



[2025] JMSC Civ. 23

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015HCV03387

BETWEEN	MARVA WATSON	CLAIMANT/APPLICANT
AND	THE ATTORNEY GENERAL OF JAMAICA	DEFENDANT/RESPONDENT

IN CHAMBERS

Mr Michael John Jordon and Ms Debranette Mattis, instructed by Jordon and Francis, Attorneys-at-Law for and on behalf of the Applicant.

Ms Karressiann Gray and Mr Dimitri Jean-Paul Mitchell, instructed by the Director of State Proceedings, for the Respondent.

Heard: 24th February 2025, 11th March 2025 and 3rd June 2025

Civil Procedure – Rules 29.11, 26.8, 27.6 (2) AND 12.3 of the Supreme Court of Jamaica Civil Procedure Rules 2002- Application for Relief from Sanctions – Failure to file and serve witness statement within the time ordered in keeping with rule 29.11 of the CPR- Whether the application was made promptly- Whether a defendant has a right to oppose the application for relief from sanction in light of rule 12.3 of the CPR.

M. Jackson, J

Background

[1] These proceedings relate to an application for relief from sanctions. In my final decision on the matter, I made the following Orders:

1. The claimant's notice of application for relief from sanctions filed on October 2, 2024, is refused.
2. The Assessment of Damages hearing is fixed for the 26th January 2016 at 10 a.m. in open court by a judge alone.
3. The parties are to file and exchange written submissions and a list of Authorities on or before November 28, 2005.
4. The claimant's attorney at law is to file a Judge's Core Bundle by December 19, 2025, and an Index to that Bundle is to be served on the Defendant's attorney at law
5. The costs of the application to the defendant to be taxed if not agreed.
6. Claimant's Attorney at Law is to prepare, file, and serve this order.

[2] This is my written decision.

[3] This claim, filed nearly ten years ago on 8 July 2015 by the applicant, Miss Marva Watson, against the respondent, the Attorney General of Jamaica, was initiated as a representative action under section 13 of the **Crown Proceedings Act**. It involves a claim for damages for acts committed against her by members of the Jamaica Constabulary Force arising from a shooting incident that caused her personal injuries and losses.

[4] The claim form and all accompanying documents were served on the respondent on 13 July 2015, and an acknowledgment of service was filed on 21 July 2015. No defence was filed within the 42-day period specified by rule 10.3(1) of the Supreme Court of Jamaica Civil Procedure Rules 2002, as amended (CPR). On 12 May 2023, the applicant, pursuant to rule 12.3 of the CPR, applied to the court for permission to enter judgment in default of a defence against the respondent.

On 28 July 2023, the respondent filed an application seeking the court's permission to extend the time to file a defence pursuant to rule 10.3(9) of the CPR.

[5] On 29 November 2023, both applications were heard by Master Orr, as she then was. Present at the proceedings were Mr. Michael Jordon, the applicant's counsel, and Miss Karessiann Gray, counsel for the respondent. The learned master refused the respondent's application and entered judgment in default of a defence in favour of the applicant. In exercising her case management powers, the learned Master issued orders for the matter to proceed to an assessment of damages, and directed that disclosure and inspection of documents be completed by 20 December 2023 and 12 January 2024, respectively, and that the applicant's witness statement be filed and served by 23 February 2024.

[6] Master Orr issued a further order that any discussions aimed at settling the claim must be concluded by 10 April 2024, and she directed that the parties attend a case management conference on 16 April 2024. On 23 February 2024, the sanction for the applicant to serve the witness statement came into effect. No witness statement, witness summary, or application for relief from sanction was filed on that day.

[7] On 16th April 2024, the parties appeared before Mott Tulloch-Reid J for the case management conference. Present were the applicant, her counsel Miss Debranette Mattis, and the respondent's counsel Mr. Dimitri Mitchell. The applicant did not comply with any of the case management orders made by Master Orr. Mott Tulloch-Reid J adjourned the case management conference to 16th October 2024 and made the following orders:

1. The Case Management Conference is adjourned to October 16, 2024, at 2 p.m. for ½ by video conference. **There shall be no further adjournment of the case Management Conference, and if the claimant is not ready to proceed on the adjourned**

hearing date, the statement of case is to be struck out. (My emphasis)

2. Defendant's attorney to file and serve a Form 8A on or before April 23, 2024.
3. No Order as to costs
4. Claimant's attorneys at law are to prepare, file and serve the Formal Order.

