[2020] JMSC Civ 115

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISON

CLAIM NO. 2012HCV06573

BETWEEN	**WINSTON CHIN**	**CLAIMANT**
AND	**CAN-CARA DEVELOPMENT LIMITED**	**1ST DEFENDANT**
AND	**CAN-CARA ENVIRONMENT LIMITED**	**2ND DEFENDANT**
AND	**THE MINISTER OF TRANSPORT WORKS AND HOUSING**	**3rd DEFENDANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**4TH DEFENDANT**

IN CHAMBERS

Mr. Nigel Jones and Mrs. Olesya Ammar instructed by Nigel Jones & Co for the Applicants/1st and 2nd Defendant

Mrs. M. Georgia Gibson Henlin Q.C. & Ms. Stephanie Williams instructed Henlin Gibson Henlin for the Respondent/Claimant

Mr. Carson Hamilton instructed by the Director of state Proceedings for the 3rd and 4th Defendants

APPEAL- Extension of time to apply for leave to appeal- Permission for leave to appeal- section 11(1)(f) Judicature (Appellate Jurisdiction) Act- Court of Appeal Rule 1.8-Relief from sanctions- Failure to comply with court orders- Civil Procedure Rules 26.3(1) & 26.7(1) & (2) & 26.8

HEARD: March 10, 2020 & June 12, 2020

WOLFE-RECCE, J

Introduction

[1] The Applicants/ 1st & 2nd Defendants seek to move this Court for an extension of time within which to make an application for leave to appeal and to apply for leave to appeal the orders made on 13th day of December 2018 by Thomas, J (Ag) (as she then was).

[2] The orders made against the Applicants are inter alia, that the statement of case of the 1st and 2nd Defendants (hereinafter called 'the applicants') be struck out and that judgment be entered against them.

Background

[3] The Claimant, Mr. Winston Chin, is the registered proprietor of Lot 502 White Water Meadows, Spanish Town in the parish of St. Catherine being all that parcel of land comprised in Certificate of Title registered at Volume 1332 Folio 790. The Claimant filed a claim against the four (4) Defendants on the 27th November, 2012 seeking damages and an injunction for nuisance, breach of contract and breach of section 13(3)(1) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 arising out of what he described as the unrestricted discharge of untreated sewage on the said property.

[4] The 1st Defendant is the developer of lands known as White Water Meadows which is owned by the 3rd Defendant and formerly comprised in Certificate of Title registered at Volume 353 Folio 42 of the Register Book of Titles. The 2nd Defendant was at all material times responsible for providing sewage services to the development in general and in particular the aforementioned premises owned by Mr. Chin. The 3rd Defendant who being an agent and/or servant of the crown was responsible for administering the housing development. The 3rd and 4th Defendants were joined as parties to the claim by virtue of the Housing Act and the Crown Proceedings Act.

[5] The chronological progression of this claim before the court is important in resolving the issues for determination in this matter. The claim was set for trial from the 3rd to the 14th of December, 2018 at the Case Management Conference held on the 8th July, 2016. On the 6th March, 2017 the matter came on for a further Case Management Conference before Master Miss Y. Brown (as she then was), who made the following orders:

> *(1) Standard Disclosure on or before January 31, 2018;*
>
> *(2) Inspection of Documents on or before February 16, 2018;*
>
> *(3) Witness limited to three (3) ordinary for each party;*
>
> *(4) Witness Statements to be filed and exchanged on or before June 22, 2018;*
>
> *(5) Listing Questionnaire to be filed on or before September 5, 2018;*
>
> *(6) Pre-trial Memorandum to be filed on or before September 5, 2018;*
>
> *(7) Issues of expert evidence is reserved for Pre-Trial Review*
>
> *(8) Costs to be costs in the Claim;*
>
> *(9) The Claimant's Attorneys-at-law to prepare file and serve order herein.*

