[2020] JMSC Civ 190

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2006/HCV 03917

BETWEEN	**JAMES TAYLOR**	**CLAIMANT/RESPONDENT**
	(Executor of the Estate of Jerusha Taylor)	
AND	**ERROL GEORGE RENNIE**	**DEFENDANT/APPLICANT**

IN CHAMBERS

Nigel Jones instructed by Nigel Jones and Company for the Claimant/Respondent.

Faith Gordon instructed by Hugh Wildman and Company for the Applicant/Defendant.

HEARD: 23rd July and 25th September, 2020

Application to set aside provisional charging order - Provisional charging order issued by registrar on a default cost certificate - Whether default cost certificate properly issued - Whether the registrar is empowered to make provisional charging orders. Application to set aside Judgement After Striking Out - Defendant and Attorney were present when the Unless Order was made - Whether the Defendant had to be served with the Unless Order before judgment could be entered - Whether the Rules and law relating to the setting aside of Default Judgment are applicable (Rules 2.5;.12.4;12.1, 12.2; 12.5 13.2 ;13.3; 26; 45.2, 46.3; 48.2; 48.3; 48.5; 50.3 64.2;64.5';65.20;65.21;65.22).

THOMAS, J.

Introduction

[1] Two applications have come before me for my determination. The Defendant, Mr. Rennie is the Applicant in both applications. In one application, Mr. Rennie seeks a declaration that a provisional charging order made against his property is null and void and in the other application he seeks an order setting aside a judgment which was entered against him consequent upon the striking out of his statement of case

History

[2] The following is a chronology of the main events relevant to the applications:

On November 6, 2006 the Claimant/Respondent filed a Fixed Date Claim Form and Affidavit in Support. On December 22, 2006, the Defendant/Applicant filed a Defence and Counterclaim. On February 19, 2007, the Claimant/Respondent filed an Amended Fixed Date Claim Form. The Fixed Date Claim was set for trial for 3 days, from the 16th to the 18th of March 2009. On March 16, 2009, the first date that the trial should have commenced, the parties, including, the Defendant/Applicant, and his attorney-at-law, appeared before his Lordship Mr. Justice Rattray. The Defendant/Applicant made an application before his Lordship for an adjournment of the trial. The application was granted and cost was awarded against the Defendant. The order for the Defendant/Applicant to pay the Claimant's cost was contained in an Unless Order which stated that "*Costs ordered for the Claimant against the Defendant to be agreed or taxed and to be paid within seven days after the agreement or taxation, failing which the Defence and Counterclaim would stand struck out*"**.** The matter was then set for trial to commence on November 10, 2009.

[3] On April 23, 2009 the Claimant/Respondent filed and served a Bill of Costs on the Defendant/Applicant. On May 15, 2009. The Defendant/Applicant filed Points of Dispute in relation to the Bill of Costs. (The Applicant/Defendant has accepted that the Points of Dispute were not served on the Claimant nor his attorney-at-law.)

[4] On May 26, 2009, the Claimant/Respondent filed a request for Default Costs Certificate and Supporting Affidavit. On the 3rd of August, 2009 the Default Cost Certificate was issued by Registrar. An admit copy of the Default Cost Certificate filed by the Claimant's attorney-at-law indicates that the Default Cost Certificate was served on Mr. Sheldon Codner, the Defendant's then attorney-at law on the 11th of August 2009.

[5] On September 9, 2009, an application for a Provisional Charging Order was filed by the Claimant in relation to the Default Cost Certificate. On the November 10, 2009, the Amended Fixed Date Claim Form did not proceed to trial as the Defendant had failed to pay the costs in accordance with the Unless Order, so that by then the Defence and Counterclaim had already been struck out.

[6] On November 19, 2009, the Claimant/Respondent filed a Notice of Application for judgement without trial after striking out. On January 19, 2010 the Defendant/Applicant filed a Notice of Application for relief from sanctions with supporting affidavit. There is no indication that this application was ever served or heard. The application for judgment after striking out was set to be heard on July 7, 2011.

[7] On the 30th of December 2010, the hearing for a final charging order, in relation to the application for Provisional Charging Order that was filed on September 9, 2009, was set for July 7, 2011. I was unable to locate the original or a copy of this Provisional Charging Order from the court's records or the documents filed by the parties.

[8] When the consideration for the Final Charging came up for hearing on the 7th of July 2011, neither the Defendant nor his counsel attended the hearing. However, the Honourable Mr. Justice Morrison in granting the Final Charging Order made reference to the "*Provisional Charging Order that was made on May 12, 2011*." It is also significant to note that in the said Final Charging Order, the charged

property was stated as being property registered at Volume 1069, Folio ***325*** of the Register Book of Titles *(emphasis mine)*.

[9] On the 7th of July 2011, the Honourable Mr. Justice Morrison also granted judgment in favour of the Claimant on his Application for judgment after striking out. On the 2nd of August 2011, the Claimant/Respondent filed another Notice of Application for Provisional Charging Order and supporting affidavit in relation to the Default Cost Certificate. However, in this application there was a difference in one digit of the folio number as compared to the previous application referencing the property of the Defendant that the Claimant was seeking to have charged. That is, Volume 1069, Folio **329** instead of Volume 1069 Folio ***325***.

[10] On the 17th of April 2012, a Provisional Charging Order signed by the registrar was issued by the court in relation to the application that was filed on the 2nd of August 2011. There is no indication that this application was placed before a judge for consideration.

[11] Arising from the judgment of Justice Bertram Morrison on the Amended Fixed Date Claim after striking out and the issuing of the Provisional Charing Order by the registrar, the Defendant filed several applications.

[12] On February 9, 2012 the Defendant/Applicant filed a Notice of Application for Court Orders to, *inter alia*, set aside the orders made by Morrison J. on July 7, 2011.On the 27th of June 2014 the Defendant filed an application to set aside the Provisional Charging Order. The Defendant/Applicant's Application for Court Orders to set aside the Orders made by Mr. Justice Bertram Morrison, was heard by Mr. Justice Lennox Campbell (as he then was). Mr. Justice Campbell reserved his judgement in the matter but retired before handing down his judgement.

[13] On April 30, 2019 the Claimant/Respondent filed a Notice of Application for Court Orders for the rehearing of the Application filed February 9, 2012, (i.e. the Application to set aside the orders made by Justice Morrison on July 7, 2011.) On the 15th of April 2020 the Applicant/Defendant filed another application seeking an

order setting aside the Judgment of Mr. Justice Bertram Morrison made on the 7th of July 2011.

[14] The retirement of the Mr, Justice Lennox Campbell, (as he then was) before delivering his judgement on his hearing of the application, rendered him incapable of delivering same. Consequently, the applications have to be heard anew. However, before the commencement of these proceedings attorney-at-law, Ms. Faith Gordon acting on behalf of the Defendant/Applicant, withdrew all other applications with the exception of the two (2) applications now under consideration. In the first application filed on the 27th of June 2014 the Applicant seeks the following orders:

(i) That the Provisional charging order, which the was granted on the 17th of April 2012 charging the applicant's property be (declared) null and void;

(ii) That the Registrar of Titles is ordered forthwith to remove from the registered tile registered at Volume 1069, Folio 329 the provisional charging order made by the registrar;

[15] In the other application which was filed on the 15th of April 2020 the Applicant is seeking an order setting aside the judgment after striking out of Mr. Justice Bertram Morrison made on the 7th of July 2011. Counsel for the Applicant has indicated that in support of these applications she is relying on three affidavits of the Applicant Mr. Rennie filed on June 27th, 2014, April 15th, 2020 and the supplemental affidavit of Mr. Rennie filed on November 4th 2019.

The Evidence of the Applicant

[16] The Applicant states that, on or about the 30th of January 2012, he was served with a judgment from the Honourable Mr. Justice Bertram Morrison delivered on the 7th of July 2011; and an instrument of transfer, in triplicate, signed by the Respondent and witnessed by an attorney-at-law. His attorney-at-law at the time was Mr. Sheldon Codner, who told him that no documents were served on him that would have brought the July 7, 2011 hearing date to his attention.