[8] On 19 April 2024, the respondent filed a Form 8A in accordance with the order issued by Mott Tulloch- Reid J on 16 April 2024. On the same day, the applicant's attorneys at law filed the Formal Order of the proceedings. Just over five months later, on 1 October 2024, the applicant's attorney filed a witness statement, a list of documents, and a notice of intention to tender hearsay evidence. The following day, 2 October 2024, she filed an application for relief from sanction, supported by an affidavit from counsel, Mr Michael Jordon.

[9] The respondent strongly opposes the application. The applicant, fervently defending her position, also objected to the respondent's involvement in the matter, asserting that, pursuant to rule 12.13, as amended on 17 June 2020, the applicant has no right of audience in respect of an application for relief from sanction. This, she added, was in the context of no defence or witness statement having been filed by the respondent to challenge the applicant's version.

Issues

[10] The main issues to consider are whether the statutory requirements of rule 26.8 are satisfied so that I can exercise my discretion in favour of the applicant and grant the order, as prayed for, and whether the defendant has the right of audience at this stage.

[11] Previously, I ruled on another case concerning this issue, concluding that the defendant's involvement is limited to non-existence in these applications. I determined that, in accordance with the clear provisions of rule 12.13, the

defendant's rights following a default judgment and 16.2, which set out specific timelines for both a claimant and a defendant after a default judgment has been granted. Both provisions were amended on 17 June, 2020, following the defendant's right to be heard at the assessment of damages.

- [12] Rule 12.3 states that, 'unless the defendant applies for and obtains an order for a default judgment to be set aside, the only matters he can be heard on are the assessment of damages, provided he indicates he wishes to be heard and has filed the form 8A pursuant to 16.2(4), costs, the time of payment of any judgment debt, enforcement of judgment, and any application to vary or set aside default judgment.
- [13] An application for relief from sanctions involves the court's discretion, granted under the powers outlined in the CPR, specifically rule 26.8. The application must, among other requirements, be filed promptly and supported by evidence on affidavit. The introduction of the CPR in 2002 marked a shift in the paradigm of civil litigation. Timelines are fixed by the rules and are crucial for the timely progression and resolution of cases. The rules established in the CPR aim to expedite litigation and enable the court to exercise more active control, unlike in the past when there was widespread disregard for the rules and a lack of proper expedition by one or both parties.
- [14] The result is that the process becomes judge-driven, signalling the end of the culture of delay, moving cases swiftly, and sanctioning parties who have abused the rules. In **Oneil Carter and others v Trevor South and others** [2020] JMCA Civ 54, Dunbar JA (Oneil Carter) explains how rule 26.8 operates in relation to an application for relief from sanction when a witness statement or witness summary is not served on time.
- [15] In this matter, the respondent filed a Form 8A, indicating his intention to cross-examine the claimant and to make submissions solely on quantum. The form states that he does not intend to call any evidence. To my mind, whether the

defendant participates or not, the rules require compliance with timelines. Under this new regime, rules have been established to enable the court to manage cases, prevent abuse, and disregard the rules. In **Biguzzi v Rank Leisure Plc** [1999] EWCA Civ 1972, Lord Woolf (MR) at 6, aptly sets out the defining role of the judge when there is non-compliance; among other things, he held as follows:

“.... But if the court exercises its power with circumspection, it is also essential that the 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.” (My emphasis)

The Law regarding an Application for Relief from Sanction

[16] The law regarding relief from sanctions is well established in this jurisdiction. In **Deputy Superintendent John Morris and others v Desmond Blair and another** [2023] JMCA Civ 45, (**‘Deputy Superintendent John Morris’**), and **Oneil Edwards v Jamaica Public Service Company Limited** [2025] JMCA Civ 13, (**‘Oneil Edwards’**), the two most recent cases from our Court of Appeal have thoroughly addressed this area and also referenced various other notable cases on the subject, including **Oneil Carter** and **HB Ramsay and Associates Ltd and others v. Jamaica Redevelopment Foundation Inc and Anor** [2013] JMCA Civ 1.

