THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANGUILLA CIRCUIT

Claim No. AXAHCV2013/0116

Between:

IONA IRINA TRUICA

Claimant

And

1. **REMUS TRUICA**
2. **NICOLAE SIMION**
3. **UNITED INTERNATIONAL TRUST N.V**
4. **UNITED TRUST (ANGUILLA) LIMITED**

Defendant

Before:

Master Fidela Corbin Lincoln (Ag.)

On Written Submissions:

Ms. Jean M. Dyer of counsel for the Claimant
Ms. Samantha Wright of counsel for the Defendants

2015: February 23;
March 4.

Extension of time to file witness statements – Relief from Sanctions – CPR 26.8 – Whether both sub-rule (1) and sub rule (2) of CPR 26.8 contain mandatory conditions to be satisfied.

JUDGMENT

[1] **CORBIN LINCOLN M (Ag)**: This matter concerns an application by the defendants for an extension of time to file witness statements and relief from sanctions.

Background

[2] The claimant and the 1st defendant, who are both citizens of Romania, were married on 9th February 2002 in Romania. The claimant petitioned for divorce on 6th June 2011.

[3] The claimant's statement of claim avers that:

(1) The 1st defendant was at all material times the registered shareholder of all the issued shares in IRNAMA Limited, an international business company registered in Anguilla.

(2) The 2nd defendant is a longtime friend and employee of the 1st defendant.

(3) The 3rd defendant was at all material times the Managing Director and the 4th defendant the registered agent of IRNAMA Limited.

[4] The claimant commenced the claim against the defendants on 20th January 2014 for damages pursuant to section 49 of the Trusts Act for fraudulent breach of trust by the 1st and/or 3rd defendants for the transfer by the 1st defendant of the claimant's 50% share in IRNAMA Limited, a international business company registered in Anguilla.

[5] Defences were filed by the defendants on various dates. A chronology of the key events relevant to this application is as follow:

Date	Action
10th April 2014	Hearing in chambers.. Matter referred to Mediation
16th May 2014	Mediation. Defendants fail to attend.
1st July 2014	Case Management Conference. Master refers matter back to mediation and costs of US$450.00 are

	awarded against the defendants.
29th September 2014	Case Management Conference. Master notes that there has been a continuous failure by the defendants to prioritise mediation. Mediation order dispensed with and the defendants are ordered to pay the costs awarded on 1st July 2014 plus costs of US$1000.00 in 14 days failing which summary judgment would be entered for the claimant.
20th October 2014	Case Management Conference. Master orders as follows: 1. Standard Disclosure by 5th December 2014 2. Parties to file and exchange witness statements by 20th January 2015. 3. Parties may apply for further directions and orders by 26th January 2015. 4. Parties to file Listing Questionnaire by 4th February 2015 5. Pre-trial review fixed for 19th February 2015 6. Pre-Trial Memorandum to be filed by 6th February 2015.
4th December 2014	Claimant files List of Documents.
11th December 2014	Defendants file and serve List of Documents
20th January 2015	Claimant files witness statement
26th January 2015	Defendants file application for an order extending time for filing witness statements and relief from sanctions.

10th February 2015	Defendants file Listing Questionnaire
13th February 2015	Claimant files Pre-Trial Memorandum
18th February 2015	Defendants file Pre-Trial Memorandum.

Grounds of the Defendants' Application

[6] The grounds of the application are:

(1) The applicants were unable to comply with the order of the Master due to difficulties with communication.

(2) The applicants' first language is not English. To alleviate this difficulty and given the importance of understanding documentation in this case and the correspondence from counsel, an intermediary lawyer, based in Romania, was appointed by the applicants.

(3) Correspondence and other such papers were 'filtered' through the said lawyer who would then translate the papers, emails and so to the Applicants, explain the contents and so on.

(4) Unbeknownst to Counsel in Anguilla, and since the beginning of December 2014 the said Lawyer in Romania had ceased her role and therefore the communication had inadvertently broken down.

(5) Within the past 10 days however, Anguilla counsel has been informed regarding the departure of the former Lawyer in Romania. Anguilla Counsel has been informed that the Applicant's have found a competent English speaking Lawyer in Romania, who is competent to undertake work in the specialist fields of law as currently before the court.

(6) Some of the Applicant's witnesses speak Romanian as their first language and therefore it is imperative that the Applicants have a Romania speaking Lawyer who can take the said statements and translate them into English and vice-versa.

