EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANGUILLA

AXAHCVAP2015/0002

BETWEEN:

VANROY ROMNEY

Appellant

and

SHERIDAN SMITH

Respondent

Before:

The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

On Written Submissions:

Ms. Jenny Lindsay for the Appellant

2016: September 14.

Interlocutory appeal – Application for variation of court order – When variation application should be made – "Unless order" – Application for relief from sanctions – When application for relief should be made – Exercise of discretion – Whether learned master considered relevant factors in exercising her discretion – Rule 26.8 of Civil Procedure Rules 2000

The appellant filed a claim against the respondent on 12th October 2012 seeking to recover an outstanding debt of US$62,420.00 in respect of electrical work which he had carried out on 5 buildings that formed part of the respondent's resort. Pursuant to Part 28 of the Civil Procedure Rules of 2000 ("CPR"), the parties were ordered, on 28th October 2013, to give standard disclosure on or before 22nd November 2013. Notwithstanding this, the respondent failed to disclose certain documents (a cheque numbered 6879 and all original and amended electrical plans and sketches for the construction of the hotel project) that were alleged to be relevant to the facts in issue. Consequently, the appellant made an application for specific disclosure of the requisite documents on 31st January 2014, which was granted by the court on 14th May 2014.

The respondent, in breach of the disclosure order, failed to disclose the aforementioned documents, which prompted the appellant to make an application on 18th June 2014 for an "unless order", which was granted on 24th July 2014. The "unless order" provided that should the respondent not disclose the documents specified therein before 30th September 2014, his defence would be struck out and judgment would be entered against him, with costs thereafter having to be assessed.

Four days before the scheduled expiry of the "unless order", the respondent made an application to vary the order for specific disclosure and the "unless order", and sought relief from sanctions on the basis that he was unsuccessful in his efforts to locate the original and amended electrical plans and sketches for the construction of the hotel project and that cheque number 6879 was non-existent.

The hearing of the application for variation was scheduled for 21st October 2014, but on 1st October 2014, counsel for the appellant, Ms. Lindsay, allegedly emailed counsel for the respondent asking if she was agreeable to the matter being heard in December 2014, as she had to leave the jurisdiction. Upon failing to receive a reply from the respondent's counsel, Ms. Lindsay emailed the Registrar of the Supreme Court on 10th October 2014 requesting an adjournment. The Registrar replied on the same day indicating that the proper course was for her to direct her application for an adjournment to the court. On 13th October 2014, Ms. Lindsay again emailed the Registrar with the same request, this time referring to a Practice Direction of 27 November 2006 by then Acting Chief Justice, Sir Brian Alleyne. The Registrar's reply on 15th October 2014 was to the same effect as her first reply, that is, she had no jurisdiction to grant the appellant's request for an adjournment.

The hearing of the application for variation of the order took place on 21st October 2014 in the absence of the appellant. The learned master granted the variation sought, having held, among other things, that the documents subject to specific disclosure were no longer in possession of the respondent; and the respondent was relieved from sanctions in respect of the non-disclosure of the documents.

On 13th November 2014, the appellant filed an application to set aside the order made on 21st October 2014. In her application, counsel for the appellant requested that the court set aside the order made on the ground that it was made in her absence. The application was heard in December 2014 by the same master. Dismissing the application to set aside the order, the learned master held, among other things, that Ms. Lindsay had instructed her client not to attend court and had herself left the jurisdiction without the court's approval; the Registrar had clearly directed Ms. Lindsay as to the proper course to be taken in seeking to have the matter adjourned; and that the respondent's disclosure of the requisite documents was impossible. The appellant, dissatisfied with the learned master's ruling of 4th December 2014, filed, with the leave of the court, a notice of appeal on 18th February 2015.

Held: dismissing the appeal; and ordering that costs be costs in the cause, that:

1. The learned master did not err in finding that the Registrar acted correctly in refusing counsel for the appellant's request for an adjournment sent via email, as she had no jurisdiction to grant such a request. The proper course was for the appellant to have made an application to the court, which the learned master would then have

considered. In any event, even if the court were to have acted in accordance with Acting Chief Justice's memorandum, counsel for the appellant's email to the Registrar did not provide sufficient basis for the grant of an adjournment as it did not contain proof of service of the request for adjournment on the respondent and did not indicate whether the respondent objected to such a request.

2. An application for relief from sanctions ought only to be made after the sanction has taken effect, because it is only then that the court can consider the factors on the basis of which the application is to be determined, in accordance with rules 26.8(2) and (3) of the CPR. Although the respondent's application for relief from sanctions dated 26th September 2014 was prematurely made, this was not sufficiently material to constitute a basis for interfering with the master's order because it did not constitute a stand-alone application, but was instead appended to an application for variation, this having been rightly made before the sanction took effect.

3. The learned master did not err in allowing a variation of the disclosure order within the period for disclosure (as per the "unless order"). This is because, on the evidence before the learned master, she found it impossible for the respondent to have disclosed the requisite documents that were allegedly not disclosed in the time specified by the order, this being a finding which she was entitled to make. Accordingly, it could not be said that, in exercising her discretion, the learned master exceeded the "generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."