[17] Rule 29.11 of the CPR states that if a witness statement or witness summary is not served within the period specified by the court, the witness cannot be called unless the court grants permission. Furthermore, it clarifies that a court might refuse permission if the application is made at trial, unless the party seeking permission has a valid reason for not applying under Rule 26.8. Regarding the operation of these two rules, Pusey JA in **Oneil Edwards** commented:

*“29. In **Oneil Carter and others v Trevor South and others** [2020] JMCA Civ 54 (**‘Oneil Carter’**), this court noted that a defaulting party under rule 29.11 must apply for and receive relief from sanctions under rule 26.8 to avoid the sanction imposed by*

*rule 29.11. That sanction remains in effect until a successful application for relief from the sanction is made (see paras. [34], [35] and [38]). In **Oneil Carter**, the respondents had not applied for relief from sanctions resulting from their failure to file and serve their witness statements in time. The judge at first instance had, in error, granted the respondents an extension of time to file and serve witness statements on an oral application for extension of time. This court made it clear that the lower court's general case management powers are inapplicable in the circumstances where rule 29.11 of the CPR is operational (see para.[64])."*

[18] Rule 26.7(2) of the CPR states that if a party fails to comply with any rule, direction, or order, any sanction or non-compliance imposed by the rule, direction, or order takes effect unless the defaulting party applies to the court and obtains relief from the sanction.

[19] Rule 26.8, the relevant provision for seeking relief from sanctions, states as follows:

(1) An application for relief from any sanction imposed for a failure to comply with any rule, order, or direction must be –
made promptly; and

(a) 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 the 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.”

[20] This provision includes both mandatory and discretionary elements. The mandatory component is 26(1), which requires that the application be submitted promptly and supported by evidence. Brooks JA (as he then was) explained in **HB Ramsay and Associates Ltd and others v. Jamaica Redevelopment Foundation Inc and Anor** [2013] JMCA Civ. 1 (**‘HB Ramsay’**), how rule 26.1 operates. In **Deputy Superintendent John Morris**, P Williams JA, also adopts that interpretation. The learned judge of appeal stated this:

“In **HB Ramsay**, Brooks JA (as he then was) succinctly explained the rule as follows at para. [31]:

“[31] An applicant who seeks relief from a sanction, imposed by his failure to obey an order of the court must comply with the provisions of rule 26.8(1) in order to have his application considered. If he fails, for example, to make his application promptly, the court need not consider the merits of the application. Promptitude does, however, allow some degree of flexibility and thus, if the court agrees to consider the application, the next hurdle that the applicant has to clear is that he must meet all the requirements set out in rule 26.8(2). Should he fail to meet those requirements then the court is precluded from granting him relief. There would, therefore, be no need for a court, which finds that the applicant has failed to cross the threshold created by rule 26.8(2), to consider the provisions of rule 26.8(3) in relation to that applicant”

[21] The rule does not specify what 'promptly' means. P Williams JA, in **Deputy Superintendent John Morris**, cites various authorities that have interpreted the word 'promptly' and determined as follows:

*“(66) In **Ray Dawkins**, this court considered the question of what the word “promptly” meant and stated as follows:”*

[60] It is to be noted that the rule does not give any definition of the word 'promptly' neither is this requirement of promptness referable to any other event. There are rules where a party is required to make an application to avoid the consequence of its matter being determined due to failure to comply with a rule or a direction. For example, in an application to set aside or vary a judgment made in default 'the court must consider whether the defendant has applied to the court as soon as is reasonably practicable after finding out the that [sic] judgment has been entered' (see rule 13.3(2) of the CPR).

[61] Harrison JA stated that: '[14] [...] Promptly is an ordinary English word which we would have thought had a plain and obvious meaning, but if we need to be told a bit more about what it means, we do have the authority of **Regency Rolls Limited v Carnall** [2000] EWCA Civ. 379, where Arden, L.J. pointed out that the dictionary meaning of 'promptly' was 'with alacrity'. Simon Brown, L.J. said:

'I would accordingly construe 'promptly' here to require, not that an applicant has been guilty of no needless delay whatever, but rather that he has acted with all reasonable celerity in the circumstances.'

