[2025] JMCC Comm 02

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO: SU2022CD00553

BETWEEN	**BEVERLEY BYFIELD**	**CLAIMANT**
AND	**MALCOLM MCDONALD**	**1st DEFENDANT**
AND	**PAUL MICHAEL HARRIS**	**2nd DEFENDANT**
AND	**LESLIE CHANG**	**3rd DEFENDANT**
AND	**ROSENEATH DEVELOPERS LIMITED T/A SOFT FLANNEL HOMES**	**4th DEFENDANT**

HEARD TOGETHER WITH:

IN THE SUPREME COURT JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO: SU2022CD00554

BETWEEN	**BEVERLEY BYFIELD**	**CLAIMANT**
AND	**MALCOLM MCDONALD**	**1st DEFENDANT**
AND	**TOY INC**	**2nd DEFENDANT**

IN CHAMBERS BY VIDEO-CONFERENCE

Appearances: Mr. Kevin Powell and Ms. Timera Mason instructed by Hylton Powell Attorneys-at-Law for the Claimant

Mr. Jerome Spencer instructed by Chen Green & Company for the 1st and 4th Defendants in SU2022CD00553 and both Defendants in SU2022CD00554

Heard: 21st November 2024 and 9th January 2025

Civil Procedure – Failure to file witness statements – Failure to comply with Case Management Orders – Application to extend time for compliance and for relief from sanctions – Application to strike out statement of case for non-compliance

BROWN BECKFORD J

BACKGROUND

[1] The applications being considered find their genesis in two claims by Beverly Byfield, Claimant herein, one against Malcolm McDonald, Paul Michael Harris, Leslie Chang and Roseneath Developers Limited T/A Soft Flannel Homes, 1st, 2nd, 3rd and 4th Defendants, respectively, in claim SU2022CD00553, and the other against Malcolm McDonald and Toy Inc, 1st and 2nd Defendants, respectively, in claim SU2022CD00554.

[2] In claim SU2022CD00553, the Claimant claims that the 1st, 2nd and 3rd Defendants have exercised their powers as directors and shareholders in the 4th Defendant, in a manner that is oppressive, unfairly prejudicial and unfairly disregards the interest of the Claimant, and so relief is sought pursuant to **S.213A(2) of the Companies Act**. In claim SU2022CD00554, the Claimant claims that Malcolm McDonald, whilst acting as her Attorney-at-Law, breached his fiduciary duty and committed acts of fraud in relation to conveyancing dealings for properties registered at Volume and Folio numbers 1194 670, 1288 818, 1341 208; 209 and 210 of the Register Book of Titles. She further asserted

that Mr. McDonald is the director and/agent or servant of Toy Inc which is the trustee of the benefits of the impugned conveyancing dealings.

[3] At a Case Management Conference **("CMC")** on 20th November 2023, Brown Beckford J made inter alia the following Orders:

> 1. *Claim No. SU 2022 CD 000553 (sic) and Claim No. SU 2022 CD 00554 ("the Claims") shall be tried together.*
>
> 2. *The trial date for the Claim is set for February 3, 2025 for 5 days before a single judge in open court.*
>
> 3. *Standard Disclosure shall be on or before January 31, 2024.*
>
> 4. *The Inspection of documents shall be on or before February 14, 2024.*
>
> 5. *Witness statements are to be filed and exchanged on or March 21, 2024.*
>
> *…*
>
> 7. *The parties shall file pre-trial memoranda and listing questionnaires on or before November 7, 2024.*
>
> *…*

[3] The Defendants in both claims failed to comply with the orders for disclosure, inspection and the filing of witness statements. Consequently, on 15th October 2024, the Claimant filed in each claim an Application to Strike Out the Defendants' Defence **("Application 1")** on the grounds that the Defendants failed and/or refused to comply with CMC Orders for witness statements, disclosure and inspection made on 20th November 2023, and had not sought relief from sanctions or an extension of time, or given an explanation of their failure or refusal to do so. Counsel for the Defendants indicated to the Court that the applications were served on the Defendants on the 4th November 2024.

[4] On 6th November 2024, the Defendants filed a Notice of Application for Summary Judgment and to Strike Out Claim, and on 20th November 2024, the Defendants also filed

a Notice of Application to Extend Time and for Relief From Sanctions **("Application 2")**. Applications 1 and 2 are the subject of this Judgment.

[5] The Defendants' Applications for Relief from Sanctions for failing to serve witness statements are refused, but are granted an extension of time to comply with the other CMC Orders. The Claimant's Application to Strike Out the Defendants' Defence is refused. The reasons herein given.

SUBMISSIONS ON BEHALF OF THE CLAIMANT

[6] Counsel on behalf of the Claimant, Mr. Kevin Powell, grounded his application under **Rule 26.3(1)(a) of the Civil Procedure Rules ("CPR") 2002 (as amended on the 3rd of August 2020)**, which permits the court to strike out a statement of case for failure to comply with a rule or an Order.