[17] He also states that prior to the 30th of January 2012, he was not contacted or served personally with any documents advising him of the hearing date of the 7th of July 2011 and that prior to the 30th of January 2012, he believed that his legal interest was being represented and protected because of Mr. Codner's representation. He subsequently retained, Bishop & Partners, Attorneys-at-Law, who on the 9th of February 2012 filed a Notice of Application for Court Orders with supporting Affidavit, to inter alia, set aside the judgement delivered against him on the 7th of July 2011 by the Honourable Mr. Justice Bertram Morrison. He states that he applied to the Court as soon as was reasonably practicable after finding out that judgement was delivered against him and contends that the judgement of the Honourable Mr. Justice Bertram Morrison was made without a trial of the issues in relation to which he has a real prospect of successfully defending the claim**.**

[18] He further states that the Respondent's application was made in his absence and the absence of his then attorney-at-Law, Mr. Codner. Documents that were shown to him by his present attorneys-at-law indicate that Mr. Codner was in fact served with documents that would have brought the hearing date of the 7th of July 2011 to the attention of Mr. Codner. He contends that, as he is the rightful owner of some of the properties in dispute, namely the property at Annette Crescent, Kingston 10 and Princess Street, Kingston CSO, he has a real prospect of defending the claim.

[19] He also contends that had he appeared at the hearing on the 7th of July 2011 personally or by legal counsel, some other judgement would have been delivered for the following reasons:

(a) The medical report that the Respondent relied on to support the point for the lack of capacity was done well after the transfers were signed and was never signed by the doctor. He would have been able to provide credible and compelling evidence that Jerusha, up to the date that she was taken from his house, had no problems with her memory or ability to understand what she was doing. Further, at no

time did the Respondent allege fraud or make any effort to particularize fraud in the claim.

(b) The issue of capacity was never tested by the court as there is no medical report which states that, at the time that Jerusha signed the instruments of Transfer, she did not understand what she was doing and effect of what she was doing at the time.

[20] He also states that he has always been very interested in the trial of the claim and he is not personally responsible for any delays or his non-attendance in Chambers. His contention is that, on the 7th of July 2011, he was in good health and would have attended the hearing had he known the court date. The granting of this Application, he states, would be in the interest of justice and in keeping with the court's overriding objective of dealing with cases justly

[21] As it relates to the Provisional Charging Order, he states that on or about the 23rd of April 2009, the Claimant filed and served a Bill of Costs on his previous Attorneys-at-Law, Sheldon Codner. He says that he was not aware that any order by any judge of the Supreme Court gave the Claimant the right to file a Bill of Cost prior to the completion of the matter. His previous Attorney-at-Law, Sheldon Codner, was in fact served with a Bill of Costs in the sum of $2,899,521.90.

[22] He adds that documents for the hearing which was scheduled for the 7th of July 2011 were served on the 5th day of July 2011, two (2) days before the hearing of the matter. He states that he was not served personally with any of these documents advising him of hearing date of the 7th day of July 2011 or any hearing date on which an order for cost was made against him.

[23] The Applicant further states that he was advised by his present attorneys-at-law that there is no indication that the Points of Dispute in response to the Bill of Costs was filed by his previous attorney-at-law. He believes that the Claimant is not entitled to a Default Costs Certificate, as the Provisional Charging Order that the Claimant applied for and obtained, after receiving the Default Costs Certificate over

one of his properties registered at Volume 1069 Folio 329 of the Register Book of Titles, was signed by a Registrar of the Supreme Court who is not empowered by law to do so. Given these circumstances, he seeks orders setting aside the Default Costs Certificate and the Provisional Charging Order.

Whether the Provisional Charging Order is Null and Void.

[24] In light of the fact that the Provisional Charging Order was entered as a result of the Default Costs Certificate obtained by the Claimant, I must first be satisfied that the Claimant was entitled to the Default Cost Certificate, so as to determine whether the Claimant was in fact entitled to the Provisional Charging Order. Secondly, I must go further to determine whether the Registrar of the Supreme Court is empowered to issue a Provisional Charging Order.

Whether the Claimant was Entitled to The Default Cost certificate

[25] When I examine the Unless Order of the Honourable Mr. Justice Rattray, made on the on March 16, 2009, it is clear that cost was awarded to the Claimant against the Defendant. The Defendant has not denied that this cost was awarded. Nonetheless he has stated that he was not aware that the Claimant was entitled to file a Bill of Cost to be taxed before the end of the trial. The Applicant/Defendant states that, *on or about April 23,2009, the Claimant filed and served a Bill of Costs on his previous Attorneys-at-Law, Sheldon Codner, but he was not aware of any Order by any Judge of the Supreme Court, which gave the Claimant the right to file a Bill of Cost prior to the completion of the matter*.

[26] However, I reject this assertion of the Applicant/ Defendant. He has not denied the fact that both he and his attorney-at-law appeared before the Honourable Mr. Justice Rattray when the Unless Order was made; that is, the Unless Order was made in their presence and hearing. As such, they would have had first-hand knowledge of the terms of the order.

[27] The learned Judge's order was that the Applicant/Defendant should pay the cost of the Claimant for the adjournment of the trial. The order went on to specify that the cost should be paid seven (7) days after agreement or taxation, otherwise his statement of case would stand struck out. Therefore, it is quite clear that the order mandated payment of cost by the Applicant/Defendant seven (7) days from an agreement by the parties or if the parties did not arrive at such an agreement, there should have been a determination of the cost by taxation. Thereafter the Applicant/ Defendant would be obligated to pay the cost seven (7) days from the date of the determination of the cost by Taxation. Failure to comply with this order meant that the Defendant's statement of case would be automatically struck out.

[28] I have seen nothing in the order that could have conveyed to the Defendant, that there was any contemplation by the Court that the payment of the cost should have been at the end of the trial. The fact is, this position is completely incongruous with the terms and conditions of the Unless Order. Additionally, it would render the Unless Order absolutely ineffective, as on the completion of the trial the Defendant's statement of case would already have been considered. Consequently, it could not, at that time be struck out. Therefore, I find it quite inconceivable that the Applicant would even raise such a contention in support of his application

[29] ***Rules 65.20 (1) - (6***) set out the responsibility of the party who has been ordered to pay cost. Where he is objecting to items in the Bill of Cost it is clearly outlined that he is required to file and serve Points of Dispute. It also outlines the consequences of failing to comply with this requirement.

[30] These Rules read:

> *"(1) The paying party and any other party to the taxation proceedings may dispute any item in the bill of costs by filing points of dispute and serving a copy on -*
>
> *(a) the receiving party; and*

(b) every other party to the taxation proceedings.

(2) Points of dispute must -

(a) identify each item in the bill of costs which is disputed;

(b) state the reasons for the objection; and

(c) state the amount (if any) which the party serving the points of dispute considers should be allowed on taxation in respect of that item.

*(3) The period for filing and **serving points of** dispute is 28 days after the date of service of the copy bill in accordance with paragraph (1).*

(4) If a party files and serves points of dispute after the period set out in paragraph (3), that party may not be heard further in the taxation proceedings unless the registrar gives permission.

(5) The receiving party may file a request for a default costs certificate if -

(a) the period set out in paragraph (3) for serving points of dispute has expired; and

(b) no points of dispute have been served on the receiving party.

(6) If any party (including the paying party) serves points of dispute before the issue of a default costs certificate the registrar may not issue the default costs certificate"

[31] It is accepted by the Applicant/Defendant that the Claimant's Bill of Cost was served on his then attorney-at-law on the 23rd of April, 2009. Therefore, in accordance with the rules, Points of Dispute should have been filed and served on or before the 21st of May 2009. The Points of Dispute that were filed on the 15th of May 2009 were not served. Therefore, the Defendant would have failed to comply with the provisions of ***Rule 65.20.3.***

[32] However, his failure to serve his Point of Dispute within the stipulated period would not have been fatal to his objecting to the Claimant's Bill of Cost had he acted under ***Rule 65.20. 4***. That is, he could have served his Point of Dispute albeit being out of time and sought the permission of the registrar to participate in the taxation proceedings.