(7) As a result of the breakdown in communication, the Applicants have been unable to comply with the filing of witness statements but say that the filing of the witness statements is essential to the Applicant's being in a position to put their case before the court.

(8) Additionally, the defendants, nor their witnesses reside in Anguilla making it especially challenging and delays are inevitably incurred through [sic].

(9) The applicants apologise to the Honourable Court and hope to minimize any prejudice to the claimant. That being said the Applicants will say that they will require an extension of time to file their witness statements.

(10) The applicants will say that they also require an extension of 28 days from the original date of filing, namely from 20th January 2015.

(11) The applicants will say that they believe in the merits of their case and that they are committed to filing their witness statements and humbly pray that the Honourable Court will permit the requested extension to file their witness statements and that they are relieved from sanctions.

[7] The application is supported by an affidavit of Carole Bryan, the casual administrative assistant employed in the chambers of counsel for the defendants. The affidavit expands upon the grounds set out in the application.

The Claimant's Opposition to the Application

[8] The claimant swore and filed an affidavit in opposition to the application. The claimant states that the defendant have failed to satisfy the requirements of the Civil Procedure Rules ("**CPR** ") Part 26.8 for relief from sanctions.

The Applicable Rules

[9] **CPR** 26.1 (2) (k) gives the court the power to extend or shorten the time for compliance with any rule or order of the court even if the application for an extension is made after the time for compliance has passed.

[10] **CPR** 27.8 states:

" (1) A party must apply to the court if that party wishes to vary a date which the court has fixed for –

(a) a case management conference;

(b) a party to do something where the order specifies the consequences of failure to comply;

(c) a pre-trial review;

(d) the return of a listing questionnaire; or

(e) the trial date or trial period.

(2) Any date set by the court or these rules for doing any act may not be varied by the parties if the variation would make it necessary to vary any of the dates mentioned in paragraph (1).

(3) A party seeking to vary any other date in the timetable without the agreement of the other parties must apply to the court, and the general rule is that the party must do so before that date.

• Rule 42.7 deals with consent orders.

(4) A party who applies after that date must apply for – (a) an extension of time; and (b) relief from any sanction to which the party has become subject under these Rules or any court order.

- Rule 26.8 provides for applications for relief from sanctions. "

[11] The sanction imposed by the **CPR** for failure to serve the witness statement of an intended witness within the time specified by the court is contained in **CPR** 29.11 which states that the witness may not be called unless the court permits.

[12] **CPR** 26.8 states:

"(1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be -

(a) made promptly; and

(b) supported by evidence on affidavit;

(2) The court may grant relief only if it is satisfied that –

(a) the failure to comply was not intentional;

(b) there is a good explanation for the failure; and

(c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions.

(3) In considering whether to grant relief, the court must have regard to;

(a) the 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;

(d) whether the failure to comply was due to the party or the party's legal practitioner; and

(e) whether the trial date or any likely trial date can still be met if relief is granted.

[13] The application falls to be determined under **CPR** 26.8 since the defendant has made the application for an extension of time after the date fixed by the court for filing of witness statements and the defendant has become subject to the express sanction contained in **CPR** 29.11.

The Approach to CPR 26.8 – An examination of Case Precedents

[14] Some guidance on the approach to **CPR** 26.8 was given by Barrow J.A in **Nevis Island Administration v La Coppropretе Du Navire**[1]. Barrow J.A. said:

> "There are mandatory conditions imposed by this rule. It is stated in sub- rule (1) that the application must be made promptly and it must be supported by an affidavit. The application, in this case, satisfies both these requirements. In sub-rule (2) a strict fetter is imposed upon the court's discretion- the court may grant relief only if it is satisfied that the failure to comply was not intentional, that there is a good explanation for the failure and the party in default has generally been compliant. This means that the court must conduct an examination of the evidence before it (normally the applicant's affidavit) to decide if that evidence satisfies the court that the failure to comply was not intentional, that there is good explanation for the failure and the applicant has been generally compliant...
>
> The applicants did not address even one of the three conditions that must be satisfied. The rule is uncompromising so that the Court is prohibited from exercising its discretion to grant relief from sanctions if these conditions are not satisfied...the failure of the applicants to comply with the requirements of the rule puts the applicants in a hopeless position..."