[7] He argued that the Defendants' failure to file and serve List of Documents by January 31st 2024, failure to file and exchange witness statements by March 21st 2024, and failure to file and serve Listing Questionnaire and Pre-trial Memorandum by November 7th 2024, breached the Case Management Orders of this Court. Counsel submitted that the circumstances justify the Court striking out the Defendant's Defence. To this end, he relied on the cases of **Gloria Chung & Ors. v Michael Chung & Anor** [2018] JMSC Civ 44 and **Campbell v Cross & Ors** [2024] JMSC Civ 68.

[8] Counsel Mr. Powell argued that this failure to comply has significantly prejudiced the Claimant, given that the trial is merely three months away and she remains uninformed regarding the documents or evidence the Defendants plan to rely upon.

[9] Moreover, should the Application to Strike Out not be granted, the Court would be compelled to allocate additional time and resources to the proceedings to ensure that the parties are adequately prepared for trial. This, in turn, would exacerbate the risk and prejudice faced by the Claimant, as she continues to be excluded from the management and involvement in Roseneath Developers Limited T/A Soft Flannel Homes.

[10] In light of this, Counsel urged the Court to deny any applications for relief from sanctions, arguing that the Defendants have, in contravention of **Rules 26.8(1) and (2) of the CPR**, neither promptly or otherwise sought relief from sanctions prior to the making of this application nor had they submitted an affidavit explaining their non-compliance. Additionally, the Defendants have consistently failed to adhere to the Court's orders throughout the course of these proceedings. Counsel relied on the cases of **H.B. Ramsay & Associates Ltd et al v Jamaica Redevelopment Foundation Inc et al** [2013] JMCA Civ 1 and **Angella Clarke Morales v Sunswept Jamaica Company Limited** [2019] JMSC Civ 221.

SUBMISSIONS ON BEHALF OF THE DEFENDANT

[11] Counsel on behalf of the Defendant, Mr. Jerome Spencer, argued that though the Court is empowered, pursuant to **Rule 26(3)(1) of the CPR**, to strike out a party's statement of case due to non-compliance, he urged the Court to refuse the Claimant's application. It was argued that pursuant to the cases of **Branch Developments Limited (t/a Iberostar Rose Hall Beach Hotel v The Bank of Nova Scotia Jamaica Limited** [2014] JMSC Civ 003 and **Commissioner of Lands (The) v. Homeway Foods Ltd and Anor** [2016] JMCA Civ 21, the power to strike out is to be utilized as a tool of last resort and this is not a case which would justify the use of such a measure.

[12] It was contended that the Defendants had a good reason for the non-compliance. He submitted that the parties were actively engaged in settlement negotiations, and, in light of this, it was not expected that the Claimant would take any steps which were prejudicial while a settlement was being pursued.

[13] He further submitted that the Defendants have since applied for an extension of time and for relief from sanctions and have now complied with all outstanding Case Management Orders, in advance of the pre-trial review.

[14] Counsel Mr. Spencer further advanced that the Claimant would not be prejudiced by the delay in proffering the documents and evidence to be relied on by the Defendants.

He argued that in or around July or August 2024, the Claimant would have been in receipt of the affidavit of Mr. McDonald, filed in response to the disciplinary proceedings the Claimant brought against him at the General Legal Council, which disclosed the evidence and a vast majority of documents which Mr. McDonald intends to rely on.

[15] Lastly, it was contended that Counsel for the Claimant has not led any evidence to indicate that a fair trial cannot be achieved due to the delay of the Defendants.

ISSUES

[16] The determination to be made by the Court is whether the Defendants have satisfied the requirements to be granted relief from sanctions for failing to serve the witness statement. The Court will go on to consider whether the defences of the Defendants should be struck out. If the Claimant is successful, a third question arises, which is whether judgment should be entered for the Claimant on the claims.

LAW AND ANALYSIS

[17] It is necessary to consider the Defendants' Application for Relief from Sanctions as the first step. A backdrop of when the Defendants complied with the various Orders is below.

1. Standard Disclosure was to be done on or before January 31, 2024, but was made on November 20, 2024. **(9mths & 20 days after date for compliance)**
2. The Inspection of documents was to be done on or before February 14, 2024, but was provided on November 21, 2024. **(9mths & 7 days after date for compliance)**
3. Witness statements were to be filed and exchanged on or before March 21, 2024, but was filed on November 20, 2024. **(7mths & 30 days after date for compliance)**

4. The parties were to file pre-trial memoranda and listing questionnaires on or before November 7, 2024, but were filed on November 21, 2024. **(14 days after date for compliance)**

[18] Where the witness statement or witness summary is not served within the time specified, **CPR Rule 29.11** provides that the witness may not be called unless the court permits it. This sanction takes effect immediately on the breach. In **Carter (Oneil) et al v South (Trevor) et al. [2020] JMCA Civ 54**, Dunbar Green JA (AG) (as she then was) pointed out that the permission of the court is obtained by an application for relief under **CPR Rule 26.8**.[1] She stated that:

> *[32] CPR rule 29.11, states as follows:*
>
> *Where a witness statement or a witness summary is not served in respect of an intended witness within the time specified by the court then the witness may not be called unless the court permits.*
>
> *The court may not give permission at the trial unless the party asking for permission has a good reason for not previously seeking relief under the rule 26.8.*
>
> *[33] The appellants are correct in their submission that the sub-rules comprised in rule 29.11 should be read together as one rule. The phrases, "unless the court permits", in sub-rule 1, and "the court may not give permission", in sub-rule 2, relate to the seeking of relief under rule 26.8. Furthermore, the words, "at the trial", in rule 29.11(2) are contextual, since a court may grant permission in different contexts and at different stages.*

[19] The Court of Appeal has recently discussed the approach a court should take in considering an Application for Relief from Sanction under **CPR Rule 29.11** for failure to serve witness statements. In **Deputy Supt Morris (John) et al v Blair (Desmond) and anor** [2023] JMCA Civ 45 **("Morris")**, P. Williams JA reaffirmed that where the application is being made before the date of trial, as in this case, the application is to be considered under **Rule 26.8** which reads:

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[1] [2020] JMCA Civ 54, paras 32-33

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.