[33] However, between May 22, 2009 and the 3rd of August 2009, that is, between the date that the time for service of the Points of Dispute had expired and the filing of the request for, and the subsequent signing of the Default Cost Certificate, there was no application by the Defendant for an extension of time to serve the Points of Dispute or to participate in the taxation proceedings. Therefore, in the circumstances, the Claimant was entitled to apply for the Default Cost Certificate**.**

[34] Further**, Rule 65.21 (1)** states that:

> *"(1) A receiving party who is permitted by rule 65.20 to obtain a default costs certificate does so by filing -*
>
> *(a) an affidavit proving -*
>
> *(i) service of the copy bill of costs; and*
>
> *(ii) that no points of dispute have been received by draft default costs certificate in form 26 for signature by the registrar.*
>
> *(2) The registrar must then sign the default costs certificate.*

(3) A default costs certificate will include an order to pay the costs to which it relates."

[35] Therefore, in accordance with the aforementioned rules, the Defendant, having failed to serve the Points of Dispute through his attorney-at-law, on the Claimant's Attorney- at-Law within the time stipulated by the rules, and having not sought the permission of the registrar to serve the Points of Dispute out of time and to participate in the taxation proceeding, the registrar would have been duty bound on the Application of the Claimant to issue the Default Cost Certificate.

[36] It is also significance to note that the rules also make provision for the setting aside of a Default Cost Certificate. ***Rule 65.22*** reads:

"(1) The paying party may apply to set aside the default costs certificate.

(2) The registrar must set aside a default costs certificate if the receiving party was not entitled to it."

[37] Therefore, in order to have the Default Cost Certificate set aside the Defendant is required to establish that it was improperly obtained. However, having reviewed the facts I find that, the Defendant has failed to establish that the Default Cost Certificate was improperly obtained. Therefore, I find that the Default Cost Certificate was properly obtained, and no grounds have been established for setting it aside.

Whether the Claimant Was Entitled to the Provisional Charging Order

[38] The next issue for me to determine is whether the Claimant was entitled to apply for a Provisional Charging Order on the basis of the cost awarded in the Default Cost Certificate. It is apparent that within the context of the Unless Order of the Honourable Mr. Justice Rattray, in the absence of any application to set aside the Default Cost Certificate or to vary the terms of the Unless Order, the sum contained

in the Default Cost Certificate would have become due and payable by the latest the 18th of August 2009

[39] ***Rule 64.2 (3***) states that:

> *"Costs authorised to be recovered under a certificate of costs signed by the registrar may be enforced in the same way as a judgment or order for the payment of a sum of money".*

[40] ***Rule 45.2*** states that:

> *"A judgment or order for payment of a sum of money other than an order for payment of money into court may be enforced by -*
>
> *(a) an order for the seizure and sale of goods under Part 46;*
>
> ***(b) a charging order under Part 48;***
>
> *(c) an order for attachment of debts under Part 50;*
>
> *(d) the appointment of a receiver under Part 51;*
>
> *(e) a Judgment Summons under Part 52; or*
>
> *(f) an order for sale of land under Part 55.*

[41] **Rule 48.3 (2)** sets out the evidence required to support an application for a charging order. It states that:

> *"The affidavit must -*
>
> *(a) state the name and address of the judgment debtor;*
>
> *(b) identify the **judgment or order** to be enforced;*
>
> *(c) state that the applicant is entitled to enforce the judgment;*
>
> *(d) certify the amount remaining due under the judgment;*

(e) where the application relates to land, identify that land;

(f) where the application relates to stock –

(i) identify the company and the stock of that company to be charged;

(ii) identify any person who has responsibility for keeping a register of the stock;

(iii) state whether any person other than the judgment debtor is believed to have an interest in that stock whether as a joint owner, a trustee or a beneficiary; and

(iv) if so, give the names and addresses of such persons and details of their interest;

(g) in the case of any other personal property -

(i) identify that property; and

(ii) state whether any other person is believed to have an interest in the property; and

(h) state that to the best of the deponent's information and belief the debtor is beneficially entitled to all or some part of the land, stock or personal property as the case maybe'

[42] These rules establish the fact that it is not only in relation to a final judgment debt that a party may seek enforcement by a charging order. The rules refer to ***judgment debt or order***. Therefore, I take the view that despite the fact that the Cost Order by the Honourable Justice Rattray was not as a result of a final judgment, it is an order, by virtue of which the Defendant became indebted to the Claimant. In essence it is an order which is enforceable by a charging order.

[43] Another contention of the Applicant in his bid to have the Provisional Charging Order set aside is that he was entitled to be served with the Notice of Application for the Provisional Charging Order and he was not so served. Counsel for the Claimant/Respondent contends that there is no basis for the Provisional Charging Order to be served as ***Rule 46*** provides that it may be made ex parte. I will

therefore examine the provisions of the rules to decide whether they validate the position of the Applicant/Defendant.

[44] **Rule 48.2 (1)** states that:

> *"(1) The application is to be made **without notice** but must be supported by evidence on affidavit".*

Rule 48.5 states:

> *"(1) In the first instance the court must deal with an application for a charging order without a hearing and may make a provisional charging order.*
>
> *(2) On the application of the judgment creditor the court may grant an injunction to secure the provisional charging order.*
>
> *(3) An application for an injunction may be made without notice and may remain in force until 7 days after the making of an order under rule 48.8(4).*
>
> *(4) The provisional charging order must state the date, time and place when the court will consider making a final charging order".*

[45] It is evident from the rules that there is no requirement for the application for the Provisional Charging Order to be served. The rules explicitly state that the application should be made without notice and that it should be dealt with without a hearing. It is my view that the rationale behind this provision is to prevent a Respondent from circumventing the application of the provisional charging order by the disposition of the land, stock or personal property prior to the order being made.

Whether the Registrar is Empowered to Consider the Application for a Charging Order

[46] Both the Applicant /Defendant and his counsel are contending that the registrar is not empowered to issue the Provisional Charging Order. Counsel essentially takes the position that the registrar lacks the capacity as the rules have made no provision for the registrar to issue a Provisional Charging Order. I will commence my consideration of this issue with a further examination of the Rules.

[47] In accordance with **Rule 2.5** the general position with regards to the exercise of the power of the Court is that:

> *"(1) Except where any enactment, rule or practice direction provides otherwise the functions of the court may be exercised* ***in accordance with these Rules and any direction made by the Chief Justice*** *by:*
>
> *(a) a single judge of the court;*
>
> *(b) a master; or*
>
> *(c) a registrar.*

[48] However, ***Rule 12.4*** specifies that:

> *"At the request of the claimant,* ***the registry*** *must enter judgment against a defendant for failure to file an acknowledgment of service",*

once certain conditions are satisfied.

