[2019] **JMSC Civ. 197**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISON

CLAIM NO. 2009 HCV 3908

BETWEEN	**CRICHTON AUTOMATIVE LIMITED**	**APPLICANT/DEFENDANT**
AND	**ZULFIQAR MOTORS CO. LIMITED**	**RESPONDENT/CLAIMANT**

IN CHAMBERS

Mr Raymond Clayton and Mr Matthew Royal instructed by Messrs. Samuda & Johnson for the Applicant/Defendant.

Mr Garth McBean Q.C. instructed by Garth McBean & Co. for the Respondent/Claimant.

Civil procedure - Application for relief from sanction - Failure to comply with unless Order - Rule 26.8 of the Civil Procedure Rules.

Heard: July 16, 2019 & October 4, 2019

WOLFE-REECE, J

INTRODUCTION

[1] The Applicant/Defendant has filed a Notice of Application for Court Orders on July 11, 2018 before Court for relief from sanctions filed, in which they are seeking the following orders:

1. The time limited for the Applicant to comply with the Order of the Honourable Mr. Justice K. Laing made on February 5, 2018 requiring the Applicant/Defendant to comply with the Order previously made for disclosure of its financial statements for period of January 1, 2006 to December 31, 2009 on or before the 4th of May 2018, be extended to the

date of this Order hereof and all steps taken be the Applicant/Defendant in pursuance of the said Order be permitted to stand in good stead.

2. The Applicant/Defendant be granted relief from sanction that the Statement of Case of the Defendant stands struck out and Judgment entered in favour of the Claimant pursuant to the order of the Honourable Mr. Justice A. Rattray dated June 26, 2018;

3. There be such further or other relief as this Honourable Court deems fit.

SUBMISSIONS

Applicant/Defendant Submissions

[2] Counsel for the Applicant/Defendant Mr Ramon Clayton prefaced his submissions by stating that the principal grounds for the application are, inter alia, that the Applicant's failure to comply with the relevant Order was unintentional and arose from circumstances beyond its control in that the documents which were subject to the order for disclosure were not in the Control of the Applicant but was in the custody of the Revenue Protection Department. He submitted that the Applicant had complied with the orders of the Court although late and the unless Order would cause irremediable prejudice to be suffered by the Applicant.

[3] Counsel submitted that the Applicant had complied with Rule 26.8(1) where the Court mandates the prompt filing of an application for relief and further to that they satisfied the requirements as set out in Rule 26.8(2) which states that the Court may grant relief 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.

[4] Reference was also made to Rule 26. 8(3) that prescribes the set of considerations that the Courts must have regard to in the exercise of its discretion. These were outlined as:

> 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 dates or any likely trial date can still be made if relief is granted; and*
>
> e. *the effects which the granting of relief or not would have on each party.*

[5] In determining the issue of promptitude the Court was referred to the case of **H.B. Ramsay & Associates Ltd & Another v Jamaica Redevelopment Foundation Inc. & the Workers Bank** [2013] JMCA Civ 1 where Brooks JA advised that the requirement of promptness in the rule be applied with a "measure of flexibility in its application". Counsel submitted that at paragraph 32 of the decision in **H.B. Ramsay**, the Court of Appeal upheld the decision of the Court below and refused the application for relief on the basis that the Applicant had not provided an explanation for its default in addition to the fact that the application was not made promptly. Counsel pointed out that this scenario does not apply to the case at bar as the Applicant had provided an explanation for the delay which was his inability to obtain the documents which were the subject of the disclosure order and had promptly filed its application.

[6] On this point, Counsel submitted that the Court is not bound to adopt the 'number of days' assessments which have been utilized in previous authorities to measure the promptitude or determined the absence thereof. He contends that the Court is emboldened to consider other circumstances made known to it on the evidence, which may touch and concern the issue of promptitude. It was submitted that the Applicant made good on the terms of the Order soon after the documents were

procured from the Inland Revenue Department, which was the only point it could have complied with the Courts Order.