[6] The Defendants failed to fully comply with the orders of Master Brown. The Claimant filed an application seeking that the defence of the 1st, 2nd and 3rd Defendants be struck out or in the alternative that an unless order be imposed for the Defendants' statements of case to be struck out should they fail to comply with the order of Master Y. Brown by the 19th September, 2018. At the Pre-Trial Review on the 19th September, 2018 the claimants' application was heard by Jackson-Haisley, J at which time the learned Judge made the following orders:

> *1. That time within which the 1st, 2nd, 3rd and 4th Defendants are required to comply with all Case Management Orders made on March 6, 2017 is extended to September 28, 2018;*

2. *Unless the 1st, 2nd, 3rd and 4th Defendants comply with order 1 above then their respective case stand as struck out;*

3. *Parties are to file written submissions on or before November 17, 2018;*

4. *Claimant's Attorney-at-law to file Joint Bundles on or before November 19, 2018;*

5. *Costs to be costs in the Claim;*

6. *The Claimant's Attorney-at-Law to prepare file and serve order.*

[7] Up to the date when judgment was entered against the applicants, they were represented by counsel Mr. Anthony Pearson who was present on each date the matter came up before the court, including the aforementioned Pre-Trial Review Hearing. Mr. Joseph Lincoln was also present as the representative of the 1st and 2nd Defendant.

[8] The applicants failed to comply with the unless order made by Jackson-Haisley J. in line with the learned Judges' order of 19th September 2018. The 1st and 2nd Defendants case stood struck out. On the 5th November, 2018 the Claimant filed an application for Judgment against the Applicants on the basis that that their failure to comply resulted in their statement of case being stuck out and therefore the Claimant was entitled to judgment against them.

[9] On the 3rd December, 2018, which was the date set for the commencement of the trial, the Court adjourned the matter due to the applicants' failure to comply with the unless order or at the very least file an application for relief from sanctions. On the 4th December, 2018, Mr. Pearson filed an application seeking relief from sanctions citing in his affidavit that failure to comply with the unless order was due to him being robbed in his home at gunpoint and being badly beaten by the assailants. He argued that the situation left him with post-traumatic stress disorder which prevented him from meeting the deadline stipulated in the order of Jackson-Haisley, J.

[10] The application for relief from sanctions was heard on the 6th December, 2018 before A Thomas (Ag), (as she then was), who favourably considered the application of the applicants and ordered that the 1st and 2nd Defendants were granted relief from sanctions and their statements of case restored. The order also stipulated that all witness statements and standard disclosure were to be filed and served by 4 p.m. on the 6th December, 2018.

[11] The applicants failed to comply with the order of the Learned Judge and instead filed the witness statements and the list of documents on the 7th December, 2018. This prompted the Claimant to file yet another application on the 7th December, 2018 for the applicants' statements of case to be struck out for failure to comply with order of the court. The application was heard on the 10th December, 2018 when A Thomas J (Ag) struck out the applicants' statements of case for failure to comply with the orders of the court. On the 13th day of December, 2018 the learned judge ordered inter alia, as follows:

> *(1) The statements of case of the 1st and 2nd Defendants are struck out.*
>
> *(2) Judgment is entered against the 1st and 2nd Defendants.*
>
> *(3.) -(12.) ……..*

[12] No further action was taken by the applicants in the matter since the order was made on the 13th December, 2018, until the 9th May, 2019 when the Applicants filed Notice of Application for Court Orders, (which is presently before the Court for consideration), seeking the following orders

> 1. *The time within which to file an application for permission to appeal be extended;*
>
> 2. *The 1st and 2nd Defendants/Applicants be granted permission to appeal the decision of the Honourable Ms. Justice A. Thomas (Ag.) made on the 13th day of December, 2018;*
>
> 3. *An Order that there be a stay of execution pending the hearing of the appeal from the said Order;*

4. *An order that there be a stay of proceedings pending the hearing of the appeal for the said Order;*

5. *Costs to be costs in the Claim; and*

6. *Such further and other relief as this Honourable Court may deem.*

Applicant's Submissions

[13] Counsel, Mr. Nigel Jones, submitted that the delay in bringing the application for leave to appeal the order of Thomas, J was not due to any deliberate act on the part of the applicants. Rather, Counsel attributed the failure to file the application for leave to appeal within the specified time to their own inability to obtain the file from the previous attorney-at-law, who not only failed to turn over the file but also failed to instruct the Nigel Jones & Co on whether any steps were taken in relation to the matter since the order was made on December 13, 2018.