[49] Likewise ***Rule 12.5*** specifies that:

> *"The* ***registry*** *must enter judgment at the request of the claimant against a defendant for failure to defend" once certain conditions are satisfied."*

[50] ***Rule 46*** deals with writs of execution. ***Rule. 46.2.1*** states that a Writ of Execution, in certain circumstances, has to be issued with the permission of the court. It is essential to note that ***Rule 46.3*** states that:

> *"(1) An application for permission to issue a writ of execution may be made without notice unless the court otherwise directs but must be supported by evidence on affidavit.*
>
> *(2) On an application for permission the applicant* ***must satisfy the court or the registrar*** *that it is entitled to proceed to enforce the judgment or order.*
>
> *(3) An application under this rule may be considered by the registrar.*
>
> *(4) Any permission given by the court or the registrar shall have effect for one year only".*

[51] ***Rule 50.3*** *provides for an attachment of debt order against a garnishee. It states:*

> *"(1) The application may be made without notice but must be supported by evidence on affidavit.*
>
> *(2)* ***Where the court or the registrar considers*** *that on the evidence submitted the judgment creditor is entitled to an attachment of debt order, it must make a provisional order.*
>
> *(3) It is to do this without a hearing.*
>
> *(4) The registry must state in the provisional order the date, time and place of the hearing.*
>
> *(5)* ***An application under this rule may be considered by the registrar".***

[52] However, when I examine the rules relating to the application for Provisional Charing Orders, there is nothing in these rules which explicitly states that the registrar is empowered to make such an order. I have also observed that where the registrar in the normal course of business is to perform particular functions, especially in relation to the application for order, these are specifically outlined in the rules.

[53] Notwithstanding the fact that the rules have not explicitly assigned the function of issuing Provisional Charging Orders to the registrar, the issue for me to determine at this stage, is whether this precludes the registrar from issuing these orders. It is trite law that the rules of court are subject to the legislation from which the power is derived. In this case the relevant legislation is the ***Judicature Supreme Court Act.*** It is therefore imperative for me to examine the provisions in the aforementioned legislation, as it relates to the role and function of the registrar, in my determination of this issue.

[54] ***Section 12 (1) of the Judicature Supreme Court Act*** outlines the role and function of the registrar as follows:

> *"The Registrar…shall perform the following duties, that is to say -*
>
> - *keep account of all fees, fines and amounts of forfeited recognizances received in proceedings in the supreme Court;*
> - *furnish to the Accountant-General of this Island accounts of all stamps passing through the offices of the Supreme Court, and submit all such accounts for audit as public accounts;*
> - *examine, copy, enter, arrange, index and keep, proceedings and records of proceedings in the Supreme Court, and shall permit the public to search and take copies*

of the same in the office of the Supreme Court at reasonable hours;

- *attend the sittings of the Courts and Judges, take minutes, write out and enter up judgments and orders;*

- *report as to the sufficiency or otherwise of the stamps upon documents tendered in evidence in the Supreme Court, and receive and account for deficiencies therein, and penalties in respect thereof;*

- *enter satisfaction and assignments of judgments, and prepare and deliver appeal papers and papers of a like kind, and tax the costs of proceedings in the Supreme Court;*

- *issue process of the Supreme Court, and keep account thereof, and of levies made and moneys received thereunder, and of returns 'thereto;*

- *keep jury lists, and strike and make up panels of jurors;*

- *make such investigations and take such accounts in relation to proceedings in the Supreme Court as the Court may direct, and shall have power for the above purposes to issue advertisements, summon parties and witnesses, and take examinations viva voce, or upon interrogatories, and the Court shall have power to enforce -his orders as if they were those of a Judge;*

- *have power to administer oaths, and take affidavits and declarations, in all proceedings in the Supreme Court;*

- *transact all such ministerial business of the Supreme Court,* ***and perform such other duties of a like kind, as are assigned to him by rules of court;"***

[55] ***Section 13*** of the Act states that:

> *"Upon proof of urgency the Registrar, being a barrister or solicitor, may, in the absence of the Supreme Court Judges, make orders which can be made by a Judge in Chambers. An appeal shall lie from any such order to a Judge in Chambers on two days' notice"*

[56] Whereas Section ***12*** of the Act outlines certain ministerial roles of the registrar, it also permits duties of similar nature to be assigned under the rules. However, Section ***13*** specifically empowers the registrar to make orders that could be made in Chamber by a Judge. The conditions that should be satisfied are the unavailability of a judge and the urgency of the matter.

[57] In his affidavit in support of the application for the Provisional Charging Order Mr. Jones stated that the application was urgent as there was a previous application to charge the Defendant's property in which the wrong volume and folio numbers were inadvertently stated. It is presumed, that this is in reference to the Application that was filed on the 9th of September 2009 that was subsequently made a Final Charging Order by the Honourable Mr. Justice Morrison on July 7, 2011. Mr. Jones went on to state that the Defendant had notice of the previous application to charge his property and there was a real likelihood that he would take steps to dispose of the property.

[58] No issue has been raised in relation to the urgency of the matter or the availability of a judge. The sole objection of the Applicant with regards to the registrar issuing this order, is that she was not empowered so to do. Therefore, despite my observation that there is no clear indication that it was contemplated by the rule-makers that the registrar should, under normal circumstances, make such an order, where there is any apparent conflict between the rules and the provisions of

substantive legislation, the provisions of the substantive legislation must prevail. (See, ***The Contractor-General of Jamaica v. Cenitech Engineering Solutions Limited*** [2015] JMCA App 47 at para 57; ***Rayan Hunter v. Shantell Richards & Stephanie Richards*** at para. 27).

[59] The making of the Provisional Order by the registrar is perfectly permissible by the legislation, once the aforementioned conditions are satisfied. In light of the fact that no issue has been taken with regards to the urgency of the matter or the availability of a judge, I take it that those conditions were satisfied. Therefore, in light of these circumstances the Provisional Charging Order issued by the Registrar on the 17th of April 2012 cannot be deemed invalid.

Whether Judgment was Properly Entered on Behalf of the Claimant

[60] In order for me to determine whether the judgment should be set aside, I must first determine whether the judgment was properly entered on behalf of the Claimant. The substantial issue I must decide is whether the Claimant has satisfied the required conditions for judgment to be entered in his favour. If the judgment was wrongly entered, then the Defendant would have earned the right to have it set aside.

The Law

[61] ***Rule 26.5*** is applicable, where the court makes an order for a party's statement of case to be struck out for failure to comply with an order of the court. It states:

> *"(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.

(5) Where the party applying for judgment is the claimant and the claim is for -

(a) a specified sum of money;

(b) an amount of money to be decided by the court;

(c) delivery of goods where the claim form gives the defendant the alternative of paying their value; or

(d) any combination of these remedies, judgment shall be in accordance with the terms of the particulars of claim together with any interest and costs after giving credit for any payment that may have been made.

(6) Where the party applying for judgment is the claimant and the claim is for some other remedy the judgment shall be such as the court considers that the claimant is entitled to.

(7) Where a defendant seeks to obtain judgment on the claim, judgment shall be for costs to be taxed.

(8) Where a decision of the court is necessary in order to decide the terms of the judgment the party making the request must apply for directions".

Submissions

[62] Counsel for the Applicant/Defendant submits that the judgement without trial after striking out delivered on the 7th of July 2011 was improperly obtained. She contends that, the Respondent must show proof of service of the Unless Order. The fact that the Applicant was not served with the Unless Order means that ***Rule 26.5(1) - (8***) was not complied with.

[63] Relying on ***Rule 26.4(1)***, she states that a party should apply to the court for an "Unless Order", and this was not done. Referring to the case of ***R.E. Forrester & Anor v Holiday Inn (Jamaica)*** Claim No. CL 1997/F-138, she submits that "*an unless order is a peremptory order directing a party to the litigation to act within a specified time, which, if not done, is visited by sanctions prescribed by the order. It is a fundamental principle that a litigant who fails to comply with a such an order, should suffer the penalty prescribed by the order unless he can show good reason why the stated consequences should not follow".*

[64] She further submits that had the Applicant been served with the Unless Order and he failed to act, the court would have been justified in making an order such as the one made i.e., to give judgment without trial after striking out. She however takes the position that the Applicant, having not been served with the Unless Order by the Claimant, was not properly warned, and that, had his Counsel been put on notice, Counsel for the Applicant would have found an opportunity to act with the alacrity Sykes J spoke of.

[65] She also submits that the Applicant has satisfied ***Rule 26.6 (1) - (4)*** - and that in the instant case the right to enter judgement had not arisen at the time it was entered, the Unless Order having not been served on the Applicant nor his Counsel within in the specified time frame. She acknowledges the fact that the Applicant

was present when the Unless Order was made, but insists that this still does not satisfy the requirements of the rules.

