THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV2011/0785

BETWEEN:

CYNTHIA SAMUEL

Claimant

AND

MOUNT ST. JOHN'S MEDICAL CENTRE BOARD — First Defendant
THE ATTORNEY GENERAL — Second Defendant

Before:

Master Charlesworth Tabor (Ag.)

Appearances:

Mr. Kendrickson Kentish and Miss Amiya Athill for the Claimant
Mr. Kelvin John and Mr. Loy Weste for the First Defendant
Miss Luann Da Costa for the Second Defendant

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2013: July 18, November 21
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Civil Procedure Rules 2000 (CPR 2000) - application to strike out statement of claim pursuant to 26.3 - relief from sanctions pursuant to 26.8 and 26.9 - time to serve claim form pursuant to 8.12 - procedural error - discretion of court to grant extension of time in absence of specific sanctions – implied sanctions doctrine - order in which applications should be heard.

RULING

[1] TABOR, M (Ag.): There are three (3) applications before the court. The first application was filed on 20th November, 2012 by the first defendant. This is an application

pursuant to Rules 8.12 and 26.3, which inter alia, sought to have the claimant's claim against the first defendant struck out because of the claimant's failure to serve the Claim Form within six months after the date when the claim was issued. The second application was filed on 22nd November, 2012 by the second defendant. This is an application pursuant to Rules 26.3 (1) (b) and (c) and 19.2 (4) which sought to have the second defendant removed as a party to the proceedings and that the claimant's Statement of Claim as it relates to the second defendant struck out. The third application was filed on 15th January, 2013 by the claimant. This application sought relief from sanctions pursuant to Rule 26.8 of the CPR and/or an extension of time within which to serve the Claim Form under Rule 8.13 of the CPR.

Grounds of the First Defendant's Application

[2] The first defendant has listed nineteen (19) grounds as the basis for its application to strike out the claimant's statement of claim. I will not restate these grounds but will simply provide a synopsis. Essentially, the position of the first defendant is that "a claim form must be served within 6 months after the date when the claim was issued" as required by Rule 8.12 (1) of the CPR. Also, pursuant to Rule 8.1 (2) "a claim is issued on the date entered on the claim form by the court office."

[3] With respect to the present case, the date entered on the claim form by the court office was the 2nd December, 2011. On the Notice to the Defendant accompanying the claim form is the statement that "This claim form has no validity if it is not served within 6 months of the date below unless it is accompanied by an order extending that time." The date on the Notice to the Defendant was the 3rd November, 2011. Consequently, pursuant to the CPR the claim form was only valid until 2nd June, 2012 i.e., six months after the date the claim form was issued; or alternatively, the claim form could only have been valid until 3rd May, 2012 i.e., six months after the date of the Notice to the Defendant.

[4] However, despite the requirements of the CPR regarding the service of a claim form, the claim form was served on the first defendant on 25th October, 2012; approximately 11 months after it was issued by the court office. Since the claimant did not obtain an extension of time to extend the validity of the claim form, the claim form and statement of claim would have no validity and there would be no legal basis for the claimant to maintain the claim against the first defendant. In the circumstances, therefore, learned Counsel has argued that the claim should be struck out in its entirety pursuant to Part 26 of the CPR.

[5] Learned Counsel has urged the court that should its application be denied, that the first defendant should be given the opportunity to enter a defence to the claim since it has a real prospect of successfully defending the claim. He indicated that the first defendant was unable to file its defence within the prescribed 28 day time period under the Rule 10.3 (1) of the CPR, since it is awaiting an expert medical report, among other things, to facilitate the preparation of its defence. He further indicated that the extension of time to file the defence of the first defendant is necessary for the just disposal of the claim on its merits, and no prejudice will be caused to the parties if this application is granted.

Grounds of the Second Defendant's Application

[6] With respect to the second defendant, the grounds of the application are:

(1) The second defendant/applicant has been wrongly sued and made a party to the claim.
(2) That the claimant's statement of claim discloses no reasonable ground for bringing an action against the second defendant or for the second defendant to be defending this claim.
(3) That the claim against the second defendant is frivolous and vexatious.
(4) That the statement of claim in its form is an abuse of the process of the court.

