IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. W-183 OF 1996

BETWEEN	**RUDOLPH WOOZENCROFT**	**CLAIMANT**
AND	**HOLIDAY INN JAMAICA INC.**	**1ST DEFENDANT**
AND	**HOLIDAY INN INC**	**2ND DEFENDANT**

Rudolph Francis Esq., instructed by Keith Jarrett for Claimant
Mrs. Denise Kitson instructed by Grant Stewart Phillips & Co. for both Defendants

Heard June 3 & 4 and August 7, 2009

Application by Claimant for relief from sanctions under CPR 26.8; whether conditions satisfied for court to grant relief; whether the conditions of Rule 26.8 are to be read conjunctively; the exercise of the judge's discretion in the context of the over-riding objective.

ANDERSON, J;

This is an application by the Claimant for relief from sanctions under Rule 26.8 of the Civil Procedure Rules 2002. The application was filed by the Claimant on May 12, 2009 and is in the following terms

1. That he be granted relief from all sanctions for failure to comply with the order on the adjourned Pre-trial Review, made on the 27th day of January, 2009
2. That the Claimant's:
   - (i) Statement of Facts and Issues
   - (ii) Listing Questionnaire
   - (iii) Witness statement, and
   - (iv) The Witness Statement of the Claimant's witness Mr. Elgar Bell, Accountant, be made to stand.

Interestingly, the application does not set out the "Grounds" upon which it is being made as required by rule 11.7(1)(b). Although this rule says that an application "must" state briefly the grounds upon which the application is being made, I am not prepared to hold that in the absence of the grounds it is invalid as the affidavits would seem to fill the void thereby created.

The sanction in respect of which relief is sought is the striking out of the action pursuant to the order of Hibbert J at the Pre Trial on January 22, 2009, at that time his Lordship ordered:

1. Pre-Trial Review adjourned to the 19th May, 2009 at 3:00 p.m. for one-half (½) hour.
2. The time for compliance with the orders made at the Case Management Conference is extended to 1st May, 2009.
3. Statement of Case of any party who fails to comply by 1st May, 2009 shall stand struck out.
4. Defendants' Attorneys-at-Law to prepare, file and serve the orders made herein.

The application for relief from sanctions is vigourously opposed by the Defendants.

It is instructive, in my view to advert for the history of this matter which was first filed in the Supreme Court in August 1996. The summary which I set out is largely taken from the chronology provided as an exhibit to the affidavit of counsel for the defendants, Mrs. Kitson, the accuracy of which has not been challenged by the Claimant. Since the time of filing in 1996 there has been, inter alia:

(a) a judgment in default of defence
(b) a setting aside of that judgment
(c) application to set aside the order setting aside the default judgment
(d) dismissal of the application at (c) above
(e) An appeal from the order at (d) above
(f) dismissal of the appeal by the Court of Appeal for want of prosecution
(g) On September 20, 2004 costs awarded to the Defendant by Straw J in the sum of $20,000.00 to be paid by November 15, 2004; still unpaid.
(h) Application for Writ of Seizure and Sale dismissed in June 2005.

(i) Seven (7) years after original filing of Suit, Claimant applied Ex-Parte for order of Ellis J. of November 20, 1996 setting aside default judgment to be set aside and for Writ of Seizure and Sale to issue. Order granted.

(j) the Writ is stayed by Order of James J.

(k) Attempt to execute the Writ of Seizure and Sale.

(l) Writ of Seizure and Sale was set aside.

(m) Case Management Conference held on July 24, 2007 at which orders were made by Campbell J.

(n) Pre Trial review held on 27th January 2009 at which Hibbert J made the order referred to above.

(o) No fewer than twelve different attorneys-at-law who have successively represented the Claimant.

It is not disputed that the Claimant has failed to comply with the Case Management Orders by the May 1, 2009 deadline ordered by Hibbert J, while the Defendants completed compliance with the Case Management Conference Orders on or before the date given by the Court. It is also to be noted that during the period from 1996 to the present, the Claimant has changed his representation at least eleven (11) or twelve (12) times. His most recent attorney of record is Mr. Keith Jarrett who was retained in or around November 2008.