And at paragraph [16], he had this to say:

'[...] Promptness, in our view, is the controlling factor under rule 26.8. It is plainly a very important factor, as is evident from the fact that it is singled out in the rule as a matter to which the court must have regard. In our judgment, it is a very important factor because there is a strong public interest in the finality of litigation. Put simply, people are entitled to know where they stand.'"

[22] P. Williams, JA, in reversing the learned judge's decision in **Deputy Superintendent John Morris**, to grant the application for relief from sanction, held as follows:

"[67] It is accepted that what amounts to promptness significantly depends upon the circumstances of the particular case (see *Meeks v Meeks*). In this case, I find that the question of promptness was relative to the time the breach had taken place, with the consequential sanction taking effect. On 10 July 2020, the court ordered that the witness statements were to be filed and served on or before 8 January 2021. The sanction took effect on that date. The respondents did not file and serve the statements until 17 September 2021. The application for relief from sanction was made on 2 December 2021, only after they had been served

with the appellants' application that the statements be struck out. It bears repeating that it was a significant admission by Miss Campbell that 'the application [was] being made at this stage as [the respondents] are now aware that the [appellants] are unwilling to settle the matter'. The respondents were not purporting to say that they were unaware of the fact that they were in breach of the court's order. They accepted that the witness statements had been filed late, they, however, did not accept the need to apply for relief from sanction for so doing, until three months later, when it was clear that the settlement they were anticipating would not be realised. In these circumstances, although the application can be viewed as having been made promptly in response to the application to strike out, to my mind, there was an inordinate delay in relation to when the breach had occurred. Thus, I find that the application for relief from sanction was not made promptly." (Emphasis supplied)

- [23] In **Oniel Edwards**, Pusey JA also emphasised the importance of considering the specific circumstances of each case. The learned judge of appeal, in that case, proceeded to examine the circumstances, focusing mainly on when the applicant's solicitor discovered the breach and how promptly he acted after becoming aware of it. Before doing so, the learned judge of appeal referred to **HB Ramsay**, where submissions were made to Brooks, JA, as he then was, on the issue, in the context of whether the solicitor had acted promptly; Pusey JA had this to say.

*"[40]. I move to consider the issue more closely against the backdrop of the cases. In HB Ramsay, the appellant did not comply with an unless order. **I note that Brooks JA considered an argument by counsel that an assessment of whether an application was made promptly should take into account the time when the applicant discovered the default. Brooks JA did not dismiss the possibility of such an approach, but indicated that the submission did not have much force in the context of a sanction applied pursuant to an unless order, when the deadline for compliance should be at the forefront of the litigant's mind and his attorney-at-law.**" (My emphasis)*

- [24] In **Oneil Edwards**, the applicant's lawyer, prepared his witness statement. It was signed by the applicant before the court-imposed deadline for filing. However, counsel directly handling the matter inadvertently failed to file and serve the statement. This was because counsel placed it in an envelope for filing at the

Court Registry and for a notice to be given to the defendant pursuant to rule 29.7, since the defendant had not filed a witness statement by then.

- [25] Regrettably, counsel had left the firm. The application was filed within three (3) days of counsel's discovery of the breach. However, in the context of the breach, the application was made nearly one (1) year and nine (9) months after the sanction had taken effect. The learned Master, before whom the application was made, refused it. Pusey JA, emphasising the importance of examining the circumstances of each case, stated this:

*"26. This court does not have the benefit of the learned Master's reasons. However, the parties appear to agree that the learned Master concluded that the application was not made promptly. The authorities indicate that once this determination is made, the application for relief from sanction cannot succeed. **Was this an appropriate assessment of the circumstances?** I will consider this issue further on in the judgment." (My emphasis).*

- [26] The learned judge of appeal, after examining several cases, including **National Irrigation Commission Ltd v Conrad Gray and Marcia Gray** [[2010] JMCA Civ 18], **Price Waterhouse (A Firm) v HDX 9000 Inc** [2016] JMCA Civ 18, **Regency Rolls Limited v Carnall** [2000] EWCA Civ. 379, and **Deputy Superintendent Morris**, held the following:

*"42. An application for relief from sanctions, pursuant to rule 26.8, is usually made because a duty imposed by the court or the rules has not been fulfilled within the relevant timelines. **So the circumstances usually involve some delay, but, nevertheless, the application for relief must be made promptly.** As Arden LJ commented in **Regency Rolls Limited v Carnall**, it is not that the applicant has not been guilty of some delay, but the applicant must have "acted with all reasonable celerity in the circumstances". **How does the court make this assessment? The court must consider the circumstances surrounding the timing of the application to determine whether it was made promptly***

43. The case at bar involved a failure to file and serve witness statements within the time ordered at the case management conference. These timelines are important for the timely progress of matters for trial. At the case management conference held in March 2019, the learned Master ordered that witness statements

be filed and exchanged on or before 8 March 2022. The attorneys-at-law for Mr Edwards filed two witness statements on 25 October 2022, those of Kirth Lewis and Raymond Garwood. The copies in the record of appeal are incomplete, as they do not have the final page reflecting when the statements were signed. Mr Edwards' attorneys-at-law also filed their list of documents on 25 July 2022.

44. Interestingly, Mr Edwards' witness statement is dated 3 March 2022, a date falling before the deadline of 8 March 2022 set by the court to file witness statements. In such circumstances, it is clear that counsel for Mr Edwards prepared his witness statement ahead of the court-imposed deadline.

45. Unlike the circumstances in Deputy Superintendent John Morris where counsel knew that the time for filing witness statements had passed but held back on the filing of witness statements in the hope that the matter would be settled, in the case at bar, counsel did not realise that Mr Edwards' witness statement had not been filed. Further, within three days of counsel discovering the witness statement in an envelope on the file, counsel applied to the court for relief from sanctions so as to be able to rely on it at trial.

46. Once counsel's version of events is believed, and we see no reason not to do so, the promptness of the application must, in these circumstances, be assessed in the context of when the error or oversight was discovered. Three days after the event cannot, in all reasonableness, be seen as not prompt....." (My emphasis).

Application of the Law to the Facts

[27] I must now consider the circumstances of this case and apply the law. When reviewing these circumstances, an examination of the evidence relied upon is necessary. Therefore, I am required to scrutinise Mr Jordan's affidavit. He outlines the evidence supporting the application. The relevant parts are as follows:

I, MICHAEL JOHN JORDON, make oath and say as follows:

1....

2....

3. That the matter came up for hearing on the 29th of November 2023, where court orders were made by the Honourable Ms. Justice Stephanie Orr.

4. That court orders were not complied with due to an administrative oversight. No Minutes of Order was on the client's file, and my notes from the hearing had been misplaced. Further, the formal order from this hearing was to be filed and served by the Defendant, however, the same was never served in our office.

5. That the claimant has faced significant delays in receiving the medical report from her Orthopaedic Surgeon Dr. Steven Saint Juste. Due to this delay, she was not properly in a position to hold settlement discussions.

6. That the claimant has advised, and I do verily believe that she was still consulting with Dr. Saint Juste as he was still monitoring her progress based on the nature of her injuries.

7. That on February 16, 2024, my office requested the medical report from Dr. SaintJuste's office. Hereto attached and marked as Exhibit "MJJ-1" is a true copy of the email request with the letter attached.

8. That on June 5, 2024, my associate Debranette Mattis advised, and I do verily believe, that she attended the office of Dr. Saint Juste and paid the relevant fees for the medical report. Hereto attached and marked as Exhibit "MJJ-2" is a true copy of the payment receipt.

9. That we have been in contact with Dr. Saint Juste's office since February 2024, specifically calling weekly to follow up on this matter. They did not provide the medical report.

10. That on September 9, 2024, I attended the office of Dr. Saint Juste located at Medical Associates, 18 Tangerine Place, Kingston. I spoke to the doctor's assistant, who advised me that she would give me a call later that day, to confirm when the medical report could be collected. I did not receive a call from the office.

11. That the challenges of obtaining the medical report in a reasonable time have significantly prejudiced our client as we have been unable to hold settlement discussions with the Defendant.

12. That the medical report was received on September 20, 2024, seven months after our initial request.

13. That the failure to comply with the court orders was not due to any disregard for the order of this Honourable Court.

14. That the Claimant has remedied the error as her List of Documents, Witness Statements, and Notice of Intention to Rely on Hearsay Evidence have been filed.