[20] The guidance from P Williams JA may be summarized as follows:

- The application must be made promptly. This is a mandatory requirement. If the application is not made promptly, then it need not be considered on the merits.
    - Promptness means with alacrity.
    - All reasonable celerity in all the circumstances.

- This is a very important requirement as there is a strong public interest in the finality of litigation.
- Promptness is not only referable to time but depends on the circumstances of each case.
- Delay is to be construed from the time the breach occurred/sanctions imposed.

- If the application was made promptly then go on to consider the threshold requirements of **CPR Rule 26.8(2)**. The applicant must prove that:
  - Failure to comply was not intentional.
  - Have a good explanation for the failure to comply.
  - Be generally compliant with other relevant rules, practice directions, orders and directions of the court.
  - All the requirements must be met.
  - The explanation must relate to the failure to file in the time allotted.
- Only go on to consider the requirements of **CPR Rule 26.8(3)** if the requirements of **Rule 26.8(2)** are met.

[21] The Court must consider the Affidavit of Malcolm McDonald in support of the Application to Extend Time and for Relief from Sanctions with the foregoing in mind. The relevant paragraphs are reproduced below.

> *3. This claim and a related claim, Claim No. 2022 CD 00554 Beverly Byfield v. Malcolm McDonald and Toy Inc., proceeded to mediation on July 5, 2023. The matters were not settled at mediation but the parties involved at mediation agreed to further pursue the amicable ultimate resolution of the matters in dispute.*

> 4. *While the settlement discussions continued, we took no steps in the proceedings, not out of disrespect for the orders of the court, but because we were fully committed and focused on exhausting all possible settlement possibilities with the Claimant. In fact, we instructed our Attorneys-at-Law to delay making an application for summary judgment in the related claim, although the application and affidavit were prepared from early April, 2024. We did not understand that the Claimant would take any step detrimental to our position in the claim while negotiations were ensuing and only realized this when we were served with her application to strike out our Defence filed on October 15, 2024.*
>
> *….*
>
> 8. *Prior to our non-compliance with the case management orders, we were in general compliance with all other rules, practice directions, orders and directions, in that:*
>
> a. *our acknowledgment of service and defence were filed in time; and*
>
> b. *we participated in mediation as required by the Civil Procedure Rules on July 5, 2023, as no order to dispense with mediation was made by this Honourable Court.*

[22] The first issue is whether the application was made promptly. The period under contemplation is from 22nd March 2024, the date the sanction took effect, to 20th November 2024, the date of the filing the application. This is a period of 8 months. In **Dawkins (Ray) v Silvera (Damion)** [2018] JMCA Civ 25, relied on by the Defendants, a period of 1 year was considered inordinate. P Williams JA noted that promptness was not only referable to the time, but also considered that circumstances of partial compliance and no negative delays in the matter proceeding to trial, were circumstances to be taken into account. The circumstances of that case are peculiar and, in my view, would not serve as a template generally. The circumstances of partial compliance referred to the fact that the witness statements were to be filed and served by 9th May 2014. The witness statement of the respondent was filed on 13th June 2012 and served on the 5th June 2015. Service only took place after the time limited by two unless orders that the respondent's statement of case should stand as struck out if the witness statement was not served within the time specified. This failure was due to an oversight on the part of Counsel. The Application for Relief from Sanctions was made promptly upon discovering that the

witness statement was not served in time. The application was successful and was being appealed. It was in these circumstances of partial compliance by filing the witness statement, and full compliance by serving the witness statement more than a year from the trial date, and the application being made almost immediately upon Counsel discovering the oversight, that the Application for Relief from Sanctions was deemed to be promptly made.

[23] In the case at bar, the only circumstance presented is the Defendants' belief that their focus should be on the negotiations with a view to settlement. It is not being contended that they were not aware that they were not in compliance with the Court's Orders. Mr. McDonald's affidavit indicated not that they were unaware, but that they did not expect the Claimant to take any steps detrimental to them while they were in discussions. This position cannot be viewed as a reasonable one to hold when they were aware that the Claimant was nonetheless properly abiding by the Orders of the court to be trial-ready. This is also against the requirement of **CPR Rule 29.4(4)** that a party's obligation to serve a witness statement is independent of any other party's obligation to do so. The Defendants having been served with the Claimant's applications on the 4th November 2024, evincing the clear intent of the Claimant, still did not file an Application for Relief from Sanctions until the 20th November 2024.