The Claimant's application is supported by affidavits of Mr. Jarrett who avers that while he had been on the record since November 24, 2008, and had served a notice of change of attorney on the Defendants' attorney-at-law, he held not been served with a notice of a pre trial Review to be held on January 27, 2009, and as a result he did not attend the Pre Trial Review at which the orders of Hibbert J were made. The Claimant's affidavit with respect to the non-attendance of the attorney at the pre-trial review is instructive and I refer to that later in this judgment...

CPR 26.8 is in the following terms

(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 an 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.

The Claimant's counsel, Mr. Francis, submits that the application has been made promptly. Given that it was made within two (2) weeks of the date on which the sanction of striking out took effect based on the order of Hibbert J., it is conceded by the Defendant's counsel that the test of promptitude has probably been met, although counsel for the Defendants points out that a delay of even some minutes late may give rise to a finding that compliance was not prompt. (See ***Contract Facilities*** case cited below). The affidavit in support of the application and the submissions of counsel in support of the application focus on two (2) primary issues.

1) The fact that the formal Case Management Order made by Campbell J. on July 24, 2007 was to have been prepared, filed and served by Defendants' attorney-at-law, and it appears this was not done until May of this year, nor was there a copy on the court file when it was checked...

2) The Claimant's attorney-at-law on the record as of January 27, 2009, says he was not aware of the Pre Trial Review set for that day and so did not attend.

While the Defendants' attorney avers that the order of Campbell J was eventually served on the Claimant's current attorney-at-law, the latter, in his affidavit, still insists he had not seen it up to the time of the preparation of his affidavit.

CLAIMANT'S SUBMISSIONS

Claimant's counsel, in his written submissions, recited the provisions of the relevant rule and compared those provisions with the equivalent English rule. He discussed at length two (2) cases cited by the Defendants' counsel; ***CONTRACT FACILITIES LTD. v ESTATE REES (DECEASED) (2003) EWCA CIV 1191*** and ***MARCAN SHIPPING (LONDON) LTD. V KEFALAS and Anor (2007) EWCA (CIV) 463 (17 May 2007)***. He argued that these cases could be distinguished on their facts. In the former case he submitted, the appellant had already been the beneficiary of two (2) unless orders and secondly, what was in issue was the appeal against a costs order. In the latter, it was the view of defence counsel that the distinguishing feature of this case was the fact that Claimant had failed to provide the further disclosure of documents including specific disclosure, and also failed to provide the additional security for costs.

On the other hand he submitted that the case of ***BIGUZZI v RANK LEISURE PLC (1999) 1 WLR 1926***, supported the Claimant's application. It was his submission that the appeal against the striking out in that case was successful because both parties had been in breach of the rules and there would be nothing unfair to either in allowing the trial to proceed. In that regard he submitted that the Defendants' counsel "not having prepared, filed and served the Case Management Order of 24th July 2007, was in breach of the rules and is not entitled to succeed on their application for judgment in default of compliance with Hibbert J's order of 27th January 2009". He also submitted that ***Biguzzi*** was authority for the proposition that the Defendants, not having paid the Claimant the costs of the application to set aside the default judgment which was ordered by Mr. Justice Ellis (retired) on the 20th day of December 1996, is not entitled to have the claimant's case struck out on the grounds that he did not pay the costs of $20,000.00 ordered against him by Straw J on September 20, 2004.

Finally, he cited the local Court of Appeal decision, ***INTERNATIONAL HOTELS JAMAICA LIMITED v NEW FALMOUTH RESORTS LTD SCCA 56 and 95/03***. In that case the Court of Appeal reversed a decision by Brooks J in the Supreme Court. It was felt that the trial judge had been too stringent in applying the tests for striking out and so his was a wrongful exercise of the judge's discretion. Counsel did not mention in his submission the recent Court of Appeal decision in the case of ***RBTT BANK JAMAICA LIMITED V Y.P. SEATON, EARTHCARE HAULAGE LIMITED, AND Y.P. SEATON & ASSOCIATES COMPANY LITED, SCCA 107 OF 2007.*** There an earlier striking out by Sykes J. was reversed. It is to be noted that here, as observed by Cooke J.A. at paragraph 20 of his judgment, the reversal was based upon a conclusion that the judge at first instance had not properly exercised his discretion.