[1]Civil Appeal No.7 of 2005

[15] The consequence of failing to satisfy sub-rule (1) did not arise in the above case since the Court found that this sub- rule was satisfied. The Court's finding that **CPR** 26.8 imposes mandatory conditions with sub rule 2 containing 'a stricter fetter ' on the court's discretion suggests to me that the court considered the factors listed in sub-rules (1) **and** (2) as **mandatory conditions** to be satisfied. If the mandatory conditions in sub rules (1) and (2) are not satisfied relief from sanctions could not be granted.

[16] In **Dominica Agricultural and Industrial Development Bank v Mavis Williams** [2] the Court of Appeal was considering two applications, one of which was an application for an extension of time to appeal against the judgment of the High Court. Barrow J.A, who delivered the judgment of the court stated:

> "Apart, therefore, from providing the criteria by which to determine the present application, rule 26.8 has a wider importance. Rule 26.8 demonstrates the paradigm shift in the culture of litigation that CPR 2000 is intended to accomplish by, along with other things, its emphasis on compliance with the rules. Rule 26.8 ordains that the sanctions imposed for non-compliance shall not be relieved against unless the defaulter is able to satisfy the criteria for relief that the rule lays down. It bears repeating that the rule restricts the court from exercising its discretion if the applicant does not satisfy the criteria. The court is no longer able to exercise, as it did in the past, an "unfettered discretion" and relieve against sanctions where the defaulter fails to satisfy a particular criterion. The court has no power to overlook inordinate delay or intentional non-compliance"

[17] While the Court: (a) held that an applicant "must satisfy the criteria for relief" laid down in the rule; (b) expressly stated that the requirement to show that the default was not intentional was mandatory; and (c) held that the court had no power to overlook inordinate delay, the court did not expressly address which of the other criteria set out in **CPR** 26.8 were mandatory. I note however that the issue of the timeliness of the application is a factor set out in sub-rule (1) and therefore in my view this decision suggests that the Court

[2] DOMHCVAP2005/0020

considered the factors set out in both sub rules (1) **and** (2) to be mandatory conditions to be satisfied.

[18] Belle J in **Wycliff H. Baird v David Colgar and others** [3] appears to have been faced with some of the same questions which now confront me. In this case the claimant filed an application for an extension of time to file witness statements and relief from sanctions. The claimant's application for an extension of time to file witness statements did not contain an application for relief from sanctions but the learned trial judge granted the application. The defendant appealed. Edwards JA,[4] among other things, set aside the order of the learned trial judge, dismissed the application for an extension of time and directed the claimant to make an application for an extension of time to file witness statements unless the parties agreed to a variation of the timetable.

[19] The claimant filed a second application for an extension of time to file witness statements and on this occasion sought relief from sanctions. The application was dismissed by the learned trial judge and the claimant appealed. The appeal was allowed and the decision of the learned trial judge set aside. The matter was remitted back to the learned trial judge for a fresh consideration of the application.

[20] After setting out the provisions of **CPR** 26.8 the learned trial judge stated:

> "I found it somewhat artificial to attempt to separate these rules into categories as they have been expressed, as part of a realistic thought process. I find it impossible to consider promptness without considering the effect of granting relief or not would have on the parties and whether the non-compliance can be remedied within a reasonable time. Indeed the witness statements had been filed and served. I find it impossible to consider the interest of the administration of justice and the effect on the applicant without considering the consequence of refusing to grant relief from sanction if the explanation given by the applicant for his failure is not considered to be a good explanation. But I have to find on the facts that the applicant's failure was due to the

[3] SKBHCV1993/0084
[4] Civil Appeal No 13 of 2007

advice of his legal practitioner. Finally at this stage I can also state that the applications and the appeals have cost us another trial date and has had an impact on the administration of justice.

I am greatly assisted in my comprehension of the approach to be taken toward Part 26.8 by the writings of one academic scholar, D.S. Piggott in the article Relief From Sanctions and the Overriding Objective, Civil Justice Quarterly 2005, 24 (Jan) 103-129. In this article Mr. Pigott referred to the guidance in the equivalent English CPR Part 3.9 as the checklist approach. The approach preferred by Mr. Piggott is that the list is to be used for guidance and all of the items are to be considered, but not all of the conditions listed are to be given the same weight. Indeed the English rules provide no guidance as to the weight to be given to the various conditions. But Part 26.8 of the CPR 2000 obviously ascribes greater weight to the conditions found at 26.8 (2) (a) (b) and (c). However the list is not exhaustive. I believe that one may add to the list that if it is unjust in the circumstances to either grant relief or not grant relief then the court should not act unjustly. All of the circumstances must be considered.

