[2012] JMSC Civ 100

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. 2011 HCV05632

BETWEEN	**ASTON EAST**	**CLAIMANT**
A N D	**GEORGE FRECKLETON**	**DEFENDANT**

Vernon Daley instructed by Gifford, Thompson & Bright, for the Claimant.

Anthony Pearson instructed by Pearson & company for the Defendant.

Unless Order – Breach of Unless Order – Whether Court has discretion to extend time for compliance of Unless Order – Civil Procedure Rules 6.6, 6.6(1), 26.2(1), 26.1(2) (c) and 26.9. – Application dismissed – Cost to Claimant.

HEARD: July 20 & 24, 2012.

IN CHAMBERS

CORAM: ANDERSON, K., J.

[1] This Claim concerns a property dispute between the respective parties and has been instituted by means of Fixed Date Claim Form which is supported by Affidavit, as deponed to by the Claimant. In that Affidavit which was filed on September 12, 2011, the Claimant deponed to having then been ninety-one (91) years old. A first hearing of the Fixed Date Claim Form was held on October 11, 2011. Prior to that, the Defendant had filed an Acknowledgement of Service which stipulated that the Defendant had received both the Fixed Date Claim Form and Affidavit in Support on September 13, 2011. To date however, the Defendant has not filed a

Defence in answer to the Claim made against him. Case management Orders were made by this Court at the First Hearing and those Orders had, inter alia, required the Defendant to file an Affidavit in response to Fixed Date Claim Form, a List of Documents, a Listing Questionnaire and Skeleton Arguments and Bundle of Authorities. This Court had, at that first hearing, also then scheduled respective dates when each of the respective documents were to have been filed by the respective parties. All of those case management Orders have been complied with by the Claimant. The Defendant however, did not comply with any of those case management Orders. At First Hearing, this Court had then scheduled trial for July 4, 2012. When that trial date came up, the Claimant was at Court and prepared and ready to undergo the trial. The trial was not however, conducted on those then scheduled dates, as the Defendant was clearly not then in a position to properly proceed with the same, since he had, even by then, still not filed any documents in response to the Claimant's Claim and/or other documents which had, by then, been filed by the Claimant. At trial therefore, the Defendant applied orally, for extensions of time in order to permit the requisite documents to be filed. At the same time, the Claimant applied for Default Judgment to be granted. This Court then refused the Application for Default Judgment , insofar as I was aware, as the Judge who heard the matter in open Court, on July 4, 2012, that a Default Judgment cannot properly be granted in respect of a Fixed Date Claim Form matter. See Rule 12.2 (a) of the Civil Procedure Rules in that regard. On the day when this matter came before the Court for trial, there were several other matters listed before the Court for hearing on that day and mistakenly, this matter was not actually on the list prepared of matters scheduled to be heard on either July 4, or 5, 2012. Added to that is the fact

that I was not actually scheduled to hear matters in Motion Court on that day, as I then was actually scheduled to have been in Chambers.

Accordingly, I had not properly prepared myself to proceed on that day or even the following day, with a trial of this matter. Thus, although this Court is empowered by Rule 27.2(8) of the Civil Procedure Rules to dispose of a Fixed Date Claim Form, summarily at a First Hearing, if it is undefended and therefore, it seems, would have a similar power if the Fixed Date Claim were to come up for Trial and even by then, still be undefendedThis to my mind would be a case management power which this Court can exercise in such a circumstance. As things turned out however, that was not what then transpired. Instead, this Court then granted the Defendant's Application for extensions of time for compliance with this Court's case management orders.

In that regard, the Defendant was then granted up to and inclusive of July 18, 2012, within which to comply with all case management Orders. Additionally, it was then Ordered by this Court that if the Defendant failed to comply with all case management Orders by or before July 18, 2012, then the Defendant's Statement of case (if such were to then have existed), should stand as struck out. The Court also then scheduled another case management hearing to be held on July 19, 2012 at 12 noon. On that date (July 19,2012) by consent of the parties and with the Court's concurrence, arising from circumstances which occurred on that date and which were beyond this Court's control, the next scheduled case management hearing pertaining to this Claim, came back before this Court on July 20, 2012.