DEFENDANTS' SUBMISSIONS

The Defendants' counsel, Mrs. Kitson, referred to a chronology of events as outlined in her affidavit in opposition to the application, which showed a consistent dilatoriness on the part of the Claimant. I understood her to mean that this dilatoriness was the context in which the Claimant's application was to be considered. Defendants' counsel cited ***MARCAN SHIPPING*** *(supra)* where the English Court of Appeal reviewed the common law relating to "unless orders". Moore-Bick L.J. in the course of his judgment, considered the effects of Part 3 of the U.K. Rules which mirror CPR26.8. Mrs. Kitson cited in particular the passage at paragraph 28 of his Lordship's judgment, where he discusses Part 3 of the UK Civil Procedure Rules, to the following effect.

> 28. The starting point in the present case must be the terms of the Rules themselves. Rule 3.1(3) (b) expressly gives the court the power when making an order to specify the consequences of failure to comply with its terms and rule 3.8(1) expressly provides that where a party has failed to comply with an order any sanction imposed by the order has effect unless the party in default applies for and obtains relief from the sanction. This makes it clear, in my view, that no further order is required to render the sanction effective; on the contrary, the onus is on the defaulting party to take steps to obtain relief. Moreover, in case there should be any doubt the effect of a failure to comply with an order of this kind, paragraph 1.9 of the Practice Direction

supplementing Part 3 states that "where a rule, practice direction or order states 'shall be struck out or dismissed' or 'will be struck out or dismissed' this means that the striking out or dismissal will be automatic and that no further order of the court is required."

That is reflected in the following observations of Brooke L.J. in ***Sayers v Clarke Walker (Practice Note) [2002] 1 W.L.R. 3095***:

> "The philosophy underpinning CPR Pt. 3 is that rules, court orders and practice directions are there to be obeyed. If a sanction is imposed in the event of non-compliance, the defaulting party has to seek relief from the sanction on an application made under CPR 3.9 and, in that event, the court will consider all the matters listed in CPR 3.9, so far as relevant."

Ruling

The court has to consider all the requirements of CPR 26.8 before determining whether it would be appropriate to grant relief from sanctions. Although in the ***RBTT Bank*** case Cooke J.A. did not dwell on the submissions which were made before the court in respect of the effect of the over-riding objective, I am of the view that the approach to this issue must be informed by a recognition of the need for the court to act justly. Thus, as he stated, if the exercise of the discretion was improper, then the court could hardly be acting "justly". I propose to consider in turn the different elements of Rule 26.8 in order to determine whether, in all the circumstances, the court ought to exercise its discretion to grant relief from the sanction of striking out the statement of case of the Claimant.

Before I do this I will return to deal briefly with the two reasons advanced by the Claimant in support of application. It will be recalled that the Claimant said in his affidavit that the formal order in respect of the orders made at the Case Management Conference on July 24, 2007 had not been "prepared filed and served by the Defendants" as ordered by the judge. Secondly, the Claimant was prejudiced by the order of Hibbert J. made at pre trial review since he did not have sight of that order. Further, he was not accompanied by his attorney at the pre trial review and did not understand the proceedings.

The absence of the Formal Order (in respect of the orders made at the Case Management Conference) from the file at the Supreme Court cannot in my view be advanced as a legitimate basis for failure to comply with Hibbert J's order of January 27, 2009. The fact is

that the claimant was properly represented by Counsel, Mr. Andrew Campbell at the Case Management Conference. Counsel was therefore aware of the orders made. The problems seem to have arisen because of the constant turn over of attorneys representing the Claimant. It is for the Claimant to ensure that when he changes attorneys, the new representative is fully briefed with what has transpired, including outstanding obligations of a party. Further, in the absence of a positive averment that the Claimant himself was not at the Case Management Conference, I believe it is proper to hold that he was indeed present (as the rules require him to be) and would have been aware of the orders of the Court. It is not at all clear that any efforts was made to try to ascertain whether the terms of Campbell J's order could be secured by reference to the Judge's notebook or the chamber notebook or indeed from counsel on the other side. Nor is there any evidence that efforts were made to enlist the assistance of the then counsel, Mr. Andrew Campbell to ascertain whether he had any notes of the order.