   Dufour v Helenair Corporation Ltd (1996) 52 WIR 188 applied.

4. Although the learned master did not specifically indicate or demonstrate in her judgment that she had satisfied herself on the factors enumerated in CPR 26.8(2) and (3), her judgment demonstrated that she had in fact satisfied herself that the respondent failed to comply with the terms of the "unless order", but that this was not intentional and that there was a good explanation for the respondent's failure to comply. Her expressed findings, in this context, showed that she had regard to the effect that the granting of relief would have on the parties, the interests of the administration of justice and the possible remedying of the respondent's failure to comply.

   Rules 26.8(2) and (3) of the Civil Procedure Rules 2000 applied.

JUDGMENT

Background Facts

[1] MICHEL JA: On 12th October 2012, the appellant filed a claim against the respondent for the recovery of an outstanding debt in the amount of US$62,420.00.

This sum was allegedly owed to the appellant for electrical installation work carried out by him on five buildings forming part of the respondent's multi-million dollar resort construction - the Sheriva Boutique Villa Hotel. On 28th October 2013, the parties were ordered to give standard disclosure on or before 22nd November 2013, pursuant to Part 28 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 ("CPR").

[2] The respondent having failed to disclose certain documents which the appellant contended were relevant to the facts in issue in the case, on 31st January 2014 the appellant made an application for specific disclosure of the aforesaid documents. The appellant's application was granted on 14th May 2014. In breach of the disclosure order, however, the respondent failed to disclose some of the documents which he was ordered to give specific disclosure of, these being a cheque numbered 6879 and all original and amended electrical plans and sketches for the construction of the hotel project. This gave rise to an application filed by the appellant on 18th June 2014 for an 'unless order'. The application was granted on 24th July 2014. The terms of the 'unless order' were to the effect that - should the respondent fail to disclose the specified documents before 30th September 2014, his defence would be deemed to be struck out and judgment is to be entered for the appellant, with costs to be assessed.

Respondent's Variation Application

[3] On 26th September 2014, the respondent made an application to vary the order for specific disclosure dated 14th May 2014 and the 'unless order' dated 24th July 2014. The respondent also sought relief from sanctions for not disclosing the documents as ordered. The grounds of the application were essentially that the respondent had legitimate reasons why he had not complied with the orders of the court concerning the plans for the project and the cheque; that is, efforts to locate further plans from the persons who had drawn them up having been unsuccessful and cheque number 6879 turning out to be non-existent. In fact, a subsequent application was made to amend the defence to delete reference to the cheque. The

hearing of the respondent's variation application was scheduled for 21st October 2014. On 2nd October 2014, however, the appellant filed an application for judgment to be entered against the respondent for non-compliance with the "unless order".

[4] Prior to the hearing of the respondent's variation application on 21st October 2014, counsel for the appellant, Ms. Jenny Lindsay, had sought to have the hearing of the application adjourned to the following sitting of the learned master, which she stated would be in December 2014. The exhibits show that on 1st October 2014, Ms Lindsay emailed counsel for the respondent asking whether she was "agreeable for the matter to be heard" at the next sitting of the master in December 2014, on the basis that she (Ms. Lindsay) would be out of the country during the upcoming master's sitting. It appears that Ms Lindsay had not received a reply by 7th October 2014, because a follow up email was sent on that date to counsel for the respondent. Subsequently, on 10th October 2014, Ms. Lindsay informed the Registrar of the Supreme Court (by email) that she would be travelling at the end of October and so would not be available for the hearing of the respondent's application at the end of the month. She further stated that counsel on the other side was "agreeable for the matter to be heard on the next Master's list in December". She then went as far as asking that the Registrar acknowledges her email and confirms that her request for the adjournment had been granted. The Registrar replied on the same day informing counsel that the proper course to follow was to make an application for an adjournment in advance of the scheduled hearing date. On 13th October 2014, Ms Lindsay emailed the Registrar, with a letter attached to the email referencing a "Practice Direction 27 November 2006", pursuant to which she was making an application for an adjournment by letter of request. The contents of this letter of request were essentially identical to those of the email sent to the Registrar on 10th October 2014, and it concluded with a request to the Registrar to grant the application for the adjournment.

[5] The "Practice Direction 27 November 2006" to which Ms. Lindsay referred, was a memorandum from the then Acting Chief Justice Sir Brian Alleyne dated 27th

November 2006 and directed to the Registrars of the High Court of the member states and territories of the Eastern Caribbean Supreme Court informing them that "applications for adjournment may be made orally before the Court, by formal application on paper or by letter of request." The memorandum went on to state that – "The letter of request must state reasons and contain proof of service on, as well as an indication from the other side as to whether or not they object." The memorandum also directed the Registrars to circulate the information contained in the memorandum to all members of the Bar.