[14] Counsel submitted that the applicants have a realistic chance of success on the appeal on the following grounds:

1. *That the learned judge erred in striking out the statements of case of the 1st and 2nd Defendants on the 13th December, 2018 by failing to recognize the difficulties that the Attorney-at-law experienced due to the traumatic experience of being robbed at gun point and its consequences.*

2. *That the learned judge erred by not having regard to the overriding objective of dealing with cases justly by striking out the statements of the case of the 1st and 2nd Defendants.*

3. *That the learned Judge failed to consider the relevant legal principles in relation striking out the statements of case of the 1st and 2nd Defendants.*

[15] Counsel advanced several cases in arguing that the learned judge erred in the exercise of her discretion when she refused to grant relief from sanctions. I have taken into account all cases advanced by counsel but will highlight only a few. Counsel relied on the case of **Branch Developments Limited t/a Iberostar Rose Hall Beach Hotel v The Bank of Nova Scotia Jamaica Limited** JMSC [2014] Civ

003 where McDonald-Bishop J explored the issue of whether non-compliance when viewed against the background of previous non-compliance with case management orders, warrants the ultimate sanction of striking out of a party's statement of case. Counsel relied on the case for the point that previous acts of noncompliance is not an ultimate bar for relief from sanctions. Counsel noted that in that case, despite the repeated failure on the part of the Claimant to comply with orders of the court, McDonald-Bishop J refused to impose an order striking out the Claimant's statement of case after looking at the cumulative effect of the breach and finding that the 'the punishment should fit the crime.'

[16] Counsel also cited several cases to express the point that the striking out of a party's case is an extreme measure which should be used with caution. Mr. Jones submitted that striking out of a litigants' statement of case should be a last resort. He relied on the **Business Ventures & Solutions Inc. & Anthony Dennis Tharpe v. Capital One NA** [2012] JMCA Civ 49, which referenced the principle expressed by Lord Woolf MR in the case of **Biguzzi v Rank Leisure Plc** [1999] 4 All ER 934 at page 940c as follows:

> *"Under r 3.4(2)(c) 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. The advantage of the CPR 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."*

[17] Further to that Counsel also asked the Court to consider granting a stay of execution pending the hearing of the appeal. Counsel relied on the case of **Desmond Robinson and the Attorney General of Jamaica v Brenton Henry and others** [2011] JMCA App 21 to advance the point that the applicants satisfied the twofold test in showing that there is some prospect of success on appeal and that without a stay the companies would be ruined.

Defendant's submissions

[18] Queens Counsel Mrs. Gibson Henlin relied on the affidavit of Mr. Winston Chin filed on the 10th June, 2019 in response to the affidavit of Ms. Moore in support of the Applicant's Notice of Application for Court Orders. Mr. Chin outlined that the claim was filed since 2012. He noted that since that time he has taken time from his job in Antigua to fly to Jamaica on two occasions for the trial of the matter both of which were postponed because of the conduct of the applicants in failing to comply with the relevant court orders.

[19] Mr. Chin sought to highlight the history of noncompliance. According to Mr. Chin, the applicants failed to comply with the further case management orders made on the 6th March, 2017. He argued that this breach lasted for nine (9) months up to the date of the Pre-trial Review on the 19th September, 2018.

[20] Mr. Chin noted that as a result of the failure to comply with the orders of the court, Jackson-Haisley, J who presided over the Pre-Trial Review imposed an unless order in the presence of the applicants' attorney-at-law and the companies' representative, Mr. Lincoln. According to Mr. Chin, despite being present at the hearing the applicants failed to comply with the order of the court within the stipulated time. Instead, Mr. Pearson contacted counsel for the claimant on the 28th September, 2018, which was the date stipulated for compliance, advising counsel that he would not be able to comply with the unless order as he was robbed at gunpoint in his home on the 21st September, 2018. Mr. Pearson advised the claimant's attorneys-at-law that he would be able to comply by the 1st October, 2018.