The background information, as provided in detail, is of great importance for the purpose of understanding the context to that which transpired before this Court on July 20, 2011. On that date, the Defendant applied orally

again, for another extension of time. On that most recent occasion however, his Application was supported by Affidavit evidence, which was filed on July 18, 2012 and served on the Claimant's Attorney. That Affidavit was deposed to by the Defendant's Attorney - Mr. Anthony Pearson. Attached to that Affidavit is a draft Affidavit of the Defendant, but which has not yet been deposed to by the Defendant. Thus as stated above, it is a draft Affidavit or in other words, a draft Defence only. Mr. Pearson gave sworn testimony in that Affidavit of his, that he was informed by the Defendant's son that the Defendant is ill and has gone abroad to seek medical treatment. The affidavit though does not refer to the specifics of the Defendant's illness, nor is there any medical report from any doctor, whether based locally or overseas, attached as an exhibit to Mr. Pearson's Affidavit. Additionally, no evidence has been provided by the Defendant's counsel in his Affidavit as to when it is that the Defendant will likely return to the country, or even as to when he will be fit and/or well enough to depose to his proposed Affidavit in response to the Claim. What though has been stated by Mr. Pearson in his Affidavit, is that he has, via courier, transmitted the draft Affidavit to the Defendant, who is stated as presently being in the United States undergoing medical treatment there, and is therefore awaiting the return of the properly executed Affidavit (albeit the date of such expected return has not been stipulated to, in counsel's Affidavit).

[2] When this Court made enquiry of defence counsel, in Chambers, on July 20, 2012, whether the other case management Orders had been complied with, Mr. Pearson then informed that they had indeed so been and that the only outstanding defence document at this time, was the

Defence – in the form of an Affidavit in response. Mr. Daley – counsel for the Claimant, has taken issue with this, insofar as those other documents were served on the last date prescribed for filing – July 18, 2012, at 4:02 p.m. and thus, he contends that in accordance with Rule 6.6 (2) of the Civil Procedure Rules, those other documents were also filed a day late. Mr. Pearson disagrees with this contention and has suggested that this Court should not pay any regard to 'trifles.' This Court though, is of the view that whether or not a particular action as taken by a party, or lack of action by a party is to be considered as trifling, must in a Court scenario, just as it should in any other type of scenario, be viewed in context. With that in mind, it cannot at all be forgotten that there existed an Unless Order in respect of the Defendant. That Unless Order was made because of the Defendant's delay in responding to the Claim and in an effort to ensure that this matter does not take up more of this Court's time and/or resources than it should, if the Defendant either is not serious about putting forward a Defence to the Claim, or if, for whatever reason, he is unable to do so in a timely way – as must, of necessity, be required. In that context, the Defendant should not even have run the risk that a further delay may have arisen. As things have occurred, this Court is constrained, in accordance with Rule 6.6 of the Civil Procedure Rules to conclude that there has been a breach by the Defendant of its Unless Order, in respect of the date by which the Defendant's other documents (other than the Affidavit in Response), ought to have been served.

The breach in that regard may have been brought about due to a misunderstanding of, or lack of sufficient knowledge of the relevant Rules of Court, or may have been brought about simply because, for whatever reason, the documents in question could not have been served before the

required date at 4:00 p.m – as per Rule 6.6 of the Civil Procedure Rules. Be that as it may though, this Court will have to consider whether it can properly exercise any discretion to extend time in that regard, at this stage, and if this Court can indeed extend time, then the nature of the time breach and the reasons therefor, should properly be considered by this Court, with a view to making a proper determination as to whether and if so, to what extent if at all, the other party – in this case, the Claimant, has been prejudiced. Thus, Mr. Pearson has also requested that this Court grant an extension of time, if this Court disagrees with him on the effect of Rule 6.6 of the Civil Procedure Rules in circumstances wherein the relevant other documents were served two minutes after 4p.m on July 18, 2012.

