the court, in circumstances wherein, the counsel for the claimant had, albeit improperly and devoid of any legal effect, made the application orally on November 13, 2019. It is thus inconceivable to this court, in those circumstances, as to the reason for the application then, only being properly before the court, eighteen (18) days later.

[27] This court is also guided by the background facts, in that the court had scheduled the application to be heard on December 13, 2019. It is undisputed that the application was filed in time for that hearing date. The date for the hearing of the application however, did not, in these circumstances, override the need to be prompt in accordance with CPR 26.8 (1) (a). In the opinion of this court, in this case, promptitude is to be measured from the date when the statement of case stood struck out and not when the court ordered that the application should be heard.

[28] As adumbrated above, the interpretation of promptly, does have some flexibility, as it is dependent on the facts of the particular case. In this particular case, the relevant factors to be considered, concerned the fact that the claimant's counsel had, albeit in an incorrect form, sought to make the application for relief from sanctions orally, on November 13, 2019. No explanation has been proffered to this court, by the claimant, which can serve to properly satisfy this court, that his application which is now under consideration by this court, was made promptly. In that context, it is this court's conclusion, that the claimant's present application, was not made promptly.

[29] In the event however, that this court is incorrect in its finding that the claimant's application was not made promptly, this court will now go on to consider the considerations in CPR 26.8 (2). To reiterate, in order for the claimant to succeed,

in an application such as this, the claimant must meet all of the requirements of CPR 26.8 (2), even if he has met all of the requirements of CPR 26.8 (1).

Whether the failure to comply was unintentional

[30] It is important to note that CPR 26.8 (2) (a) stipulates that one must show that the failure to comply with the order of the court, was unintentional. This is distinguished from accidental, or mere inadvertence.

[31] The claimant's alleged impecuniosity and his affiants being out of the jurisdiction, in the circumstances, allegedly resulted in his non-compliance with the orders of Thomas J. The claimant has not led any evidence that, despite his state of affairs, he used his best efforts to try to comply with the orders of the court.

[32] The question of whether the claimant was intentional in his non-compliance with the orders of Thomas J., in these circumstances, is closely tied to the issue of the reason given for the failure to comply. This court, is of the considered opinion, that the fact that a person is impecunious, does not preclude him/her from complying with an order of the court and as such, in the circumstances of this case, the claimant's non-compliance, was in fact, intentional. It may though, have been intentional, albeit, for a reason, with that reason being, the claimant's impecuniosity. I will therefore, next proceed to consider that aspect, particularly, both as to whether that reason has been duly proven at all and whether also, it has been proven as a good explanation, for the claimant's failure to comply with this court's earlier orders.

Whether there is a good explanation for the claimant's failure to comply with the orders of the court

Impecuniosity

[33] In **Leymon Strachan v Gleaner Company Ltd and Dudley Stokes (Motion No 12/1999 – judgment delivered 6 December 1999),** the applicant had delayed 6 ½ months, before filing the notice of appeal and then sought an extension of time,

on the basis that he was impecunious, due to the expenses which he incurred in prosecuting the matter, which resulted in him not having given instructions to his attorneys to file his appeal in the stipulated time.

[34] At page 8, Harrsion JA opined:

> *'The Applicant's plea of impecuniosity as the reason for his delay is a plausible one, in my view, and the circumstances sufficiently explain the delay of five months to enable the court to exercise the discretion in his favour.'*

[35] In the Court of Appeal decision of **Alcron Development Limited v Port Authority of Jamaica [2014] JMCA App 4**, the applicant had advanced the reason of impecuniosity, for his failure to instruct his attorneys-at-law to file his appeal in time.

[36] At paragraph 21, Brooks JA stated that:

> *'Alcron's explanation for the delay boils down to impecuniosity. Although in Leymon Strachan this court accepted impecuniosity as a plausible reason for a delay in filing a notice of appeal, the circumstances in that case were quite different from those in the present application. Firstly, unlike Mr Strachan, Alcron is a corporate entity with shareholders and directors. Those persons could have been approached for additional financing for the business of the company. The directors are also functionaries through whom Alcron may act in complying with the rules. Alcron does not bear the limitations that an individual litigant, such as Mr Strachan, would have. Secondly, Mr Strachan had demonstrated to the court that the litigation in which he was involved was lengthy and complicated, involving several appearances both in this court and in the court below. Those circumstances do not exist in the present case.'*

[37] By a majority ruling, the Court of Appeal held that it is not sufficient for an applicant to baldly state that he/she, or they, are impecunious. An applicant who relies on such a ground as a basis for delay in compliance, must provide evidence to support the assertion. It is one thing to make an assertion. It is another thing, to prove that assertion.

[38] In **Arawak Woodworking Establishment Ltd v Jamaica Development Bank Ltd [2010] JMCA App 6,** that applicant had not supported its alleged impecuniosity with evidence. Though the applicant had asserted that it was in

financial difficulty, the court found that general evidence of financial difficulty, is insufficient in support of an assertion of impecuniosity.