[21] Mr. Chin noted that the applicants did not comply with the order at the time stipulated in the order nor by 1st of October, 2018 as proposed by Mr. Pearson. He further stated that he was advised by his attorney that the applicants conveyed no further information as to difficulties being faced by them in complying with the

order. This resulted in his attorney-at-law filing an application for judgment after striking out on the 5th November, 2018.

[22] According to Mr. Chin the applicants waited until the date slated for the trial to make an application for relief from sanctions, as a result, the matter was adjourned to the 6th December, 2018 for the application to be heard by Thomas, J (Ag) who granted relief from sanctions and who required that the witness statements and standard disclosure be served on the same day by 4 p.m. Mr. Chin argued that the relief was made in that manner because Mr. Pearson had indicated that the documents were prepared and that he was in a position to comply on the same day and also because the trial was set to be resumed on the 10th December, 2018.

[23] It was further argued that the applicants perpetuated the pattern of non-compliance by filing the witness statement and list of documents, which revealed no document, on the 7th December, 2018 instead of the 6th December, 2018 as stipulated by the court.

[24] Mr. Chin's evidence is that the reason advanced by Mr. Pearson for his failure to file the documents on the 6th December, 2018 is that he had to travel to Mr. Lincoln's home in Stony Hill for him to sign the documents. He asserts that it was against this background that the learned Judge refused to grant any further relief from sanctions by noting that due to the seriousness of the matter and the fact that the applicants were given a second chance they should have taken the necessary steps to ensure that they complied with the orders of the court.

[25] The Respondent/Claimant has advanced the point that the Applicants have no realistic prospect of success on this appeal as they have been given several opportunities to regularize their conduct but have failed to do so. Queens Counsel submitted that the breaches cannot be considered to be miniscule as the breach has been continuous and has even resulted in trial dates being missed. Mr. Chin indicated that he is eager to have the matter resolved as he is prejudiced by the

delay and has been suffering as a result of state of affairs caused by the applicants for the past 15 years.

Discussion & Analysis

Whether the Court should grant permission to appeal the decision of the Honourable Ms. Justice Thomas (Ag) made on the 13th day of December, 2018 striking out the applicants' statements of case for failure to comply with the order of the court

[26] Section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act (JAFA) and Court of Appeal Rule (CAR) 1.8 outlines the procedure to be followed in bringing an application for permission to appeal. Section 11(1)(f) of JAFA provides as follows:

> *- No appeal shall lie-*
>
> > *(f) without the leave of the Judge or of the Court of Appeal from any interlocutory judgment or any interlocutory order given or made by a Judge except-*

[27] Section 11(1)(f) JAFA stipulates that leave is required from any interlocutory judgment or interlocutory order given or made by a judge except in specific circumstances. Given that the matter before the court does not fall within any of the specified exceptions, I must determine whether the order was an interlocutory one. The Court of Appeal decision of **Garbage Disposal & Sanitations Systems Ltd v Noel Green et al** [2017] JMCA App 2 is instructive on how to distinguish between an interlocutory order and a final one. At paragraph 31 of the judgment, F. Williams JA expressed as follows:

> *"In **John Ledgister and Others v Bank of Nova Scotia Jamaica Limited** [2014] JMCA App 1, for example, Brooks JA considered what would constitute an interlocutory order as distinct from a final one. In so doing, at paragraph [9] of the judgment, he quoted the dictum of Lord Esher MR, in **Salaman v Warner and Others** [1891] 1 QB 734, at page 735, where Lord Esher expounded on the "application test" which has been accepted as the*

proper test to be used to distinguish between interlocutory and final orders:

> *"The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally disposes of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory." (Per Lord Esher MR)"*

[28] Based on the foregoing, it is clear that the order, which forms the subject matter of this application, is an interlocutory order, in that, the order of the learned judge in striking out the applicants' case brought the issue of liability to an end therefore leading to an assessment of damages. However, if the Judge had granted the relief, the matter would have been allowed to go on to be tried on the merits of the case. It therefore means that in keeping with section 11(1)(f) JAFA leave to appeal is required.

