IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2018 CD 00260

BETWEEN	**GLORIA CHUNG**	**1ST CLAIMANT**
	AMANDA CHUNG	**2ND CLAIMANT**
	MARK CHUNG	**3RD CLAIMANT**
AND	**MICHAEL CHUNG**	**1ST DEFENDANT**
	MIKOL INVESTMENTS LIMITED	**2ND DEFENDANT**

Application for Request for Judgment – Unless Order – Non-Compliance - Application for Relief from Sanctions - Whether relief to be granted.

Stephen M. Shelton, Q.C. and Stephanie Eubanks instructed by Myers, Fletcher & Gordon for the Claimants.

Georgia Gibson Henlin, Q.C. and Stephanie Williams instructed by Henlin Gibson Henlin for the Defendants.

HEARD: 8th July 2018, 13th July 2018 and 8th August, 2018.

IN CHAMBERS

COR: BATTS J

[1] On the 13th day of July 2018 I announced my decision but gave the parties an opportunity to submit a draft minute of order for my consideration, without prejudice to any right of appeal. They were allowed until the 27th day of July 2018 to do so, and each filed a separate minute. I am indeed grateful. In the result my Orders are as contained in paragraph 32 below. These are my reasons.

[2] This action was commenced by way of Fixed Date Claim Form filed on the 9th day of May, 2016. The Claimants allege oppression and/or unfair prejudice and seek relief pursuant to Section 213A of the Companies Act. An affidavit was filed in support of the Fixed Date Claim. The Claimants, on the 6th day of March, 2017, filed a Notice of Application for Court Orders with an affidavit of Gloria Chung in support, seeking inter alia, orders for specific disclosure of various documents. Having heard the said Notice of Application the Honourable Mr. Justice Rattray, on the 25th day of July, 2017, made an Order for specific disclosure. Disclosure was ordered to take place on or before the 22nd day of September, 2017 by 3:00 p.m.

[3] The Defendants failed to comply with the Order and, as a result, the Claimants, on the 13th November 2017, applied for an Order that the Defendants' statement of case be struck out. On the 11th December, 2017, the Defendants filed an Amended Notice of Application for Court Orders, seeking a variation and/or setting aside, or alternatively an extension of time, of the specific disclosure Order made by Rattray, J. Both applications were heard by Rattray J on the 6th day of February 2018. He delivered a written judgment on the 3rd day of April 2018 in which he made an unless order. This extended the time for compliance to the 9th day of April, 2018.

[4] On the 9th day of April, 2018, the deadline stated in the unless order, the Defendants filed a List of Documents. The Claimants say that it does not comply with the order for specific disclosure. The Defendants also filed and served Supplemental Lists of Documents on the 11th April, 2018 and 2nd May, 2018. These the Claimants also say do not comply.

[5] In the application before me the Claimants assert that, due to non-compliance with the unless order made on the 3rd April 2018, the Defendants' statement of case has been struck out. The Claimants say they are, in consequence, entitled to request judgment. The Defendants say they have complied and, in the alternative, seek relief from sanctions.

[6] The issues for my determination are therefore:

(a) Whether the Defendants have complied with the order for specific disclosure

(b) If not, whether relief from sanctions is appropriate

(c) If not what should be the remedy to the Claimants

[7] The following are the relevant rules in the Civil Procedure Rules (2002), hereinafter referred to as the "CPR":

Rule 26.3(1) (a) states that:

> *"(1) 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 -*
>
> *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;"*

Rule 26.4 states:

> *"(1) Where a party has failed to comply with any of these Rules or any court order in respect of which no sanction for non-compliance has been imposed, any other party may apply to the court for an "unless order"."*
>
> *"(7) Where the defaulting party fails to comply with the terms of any "unless order" made by the court that party's statement of case shall be struck out."*

Rule 26.5 states that:

> *"(2) Where the party against whom the order was made does not comply with the order, any other party may ask for judgment to be entered and for costs."*
>
> *(3) A party may obtain judgment under this rule by filing a request for judgment.*

(4) The request must -

(i) prove service of the "unless order";

(ii) certify that the right to enter judgment has arisen because the court's order was not complied with; and

(iii) state the facts which entitle the party to judgment."

