[2020] **JMSC Civ. 101**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISON

CLAIM NO. 2009HCV01956

BETWEEN	**EARL MARTIN**	**CLAIMANT**
AND	**RICHARD BURGHER**	**DEFENDANT**

IN CHAMBERS

Mr. Philip Bernard instructed by Bernard & Co for the Claimant

Mr. Kevin Williams and Ms. Anna-Kay Brown instructed by Messrs Grant, Stewart, Phillips & Co for the Defendant

HEARD: February 23, 2020 & May 21, 2020

CIVIL PROCEDURE RULES (CPR) 2002 – APPLICATION TO STRIKE OUT – FAILURE TO COMPLY WITH ORDERS OF THE COURT – WITNESS STATEMENTS FILED AFTER SPECIFIED DATE – PREVIOUS BREACHES OF COURT ORDERS – APPLICATION FOR RELIEF FROM SANCTIONS – APPLICATION TO AMEND STATEMENT OF CASE.

WOLFE-REECE, J

INTRODUCTION

[1] The seminal issue before the Court is whether the Defendant's statement of case should be struck out for failure to comply with Pre-Trial Review Orders made by the Honourable Mr. Justice K Anderson on the 5th May, 2017.

[2] The Court is faced with considering two competing applications. On the one hand, the Defendant, who is in breach of the said orders of Anderson J, has filed a Notice of Application for Court Orders on the 24th June, 2019, seeking permission for his Amended Defence and Counterclaim, Witness Statements and Notice of Intention to Rely, (listing 35 documents), which were all filed out of time to stand as properly filed.

[3] On the other hand, the Claimant who is aggrieved by the Defendant's delay has filed a Notice of Application for Court Orders on the 25th June, 2019 seeking an order that the Defendant's statement of case be struck out for failure to comply with the court's orders or in the alternative, an order that those documents which were filed by the Defendant after the dates stipulated by Anderson J be struck out.

BACKGROUND

[4] The competing applications before the Court have their genesis in the alleged breach of a contract for carpentry works carried out at the Defendant's premises situated at 17 Edgecombe Avenue, Kingston 6 in the parish of Saint Andrew which resulted in the Claimant filing a Claim Form and Particulars of Claim on the 8th day of April 2009 for unpaid monies owed by the Defendant to the Claimant being the sum of $1,708,796.55 plus interest at the commercial rate of 22% per annum, court fees and Attorney's fees totalling $2,096,731.79.

[5] The Defendant filed a Defence and Counterclaim on the 10th July, 2009 wherein he refuted the Claimant's claim and instead argued that the Claimant failed to complete the work satisfactorily. The Defendant counterclaimed on the basis that due to the Claimant's negligent carpentry work, he sustained loss, damage and has incurred expense. The Defendant therefore counterclaimed for damages in the sum of $130, 000.00 plus interest, damages for breach of contract and/or negligence or alternatively damages for costs of rectifying all defects.

[6] The matter was referred to mediation on the 17th January, 2011 however, the mediation was postponed because the Claimant's initial attorney ceased representing him. Mediation was set for the 29th April, 2014 when the Claimant failed to attend the mediation. As a result, the Defendant filed an application for the Claimant's case to be struck out.

[7] This application to strike out the Claimant's case was withdrawn at the Case Management Hearing on the 23rd day of November, 2015 where Bertram-Linton, J made the following orders:

1. *Defendant's application to strike out the Claimant's statement of case is withdrawn at the request of the applicant*
2. *Costs for the application is awarded to the defendant summarily assessed at $14,000.00*
3. *The Claimant is permitted to file his defence to counter on or before 31st December, 2015*
4. *The Claimant is permitted to file an Amended Claim Form and Particulars on or before 31st December, 2015*
5. *The Defendant is permitted to file documents in response to the Claimant's amendments on or before 31st January 2016*
6. ***Trial scheduled for 31st May 2017 to 1st June 2017***
7. *Witnesses Limited to 3 for each side*
8. *Trial by Judge alone*
9. ***Standard Disclosure on or before 31st July, 2016***
10. ***Inspection of documents on or before 30th September, 2016***
11. ***Witness statements to be filed and exchanged by 30th November, 2016***
12. *Listing Questionnaire to be filed by 30th November, 2016*
13. ***Pre-Trial Review on 20th February, 2017 at 10:00 a.m. for ½ hour***
14. *Claimant to prepare, file and serve these orders*

15. Costs for the Case Management Conference to be costs in the claim

[8] The Court record indicates that the Claimant largely complied with the Case Management Orders of Bertram-Linton J with the exception his failure to comply with the Order for Standard disclosure by filing his List of Documents a few days late.

[9] The Defendant filed a List of Documents on the 27th July, 2016 where he disclosed 9 documents. The Defendant did not file an Amended Defence and Counterclaim. He also failed to file the witness statements of the witnesses he intended to rely on at the trial.

[10] The Pre-trial review came before the *Honourable Mrs Justice* L. Palmer Hamilton on the 20th February, 2017 when she heard a joint application for extension of time to fully comply with the Case Management Orders dated 23rd November, 2015. The extension was granted to the 24th March, 2017. Palmer Hamilton J also adjourned the Pre Trial Review to 28th April, 2017.