[29] CAR 1.8 provides, inter alia, that a party desirous of obtaining leave must make the application for leave within 14 days from the date of the judgment or order. Part 1.8 of the CAR further provides that leave will only be granted if the court considers that there is a real chance of success. The relevant rules provide as follows:

> *Court of Appeal Rules 1.8(1), 1.8(2) and 1.8(9)*
>
> > *(1) Where an appeal may be made only with the permission of the court below or the court, a party wishing to appeal must apply for permission within 14 days of the order against which permission to appeal is sought.*
> >
> > *(2) Where the application for permission may be made to either court, the application must first be made to the court below.*
> >
> > *(9) The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success.*

[30] The facts of the case reveal that the application for leave to appeal was made out of time, however, the case of **Evanscourt Estate Company Limited v National Commercial Bank** (unreported) Court of Appeal, Jamaica Appeal No SCCA 109/2007, judgment delivered on 26th September 2008, provides useful guidance on the approach to be taken by the court in handling matters of this nature. At page 9 of the judgment Smith JA expressed the point that "*if permission to appeal ought not properly to be given, it would be futile to enlarge the time within which to apply for leave."* It is therefore prudent to start by considering whether the applicant has a real chance of success as required by Court of Appeal Rules (CAR) 1.8(9).

[31] The examination of the phrase 'real chance of success' has been considered in numerous cases. It is now trite law that the term 'real chance of success' means a realistic prospect of success as opposed to a fanciful chance of success in the appeal. Lord Woolf MR defined the term 'real prospect of succeeding' in the case of **Swain v Hillman** [2001] 1All ER when he expressed as follows:

> *"The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or, as Mr Bidder QC submits, they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."*

[32] The term real chance of success was also discussed at pages 9-10 of the decision *of* ***Evanscourt and others v National Commercial Bank and ors***, (supra), where Smith JA explored the decision of **Swain v Hillman,** (supra) and its application in our courts, His Lordship found that the following principles are to be extracted the authorities:

> *"Generally, leave will be given unless an appeal would have no realistic prospect of success. A fanciful prospect is not sufficient.*
>
> *Leave may also be given in exceptional circumstances, even though the case has no real prospect of success, if there is an issue which, in the public interest, should be examined by the Court of Appeal."*

[33] The Applicants argued that they have a realistic prospect of success in the appeal by raising what they consider to be several errors on the part of the learned judge

in striking out the applicants' statement of case for failure to comply with court orders. Counsel for the Applicants argued that the learned judge erred by failing to recognize the difficulties that the Applicants' previous attorney-at-law experienced due to his experience of being robbed at gun point. It was Counsel's further contention that in striking out the applicants' case, the Learned Judge failed to consider the overriding objective of dealing with cases justly and that she failed to take into account the relevant legal principles in relation to striking out of a party's statement of case.

[34] The Claimant rebuffs the argument that applicants have a realistic prospect of success in the appeal and instead argued that leave should not be granted as there was a pattern of non-compliance and the applicants were given numerous opportunities to regularize their acts of non-compliance.

[35] It is not the duty of this court on hearing this application to determine whether the learned judge erred in the exercise of her discretion as this falls within the function of the Court of Appeal on hearing the appeal. The role of the court is solely to determine whether the applicants have a realistic chance of success. In determining whether the applicants have a realistic chance of success, it is important to assess the nature of the breach and the complete circumstances which flowed therefrom.

[36] It is agreed between the parties that the applicants were in constant breach of the orders of the court, ranging from the breach of case management orders to the breach of an unless order therefore rendering them susceptible to having their statement of case struck out under Civil Procedure Rules 26.3(1) and 26.7(1) & (2).