Background Facts

[7] On 9th March, 2009 the claimant aged 50 was admitted to the Mount St. John's Medical Centre (MSJMC) with uncontrolled diabetes and right arm swelling and pain. The claimant was treated with antibiotics from 10th March, 2009 as well as being administered incorrect doses of insulin from the date of her admission to the hospital.

[8] The claimant's condition worsened on 12th March, 2009 and on 15th March, 2009 she was seen by the surgical team of the hospital. On 16th March, 2009 she underwent surgery for a fasciotomy in respect of her arm. The infection the claimant developed and the need for the fasciotomy was caused by the negligence of the defendant.

[9] The claimant has identified the following as the particulars of negligence:

(a) The defendants and their servants or agents did not administer the antibiotics to the claimant in a timely manner, thereby worsening the infection and increasing the risk for the subsequent need for surgery.
(b) The defendants and their servants or agents did not administer the correct dosage of insulin to the claimant, thereby worsening the infection and increasing the risk for the subsequent need for surgery.
(c) The defendants and their servants or agents did not refer the claimant to the medical team in a timely manner thereby increasing the risk for subsequent need for more serious surgery.
(d) The surgical team did not take the claimant to the operating room in a timely manner thereby allowing for the claimant's infection to worsen.

[10] The claimant has identified the following as the particulars of injury and loss:

(a) Deformity of the right arm
(b) Flail right limb.
(c) Limited use of right arm.
(d) Loss of earning capacity by reason of her disability.

[11] As a result of the foregoing, the claimant is asking the court for the following relief:

(a) General damages.
(b) Interest pursuant to section 27 of the Eastern Caribbean Supreme Court Act, Cap. 143.
(c) Court fees.
(d) Costs.
(e) Such further Order as the court deems fit.

Principles Governing CPR 8.13 – Extension of time for serving a claim form; CPR 26.3 – Sanctions: striking out statement of case and CPR 26.8 – Relief from sanctions

[12] The extension of time for serving a claim form is provided for by Rule 8.13 which states as follows:

(1) The claimant may apply for an order extending the period within which a claim form may be served.
(2) The period by which the time for serving a claim form is extended may not be longer than 6 months on any one application.
(3) An application under paragraph (1) –
(a) must be made within the period –
(i) for serving a claim form specified by rule 8.12 or
(ii) of any subsequent extension permitted by the court; and
(b) may be made without notice but must be supported by evidence on affidavit.
(4) The court may make an order under paragraph (1) only if is satisfied that –
(a) The claimant has taken all reasonable steps to -
(i) trace the defendant; and
(ii) serve the claim form;
but has been unable to do so; or
(b) there is some other special reason for extending the period. …

[13] The power of the court to strike out a statement of case is provided for by Rule 26.3 (1) of the CPR 2000 which states as follows:

In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that –
(a) There has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings;
(b) the statement of case or part to be struck out does not disclose any reasonable ground for bringing or defending a claim;
(c) the statement of case or part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings; or
(d) the statement of case or part to be struck out is prolix or does not comply with the requirements of Part 8 or 10".

[14] The power of the court to grant relief from sanctions is provided for by Rule 26.8 of the CPR 2000 which 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 –
   (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.

First Defendant's Submissions

[15] As I have indicated earlier, there are three applications before the court, namely; the first defendant's application to strike out the claim, the second defendant's application to be removed as a party to the claim and that the claim against him struck out, and the claimant's application for relief from sanctions and an extension of time to serve the claim form.

[16] Learned Counsel for the first defendant, Mr. Loy Weste, has submitted that the application of the first defendant should be heard first since it was first in time. In support of his submission he cited the Court of Appeal decision St. Kitts Nevis Anguilla National Bank Ltd. v Caribbean 6/49 Ltd, Civ. App. No. 6 of 2002 where Barrow JA stated:

> "The overriding objective of the Rules is not furthered when the course and result of litigation can be severely influenced and indeed definitively determined by the vagaries of the court office in determining which of two extant applications should be heard first in time. Chronologically and logically the bank's application was prior in time and should have been first determined. The failure of the Court office to ensure that sequence resulted in a denial of justice".

He has urged the court, therefore, not to determine the claimant's application until the applications of the defendants are determined.