Secondly, it seems to me that the absence of his present counsel from the pre-trial review at which Hibbert J. made his unless order, is also irrelevant. According to the Claimant, he became aware of the pre trial hearing set for January 27, 2009, a week earlier on January 20, 2009. Not only did he become aware of this but he said he immediately came into Kingston, confirmed the listing at the Supreme Court and them went to his counsel to alert him of the listing. This was apparently a full week before the hearing but counsel advised the Claimant that he was unable to go to Court on the appointed day as he had another fixture in another court on the day. There is no evidence that there was any attempt made to get another attorney to hold for the Claimant's counsel even for the limited purpose of seeking an adjournment. But further and in the circumstances, most importantly, the pre-trial review order made by Hibbert J was served on Mr. Jarrett by February 10, 2009, and this must have put him on notice of the jeopardy in which his client stood. It was fully three (3) months before attempts were made to comply with the order and the application for relief from sanctions pursued.

I turn now to go through the elements which must be considered by the court as it seeks to determine whether the terms of CPR 26.8 have been satisfied. In this regard I consider that it is useful to proceed seriatim as the Defendants' attorney has done.

The first consideration is **whether the application for relief has been made promptly.**

In this case the application was made on or about May 12, 2009, a mere eleven (11) days after the deadline set by the order of Hibbert J. This may well be considered to have been done "promptly". It seems that the Defendant's counsel is prepared to accept this characterization in the instant case although, using the **Contract Facilities** decision as a guide, she argued that it was evident that such a conclusion can only be made after having reviewed the entirely of the Claimant's actions. She noted that in the ***Contract Facilities*** case, a few minutes late in complying with an order was deemed too late.

A second consideration is: **Whether the failure to comply was intentional and whether there is a good explanation for the failure**:

It was submitted that the evidence revealed no good reason given for the failure to comply with the Case Management Conference order. It was further submitted that the evidence showed that once the Honourable Mr. Justice Hibbert had directed that the CMC Order be complied with the Claimant took no material steps to comply with the Order. Indeed, as I have observed elsewhere, the Claimant's attorney-at-law was served with the order of Hibbert by February 10, 2009 but apparently took inconsiderable steps to ascertain the full import of the order. In this regard, it was also noted that the documents on the List of documents which was served on the 18th May, 2009 have not been produced.

The court has to consider whether in these circumstances it would be fair and appropriate to consider the failure to comply with the CMC Order or the Unless Order as intentional and/or contumelious. I have searched the affidavits in support of the Claimant's application and have come to the view that little has been offered little in the way of evidence, in relation to the elements of CPR 26.8 to explain the failure to comply with the orders on case management or the unless order.

A third consideration under the terms of the rule is: **The extent to which the party in default has complied with other Rules, Practice Directions and court orders** –
Accepting the chronology set out as an exhibit to Mrs. Kitson's affidavit, it appears that the Claimant has on at least one other occasion, failed to comply with the orders of this Court in relation to an order for payment of costs made by Straw J. In his submissions, Claimant's counsel speaks of an order for costs made in his favour by Ellis J in relation to the costs for setting aside the default judgment. Nowhere in the affidavit of either the Claimant or his attorney is there any averment as to this being an outstanding debt due to the Claimant/

A fourth consideration is in the following terms: **Whether the failure to comply was caused by the party of his legal representatives-**

It was submitted by the Defendants that the failure to comply with the CMC Order and the Order of Mr. Justice Hibbert was the direct result of actions of the Claimant in repeatedly changing Counsel. It is noted that over the thirteen year life of the matter, some twelve (12) or thirteen (13) different attorneys represented the Claimant. It would be surprising if there were not instances where incomplete information was passed from one to the other with matters falling through the cracks. I am also constrained to note that with respect to the particular issue of the unless order of Hibbert J., that the Claimant's attorney of record was served with the unless order on February 10, 2009, almost three (3) months before the trigger date of May 1, 2009. Unfortunately, nothing was done, for example, an application for extension of time to comply with the case management orders while it was being definitively being checked. In addition, it must be noted that on the evidence of the Claimant, he had adverted the attention of his attorney to the upcoming pre-trial review date but was told that the attorney would not be available.