The Respondent's Submissions

[66] Mr. Jones notes that the application for judgement after striking out was filed on November 19, 2009. In the application it was stated that the Defendant and his attorney were present at the March 16th, 2009 adjourned trial, when the "Unless Order was made.

[67] He submits that Rule ***26.7*** sets out that any sanction imposed has effect unless the party in default obtains relief from sanctions. ***Rule 26.4*** applies to orders where no sanction was imposed. On March 16, 2009, the judge issued the Unless Order for the payment of cost and the sanction of the striking out of the Defendant's statement of case. In relation to ***Rule 26.7***, where the Court makes an order, it must also specify the consequence of non-compliance. In this case the Applicant did not comply and his defence was struck out.

[68] He further submits that he is not sure of what other order was required in these circumstances. He states that the rules are clear and that the order comes into effect from the moment it is made. Were it otherwise, someone could say that even if present, they don't have to comply with the order unless it is served. He submits that this could not have been the intent of the framers of the rules.

[69] He also submits that the fact that the court's records show that the Applicant/ Defendant was present when the Unless Order was made, all the Claimant/ Respondent needs to satisfy, is that the costs were not in fact paid. In that context, there is no provision for any additional notice. He asserts that as of November 19, 2009, the Court could have enforced judgement without notice. He states that although not required by the rules, out of an abundance of caution, a notice was served. He maintains that once the Claimant/ Respondent showed that there was non-compliance with the "Unless Order" the right to judgement had arisen and cannot now be taken away.

Discussion

[70] ***Rule 26.4*** states:

> *"(1) Where a party has failed to comply with any of these Rules or any court order in respect of which no sanction for non-compliance has been imposed, any other party may apply to the court for an "unless order".*
>
> *(2) Such an application may be made without notice but must be accompanied by -*
>
> *(a) evidence on affidavit which -*
>
> *(i) identifies the rule or order which has not been complied with;*
>
> *(ii) states the nature of the breach; and*
>
> *(iii) certifies that the other party is in default; and*
>
> *(b) a draft order.*
>
> *(3) The registry must refer any such application immediately to a judge, master or registrar who may -*
>
> *(a) grant the application;*
>
> *(b) seek the views of the other party; or*
>
> *(c) direct that an appointment be fixed to consider the application.*
>
> *(4) Where an appointment is fixed under paragraph (3)(c) the court must give 7 days' notice of the date, time and place of such appointment to all parties.*

(5) An "unless order" must identify the breach and require the party in default to remedy the default by a specified date.

(6) The general rule is that the respondent should be ordered to pay the costs of such an application.

(7) Where the defaulting party fails to comply with the terms of any "unless order" made by the court that party's statement of case shall be struck out."

[71] ***Rule 26.5(4)*** does state that in order to obtain judgment after striking out, the party seeking to obtain judgment must*, prove service of the "unless order".* However, on an examination of the rules, it is clear that ***Rule 26.5*** is sequential ***to Rule 26.4. Under Rule 26.5(2)*** judgment can only be entered where a party has failed to comply with the order. It is therefore logical that there would be a requirement that, where the order was made in the absence of a party there would have to be proof that the party is aware of the order that he is required to comply with. It is within this context that I form the view that the purpose for the requirement for service is to give to the party against whom the Unless Order is made notice of the said order, so as to make him aware of what he is required to do under the order, the time stipulated for compliance and the consequence of failing to comply with the order.

[72] Essentially, I form the view that service would only be required where the Defendant was not present at the proceedings where the Unless Order was made. The fact that the Defendant and his attorney were present at the making of the order, suggest to me that the order would have been communicated to them directly by the Judge. In my view this is tantamount to immediate, direct and personal service of the order by the Court to the Defendant and his attorney-at-law. That is, they immediately became aware of the order and its contents, from the moment the order was made. They became aware of the Defendant's obligation under the order and the consequence of his failure to comply.

[73] For me to construe the rule otherwise would lend to a complete absurdity, taking into consideration that there are instances where Unless Orders are made in the presence of both parties for them to comply within a specified time, commencing from the date of the order. For example, an order stating that something is to be done by both parties such as the filing and serving of witness statements "*21 days from the date hereof or the party who fails to comply, that party's statement of case stands struck out"*. Generally, the court would make an order for all the orders made on that occasion to be prepared, filed and served by the Claimant's attorney-at-law. In such a scenario, it is quite apparent that, in that event the Defendant would have had no obligation to serve any order on the Claimant. However, If I were to accept and apply the reasoning of Counsel for the Applicant, it would suggest that in the event that the Claimant failed to comply with such an Unless Order, he could circumvent that order by arguing that judgment could not be entered in favour of the Defendant until the Defendant served him with the Unless Order. To subscribe to this position in this scenario would render the application of the rule in this fashion quite preposterous

[74] In the case of **Tingles *Distributors Limited v Liquid Nitro Beverages Inc. and Anor*** [2020] JMCA Civ 24, despite the fact that no point was raised as it relates to service, the comments of the learned Judge of Appeal supports my view that a party being present when the Unless Order was made would have had sufficient notice of the order without the necessity for any further service of the order. At paragraph 82 Paulette Williams JA stated that:

> "*The attorney-at-law for the appellant was present when the unless order was made. The trial date had previously been set for 4, 5 and 6 April 2018 and counsel was present when that was done. This is an instance where the deadline for compliance should have been uppermost in its mind*."

[75] This, in my opinion reinforces a finding that a party being present at the making of the Unless Order has sufficient notice to propel him into action without any further

necessity to serve him with the same order. Therefore, I am unable to share the view of Counsel for the Applicant that by the Claimant not serving the Unless Order on the Applicant, the Applicant was not properly warned.

[76] When I examine the case of ***R.E. Forrester & Anor v Holiday Inn (Jamaica)*** Claim No. CL 1997/F-138 on which Counsel for the Applicant relies, it becomes apparent that the application in that case was not for a relief from sanction but an application for extension of time to comply with an Unless Oder which had not yet taken effect. In a without notice application the Claimants had applied for an Unless Order to enforce the disclosure portion of Case Management Conference Orders. The judge noted that although the rule permitted a without notice application, notice was served on the Defendant. In this regard, the Unless Order being made in the absence of the Defendants, the Claimants served the Unless Order on the Defendants as they would have been mandated to do.

[77] However, I also take note of the fact that counsel for the Applicant submits that "had the Applicant been served with the unless order and he failed to act, the court would have been justified in making an order such as the one made i.e., to give judgment without trial after striking out". As I have already stated, in my view, the order having been made and communicated directly by the Judge to the Applicant, that was sufficient notice for the Applicant to comply with the terms of the order.

[78] In essence, I agree with counsel for the Claimant that the Defendant and his Counsel being present at the making of the Unless Order, the order being directed to the Defendant, he had immediate notice of the order and therefore cannot complain that he had no notice, because he was not served with the order by the Claimant. Therefore, the Applicant, having failed to comply with the terms of the order, I take the view, using Counsel's own words, that "the court was justified in giving judgment without trial after striking out".

Whether the Judgment Should be Set Aside

Submissions

[79] Ms. Gordon made the following submissions on behalf of the Applicant:

(i) Where the party applying for the judgement is the Claimant, the judgement shall be such as the court considers that Claimant is entitled to. As such, the Court was not entitled to give the orders requested by the Claimant without the evidence to support it. (She relies on ***Rule 26.5(6)***)

(ii) When the overriding objective of the Rules is applied, it is obvious that the Claimant should have a trial in a matter where he has a real prospect of successfully defending his case. The Applicant in the instant case, has more than an arguable defence; he has merit. His interest will also be prejudiced as orders such as those made by Morrison J., seek to restrain the Applicant from the use and enjoyment of his property. No fraud was alleged or particularized; all that is before the court is that the deceased did not have capacity to sign the instrument of transfer.