[6] The Registrar of the High Court of Anguilla replied to Ms Lindsay's email of 13th October 2014 by letter dated 15th October 2014 stating that she (the Registrar) had been unable to locate the practice direction to which counsel referred and reiterating that the proper course would be for counsel to make an application for consideration by the master. The Registrar further stated that she had no authority to grant counsel's request for an adjournment.

[7] The application to vary the order for specific disclosure and the "unless order" was heard by the learned master on 21st October 2014 in the absence of the appellant, his counsel, and the respondent. Only the respondent's counsel was present. The application to vary the orders was made on the basis that the overriding objective of the CPR is to enable the court to deal with cases justly and, in the circumstances, disclosure of the remaining undisclosed items was simply not possible. With regard to the building plans, the respondent stated, in his affidavit in support of his variation application, that all attempts to reach one Natasha Gumbs, who had drawn up the plans for the hotel's office building, had proven futile and so had efforts to source the plans from the Planning Department. Concerning cheque number 6879, the respondent stated that that cheque never in fact existed and was mentioned in the defence in error.

[8] Upon hearing the respondent's variation application, the learned master held that the respondent had proven that the documents directed for specific disclosure were

not then in the possession of the respondent and that reasonable attempts to locate them had proven futile and, further, that cheque number 6879 did not exist. The learned master denied the appellant's request filed on 2nd October 2014 for judgment to be entered against the respondent and for the terms of the orders made by the previous master on 14th May 2014 and 24th July 2014 to be varied "to extend the date for compliance with regard to the requirement for [the respondent] to disclose Cheque No. 6879, if it exists" and "to extend the date for compliance with regard to the electrical plan, sketches and other plans in so far as these are in [the respondent's] possession so as to comply with the obligations for continuing disclosure if and when these come into [the respondent's] possession". The learned master also ordered that the respondent be relieved from sanctions for not disclosing the documents in the time specified.

Appellant's Application to Set Aside Judgment Entered on 21st October 2014

[9] By notice of application filed on 13th November 2014, the appellant applied to set aside the order of the learned master made in his absence on 21st October 2014. The application was made pursuant to CPR 11.18.

[10] The learned master heard the appellant's application on 3rd December 2014, whereupon she stated that she would not usually accept letters from parties (including attorneys) for the adjournment of proceedings and that requests for adjournments can only be applications under Part 11 of the CPR, which sets out the details of the manner in which any application should be made. The learned master stated that she had gone as far as indicating to the Registrars in the jurisdictions in which she sits that she does not entertain letters submitted without the required formalities, on the basis that they force the court to hear the views of one side in the proceedings in the absence of the other side.

[11] The learned master noted that Ms. Lindsay proceeded to leave the jurisdiction and also instructed her client not to attend court, without the court's approval of the adjournment request. She held that Ms Lindsay, in her application to set aside the

order of 21st October 2014, failed to explain why she left the jurisdiction without confirmation that her request for an adjournment had been approved, and also failed to justify her client's absence in the circumstances. The learned master additionally stated that the respondent indicated to her that the Registrar had clearly directed Ms. Lindsay as to what she should do in terms of her request for an adjournment, but this was apparently disregarded. The master saw no reason why the appellant's counsel could conclude that she was entitled to leave the jurisdiction without a confirmation from the court that her request for an adjournment had been approved.

[12] Concerning the merits of the respondent's variation application, the learned master held that notwithstanding the fact that counsel for the respondent may not have been forthcoming about all that had taken place before the previous master who had made the order for specific disclosure and the "unless order", these orders were before her and it was necessary for her to consider them in arriving at a determination of the respondent's variation application. The previous master had found that the respondent had not established that it was impossible to disclose the items which remained to be disclosed and therefore held that the failure to disclose was unreasonable. On the application before her, however, the learned master found that the respondent had justified that performance of the disclosure orders was impossible. In the circumstances, she granted the respondent's application for variation and, by order dated 4th December 2014, she dismissed the appellant's application to set aside the order made on 21st October 2014.

The Appeal

[13] By notice of application filed on 18th December 2014, the appellant applied for leave to appeal the master's order dated 4th December 2014.[1] Leave to appeal was granted to the appellant on 27th January 2015 and the appellant's notice of appeal was filed on 18th February 2015 and an amended notice was filed on 26th February 2015.

[1] Although the application for leave to appeal, the notice of appeal and other documents refer to the master's order of 3rd December 2014, the actual order is dated 4th December 2014.

[14] The appellant's grounds of appeal are as follows:

(1) The learned master erred in law when she found that the unless order had not crystallised as the respondent's application to vary did not and could not operate as a stay to prevent the consequences of an automatic strike out clause.

(2) The learned master erred as a matter of law and fact in assessing that the unless order was impossible to perform with justification as there was no such evidence given to prove impossibility and, if there was, it was so weak that it could not be considered to prove impossibility or even justify impossibility in these circumstances.

(3) The learned master erred in failing to assess whether the respondent was truthful when he said he could not disclose the documents.