[24] I do not find the Defendants' position to be a sufficiently extenuating circumstance to conclude that the Application for Relief from Sanction was made promptly. In **Burton (Norman Washington) v Director of Public Prosecutions (The)** 2023 JMCA Civ 30, D. Fraser JA pointed out that where the party was aware of the breach, the reference point for determining whether the application was made promptly should be the date of the breach. After a comprehensive review of the law and cases relating to the issue, he found that:[2]

> *[61] … While the cases show that varying periods of time have been held to be prompt, depending on the circumstances, long inaction in the face of*

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[2] 2023 JMCA Civ 30, para 61

> *knowledge of the breach requiring an application for relief, vitiates a finding of promptitude. In this regard the case of **Ray Dawkins v Damion Silvera**, where the application was made approximately a year after the deadline for compliance, but was filed the same day the breach was discovered, is clearly distinguishable from the instant case. Accordingly, the learned judge fell into error in determining that the application had been made promptly…*

[25] In all the circumstances of this case, it cannot be said that the Defendants acted with alacrity or celerity. The application not being made promptly, is sufficient to dispose of the Application for Relief from Sanctions.

[26] In the event I am wrong, I will go on to consider whether the requirements of **CPR Rule 26.8(2)** have been met. The first is whether the failure to comply was intentional. As in **Morris**, it was the deliberate choice of the Defendants not to comply with the Court's Orders but to focus instead on their attempts to settle the matter. In fact, Mr. McDonald stated that the Defendants instructed their Attorneys not to file an Application for Summary Judgment, which had been prepared, while the settlement discussions were ongoing. There can be but no other finding than that the failure to comply with the Order to file and serve witness statements was intentional.

[27] The next criterion is whether there was a good explanation for the failure to comply with the Court's Order. The Court disagrees with the submission of Counsel that the involvement of the parties in settlement negotiations constitutes a good reason for non-compliance with court Orders. This is particularly so in the face of the Claimant's compliance with the Orders.

[28] In **Flexnon Limited v Michell (Constantine)** [2015] JMCA App 55, the court addressed the issue of delay attributed to parties engaging in good faith negotiations, finding such an explanation insufficient.[3]

> *[38] **The applicant has contended that it was always taking steps to resolve the matter and so it was engaged in negotiations for the***

[3] [2015] JMCA App 55, paras 38-39

> ***settlement of the matter. It was after the applicant had exhausted such negotiations and no resolution was arrived at, that it took steps to have the default judgment set aside. This explanation is by no means an acceptable one. It should have been abundantly clear to the applicant and its legal representatives from the very outset that even with discussions, the respondents were active in prosecuting their claim.*** *If no other step taken by the respondents in the proceedings would have made this clear, the proceedings before Sinclair-Haynes J for enforcement of the judgment would have done so. This would have shown that regardless of discussions, the respondents were serious about their claim.*
>
> *[39] The applicant ought to have treated the claim and its response to it with the same seriousness displayed by the respondents. The need on the part of the applicant to move with some degree of responsibility and alacrity in protecting itself against contempt proceedings would have become greater with the order of Sinclair-Haynes J, yet the applicant failed to approach the court to deal with the judgment that had been entered for almost two years. Simply put, no effort was made by the applicant to comply with any rules of court applicable to the case.* (emphasis mine)

The court ultimately found that the learned trial judge was correct in rejecting the applicant's explanation as a good one in all the circumstances of the case.

[29] This was the similar view of the court in **Morris** where Williams JA said:[4]

> *[48] Miss Campbell indicated that ongoing good-faith discussions pending settlement were the reason for the breach of the order to file the witness statements at the stipulated time. She asserted that, at all material times, the witness statements were ready to be filed and were eventually filed "approximately four (4) months before the date of hearing and thus the failure to file was remedied within a reasonable time". In an affidavit filed in response to Miss Campbell's, Miss Hall sought to deny that there were any such discussions. However, the records of the proceedings clearly indicate that the court was advised of the existence of discussions, and the matter was adjourned to facilitate the discussions. The parties were present when those orders were made. When the order was made for the filing of the witness statements, there was no indication that this was contingent on any further discussions.* ***The parties were obliged to comply with the orders of the court, and failure to do so was at their peril.***

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[4] [2023] JMCA Civ 45, paras 48-49

[30] The Defendants' failure to comply with the Court's Orders is particularly egregious given that the 1st Defendant, Mr. McDonald, is an Attorney-at-Law and an officer of the court. The Court would go so far as to say that his explanation is suspect, given the consistent adherence to the Orders by the Claimant's Attorneys, despite their involvement in settlement discussions. Certainly, as Counsel, a review of his position to focus solely on the settlement discussions should have been triggered. Counsel for the Defendants only sought to comply after the Claimant filed an application to strike out the 1st and 4th Defendants' defences on 15th October 2024. Edwards JA (Ag.) (as she then was) in **Jamaica Public Service Co Ltd v Francis (Charles Vernon) and anor** [2017] JMCA Civ 2 approved the following statement of Jamadar JA.[5]

> *[66] Faced with what would be the result of its failure as per the language of rule 29.11, it was incumbent on the appellant to comply with the orders or apply for an extension of time before the time expired when it found it had difficulties in complying or furnish the court with a good explanation for failing to comply. As stated by Jamadar JA in his judgment in the Court of Appeal of Trinidad and Tobago in* ***Attorney General v Universal Projects Limited*** *which was approved by the Board:*
>
> > *"A party cannot in the face of a court order pursue a course that it knows or reasonably anticipates will lead it foul of that order and then pray in aid relief from the sanctions of the order the circumstances that it was aware could lead to default. In such circumstances a party must act promptly to either comply with the court order or to secure further directions so as to avoid default. Thus the explanation given for failing to file a defence by the 13th March 2009 is not, in my opinion, a good explanation for the breach."*

[31] In all the circumstances, I find that there was no good explanation given by the defendants for the delay in complying with the Court's Order to file and serve witness statements.