(iii) The judgment that was granted on July 7, 2011 in light of the circumstances, was granted in default as the orders were granted as a result of the Applicant's failure to comply with an order. Default Judgement was defined as a judgement which has not been decided on its merits. The entering of a default judgement in most cases including the one at bar is an administrative one. (She relies on the case ***of Leymon Strachan v Gleaner Company Limited and Dudley Stokes*** [2005] UKPC 33)

(iv) The power of the court to set aside a Default Judgement ordinarily obtained is set out in ***Rule 13***. What the court looks at is whether the party has a real prospect of success. The Applicant has a real prospect of successfully defending the Claim. The Applicant's

defence has been consistent throughout in his affidavits. (She relies on the case of ***Evans v Bartlam*** [1973] AC 437;) Even in cases where the defence was not filed promptly, up to the point of assessment of damages, an application can be made to set aside default judgement and the courts have set aside the default judgement where the Defendant has a reasonable chance of successfully defending the Claim. (She relies on the cases of: ***Sasha-Gaye Saunders v Michael Green et al***, In The Supreme Court of Judicature of Jamaica, Case Number: 2005 HCV 2868; Delivered 27.02 2007**:** (***Strachan v Gleaner Co. Ltd*** SCCA 54/97)

(v) The Applicant was served with the judgment on or about January 30, 2012. The Respondent and/or his servant/agent having left the documents at the service address of the Applicant's then Attorney, on July 5 it would be deemed served on July 6, 2011, which was the day before the matter came up for hearing. The Applicant's attorney-at- law having received the documents the day before the hearing would not have been able to take proper instructions and file and serve the response of the Respondent. The court was in a position to abridge the time for notice but this was not done. In the circumstances, she submits, that the Applicant was not given a fair chance to defend his case.

(vi) Had the Applicant been present personally or by way of Counsel at the hearing of the application for judgment after striking out, it is likely that the court would have ruled differently given the circumstances of the case. (She relies on ***on Rule 1.1***)

(vii) the Applicant should not be prevented from defending his claim as the court, where possible, is to decide cases on their merit and refrain from refusing them on grounds of procedure. The court "cannot *accept that, where a defendant fails to file a defence within the period prescribed by the rule, it is to an imply a sanction imposed by the*

rules." (She relies on the Privy Council decision of ***Attorney General v Keron Matthews*** 2011 PC, specifically paragraph 20)

[80] Counsel for the Respondent submits that:

(i) It is crucial to look at the context in which a judgement in default is made. This case is not one where a default judgement was entered in the context that it is being argued by Counsel for the Applicant and that this is not a default situation as defined by **Rule 12**. It is a case in which the defence was filed but was struck out. Under ***Rule 12.1*** - Default Judgement is very narrowly defined and another criteria ought not to be imposed.

(ii) The failure to apply promptly is fatal is to the application for relief from sanctions. The Defence was struck out from August 2009 and the first application was made in 2012. In the context of promptness, the material date is not when the judgement on striking out was entered, but from the time the order that was made by Rattary J took effect. (He refers to Rule ***26.8)***

Discussion

[81] The submissions of Counsel for the Applicant and the authorities on which she has relied are substantially grounded on the principles relating to the setting aside of a judgment entered in default of appearance or a defence. ***Rules 12 and 13*** are the rules that govern the entry and setting aside of Default Judgments. ***Rule 12.1 and 2*** read:

"(1) This Part contains provisions under which a claimant may obtain judgment without trial where a defendant -

(a) has failed to file an acknowledgment of service giving notice of intention to defend in accordance with Part 9; or

(b) has failed to file a defence in accordance with Part 10.

*(2) Such a judgment is called a **"default judgment"**.*

[82] Rule 13.2 reads:

"(1) The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because -

(a) in the case of a failure to file an acknowledgment of service, any of the conditions in rule 12.4 was not satisfied;

(b) in the case of judgment for failure to defend, any of the conditions in rule 12.5 was not satisfied; orc) the whole of the claim was satisfied before judgment was entered.

(2) The court may set aside judgment under this rule on or without an Application".

Rule 13.3 reads:

"(1) The court may set aside or vary a judgement entered under Part 12 if the defendant has a real prospect of successfully defending the claim.

(2) In considering whether to set aside or vary a judgment under this rule, the court must consider whether the defendant has:

(a) applied to the court as soon as is reasonably practicable after finding out that judgment has been entered.

(b) given a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be.

(3) Where this rule gives the court power to set aside a judgment, the court may instead vary it".

[83] Having examined the history of the applications and the relevant orders giving rise to these proceedings, it is clear, in light of the aforementioned rules, that in the circumstances, a defence was in fact filed within the time stipulated by the rules. Consequently, the judgment that was entered was not entered as a result of the Defendant's failure to file a defence.

[84] Therefore, in my view, the provisions of the rules and the law relating to the setting aside of a Judgment entered in Default of Defence, are not relevant to my determination of this application. Consequently, I do not consider it necessary at this time to examine the authorities cited by Counsel as it relates to the setting aside of a Default Judgment.

[85] However, having examined the rules, I find that Rule ***26*** is the applicable provision to the instant application. It governs the condition for the entry of a judgment after striking out and the procedure for setting aside such a judgment. ***Rule 26.6.1- 4*** provides as follows:

"***26.6*** *(1) A party against whom the court has entered judgment under rule 26.5 when the right to enter judgment had not arisen may apply to the court to set it aside.*

(2) An application under paragraph (1) must be made not more than 14 days after the judgment has been served on the party making the application".

(3) Where the right to enter judgment had not arisen at the time when judgment was entered, the court must set aside judgment.

(4) Where the application to set aside is made for any other reason, rule 26.8 (relief from sanctions) applies. ***Sanctions have effect unless defaulting party obtains relief.***

26.7*(1) Where the court makes an order or gives directions the court must whenever practicable also specify the consequences of failure to comply.*

(2) Where a party has failed to comply with any of these Rules, a direction or any 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".

[86] It is patently clear as outlined by ***Rule 26.6 (1***) and ***26.6 (3)*** that where it is established that judgment was improperly entered, the Applicant /Defendant would be entitled to have it set aside as of right. However, in light of my findings in the previous section that the judgment was properly entered this application has to be considered as directed by ***Rule 26.6(4***), under ***Rule 26.8***

[87] The provisions of ***Rule 26.8*** are as follows:

> 26.8 "(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.

(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 show".

[88] The case of ***University Hospital Board of Management v Hyacinth Matthews***, [2015] JMCA Civ 49, also explains the procedure under ***Rule 26.8.*** That is, in order to succeed in an application for relief from sanctions, the Applicant must satisfy all the requirements outlined in this rule and that the provisions should be applied sequentially to the application. Essentially, if the Applicant fails to satisfy any of the requirements he would have failed to establish that he is entitled to be granted relief from sanction. (See also the case of ***H.B. Ramsay v Jamaica Redevelopment Foundation*** [2013] JMCA Civ 1, and***, New Falmouth Resorts Limited v National Water Commission*** [2018] JMCA Civ 13, **Sean *Greaves v Calvin Chung*** [2019] JMCA Civ 45)

[89] The instant application was in fact supported by evidence in an affidavit. Consequently, the Applicant would have satisfied the second requirement in ***Rule 26.8.1*** However, in the event that I find that the application was made promptly the Applicant would only have passed one test, that is stage one in the process of the two stage test contained in ***Rule 26.8. (1) and (2***). Therefore he must go on to satisfy the requirements that the failure to comply was not intentional, that there is a good explanation for the failure to comply and that he, as the party in default has generally complied with all other orders, relevant rules, practice directions orders and directions.

[90] Notwithstanding the fact that the Applicant may have satisfied all the requirements in stage 1 and 2 he is not automatically granted the relief from sanction. The court must thereafter go on to consider whether to grant the relief from sanction in light of the provisions of ***Rule 26.8 (3).*** That is, whether the failure to comply was due to the Applicant or his attorney-at-law; whether the failure can be or has been remedied within a reasonable time; whether the trial date can still be met; and the effect which the granting of relief or not would have on each party.