[3] Thus, this Court must now first consider whether or not it has a discretion to extend time for compliance with peremptory Orders of the Court, in circumstances wherein the Court has Ordered that unless those peremptory Orders are complied with, then the Defendant's Statement of Case shall stand as struck out. Mr. Pearson submits and Mr. Daley disagrees with this, that this Court always has discretion to extend time and in so doing, should apply the over-riding objective as specified in Part 1 of the Civil Procedure Rules. Mr. Pearson also relies on Rule 26.1(2) (c) of the Civil Procedure Rules, which he contends, authorizes this Court to extend the time for compliance with any Order of this Court, this even after the time for compliance with the same has passed. Defence counsel has further contended that this Court can make such an Order of its own motion and thus, even without an application. The defence counsel has cited Rule 26.2(1) in the Civil Procedures Rules in support of this proposition. For his part, the Claimant's counsel has instead, in response, relied on Rule 26.7,

which provides that – '**where a party has failed to comply with any of these Rules, a direction of any Order, 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** [4] Rule 26.9 is definitely worthy of note, because it is with Rule 26.9 in mind that the Court must consider whether it can extend time in accordance with Rule 26.1 (2) (c) of the Civil Procedure Rules Rule 26.9 in that context, is worthy of reference in its entirety. It reads as follows:-

'(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.

(2) An error of procedure or failure to comply with a rule, practice direction or Court Order does not invalidate any step taken in the proceedings, unless the court so orders.

(3) Where there has been an error of procedure or failure to comply with a rule, practice direction or Court Order, the Court may make an order to put matters right.

(4) The court may make such an order on or without an application by a party . '

[5] There are a few mattes of law which immediately become clear, upon a careful consideration of the provisions of Rule 26.9. The first is that this Rule has no applicability whatsoever, in circumstances wherein the consequences of failure to comply has been specified in a Court Order. It follows from this, that Rule 26.9 cannot avail a party who has failed to comply with an Unless Order, since that Order, must always, just as it did in the case now at hand, specifies the consequence of failure to comply, this being, in this particular case , that the Defendant's statement of case shall stand as struck out. If even this was in doubt though, Rule 26.7 (2) makes it even more specifically clear, that unless the party in default of an Unless Order obtains relief from the sanction, then the sanction as imposed by the Court Order, has effect, and 'Rule 26.9 shall not apply.' If Rule 26.9 does not apply to such a circumstance, then clearly, Rule 26.1 (2) (c) cannot avail the Defendant, this because, Rule 26.1 (2) has as its prefacing words, the following – 'Except where these Rules provide otherwise, the Court may.' Where there has been a breach of an unless Order, the Rules expressly provide that the sanction as imposed for the breach of the Unless Order, has effect and thus, the general power of the Court to extend time for compliance with a Court Order even after the time for compliance has passed, has absolutely no applicability to circumstances wherein a sanction is applied for breach of an Unless Order. This is why it is now settled law, both inside and outside of Jamaica, that where there has been a breach of an Unless Order by a party, the sanction imposed arising from that breach, automatically takes effect, without the need for any subsequent Court Order. See on this point: - ***H.B. Ramsay J.D.R.F. and the Workers Bank – [2012] JMSC Civ 64 and Marcan Shipping (London*) *Ltd. V Kefalas and another – (2007) EWCA Civ 463***. It should also be noted at this

juncture, that the England & Wales Court of Appeal has accepted, in its Judgment in the case – ***Robert v Momentum Services Ltd***. **(2003) 1 W.L.R 1577**, that there is a difference between applying for an extension of time before the time for doing a particular act has arrived, as against applying for relief from sanction in circumstances wherein an Order of the Court has not be complied with.

[7] It is important to be aware when addressing one's mind to Applications such as the one now before this Court for consideration, that English Courts have, for some time now, been back and forth over whether or not a Court has power to extend time for compliance, in circumstances wherein an Unless Order has been made by a Court, but not been complied with by a party. The English court of Appeal case of **Samuels v Linzi Dresses Ltd.** is thus, one case that can be cited in support of the proposition that a Court has power to extend time even in circumstances wherein an Unless Order has been made and not complied with, albeit that such power, it was specified in that case, should be exercised cautiously and with due regard to maintaining the principle that Orders were made to be complied with. The citation for ***Samuels v Linzi Dresses Ltd., is:- (1980) 1 ALL E.R. 803***. This case (Samuels) expressly refused to follow the Judgment in an earlier case from the Q.B.D., which had expressly decided to the contrary, that being – **Whistler v Hancock (1878) 3 Q.B.D. 83**. There are other earlier cases though, which also had decided to the contrary, these being:- ***Wallis v Hepburn (1878) 3 Q.B.D. 84, King v Davenport (1878) 4 Q.B.D. 402 and Script Phonography Co. Ltd. v Gregg (1890) 59 L.J. Ch 406***. Neither as at the date when the Judgment in the Samuels case, nor any of the earlier Judgments on this point were delivered by respective Courts in England, were there any Civil Procedure Rules in similar terms as now exists in Jamaica, in effect.