15. That the delay will not affect the Assessment of Damages Hearing because none have been set.

16. That there was no intention to disregard the orders of this Honourable Court and if the orders sought herein are granted, there will be no prejudice to the Claimant and the Defendant and there would be no disruption of the proceedings.

17. That in the circumstances, I humbly pray that this Honourable Court will grant the orders as prayed.

.....”

- [28] The main evidence is summarised in paragraphs 4, 5, and 6. Mr Jordon explains that he did not comply with the court’s orders for two reasons: administrative oversight and the absence of a medical certificate. Regarding the administrative oversight, he attributed it to the lack of the minutes of the court’s orders in the applicant’s file, combined with the fact that the notes from the case management conference were misplaced, and the formal order was never served by the defendant.
- [29] Regarding the medical report, he stated that the claimant faced delays in obtaining it; the applicant was still receiving treatment, which prevented the statement from being made and also impacted the parties’ ability to engage in settlement discussions. The medical certificate was not received until 20 September 2024, despite repeated requests.
- [30] In applying rule 26.8 (1), I must first be satisfied that the application was made promptly or with reasonable celerity. The applicant’s application was filed seven months and one week after Master Orr’s order. No explanation was provided for the delay in filing the application after the sanction took effect. Furthermore, it took roughly five months following Mott Tulloch Reid’s order.
- [31] At first glance, these periods involved significant delays. However, I accept that the word 'promptly' has some flexibility and elasticity. I note the guidance of Pusey JA in **Oneil Edwards** regarding Arden LJ’s comments in **Regency Rolls Limited v Carnall**, that “it is not that the applicant has not been guilty of some

delay, but the applicant must have acted with all reasonable celerity in the circumstances.” I must therefore consider whether, in all the circumstances, the applicant acted with reasonable celerity. Thus, focusing only on the time the application was made, without understanding the full circumstances of the case as seen in **Oneil Edwards**, will not suffice.

- [32] The explanation provided concerns the failure to file the witness statement, not the application. No reason was given for the delay in filing the application promptly after the sanction came into effect. Counsel was aware that the sanction had been imposed. I find that Mr Jordan's affidavit offers no good explanation. He has not specified when the oversight occurred, when he realised the file notes were missing, what steps he took to address the issue after discovering it, or how it impacted the filing of the application. Counsel attended the case management conference; the applicant was also present. Nevertheless, the explanation does not appear to address the failure to file the application.
- [33] The delay in filing a witness statement or summary was also intentional; counsel was waiting for the medical report. By 16 April 2024, it was evident that the breach had occurred, and an application was necessary. However, when the parties appeared before Mott Tulloch Reid J, the application was instead made roughly five months later. No explanation was given for the delay. A formal order was filed three days after the pre-trial review. The order of Mott Tulloch-Reid J served on the applicant was a reminder; however, the application was filed on 2 October 2024, while the witness statement was filed the day before. No explanation was provided for that further delay. Knowing that the sanction had already taken effect, rectifying the breach should have been a priority for the applicant. The applicant ought to have acted promptly. I do not consider the action to have been prompt.
- [34] I endorse the words of Brooks JA, as he then was, in **HB Ramsay**, although the learned judge of appeal was considering circumstances relating to an “unless

order"; the circumstances regarding adherence to the rules and orders of the court remain applicable. The learned judge of appeal held that:

"[14]in the context of a sanction that is applied pursuant to an 'unless order'. 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."

- [35]** Rule 29.11 of the CPR is clear and specific: an application for relief from sanctions must be made if a witness statement or a witness summary was not served as ordered by the court. Consequently, the applicant will not be called as a witness unless the court grants permission. Additionally, the court may refuse permission at trial unless the applicant provides a good reason for not making a prior application under Rule 26.8 of the CPR. Counsel was required to make an application promptly.
- [36]** Regarding settlement discussions, the records of the proceedings, that is, the minutes of the court, do not show that the parties ever engaged in such talks. Master Orr's orders clearly stated that any attempt at settlement should be concluded by 10 April 2024, which was six days before the pre-trial review hearing. The issue of settlement was never recorded or addressed by any of the parties, even when the case was before Mott Tolluch-Reid J. The applicant needed to act promptly once the sanction had come into effect.
- [37]** The circumstances of this case indicated a deliberate intention not to file a witness statement until a medical report was obtained. The CPR allows a witness summary to be filed. Mr Jordon stated that the medical report was received on 24 September 2020. Even after that event, the application for relief from sanctions was filed one week later. No explanation for that delay was provided in the affidavit. I do not accept that counsel acted promptly in accordance with Rule 26.8(1).