[32] For completeness, I will state that none of the Case Management Orders had been complied with, although there was not an established record of failure by the Defendants

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[5] [2017] JMCA Civ 2, para 66

to comply with court Orders. However, since the criteria are cumulative, the Defendants have also failed to meet these threshold requirements. There is therefore no need to address the requirements of **CPR Rule 26.8(3).**

[33] It is appropriate to part from this discussion with the observations of Williams JA and Edwards JA (Ag.) (as she then was) from **Morris** that:[6]

> *80. The respondents, without more, will not be able to call a witness at the assessment of damages. This result is similar to one that was arrived at by this court in JPS v Francis, where Edwards JA (Ag) (as she then was) made an observation that is appropriate to this matter at para. [70]. She stated the following:*
>
> > *"The result is that the appellant will not be able to call a witness at the trial. Though this result may appear to be draconian, it is the rule and litigants will best give regard to it or suffer the consequences. It is no use to say that the appellant will be prejudiced if it is not able to call witnesses at the trial**. Inherent in the existence of rule 29.11 of the CPR is an acceptance that there will be prejudicial effect; nonetheless the rule still exists and attorneys and their clients must be mindful of it and the effect of non-compliance. As the Board stated in the case of The Attorney General v Universal Projects Limited** [[2011] UKPC 37], it serves the useful purpose of improving the efficiency of litigation." (Emphasis supplied)*

APPLICATION TO STRIKE OUT THE DEFENDANTS' DEFENCE

[34] Rule 26.3 (1)(a) of the CPR, empowers the court to strike out a statement of case for non-compliance with a rule, practice direction or an Order of the court. The case of **International Hotels Jamaica Ltd. V New Falmouth Resorts Ltd.** (unreported), Court of Appeal, Jamaica, Appeal No. SCCA 56 & 95/2003, judgment delivered 18 November 2005 **("International Hotels")** is instructive on how the Court should treat with the application.

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[6] [2023] JMCA Civ 45, para 80

[35] In **International Hotels**, McCalla JA (Ag) (as she then was) examined the relevant considerations to be had in determining applications for strike out for non-compliance and for relief from sanctions. The court was of the view that a judge's discretion to strike out a party's statement of case should be applied cautiously in situations where fairness can be preserved between the parties. This is so given that such an action ultimately concludes the party's case. In support of this view, P. Harrison J.A, writing in the same case, cited the English case of **Biguzzi v Rank Leisure PLC** [1999] 1 W.L.R. 1926 **("Biguzzi")**, which concerned the strike out of a case for non-compliance of time limits. In **Biguzzi**, the application to strike out the claim was grounded on the claimant's failure to give discovery on time, prepare trial bundles, set down the case for trial in accordance with a court order, and prepare a calculation of special damages. The claim was struck out at first instance, however, on appeal, the court found that as there was a breach of the rules on the part of both parties, there was nothing unfair in allowing the trial to proceed.

[36] P. Harrison J.A cited the dicta of Lord Woolf, M.R. in **Biguzzi** as follows:[7]

> *Under rule 3.4(2)(c) a judge has an unqualified discretion to strikeout 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. The advantage of the C.P.R. over the previous rules is that the court's powers are much broader than they were. 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. (Emphasis added)*
>
> *…*
>
> *There are alternative powers which the courts have which they can exercise to make it clear that the courts will not tolerate delays other than striking out cases. In a great many situations those other powers will be the appropriate ones to adopt because they produce a more just result. In considering whether a result is just, the courts are not confined to considering the relative positions of the parties. They have to take into account the effect of what has happened on the administration of justice*

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[7] (unreported), Court of Appeal, Jamaica, Appeal No. SCCA 56 & 95/2003, judgment delivered 18 November 2005, pgs 4-5

> *generally. That involves taking into account the effect of the court's ability to hear other cases if such defaults are allowed to occur. It will also involve taking into account the need for the courts to show by their conduct that they will not tolerate the parties not complying with dates for the reasons I have indicated."*

[37] The case of **Finnegan v Parkside Health Authority** [1998] 1 W.L.R. 411 **("Finnegan")** was also cited, an appeal against a refusal to allow a plaintiff to file a notice of appeal out of time, where it was observed that, *"the absence of a good reason for non-observance of the rules was not an inflexible and automatic consequence that a court should refuse the exercise of its discretion and that the court should also consider any prejudice involved."*

[38] The foregoing authorities highlight that in coming to a determination which is fatal to a party's claim, such as an Order for striking out or a refusal to grant an extension of time, the court should consider both the need to ensure compliance with its Orders and the goal of achieving justice between the parties.