The Civil Procedure Rules in England, came into effect in 1988, via statutory instrument 1998/3132. Thus, when all of the cases as

aforementioned, which address this point, were being adjudicated upon by various Courts in England, those Courts were considering the effect of Order 57, Rule 6, which is in nearly the same terms as Rule 26.1 (2) (c) of the Civil Procedure Rules (op. cit.)

This would no doubt, help to explain why the Court in rendering its Judgment in the Samuels case, felt it necessary to refer to the House of Lords decision in **Birkett v James (1977) 2 ALL E.R. 801**, which case looked at the question as to the circumstances in which the Court should exercise its power to strike out a claim and how the Court should go about exercising its discretion in that regard. In yet another English Court Judgment in which it was held that a Court had discretion to extend time even in circumstances wherein there had been non-compliance with an unless order, this being: **Pereira v Beanlands (1996) 3 ALL E.R. 528,** it comes as no surprise therefore, that reliance was placed on the cases of **Birkett v James (op. cit)** and **Alpine Bulk Transport Co. Inc. v Saudi Eagle Shipping Co. Inc., The Saudi Eagle (1986) 2 Lloyd's Rep. 221**. Neither the Birkett nor the **Saudi Eagle** case though , concerned breaches of peremptory Court Orders and as earlier stated, neither of those Judgments were rendered subsequent to the coming into force and effect , in England , of the Civil Procedure Rules. The position is entirely different with respect to the **Pereira v Beanlands case (op. cit.)** and the England and Wales Court of Appeal Judgment in **Re Jokai Tea Holdings Ltd. (1993) 1 ALL E.R. 630.** Both of these latter – mentioned Judgments address issues that are similar as have now arisen in the oral Application which is now being decided upon by this Court. Additionally, both of these cases were decided in the context of the applicability in England, of their Civil Procedure Rules.

[8] We come then to that which , as far as my extensive research on the issues surrounding the Defendant's Application is concerned, appears to be the most recent England and Wales appellate Court decision on the pertinent issues, this being – **Marcan Shipping (London) Ltd., v Kefalas**

and another (op. cit.) The England and Wales Court of Appeal's Judgment in the Marcan case, has made three things very clear, in circumstances such as those which exist in the case at hand. They are as follows:

(1). The sanction embodied in an Unless Order takes effect without the need for any further Order if the party to whom it is addressed, fails to comply with it in any material respect.

(2). A party in default of an Unless Order must apply for relief from sanctions if he wishes to escape its consequences. An Application of that kind under the Jamaican Civil Procedure Rules, must deal with all of the matters which this Court is required by Rule 26.8 of Jamaica's Civil Procedure Rules, to consider. In that regard, it is also important to note that the English Civil Procedure Rules 3.9 – which addresses the circumstances in which the appropriate Courts in that jurisdiction, can properly grant relief from sanctions and sets out all of the factors to be considered by such Courts in that regard, is not , in all respects, worded in the same way, as Jamaica's Civil Procedure Rule 26.8. The latter, having come into force and effect later in time, were clearly intended therefore, to have been applied differently. This point was clearly made by my brother Justices – Sykes J. and Fraser J. in two separate Judgments:- See: **Kristin Sullivan and Rick's Café Holdings Inc. Claim No. 2007HCV03502 and H.B. Ramsay and Associates Ltd., et al & J.D.R.F. and The Workers Bank (op. cit.).** The application of the law in that

regard though, need not be addressed for the purposes of this Judgment, as no relief for sanctions has been made by the Defendant. Instead, the Defendant has chosen, at least for now, to rest his laurels on an Application for an extension of time, in circumstances wherein there has been a failure to comply with an Unless Order requiring certain documentation to have been filed by the Defendant by or before a specified date.

(3) It is always important for Justices of this Court to note that before making Unless Orders, which could result in either the striking out of a party's statement of case or the dismissal of a Claim or Counter-Claim, the Judge should consider carefully, whether the sanction being imposed is appropriate in all the circumstances of the case. This is because a conditional Order striking out a statement of case or dismissing a Claim or Counterclaim, is one of the most powerful weapons in the Court's case management armoury and therefore, should not be deployed unless its consequences can be justified.