(4) The learned master failed to consider or give weight to whether or not the respondent is suppressing disclosure of documents.

(5) The learned master failed to consider or give weight to the significance and importance of the documents ordered to be disclosed and the effect of non-disclosure on the disposal of the issues at trial.

(6) The learned master failed to consider as a matter of law whether there could be a fair and just disposal of the claim at trial without disclosure as ordered.

(7) The learned master erred in finding that the respondent had presented fresh issues when in fact there were no fresh issues that had been presented by the respondent upon which the learned master could find as she did. All the same issues had been argued by the respondent at least on two separate hearings prior to the unless order being made.

(8) The learned master erred in the exercise of her discretion in allowing the application to vary more than 14 days after the order granting specific

disclosure dated 14th May 2014 and unless order was granted in the face of no material reasons for the delay of more than 16 weeks and 8 weeks, respectively.

(9) The learned master erred in the exercise of her discretion in granting relief from sanctions to the respondent by failing to consider the checklist pursuant to rule 26.8, more particularly in light of [the respondent] failing to comply with several orders prior to the unless order and the application to vary had not been made with promptitude.

(10) The learned master erred in law in failing to give any or any sufficient weight to the following matters in making her decision in the absence of the appellant and his attorney and the respondent at the hearing:

(a) the parties had agreed between themselves to seek the adjournment;

(b) the appellant relied upon the agreement to seek the adjournment and in the face of the agreement it was unfair and unjust for the respondent to proceed with his application in the knowledge that there was an agreement between the parties;

(c) the adjournment application was first in time and should have been heard on paper pursuant to the direction of the Chief Justice [Ag.] Brian Alleyne, SC dated 27 November 2006;

(d) the master's personal preferences in not reading letters from attorneys in light of the request for an adjournment pursuant to the direction/guidance of 27th November 2006 tended to unfairly prejudice the appellant who had complied with the direction of 27th November 2006;

(e) the respondent attempted to obtain an undertaking from the appellant not to make any applications on account of the parties' agreement to seek the adjournment;

(f) there were extreme conditions when Hurricane Gonzalo passed through Anguilla and there was no electricity which prevented normal business operations at the Registry that was closed for a period as was the attorney's office where there was no electricity for more than 7 days.

Submissions

[15] Ms. Lindsay submitted (on behalf of the appellant) that by the time the application was heard on 21st October 2014, the sanction contained in the "unless order" dated 24th July 2014 had already taken effect and the respondent's defence was struck out, so the learned master did not therefore have jurisdiction to proceed to hear the respondent's application as she did.

[16] Ms. Lindsay submitted that the "unless order" in this matter specifically stated that "should the respondent fail to comply with this Order within the time limited, the defence will be deemed to be struck out and judgment is to be entered for the applicant with costs to be assessed". She submitted that the learned master ought to have considered CPR 26.4 in coming to a determination on the "unless order". In particular, she should have had regard to sub-rule (7) which states that "If the defaulting party fails to comply with the terms of any 'unless order' made by the court that party's statement of case shall be struck out." Ms. Lindsay submitted that, for these reasons, the learned master erred in the exercise of her discretion, because she would not have had an unfettered discretion and could not grant leave to the respondent as a matter of law. She (Ms. Lindsay) argued that the master would have to apply the conditions in rule 26.8, as the court is expressly precluded from granting relief under this rule if the conditions set out therein are not satisfied. She submitted too that the discretion to grant relief under CPR 2000 is distinctly

fettered and relied on the Court of Appeal decision in The Nevis Island Administration v La Copropriete du Navire J31[2] as authority for this point.

[17] Ms. Lindsay contended that the appellant's application for judgment ought to have been heard and judgment entered in the claim, since the appellant had complied in full with CPR 26.5. This rule applies where the court makes an "unless order" in a matter and sets out the procedure which the party who seeks to obtain judgment would need to follow. Counsel accordingly submitted that the learned master erred in the exercise of her discretion in failing to set aside the order of 21st October 2014 and unfairly penalised the appellant by not allowing him the opportunity to respond to the respondent's variation application.

[18] Counsel submitted that, pursuant to CPR 26.8(1), an application for relief from sanctions must be made promptly, but that the respondent's application was made more than 2 months after the "unless order", without any reasons whatsoever given for the delay. She argued that the respondent ought to have given a good and substantial reason for not complying with the order. Counsel cited the case of John Cecil Rose v Anne Marie Uralis Rose[3] in support of this submission. Furthermore, she argued that the criteria set out in CPR 26.8(2) and 26.8(3) are conditions precedent to the grant of relief pursuant to rule 26.8, and the learned master erred because, not only did she not consider any of the criteria laid down in sub-rules (2) and (3) but, rather, she applied another "test" akin to judge made criteria which Barrow JA made reference to in The Nevis Island Administration case. She argued that the learned master suggested that it was impossible for the respondent to obtain the plans and she (the master) criticised the appellant's absence, even if she accepted that an application for adjournment had been made by letter to the Registrar by counsel for the appellant and that there were real and significant reasons for counsel's absence. Ms. Lindsay stated that the respondent's reasons for not being able to disclose the documents in question were no different from his

[2] SKBHCVAP2005/0007 (delivered 3rd April 2006, unreported).
[3] SLUHCVAP2003/0019 (delivered 22nd September 2003, unreported).

reasons which had been stated previously,[4] save and except for the fact that he had checked to see if the plans were in the Planning Department.