A fifth consideration is: **Whether to trial date or the likely date can still be met if relief is granted** –

As far as this the trial dates of the 1st – 3rd June, 2009 have already been vacated. The defendants have also submitted that their best efforts at defending the action would now be compromised. Two of its witnesses who reside overseas would be prejudiced by having to

deal with the documentary evidence on which the Claimant proposes to rely, the Claimants having failed to make the documents available. It was suggested that this inhibited the proper preparation of the Defendants' case.

A sixth consideration is: **The effect which the failure to comply had on each party and the effect which the granting of relief would have on each party**.

In looking at this aspect, it is difficult to see why the failure by the Defendants to prepare file and serve the formal order of Campbell J. of July 24, 2007 should have had any material effect on the Claimant. The Claimant was at all material times represented and there is no evidence given as to why there was an inability to transmit information from one counsel to his successor. In any event, Mr. Justice Hibbert's order having been served on his counsel on February 10, 2009, ought to have provoked him to action, if only to seek an adjournment. This was not done.

A serious question also arises as to whether the granting of the application herein will be fair to the Defendants who have been dragged along by this Claimant who does not seem to be in any hurry to bring closure to this case. It is not immediately apparent from the submissions of Claimant's counsel that the Claimant has provided any evidence which would enable this Court to determine whether his case has a real prospect of succeeding on the merits. The Defendants submit that it does not. I would have thought that the Claimant would have sought to impress upon this court the strength of its case and why it ought to be allowed to proceed to pursue the remedies it seeks. This has not been forthcoming.

I agree with the Defendants that the Claimant has not given any evidence which is able to assist the Court to determine the application in his favour by reference to the various criteria set out in the CPR Part 26 and adumbrated above.

I cite and accept the dictum of my learned brother Sykes J in another case where there was an application for relief from sanctions, ***ELENARD REID AND ANOR V NANOY PINCHAS AND OTHERS Suit # C.L. R-031 of 2002***, and having sought to compare the UK provision (Part 3) with the Jamaican counterpart provision, he said:

> The Jamaican rule is far more stringent than the English rule. Rule 28.6 (1) requires that the application is made promptly. The rule does not define promptly and neither does the CPR. There must be affidavit evidence. Rule 28.6 (2) requires that all three paragraphs are met before the exercise of the discretion can arise. In my view this provision is to be read conjunctively. Were it otherwise, then it would not be intelligible. A court could not sensibly proceed to rule 26.8 (3) if the applicant only met rule 26.8 (2) (3). In other words, if the applicant fails any of these paragraphs, then that is the end of the matter for him.

I also agree with the learned judge in the case last cited when, in analyzing the elements of rule 26.8 and examining the evidence in relation to each such element he set out his approach:

> I now turn to the systematic analysis of the evidence under each head ever mindful that I am not totting up a score card and awarding points under each head. What I am required to do is to give the appropriate weight to each factor listed once the threshold requirements are met; stand back and look in light of the over-riding objective to see if what I have decided is proportionate and consistent with fairness to
> a) both sides;
> b) other users of the courts who are waiting their turn to gain access to the public good of judicial time and
> c) the overall interests of justice.
> Rule 26.8 enables the court to achieve maximum flexibility when dealing with a breach of an "unless order". It is not a mechanical exercise of the discretion. (See ***Barbados Rediffusion Services Limited v Mirchandani (No 2) at paragraph 36)***.