[9]. All of those three points mentioned in paragraph 8 of this Judgment above, were made very clearly by Moore-Bick, L.J. in the Judgment which he delivered in the **Marcan Shipping case**. See paragraphs 34-36 of his Judgment, in that regard. There is however, one other significant point which Moore – Bick, L.J. made in the **Marcan Shipping case**, which ought also to be considered and it is that the Court can, of its own motion, grant relief from sanctions arising from the failure to comply with an Unless Order. See paragraphs 32, 33 & 35 of the England and Wales Court of

Appeal's Judgment in the Marcan case, per Moore – Bick L.J., in that regard and the case cited – **Keen Phillips v Field (2006) EWCA Civ 1524.** Whilst it is accepted by me that this is the applicable effect of their Civil Procedure Rules in England, this Court does not hold the view that the same would be applicable in Jamaica, in circumstances where there has been a breach of an Unless Order. This is because, in Jamaica, Rule 26.9 has no applicability whatsoever in matters concerning a failure to comply with an Unless Order. It must be recalled in that regard, as aforementioned, that Rule 26.9 permits this Court to act of its own motion and put matters right, in circumstances wherein there has been a failure to comply with a rule, practice direction or court order. Thus, with that Rule being inapplicable to the matter now at hand, even though the breach of the Unless Order in respect of the service of documents other than the Defendant's Defence was, at worst, trivial in nature and hardly such as to have prejudiced the Claimant in any way whatsoever, nonetheless, this Court is at this time, of the considered opinion, that it can do nothing of its own motion to rectify the consequences of that which, although trivial in terms of the nature of the breach, was in fact a breach. Whether relief from sanctions in that regard, ought to be granted, is a matter that may have to be considered by this Court at a later date. Insofar though, as the failure of the Defendant to file a Defence to the Claim is concerned, it is the considered opinion of this Court, that such breach, for whatever reason it may have been caused, is egregious in nature and would, if the Defendant's present Application were to be acceded to, undoubtedly cause yet another trial delay, in circumstances wherein the Claimant is elderly and as time progresses, will less and less, likely be either able to remember events and facts pertaining to this Claim, much less to actually give

evidence in respect of same, thereby likely subjecting himself to the distinct likelihood of having to undergo vigorous cross-examination.

[10] Thus, even if this Court is wrong in having concluded that it cannot properly extend time for compliance with an Unless Order, in circumstances wherein that said Unless Order has been breached, the context of the Defendant's Orders regarding the filing and service of various documentation and the past effects of and likely future effect of those breaches, in terms of the conduct of the Claim, if the Court were to allow for such breaches to be waived, would all have to be carefully considered by this Court, even if it could exercise a jurisdiction to extend time in present circumstances. Viewed in that context, this Court would not have granted an extension of time in any event, as the evidence supporting the Defendant's oral application for an extension of time, does not sufficiently support the granting of that Application. There is no medical evidence provided in respect of the Defendant's current medical condition, nor as to his medical prognosis.

Additionally, no indication has been given in that Affidavit evidence as to when the Defendant is likely to be able to return to Jamaica for trial. Thus, if this Court were to have to adjourn trial of this Claim for a second time, it would still be uncertain as to whether on the third scheduled trial date commencement, the Defendant will be, or even will be able to be, present for same. All of this results in more costs unnecessarily being incurred by the Claimant and has already resulted in wastage of this Court's already limited time and human resources. Added to that is that any further delay may very well result in a fair trial being impossible to achieve, this because of the Claimant's age and likely powers of recollection at this stage of his

life – this of course in circumstances wherein it is the Claimant that bears the burden of proof. In circumstances such as these, it is my view that significantly compelling evidence would have had to have been provided to this Court, if this Court were to be expected to exercise a discretion to extend time in the Defendant's favour, in that regard. Such significantly compelling evidence has not been forthcoming. Whilst there is a draft Defence exhibited to Defendant counsel's Affidavit in support of his client's oral Application, this is as yet unsigned and thus, unapproved of by the defence counsel's client. Thus whilst the draft Defence does indeed join issue with various aspects of the Claimant's Claim, it is still, as yet, only a draft and therefore, it remains to be seen, what the final defence would be. Even though the Defendant may have a good defence to the Claim and even though the breach or breaches of the Unless Order were neither contumelious nor contumacious in nature, nonetheless, such even collectively, would not entitle the Defendant to succeed on an Application to extend time in the present circumstances. The Court must have regard, in considering such an Application, the likely prejudice to the Claimant if the Defendant's Application were to be granted and must consider same in the context of the overall interests of justice, taking into consideration, all of the factors as specified in Rule 1.1 (2) of the Civil Procedure Rules of Jamaica. When so considered, the Defendant's Application would, in this Court's considered opinion, be bound to fail.