Rule 26.8 deals with relief from sanctions and states 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 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."*

Rule 26.9 states:

> *"(1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order."*

Rule 28.14 states that:

> *"(2) A party seeking to enforce an order for disclosure may apply to the court for an order that the other party's statement of case or some part of it be struck out."*
>
> *"(5) On an application under paragraph (2) the court may order that unless the party in default complies with the order for disclosure by a specific date that party's statement of case or some part of it be struck out."*

Rule 42.8 deals with the time when judgment or order takes effect, it states:

> *"A judgment or order takes effect from the day it is given or made unless the court specifies that it is to take effect on a different date".*

[8] Mr. Shelton, Q.C, for the Claimants, submits that the Request for Judgment has been, pursuant to CPR **Rule 26.5**, filed because the Defendants are in breach of an unless order. Queen's Counsel contends that the Request for Judgment complies with all the requirements under **Rule 26.5 (4)** of the **CPR**. He submits also that the terms of the unless Order, and **Rule 26.4 (7)** of the **CPR,** make it clear that where a party fails to comply, that party's statement of case shall be struck out. The general power of the Court to rectify in **Rule 26.9** does not apply to unless orders. Counsel submitted that partial compliance with an 'unless order' is not sufficient to avoid the specified sanction (see ***Marcan Shipping (London) Ltd v Kefalas and another [2007] EWCA Civ. 463***). Therefore, the Defendants

at bar cannot rely on partial compliance as a basis for avoiding the sanction of the 'unless order'. Placing further reliance on the ***Marcan Case*** Queen's Counsel submitted that the sanction specified in an 'unless order' takes effect from the date for compliance without the need for any further order from the Court.

[9] Mr. Shelton, Q.C., further submitted that **Rule 26.8** of the **CPR** governs the Court's discretion as it relates to applications for relief from sanctions, and provides a cumulative set of threshold requirements. In support he cited the Court of Appeal decisions in ***H B Ramsay & Associates Ltd and others v Jamaica Redevelopment Foundation Inc. and another [2013] JMCA Civ. 1*** (application, made one month after the date for compliance with the 'unless' order and three months after the order, held to be not made promptly) and, ***F1 Investments Inc. et al v Peter Krygger et al [2015] JMCA App 38*** (held that an application two months after default did not satisfy the requirement of promptitude). It was decided in these two cases that promptness is a mandatory requirement for an application for relief from sanctions. Therefore, it was submitted, as the Defendants' application for relief from sanctions was made almost two (2) months after the deadline specified in the unless order, it does not meet the requisite threshold for promptness established in binding case law. It was submitted that the Court of Appeal in the ***H B Ramsay case(cited above)***, ***Jamaica Public Service C. Ltd v Charles Vernon Francis and Columbus Communication Jamaica Ltd (trading as Flow) [2017] JMCA Civ. 2*** and ***Alliance Investment Management Limited v Universal Agencies Limited and another [2017] JMSC Civ. 126***, decided that although the factors in **Rule 26.8 (3)** of the **CPR** are important, these factors are to be considered only after the Court is satisfied that all the threshold requirements of **Rule 26.8 (1)** and **(2)** of the **CPR** have been met. The application must be made promptly and supported by affidavit evidence in order for the Court to consider the application. It was submitted that the Defendants' application for relief from sanctions must fail on the basis of not meeting the mandatory requirement of promptitude, without the need to consider any other criteria in **Rule 26.8 (2)** of the **CPR**.

[10] It was further submitted that even if the application for relief from sanctions was made with sufficient promptitude, the other requirements of **Rule 26.8 (2)** have not been met. The Defendants' failure to comply was intentional, there is no good explanation for the failure, and the Defendants have a history of non-compliance in these proceedings. The Claimants submitted that the Defendants' affidavit of Michael Chung, is not sufficient. Michael Chung stated that he had to personally conduct a thorough search of the company's records, because he does not have a secretary or anyone to handle paperwork. It was submitted that this could not be a reasonable explanation for not complying with an order for specific disclosure made a year ago.

[11] Mr. Shelton, Q.C., also submitted that there is sufficient evidence, in the affidavit of Gloria Chung filed on the 9th May 2016 and the affidavit of Gloria Chung in response to the affidavit of Michael Chung filed 18th October, 2016, to meet the threshold of unfair prejudice pursuant to **Section 213 A** of the **Companies Act**. It was submitted that all of the orders being sought by the Request for Judgment are within the scope of the remedies provided under **Section 213 A** of the **Companies Act**.