I have sought to see what evidence exists in relation to each element of CPR 26.8. Having done that, I must consider whether, on the totality of the circumstances, it would be appropriate to confirm the striking out, or to grant the relief sought by the Claimant herein.In coming to a decision on this application, I have found the reasoning and decision of the Caribbean Court of Justice ("CCJ") in the ***Barbados Rediffusion*** case, very helpful. In that case, the CCJ considered two alternative approaches as shown by two lines of authorities, to the proper treatment to be given to breaches of unless orders. The first line of authorities treated any breach of an unless order as being necessarily "intentional and contumelious" unless the party in default could satisfy the Court that he was prevented by some extraneous

circumstances i.e. something beyond his control, from complying with the order. In the absence of doing so, the matter was struck out.

De La Bastide (President) stated that the classic statement of this type of approach which was referred to and relied upon by the judge at first instance in the ***Barbados Rediffusion*** case, when he was considering the approach he should adopt, is found in the following citation from a judgment of Sir Nicholas Browne-Wilkinson V-C in ***Re: Jokai Tea Holdings Ltd. [1993] 1 All E.R. 630***

> "In my judgment, in cases in which the court has to decide what are the consequences of a failure to comply with an "unless order", the relevant question is whether such failure is intentional and contumelious. The court should not be astute to find excuses for such failure since obedience to orders of the court is the foundation on which its authority is founded. But if a party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, such failure to obey is not to be treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have enjoyed".

President De la Bastide however, said that there was another approach which was shown by another line of cases which seemed to focus on whether the nature of the disobedience was such as to make it unlikely that a fair trial could still be achieved. In that regard, he cited a judgment of Millett J. (as he then was) in ***Logicrose Ltd. v. Southend United Football Club Ltd. The Times, March 5, 1988***. The learned CCJ President, in the passage cited *in extensu* below, said:

> In that case there was no unless order involved, but an application was made at the trial for an order that the action be dismissed and the Defence to Counterclaim struck out and judgment on the Counterclaim entered for the defendants, on the ground of what was alleged to have been a deliberate suppression of a crucial document by the principal director and shareholder of the plaintiff. The application was refused by Millett J. who found that the suppression of the document was not deliberate, but held that even if it had been, he would not have made the order sought once the missing document had been produced. He explained why in this passage:
>
> > "The object of Order 24, Rule 16 is not to punish the offender for his conduct but to secure the fair trial of the action in accordance with the due process of the Court (see **Husband's of Marchwood Ltd. v. Drummond Walker Development Ltd. [1975] 2 All ER 30, [1975]**

1WLR 603). The deliberate and successful suppression of a material document is a serious abuse of the process of the Court and may well merit the exclusion of the offender from all other participation in the trial. The reason is that it makes the fair trial of the action impossible to achieve and any judgment in favour of the offender unsafe".

Earlier in his judgment the learned Judge dealt with disobedience of an order of the Court in this way:

> "Deliberate disobedience of a peremptory order for discovery is no doubt a contempt and, if proved in accordance with the criminal standard of proof, may, in theory at least, be visited with a fine or imprisonment. But to debar the offender from all further part in the proceedings and to give judgment against him accordingly is not an appropriate response by the Court to contempt".

A little later on he said:

> "In my view a litigant is not to be deprive of his right to a proper trial as a penalty for his contempt or his defiance of the Court, but only if his conduct has amounted to an abuse of a process of the Court which would render any further proceedings unsatisfactory and prevent the Court from doing justice. Before the Court takes that serious step, it needs to be satisfied that there is a real risk of this happening."

President De La Bastide was nevertheless, constrained to the view that the prevailing approach by the court is still the former and not the latter, despite it having found some traction in some other cases decided before the changeover in England to the new Civil Procedure Rules and the introduction of what is now Part 3 of those rules. Nor did he think that the new procedural rules changed the principles at issue.

He nonetheless suggested that the approach which should be taken to this issue ought to be one which bears in mind the finality of a decision to strike out a statement of case on the basis of the breach of an unless order, on the one hand, and consideration of whether the breach makes it unlikely that there will be a fair trial for all the parties. In that regard, he noted that some decisions now indicate that even if there could still be a fair trial, that would not automatically mean that the offending party would be relieved from the sanction of striking out.