[11] Two options were open to the Defendant in this case, to have prevented the sanction as has been imposed for non-compliance with the Unless Order, from having taken effect. One of these would have been to have applied for an extension of time prior to the sanction having taken

effect and then, if possible had such Application heard, as a matter of urgency, by this Court, before July 18, 2012. Additionally, the Defendant could have, through and with the assistance of his counsel, filed a Defence and since, by July 18, 2012, his client was no longer available to certify same as he was then out of the country to seek medical treatment, the Defence counsel could have certified the same on his behalf. To my mind, this could have been the course adopted in unusual circumstances such as this, even though it is a Fixed Date Claim Form matter and the Claimant's Particulars of Claim are contained, as the Rules of the Court permit, in an Affidavit of the Claimant. To my mind, Rule 10.2(1), (2) and (3), when read together, permit a Defendant, even in a Fixed Date Claim Form matter, to file either a Defence or an Affidavit in response, as his Defence. This Court did bring this point to defence counsel's attention during the hearing of his client's Application for an extension of time, but defence Counsel then told this Court that it was not his understanding that in a Fixed Date Claim Form matter, such a procedure could have been adopted.

[12] One final point of law must now be mentioned for the sake of completeness, in this Judgment, and it is as regards defence counsel's submission that this Court, 'always has discretion.' With respect, this Court cannot agree with such a proposition. In fact, there now exists, Jamaican Court of Appeal Judgments which suggest quite to the contrary. See for example – Dorothy Vendryes and Dr. Richard Keane and Karene Keane – Supreme Court Civil Appeal No. 101/2009/[2011] JMCA Civ 15, especially at paragraphs 12 & 34 of the Court of Appeal's Judgment in that case, as was delivered by Harris J.A.

[13] In the circumstances, the Defendant's statement of case stands as struck out. This matter will still have to proceed to trial, as no default Judgment can be entered in a Fixed Date Claim Form matter. Thus, this Court cannot accede to the Claimant's request , as was made through his counsel, just before the close of proceedings in Chambers as regards the Defendant's Application, for Judgment to be entered in the Claimant's favour at this time. The Defendant's statement of case, at this time, would be comprised of all documents filed in support of his proposed Defence, albeit that he has not yet filed a Defence. The definition of the term, 'statement of case' as given in the definition segment of the Civil Procedure Rules at Rule 2.4, makes this clear. Thus, at trial, the Claimant can apply for the trial to be proceeded with summarily and thereafter, it seems, that if this Court then decides to proceed with the Fixed Date Claim summarily, it would not be necessary for any evidence at trial to be led. This Court, upon review of the documents as filed by the Claimant, may grant any Order which it believes the Claimant is entitled to, or alternatively, it may even dismiss the Claim. All of those are matters which will through, have to be determined at trial on July 30, 2012. The Court then can exercise its case management powers, as per Rule 27.2 (8) of the Civil Procedure Rules and dispose of this matter summarily.

[14] In the circumstances, the Defendant's oral Application for an extension of time, is dismissed and the Claimant's oral Application for Judgment to be entered in his favour, is also dismissed. Since the hearing on the 20th July, 2012, was not effectively utilized as a scheduled case management conference so as to ensure that everything and everyone were ready for trial, but instead, was used up primarily by the Defendant in

applying for an extension of time and lasted for 90 minutes in that regard, rather than the scheduled 30 minutes, this Court awards costs of that hearing to the Claimant with such costs to be assessed for 90 minutes of Court time. Leave to appeal is granted.

Orders

(i) Defendant's oral application for an extension of time within which to file a Defence is dismissed.

(ii) Claimant's oral application for Judgment to be entered in his favour arising from the Defendant's failure to comply with the Unless Order, is dismissed.

(iii) Costs of hearing on July 20, 2012, being costs for 90 minutes are awarded to the Claimant.

(iv) The trial of this Claim shall proceed as scheduled on July 30, 2012.

(v) Leave to appeal is granted to the Defendant

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Honourable K. Anderson, J.