[7] Mr. Clayton also noted that it was incumbent on the Court in considering the application to look at the circumstances of this particular case. He made reference to the case of **Victoria Marie Meeks v Jeffrey Williams Meeks** [2018] JMSC Civ. 37 in particular paragraph 44 where the court opined that slavishly following precedent is:

> *"not the correct approach to be adopted and applied by this Court, when considering the issue of whether or not an Applicant pursuing an application for relief from sanction, has 'made', or in other words, filed the application, promptly."*

[8] Counsel added that Anderson J in his judgment notes that "there is no litmus test that can be used for the purpose of determining whether or not the party's application for relief from sanctions, has or has not been filed, 'promptly'". In so noting, the learned judge placed reliance on the Court of Appeal's judgment in **H.B. Ramsay**.

[9] In paragraph 44 of his judgment, Anderson J noted that:

> *"Since there is no litmus test that can be utilized….. it is incumbent upon any judge who is considering whether or not to grant such an application, to consider any circumstances made known to the Courts, via evidence, or which, at the very least, that the Court can take judicial notice of, which impact upon the issue as to whether or not the Applicant's application for relief from sanctions, was filed promptly."*

[10] Counsel went on to submit that the circumstances of that case can be easily distinguished as the learned judge underscored that his decision to refuse the application for relief from sanction was on the basis that the Defendant had failed to offer a good explanation for failing to comply with the order in conjunction with his findings that the application was not made promptly. Counsel avers that this does not arise in this application and the Applicant has promptly filed its application and provided a good explanation for failing to comply with the order.

[11] Mr. Clayton contends that the measure of flexibility in this jurisdiction has extended to as much as two months, and supported this submission by reference to **Garbage Disposal & Sanitations Systems Ltd. v Noel Green and others** [2017] JMCA App 2 where at paragraph 36 of the judgment, F. Williams JA noted that the delay of 62 days in an application for relief from sanction is not 'in ordinate'.

[12] Counsel went on to say that at paragraph 51 to 52 of the said judgment, the Court of Appeal advised that the *Applicant [had] plausible explanation to deploy* and that it *[had] a real chance of succeeding on the appeal* and the Courts so concluded that notwithstanding its findings as to the period of delay.

[13] It was also submitted that the overriding objectives permeate the Court's contemplation '*in exercising any powers was under these rules'* as is well noted in Rule 1.2.

[14] It was Counsel submission that in essence the failure to comply was not the fault of the Applicant as the documents were not within his control. Counsel contends the non-compliance was unintentional that the Applicant made every effort to comply with the terms of the Order and procure the documents. Mr. Clayton says this was demonstrated on the evidence that the Applicant delivered the documents when they came into possession of it. He argued that this demonstrated a temperament to act in compliance with the Order and further demonstrating the absence of an intention to disregard the Order of the Court. The Court was asked to find that the Defendant's default was not intentional and was occasioned by the fact that a third party retained possession of the documents.

[15] Reference was made to the UK Privy Council case of the **Attorney General v Universal Projects Ltd.**, [2011] UKPC 37, an appeal from Trinidad and Tobago, where, it was indicated that the test for good explanation, in the context of equivalent rules, as being whether *"the explanation for the breach…… connotes real or substantial fault on the part of the defendant"*. The Supreme Court case of

Corey Jackson v Annmarie Phillips et al [2017] JMSC Civ 30 at paragraph 39 applies the standard articulated in **Universal Projects Limited**.

[16] In regards to what amounts to the absence of general compliance in terms of Rule 26.8(2)(c), Counsel referenced the decision of the Full Court at paragraph 17 of the case of **Shurendy Adelson Quant v Minister of National Security and the Attorney General** [2014] JMFC FULL 01 where it said that:

> *"The rule cannot be taken to mean that there is not 'general compliance with the rules' if the previous breach is the one which led to the making of the order in which relief is sought. Surely, it must be other beaches in relation to the conduct of the action generally."*

[17] This submission made was that this approach is contrary to the overall regime of the Civil Procedure Rules which encourages that litigants be not driven from judgment on mere procedural points but rather have determinations made on its merits. It was also submitted to be contrary to the specific regime as prescribed in Rule 26.8 and as explored by the Court in **H.B. Ramsey** and **Meeks** which both encourages flexibility and a regard for special circumstances.

[18] Counsel argued that there was a prompt compliance with the terms of the original Order and this ought to be imputed to the Applicant's credit in assessing its promptitude in relation to his application for relief. The Court was encouraged as a result to adopt this approach that looks to substance over form and not turn away a litigant because of the date on which he filed an application while ignoring other steps he would have taken to regularize his position and cauterize any prejudice to the other parties to the proceedings.