[12] Mrs. Gibson Henlin, Q.C., Counsel for the Defendants, made oral submissions before the Court, which she later reduced to writing and filed on the 9th of July, 2018. Queen's Counsel submitted that an order for specific disclosure requires a party to disclose documents or classes of documents specified in the order and/or to search for documents to the extent stated in the order. Disclosure of any documents may be made with or without an application. An application may be made without notice at a case management conference, pursuant to Rule **28.6 (2)** and **(3)** of the **CPR**. Specific Disclosure requires the party to prepare and serve on every other party, a list of documents in form 12; stating the documents that are no longer in the party's control. The Defendants' counsel submitted that they place reliance on this rule as to procedure for disclosure because the documents that are not included are not in the party's possession. It was further submitted that there is a continuous duty to disclose in accordance with any

order for specific disclosure until the proceedings are concluded. This requires the party to whom the order extends to notify the other party by filing a supplemental list.

[13] Queen's Counsel made submissions concerning the unless order. She stated that 'unless orders' are made where the party has failed to comply with "any court order" in respect of which no sanction for non-compliance has been imposed, as per **Rule 26.4(1)** of the **CPR**. Counsel states that the Claimants' application for the "unless" order was made while opposing the Defendants' application for an extension of time. The learned Judge granted the extension of time and made an 'unless order' even though the Defendants at the time of their application were not in breach of the order for specific disclosure.

[14] It was submitted that the automatic sanction does not apply as they can only disclose documents that are in their possession coupled with a duty to continue to search, Counsel relied on the case of ***Jani-King (GB) v Prodger [2007] EWHC 712 (QB)***, per Mackay J at paragraphs 13 and 14. Queen's Counsel submitted that where there is complete compliance (subject only to *de minimis* exceptions) the automatic sanctions do not take effect. In this case Mrs. Gibson Henlin Q.C., submitted that the Defendants were only able to disclose documents in respect of which they have possession or control. This position of complete compliance following the filing of an "incomplete" list was addressed in the pre-CPR case of ***RealKredit Danmark A/S (as a body corporate) & Anor v. York Montague Limited & Anor [1998] Lexis Citations 3157*** at pages 4-5. Queen's Counsel further states that the assertion of the Defendants that it does not have the document is conclusive, and is the context within which the responses from the Defendants' counsel are to be understood. The explanation at page 2 schedule 2 of the list of documents is relevant, as well as the further searches made by the Defendants. The Claimants know that by virtue of prior disclosure in Ontario some documents, such as the urban bonds, do not exist.

[15] Defence Counsel also stated that the several applications to strike out the Defendants' case are oppressive. The matter has been characterized by interim applications by the Claimants geared to end the case without a trial on the merits. This matter is a complex case which in any event must be resolved by taking the interest of the 2nd Defendant into account. The Court should take steps to ensure that the trial of the action proceed, ***Denton v White [2015] 1 ALL ER 880*** was cited in support of this submission. In summary the Defendants contend that the Claimants' application to strike out the Defendants' case was filed after the Defendants applied for an extension of time to comply with the order. That application resulted in the 'unless order', which has been complied with, insofar as the Defendants to date do not have the documents omitted in their possession or control.

[16] Queen's Counsel for the Defendant submitted that, even if there is non-compliance, that is not the end of the matter; per **MacKay J** in the ***Jani-King case*** cited above. It was decided in that case that even if compliance was not complete the Court had jurisdiction to grant relief from sanctions. In the alternative that there was substantial compliance on the 9th April 2018. They provided all documents in their possession and/or control. The annual returns were exempted by the order of Rattray J; similarly, the 1st Claimant is aware that the bond account does not exist and the Defendants have explained that they do not have possession or control of the remaining documents. It was further submitted that **Rule 26.5 (4)** of the **CPR** does not entitle the Claimants to Judgment without more; as such the Claimants are not entitled to Judgment in the terms sought. The proper course is for the Claimants to apply for directions pursuant to **Rule 26.5 (6)** and **26.5 (8)** of the **CPR** see ***Capital One NA v Business Ventures and Solutions Inc. [2015] JMSC Civ. 102*** . In other words, there has to be an objective assessment of the facts. The Defendants are entitled to cross-examine the Claimants and/or make submissions. In the alternative, if the Court finds that the Claimants are entitled to Judgment without directions the

Court should have regard to the remedies available under **Section 213 A** of the **Companies Act**.