[19] Ms. Lindsay submitted that when the respondent's evidence is carefully considered, it is (at its highest) so weak and vague that the learned master ought to have dismissed the respondent's application. Moreover, applying the criteria set out in CPR 26.8(2), she submitted that the respondent cannot say that the failure to comply with the "unless order" was not intentional; he had prepared the sketch plans and the amended plans had been handed over to him, yet he had not filed those plans as he is legally required to do pursuant to sections 8-10 of the Land Development Control Act. Ms. Lindsay further complained that the learned master made no further enquiries of the respondent, notwithstanding that there were allegations that he was not telling the truth and was suppressing disclosure of the documents to prevent a fair and just outcome at trial and, ultimately, the payment of the outstanding debt. She argued that the plans, sketches and amended plans were critical to the trial, because they were the very documents that formed the basis of the agreed price for the project, and that the prejudice to the appellant would be material and significant if these plans and sketches were not obtained, whereas the respondent did not raise any issue of prejudice to himself.

[20] Ms. Lindsay submitted that the master failed to give due regard to the appellant's allegations that the respondent was suppressing disclosure of the documents to avoid a fair trial or payment of the debt, contrary to the interests of the administration of justice to which the court is required by CPR 26.8(3)(b) to have regard. She referred the Court to the case of Barbados Rediffusion Services Limited v Asha Mirchandani and Others,[5] citing dicta of Mr. Justice de la Bastide, who dealt with what is meant by a "fair trial". In this case, the President of the CCJ stated:

> "If there is a real risk that a fair trial may not be possible as a result of one party's failure to comply with an order of the Court, then that is a situation which calls for an order striking out the party's case and giving judgment

[4] A different master dealt with the disclosure order and the "unless order" on 24th July 2014, and had included the respondent's reasons in his order.
[5] CCJ Appeal CV1 of 2005.

> against him. One way in which such a situation may come about, is if crucial documents which are not disclosed within the time prescribed by an order for discovery, are subsequently lost or destroyed, albeit without fault on the part of the non-disclosing party. Another is where a party has been so fraudulent in relation to the discovery process, for example by forging or deliberately suppressing documents and lying about it, that it is impossible to place any reliance on what he has disclosed as being either authentic or complete, without a long and expensive inquiry."

[21] Ms. Lindsay made the further point that the learned master failed to consider whether in actual fact the respondent had generally complied with all other relevant rules, practice directions, orders and directions. She submitted that the respondent had generally failed to comply with numerous orders that had been made by the learned master, as well as with many of the rules and directions. Counsel proceeded to particularise those breaches of the rules. Accordingly, based on the facts and circumstances of the case at Bar, counsel submitted that it would be in the interest of the administration of justice to strike out the respondent's defence and enter judgment for the appellant.

[22] Ms. Lindsay submitted that the respondent's reasons for failing to comply with the "unless order" are so weak and vague that they give no reasons at all for his delay, and ought to prevent him from pursuing his defence. She argued that there was no prejudice to the respondent, whereas the prejudice to the appellant was material and substantial. Ms Lindsay submitted that the learned master erred in the exercise of her discretion by failing to balance the competing interests of justice and fairness. Accordingly, she submitted, the appeal should be allowed, the defence struck out, the appellant's application for judgment in default of specific disclosure be granted, and judgment entered for the appellant with costs, thereby setting aside the master's order dated 4th December 2014 and substituting its own order, with the effect of setting aside the master's order of 21st October 2014.

[23] The respondent did not file any submissions in the appeal.

Analysis

[24] The learned master had before her an application for the variation of both an order for specific disclosure and an "unless order", with the deadline for compliance with the specific disclosure order and the "unless order" having already passed. The variation application also asked that the respondent be "relieved from all sanctions for not disclosing the documents ordered". As stated previously, the sanction for non-compliance with the terms of the "unless order" was that the respondent's defence would be struck out. The master proceeded to hear the application with only the respondent's counsel being present. In accordance with CPR 11.17, it was within the learned master's discretion to proceed with the respondent's application in the absence of the appellant. The appellant, however, took issue with this.

[25] Ms. Lindsay submitted that a valid application for an adjournment had been made by means of letter of request and that the respondent had been "agreeable" to the granting of this adjournment. No evidence was exhibited, however, to support the appellant's assertion that counsel for the respondent had agreed or, to use the appellant's language, "was agreeable" to the grant of the adjournment. Ms. Lindsay had urged the Registrar (to whom the letter of request had been addressed) to confirm that the application for the adjournment had been granted, but the Registrar refused to do so.