[19] It is Counsel's argument that the Applicants explanation for non- compliance is a good explanation. The evidence before the Court is that there was an absence of real or substantial fault on the part of the Applicant in that they were dependent on the third party Government of Jamaica Agency [Revenue Protection Department] to deliver up position of the documents relevant to the disclosure order. The

Applicant was at the mercy of the Agency as to when the documents would be released by them.

[20] It was argued that the Applicant demonstrated its desire to comply through pursuing alternative means by contacting the Inland Revenue Department, which was ultimately successful. The argument is that the Applicants acted reasonably in the circumstances and it did all it could to comply and the non-compliance was rendered inevitable by the involvement of third party agencies.

[21] Counsel submitted as a result that in these circumstances, the Applicant had no control over the release of the documents and such a substantial fault cannot be placed at its feet.

[22] Counsel concluded that the Applicant has been compliant with the other Orders of the Court and in any event, it is noted that the current non-compliance does not come to bear on the substance of this application.

[23] Counsel advanced that the rules require that the Court considered the grounds set out in Rule 26.8 (3). The Court was further behooved to inform itself of the overriding objective and the need to deal with cases justly. As a result, Mr. Clayton submitted that the following are factors relevant for the Courts consideration:

a. The matter involves a significant money judgment with a claim in excess of 1.9 million on United States Dollars; a judgment in this matter would lead the Defendant to financial ruin if the relief start is not granted as per Rule 26.8(3)(e).

b. The matter has been before the Courts for nearly a decade and that throughout the time the Applicant/ Defendant has been an active participant in the litigation and has maintained attendance and compliance with the Court order.

c. The Claimant/ Respondent herein has benefited from an order for relief from sanction where their claim was struck out but restored by means of relief by order of Mr. Justice C. Daye dated December 11, 2013.

d. The Court is disposed against having matters determined based on procedural points rather than on merits.

e. The Applicant/Defendant has a good defence with a real prospect of success.

f. There is no disruption of trial date as the default has already been remedied.

Respondent/Claimant Submissions

[24] In relation to the promptitude of an application for relief of sanction Queens Counsel Mr. McBean submitted that the Defendant had failed to satisfy the first issue, requirement of promptitude as the application for relief was made more than two months after the sanction took effect. He urged upon the Court to consider that the Defendant would have anticipated their default in complying based on the evidence contained in the affidavit of Kirk Crichton filed on, specifically paragraphs 6 to 8.

[25] Queens Counsel noted that whilst the Civil Procedure Rules do not set out the meaning of the prompt, the Court had the benefit of case law to guide its determination. He referred to the case of **Corey Jackson v Annmarie Phillips and Priscilla Fisher** Supreme Court Claim No. 2009 HCV 3759 where Simmons J at paragraph 21 of the judgment summarized and reaffirm the current position of the law by saying that:

> *"The word "promptly" is not defined in the CPR. In **Kristin Sullivan v Rick's Café Holdings Inc T/A Rick's Café** (No 2) (unreported) Supreme Court Jamaica claim no. 2007 HCV 03502 judgment delivered 15 April 2011, Sykes J stated:-*
>
> > *"Promptly is not defined in the rules, however, it is obvious that the context in which this adverb is used in the rules conveys the sense of „without delay", „quickly" or „at once".*
>
> *It is however clear that in assessing whether a party has acted promptly, the Court will have regard to the particular circumstances of each case. In **H.B Ramsey & Associates Ltd &another v Jamaica Redevelopment Foundation Inc & the Workers Bank** [2013] JMCA Civ 1 Brooks JA stated: -*
>
> *"the word "promptly", does have some measure of flexibility in its application. Whether something has been promptly done or not, depends on the circumstances of the case".*

[26] Further examples were submitted to the Court in particular in the case of **Joseph Nelson v David Robert Spencer et al (trading as Pneumatron Electrical Services and UC Rusal Alumina Jamaica Limited)** Supreme Court claim number 2009 HCV 05253 where the Court found that a delay of approximately three months in filing an application for relief from sanction was not made promptly notwithstanding the fact that the Applicant had sought to comply with the unless order within nine days of a simulated deadline. Paragraphs 7 of the judgment was relied on where it said that:

> *"Be that as it may, the filing of the document was within nine (9) days from the deadline stated in the "Unless Order." However, Rule 26.8(1) clearly stipulates that an application for relief from sanctions must be made promptly. As Brooks, JA had said, the context of Rule 26.8(1) does suggest a mandatory element. Once the application is found to have not been made promptly then it should not be considered."*

At paragraph 15 it was stated that:

> *"However, the application for relief from sanctions was made in November 2017, which was 3 months later. I agree, there was promptitude in filing the document but I do not find that there was promptitude in making the application for relief from sanctions. Bearing in mind that the Court does have the jurisdiction to extend time even after there has been a failure to comply with an "Unless Order", the 1st hurdle of promptitude in bringing the application for relief must be crossed."*

[27] The Respondents also submit that the Applicant has failed to demonstrate that any alternate attempts were made to obtain documents from the Inland Revenue Department before the expiry of the date of compliance. The Order for the production of the financial statements was made from 17th October 2017. Therefore, from that date the Applicant was aware of the need to produce these documents, having failed to do so on the 5th February 2018 the Court made the unless order giving the Applicant time to comply with the previous order. It is the Respondents opinion that failure to comply should be deemed as intentional.

[28] Further, the Respondents submitted that the Applicant has consistently failed to comply with orders made by the court for disclosure or production of documents which were crucial to their Defence to the claim and which were necessary for the

Court appointed expert accountants to reconcile the accounts and complete their report. In the case of **F1 investments Inc. et al v Peter Krygger et al** SCCA No. 148/2010, it was submitted that the Court in determining whether an application has generally complied with all rules and Order the Court pursuant to Rule 26. 8 (2) (c) of the Civil Procedure Rules, Brooks JS at paragraph 30 of his judgment stated:

> *"……. The rule does not ask whether the Applicant is in compliance with all previous orders, directions and rules. The requirement of general compliance speaks to a tendency or trend and seeks to address or foreshadow what the position will be going forward. If there has been general compliance in the past, then a slip could be considered an aberration and there is unlikely to be further slips going forward. Several slips in the past, however, are harbingers of further disobedience in the future……."*

[29] In conclusion Queens Counsel submitted that the general approach to be taken by the Court when considering an application for relief from sanction was found in the case of **Jamaica Public Service v Charles Vernon Francis and Columbus Communications Jamaica Limited (Trading as FLOW)** SCCA No. 12/ 2015 at paragraph 57 where Morrison P states that:

> *"…… In this jurisdiction, a first instance judge faced with an application for relief from sanctions must begin from a point of principle that (a) the orders of the Court must be obeyed; (b) all the requirements of rule 26.8 (1) and 26.8(2) must be met; (c) once those requirements have been met, it is the duty of the judge to have regard to the interest of the administration of justice and ensure that justice is done in accordance with the overriding objective, without resort to needless technicalities, in keeping with the factors set out in rule 26.8(3); (d) a litigant is entitled to have his case heard on the merits and should not lightly be denied that right; and (e) the Court must balance the right of the litigant against the need for timely compliance."*

LAW AND ANALYSIS

[30] In his delivery of the Court of Appeal judgement of **H.B. Ramsay and Associates Limited et al v. Jamaica Redevelopment Foundation Inc. and The Workers Bank** [2013] JMCA Civ. 1, Brooks JA rightfully outlined the position to be taken by the Court in an application for relief of sanction where he said :

> *"In a case where the sanction has taken effect, the Court, in deciding whether to grant relief, must give due regard to the factors in rule 26.8. In the case of a failure to comply with any rule, order or direction which specifies a sanction for such a failure under rule 26.7 the sanction takes effect unless relief is granted.*
>
> *The rule is that where a party fails to comply (within the time limited) with a rule, practice direction or Court order imposing any sanction, that sanction will take effect unless the party in default, applies for and obtains relief from sanction. In principle, where the time limited for compliance has expired, there is no need for a further order from the Court for the sanction to take effect. This is because the breach of an order imposing a sanction automatically results in the stated sanction taking effect. See* ***Marcan Shipping (London) Ltd v Kefalas and another*** *[2007] EWCA Civ. 463. A party in default of compliance with such a time limit must seek relief from sanction, if he wishes the effect of the sanction to be removed. The Court has to take into consideration the several factors stated in rule 26.8 before granting relief because regard has to be given to the principle that where the Court sets a timetable litigants are expected to comply."*

[31] The provisions of Rule 26.8 of the Civil Procedure Rules are that

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 remedies within a reasonable time;*

d) whether the trial date or any likely trial date can still be met if relief is granted; and

e) the effect which the granting of relief or not would have on each party.