[39] In **International Hotels**, the trial court had struck out the claimant's statement of case on the basis that the Order for disclosure made on May 19, 2003, had not been adhered to. However, the Court of Appeal determined that the judge had erred in striking out the statement of case without considering the particular circumstances of the case. This finding of the court was on the basis that the documents in question were not within the possession of the appellant, and that the appellant's request for an extension of time submitted on July 21, 2023, was made promptly. Further, there was no evidence indicating that the appellant had failed to comply with any other pertinent rules and directives of the court. Also, given that the appellant's attorney-at-law had submitted that he was ready to proceed with trial, the judge ought to have considered the possibility of the trial proceeding.

[40] The more recent case of **Branch Developments Limited T/A Iberostar Rose Hall Beach Hotel v The Bank of Nova Scotia Jamaica Limited** [2014] JMSC Civ 003 **("Branch Developments")**, gives a more nuanced view of the courts approach in an era where efficient utilization of the court's resources are being prioritized. This was a case

concerning sanctions imposed as a result of a failure to comply with an Order of the court. McDonald-Bishop, J (as she then was) cited with agreement the case of **Barbados Rediffusion Service Ltd v Mirchandani** (No 2) [2006] CCJ 1 (AJ), 69 WIR 52, a Barbadian case concerning the approach to be taken in considering whether to strike a statement of case, and distilled the following principles:[8]

> *(1) Broadly speaking, strike-out orders should be made either when that is necessary in order to achieve fairness or when it is necessary in order to maintain respect for the authority of the court's orders. In this context 'fairness' means fairness not only to the non-offending party but also to other litigants who are competing for the finite resources of the court.*
>
> *(2) If there is a real risk that a fair trial may not be possible as a result of one party's failure to comply with an order of the court, that is a situation which calls for an order striking out that party's case and giving judgment against him. One way in which such a situation may come about is if crucial documents, which are not disclosed within the time prescribed by an order for discovery, are subsequently lost or destroyed, albeit without fault on the part of the non-disclosing party. Another is where a party has been so fraudulent in relation to the discovery process, for example by forging or deliberately suppressing documents and lying about it, that it is impossible to place any reliance on what he has disclosed as being either authentic or complete, without a long and expensive inquiry.*
>
> *(3) With regard to the use of strike-out orders as a response to disobedience of court orders, the view of Millett J expressed in the Logicrose case (1988) The Times (London), 5 March, that such disobedience can never justify the making of a strike-out order is not accepted. The view that is preferred is that expressed by Arden LJ in the Stolzenberg case (unreported) that the fact that a fair trial is still possible does not preclude a court from making a strike-out order.*
>
> *(4) It is accepted with some qualifications the principle expounded and applied in cases such as Tolley v Morris [1979] 2 All ER 561, Hytec Information Systems Ltd v Coventry City Council [1997] 1 WLR 1666 and Re Jokai Tea Holdings Ltd [1993] 1 All ER 630, that defiant and persistent refusal to comply with an order of the court, can justify the making of a strike-out order.*
>
> *(5) While the general purpose of a strike- out order in such circumstances may be described as punitive, it is to be seen not as retribution for some offence but as a necessary and to some extent symbolic response to a*

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[8] [2014] JMSC Civ, para 34

> *challenge to the court's authority, in circumstances in which failure to make such a response might encourage others to disobey court orders and tend to undermine the rule of law. This is the type of disobedience that may properly be categorised as contumelious or contumacious.*
>
> *(6) What is required is a balancing exercise in which account is taken of all the relevant facts and circumstances of the case. For one thing, it must be recognised that, even within the range of conduct that may be described as contumelious, there are different degrees of defiance which cannot be assessed without examining the reason for the non-compliance.*
>
> *(7) The fact that what has been breached is an 'unless' order has a special significance, as such an order is framed in peremptory terms which makes it clear to the party to whom it is directed, that he is being given a last chance.*
>
> *(8) The previous conduct of the defaulting party will obviously be relevant, especially if it discloses a pattern of defiance. It is also relevant whether the non-compliance with the order was total or partial.*
>
> *(9) Normally it will not assist the party in default to show that the noncompliance was due to the fault of his lawyer since the consequences of the lawyer's acts or omissions are as a rule visited on his client. There may be an exception made, however, when the other party has suffered no prejudice as a result of the non-compliance.*
>
> *(10) Other factors which, depending on the context, have been held to be relevant include such matters as whether the party at fault is suing or being sued in a representative capacity and whether, having regard to the nature of the relief sought or to the issues raised on the pleadings, a default judgment can be regarded as a satisfactory and final resolution of the matters in dispute.*
>
> *(11) Regard may have to be paid to the impact of the judgment not only on the party in default, but on other persons who may be affected by it.*

This authority underscores the principles articulated by the court in **Biguzzi** and **International Hotels**, which stipulate that when evaluating an application for strike out due to non-compliance, the court is required to undertake a balancing exercise between achieving fairness between the parties and jealously safeguarding the authority of the court.