[38] P. Williams JA's remarks in **Deputy Superintendent John Morris's comments** regarding the deliberate failure to file a witness statement are appropriate to this case, the learned judge of appeal held.

*"The primary reason given by the respondents for their failure to comply with the orders of the court was that they were awaiting the outcome of what they viewed as ongoing good-faith discussions to settle the matter. The learned judge was satisfied that there had been great emphasis placed on the possibility of bringing the matter to an end by settling the same, and she accepted that this situation, along with the impact of the pandemic, resulted in the statements being filed outside the stipulated period. To my mind, she did not need to resolve the question of whether there were indeed ongoing discussions for a settlement. She was at liberty to find, as she did, on the evidence that for the respondents, there was indeed great emphasis on the possibility of settling the matter. It was on this basis that she was satisfied that the respondents did not intentionally fail to comply with the order of the court. It is, however, to be noted that Miss Campbell asserted that, at all material times, the respondents were led to believe that a settlement could be reached and, as a result, the respondents "did verily believe that the filing of [the respondents'] witness statements was a mere formality". Further, she asserted that, at all material times, the witness statements were ready to be filed. **It seems to me that there was some deliberateness in the decision not to file the statements in the hope that the matter would have been settled. In all those circumstances, the learned judge erred in concluding that failing to comply with the order was not intentional.**" (My emphasis).*

[39] As mentioned earlier, Rule 26 (1) is mandatory and requires prompt action. The court rules were established to ensure adherence to time limits and to avoid delays. The affidavit states that the defendant would not be prejudiced, and the delay was not intentional. These arguments relate to other provisions, specifically 26.8 (2) and 26.8 (3), not 26.8 (1). Once I determine that the application was not filed promptly, I do not need to consider those provisions.

[40] Even if I were to consider rules 26.8 (2) and 26.8 (3), the applicant has not met the threshold based on the affidavit evidence. I have already stated that the failure to comply was deliberate. In **The Commissioner of Lands v Homeway Foods Limited and Stephanie Muir** [2016] JMCA Civ 21, McDonald-Bishop JA

(Ag) (as she then was), conducted a thorough examination of this issue. I find the guidance at paragraphs 87 and 88 of the learned judge of appeal, as she then was, to be relevant to my determination:

*87. I accept, as pointed out by Harris P (Ag) in **Watersports Enterprises Limited v Jamaica Grande Limited**, that the intention of the appellant must be viewed against the background of the explanation given for not complying.....*

“88. What is clear, however, is that even if the non-compliance was not deliberate or intentional, it would, at best, have been due to willful neglect, when all the circumstances are considered. This would render the appellant’s non-compliance “equally culpable”, in my view. Therefore, the argument that the appellant’s non-compliance was not deliberate or intentional is rejected as a proper basis on which to grant the orders being sought on the application for extension of time and variation of the case management order.

[41] Regarding the administrative oversight, I have already concluded that the explanation provided was not a good reason. In **The Attorney General v Universal Projects Ltd [2011] UKPC 37**, Lord Dyson, who delivered the decision on the Board, stated at paragraph [23] that:

“...To describe a good explanation as one which ‘properly’ explains how the breach came about simply begs the question of what is a ‘proper’ explanation. Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly, if the explanation for the breach is administrative inefficiency.”

[42] I, therefore, find that the mandatory provision was not satisfied. I am guided by the words of Pusey JA in **Oniel Edwards**, where she said that:

“As indicated in the cases, once a decision is made that the application was not made promptly in the context of the circumstances before the court, the application must fail. The learned Master was not required to further assess the other requirements of rule 26.8 of the CPR after her conclusion that the application was not made promptly.”

[43] Accordingly, the Orders outlined in paragraph 1 constitute my disposition of the matter and for nominal damages to be assessed.