[11] The Pre-trial review came before The Honourable Justice Mr. K. Anderson to on 28th April, 2017 and May 5, 2017. The record does not indicate the reason for the adjournment on the April 28, 2017. However, on the 5th May, 2017, Anderson J made the following orders:

> 1. *Trial of this Claim shall be held on July 8-11, 2019 and any trial dates earlier ordered by this Court shall stand as vacated.*
>
> 2. *The Claimant shall file a core bundle and shall file and serve an index to that core bundle by or before June 24, 2019.*
>
> 3. *The parties shall respectively file and serve a bundle of Skeleton Submissions and Authorities and shall do so by or before July 1, 2019.*

4. *Upon trial of this claim the parties shall be limited to examination in chief and cross examination of each witness as named in this order, during examination time lengths as specified in this order, below the name of each witness:*

Claimant's witnesses:

i. *Earl Martin (Claimant)*
Examination in Chief — *90 Minutes*
Cross-examination — *2 hrs. 30 minutes*

ii. *Junior Grant*
Examination in Chief — *30 Minutes*
Cross Examination — *45 Minutes*

iii. *Carlton Hollingsworth*
Examination in Chief — *30 Minutes*
Cross Examination — *60 Minutes*

Defendant's Witnesses:

i. *Richard Burgher (Defendant)*
Examination in Chief — *45 Minutes*
Cross Examination — *45 Minutes*

ii. *Robert Woodstock*
Examination in Chief — *45 Minutes*
Cross-examination — *45 Minutes*

iii. *Ruth Morrison*
Examination in Chief — *45 Minutes*
Cross Examination — *45 Minutes*

5. *It shall be open to the trial judge to extend to whatever extent that the Judge considers necessary, the time periods required for examination in chief and cross examination in order number 4 above.*
6. *The last date scheduled for the trial of this claim shall be the date on which the respective parties shall present to the Court, oral closing submissions, unless the trial judge thinks the presentation/making of same to be unnecessary.*
7. *By or before June 3, 2019 the Defendant shall notify the Claimant in writing by means of a document to be filed and served, of any document which the defendant wishes to rely on at trial.*
8. *The Claimant shall file and serve by or before June 24, 2019 and shall file and serve by or before same date, a bundle of agreed documents and a bundle of those documents that are not agreed and indices for those documents that are not agreed and indices for*

those bundles. Those bundles need only to be filed but the indices for same shall be filed and served.

9. *The parties shall respectively file and serve all witness statements for all witnesses whose evidence is intended to be relied upon at trial and no extension of time for this order shall be granted by this Court without there having been a written application filed for that purpose. Said witness statements shall be filed and served before July 31, 2017.*
10. *The costs of today shall be costs in the Claim.*
11. *The Claimant shall file and serve this order.*

[12] The undisputed fact is that the Defendant failed to comply with the orders of the Court. The Defendant has filed the following documents out of time and is seeking the Court's permission for the following documents to stand as properly filed:

(i) Amended Defence and Counterclaim filed on the 9th May, 2019 (The Defendant also seeks to amend his statement of case in terms of the amendment contained in the said Amended Defence and Counterclaim filed on the 9th May, 2019)

(ii) Witness statement of Richard Burgher filed on the 12th June, 2019

(iii) Witness statement of Carlton Hollingsworth filed 12th June, 2019

(iv) Witness statement of Stacey-Ann Dennison-Heron filed on the 24th June, 2019

CLAIMANT'S SUBMISSIONS

[13] Mr. Bernard submitted that pursuant to Rule 26.3(1) of the Civil Procedure Rules (CPR), the Court has the discretion to strike out a party's statement of case or a part thereof for failure to comply with a rule, a direction or an order of the Court. Counsel relied on the dicta of Lord Wolf M.R. in the case of ***Biguzzi v Rank Leisure Plc*** [1999] 1 W.L.R. 1926 and ***McNaughty v Wright and others***, SCCA No. delivered May 25, 2005 to advance the point that *"orders or requirements as to time are made to be complied with and are not to be lightly ignored."* Counsel highlighted relevant sections of the judgment which emphasised that in making a

decision as to whether to strike out a case for noncompliance, the Court must take into consideration the overriding objective of the rules and the effect that the delay will have on the Court's ability to hear other matters. It was Counsel's contention that the court should take an approach which shows its lack of tolerance with the Defendant's noncompliance with rules of the Court.

[14] Mr. Bernard sought to highlight the Defendant's pattern of failing to adhere with the orders of the Court. Counsel submitted that there was "a blatant, repeated and significant disregard" for the orders of the Court.

[15] According to Mr. Bernard when the matter came on for Pre-trial review on the 20th February, 2017, the Defendant was still not in compliance with the case management orders. As a result, Palmer-Hamilton J extended the time to comply to 24th March, 2017. The Claimant contends that when the matter came on for the second Pre-trial review on the 5th May, 2017 the Defendant was again in breach, in that he failed to comply with the orders made by Palmer-Hamilton J which resulted in Anderson J making the orders which are outlined above.

[16] Counsel drew specific reference to the following order made by Anderson J:

> *The parties shall respectively file and serve all witness statements for all witnesses whose evidence is intended to be relied upon at trial and no extension of time for this order shall be granted by this Court without there having been a written application filed for that purpose. Said witness statements shall be filed and served before July 31, 2017.*

[17] Learned counsel submitted that the failure of the Claimant to file his witness statements before the 31st July, 2017 was in clear breach of the order of Anderson J. Counsel explained that the Defendant's conduct in filing the statements almost two years later without first making a written application to the Court amounted to a further breach of the order of the Court.

[18] Mr. Bernard further argued that where there is such blatant disregard for court orders good reasons must be offered to the Court for the delay. Counsel contends

that the reasons advanced by the Defendant are not sufficient to displace the prejudice faced by the Claimant. Counsel asserts that the Defendant has failed to explain why he was unable to secure replacement witnesses earlier. Also, in regard to his own witness statement, it was contended that no good reason was offered for the delay in filing same.