[17] Having perused the affidavits and considered the submissions, it is clear to me that on the deadline of 9th of April 2018 and to date, the Defendants failed to comply with the order for specific disclosure. I have examined the Order for Specific Disclosure, the List, Supplemental List and the Further Supplemental list of Documents. The following have not been disclosed:

i. Annual Returns for 1999-2004.

ii. Management Accounts or Audited Financial Statements for 1999-2008.

iii. Bank records, loans, overdraft, statements for 1999-2009, 2012 and 2013.

iv. Statements in relation to the Directors Urban Renewal Bond Account for 2004-2016.

v. Leases and Rental Agreements for Centrepoint Plaza between 2000-2010 and for Sea View between 2011-2016

vi. Income Tax Returns for 2000-2011 (The Defendants under schedule 2 of their Supplemental List of Documents filed on 11th April, 2018 state that the Income Tax Returns for the years 2010-2012 are no longer in their possession. The Defendants have not stated that the Income Tax Returns for 2000-2009 are not in their possession).

vii. GCT Returns for 2000-2007.

viii. General Ledgers for 1999-2016. (The Defendants have listed in Schedule 2 of their Supplemental List of Documents filed on 11th April, 2018 that the General Ledgers for the years 2000-2008 and 2012-2013 are no longer in their possession. The Defendants have not stated that the General Ledgers for 1999, 2009-2011 and 2014 are not in their possession).

ix. Minutes of shareholder's meetings for 1999-2016.

x. Bank Statements from NT Butterfield & Sons Ltd in Bermuda from May 2010 to December 2010 (The Defendants have listed this in Schedule 2 of their Supplemental List of

Documents filed on 11th April, 2018 as they say that these are no longer in their possession).

xi. All Contracts of Service between the 2nd Defendant and its employees, auditors, lawyers and consultants.

xii. Details of all insurance Claims and settlements in relation to and on behalf of the 2nd Defendants between 2000 and 2015.

[18] The Defendants have given various explanations for the failure to disclose the documents listed above; and in that regard stated the following:

(a) Items listed under i-iii (Annual returns, Accounts, Bank records), the Defendants have stated that the documents not listed under these sections do not exist. Counsel placed reliance on schedule 2 of the List of Documents. In addition, in oral submissions reliance was placed on the Second Affidavit of Michael Chung dated the 5th July 2018. I hold that schedule 2 makes no reference to these items. Furthermore, the Second Affidavit of Michael Chung does not say the documents do not exist.

(b) Item iv (Renewal Bond), Defendants stated that this document does not exist because no new renewal bond was issued. The Defendants relied on the Claimants' affidavit of Gloria Chung filed on 18th October 2016 see Exhibit GC 11, and the Second Affidavit of Michael Chung dated the 5th July 2018 at paragraph 6 (c). I hold that Exhibit GC 11 indicates that no paper Bond was issued and this to the Claimants' knowledge.

(c) Item v (Leases), Defendants stated that they disclosed all the leases they had and, pointed out that Centrepoint is the plaza. The leases listed are for the shops in the plaza. This explanation has not been successfully countered by the Claimants.

(d) For item vi (annual returns). The Defendants contend that in the Supplemental List of Documents they stated that for the year 2010-2012 these annual returns of income tax are not in their possession. The accountant, who had possession of these documents, died without handing over same and all efforts to get same proved futile. For 2000-2010 Annual Returns the Defendants stated that these are not available as the company was tax free until 2010; as such no document exists for the same. This may be true, however, returns of income are to be filed regardless of one's tax status. The explanation for the years 2010 to 2012 however I find to be satisfactory.

(e) Item vii (GCT Returns). The Defendants contend that the List of Documents filed on the 9th April 2018 discloses the GCT returns and those not disclosed are covered by schedule 2. I hold that there has been no disclosure of GCT returns for the period 2000 to 2007 and that schedule 2 makes no reference to that.