[37] Civil Procedure Rule 26.3(1) gives the court a wide discretion to strike out a party's statement of case or a part thereof for failure to comply with a rule, an order or direction of the court, the rule provides as follows:

> *In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court - (a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings.*

[38] Civil Procedure Rules 26.7(1) and 26.7(2) deals with breaches of what is termed as an unless order. The relevant rules state that:

> *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 other, 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."*

[39] An unless order has been described by the Courts as "*an order of last resort" see* **Hytec Information Systems Ltd. v. Coventry City Council** [1997] 1 WLR 1666. Sykes J (as he then was) discussed the unique nature of unless orders at paragraph 26 of the judgment of **Elenard Reid and Shanti Abdalla v Nancy Pinchas et al** (unreported) Supreme Court, Jamaica Claim No C.L. 2002/R031, judgment delivered 27th February 2009 when he expressed that *"unless orders are treated quite differently from other orders. It indicates that time is running out for the erring litigant and he really needs to do what is required of him by the order."*

[40] The case of **Hytec Information Systems Ltd. v. Coventry City Council**, (supra) highlights seven important observations relating to unless orders which must be considered and addressed in determining this matter before this court. The following points were expressed by the court at page 1674:

> *"(1) An unless order is an order of last resort. It is not made unless there is a history of failure to comply with other orders. It is the party's last chance to put his case in order. (2) Because that was his last chance, a failure to comply will ordinarily result in the sanction being imposed. (3)* ***This sanction is a necessary forensic weapon which the broader interests of the administration of justice require to be deployed unless the most compelling reason is advanced to exempt his failure.*** *(4) It seems axiomatic that if a party intentionally or deliberately (if the synonym is preferred) flouts the order then he can expect no mercy. (5) A sufficient*

exoneration will almost inevitably require that he satisfies the court that something beyond his control has caused his failure to comply with the order. (6) The judge exercises his judicial discretion in deciding whether or not to excuse. A discretion judicially exercised on the facts and circumstances of each case on its own merits depends on the circumstances of that case; at the core is service to justice. (7) The interests of justice require that justice be shown to the injured party for the procedural inefficiencies caused by the twin scourges of delay and wasted costs. The public interest in the administration of justice to contain those two blights upon it also weighs very heavily. Any injustice to the defaulting party, though never to be ignored, comes a long way behind the other two."

[41] Another distinguishing feature of an unless was discussed in the case of **George Freckleton v Aston East** [2013] JMCA Civ 39 where the court pointed out that an unless order takes effect automatically without need for further reference to the Court once the party against whom the order was slated to take effect fails to comply. Morrison JA expressed the point that in such situations the appropriate course of action is for the party to seek relief under Civil Procedure Rule 26.8, which provides as follows:

(1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –

(1) made promptly; and

(2) supported by evidence on affidavit

(2) The court may grant relief only if it is satisfied that –

(1) the failure to comply was not intentional;

(2) there is a good explanation for the failure; and

(3) 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 –

(1) the interests of the administration of justice;

(2) whether the failure to comply was due to the party or that party's attorney-at-Law;

(3) whether the failure to comply has been or can be remedied within a reasonable time;

> *(4) whether the trial date or any likely trial date can still be met if relief is granted; and*
>
> *(5) 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.*

[42] In applying the law to the facts of this case, it is clear that upon the applicants' failure to comply with the unless order made by Jackson-Haisley, J their statement of case was automatically struck out on the 29th September, 2018 with no need for any further reference to be made to the Court. It is important to note that the subject matter of this application is not in relation to the exercise of learned judge's discretion in relation to granting relief for breach of the unless order of Jackson-Haisley J. The record reveals that when Mr. Pearson's application for relief from sanctions was heard on the 6th December, 2018, the learned judge exercised her discretion in favour of the applicants by granting relief from sanctions and ordering that the statements of case of the 1st and 2nd Defendant be restored.