Amendment of Defendant's Statement of Case

[19] As it relates to the amendment of the Defendant's statement of case, Counsel contends that the Defendant has shown a blatant disregard for the Claimant by seeking to amend their Defence and Counterclaim ten (10) years after commencement of the Claim. It was also pointed out that the Defendant's action in this regard is in breach of CPR 20.4(2) which requires a party to obtain permission to amend its statement of case. The Claimant's contention is that the Defendant filed the amended documents then sought to permission of the court to have the documents stand as properly filed. Counsel contends that such conduct is severely prejudicial to the Claimant's ability to effectively respond at trial.

Failure to Disclose

[20] Counsel contends that the Defendant failed to disclose documents pursuant to Part 28 of the Civil Procedure Rules and is therefore liable to have his statement of case or a part thereof, struck out in keeping with Rule 28. 14(2) which provides as follows:

> *"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."*

[21] The Claimant contends that on the 27th July, 2016 the Claimant filed a List of Documents dated 23rd day of November, 2015 where they disclosed only 9 documents, yet years later on the 24th day of June, 2019 the Defendant filed a Notice of Intention to Rely on over 35 documents.

DEFENDANTS SUBMISSIONS

[22] Learned counsel, Mr. Kevin Williams, submitted that the Claimant did not make an application under CPR 26.4 for an unless order nor did the Court impose such an order, therefore the rules under CPR 26.8 pertaining to an application for relief from sanctions do not apply in this case as there are no applicable sanctions. Mr. Williams argued that the Claimant is therefore not entitled to judgment without a trial. According to Mr. Williams such a right only arises under Rule 26.5 which provides as follows:

> *26.5 (1) This rule applies where the court makes an order which includes a term that the statement of case of a party be struck out if the party does not comply with the "unless order" by the specified date.*
>
> *(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."*

[23] Learned Counsel relied on the case of ***Nicholet Ward v Security Administrators Ltd & Port*** [2019] JMSC Civ. 32 in arguing that the Claimant's application ought not be granted as he himself has failed to take the necessary steps to ensure that he is ready for trial. Counsel argued that even though the Claimant filed his witness statement and witness summaries in compliance with the order of Anderson J, the

Claimant failed to issue the witness summons for the witnesses for whom witness summaries were filed.

[24] Mr. Williams also argued that the Claimant's application should not be granted because the Defendant has a good explanation for the delay in filing the witness statements and the Notice of Intention to Rely. According to Mr. Williams since the Pre-trial review, he was unable to obtain witness statements from the witnesses who were named in the order. He noted that witnesses who worked for the architect firm which assessed the defects in the Claimant's work, no longer worked for the company. Namely, Ruth Morrison, who no longer works for the said architect firm and now resides overseas.

[25] It was argued on behalf of the Defendant that he was only able to secure a replacement witness in April, 2019 when he was able to secure the evidence of Stacey-Ann Dennison-Heron, an architect of Harold Morrison and Robert Woodstock Associates Limited who also worked on the construction project which is the subject matter of this claim. The Defendant noted that the delay in obtaining her to serve as a witness was because she had left the firm to study and has only recently returned. He noted that since she gave her commitment to act in April, 2019 it was difficult to obtain her witness statement because of her busy schedule and it was only on the 24th June, 2019 that he was able to finalize same.

[26] Mr. Burgher expressed in his affidavit filed on the June 24, 2019 that he desired to secure the evidence of a Quantity Surveyor to aid in the resolution of the matter. He noted that he had great difficulty obtaining same as every surveyor that he approached was unwilling to act as a witness. He noted that in April, 2019 he decided to approach Mr. Carlton Hollingsworth. Mr. Burgher noted that the delay in securing Mr. Hollingsworth as a witness is because he was of the view that Mr. Hollingsworth was secured as witness for the Claimant. He again argued that even

though he secured the surveyor as a witness in April, 2019 he was only able to finalize the witness statement in June, 2019.

[27] As it relates to the late filing of the witness statement of the Defendant, it was submitted that he desired to submit same after having the opportunity of seeing the assessment of the surveyor.

[28] On the issue of whether the court should exercise its discretion under CPR 20.4 to allow for the amendment of the statement of case after the case management conference, Learned Counsel relied on the case of ***National Housing Trust v Y. P. Seaton & Associates Company Limited*** (unreported) Supreme Court Jamaica, Claim number 2009HCV05733, delivered on the 31st March, 2011 for the principles which ought to guide the court in determining whether an amendment ought to be granted. Mr. Williams noted that the Court must first be guided by the overriding objective. Counsel found that the following principles could be encapsulated from the aforementioned case:

> *i. The Court has a general discretion to permit amendments where it is just and appropriate*
>
> *ii. Where to grant such an amendment will not prejudice the other party*
>
> *iii. The amendment will usually be granted where such amendments will assist the court in determining the real issues before the court.*
>
> *iv. Any prejudice faced by the other party can be compensated by an order as to costs.*
>
> *v. The court must consider whether an arguable case is raised in the amendment.*

[29] Counsel also highlighted the case of ***Bryan Foster v Vanguard Security Company Limited*** [2016] JMSC Civ. 98 for the point that where the amendment

is being sought close to the trial date, the consideration of the court is whether the amendment will put the parties on unequal footing or jeopardize the trial date.