(f) Item viii (General Ledgers). The Defendants' have stated that these documents were excluded by Rattray J's judgement but have nevertheless disclosed those in their possession. The Claimants disagreed with this assertion and stated that the Defendants have misstated the decision of the learned judge, placing reliance on paragraph 85 of his judgment, which stated:

> *"In those circumstances, I am not prepared to set aside the Order for Specific Disclosure. However, I am of the view that it is appropriate to vary the Order to exclude all the general ledgers for Mikol Investments Limited, the 2nd Defendant, as those items*

> *were already the subject of a Disclosure Order in the Ontario Superior Court of Justice. If that Order has been complied with, my Order for Specific Disclosure herein would exclude the said General Ledgers."*

I agree with the Claimants that, given that statement by Rattray J, it is incumbent on the Defendants to provide proof of disclosure in the Canadian proceedings. This has not been forthcoming and paragraph 4 of the Affidavit of Michael Chung in Response filed on the 19th July 2017 makes no specific reference to the General Ledgers. The Defendants are therefore still under an obligation to disclose all general ledgers for the period specified.

(g) Item ix (Minutes of Meetings), Defendants relied on paragraph 6(c) of the Second Affidavit of Michael Chung dated 5th July 2018. This states that there have been no minutes of meetings. Since the inception it has always been an accepted practice by all shareholders and directors that no formal minutes would be recorded. This assertion was not traversed by the Claimants. It, in all likelihood, is true given that this was a private family owned company.

(h) Item x (bank statements) The Defendants say these documents are no longer in their possession and replacements have been requested. A response is still awaited from the bank. I hold that, although this may be true, there is no indication when the request was made. I agree with Mr Shelton QC that bank records are normally readily available on request and the probability is that the Claimants were dilatory in asking for them.

(i) Item xi (contracts of Service), The Defendants have stated that there are no formal contracts of service between the 2nd Defendant and its employees, auditors and consultants. Further that disclosure of contracts for services with its attorneys-at-law would constitute a breach of legal professional privilege. I hold that the issue of legal professional privilege ought to have been taken before or at the time the order was made. In any event disclosure of the existence of a contract does not breach any alleged privilege, it is the inspection which would do so. The Defendants were duty bound to list the contracts even if they then wished to litigate an issue as to privilege from inspection. Of course in the context of a company with directors in litigation it is difficult to see how one set of directors might be excluded from knowledge of company retainers. I accept the evidence, unchallenged, that there were no formal contracts of service. This also should have been expressly stated in schedule 2 but was not.

(j) Item xii (Insurance Claims). The Defendants state that the Claimants have all the specific details of all insurance claims in relation to and on behalf of the Defendants between 2000 and 2016. These it is said form part of the documents disclosed in divorce proceedings in Canada between Gloria and Michael Chung. I hold that there is no proof of such prior disclosure. It is significant that Rattray J made no exception for these documents notwithstanding the fact that the allegation of disclosure in the Canadian proceedings had been made, see paragraphs 2 (a) and 3 (l) of the affidavit of Michael Chung filed 24th March 2017.

[19] The Defendants' reasons for non-disclosure are generally insufficient. While the Defendants' Counsel during oral submissions placed reliance on schedule 2, there is no indication of this in the List of Documents. Schedule 2 of the Supplemental List of Documents states that some of the documents for certain periods being relied on are no longer in their possession. It fails however to state whether the said documents for the other outstanding periods are also not in their possession. I find that, although a majority of the documents have been disclosed, there has not been full or substantial compliance. There has not been an adequate explanation given for the failure to comply.

[20] It is the view of this Court that notwithstanding the number of documents so far disclosed, there has not been full sufficient or substantial disclosure. I find the case of ***Marcan*** (cited above) useful in this regard. The documents which the Defendants failed to disclose are crucial to a determination of the claim for oppression and/or unfair prejudice pursuant to **Section 213A** of the **Companies Act**. The Bank records and statements, including all bank loans, overdraft facilities, bank statements, mortgages, and the General Ledgers, are all extremely relevant in a matter of this nature. The Claimants correctly submitted that the abovementioned documents are such that the Defendants could easily have obtained copies by requesting same from the respective financial institutions. Furthermore, even the worst run companies ought to keep records of such documents.