[39] In the Court of Appeal decision - **F1 Investments and Ors. v Peter Kryger and Ors. [2015] JMCA App 38,** the applicants, had failed to comply with case management orders, made by the Court of Appeal and their appeal stood struck out. That application before the Court of Appeal, concerned the reinstatement of that appeal. In dealing with that matter, the court noted that the relevant principles to be considered in deciding whether to reinstate the appeal, are those in CPR 26.8.

[40] Brooks JA, considered whether impecuniosity can be used as a good explanation for the application being made two (2) months after it was struck out. At paragraph 28 he stated that:

> *'In this case, none of the applicants has stated what financial position he, she or it is in. None has stated that he, she or it was unable to secure, in time, the funding required to place counsel in funds to have him prepare the submissions. None has explained whether the applicants are now in a position to finance the appeal going forward. As a result, the assertion by Mr Beswick is inadequate and it must be found that no good explanation has been given for the failure to obey the "unless" orders.'*

[41] An applicant for relief from sanction(s), may rely on impecuniosity, as a good explanation, in the context of a failure to comply with orders of the court, by leading the requisite evidence, in that respect. Coupled with that reason however, it must also be shown that the applicant has acted expeditiously. (See: **Jones and Another v Solomon 41 WIR 299, per Sharma J**)

[42] The claimant in this instant case, has in his affidavit stated as follows:

> *'4. The matter before you, Claim No.2016 HCV 02949, has placed me in grave financial hardships, I have had to pay my previous Attorneys-at-Law a great sum of money, in order to represent me in this claim.*
>
> *…*
>
> *10. The entire lives of my family had to be adjusted as there have been little to no money coming in. Currently, we are still unable to find a home of our own and the*

place where my family resides is the home of one of my relative who has allowed us to stay in his home.

11. That I would be severely prejudiced if the sanctions of the 'unless order' made on the 21st day of May 2019 are imposed on me as I was unrepresented at the material time when the order was made and I have been unrepresented since July of 2018 and had tried in several occasions so to obtain legal counsel.

12. That I could not afford the high retainer fess of the Attorneys-at-Law who I consulted during this period especially in light of the financial challenges my family and I were going through at the time.

13. That it was not until I was recommended to Mr. Nicholas Kellyman in October 2019 and promptly visited his office at 7 Duke Street that I was able to obtain counsel.

14. That I verily believe Mr. Kellyman was emotionally moved by my predicament and sought to help me by both decreasing his retainer significantly and allowing for me to pay him in small manageable instalments.'

[43] A court may be satisfied, that an individual applicant is impecunious, by examining the financial effect, which the prosecution of the claim, has had on him/her. From the authorities adumbrated above, there is a different approach, in this regard, to be taken by an individual who asserts he/she is impecunious than that of a company. Since, the claimant is an individual, making said assertion, it is important that this court, examines the reasoning which led to the court's finding in **Leymon Strachan v Gleaner Company Ltd and Dudley Stokes** (op. cit).

[44] As that case indicated, the court may consider the history of the matter, which includes the number of representations, made in the relevant courts, prior to the non-compliance. In this case, it is observed that, prior to the relevant non-compliance, with the orders of Thomas J, there had been three (3) substantial hearings, which concerned the granting and discharge of the interim injunction, as well as five (5) adjourned hearings. This is to be distinguished from **Leymon Strachan v Gleaner Company Ltd and Dudley Stokes** (op. cit), wherein there had been numerous motions, before the Supreme Court and the Court of Appeal, which allowed the Court of Appeal to then make a reasonable inference, that the applicant had been left impecunious, as a consequence.

[45] This court has concluded that the claimant's mere assertion of his impecuniosity, does not properly enable this court to even draw a reasonable inference, that the claimant was in fact, impecunious.

[46] It is very easy for an applicant to make an assertion that they are impecunious. It is not however, quite so easy, to provide the evidence which is necessary, to properly prove the said assertion. For this reason, litigants, who appear before the court, have to lead sufficient evidence in support of the respective assertions, which they make. Hence, the well-known phrase: 'He who alleges/asserts, must prove.' In the absence of evidence, that which is left, before the court, is the bare assertion. That will never, be enough.

[47] The claimant has not placed before the court, sufficient evidence, in proof of his alleged impecuniosity. He has not advanced any evidence to prove what financial position he was in then, compared to that which he is in now. All this court has, is his bald assertion. That is not and cannot ever be, enough.

[48] Further, the claimant has not, in his affidavit evidence, specified what attorneys he may have communicated with, nor whether he made attempts to seek the services of an attorney, from the Kingston Legal Aid Clinic or the Norman Manley Law School Legal Aid Clinic, between May 21, 2019 and October 2019.

[49] Additionally, the claimant's affidavit evidence has only provided a partial explanation to this court, as regards, his ability to retain the services of his present attorney – Mr. Kellyman. The claimant, has failed to specify what was/were the sum(s) being charged by the prior attorney(s)-at-law, which he communicated with and was unable to afford, compared to what is the sum being charged by Mr. Kellyman and how it was, that he was able to pay same, having deponed that, he was earning little to no income at all.