ISSUES, LAW AND ANALYSIS

Whether the Defendant's statement of case should be struck out for failure to comply with the order of the Court

[30] One of the most frequently cited cases on the area of striking out *is* ***Biguzzi v Rank Leisure plc -*** [1999] 4 All ER 934. In that particular case, Lord Woolf MR outlined the need for the court to take such measures as is necessary to ensure that parties do not disregard timetables laid down by the court. However, on the other hand, His Lordship expressed that the striking out of a party's statement of case should not be the first recourse when deciding on an appropriate sanction to impose for noncompliance. Instead, such a measure should be reserved for the most egregious and repeated breaches. His Lordship expressed as follows:

> *"Under r 3.4(2)(c) a judge has an unqualified discretion to strike out a case such as this where there has been a failure to comply with a rule.* ***The fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of case. The advantage of the CPR over the previous rules is that the court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out.***
>
> *Under the court's duty to manage cases, delays such as have occurred in this case, should, it is hoped, no longer happen. The court's management powers should ensure that this does not occur. But if the court exercises those powers with circumspection, it is also essential that parties do not disregard timetables laid down. If they do so, then the court must make sure that the default does not go unmarked. If the court were to ignore delays which occur, then undoubtedly there will be a return to the previous culture of regarding time limits as being unimportant."*

[31] In furtherance of the point made by Woolf MR, a fundamental role of the court is to settle disputes through the adjudicating of matters based on the merits of the case. It is for this reason that courts are not quick to strike out a party's case on the ground of technicality. This point was expressed by Brooks JA in the case of ***Charmaine Bowen v Island Victoria Bank Limited and others*** [2017] JMCA Civ 23 where His Lordship expressed as follows:

> *"…courts exist for the resolution of disputes. It is preferable, therefore, for cases to be decided on their merits rather than to be terminated for technical blunders. It is in accordance with that principle that the overriding objective, which is the bedrock of the CPR, requires that every case that is filed in the Supreme Court must be dealt with justly."*

[32] As Brooks JA pointed out, the CPR requires that every case that is filed in this Court be dealt with justly. In particular, CPR 1.1(1) provides that "*these Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly."* CPR 1.1(2) goes further to provide that dealing with cases justly includes, inter alia, ensuring that it is dealt with expeditiously and fairly; and allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

[33] The Defendant has found himself being in repeated breach of the orders of the court. Learned Counsel, Mr Williams argued that while the Defendant failed to comply with the orders of the Court, CPR 28.6 which deals, with relief from sanctions, is not applicable to the current case as it does not involve the breach of an unless order. This leads me to first address whether the rules and considerations concerning relief from sanctions is applicable to the current case.

[34] The difference between the breach of an unless order and any other order, direction or rule of the court is that the breach of the unless order takes effect immediately without the need for further reference to the court once the party against whom the order was slated to take effect has failed to comply (see ***George Freckleton v Aston East*** [2013] JMCA Civ 39). On the other hand, the breach of

any other order, direction or rule of the court places the defaulting party in the position where he is susceptible to having his case struck out. For the purposes of these proceedings, Mr. Burgher stands in the position where the court has the discretion under CPR 26.3(1) and 28.14(2) to strike out his statement of case or apart thereof for failure to comply with the orders of the court. The relevant provisions provide as follows:

> *26.3 (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 - (a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings*
>
> *28.14 (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.*

[35] The case of ***Charmaine Bowen v Island Victoria Bank Limited and others* (supra),** is an example of an instance where a party's case was struck out under CPR 26.3(1) for failure to comply with an order of the court. That case was an appeal from the decision of the Honourable Justice Mr. Pusey, where the Court of Appeal ruled that Pusey J had correctly exercised his discretion under CPR 26.3(1) by striking out the Claimant's case for failure to comply with a court order. In the said case, the Court of Appeal pointed out at paragraph 52 of the Judgment that *"a judge, who was considering whether to strike out a party's statement of case, should consider the provisions of the CPR dealing with relief from sanctions."*

[36] The relevant section which deals with relief from sanctions is CPR 28.6 which provides as follows:

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

[37] The principles outlined under CPR 28.6 have been summarized in a great deal of cases including ***Sandals Royal Management Ltd v Mahoe Bay Co Ltd***. [2019] JMCA App 12 where Foster-Pusey JA outlined at paragraph 47 that the factors to be considered are:

(i) The length;

(ii) The reasons for the delay;

(iii) the merit of the case; and

(iv) Whether any prejudice would be suffered by the opposing side

Length of the delay

[38] When considering the length of the delay, I have taken account of the fact that when the matter came on for Pre-trial Review Hearing on the 5th May, 2017 the Defendant was still not in compliance with the Court Management Orders of Bertram-Linton J which dated back to 23rd November, 2015 and even after being granted two extensions, the Defendant still failed to comply with the orders of the court and has filed the relevant documents a month shy of the trial date.

[39] The length of the delay can clearly inordinate; nevertheless, repetitive tardiness is not a complete bar to the exercise of the court's discretion in grating relief. See

Branch Developments Limited t/a Iberostar Rose Hall Beach Hotel v The Bank of Nova Scotia Jamaica Limited [JMSC] Civ 003.

Reasons for the delay

[40] The Defendant argued that the reason for the delay in filing the witness statements was due to difficulties in securing replacement witnesses after the intended witnesses were no longer available. At paragraphs 4-7 of his affidavit which was dated and filed on the 24th June, 2019, Mr. Burgher explained the reason for the failure to file the witness statements in the time stipulated as follows:

> *The pre-trial review orders in the matter herein were made on the 5th May, 2017 (filed 29th May 2017)*
>
> *The pre-trial review was held three days after. However, since the pre-trial review I was unable to secure the witnesses named in the pre-trial review order due to their unavailability to act as the same.*
>
> *Ruth Morrison, for example no longer works for the Architect Firm associates with the firm Harold Morrison + Robert Woodstock Associates Limited (HMRW) and is presently overseas. However, I continued to try to secure a witness from HMRW who could testify on my behalf in relation to the subject matter of this claim.*
>
> *However, since April 2019 I have been able to secure Mrs. Stacey-Ann Dennison-Heron, the Architect of HMRW who also worked on the construction project which is the subject of the claim herein, as she had left the said firm to study and recently returned, to act as a witness herein.*
>
> *However, since getting her commitment to act as a witness herein it has been a process to secure information from the said witness because of her busy schedule. Mrs. Dennison was just able to finalise the witness statement on 24th June, 2019. I then immediately filed the same.*

[41] I find that the reason advanced by the Defendant in this regard cannot be considered to be 'good reason.' The Defendant failed to explain why Ruth Morrison could not act as a witness at the relevant time (July 2017). To my mind, her currently being overseas or no longer being employed to the architect company is

not by itself sufficient reason. CPR 29.3 makes provision for a witness to give evidence by video link, therefore, her geographical location is not a hindrance of the sort which would prevent the Defendant from using her as a witness and by extension filing the relevant witness statement in time.