4) The Court may not order the respondent to pay the Applicant's costs in relation to any application for relief unless exceptional circumstances are shown.

[32] It becomes apparent therefore, that for an Applicant to succeed on an application for relief from sanction, he has three main hurdles to overcome under the provisions of Rule 26.8 (1) and (2). In the case of the **Attorney General v Universal Projects Ltd.** (supra), the Privy Council said:

> *"... an application for relief from a sanction must fail unless all three of the conditions precedent specified in rule 26.7(3)5 are satisfied. These are that "(i) the failure to comply was not intentional, (ii) there is a good explanation for the breach and (iii) the party in default has generally complied with all other relevant rules, practice directions, orders and directions."*

[33] Similarly, in **H.B. Ramsay** (supra), Fraser, J added that:

> *"The claimants must therefore first successfully clear the mandatory hurdles established by rule 26.8 (1) (a) (prompt application) and (b) (supported by evidence on affidavit) and by 26.8 (2) (a) (failure unintentional); (b) (good explanation for the failure) and (c) (compliance by the party in default with other rules, directions and orders). Thereafter the Court is empowered to undertake the balancing exercise contemplated by rule 26.8 (3) which outlines factors the Court should take into account when considering whether or not to grant relief, the conditions precedent established by rule 26.8 (1) and (2) already having been satisfied."*

[34] Skyes J (as he then was) in the case of **Reid, Elenard and Abdalla, Shanti v Pinchas, Nancy and Pinchas, Israel et al**. 2002CLR03, "...*"promptly" does not necessarily mean immediately, and that there can be a certain amount of elasticity in meaning, clearly the more removed one is from the date the sanction takes effect the less prompt the application is with the corresponding need to explain more fully, the reasons for the delay in applying for relief."*

[35] In the case at bar, the Unless Order made by Laing J on February 5, 2018 imposed compliance by May 4, 2018, wherein the Applicant/Defendant's statement of case would have been struck out and judgment entered for the Respondent/Claimant.

The Order striking out the statement of case for the Applicant/Defendant was later made by Rattray J on June 26 2018. The application for relief from sanction was made on July 11, 2018. It was supported by affidavit evidence of Nordia Murray-Lewars and Kirk Crichton. The application for relief from sanction was also made with an application for extension of time.

[36] The evidence of the Applicant/Defendant from the affidavit of Kirk Crichton filed on July 26, 2018 is that the delay is attributable to the fact that the documents required by the Court were in the possession of the Revenue Protection Department. It was advanced that the efforts to procure the documents made by himself and other agents of the Applicant/Defendant were bona fide but yielded no success. He added that he was informed by Miss Nordia Murray-Lewars that the efforts to procure the pertinent documents were done with alacrity.

[37] On the evidence of Nordia Murray-Lewars through affidavit filed on July 24, 2018, it was not until June 19, 2018 that the documents were received from the Inland Revenue Department. Further, by way of documentation evincing acknowledgement of receipt, it was also shown that the documents were given to the Respondent/Claimant on June 26, 2018.

[38] It is apparent that the sanctions of the Unless Order would have become effective on May 4, 2018 once there was no compliance. Having filed the application on July 11, 2018, the delay in the instant case is in excess of two (2) months. The delay period starting to run as at the date the sanction took effect (May 4, 2018) to the date the application for relief from that sanction was filed (July 11, 2018).

[39] I acknowledge the explanation given by the Applicant as to the reasons behind the delay but I must note the fact that even after the documents were in the possession of the Applicant, there was an additional eight (8) days delay disclosing them to the Respondent.