The court must therefore take into account the effect of Part 1.1, the overriding objective to do justice. But in following Part 1.1 the court must be cognizant of the plain words of the rules and the obligation to impose a normative culture of compliance. All of the cases cited by counsel for the respondents including indeed the decision of Edwards J.A . (Ag) in this very matter in Civil Appeal No 13 of 2007 and the authorities cited therein lead me to this conclusion. Special reference should also be made to the decision of Barrow J.A. in *Nevis Island Administration v La Copproprete Du Navire* Civil Appeal No.7 of 2005 and the case cited above *Dominica Agricultural And Industrial Development Bank v Mavis Williams*."

[21] The writings of the academic scholar D.S. Piggott have not assisted me for two reasons : (a) the UK CPR Part 3.9 which deals with relief from sanction is differently worded from our **CPR** 26.8; and (b) the suggested approach of considering all the factors in sub-rules (1) (2) and (3) together but attaching a different weight to some appears to conflict with the

Court of Appeal decisions of **Nevis Island Administration v La Coppropretе Du Navire** and **Dominica Agricultural and Industrial Development Bank v Mavis Williams**.

[22] In **Robin Darby v Liat (1974) Limited** [5] Pereira J.A stated**:**

> **"Relief from Sanctions – CPR Part 26.8**
>
> [15] This rule says in effect that an application for relief must be made promptly and be supported by affidavit. The relevant part of this rule which is critical to the court's exercise of its discretion to grant relief are contained in sub rules (2) and (3). Sub rule (2) states as follows:
>
> > "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."
>
> These may be termed the compendious conditions circumscribing or the **prerequisites for the exercise of the discretion. Once these are satisfied**, sub rule (3) then sets out the considerations by which the court is to be guided in exercising the discretion." **(emphasis mine)**

[23] Pereira J.A stated further:

> **"**Rule 26.8 of the **Civil Procedure Rules** does not direct the court to have regard to whether or not the application for relief from sanction has been made promptly in considering whether to grant relief. Therefore, the Master erred in placing undue emphasis on what has been viewed as a lack of promptitude in applying for relief.

[5] ANUHCVAP2012/002

[24] The Court in this case therefore found that sub-rule (1) does not contain mandatory conditions to be satisfied but sub-rule (2) contained "prerequisites for the exercise of the discretion" and it was only if these prerequisites were satisfied that the court moves on to consider the matters set out in sub-rule (3) in determining whether to exercise its discretion.

[25] In **Prudence Robinson v Sagicor General Insurance** [6] the Court of Appeal was considering an appeal arising from an order of the learned trial judge granting the respondent an extension of time to file witness statements. The grounds of the respondent's application were that the witness summary was filed late due to the change in position of its claims manager and the unforeseen unavailability of the former claims manager to give evidence on its behalf. The affidavit in support of the application, sworn by the new claims manager, stated that the witness summary covered the two grounds on which the respondent's defence rested, that the appellant had not been prejudiced by the late filing and that the trial date had not been compromised. The judge granted the application for relief from sanctions and the appellant appealed on the several grounds. Baptiste J.A, who delivered the judgment of the Court of Appeal, stated:

> "The second ground of appeal alleges that the judge erred by granting relief from sanctions when the application was not in accordance with CPR 26.8(1), (2) and (3). Rule 26.8 sets out the circumstances which the court will consider on an application to grant relief from a sanction. I begin by examining the text of the rule. Rule 26.8(1) states when the rule is engaged by providing that it applies on '[a]n application for relief from any sanction imposed for a failure to comply with any rule, order or direction'. The court's first task is to identify the 'failure to comply with any rule, order or direction' which initially triggers the operation of the rule. Secondly, the application must be made promptly; and supported by evidence on affidavit. Thirdly, rule 26.8(2) confers on the court a discretion to grant relief. It states that the court may grant relief only if satisfied that (a) the failure to comply was not intentional; (b) there is a good explanation for the failure; and (c) there has

[6] SLUHCVAP2013/0009

been general compliance by the defaulting party with all other relevant rules, practice directions, orders and directions. Fourthly, in the exercise of its discretion to grant relief, the Court must consider rule 26.8(3), …

The witness summary, in respect of which the application for relief from sanctions was made, should have been filed on 19th December 2008. The application was seven months late and therefore was not made promptly (in breach of rule 26.8(1)(a)). The judge however considered the reasons for the delay and essentially concluded that there was a good explanation for the delay. The judge also concluded that the delay was not intentional. In considering whether there was general compliance with rules and court orders, the judge noted that there had been some non-compliance which was largely in relation to the case management timetable.