[42] Even if I were to accept that the Defendant could no longer secure Ruth Morrison as a witness, I see no reason proffered why it took ten years since the claim was filed and two years after the ordered date for filing witness statements had passed to secure another witness in her stead. Even after securing Mrs. Stacey-Ann Dennison-Heron as a witness, the Defendant failed to act with a sense of urgency in obtaining a witness statement from her. It took approximately two months for same to be prepared and filed.

[43] The Defendant also failed to file his own witness statement and the statement of Robert Woodstock in the time stipulated. At paragraphs 9-13 of the said affidavit he offered to following reasons for the delay to the court.

> *9. I also desired to secure the evidence of a Quantity Surveyor to aid in the resolution of the matter, as regards the damages associated with my counterclaim.*
>
> *10. However, securing same proved challenging as every Quantity Surveyor firm which I had approached was unwilling to act as a witness in the court matter herein. Further, the Quantity Surveyor who was intimately connected to the matter herein, Mr. Carlton Hollingsworth, seemed to have been secured as a witness for the Claimant.*
>
> *11. Nevertheless, after being unable to secure another Quantity Surveyor, eventually, in April, 2019 I approached Mr. Hollingsworth to assess the cost of remedying the works of the Claimant which I have maintained is defective. He was unable to complete the same until on the 24th April, 2019.*
>
> *12. Mr. Hollingsworth was just able to finalise the witness statement on 12th June, 2019. I then immediately filed same and served the same on the 13th June, 2019.*
>
> *13. Regarding my witness statement, I desired to file same upon assessment of the Quantity Surveyor, which as afore-explained was only*

> *recently received from Mr. Hollingsworth. Shortly after receiving Mr. Hollingsworth's assessment I filed and served my witness statement along with the witness statement of Mr. Hollingsworth.*

[44] I find the explanation offered by the Defendant in relation to his failure to file the witness statements by the ordered time to be unreasonable. The Defendant waited also two years after the ordered date before approaching Mr. Hollingsworth. This is a clear indication that the defendant showed scant regard towards the prosecution of his counterclaim and his defence. I therefore find that no good reason was offered as to why the Defendant failed to comply with the order of the court in this regard.

[45] The Claimant is also seeking that the Defendant's claim be struck out for failure to comply with Anderson J's order for standard disclosure. The Claimant contends that on the 27th day of July, 2016 the Defendant filed a List of Documents which disclosed 9 documents. Yet on the 24th day of June, 2019 the Defendant filed a Notice of Intention to Rely on thirty-five (35) documents most of which the Defendant had failed to disclose despite those documents being in his possession prior to July, 2016 when the original List of Documents was filed.

[46] Pursuant to CPR 28.4(1), following an order for standard disclosure by the Court the party to whom the order or direction relates must disclose all documents which are directly in their possession by the date specified in the order. CPR 28.9 stipulates that the Attorney-at-law for the party who was so ordered, has a duty to explain the necessity of making full disclosure and the implications of failing to so act.

[47] The court is granted the discretion under CPR 28.14(2) to strike out a party's statement of case for failure to comply with an order for disclosure. In the alternative, pursuant to CPR 28.14(1) the party seeking to reply on a document may be barred from doing so for failure to disclose same within the time specified by the court. The relevant provisions provide as follows:

> *28.14 (1) A party who fails to give disclosure by the date ordered or to permit inspection may not rely on or produce any document not so disclosed or made available for inspection at the trial.*
>
> *(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.*

[48] I have taken note that items 1& 3-32 of the Notice of Intention to Rely filed on the 24th day of June, 2019 are all dated between the year 2007- 2009, which would appear to support the Claimant's position that these documents were in the Defendant's possession on or before the 27th July, 2016 when the first List of Documents was filed and should therefore have been disclosed therein. The Defendant has advanced no reason why the documents were not disclosed at the time stipulated for standard disclosure.

[49] The reasons given by the Defendant or the lack thereof are important considerations in determining whether or not the court ought to exercise its discretion in his favour. In the case of ***Charmaine Bowen v Island Victoria Bank Limited and others*** [2014] JMCA App 14 Phillips JA explained at paragraphs 48-49 that where there is a delay, the absence of good reason is not sufficient to justify the court refusing to exercise its direction to grant an extension of time, however, at the very least, the party seeking the relief must offer a reason for the delay. Her Ladyship expressed as follows:

> *In Peter Haddad v Donald Silvera SCCA No 31/2003, Motion No1/2007 delivered 31 July 2007, Smith JA on behalf of the court endorsed the principles stated by the court in Leymon Strachan, but clarified with reference to the dictum of Lord Edmund Davies LJ in Revici v Prentice Hall Inc [1969] 1 All ER 772, in which it was stated that if there was non-compliance, it must be explained away as "prima facie, if no excuse is offered, no indulgence should be granted..",* ***to confirm that although the absence of a good reason for the delay is not in itself sufficient to justify the court in refusing to exercise its discretion to grant an extension, "some reason must be proffered". [Emphasis Mine]***

[50] As I have indicated earlier, the reasons advanced by Mr Burgher for failing to file the witness statements in the time stipulated is wholly unacceptable, similarly, I find that the Defendant has not advanced any good reason why he failed to disclose all documents in his possession by the date stipulated in the order of Anderson J. However, the lack of good reason for the delay or failure in not sufficient reason to justify striking out a party's statement of case. The court is required to consider the merit of the case and also decide which party will suffer greater prejudice by the granting or refusal of the relief.