[17] Invoking Rule 8.12 (1) of the CPR which requires that "a claim form must be served within 6 months after the date when the claim was issued" and Rule 8.1 (2) which notes that "a claim is issued on the date entered on the claim form by the Court office"; learned Counsel has submitted that the claimant has ran afoul of the service period stipulated by the CPR. Learned Counsel has also invoked Rule 8.13 (1) which provides that "the claimant may apply for an order extending the period within which a claim form may be served". Counsel has noted that the claimant did not make an application to have the time in which to serve the claim form extended, and that the Rules do not allow the court to grant an extension in the circumstances of the case. To support this contention he has cited the case of Ferdinand Frampton v Ian Pinard, Dominica, Civ. App. No. 15 of 2005 where Barrow JA stated:

> "The court cannot grant an extension of time purely as a matter of discretion. The court can only do so in accordance with the rules that are laid down. Not even in a

> case of the utmost public importance can the court overlook the rules because in a particular case the court thinks it is fair or reasonable or appropriate or just to do so. The rules must be seen as establishing criteria that are definitive as to what is fair and reasonable and appropriate and just."

Learned Counsel has submitted, therefore, that the claimant's failure and/or refusal to comply with Rules 8.12 (1) and 8.13 of the CPR strip the claim of its validity.

[18] Learned Counsel has noted that the claimant seeks to overcome the legal hurdle of failure to serve the claim form within six months by relying on Rule 26.9 of the CPR which states "this rule applies only where the consequences of failure to comply with a rule, practice direction, court order or direction has not been specified by any rule, practice direction or order". Learned Counsel is of the view that the claimant's argument is flawed since the Notice to the Defendant contained in the CPR specifically sets out the consequence for failure to serve the Claim Form within the 6 month period. Counsel has argued, therefore, that Rule 26.9 applies only where a consequence is not specified and since the Notice to the Defendant specifies the consequence of invalidity of the Claim Form if not served within 6 months, then Rule 26.9 would not apply and the court has no discretion to "put things right" under that Rule.

[19] Learned Counsel further noted that granting the claimant an extension of time in the present circumstances, would deprive the defendants of the defence of statutory limitation since the cause of action arose on or about 16th March, 2009 and expired on or about 16th March, 2012. To support this contention he cited the Court of Appeal decision of Marty Steinberg et al v Swisstor & Co. Ltd. BVI HCVAP 2011/0012 where Mitchell JA stated:

> "Once the respondents could show as they have, that they might be deprived of a defence of limitation if time for service of the Claim Form was extended, it was enough for the extension to be set aside. The statutory limitation period should not be made elastic at the whim or sloppiness of a litigant. Public interest requires that claimants adhere strictly to the time limit for service …"

In this case the extension of time was not granted and Counsel is of the view that a similar outcome should be reached in the present case.

[20] Invoking Rule 8.13 (4) of the CPR, learned Counsel pointed out that the court may only make an order extending the time for service of a Claim Form if satisfied that the claimant has taken all reasonable steps to trace the defendant and serve the Claim Form. Counsel has opined that the claimant has failed to show in her Notice of Application or Affidavit evidence any steps that were taken to trace the defendant. He has equated this failure of the claimant to that of the appellants in the Marty Steinberg case where the Court of Appeal stated:

> "In the case of Wise Global, the appellants had failed to take any steps at all to serve the Claim Form before the time of their application for an extension. They had no explanation as to why they had failed to do so or what they had been doing".

The Court of Appeal denied the application for the extension of time to serve the Claim Form because the claimant provided no explanation of the steps taken to effect service. Similarly, Counsel contends that the claimant in the present case has failed to show the steps taken to have the Claim Form served, and consequently the application for the extension of time should be denied.

[21] Learned Counsel has posited that for the claimant's application to be successful the court must be satisfied of the conjunctive test of Rule 26.8 which requires:

> (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 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 effect which the granting of relief or not would have on each party;
> (b) the interests of the administration of justice;
> (c) whether the failure to comply has been or can be remedied within a reasonable time; whether the failure to comply was due to the party or the party's legal practitioner; and
> (d) whether the trial date or any likely trial date can still be met if relief is granted.