[21] I agree with Queen's Counsel, appearing for the Claimants, that given the Defendants' failure to comply, **Rule 26.5** of the **CPR**, enabled them to file a Request for Judgment. The party against whom the unless order was made has not fully complied with the order by the specified date or at all. The Claimants' Request for Judgment has complied with the requirements specified in **Rule 26.5 (4)** of the **CPR**. As to the Defendants' submission, that the unless order ought not to have been made given that the application to extend time was filed prior to the Defendants breaching the disclosure order, I do not agree.

However, and in any event, as I do not sit to review decisions of a Judge of coordinate jurisdiction it is not a matter I will or should address.

[22] The Defendants' application for Relief from Sanctions was filed on the 1st day of June, 2018, almost two (2) months after the deadline specified in the unless order. It is settled law that **Rule 26.8** of the **Civil Procedure Rules** treats with the procedure and prerequisites for relief from sanctions. The mandatory prerequisites for relief are that:

a) The application is promptly made.

b) It is supported by affidavit evidence.

c) Failure to comply was not intentional.

d) There is a good explanation for the failure.

e) There has been a general compliance with all other rules and orders.

[23] Whether or not each of these mandatory prerequisites is satisfied can only be assessed with reference to the context and facts before the tribunal considering the application for relief. "Promptitude" for example requires an examination of the nature of the duty imposed and the reason for the failure to comply. In ***Sherine Blake v LDCosta Loans and Financial Management Ltd and Anor [2015] JMSC Civ. 14,*** I stated at paragraph 9:

> *"Whether or not each of these mandatory prerequisites are satisfied can only be assessed with reference to the context and facts before the tribunal considering the application for relief. "Promptness" for example is a function of the nature of the duty imposed, the or any other pertinent time periods for example the trial date and how far away it is, and the reason for the failure to comply. This must be so for otherwise the drafter of the rules would have stipulated a fixed time period within which the application is to be made. There is very good reason why that was not done. This is because, in the fog of*

> *litigation, there are a great many and unpredictable circumstances and situations that may occur. A just cause ought not to be defeated by mere technicalities. Litigation is not, as a great judge once said, a game of "snap" in which a party wins because the other has "tripped" over a rule."*

[24] In the case at bar, the application for relief came almost two (2) months after inadequate disclosure was made. This is not a case in which the party was unaware of the order. Indeed, the Defendants were aware of the order since the day it was made on the 25th, July 2017 (almost one year ago). An extension of time was granted on the 3rd April 2018, along with the unless order. The assessment of "promptitude" has to be made with regard to the original date on which disclosure ought to have been given. I hold that the application for relief coming almost two months after the sanction took effect, in the circumstances of this matter, was not prompt.

[25] The Claimants relied on the ***Jamaica Public Service Co. Ltd case*** (cited above), and in particular paragraph 65, where it was stated:

> *"…the appellant is the author of its misfortune. Rule 29.11 is quite clear. The case management order gave the appellant a period of almost a year to file and exchange witness statements. It failed to do so in circumstances where the witnesses were its own employees. It sent these needed employees off the island and travelling out into other parishes without securing their statements and with no mechanism in place to get them back into office in time to give the statements, even up to the last day of the time limited.* ***This amounted to administrative inefficiency which, in my view, does not amount to a good explanation****." Emphasis Added.*

[26] The Claimants assert that the Defendants' explanation in this case amounted to administrative inefficiency and therefore could not be a good explanation for its failure to comply. I do not understand the Court of Appeal to be saying that administrative inefficiency can never under any circumstance provide a reasonable explanation. It is the circumstance and nature of the administrative

inefficiency under consideration that was unacceptable. Indeed, in a general sense any failure to comply is more likely than not to be due to some form of administrative inefficiency, for otherwise the failure would be deliberate. The rules do not preclude any category of explanation and neither should the court. It is the context and circumstances of the explanation that is germaine not its categorization. In the case under reference, for example, the Defendant Company showed disdain for the court's order by sending the relevant personnel all around the island making no arrangements for their availability to give witness statements. It is in that context the dictum must be understood. The Court of Appeal has found reasonable explanations in factual situations which amount to administrative inefficiency ,see : ***Villa Mora Cottages v Monica Cummings et al SCCA 49/2006*** **unreported judgment dated 14th December 2007** (attorneys negligence, failure to file defence*),* ***Rodney Ramazan et al v Owners of Motor Vessel (CFS Pamplona) SCCA 12/2011 App 176/2012*** **unreported Judgment of Brooks JA 2nd December 2012**, (clerical error resulting in document being misplaced) and ***Henlin Gibson Henlin (A Firm) v Calvin Green et al 2015 JMCA App 2*** (service on the incorrect firm). I venture to repeat what I said in ***Construction Developers Associates Limited v Urban Development Corporation [2018] JMCC Comm 26***, at paragraph 12:

> *"The question of what is a good reason is answered by the exercise of a judicial discretion. The authorities suggest that a bona fide explanation and circumstances that do not suggest a deliberate intentional or culpable failure will generally suffice"*

[27] In the case before me, the Defendants' explanation is that Mr Chung had no secretarial assistance so he had to do the searches personally. He has not said so, but assuming, he was unable to employ such assistance that may be a good explanation even though it constitutes a form of administrative inefficiency. The problem the Defendants have is that the order for discovery was made almost one year before. If it is that the Defendants only started to attempt to locate the documents when Rattray J made the unless order then, it is not inefficiency that

is the problem, it is a disregard for the court. It seems to me that, even searching alone, the documents should and could have been located if the searches commenced a year ago. It is manifest that the Defendants made no serious effort to comply when the order was first made. If they have now run out of time as a consequence, the reason offered is unreasonable. In any event it has not been said that the Defendants lacked the wherewithal to retain secretarial assistance to aid the search. As such the failure to retain assistance supports a submission that there was no real or genuine desire to comply. In either event the reason proffered is not a good one, in all the circumstances.

[28] The authorities are clear that these threshold requirements must be met for relief to be granted, and that if a party fails to satisfy them, there is no need to consider the factors in **rule 26.8(3)**. However, in the event another court takes a different view, I look briefly at those factors. It seems to me that the interest, of the administration of justice, does not favour the grant of relief. The Defendants' failure to comply has already caused considerable delay. Furthermore, when regard is had to the allegations and counter allegations it is apparent there is a breakdown in relations. The 2nd Defendant is a private family owned entity. Given the circumstances it is hard to imagine any other ultimate result than some form of separation of the respective interests. Relief to allow a trial to determine factual issues which, however resolved, will most likely end in a dissolution, is not in the interest of good administration. No trial date is presently fixed, the matter having recently been transferred to the commercial division. There is no indication that the Defendants' attorneys at law are to blame. The failure to obey the order for discovery is due entirely to the Defendants. There is no indication if and when the Defendants will fully comply. The further considerations in CPR Rule 26.8(3) are, on balance, in favour of refusing rather than granting relief from sanctions.

[29] The authorities indicate that what is required is a balancing exercise in which account is taken of all the relevant facts and circumstances of the case. The reason for the non-compliance is certainly not persuasive. The order for

discovery was made a year ago. An unless order has been made, and in the two months since then the Defendants have not complied. The Defendants breached an unless order. Such an order makes it clear, to the party to whom it is directed, that he is being given a last chance. The Defendants have not availed themselves of that last chance. The order for disclosure took effect from the 25th July 2017 by virtue of **Rule 42.8** of the **CPR**, but was later extended. Pursuant to Rule **28.14 (5)**, an unless order was made which took effect on the 9th April 2018.The failure of full compliance entitles the Claimants to have the Defendants' Statement of Case struck out. This is not an appropriate case for the grant of relief from sanctions and I so hold.

[30] The Claimants are entitled to Judgment and as such regard must in this case be had to **Section 213A** of the **Companies Act**. The affidavit evidence clearly demonstrates a total breakdown in trust between and among the directors and shareholders. There is no doubt that the evidence before me supports allegations of oppression and/ or unfair prejudice, see the Affidavit of Gloria Chung in support of Fixed Date Claim Form filed the 9th May 2016 paragraphs 7 to 19. I will quote only paragraph 20:

> *"The breakdown in mutual trust and confidence between the First Defendant and us, the Claimants herein, has impeded and continue to impede the management of the Company, and has resulted in total deadlock whereby it is impossible for us to conduct board meetings and take decisions which materially affect the interests of the Company. The First Defendant has unilaterally managed the Company's affairs against our wishes, and in a manner oppressive to our interests in the Company. This has eroded the very substratum of the foundations of the Company and the fundamental obligations of good faith, trust and confidence necessary for the continued co-partnership, co-operation and smooth management of the joint business enterprise*

embarked upon by the First Defendant and me when the Company was incorporated."