The merits of case

[51] The Defendant claims that the Claimant is not entitled to the sum being claimed as he was in breach of the contract between the parties after failing to carry out the carpentry work in a workmanlike manner. The Defendant also alleges that the Claimant's negligent work has caused him to suffer loss and incur additional expense for which he is counterclaiming. The Claimant seems to be saying that the defects are minor and can be corrected. Without delving more into the substance of the case, it clear that the Defendant has an arguable case.

Whether the Claimant would suffer prejudice if relief is granted

[52] Even if the Court has decided that the Defendant has a meritorious case, it may still reach a decision to strike out the Defendant's case if the prejudice to the claimant outweighs any prejudice that may be caused to the Defendant by striking out his claim. The courts have ruled that the term prejudice should be given a wide interpretation. In the case of ***Hugh Bennett and Jacqueline Bennett v Michael Williams*** [2013] JMSC Civ 194

> *The term 'prejudice' ought not to be considered in a narrow way. It is a term which ought to be considered, just as this application, in a practical and wholistic [sic] way. Thus, whilst of course, there could be no real prejudice to the respondent/defendant if it would be overall, in the interests of justice, to grant the applicants'/claimants' application, nonetheless, what this court must determine, in deciding on whether such real prejudice exists or not, is, when looked at wholistically [sic] whether such prejudice would be, in a very practical sense, substantial in nature. It is for that reason, that academics, legal practitioners and judges alike, have often preferred to use the terms, 'real prejudice' or 'substantial prejudice', instead of 'prejudice', when addressing their minds to applications such as these. The term 'prejudice' is though, to my mind, always to be assessed by this court, by considering such in a practical and wholistic [sic] way and thus, is to be viewed in the context of whether it is substantial or perhaps even irremediable or not, this as distinct from minimal, or readily compensable by an order for costs to be paid.*

[53] The matter has been before the Court since April 8, 2009, this raises a prima facie presumption that the Claimant has been prejudiced by the delay. The question for this court to answer is whether the delay is of a substantial nature or whether it is irremediable.

[54] The Defendant has argued that any prejudice that the Claimant faced by the delay could be compensated by an order for costs. Mr. Williams also argued that it would not be appropriate to strike out the Defendant's case for failure to comply with the order of Anderson J in circumstances where the Claimant was also in breach of the Court orders. Counsel submitted that the Claimant filed witness summaries for two witness instead of witness statements and that the claimant failed to put himself in a state of trial readiness by either filing the witness statements in time for trial or ensuring that witness summonses were issued for such witnesses.

[55] I do not agree that the Claimant was in breach of the orders of the court when he filed witness summaries instead of witness statements. CPR 29.6 clearly provides that a witness summary may be filed in lieu of a witness statement in circumstances where the party is unable to obtain a witness statement.

[56] A similar issue was discussed in the case of ***RBTT Bank Jamaica Limited v. YP Seaton and others*** (unreported) SCCA 107 of 2007 delivered December 19, 2008 where the court explored the application of CPR 29.6. The facts of that appeal are relevant to the case at bar. The appeal followed the refusal of Skyes J (as he then was) to vary an unless order made by him which required, inter alia, that the Claimant file and serve a witness statement by a specified time, failing which the Claimant's statement of case would stand as struck out. The Claimant sought the variation of the order on the ground that it had difficulties obtaining the witness statement and therefore filed a witness summary instead prior to the specified date in the order. The Claimant then made an application to the court for the witness summary to stand as properly filed. Panton P noted at paragraph 6 that:

> *"Rule 29.6(1) of the Civil Procedure Rules, 2002, provides that a party who is required to serve a witness statement but is unable to obtain same, may serve a witness summary instead. In that situation, the party must certify the reason why the statement could not be obtained. The summary must contain the name and address of the witness and must be served within the period in which the statement should have been served."*

[57] Cooke J.A. went further to state at paragraph 12 of the judgement that *"this Rule, 29.6(1) does not need the intervention of the Court before a party serves: a witness summary instead of a witness statement."* I therefore find that the Claimant's act of filing the witness summaries of Mr Junior Grant and Mr Carlton Hollingsworth when he did is sufficient to satisfy the requirements as outlined at paragraph 9 of the order requiring that the parties file and serve witness statements before July 31, 2017.

[58] The next issue to be addressed whether the Claimant has been so prejudiced by the Defendant's failure to comply with the order of standard disclosure so as to justify invoking CPR 28.14(2) by striking out the Defendant's statement of case.