The learned President then asked "What is a "fair trial"? He answered it by reference to the dictum of Chadwick L.J. in ***Arrow Nominees Inc. v. Blackledge & Ors. [2000] 2 BCLC 167 (at paragraph 55):***

> "Further, in this context, a fair trial is a trial which is conducted without an undue expenditure of time and money; and with a proper regard to the demands of other litigants upon the finite resources of the court. The court does not do justice to the other parties to the proceedings in question if it allows its process to be abused so that the real point in issue becomes subordinated to an investigation into the effect which the admittedly fraudulent conduct of one party in connection with the process of litigation has had on the fairness of the trial itself".

Having considered the reasoned judgment of the learned President of the CCJ, I am persuaded that his summary of the legal position is correct and I adopt as a proper statement of the approach by which this court should be guided. I need hardly add that this statement of the law by the CCJ is not at all binding upon me but I nonethesless rely upon the reasoning to inform my own decision. I set out below, an extended citation from the decision of the learned President in the ***Barbados Rediffusion*** case:

> What is required is a balancing exercise in which account is taken of all the relevant facts and circumstances of the case. For one thing, it must be recognised that even within the range of conduct that may be described as contumelious, there are different degrees of defiance which cannot be assessed without examining the reason for the non-compliance. No doubt the fact that what has been breached is an unless order has a special significance, as such an order is framed in peremptory terms which make it clear to the party to whom it is directed, that he is being given a last chance. The previous conduct of the defaulting party will obviously be relevant, especially if it discloses a pattern of defiance.
>
> It is also relevant whether the non-compliance with the order was total or partial. *Normally it will not assist the party in default to show that the non-compliance was due to the fault of his lawyer since as already stated, the consequences of the lawyer's acts or omissions are as a rule visited on his client.* (Emphasis Mine) There may be an exception made, however, when the other party has suffered no prejudice as a result of the non-compliance. Other factors which depending on the context, have been held to be relevant include such matters as whether the party at fault is suing or being sued in a representative capacity and whether having regard to the nature of the relief sought or to the issues raised on the pleadings, a default judgment can be regarded as a satisfactory and final resolution of the matters in dispute.

> Regard may have to be paid to the impact of the judgment not only on the party in default, but on other persons who may be affected by it.
>
> *We would like to emphasise again that what has been offered above is not intended to be a complete catalogue of the matters to be considered but represents a general guide to the approach to be adopted and a sample of the factors which have been held in decided cases to be relevant to the balancing exercise.* (Emphasis mine)

The line of reasoning of the learned President is analogous to that of Cooke J.A. in the ***RBTT Bank*** case, (supra) which seemed to suggest that the core of the matter is the appropriate exercise of the discretion of the judge. In the judicial exercise of that discretion, the question is whether the judge ought to come down in favour of confirming the legitimacy of the striking out of a statement of case consequent upon the breach of an unless order of the court or allow the party in default another chance. The court, of course, has a compelling interest in its orders being obeyed. At the same time, a court should not lightly disqualify a litigant from the prospect of having his day in court. It is a delicate and difficult balancing act as President De La Bastide stated, but the court ought not to shrink away from its judicial responsibility to make an appropriate decision.

Lastly, it must be remembered that neither of the affidavits in support of the application contradict anything in the fulsome chronology of events set out as an exhibit in the affidavit of Mrs. Kitson. It seems that the Claimant's constant changing of attorneys has not been beneficial to the early disposal of this matter.

Having considered all the matters properly to be considered by me, I am persuaded that this is a proper case for denial of the application for relief from sanctions. This decision means that, as far as this court is concerned, the matter is now at an end, thirteen years almost to the day after it was first filed in this court. I accordingly dismiss the application with costs to the defendants to be taxed if not agreed, and hold that pursuant to the order of Hibbert J dated January 27, 2009 the matter has been struck out.

ROY K. ANDERSON
JUDGE OF THE SUPREME COURT
August 7, 2009