Counsel has cited the Court of Appeal decision of Anthony Clyne v The Guyana and Trinidad Mutual Insurance Co. Ltd., Grenada HCVAP 2010/0011 where the court stated:

> "the principles emerging from the cases … [is] that the applicant must supply the court with bona fide and cogent excuse for his failure to comply with the timetable set out in the rules or in an order".

In the present case, learned Counsel noted that in the claimant's Affidavit in support of her application filed on 15th January, 2013, she indicated that the failure to comply was as a result of the fact she was physically disabled and was hospitalized and also that she was unable to obtain adequate information about the servants of the Crown and the proper party to sue. However, Counsel has submitted that in the absence of medical evidence to support the claimant's allegation of infirmity, the explanation provided is inadequate and should be disregarded. Counsel further submitted that the inability of the claimant or her Counsel to determine the proper parties to the proceedings is not an excuse and that this explanation is wholly inadequate. To support this contention, he cited the case of Donald F. Conway and Queensway Trustees Ltd., St. Christopher and Nevis HCVAP 1999/0011 (Unreported) where Singh JA noted that a mistake of law by an attorney is not

a cogent excuse for failure to comply with the court's timetable or the Civil Procedure Rules.

[22] Learned Counsel has further posited that the claimant has not complied with all other rules, directives and practice directions, which is a mandatory requirement under the conjunctive test for the granting of an application for an extension of time. He again cited the Court of Appeal decision of Anthony Clyne v The Guyana and Trinidad Mutual Insurance Co. Ltd., Grenada HCVAP 2010/0011 where Edwards JA "… the requirement in CPR 26.8 (2) (b) is one of 3 mandatory requirements which must be satisfied before the court can grant the application".

[23] With respect to the claimant's failure to comply with the time stipulated for the service of the claim form, learned Counsel has submitted that the claim would become statue barred and that this would make the Defendants entitled to the defence of limitation. However, Counsel has noted that the effect of granting the Claimant's application would be to deprive the Defendants of their limitation defence. To support this contention, Counsel cited the case of Marty Steinberg et al v Swisstor & Co. Ltd. BVI HCVAP2011/0012 where Don Mitchell JA stated:

> "Once the respondents could show as they have, that they might be deprived of a Defence of Limitation if time for service of the Claim Form was extended, it was enough for the extension to be set aside. The statutory limitation period should not be made elastic at the whim or sloppiness of a litigant. Public interest requires that claimants adhere strictly to the time for service …"

[24] Learned Counsel has urged the court, therefore, that no extension should be granted since the granting of an extension would cause severe prejudice to the First Defendant as a result of their deprivation of the legal defence of statutory limitation.

Second Defendant's Submissions

[25] In her submissions, learned Counsel for the Second Defendant, raised the issue whether the Second Defendant is vicariously liable for the actions/negligent actions of the First Defendant and whether the Claimant is entitled to any relief from the Second Defendant.

[26] Learned Counsel has cited sections of the Mount St. John's Medical Centre Act 2009 to support her contention that the Second Defendant should not be held liable for the actions of the First Defendant. She noted that section 3 (2) of the Act provides that:

> The Board established under subsection (1) shall be a body corporate with perpetual succession and a common seal and capable of suing and being sued in its corporate name.

She further noted that section 10 (2) of the Act states that:

> The Minister shall not direct the Board, its officers, servants or agents on the manner in which it manages the daily operation of the hospital.

[27] Learned Counsel also cited recent cases from the House of Lords and the Privy Council where the fundamental principles of vicarious liability have been revisited and reformulated. She highlighted the cases of (a) Lister v Hall [2002] 1 AC 215 (b) Dubai Aluminium Co. Ltd. v Salaam [2004] 2 AC 366 and (c) Brown v Robinson [2004] UKPC 56. Counsel noted that in these cases the test for vicarious liability was stated as "Can the wrongful conduct be fairly and reasonably regarded as done by the employee while acting in the ordinary course of the employer's business?"