[59] In matters of this nature, the Court will always look to see if there are alternate sanctions which can be imposed to demonstrate its disregard for breaches of the

rules, orders or directions of the court. As pointed out in the case of ***Biguzzi v Rank Leisue Plc*** **(supra),** the power to strike out a party's case for failure to comply with an order of the Court is a measure of last resort and is reserved for the most extreme cases. Woolf MR provides at page 940f of the judgment as follows:

> *There are alternative powers which the courts have which they can exercise to make it clear that the courts will not tolerate delays other than striking out cases. In a great many situations those other powers will be the appropriate ones to adopt because they produce a more just result. In considering whether a result is just, the courts are not confined to considering the relative positions of the parties. They have to take into account the effect of what has happened on the administration of justice generally. That involves taking into account the effect of the court's ability to hear other cases if such defaults are allowed to occur. It will also involve taking into account the need for the courts to show by their conduct that they will not tolerate the parties not complying with dates for the reasons I have indicated.*

[60] In keeping with the reasoning of Woolf Mr in ***Biguzzi v Rank Leisue Plc*** **(supra),** I have assessed the breach and the applicable rules in finding that there in a less severe sanction that would be appropriate in the circumstance. CPR 28.14(1) may be imposed to restrict a party from relying on any document which they have not disclosed by the stipulated date. I find that the blatant disregard for the orders of this court warrants the imposition of this lesser sanction. In the circumstance, the Defendant is prohibited from relying on all documents listed in the Notice of Intention to Rely filed on the 24th day of June, 2019 within the exception of the 9 documents which were disclosed on the 27th July, 2016 and items 34 &35 which by their dates seemed to have come into the possession of the defendant subsequent to the date stipulated for standard disclosure.

[61] While I find that the reasons advanced by the Defendant for filing the witness statements by the ordered time to be wholly unacceptable, I have concluded that an order striking out the Defendant's statement of case is not the most appropriate remedy given the fact that the Defendant has a meritorious claim. I am also mindful

that the limitation period for bringing a claim for damages for negligence or breach of contract has since expired, which would cause the Defendant to lose the right to seek redress if his claim is struck out. I therefore find that the Defendant would suffer greater prejudice if the relief is not granted. The Defendant has expressed a willingness to compensate the Claimant if an order for costs is imposed and I agree that this is a case where such an order would be appropriate.

Whether it would be fair to allow the Defendant to amend his statement of case given almost 10 years of delay

[62] Part 20 of the CPR allows for amendments to be made to statements of case, for the purpose of the case at bar, CPR 20.4 and 20.6 are of relevance and are provided hereunder as follows:

> *20.4 (1) An application for permission to amend a statement of case may be made at the case management conference.*
> ***(2) Statements of case may only be amended after a case management conference with the permission of the court.***
> *(3) Where the court gives permission to amend a statement of case it may give directions as to –*
> *(a) amendments to any other statement of case; and*
> *(b) the service of any amended statement of case.*
>
> *20.6 (1) This rule applies to an amendment in a statement of case after the end of a relevant limitation period.*
> *(2) The court may allow an amendment to correct a mistake as to the name of a party but only where the mistake was –*
> *(a) genuine; and*
> *(b) not one which would in all the circumstances cause reasonable doubt as to the identity of the party in question.*
> *[Emphasis mine]*

[63] Though CPR 20.6 (1) speaks only to the amendment of a statement of case to correct a mistake as to name, the relevant case law establishes that amendments after the limitation period are not limited to the change of name and guidance can be found in several Court of Appeal decisions on the approach to be taken by the court in determining whether to allow the amendment of a statement of case after the relevant limitation period has passed.

[64] I find the case of ***Sandals Resorts International Limited v Neville L Daley & Company Limited*** [2016] JMCA Civ 35 to be instructive on the approach to be taken by the Court when considering whether to grant an application for an amendment after the limitation period has passed. At paragraph 24 Brooks JA applied the case of ***The Jamaica Railway Corporation v Mark Azan*** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 115/2005, judgment delivered on 16 February 2006 and found that two important principles can be gleaned from the dicta of Harris JA. Brooks JA opined as follows:

> *Two principles provided overarching guidance for Harrison JA"s approach. The first was that "an amendment should be allowed if it can be made without injustice to the other side" ……. The second was that of the overriding objective contained in rule 1.1 of the CPR. He summarised the specific relevant principles, at paragraph 29 of his judgment, thus: "29.*
>
> > *The authorities establish certain principles in relation to what amounts to a new cause of action. The following instances are set out but they are not exhaustive: (i) If the new plea introduces an essentially distinct allegation, it will be a new cause of action. In Lloyds Banks plc v Rogers (1996) The Times, 24 March 1997, Hobhouse LJ said inter alia: „…if factual issues are in any event going to be litigated between the parties, the parties should be able to rely upon any cause of action which substantially arises from those facts. " (ii) Where the only difference between the original case and the case set out in the proposed amendments is a further instance of breach, or the addition of a new remedy, there is no addition of a new cause of action. See Savings and Investment Bank Ltd v Finckin [2001] EWCA Civ 1639, The Times, 15 November 2001. (iii) A new cause of action may be added or substituted if it arises out of the same facts, or substantially the same facts, as give rise to a cause of action already pleaded. (iv) In the case of Brickfield Properties Ltd v Newton (1971) 1 WLR 862*

> *a general endorsement on the writ claimed damages against an architect for negligent supervision of certain building works. The particulars of claim were served after the expiry of the limitation period and contained claims both for negligent supervision and negligent design. It was held by the Court of Appeal that the negligent design claim arose substantially out of the same facts as the negligent supervision claim and in its discretion the court allowed the amendment."*

[65] In applying the law to the facts of the current case, it is clear that the limitation period has passed. It is undisputed that the original contract was signed in 2007 with variations being made in the year 2008. It would therefore mean that the limitation period began to run from 2008, which leads me to conclude that the limitation period of 6 years expired in 2014. The questions which are therefore left to be answered are, whether the amendments form a new cause of action and whether in applying the overriding objective of the court, it would be just and reasonable to allow the amendment given the years of delay.