[26] In my view, the Registrar quite properly advised Ms. Lindsay that she (the Registrar) had no jurisdiction to grant a party's request for an adjournment, and that the proper course was to make an application to the court, which the master would consider. When it came before her, the learned master placed very little significance on the appellant's application for an adjournment by letter of request. In the preamble of her order of 21st October 2014 and in her written judgment dated 4th December 2014, the master confirmed that she did not consider that the appellant's application by letter was properly before the court. She stated at paragraph 1 of her judgment

that she does not "entertain letters submitted without the required formalities". She found that Ms. Lindsay's explanations for her absence, as put forward in her application to set aside the order of 21st October 2014, did not justify her absence or the absence of her client. The learned master stated that she accepted that an adjournment may be sought orally, by formal application, or by a comprehensive letter of request, but, on the facts, the appellant had not met the requirements for making a successful application for an adjournment.

[27] I am of the view that the learned master was correct in taking the position which she did. Ms. Lindsay had merely stated in her letter that she was travelling out of the jurisdiction and so would not be available for the matter. Even the memorandum from the acting Chief Justice - which Ms. Lindsay referred to as a practice direction and on the basis of which she claimed that her application for an adjournment had been made - stipulated that applications for adjournments made by letter of request "must state reasons and contain proof of service on, as well as an indication from the other side as to whether or not they object". The last two of these three requirements were absent from Ms Lindsay's letter. She merely stated, at paragraphs 2 and 3 of her letter, that -

> "I am travelling and will not be available for this matter. I would like the matter moved to the next Master's List because the travel is for a pre-existing matter and booked prior to the hearing [being] set down for 20 October.
>
> "I have spoken with the attorney for the Defendant with conduct of the matter, Ms Hodge and she [is] agreeable for the matter to be heard on the next Master's list in December. I expect Ms. Hodge will confirm same in writing also."

[28] In my view, Ms. Lindsay's statements certainly did not satisfy the requirement of proof of service on the respondent and probably did not satisfy the requirement of an indication from the other side as to whether they object to the grant of the adjournment; Ms. Lindsay merely stated in her letter that the attorney for the respondent was "agreeable for the matter to be heard on the next Master's List in December". If Ms. Lindsay intended to rely on the Acting Chief Justice's "practice

direction" as the basis for her letter application, then she had to ensure that the stipulations contained in the Acting Chief Justice's memo were satisfied; both of these requirements should have been and were not proved by affidavit evidence. Accordingly, I find that the appellant's letter of request did not meet the requirements of a properly made application for an adjournment, whether by way of letter of request or otherwise, and that there was no error on the part of the learned master in so deciding.

[29] In terms of the "letter of request" referred to in the memorandum from the former Acting Chief Justice, I do not believe that this memorandum can supersede the Civil Procedure Rules. It could not do so even if it was a practice direction; but it is evidently not even a practice direction in accordance with Part 4 of the CPR, because there is no indication that it was ever published in the Official Gazettes of the Member States and Territories of the Eastern Caribbean Supreme Court, which is required if it to have the status of a practice direction. An application for an adjournment, therefore, like any other application to the High Court sitting in its civil capacity, must be made in accordance with Part 11 of the CPR. This can be in the form of a letter, so long as the letter complies with or, at the very least, does not conflict with the requirements of Part 11.

[30] This would dispose of ground 10 of the appellant's grounds of appeal and I would accordingly dismiss this ground and then proceed to address the other 9 grounds of appeal.

[31] Grounds 1-9 of the appellant's grounds of appeal deal with the learned master's determination of the application to vary the terms of the order for specific disclosure and the "unless order".

[32] The substance of the master's reasons for the decision to allow the respondent's variation application is contained within paragraph 8 of her judgment, which reads as follows:

> "The application of the defendant of the 26th of September 2014 was filed before the effect of the unless order crystallized. It sought to vary the obligation for disclosure made by the previous Master on the basis that performance was impossible, with justification of the impossibility. It also sought to amend the defence filed. The defendant submits that the application was made pursuant to Part 1 and Part 20 of CPR 2000. My own view is that the variation of compliance is authorized under Part 42.9 (2) [and] Part 26.1. I, having satisfied myself that the application was justified granted it, varying the time for compliance in one instance and dispensing with compliance on the other, on the basis that upon review the obligation to comply was impossible."

[33] The master simply noted that the respondent's application was filed "before the effect of the unless order crystallised", but she did not go on to expound on the effect of this observation. It is noteworthy, though, that she made no pronouncement on whether, by the time the application had come on for hearing, the sanction had taken effect. The learned master simply went on to state that she was choosing to exercise her discretion in favour of the respondent, having accepted his grounds for making the variation application.

[34] The appellant's first ground of appeal states that the master erred in law when she found that the unless order had not crystallised, as the respondent's application to vary did not and could not operate as a stay to prevent the consequences of an automatic strike out clause. Here, the appellant seems to be taking the view that the master was implying that because the variation application had been filed prior to the sanction taking effect, it still had not taken effect by the time the application came on for hearing.