I agree with the judge that the failure to comply was not intentional. To my mind, however, the explanation offered by Ms. King in the affidavit is substantially deficient and did not meet the threshold of a good explanation for the delay. The affidavit evidence does not condescend to particulars...In the circumstances it cannot be said that there was a good explanation for the failure. **The pre-condition stated in rule 26.8(2)(b) was therefore not met. That is fatal to the case in relation to rule 26.8.**

The judge stated that the other considerations raised in rule 26.8 now depend largely on the court's ability to deal with the outstanding applications and set the matter down for trial. In speaking of the other considerations, the judge was clearly referencing rule 26.8(3). In treating with the rule that way, the judge erred in principle and was plainly wrong. The judge's statement does not reflect the true importance of or the role of rule 26.8(3) in an application for relief from sanctions. It also evinces a misapprehension of the rule. Rule 26.8 is an important provision. It lists a number of factors a judge must have regard to in considering whether to grant relief. It does not depend upon the courts ability to deal with outstanding applications and to set a matter down for trial. Rule 26.8(3) has to be considered

at the time of the application for relief from sanctions. It does not operate in future."

[26] The learned first instance trial judge therefore did not treat sub-rule (1) as a *precondition* or a mandatory condition to be satisfied before considering sub-rule (2) and thus notwithstanding his finding that the application was not made promptly he went on to consider sub-rule (2). This approach was not disapproved by the Court of Appeal in the course of the judgment. The Court of Appeal held however that sub-rule (2) contained preconditions and failure to satisfy these pre-conditions was "**fatal to the case in relation to rule 26.8.**"

[27] The learned first instance trial judge, after finding that the failure to comply was not intentional, that there was a good explanation for the delay and that there was some non-compliance with orders, went on to consider sub-rule (3). On appeal, the Court of Appeal noted that the affidavit in support of the application did not address all the matters listed in sub-rule (3) and stated that in the circumstance the learned trial judge had failed to consider all the matters listed in sub-rule (3). The Court of Appeal held that the matters listed in sub-rule (3) were "**relevant considerations the court was enjoined to have regard to in considering whether to grant relief**".

[28] The Court of Appeal in **Prudence Robinson**, like in **Robin Darby,** therefore did not treat sub rule (1) as containing mandatory conditions but held that sub-rule (2) contained mandatory preconditions to be satisfied. Consequently, following this approach, a failure to satisfy any of the preconditions in sub rule (2) is fatal to an application and the court would be unable to go on further to consider the factors set out in sub-rule (3).

[29] The Court of Appeal decisions of **Nevis Island Administration La Coppropreté Du Navire** and **Dominica Agricultural and Industrial Development Bank** appear to have found that the factors set out in sub-rules (1) **and** (2) are all mandatory conditions to be satisfied before the court goes on to consider sub rule (3) in determining whether to grant relief. The Court of Appeal in **Robin Darby v Liat (1974) Limited** and **Prudence Robinson v Sagicor General Insurance** held however that the factors set out in sub-rule (1) are not mandatory conditions to be satisfied but the factors set out on sub-rule (2) are

mandatory pre-conditions to be satisfied. If the mandatory pre conditions in sub rule (2) were satisfied the court must go on to consider the factors sub-rule (3) in determining whether it should grant relief.

The Approach to the Claimant's Application

[30] I propose to follow the approach of the Court of Appeal in the more recent decisions of **Robin Darby v Liat (1974) Limited** and **Prudence Robinson v Sagicor General Insurance.** Consequently**,** I will not treat sub rule (1) as containing mandatory preconditions but if the defendants fail to satisfy any of the preconditions set out in sub rule (2) their application must fail. If the defendants satisfy all the pre conditions set out in sub rule (2) I must go on to consider the factors set out in sub rule (3) in determining whether to grant relief from sanctions.

CPR 26.8 (1) - The Promptness of the Application & The Filing of An Affidavit

[31] The deadline fixed by the court for filing witness statements was 20th January 2015. The defendants filed the application on 27th January 2015.

[32] Counsel for the claimant submits that the defendants have not made the application promptly and should have filed the application for an extension of time as soon as they became aware that they were unable to meet the deadline and at the very least before the time fixed by the court for making application.

[33] The defendants filed their application prior to expiration of the time fixed by the court for filing applications – the application was filed on the last day fixed by the court for filing applications. The application was however filed approximately 6 days after the time fixed by the court for the filing of witness statements.