[50] Though the claimant asserted that his payment to Mr. Kellyman was to be made by way of small instalments, he needed to have adduced evidence of said instalment, that is: when they were to be paid, as well as the overall sum, he has

now agreed to pay, to Mr. Kellyman. He also needed to have adduced evidence as to whether he broached with the attorneys-at-law, with whom he communicated, the possibility of paying in small instalments, as he did with Mr. Kellyman and what were their responses to same (if any).

[51] In the circumstances of this case, such evidence, ought to have been provided by the claimant, for the court to be able to properly make an adjudication, as to whether his assertion that he could not afford an attorney, prior to now, because of his impecuniosity, is truthful.

[52] The mere fact that a person is impecunious does not preclude him/her or them from complying with the orders of the court. That would mean that there is no possibility for persons to represent themselves, though this has been done in the past by litigants. Under the CPR, documents are framed in a manner, so that a lay person, can prepare them on their own. Though this is inadvisable, in many instances, it is not impossible, as others have done it, before this court.

[53] The claimant has not produced sufficient evidence to this court, proving his assertion of impecuniosity. He has also, not produced sufficient evidence to this court, that his alleged impecuniosity, constitutes a good reason for his failure to have complied, with this court's earlier orders. He has failed in both of those respects. The claimant has not proven same on a balance of probabilities.

Affiants being overseas

[54] This court found that the bald assertion by the claimant, that his intended affiants were overseas, cannot be deemed a good explanation for his failure to comply, in accordance with CPR 26.8 (2). The order regarding the filing of affidavit evidence was made on May 21, 2019, which would have then expired on September 30, 2019. The claimant had four (4) months, in which he could have had the affidavit evidence drafted, sent to the witnesses overseas and filed within time. The mere fact that the claimant's intended affiants were overseas therefore, is not, without more, a good reason for his failure to comply with the court's orders.

[55] The, 'more' that is undoubtedly being relied on, by the claimant, in that respect, is that, at the material time, he was impecunious. Since that contention of his, has earlier been rejected by this court, it must follow, that what this court is left with, as the claimant's sole explanation for his failure to comply, is that his intended affiants, were then overseas. For the reasons already given, that is, without more, an inadequate explanation for the claimant's failure to comply with the relevant court orders.

File an extension

[56] It is important to note that, based on the affidavit evidence, the claimant stated that he obtained counsel in October of 2019. This would have been, at least two (2) weeks before the statement of case was struck out. The authority of **Dale Austin v The Public Service Commission and Anor [2016] JMCA Civ 46,** stipulates that the correct course that should have been taken, in these circumstances, was an application for extension of time to comply, before the claim was struck out.

Whether the claimant has generally complied with the rules, practice directions, orders and directions

[57] It is evident from examining this file, that the claimant has failed to timely prosecute this claim, which he has brought, against the defendants, which has led to this court having made an 'unless order' on May 21, 2019.

[58] This is evidenced by the claimant having been absent on October 28, 2018, which had then resulted in the matter being adjourned. The claimant's failure to settle his legal representation had also caused the matter to be adjourned on May 21, 2019, being the date when the 'unless order' was issued.

[59] Brooks JA, in the **HB Ramsay case**, at paragraph 27, noted that, a court's assessment of an application for relief from sanctions should not be restricted to only considering the applicant's conduct prior to the application of the sanction, but subsequent actions may well indicate the attitude of the applicant, to the progress

of the matter. That examination, should look to decipher, whether an applicant had demonstrated that he/she was serious about getting his/her case back on track and putting himself/herself in a position, where the adverse effect of the default, was minimized.

[60] In this regard, it appears that the claimant has sought to advance the relevant applications, which will serve to bring his claim back up to speed. In the overall circumstances of this case however, this court, found that it is not sufficient, so as to invoke the discretionary powers of the court, in granting relief from sanction.

[61] Additionally, the claimant's counsel has asserted that the claimant has generally complied with the orders of the court, and in turn has pointed out, that the 1st defendant has not generally complied with the orders of this court, in this claim. What is to be carefully noted for present purposes though, is that, since it is the claimant's application for relief from sanction, it is the claimant's conduct that is relevant for this court's consideration. Thus, that assertion, bears no relevance in this claim.

[62] This court, having arrived at the conclusion that the claimant has not shown that his application for relief from sanction was made promptly, or that his failure to comply with the relevant orders of Thomas J, was unintentional, nor has he proved that he has a good explanation, for his failure to comply with this court's other orders and has not generally obeyed the rules, orders, directions of this court, it then follows, that the claimant's application ought to be rejected by this court.

CONCLUSION

[63] In the final analysis, the claimant has failed to overcome all of the hurdles in his way of succeeding, in respect to this application. Those hurdles, are as set out in CPR 26.8 (1) and (2), to begin with, and as such, his application must, and does, fail.

DISPOSITION

[64] This court therefore, now orders as follows:

1) The claimant's application for court orders filed on December 2, 2018, is denied.

2) The costs of that application are awarded to the defendants with such costs to be taxed, if not sooner agreed.

3) The 1st defendant shall file and serve this order.

.....
Hon. K. Anderson, J.