[35] In this regard, Ms. Lindsay submits that the learned master failed to have regard to the term of the "unless order" which specifically stated that the defence will be deemed to be struck out if the respondent failed to comply with the terms of the order. The master proceeded without expressly dealing with the sanction contained in the "unless order". She did not say whether it had not come into effect at all, or whether it had come into effect and she had granted the respondent relief from the sanction and, if so, on what grounds.

[36] In terms of the "unless order", several issues arise which bear on this appeal.

[37] The first issue which arises is whether - by the time the application for relief from sanctions was made on 26th September 2014 or when it was heard on 21st October 2014 – in the words of the learned master: "the unless order [had] crystallized'. But this ought not to have been an issue, because the order is clear and definite; it imposed an obligation on the respondent to comply with an explicitly-identified order of the court by 30th September 2014, failing which his defence will be deemed to be struck out and judgment is to be entered in favour of the appellant/applicant with costs to be assessed. The clear effect of this order is that, upon the respondent failing to comply with the identified order by 30th September 2014, his defence is struck out, consequent on which judgment is to be entered against him. The respondent need not do anything before 30th September 2014 to prevent the "unless order" from taking effect and the appellant need not do anything after 30th September 2014 to cause the "unless order" to take effect. As at 26th September 2014, therefore, when the respondent made his application, the "unless order" had not yet come into effect, but on 1st October 2014, the order came into effect and the respondent no longer had a defence to the claim, and he became susceptible to a judgment being entered against him. For judgment to be entered against the respondent, however, CPR 26.5(3) requires the appellant to file a request for judgment and the other provisions of rule 26.5 lay down the steps to be followed to obtain the judgment.

[38] The second issue which arises is whether, the "unless order" having taken effect, its effect can be reversed by the court.

[39] CPR 26.7(2) provides that the sanction imposed by a court order – in this case the striking out of the respondent's defence – has effect unless the party in default applies for and obtains relief from sanctions. Then CPR 26.8(1) provides when and how the application for relief is to be made, whilst 26.8(2) and (3) provide for the factors to be considered by the court in determining the application for relief.

Contrary to the general practice though, including in the case at bar, the application for relief from sanctions ought only to be made after the sanction has taken effect, because it is only then the court can consider the factors on the basis of which the application is to be determined. The court cannot be "satisfied that – (a) the failure to comply was not intentional" if there has not been a failure to comply, which results only from the deadline under the "unless order" elapsing without compliance by the party applying; the court also cannot consider whether – "there is a good explanation for the failure" if there has not been a failure; and there can be no "party in default" if the time for compliance has not elapsed. It is also axiomatic that the court can only exercise its powers in cases of failure to comply – in accordance with rule 26.7 – when there has been a failure to comply, which only comes about when there has not been compliance by the date stipulated in the "unless order".

[40] The application for relief from sanctions in this case, having been made on 26th September 2014, for relief from sanctions taking effect on 1st October 2014, was in fact made prematurely and ought properly to have been made on a date after 30th September 2014. Having regard to the fact though that it was not a stand-alone application, but was appended to an application for variation of another order of the court, which variation application was properly made before the sanction had taken effect, and the relief from sanctions application having come up for hearing only after the sanction had taken effect, the premature making of the application is not sufficiently material in this case to constitute a basis for interfering with the master's order.

[41] It should be noted that when CPR 26.8(1) states that the application for relief from sanctions for a failure to comply with a rule, order or direction must be made promptly, it would necessarily be referring to a date after the unless order has taken effect.

[42] It would be useful for legal practitioners to note that applications for extensions of time or for variation of an order specifying a date for doing something should

generally be made before the time for compliance has elapsed, in which case they need not be filed together with an application for relief from sanctions. On the other hand, applications for relief from sanctions ought properly to be filed after the sanction has taken effect, because what one is seeking is relief from a sanction which is in effect. In the case of applications for relief from sanctions, they should generally be accompanied by an application for an extension of time to comply with the order, or for variation of the order, stipulating a date with respect to which the applicant was sanctioned.

[43] The third issue which arises in relation to the "unless order" is the effect of the grant of relief from sanctions on the obligation for which the sanction was imposed. When relief is granted from the sanction, in this case the striking out of the respondent's defence for his failure to disclose certain documents, the obligation to disclose at the time originally ordered remains, but the sanction date is effaced. There would, in such cases, normally be an application for an extension of the time for compliance with the original order or for the sanction taking effect, which would have to be granted if the relief from sanctions is to have any meaning. In the present case, the application was for variation of the specific disclosure order, the violation of which led to the making of the 'unless order'.