[34] I find that the application was made promptly. In any event, although filing the application prior to the date fixed by the court for filing witness statements would have prevented the defendants from becoming subject to the sanction imposed by **CPR** 29.11, the Court in

Robin Darby v Liat (1974) Limited held that promptness of the application is not a prerequisite for the grant of relief.

CPR 26.8 (2)

Was the failure intentional and is there a good explanation for the failure?

[35] The case management directions, which included an order for the filing of witness statements, was made by order dated 20th October 2014 in the presence of legal representatives for the claimant and the defendant. The order required witness statements to be filed by 20th January 2015 thus giving the parties some three (3) months to prepare and file witness statements.

[36] The natural and ordinary meaning of the word 'intentional' is something done deliberately or by conscious design or purpose.

[37] Barrow J.A in **Dominica Agricultural and Industrial Development Bank** v **Mavis Williams** stated:[7]

> " The lawyers submitted that intentional must mean a deliberate disregard of the rules without regard to or in spite of the obvious consequences. Even on that definition the appellant has a difficulty in escaping the conclusion that the appellant's non-compliance with the time limit for appealing was intentional. It was deliberate. As the affidavit stated, the appellant *considered* whether to appeal then, or to wait. The affidavit does not expressly say so but it says in effect – and the proposition is ineluctable – that the appellant *decided* not to appeal the liability judgment after it was delivered but to wait. The affidavit also clearly conveys that the appellant did *not* decide then that it *would* appeal after damages were assessed. Rather, the affidavit conveys that the appellant decided that it would decide *whether* to appeal after damages were assessed.

[7]DOMHCVAP2005/0020 at paragraph 11,12 and 20

> There is no suggestion in the affidavit that the appellant did not know of the rule that prescribes a time limit for appealing. Indeed the appellant relies heavily in a supplemental affidavit on the fact that it acted pursuant to legal advice. In the absence of evidence to the contrary I must proceed on the footing that the lawyers who advised the appellant knew that there was a time limit for appealing. That is something that is reasonable for every lawyer to know. (The cases that one encounters in our law reports show that lawyers sometimes mistake time limits or when time starts running; not that lawyers do not know that there is a time limit for appealing.) Therefore, the only inference that I can draw from the fact that the appellant acted after taking legal advice is that the appellant deliberately disregarded the rule that imposed a time limit for appealing. Integral to that inference is the conclusion that the appellant also disregarded the consequence. Again there is no suggestion that the appellant did not know consequences would flow from deciding not to appeal within the time limited…A deliberate decision not to comply is a significantly different thing from a simple mistake as to compliance or even plain slackness"

[38] The defendants in this case are taken to have been aware of the deadline for filing witness statements as their legal representatives were present at the time the order was made and there is no evidence to the contrary. There is no evidence that the defendants were mistaken about the time for filing witness statements or were unaware of the consequences of failing to comply.

[39] In determining whether the defendants' default was intentional I will have regard to all evidence before the court.

[40] The affidavit of Ms. Bryan states:

> *" I am further aware that owing to difficulties in communicating with, and contacting the Applicants, our chambers, has been unable to prepare the witness statements setting out the case for the defendants."*

I am advised that owing to the fact that the Applicants all live outside of Anguilla and in different time-zones, the Applicants had worked with a Romanian Lawyer for many years as an intermediary with the benefit that the Romanian Lawyer understood the case, had expertise in commercial law and, vitally, could speak both Romanian and English and therefore making the preparation of documents more efficient.

Additionally, the Romanian Lawyer had acted as a main contact person and relayed information between our chambers and the Defendants.

I am aware from instructions from Ms. Wright, that sometime in December 2014 email exchanges ceased with the Romanian Lawyer. Ms. Wright believed that this was due to the holiday season and similarly Ms. Wright left Anguilla for the holiday season.

Contact was attempted several times with the said Romanian Lwyer by Ms. Wright to advise of deadlines, for instructions and so on but to no avail.

I verily believe that Ms. Wright was informed by a 'new' Lawyer only recently that the former Romanian Lawyer was no longer involved in the case and that the new lawyer would be taking over as intermediary but he is unfamiliar with the case. As a result, the progress of preparing the witness statements has been significantly interrupted…I am informed that the process of completing the witness statements has now commenced "

[41] I pause here to note that the affidavit of Ms. Bryan does not fully comply with **CPR** 30.3 (2) which requires a deponent to state: (a) which statements are made from the deponent's own knowledge and which are matters of information or belief ; and (b) the source of any matters of information and belief. I am therefore unable to ascertain the source of some of the statements made by the deponent.