Whether the Application was Made Promptly

[91] In the case of ***H.B. Ramsay v Jamaica Redevelopment Foundation*** (Supra) Brooks J.A. at paragraph 10 stated that:

> *"In my view, if the application has not been made promptly the Court may well, in the absence of an application for an extension of time, decide that it will not hear the application for relief. I do accept, however that the word promptly does have some measure of flexibility in its application, whether something has been done promptly or not depends on the circumstances of the case. "*

[92] Further at paragraph 14 he stated that:

> *"Where such orders are made, the party affected is given notice of the requirement and the penalty for non-compliance. The deadline for compliance should, therefore, be uppermost in his mind".*

[93] The first application on behalf of the Applicant /Defendant for relief from sanction was filed on January 19, 2010. While I am aware that this is not the application that is before me today, I am reminded by the rules that in treating with an application to set aside a judgment properly entered after striking out I should apply the rules that are applicable to an application for a relief from sanction. Therefore, in determining the issue of promptitude I do not believe I should limit my consideration to the time when this present application was filed. I would have to examine the issue in light of the time when the Applicant took the initial step to either apply for relief from sanction or have the Judgment set aside.

[94] I agree with counsel for the Claimant /Respondent that in this application the relevant date in relation to the issue of promptitude is not the date that the judgment after striking out was entered, but the date when the Defendant's statement of case was struck out under the Unless Order. The Default Cost Certificate, having been served on the 11th of August 2009 on the Counsel for the Applicant/Defendant, it meant that the cost having not been paid on or before the 18th of August 2009, at

the end of that day the Applicant/Defendant's statement of case stood struck out. Therefore, the issue of promptitude has to be assessed from August 18, 2009 to the 19th of January 2010. In this event, the Applicant/Defendant would have waited five (5) months before he took any steps to apply for relief from sanction.

[95] It is my considered opinion that, the Applicant/Defendant having failed to comply with the Unless Order, should not have been waiting on the Claimant to serve him with a notice for the Application to enter judgment, to act with alacrity to apply for relief from sanction. When I examine the authorities, a delay of five (5) months, in the absence of any special circumstances, is not considered to be prompt.

[96] However**,** even supposing that the court were to accept that initially the Applicant did not comprehend the gravity of the Unless Order, at least by the latest, the 10th of November, 2009, the Applicant/Defendant was aware that the trial did not proceed in light of his statement of case being struck out. Therefore, at that point he would have fully appreciated, the consequence of his failure to comply with the Unless Order. By then, he should have moved with the utmost alacrity to apply for the relief from sanction. The court would have expected that by the very next day or at the latest within a few days from then, this application would have been made. However, the Applicant delayed until to a little over 2 months after the entry of the judgment to file that application.

[97] In the case of ***Sean Greaves v Calvin Chung (Supra)*** the, application for relief from sanction was from an Unless Order which stated that:

> "Written Submissions and any authorities in support are to be filed and exchanged by both parties on or before July 31, 2018. 2. Unless the order made herein is complied with, the claim filed on August 31, 2015 will stand as being struck out".

The Claimant, filed submissions and authorities within time, but did not serve them on the Appellant until 4:27 pm on the 31st July 2018, by electronic mail. The Court of Appeal took the view that an application for relief from sanctions that was made

almost two months following the breach in the ordinary course of things would not be regarded as prompt (see paragraph 43 of the Judgment of Edwards JA).

[98] However, the court found that there were special circumstances that existed in that case, one of which was the fact that the breach being one of a technical nature; the attorney for the Respondent seemed to have been oblivious that there was a breach or that the Appellant would take the point that there was a breach. In those circumstances the court applied a degree of flexibility and found that the application was made promptly**.**

[99] However, I find that there are no special circumstances in the instant case. In fact, in the aforementioned case, by the time the application for relief from sanction had been filed, apart from failing to act within the stipulated time, the Applicant had complied with the other terms of the order. In this case under my consideration there is no evidence of any compliance or any attempt at compliance on the part of the Applicant/Defendant.

[100] In the case of **Price *Waterhouse (A firm) v HDX 9000 INC*** [2016] JMCA Civ 18, Justice Brooks sought to explain the decision in ***HB Ramsay*** (supra). At paragraph 28 he stated that:

> *"The import of the decision, as in the case of National Irrigation, was that if the application were not made promptly, the applicant was not entitled to relief from sanction".*

[101] Further at paragraph 36 he stated:

> *"It was stated in **H B Ramsay**, that there was a degree of flexibility in the assessment of the promptitude of an application. It may well be that the explanation for what may at first blush seem a delay, demonstrates that the application was indeed made promptly. Each case would turn on its own facts. If, however, the court is of the view that the application was not made promptly, and there is no*

application for extension of time, the application for relief from sanction should fail".

[102] Therefore, I find that the Applicant in delaying five (5) months from the time his statement of case was struck out, to file his first application for relief from sanction, did not act promptly. Consequently, his application must fail.

[103] However, despite my findings that the Applicant/Defendant has failed the promptitude test and that this essentially bring the matter to an end, just in case, as regards to issue of promptitude, and in applying concept of flexibility, it is found that I am wrong, I will go further to consider whether the failure to comply was intentional and whether the explanation for the failure to comply amounts to a good explanation.

Whether the failure to Comply was Intentional

[104] Having examined the affidavit evidence of the Applicant I find that he has offered no clear evidence on this issue. He has provided no evidence on which I can conclude that he had any intention to comply with the Unless Order. He admits that the Bill of Cost was in fact served on his then Attorneys-at-Law, Mr. Sheldon Codner. Despite his evidence that he has always been very interested in the trial of the matter and he is not personally responsible for any delays or his non-attendance in Chambers on the 7th of July 2011, he also claims that he was not aware of any order by any judge of the Supreme Court, which gave the Claimant the right to file a Bill of Costs prior to the completion of the matter.

[105] Therefore, the only inference I can draw is that it is immaterial that he was not personally served with the Default Cost Certificate. That is, had he been served personally with the Default Cost certificate, he still would have failed to comply with the Unless order. I take this view in light of his statement that he was not aware of any order by any judge of the Supreme Court, which gave the Claimant the right to file a Bill of Costs prior to the completion of the matter. Therefore, clearly his position was, and still seems to be, that the Claimant was not entitled to insist on

the payment of cost under the terms of the Unless Order prior to the completion of the trial.

[106] Consequently, I find that he had no intention of honouring the Unless Order prior to the completion of the trial. The fact that he was present when the Unless Order was made and would have heard the terms of the order and specifically the timeline for payment of the cost leads me to conclude that the failure to comply with the Unless Order was intentional on the part of the Applicant.

Whether the Applicant has Provided a Good Explanation for His Failure to Comply with the Unless Order.

[107] The Applicant states that he was led to believe by his then Attorney-at-law Mr. Sheldon Codner that no documents were served on him that would have brought to his attention, the hearing date of the 7th of July 2011, neither was he served personally with any documents advising him of the hearing date of the 7th of July 2011. Prior to the 30th of January 2012, he was confident that his legal interest was being represented and protected on Mr. Codner's representation. However, the relevant issue to be determined is whether he was aware of the terms of the Unless Order.

[108] The fact of the matter is that, the Unless Order having been made in the presence and hearing of the Applicant, the nature of the order is of such that non- compliance would have been in his personal knowledge. That is, he would be the one to know whether he had provided his attorney-at-law with the sums of money to satisfy the cost. Therefore he should have been, through his attorney-at-law, either seeking to agree cost with Claimant or making enquiries from his attorney-at-law with regards to the process of taxation.