It was therefore my finding and decision that the proper remedy in this case is that one party should be permitted to purchase the shares of the other, see section 213 A (3) (f). This is subject to an order being made for an investigation by a qualified and independent forensic accountant to audit the financial affairs of the company pursuant to section 213 A (3) (m). Upon such appointment and after the audit, the company will be assessed to ascertain the value of its shares.

[31] It was however appropriate to allow the parties, without prejudice to their right of appeal, to participate in the settling of the detailed terms of my order. On the 13th July 2017 I therefore invited their legal representatives to submit an agreed minute of a draft order or in the absence of agreement, to submit separate draft minutes for my consideration.

[32] In the final analysis, and having considered the draft Minutes submitted, my Orders are as follows:

1. The Defendants' Application for Relief from Sanctions is refused.

2. Judgment is entered for the Claimants against the Defendants pursuant to Section 213A of the Companies Act.

3. The 1st Defendant is permitted to make an offer to purchase the shares of the Claimants within sixty (60) days of the delivery of a valuation of the shares, including adjustments, to his attorneys-at-law.

4. In the event the 1st Defendant fails to make an offer as aforesaid the 1st and 2nd Claimants or either of them is/are at liberty to make an offer to purchase the shares of the 1st

Defendant within 60 days of the 1st Defendant's failure to make an offer.

5. An offer to purchase pursuant to paragraphs 3 and 4 shall be at a price determined in accordance with paragraph 9 of this Order.

6. In the event neither the 1st Defendant nor the 1st and 2nd Claimants or either of them makes an offer pursuant to paragraph 3 or 4 above, or in the event the offers made are not accepted, then, notwithstanding Article 3 of the Articles of Association of the 2nd Defendant, the 2nd Defendant shall purchase the Claimants' shares within thirty (30) days of the expiration of the time limited for the Claimants to make an offer to purchase the shares pursuant to paragraph 4 above. The purchase by the 2nd Defendant shall be at a price determined in accordance with paragraph 9 of this Order.

7. An independent chartered accountant, specializing in forensic accounting, shall be agreed upon by the parties on or before the 29th day of August 2018 and instructed to carry out a forensic audit of the financial affairs of the 2nd Defendant from the 1st January 2003 to the 9th August 2018 and to prepare a report to the shareholders accordingly specifying all adjustments, if any, which are required.

8. In the event of a failure to agree the Registrar of the Supreme Court shall select the said independent charted accountant specialising in forensic accounting from a list or lists to be filed by the parties on or before the 5th September 2018.

9. An independent chartered accountant, specializing in the valuation of shares, shall be agreed upon by the parties on or

before the 29th August 2018 and instructed to determine the fair value of the shares of the 2nd Defendant, after considering the forensic audit and adjustments mentioned in paragraph 7 of this Order.

10. In the event of a failure to agree the Registrar of the Supreme court shall select the said independent chartered accountant specialising in the valuation of shares from a list or lists to be filed by the parties on or before the 5th September 2018.

11. The said independent auditor's (forensic) report and the said independent accountant's (valuation) report are to be completed as soon as reasonably practicable, and in any event no later than the 7thth day of November 2018 (for the forensic report) and the 21st day of November 2018 (for the valuation report), and delivered to the attorneys for the Claimants and the Defendants respectively.

12. The Claimants' attorneys at law shall have carriage of sale of the shares being sold by the Claimants to the 1st and 2nd Defendants, or, if the shares are being sold by the 1st Defendant to the Claimants, the 1st Defendant's attorneys at law shall have carriage of sale of the said shares.

13. Any and all outstanding sums certified by the independent (forensic) accountant as being due to the Claimants, pursuant to Loan Agreements dated 31st January 2010 between the 2nd Defendant and the 1st and 2nd Claimants and Loan Agreements dated 7th November 2011 between the 2nd Defendant and the 1st Claimant, shall be repaid by the 2nd Defendant within 30 days of the delivery of the said forensic auditor's report to the Defendants attorney at law.

14. Costs to the Claimants to be taxed, if not agreed and to be paid by the 2nd Defendant.

15. Permission is hereby granted to the Defendants to appeal, if necessary.

16. Stay of execution of this Order granted until the 24th day of August 2018.

17. Liberty to apply.

David Batts
Puisne Judge