[66] I find that to a large extent, the amendments made to the Defendant's statement of case do not form a new cause of action. Rather, the amendments are further exposition of the defendant's case. However, with regard to paragraph 22 of the Defendant's Amended Defence and Counterclaim which provides as follows:

> *"The Defendant further says that the Defendant has had to effect partial remedial work resulting from the poor quality of work negligently done by the Claimant to the doors at a cost of J $130,000.00.* ***Further the Defendant will be required to do additional remedial work to repair the cupboards, windows and kitchen cabinets and additional windows which are conservatively estimated will cost an additional $8, 565,000.00." (emphasis mine)***

[67] The Defendant included a similar paragraph in his original Defence and Counterclaim that was filed on the 19th July, 2009. However, the estimated cost of remedying the defects was estimated at $475,000.00JMD. I turn to decided cases

to explore the approach to be taken by the court in determining whether to grant an amendment to allow for a party to claim further sums for damages.

[68] I find that the reasoning of my sister, V. Harris J in the case of ***George Hutchinson v Everett O'Sullivan*** [2017] JMSC Civ. 91 provides useful guidance on the approach to be taken when allowing an amendment to claim for further a sum in damages after the limitation period has passed. The issue before the court in that case was whether the court should allow the Claimant to amend his statement of case to include further special damages after the limitation period has passed. The Learned Judge allowed for the amendment of case to include a further sum of $67,600.00 for visits made to the doctor and the cost of his medical report. Her ladyship being guided by the Court of Appeal decision of ***Judith Godmar v Ciboney Group Limited*** (unreported) SCCA 144 of 2001, delivered on July 03, 2003, found that the amendment should be allowed as they would enable the court to determine the real issue in controversy, that is, the quantum of damages. Harris J found that the decision to amend the statement of case would not cause prejudice to the defendant as he was put on notice that the statement of case would be amended to make room for further medical reports.

[69] In the said case of ***George Hutchinson v Everett O'Sullivan*** **(supra)** Harris J, refused to grant permission for the amendment to include further sums for loss of earnings. Harris J reasoned that at the time of filing the claim, the Claimant had knowledge of the sum being claimed and also failed to provide an explanation as to the blunder. Her Ladyship also noted that such an amendment would prejudice the defendant as he would be "hard pressed at this late stage to adequately investigate this additional item of special damages that is now being claimed."

[70] Though the case of ***George Hutchinson v Everett O'Sullivan*** **(supra),** bears several distinguishing feature from the case at bar guidance can be found in her application of the principles which were enunciated by Smith JA in the case of

Judith Godmar v Ciboney Group Limited **(supra). Harris J, specifically cited Smith HA when he expressed as follows:**

> *"...I have come to the conclusion that in the interests of justice leave to further amend the Statement of Claim to include the additional items of special damages should be granted. I have come to this conclusion because:*
> *1) These additional items of special damages do not constitute a "fresh claim".*
> *2) The further amendment may be necessary for the purpose of determining the real question in controversy, that is to say, the quantum of damages.*
> *2) [sic] The defendant/respondent will have adequate opportunity to investigate the additional items claimed.*
> *3) The plaintiff/appellant may be ordered to make further discovery of documents.*
> *4) The expenses claimed are capable of exact calculation thus it is possible for the defendant/respondent to come to a conclusion as to what would be a reasonable sum to pay into court to satisfy the claim and, if they are minded to increase the sum already paid into court.*
> *5) The defendant/respondent may be adequately compensated in costs on such amendment."*

[71] Based on the foregoing, I find that to allow such an amendment almost 10 years after the original claim would be manifestly unjust given that the Defendant is now counterclaiming for a sum that is almost 18 times what he originally claimed would be the cost of remedying the damages which he suffered. I have come this conclusion as the Defendant has failed to explain how he has arrived at this sum. I find that with the passage of ten years since the original work was done, it would be difficult for the Claimant to challenge such a claim as the passage of time usually leads to faded memory and the emergence of due defects due to normal wear and tear that would otherwise not have been present. Furthermore, I am mindful that the figure being claimed is an estimate which is not capable of precise calculation thereby adding an extra level of prejudice to the claimant.

[72] Additionally, as Harris J considered, I too find that the failure of the Defendant to provide good reason for the delay in amending the Defence and Counterclaim within a reasonable time has also led to my decision as I have been provided with

no explanation as to why I should allow the amendments to stand given a delay of over 10 years since the original claim was made and the delay of over 4 years from the date ordered by Bertram-Linton J for the filing of the Amended Defence and Counterclaim.

[73] Having considered the issue of Costs, I agree with Counsel for the Defendant that a more appropriate remedy in these circumstances would be to award Costs in favour of the Claimant.

DISPOSAL

On Claimants Notice of Application filed on 25the June 2019 the orders are as follows:

1. Application to strike out the Defendant's statement of case is denied.

2. Each party to bear their own costs.

3. Leave to appeal granted

On Defendants Notice of Application filed on 24th June 2019 orders are as follows:

1. The Defendant is denied the right to rely on the documents listed in Notice of Intention to Rely filed on the 24th June, 2019 with the exception of items 34 & 35 and the 9 other documents which were listed in the List of Documents filed on 27th July, 2016

2. Permission is granted for the amendments to the Defendant's statement of case and counterclaim allowed to stand as properly filed with the exception of the new estimated figure of

$8,565,000.00 at paragraph 22 of the Amended Defence & Counterclaim.

3. The Defendant is to amend the Defence and Counterclaim reflecting the particulars of Order # 2 made herein and file amended document within seven days of the date hereof.

4. The witness statements of Richard Burgher &Carlton Hollingsworth filed on 12th June 2019 and Stacey-Ann Dennison-Heron filed on 24th June 2019 stand as properly filed.

5. Costs of this Application are awarded to the Claimant to be taxed if not agreed.

6. Leave to appeal granted

……..
Hon. S. Wolfe-Reece, J