[109] Additionally, the Applicant's attorney-at-law would have had to take instructions from him in relation to the Points of Dispute that were filed but not served. The Applicant further asserts that he has a real prospect of defending his case and had he appeared at the hearing on the 7th of July 2011 personally or by legal counsel,

some other judgement would have been delivered. However, the issue at this stage is not about the merit of his defence but whether he has offered a good explanation for his failure to comply with the Unless Order. That is his failure to pay the cost seven (7) days after his attorney-at law was served with the Default Cost Certificate

[110] In the case of ***HB Ramsay*** (Supra), the Appellants failed to comply with the Unless Order which ordered that;

> *"Unless the costs awarded to the [respondents] on March 2, 2010 are paid on or before June 18, 2010 by 2:00 pm, the [appellants'] statement of case are [sic] to stand as struck out"*

[111] The explanation offered by the Applicant was that he had paid the monies to his attorney-at-law two days prior to the deadline. The attorney- at law provided no explanation to the court as to why it was not paid within the timeline stipulated by the Unless Order. The attorney-at-law, however, told the Applicant that the default that occurred was due to inadvertence. The court rejected that excuse as a good explanation, and accepted the Respondent's submission that 'inadvertence' was not an explanation in and of itself, in the absence of any evidence from the attorneys themselves explaining the default.

[112] At paragraph 16 of the judgment Brooks JA stated:

> "*In addition, the appellants, having made the payment, should have been anxious to have word from their attorneys-at-law, that the sum had been remitted and that their claim had been saved from the fatal axe".*

[113] At paragraph 21 the court also found that:

> "*Mr Ramsay's affidavit (did) not give any explanation for the failure. His evidence that his attorneys-at-law told him that the default was by way of inadvertence, (was) inadequate".*

[114] Analogous to the case of ***HB Ramsay***, I find that the Applicant in the instant case has offered no good explanation for his failure to comply with the Unless Order. At paragraph 22 of the judgment of ***HB Ramsay*** Brooks JA stated:

> "*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*".

[115] He further stated:

> *I do accept that the consideration would vary from case to case, depending on what was required of the defaulting party. I find, however, that a court assessing an application for relief from sanctions should not be restricted to considering the applicant's conduct prior to the application of the sanction; subsequent action may well indicate the attitude of the applicant to the progress of the matter. In any event, not all sanctions inflict a penalty that is fatal to that party's case. In such cases, subsequent action should be considered. [In the instant case, it would have been open to the court assessing the question of relief from sanctions, to consider whether the appellants had demonstrated that they were serious about getting their case back on track and placing themselves in a position where the adverse effects of the default were minimised. The appellants missed that opportunity for making a favourable impression in that regard. In any event, rule 28.6(2) requires an applicant to comply with all three of its requirements. It states that the "court may grant relief only if it is satisfied that" the three requirements have been satisfied. Even if Fraser J was wrong in finding that there had not been general compliance, the appellants' failure to satisfy the requirement of a good explanation would have been fatal to their application."* (See paragraph 27-29)

[116] In the instant case, having found that the Applicant/Defendant failed to act promptly and failed two of three requirements under ***Rule 26.8(2),*** I do not consider it necessary to consider whether he would have satisfied the third requirement under

Rule 26.8(2). That is, whether he has generally complied with all other relevant rules, practice directions orders and directions. In essence, having failed to satisfy the requirements already considered, his application has already failed.

Whether it is Necessary to Examine the Merit of Defence

[117] Counsel for the Applicant has invited the court to examine the merit of the case, stating that the judgment was entered "without evidence to support it". It is also her submission that the judgment should be set aside to afford the Applicant/Defendant a trial in light of the merits of his case. She made reference to the overriding objective of the Rules (See ***Rule 1.1).*** Therefore, I believe it is necessary for me to determine whether I find that the approach suggested by counsel is the correct approach in dealing with the issue.

[118] In the case of ***Price Waterhouse (A firm) v HDX 9000 INC*** [2016] JMCA Civ 18 HDX 9000 Inc., (HDX) failed to comply with certain orders of the Supreme Court. Consequently, their claim against the Defendant Firm of Price Waterhouse (PW) stood as dismissed. Thereafter a judgment, was formally entered in favour of the Defendant Company, in which cost was awarded to the Defendant Company. The Claimant subsequently applied for and was granted relief from sanction, and the judgment in favour of the Defendant was set aside.

[119] The judge who heard the application for relief from sanctions found that the application had not been promptly made and that the breach was intentional and unreasonable. He further found that HDX had not provided a good explanation for the breach. In respect of the issue of whether HDX had been generally compliant with other rules and orders, the learned judge found that it had previously been in breach of other orders.

[120] He however, he took the view that the overriding objective of the rules required the grant of relief from sanction. He was of the view that the issues to be resolved were of "tremendous importance" to the parties and that the issues should be determined at a trial. The Defendant Company appealed this decision, contending

that the learned judge improperly applied the provisions of the rules dealing with relief from sanctions.

[121] At paragraph, 27 of the judgment of the Court of Appeal, the Court stated that:

> *"Essentially as it relates to an application for relief from sanction the court is not required to examine the merit of parties statements of case".*

And further

> *"Judges must be reminded that resort to the overriding objective may only be had in the absence of specific provisions which are clear in their meaning."*

[122] In support of this point the Learned Judge of Appeal made reference to three authorities. These are contained in paragraph 38 of the judgment, where he stated that:

> "The first is **Vinos v Marks and Spencer** [2001] 3 All ER 784, where May L1 said at page 789 paragraph 20:
>
> > *"…. Interpretation to achieve the overriding objective does not enable the court to say that provisions which are quite plain mean what they do not mean, not that the plain meaning should be ignored……"*
>
> In that case Peter Gibson U said at page 791 paragraph 26:
>
> > "...The language of the rule to be interpreted may be so clear and jussive that the court may not be able to give effect to what it may otherwise consider to be the just way of dealing with the case ..."
>
> The second case is a decision by the Court of Appeal of the Republic of Trinidad and Tobago, in **Trincan Oil Ltd and Others v Martin**

(Civil Appeal No 65 of 2009). In treating with the equivalent of rule 26.8, the court stated at paragraph 27 of its judgment:

> *"It is clear that the Claimant did not satisfy the requirements of [the equivalent of rule 26.8(1)] and could not have passed the threshold test set at [the equivalent of rule 26.8(2)]. The resort by the judge solely to "the interest of justice" wholly disregarded the requirements of the Rule and was therefore plainly wrong."* (Emphasis supplied)

The Attorney General v Universal Projects Ltd [2011] UKPC 37 is the third case. The Privy Council, on an appeal from the Court of Appeal of the Republic of Trinidad and Tobago, dealt with a question similar to that in this case. In addressing the provisions of a rule, stated in almost identical terms as rule 26.8, their Lordships addressed the pre-conditions of the equivalent of paragraph (2). They found that the failure to provide a good explanation for the default was fatal to the application for relief from sanctions. Paragraph [I81] of the judgment states:

> *"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] for the failure to [comply with the 'unless order'. That is fatal to the defendant's case in relation to [the rule] 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."*

[123] The aforementioned authority has settled the issue raised by Counsel. It is incontrovertible that it is not necessary for me to consider the evidence or the merits of the parties' case when considering an application under the rules for relief from sanction. This would be inviting me to go beyond the provisions of ***Rule 26 .8***. The authorities have clearly outlined that in an application for relief from sanction, I am constrained to consider the application within the provisions of the rule and no further. Therefore, in light of the foregoing discussion I find that the Applicant has failed to establish that he is entitled to relief from sanction. Consequently, he has failed to establish any grounds for the setting aside of the Judgment entered on the 7th of July 2011.

Orders

[124] I make following orders:

(i) Application to set aside Provisional Charging Order made on the 17th of April 2012 is denied.

(ii) Application to set aside the judgment entered on the 7th of July 2011 is denied.

(iii) On both Applications, Cost is awarded to the Claimant/Respondent to be agreed or taxed.

(iv) Leave to appeal granted.