[41] In **Branch Developments**, the defendant sought to strike out the claimant's statement of case on the grounds of non-compliance with Orders for specific disclosure and the filing of witness statements. The court found that there had been no compliance

concerning the specific disclosure. However, after considering the relevance of the documents in question, the breach by the claimant was deemed not to have materially affected the fairness of the trial. Nonetheless, McDonald-Bishop J. noted that while the fairness of the trial remained achievable, it was not a determinative factor in deciding whether the claim should be struck out. This was merely one of several considerations to be taken into account in reaching a sound judgment. Regarding the witness statements, the court found no instance of non-compliance with the filing requirements.

[42] Ultimately, the court concluded that, in relation to the failure to comply with specific disclosure, the defendant had not suffered substantial prejudice, as the documents in question were not demonstrated to be relevant to the proceedings. The judge further noted that the delay in compliance did not significantly affect the progress of the matter. While acknowledging that the adjournment would cause some degree of prejudice to the litigants and others awaiting their cases, McDonald-Bishop J. observed that although the claimant had a history of delays, there was no evidence of an inordinate delay that could amount to an abuse of process. In carrying out her balancing exercise to determine whether the statement of case should be struck out, McDonald-Bishop J. stated:[9]

> *I do believe that cases must, of course, be dealt with expeditiously but they must also be dealt with fairly. I have to balance the right of the defendant to have its matter resolved in a timely manner but I also have to allow the claimant to exercise the right to have its case determined on the merits and not be driven from the judgment seat without a fair and reasonable opportunity afforded it to do so. To strike out the claim on the mere basis of the time it is taking to be disposed of would not be just when the delay is not solely or substantially attributable to the claimant and there is no substantial, inordinate or inexcusable delay in the claimants' conduct of the proceedings for the period under consideration on this application.*

[43] In light of this finding, McDonald-Bishop J. declined to grant the application to strike out the claim, yet acknowledged the necessity of imposing a sanction to underscore that non-compliance with court Orders would not be tolerated. She thus opted to impose

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[9] Ibid., para 168

alternative sanctions. While the claimant's application to strike out the defendant's statement of case was unsuccessful, McDonald-Bishop J. ruled that the claimant should bear the costs of the application, which was instigated by its own breaches of the court's Order. Further, the claimant, having not been ready to proceed even if the defendant was ready to proceed, was substantially responsible for the loss of the trial date. Consequently, the claimant was further ordered to pay the costs associated with the adjourned trial. In addition, the court granted interest on the costs of the application, from the date of the application to the date of the judgment, and from the judgment date to the date of payment. McDonald-Bishop J. expressed the hope that these measures would serve to reinforce the principle that the court would not tolerate the disregard of its Orders. The decision of McDonald-Bishop J. in **Branch Developments** aids to remind the Court that the striking out a party's statement of case is a measure of last resort.

[44] In the case at bar, the Claimant sought to strike out the defence of the Defendants' in both claims, on the premise that the Defendants had in both claims failed to comply with CMC Orders dated 20th November 2023.

[45] In respect of delay and prejudice, Counsel for the Defendants indicated that the 1st and 4th Defendants are now in compliance with the CMC Orders in advance of the pre-trial review, and have also applied for an extension of time and for relief from sanctions.

[46] It is important to note that unlike the circumstances in **Branch** Developments, where only the order for specific disclosure was not complied with, the 1st and 4th Defendants in this case had not, at the time the applications were made, complied with **any** of the CMC Orders dated 20th November 2024. Furthermore, in **Branch Developments**, McDonald-Bishop J. had found that the order for specific disclosure contained documents which were not material to the claim, and consequently, the parties would not have suffered substantial prejudice. In the present case, all documents relevant to the claim had not be disclosed or proffered up to the time of the application to strike out.

[47] Standard disclosure was not complied with, therefore all material documents would not have been disclosed to the parties until November 20, 2024, 9 months & 20 days after the date for compliance. As well as the inspection of said documents were not made possible until November 21, 2024, 9 months & 7 days after date for compliance. Additionally, the Witness Statements of the Defendants was not filed or exchanged until November 20, 2024, 7 months & 30 days after date for compliance. The Court considers the periods of delay mentioned above to be significant. What has brought these periods of delay into the realm of being inordinate is when the date in which the Defendants sought to comply with the CMC Orders is viewed against the date set for trial on February 3, 2025. Against this background it would mean that the Claimant has approximately only 50 days, excluding weekends and intervening holidays, to adequately prepare its case, given that the Defendants have only recently provided the evidence and documents it intends to rely on at trial. In light of this, I am of the view that the Claimant would be prejudiced in the preparation of her case due to the delay in compliance with the CMC Orders only recently receiving disclosure.

[48] Counsel for the Defendant also averred that any prejudice occasioned by the delay would be ameliorated by the fact that most of the evidence that the Defendants intended to rely on, as well as a vast amount of documents, contained in the List of Documents, was disclosed in July or August 2024 in the 1st Defendant's affidavit in response to the disciplinary proceedings brought by the Claimant against the 1st Defendant.