[42] The main plank upon which the defendants rest their application is that "*the Applicants' first language is not English*" and it is for this reason that the applicants appointed a lawyer based in Romania. Ms. Bryan states that *" Furthermore, I am informed that the witnesses are not English speakers*". It is not stated who the witnesses are and *by whom* Ms. Bryan was informed that the intended witnesses are not English speakers.

[43] In contrast to the evidence of Ms. Bryan regarding the language skills of the defendants which is given without the source of same being stated, the evidence of the claimant, the wife of the 1st defendant who also knows the 2nd defendant is that both the 1st and 2nd defendant are fluent in English. The claimant states that the 1st defendant attended an interlocutory hearing and was able to participate in the hearing and converse with the presiding judge in English. I prefer the evidence of the claimant who gives evidence on this issue from her personal knowledge.

[44] While the affidavit of Ms. Bryan states that *"correspondence and other papers were filtered through*" the intermediary lawyer in Romania who would then "*translate the papers, emails, and so to the Applicants, explain the contents and so on"* there is no evidence that this was the sole means by and through which the defendants could communicate with local counsel.

[45] Even assuming that the defendants require assistance in translating technical legal documents or concepts, based on the evidence of the claimant, the defendants have sufficient command of English to maintain communication and give instructions on factual matters to local counsel in relation to the preparation of their witness statements without the necessity of an intermediary Romanian lawyer.

[46] I am therefore not satisfied that there is any cogent evidence of legitimate obstacles to the defendants communicating with local counsel to give instructions for the preparation of the witness statements.

[47] Ms. Bryan states further that it is the breakdown in communication with the lawyer in Romania which caused the defendants to be unable to file the witnesses statements. Even if it is accepted (which it is not) that the defendants could only communicate with local counsel through an "intermediary" lawyer in Romania due to their inability to speak English, I note that this breakdown is alleged to have occurred in December 2014. The order for the filing of witness statements was made in October 2014. There is no evidence regarding what steps were taken by the defendants with respect to the preparation of their witness statements between October 2014 when the order was made and December 2014 when it is alleged that email communication ceased with "the Romanian Lawyer" so that the court can be satisfied that the defendants made genuine efforts to comply with the order of the court and notwithstanding those efforts they were unable to meet the deadline.

[48] Further, as previously stated, the defendants are presumed to have been aware of the deadline for filing witness statements and the consequences of failing to do so. Notwithstanding being so aware, the defendants, according to the evidence of Ms. Bryan, did not cause to be communicated to counsel in Anguilla until 'recently'[8] or around 17th January 2014[9] that the "Romanian Lawyer" - *whom it is alleged is essential to them as English is not their first language* - had "ceased her role" since the beginning of December 2014.

[49] Assuming but not accepting that it was necessary for the defendants to retain counsel in Romania to assist in the preparation of witness statements, there is no evidence that the lawyer in Romania 'ceased her role' without the knowledge of the defendants. There is also no evidence of what steps were taken by the defendants to obtain new counsel in Romania after counsel ceased her role. In the absence of evidence to the contrary, the actions of the defendants are not in my view consistent with parties who; (a) had due regard to the order of the court and; (b) took reasonable, diligent and timely action to meet the filing deadlines fixed by the court.

[8] paragraph 10 of the affidavit of Ms. Bryan

[9] paragraph 6 of the grounds states that counsel was notified 'within the past 10 days' of the filing of the application on 27th January 2014.

[50] This is a claim filed against the defendants, not their counsel, whether here or in Romania. It is therefore incumbent on the defendants to remain actively engaged in the process, including ensuring that they comply with orders of the court. There is no evidence that the failure to comply with the order was due to the fault of counsel on record or for that matter even counsel in Romania since there is no evidence that the defendants were unaware that counsel retained in Romania had "ceased her role".

[51] In **Dominica Agricultural and Industrial Development Bank** v **Mavis Williams** the court found that the appellant had considered whether to appeal the liability judgment entered against it, got legal advice and decided to wait until after damages were assessed to determine whether to appeal. Following the assessment of damages the appellant sought to appeal nine (9) months after the time for appealing had expired. The court found that in those circumstances there was a deliberate disregard for the rules and its consequences and therefore the court held that the appellant's failure to comply was intentional.