[44] Bearing in mind the above analysis, I would treat with grounds 1 to 9 of the appellant's grounds of appeal as follows:

(1) As to ground 1, the learned master erred in so far as she stated that as of 26th September 2014 the effect of the unless order had not "crystallized", since the order was always clear and definite, but she was correct in so far as she sought to convey that the order had not yet taken effect. Nowhere in her judgment did the master state that the respondent's application operated as a stay to prevent the consequences of an automatic strike out clause, and any challenge to her judgment on this basis is not well founded. The appellant's first ground of appeal does nothing therefore to disturb the

judgment of the master and consequently, as a ground of appeal against her judgment, I would accordingly dismiss it.

(2) As to ground 2, there was uncontroverted affidavit evidence before the master explaining the impossibility of performance of the obligation to make specific disclosure of certain documents, on the basis of which evidence the master made the order that she did on 21st October, and which order she found no basis to set aside in her order of 4th December. There is, therefore, no basis upon which this Court could upset this factual finding of the master, so I would accordingly dismiss ground 2.

(3) Grounds 3, 4, 5 and 6 of the appellant's grounds of appeal are disposed of by the finding made by the master, on the basis of the evidence before her, as to the impossibility of performance of the obligation to disclose at all or within the time specified in the disclosure order. I would accordingly dismiss grounds 3, 4, 5 and 6.

(4) As to ground 7, this Court is not in a position to pronounce on the freshness or otherwise of the issues canvassed by the respondent to the master upon which the learned master made the finding that she did on the impossibility of disclosure. In any event, it was open to the learned master to make the finding that she did based on the issues canvassed before her, even though another master had on 24th July 2014, made a different finding on similar issues canvassed before him. I can find no basis therefore to interfere with the master's determination in this regard and I would therefore dismiss ground 7 of the appeal.

(5) In terms of ground 8, as was noted in paragraph 39 above, an application for relief from sanctions imposed by an "unless order" ought properly to be made after the sanction has taken effect and so there can be no issue about an application made 5 days before the sanction takes effect being a delayed one. In terms of the application for variation of the order of 14th May 2014, this is not an application under CPR 11.16 or 11.18 to vary or set aside an

ex parte order, which application must be made within 14 days of service of the order on the applicant; what was sought in this case was the variation of a disclosure order on an application premised on the failure, after continuous searches, to locate documents ordered to be specifically disclosed. In the circumstances, the grant of an application to vary the disclosure order made within the period for disclosure (as per the "unless order") does not in my view suggest any error of the master in the exercise of her discretion in granting the application for variation of the order. Furthermore, the issue here is one involving the exercise by the learned master of her judicial discretion, interference with which could only be justified – in accordance with Dufour v Helenair Corporation Ltd[6] – if the master, in the exercise of her discretion, "exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong". The facts and circumstances of this case would not assist the appellant in this regard. I would accordingly dismiss ground 8 of the appeal.

(6) In terms of ground 9 of the appellant's grounds of appeal, the last limb of it concerning the promptitude of the respondent's application for variation has already been disposed of, leaving the more substantial issue of the master's alleged error in the exercise of her discretion in granting relief from sanctions by failing to consider the "checklist pursuant to rule 26.8, more particularly in light of [the respondent] failing to comply with several orders prior to the unless order". This ground does have some merit, based on the master not having specifically indicated or demonstrated in her judgment that she had satisfied herself on the factors enumerated in CPR 26.8(2) or that she had regard to the factors enumerated in CPR 26.8(3). The judgment does not, however, indicate or demonstrate that the master did not satisfy herself on or did not have regard to the factors enumerated in rule 26.8(2) and (3). Moreover, her expressed findings would indicate that

[6] (1996) 52 WIR 188.

she was satisfied that the respondent's failure to comply with the terms of the "unless order" was not intentional and that there was a good explanation for his failure to comply. Her expressed findings would also indicate that she had regard to the effect which the granting of relief would have on the parties, the interests of the administration of justice, and the possible remedying of the respondent's failure to comply. The issues of whether the failure to comply was due to the party or the party's legal practitioner and of the effect of the grant of relief on a trial date did not appear to arise in this case. It is to be noted though that the issue of general compliance by the respondent with relevant rules, practice directions, orders and directions was not addressed expressly or impliedly in the master's judgment, but there is nothing to indicate that the master did not have regard to such, the non-compliance therewith she might have been aware of, if any, or that there were in fact egregious instances of non-compliance which would have affected the master's disposition of the respondent's application. Indeed, the instances of non-compliance by the respondent enumerated in the appellant's submissions are not egregious and are not, in my view, of such a nature as should affect the court's granting of relief from sanctions. Again here, as with the previous ground of appeal, the appellant would have to surmount the hurdle of Dufour v Helenair by bringing the master outside the ambit of reasonable disagreement and bringing her into the realm of being clearly or blatantly wrong. The appellant cannot, on the relevant facts and circumstances of this case, surmount this hurdle. I would accordingly dismiss ground 9 of the appeal.

[45] All of the 10 grounds of appeal having in my view merited dismissal, I would accordingly dismiss the appeal, with costs to be costs in the cause.

Mario Michel
Justice of Appeal

I concur

Gertel Thom
Justice of Appeal

I concur

Paul Webster
Justice of Appeal [Ag.]