[28] In applying the law to the case at bar, learned Counsel has noted that the Hospital Board has legal personality and therefore can sue and be sued in its own name. Counsel further noted that it is the Board that administers, controls, regulates, supervises, and manages the day to day conduct, functions and performance of duties; including patient care and treatment, of the nurses and other medical staff of the hospital. Counsel has submitted, therefore, that since the Minister (and by extension the government) cannot direct the MSJMC Board nor its officers, servants or agents; the nursing staff and doctors were not acting within the course of employment of the Second Defendant, but rather were acting within the course of employment as employees of and directed by the First Defendant at all material times. Consequently, the government cannot be vicariously liable for the actions of the staff, servants and agents of the First Defendant.

[29] Learned Counsel has also advanced the argument that the nurses, doctors and other medical staff of the hospital are remunerated from funds paid by the Hospital Board and not from the Government's consolidated fund. Based on this argument, learned Counsel has posited that this supports the Second Defendant's contention that they were not acting in the course of employment with the Government and therefore the Government cannot be vicariously liable to the claimant.

[30] Learned Counsel has urged the court to exercise its powers under Rule 19.2 (3) (4) and/or Rule 26 (3) and strike out the Claimant's case against the Second Defendant or remove the Second Defendant as a party to the proceedings, since there is no basis for allowing the claim to proceed against the Second Defendant.

Claimant's Submissions

[31] Learned Counsel for the Claimant in his response to the submissions of the First Defendant, noted that the decision in Ferdinand Frampton v Ian Pinard is not directly on the point in issue in the case at bar, and therefore cannot assist the court in determining whether the claim form is valid and whether the Claimant is entitled to relief in the circumstances of this case. Counsel further noted to the extent that the Ferdinand Frampton v Ian Pinard case makes any determination on the so called "implied sanction" doctrine, that that doctrine has been disapproved by the Privy Council in the case of Attorney General v Keron Matthews.

[32] With respect to the case of Marty Steinberg et al v Swisstor & Co. Ltd., learned Counsel has argued that the decision in that case does not supersede the decision in Matthews. He has posited further that contrary to the position advanced by the First Defendant in their

submissions with respect to Steinberg, the grant of an extension of time in the circumstances of the present case is at the complete discretion of the court. To underscore this point he cited Rul3 26.9 (2) of the CPR which states:

> "An error of procedure or failure to comply with a rule, practice direction, court order or direction does not invalidate any step taken in the proceedings, unless the court so orders".

Learned Counsel has submitted, therefore, that the Matthews case is binding on the court with respect to the principle that in the absence of a specified sanction, the court maintains absolute discretion in determining whether or not it will grant an extension of time.

[33] With respect to the issue as to the chronological sequence in which the applications should be heard, learned Counsel has challenged the submission of the First Defendant that their application is first in time and should be heard before the Claimant's application for relief from sanctions and for an extension of time. He noted that that submission is not supported by any legal rule or practice and therefore has no basis. To lend support to his contention he has cited Rule 26.1 (2) (d) of the CPR which states:

> "Except where these rules provide otherwise, the court may –
> (d) decide the order in which issues are to be tried; …"

Learned Counsel has submitted, therefore, that the court may consider all applications together, separately or in whatever order the court sees fit. Counsel, however, has urged the court to consider all the applications at the same time in the interests of efficiency in dealing with the matter.

[34] Learned Counsel has also taken issue with the First Defendant's position regarding the "threshold of evidence" upon which the court can grant the Claimant's application for an extension of time. He noted that whereas in Steinberg, upon which the First Defendant based his argument, the Claimant did not provide any explanation for the failure to serve the Claim Form before the time of their application for an extension; in the case at bar the Claim Form was amended and then served on the Defendants. Counsel has cited the reason for the amendment being the doubt surrounding the correct legal entity operating the MSJMC. Counsel has therefore submitted that the Steinberg case is distinguishable.

[35] Another area where learned Counsel for the Claimant has taken issue with Counsel for the First Defendant was in respect to their reliance on Rule 26.8 of the CPR in their submissions. In relying on Rule 26.8, the court would have to be satisfied that the Claimant's failure to comply with the rule regarding the time for the service of the Claim Form was not intentional, that there is a good explanation for the failure and that there has been compliance with all other relevant rules, practice directions, orders and directions. Counsel for the Claimant, however, has argued that their application relied on Rule 26.9 and not Rule 26.8 and therefore the tests that the First Defendant posit should be applied are inapplicable to the case at bar.