[40] The authorities are instructive on what is considered promptitude in the application and in the case of **AG v Universal Projects** (Supra), it was held that a delay of

three weeks was not considered prompt, neither a delay of ten (10) days. Given the circumstances of the case. It is clear that the circumstances of each case must be properly and carefully scrutinized for determination. It is not 'one size fits all approach'. I have assessed the evidence before me and I find that the application for relief from sanction was not made promptly.

[41] It is my view that once the mandatory provisions have not been complied with the application cannot succeed. However, in considering all the circumstances before me and assessing the affidavits provided to this Honourable Court by the Applicant shows that the failure to comply with the Order of Laing J made on February 5, 2018 was because the requisite financial statements were not in their possession at the time it was ordered for production. The Applicant sought to outline the issues in the procurement of the documents and as a result, I find that even the failure to comply was not intentional the Applicant has failed to provide a good explanation.

[42] It has been settled that success of an application for relief from sanction will depend on the explanation given. As per Brooks JA in **H.B. Ramsay** where he made reference to the dicta in **A.G. v Universal Projects**:

> *"Where there is no good explanation for the default, the application for relief from sanctions must fail. Rule 26.8(2) stipulates that it is a precondition for granting relief, that the Applicant must satisfy all three elements of the paragraph. The Privy Council, in* ***The Attorney General v Universal Projects Ltd*** *[2011] UKPC 37, in considering a similarly worded rule, used in the Civil Procedure Rules of Trinidad and Tobago, held that the absence of a "good explanation" within the meaning of the rule, was fatal to the application. Their Lordships, in that context, said at paragraph 18 of their opinion:*
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> *"The Board has reached the clear conclusion that there is no proper basis for challenging the decision of the Courts below that there was no "good explanation" within the meaning of [the rule equivalent to rule 26.8(2)(b) of the CPR] for the failure to serve a defence by 13 March. That is fatal to the Defendant's case in relation to [the rule equivalent to rule 26.8 of the CPR] and it is not necessary to consider the challenge to the other grounds on which the Defendant's appeal was dismissed by the Court of Appeal." (Emphasis supplied)*

[43] The Applicant has sought to timetable its attempts at procurement. The Court finds however that the attempts were not made rigorously and coherently. In the affidavit of Nordia Murray-Lewars, it was expressed that the process of procurement started in February 2018 and the urgency of the matter was said to be understood. The timeline of events however do not show much action being taken by the Applicant to comply with the Order of the Court. The evidence is that several calls were made during the months of March and April and messages where left for one Krissanne Graham who would have been the person to deal with the matter.

[44] From the evidence, calls were made to Miss Graham and messages left for two months. I find that having learned of the urgency of the matter from February 2018, more stringent measures should have been taken by the Applicant. In addition to this, even after a physical letter was sent and signed for by Mr. C Morgan, the evidence of the Applicant is that they continued to call in an effort to speak with Miss Graham. There is no evidence before the Court of any stringent efforts being made on the part of the Applicant given that the matter was now to my mind more urgent that before.

[45] In answering the question as to whether this would amount to good explanation, Lord Dyson in **AG v Universal Projects Limited** stated at paragraph 23:

> *"[I]f the explanation for the breach...connotes real or substantial fault on the part of the defendant, then it does not have a "good" explanation for the breach. To describe a good explanation as one which "properly" explains how the breach came about simply begs the question of what is a "proper" explanation. Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly, if the explanation for the breach is administrative inefficiency."*

[46] I find the explanation of the Application to be a case of administrative inefficiency as opposed to an insurmountable challenge in procurement of the requisite documentation. I find that there was much more that the Applicant could have done in an effort to comply with the Order. In those circumstances, I do not consider the explanation given to be a good one.

[47] There is an issue raised on the evidence as to whether there is history of non-compliance by the Applicant/Defendant. I am not of the view in light of all the circumstances that I am required to make a final determination of that issue. That would only become necessary if the Applicant had satisfied the mandatory requirements of Rule 26.8 (1)

[48] I conclude that the applicant has failed to establish that this application was made promptly in the circumstances. Therefore, their application for relief from sanctions must be refused.

DISPOSITION

a) The Applicant/Defendants Notice of Application filed on July 11, 2018 is refused.

b) By the Order of Rattray J made on June 26, 2018, Judgment entered in favour of the Claimant stands.

c) Assessment of Damages to be scheduled for hearing.