[49] The Court accepts that the evidence from the disciplinary proceedings could give insight into the evidence to be relied upon at trial. However, the main issue is that there is no certainty that the relevant disclosure for the disciplinary proceedings would be the same for these claims. The Defendant could have omitted to proffer documents in the disciplinary proceedings which he may now find relevant for the claim. Likewise, he may opt to exclude documents which he used during the disciplinary proceedings and does not wish to rely on in the claim. This could impede the Claimant's preparation of her case, and also impede her response to the Summary Judgment application brought pursuant to the **Companies Act**, that the Court is not empowered to grant relief under **S.213a of**

the Act in respect of companies incorporated outside the jurisdiction of Jamaica such as the 4th Defendant. However, there is no evidence from the Claimant addressing these areas.

[50] Even though it was suggested by Counsel for the Claimant that the trial date in February 2025 could not be met, there was no evidence in this regard. There also has been no suggestion that the Defendants' case is without merit. The Defendants had at the date of hearing the applications complied with all the Case Management Orders. Since there was no sanction imposed for failure to comply with the Case Management Orders, save that imposed by the **CPR** for the failure to serve witness statements, striking out the Defendant's defences would in all the circumstances be draconian.

[51] The Applications to Strike Out Defences must also be considered in light of the fact that the Defendants have not been granted relief from sanction. They will not therefore be in a position to give any evidence in support of their statement of case. The question of whether striking out the defences would amount to a double sanction was addressed in **Attorney General (The) v Brown (Abigail) (BNF Affia Scott) [2021]** JMCA Civ 50. The discussion by Brown JA (Ag.) (as he then was) is instructive. He stated:[10]

> *[114] The matter in contention is whether the court should have struck out the appellant's claim where a sanction was already provided by the CPR. The respondent submitted that the court had the discretion to do so.*
>
> *…*
>
> *[118] By way of commentary, I do not agree with Ms Minto that Garbage Disposal is not to be regarded as a binding authority. This case was decided in this courtand it made pronouncements on the issue of double sanction, the proposition that it is brief has no bearing on the guidance that it offers. F Williams JA, in delivering the judgment of the court, found that where there is a sanction provided by the rules in relation to rule 29.11 then an order striking out can be deemed to be a double sanction and I accept and agree with his reasoning. F Williams JA at para. [49] of Garbage Disposal opined that:*

[10] JMCA Civ 50, paras 114 & 118

> *"Rule 29.11(1) therefore imposes a sanction for the failure to serve the witness statement in the time limited to do so and this sanction takes effect unless relief from sanction is granted by the court. As such, striking out in those circumstances would not only be inappropriate; but, in my view, would operate as a second or double sanction."*

[52] The Court is not minded in all the circumstances to exercise its discretion to grant the Claimant's Applications to Strike Out the Defendants' Defence. However, the Defendants were dilatory and they were only moved to comply with the Court's Orders by these applications of the Claimant. This calls for some sanction for their non-compliance. Again, the observations by McDonald Bishop J in **Branch Developments** are apropos. She stated:[11]

> *While the claimant might not have succeeded in obtaining an order striking out the claim it has not failed to establish a case that warrants a sanction for the non-compliance. Having considered the various options available as alternate sanctions, I find that a costs order could serve the ends of justice in this case for the non-compliance. Up to the time, the defendant filed its application, the claimant had not complied with the order for specific disclosure. The attempt at compliance was feverishly undertaken after the defendant had filed its application. The defendant had every right to pursue its application to strike out, that is to say, it was not unreasonable to do so. The defendant has always been compliant.*
>
> *[180] Having taken into account the principles governing the question of costs as prescribed in.Parts 64 and 65 of the CPR, I would order that the claimant do pay the costs of the application. It would be unjust to ask the defendant to pay the costs of the application which has been prompted by the claimant's breaches of the orders of the court and on which the defendant has succeed in part.*
>
> *[181] I also find that had the claimant complied properly as it should have done and in the timely manner required by the rules and orders of the court, the defendant would not have had to pursue its application to completion. The opportunity was given to it to do so when the claimant was unable to meet the trial because of the unavailability of its main witnesses. The claimant was not ready to proceed, even if the defendant had been ready. The adjournment, directly and/or indirectly is attributable to the claimant because if it had complied properly with the pre-trial review orders, there would have been no need for the defendant to have filed an application to strike out which had to be heard. The claimant is, substantially, if not wholly,*

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[11] [2014] JMSC Civ 003, paras, 179-181

> *responsible for the loss of the trial date. Having considered all the circumstances, I conclude that the claimant should also bear the costs of the adjourned trial.*

[53] In light of this, I find that an award of Costs against the Defendants is appropriate in these circumstances.

ORDERS

1. The Defendants are refused relief from sanctions for failing to file and serve witness statements by March 21, 2024.
2. Permission is refused to the Defendants to call Malcolm McDonald, Winston Audley Byfield and Christian Tavares-Finson as witnesses at the trial of these claims.
3. The Defendants are granted an extension of time to November 21, 2024 to comply with the Orders for Standard Disclosure, Inspection of Documents and Filing and Exchanging Pre-Trial Memoranda.
4. The Claimant's Notice of Application filed October 15, 2024 to strike out the Defendant's defence filed January 27, 2023 is refused.
5. Costs of the applications to be the Claimant's to be taxed if not sooner agreed.
6. Application for Leave to Appeal refused.
7. Claimant's Attorney-at-Law to prepare, file and serve Orders.

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Judge