[36] With respect to the submissions of Counsel for the First Defendant, Counsel for the Claimant has submitted that the court has absolute discretion in the determination of the

matter based both on case law and the CPR. Regarding the case law, he cited Keron Matthews where the Privy Council established that in the absence of a specified sanction the court has a discretion whether or not it will grant an extension of time; and in the case of the CPR, under Part 26.9 (2) the court has the power to rectify matters where there has been an error in procedure.

[37] In responding to the submissions of the Second Defendant, Counsel for the Claimant has noted that their reliance on the test for vicarious liability as expressed in Lister v Hall; Dubai Aluminium and Brown v Robinson which asks "Can the wrongful conduct be fairly and reasonably regarded as done by the employee while acting in the ordinary course of the employer's business?", can only be answered at trial after examination of all the relevant evidence. Counsel has noted further that the test is indeed that encapsulated in Rule 26.3 (1) (b) (c) of the CPR, as pointed out in the submissions of the Second Defendant, that is, whether the Claimant discloses any reasonable ground for bringing the claim; or whether it is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings.

[38] Finally, learned Counsel has noted that there is no law that limits or removes the liability of the Crown for the negligent acts of the government nurses seconded to the MSJMC. He noted further that the case at bar is one where the issues of liability should be argued and determined at trial.

Analysis and Conclusion

[39] The Claimant has sued the MSJMC for the negligent care that she received while a patient there in March, 2009. The Second Defendant, the Attorney General, was also joined as a party pursuant to the Crown Proceedings Act and the fact that the Crown had provided medical and nursing staff to the MSJMC.

[40] The date on the Claim Form entered by the Court Office was 2 December, 2011 and an acknowledgment of service by the Defendants on 25 October, 2012. On 20 November, 2012 and 22 November, 2012 the First and Second Defendants respectively applied to have the Claimant's Statement of Claim struck out. Subsequently, the Claimant made an application on 15 January, 2013 for relief from sanctions and an extension of time within which to serve the Claim Form. Regarding these applications, learned Counsel for the First Defendant submitted that their application was first in time and should be heard first. However, I am in agreement with the submission of learned Counsel for the Claimant that the court has the power to decide the order in which the applications may be heard. The court decided to hear the applications together commencing with that of the First Defendant.

[41] Succinctly put, the position of the First Defendant is that the claim has no validity since it was not served in compliance with Rules 8.12 (1) and 8.13 of the CPR, that is to say, being served within six months of the date of issue or requesting an extension of the time period within which to serve prior to the expiration of the initial six months.

[42] Counsel for the Claimant in his submissions has indicated that the First Defendant in their submissions is relying on Rule 26.8 of the CPR, but that the Claimant in her application has sought to rely on Rule 26.9. With respect to the latter, I should note that this is not really the case since in the Claimant's Notice of Application dated 15 January, 2013 it is clearly stated in the first paragraph that the application is made pursuant to Rule 26.8 of the CPR. I should indicate, however, that nothing turns on this discrepancy.

[43] A most important factor upon which the outcome of the matter will turn, depends on the issue as to whether a sanction or consequence follows the non-compliance with the six months time period for the service of a Claim Form. On this issue, it is the position of Counsel for the First Defendant that the sanction which follows is the invalidity of the Claim Form, while Counsel for the Claimant posited there is no sanction. In fact, Counsel for the Claimant has submitted that in light of the Privy Council decision in Keron Matthews, that the absence of a specified sanction gives the court absolute discretion regarding the granting of an extension of time.

[44] With respect to the issue as to whether a sanction is attached to the non-compliance with the six months period for the service of a Claim Form, I am in agreement with Counsel for the First Defendant. It follows therefore from this, that the Claimant's application of 15 January, 2013 pursuant to Rule 26.8 for relief from sanctions and/or an extension of time within which to make an application under Rule 8.13 was indeed appropriate. The argument by Counsel for the Claimant, therefore, that their application was made pursuant to Rule 26.9 would fail since that Rule applies only where the consequence for the non-compliance with a rule, practice direction, court order or direction was not specified by any rule, practice direction or court order.