[52] A finding of intentional failure to comply with a rule or order in my view requires evidence (direct or inferred) of some conscious, deliberate decision not to comply. In this case, while in my view there is clear evidence of slothfulness and unreasonable inaction on the part of the defendants, unlike the **Dominica Agricultural and Industrial Development Bank** case**,** there is no evidence that the defendants took a deliberate and conscious decision not to file their witness statements within the time fixed by the court. I am therefore unable to find that their failure to comply was intentional.

[53] While the defendants' failure to comply may not have been intentional, having considered the reasons provided by the defendants for failing to comply and the evidence of the claimant in opposition to the application, I find, for the reasons addressed above, that there are no good reasons provided by the defendants for failing to comply with the order for filing witness statements.

Have the Defendants generally complied with all other relevant rules, practice directions, orders and directions.

[54] Neither the grounds in support of the application nor the affidavit of Ms. Bryan has addressed the issue of the defendants' general compliance with all other rules orders and directions.

[55] The claimant states that the defendants have not generally complied with all other relevant rules, orders and directions. The evidence of the claimant is:

> " I am informed by my Anguilla counsel that CPR 2000 requires the Defendants to have generally complied with all other relevant rules, practice directions, orders and directions. The Defendants have not addressed this condition in the evidence filed by them. This is perhaps because there has been serial non-compliance on the part of the Defendants as detailed above in paragraphs 3 and 4 and as further detailed below.
>
> The Defendants were late in complying with all of the other directions given by Master Taylor Alexander. Standard Disclosure was given by them on 11th December, 2014 and not on 5th December 2014 as directed. Their Listing Questionnaire was filed on 10th February 2015 and not by 4th February 2015 …Indeed, in respect of this failure I am advised by my Anguilla counsel that the Defendants were required to apply to the Court for an extension of time and also for relief from sanctions in respect of the late filing of the listing questionnaire. They are yet to do so…I am advised by my Anguilla counsel that the Defendants were required by CPR 2000 to file their Pre Trial memorandum at least three (3) clear days before the Pre-Trial review hearing which was fixed to take place earlier today. This was not done."

[56] While counsel for the claimant referred to the **CPR** with respect to the deadline for filing the pre trial memorandum, in this case I note that the court specifically directed the parties to file their pre trial memorandum by 6th February 2015. The defendants filed their pre-trial memorandum on 18th February 2015.

[57] In addition, the court ordered the parties to attend mediation and, following the defendants' non-attendance, the time for mediation was extended. The defendants' failure to attend mediation resulted in the court dispensing with mediation and making two costs orders against the defendants.

[58] The defendants also failed to attend the Pre-Trial review without their attendance being dispensed with by the court contrary to **CPR** 27.4.

[59] In all the circumstances I find that the defendants have not general complied with all other rules, orders and directions.

[60] Applying the approach to **CPR** 26.8 outlined in **Robin Darby v Liat (1974) Limited** and **Prudence Robinson** my finding that the defendants have not provided a good explanation for failing to comply with the order of the court and have not generally complied with all other orders , directions and rules means that the defendants have failed to satisfy two of mandatory preconditions set out in **CPR** 26.8 (2) and consequently the defendants' application for relief from sanctions must fail.

[61] **CPR** 1.1 and 1.2 provide that the court must give effect to the overriding objective when it exercises any discretion given to it by the rules so as to enable the court to deal with cases justly. However, it has been held that the overriding objective cannot be used to widen or enlarge any power, allow the court to bend the rules or come to the rescue of an applicant.[10] In **Ferdinand Frampton v Ian Pickard** [11] the court noted:

> "it is appropriate, at the juncture to state the fundamental premise that there are rules that govern the grant of an extension of time. The Court cannot grant an extension of time 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 overrule the rules because in a particular case the

[10] Justice Dean Amore in Winston Padmore v James Morgan, Civil Appeal No. 277 of 2006; D' Auvergne JA (Ag.) in Ormiston Ken Boyea and Hudson Williams v Caribbean Flour Mills Ltd. SVGHCVAP2004/0003.

[11] DOMHCVAP2005/0015

> Court thinks it fair or reasonable or appropriate or just to do so ... The due application of the rules, therefore, is itself of the utmost public importance because those rules and their due application are the basis upon which opposing parties to litigation are entitled to and must expect their dispute to be determined."

[62] It is therefore ordered as follows:

(1) The application by the defendants for an extension of time to file witness statements and relief from sanctions is refused.

(2) Costs of US$1000.00 are awarded against the defendants.

Fidela Corbin Lincoln
Master (Ag.)