[43] It is clear that the unfortunate circumstances that had befallen Mr. Pearson were before the Court for consideration when the Court granted the Applicants relief from sanctions for failing to comply with the unless order. The first ground posited by Counsel was that the learned judge failed to recognize the difficulties of Counsel due to the traumatic experience of being robbed at gun point. I am not of the view that based on the sequence of events that this an issue for consideration by the Court on the 13th December 2018. I therefore conclude that that this ground has no realistic prospect of success.

[44] The application before the court relates to the order made on the 13th December, 2018 wherein the learned Judge struck out the applicants' statement of case and entered judgment against them as a result of the applicants' failure to comply with the orders made on December 6, 2018.

[45] Counsel advanced the point that despite the previous acts of noncompliance, the Court was not constrained to strike out the applicants' statements of case. In this regard, Mr. Jones asked the Court to consider the reasoning and be guided by McDonald-Bishop J in the case of **Branch Developments Limited t/a Iberostar Rose Hall Beach Hotel v The Bank of Nova Scotia Jamaica Limited** (supra). I found the reasoning of Learned Judge to be highly persuasive; however, I conclude that the case was not helpful to the Applicants.

[46] The case can be distinguished in many regards. The first point of distinction is that McDonald-Bishop J found that sole noncompliance was in relation to an order for specific disclosure. This order for specific disclosure was not an unless order. Rather, the applicant in that case was seeking to have the Respondent's claim struck out in that regard under CPR 28.14(2) and not CPR 26.7 which relates to unless orders. Additionally, the learned judge assessed all the circumstances of the case in exercising her discretion and found that the breach complained of was not fatal as it did not prevent the trial from proceeding. McDonald-Bishop J found that the trial could not proceed in any event as the Claimant was constrained to make an application for the witnesses to be heard by video link. The Learned judge also held that the punishment must match the crime, in this regard she found at paragraph 154 that *"the breach was not so weighty and serious so as to affect the potency of the defendant's case or to affect any matter in question between the parties to the advantage of the Claimant."*

[47] In keeping with the reasoning of McDonald-Bishop J, have the applicants successfully proven that they have a realistic prospect of proving that the punishment imposed by the Learned Judge was in excess of the breach? It seems to me that in addressing this question, Applicants' have failed to show that the punishment imposed was in excess of the breach. The court must direct its mind to sequence of events and the reasons advanced for failure to comply at each stage.

[48] Learned Counsel failed to consider the fact that the learned judge took into account the difficulties faced in complying with the September 28, 2018 deadline in the order of Jackson-Haisley, J when she granted relief from sanctions and ordered that the applicants statement of case be restored on the 6th December, 2018. What transpired thereafter constituted a fresh breach. The evidence shows no reasonable explanation why after being given a chance at redemption the applicants failed to comply with the orders of Thomas, J made on the 6th December, 2018.

[49] The Claimant argues that the reason advanced by Mr. Pearson for the delay was that he had to travel to Mr. Lincoln's home in Stony Hill to have the documents signed. This reason accords with the reason which is outlined in the affidavit of Mr. Lincoln filed on the 24th June, 2019. At paragraph 6 of Mr. Lincoln's affidavit he stated as follows:

> *" On the 6th December, 2018 sometime in the afternoon Mr. Pearson came to my house so that I could sign several documents as those were required to be filed by 4:00 p.m. on the same day pursuant to the Court orders made earlier that day. I enquired whether the said documents would be filed within the stipulated time frame and was assured once again that everything was "under control" and the documents would be filed on time and I had nothing to worry about."*

[50] After, reviewing the grounds on which the applicant is seeking permission to appeal, I would venture to say that they are fanciful at best. The evidence before this court fails to establish any basis for this court to conclude that the applicants have a real chance of success.

Disposal

1. The Application for an extension of time to apply for leave to appeal is refused.

2. The Application for leave to appeal is refused.

3. The Application for a stay of execution pending the hearing of the Appeal is refused.

4. The Application that there be stay of proceedings pending the hearing of the appeal is refused.

5. Leave to Appeal Order # 1 is granted if necessary.

6. Cost of the application is awarded to the Claimant against the 1st and 2nd Defendants to be taxed if not agreed.

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Hon. Mrs. S. Wolfe-Reece, J