[45] Learned counsel for the Claimant has submitted to the court a paper by the Honourable Justice Adrian Saunders of the Caribbean Court of Justice entitled Reflections on the CPR and the Overriding Objective, that was delivered on 29 October, 2011 at the Grenada Bar Association Seminar. I find this paper very useful and will highlight some of the important points raised by Justice Saunders as they relate to the case at bar. Firstly, Justice Saunders noted that Keron Matthews stresses that Rule 26.8 addresses relief from a sanction imposed and that seeking to extend time after the expiry of a relevant period, is not to be equated with seeking relief from an imposed sanction. Secondly, Justice Saunders also noted that where a litigant is not under a direct threat of a sanction imposed for non-compliance, the court is given a broad discretion in the carrying out of its management powers. This broad discretion is captured in Rule 26.9 which is underpinned by the Overriding Objective.

[46] It is clear that the Rule applicable to the case at bar is Rule 26.8. In that regard, for the Claimant's application for relief from sanctions and extension of time to succeed, the Claimant will have to satisfy the court 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.

[47] In addressing the conjunctive test of Rule 26.8, learned Counsel for the First Defendant has challenged the explanation of the Claimant for her failure to comply. He noted that her

explanation of being physically disabled and being hospitalized and receiving medical treatment was not supported by any documentary evidence. In the absence of this evidence, I am in agreement with Counsel for the First Defendant that the explanation is inadequate and cannot be accepted. Additionally, the Claimant has failed to meet the requirement of 26.8 (2) (c) since there has been non-compliance with a few orders of the court.

[48] I shall turn now to the position of the Second Defendant. Simply put, learned Counsel for the Second Defendant has argued that the Second Defendant was wrongly joined as a party to the Claim. The basis for this argument is that the MSJMC Act of 2009 established a Board as a body corporate which is capable of suing and being sued in its corporate name. The Board is responsible for all aspects of the Hospital's operation and administration. Also, the Act specifically states that the Minister (and by extension the government) has no part in the way in which the Board manages the operations of the MSJMC. The inescapable logic which flows from the argument of Counsel for the Second Defendant is that the Second Defendant could not properly be joined as a party to the Claim. I accept that proposition, that is to say, that the Attorney General should not be a party to these proceedings. That being the case, the issue with respect to the vicariously liability of the Second Defendant becomes mute.

[49] The circumstances of the case at bar are indeed unfortunate and sad particularly for the Claimant. It quite clearly underscores the need for Claimants who feel that they have suffered injury to act quickly and seek legal advice. In March, 2009 the claimant was a patient at the MSJMC and filed a claim in December, 2011, over two years later, for the negligent treatment she received. In invoking the defence of statutory limitation, learned Counsel for the First Defendant has noted that the cause of action arose about the 16th March, 2009 and expired about the 16th March, 2012. I will add, however, that the timeline faced by the Claimant in which to file her claim against the MSJMC would have been even much shorter than the three years since the MSJMC is a public authority and under section 2 (a) of the Public Authorities Protection Act, Cap. 352 of the Laws of Antigua and Barbuda an action must be brought within six months.

[50] Despite the apparent prima facie injustice that a litigant might encounter because of their failure to act promptly or to meet certain procedural requirement, the statement made by Barrow JA in Ferdinand Frampton v Ian Pinard is worth repeating:

> "The court cannot grant an extension of time purely as a matter of discretion. The court can only do so in accordance with the rules that are laid down. Not even in a case of the utmost public importance can the court overlook the rules because in a particular case the court thinks it is fair or reasonable or appropriate or just to do so. The rules must be seen as establishing criteria that are definitive as to what is fair and reasonable and appropriate and just."

Clearly, in the instant case the court has no discretion to grant the Claimant's application for an extension of time in the face of the rules of the CPR and the law.

Order

[51] Having examined all the documentation supplied in the case, as well as reviewing the written and oral submissions of learned Counsel on both sides and for the reasons that I have outlined above, the court orders as follows:

(1) The Amended Statement of Claim of the Claimant filed on 23rd September, 2012 is struck out against the First defendant.

(2) The Amended Statement of Claim of the Claimant filed on 23rd September, 2012 is struck out against the Second Defendant.

(3) No order as to costs.

[52] The court is extremely grateful for the helpful written and oral submissions and authorities of learned Counsel on each side.

Charlesworth Tabor
Master (Ag.)