EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2018/0044

BETWEEN:

EMMERSON INTERNATIONAL CORPORATION

Appellant

and

[1] STARLEX COMPANY LIMITED
[2] SUNGLET INTERNATIONAL INC

Respondents

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]
The Hon. Mr. Godfrey Smith	Justice of Appeal [Ag.]

Appearances:

Mr. Phillip Marshall, QC with him, Mr. Robert Weekes and Ms. Colleen Farrington for the Appellant.
Mr. Simon Birt, QC with him, Ms. Arabella di Iorio for the Respondents.

2018: October 31;
2019: March 11.

Civil appeal — Interlocutory appeal — Failure to file defence to ancillary claim within prescribed time — Relief from sanctions — Rule 26.8(2) of the Civil Procedure Rules 2000 — Whether judge erred in granting relief from sanctions

The appellant, Emmerson International Corporation ("Emmerson") is a company incorporated in the British Virgin Islands. The respondents, Starlex Company Limited ("Starlex") and Sunglet International Inc. ("Sunglet") are part of the Renova Group of Companies ("Renova"). Starlex and Sunglet are incorporated and have their registered agents located in Belize, but they do not conduct business there. The main underlying dispute concerns a joint venture which related to certain Russian power generation and distribution of assets. The Abyzov parties, which includes Emmerson, are the effective claimants in those proceedings brought against the Renova parties, which includes the

respondents. Emmerson has also brought an ancillary claim (the "third ancillary claim") against several defendants. The claims against Starlex and Sunglet were added as part of the third ancillary claim. Having unsuccessfully sought to have Starlex and Sunglet's BVI lawyers accept service of the third ancillary claim, Emmerson served the ancillary claim at Starlex's and Sunglet's registered addresses. Starlex and Sunglet were required to file their acknowledgments of service within 28 days of receipt of the third ancillary claim and were required to file their defences within 42 days. However, they failed to do so by the deadlines. Nonetheless, once the relevant officials became aware of the service of the third ancillary claim, Starlex and Sunglet filed their respective defences.

Thereafter Emmerson filed an application seeking a declaration that Starlex and Sunglet should be deemed to admit the third ancillary claim since they did not file their defences within the prescribed times. Subsequently, Starlex and Sunglet filed an application for relief from sanctions and an extension of time within which to file their defences. Starlex and Sunglet claimed that due to inadvertence, the relevant Renova officials were unaware that they had been served with the third ancillary claim. Further, that there was a breakdown in the chain of communication between their agents in Belize and relevant Renova officials based in London and Moscow.

The learned judge granted the application for relief from sanctions, holding that Starlex and Sunglet had satisfied all three pre-requisites of rule 26.8(2) of the Civil Procedure Rules 2000 ("CPR"). The judge also made findings of fact, the effect of which is that Starlex and Sunglet were so inextricably linked to Renova that the "right persons" to make the decisions were not Starlex and Sunglet simpliciter. The judge therefore found, inter alia, that the failure to file the defences within the prescribed times was caused by a breakdown in the normal channel of communication between the registered agents and the relevant officials of Starlex and Sunglet or inadvertence.

Emmerson, being dissatisfied with the judge's decision, appealed. The issue for this Court's determination is whether the learned judge erred, as a matter of law, in granting relief from sanctions, on the basis that Starlex and Sunglet had satisfied all three pre-requisites of CPR 26.8(2).

Held: dismissing the appeal and ordering that each party shall bear its own costs, that:

1. For relief from sanctions to be granted, all three preconditions outlined in CPR 26.8(2) must be satisfied by an applicant who seeks relief. The applicant must establish: that the failure to comply was not intentional; that there is a good explanation for the failure; and that the applicant has generally complied with all other relevant rules, practice directions, orders and directions. The failure to satisfy any of the three pre-conditions is fatal to the application for relief from sanctions.

   Rule 26.8(2) of the Civil Procedure Rules 2000 applied; Ferdinand Frampton v Ian Pinard et al DOMHCVAP2005/0015 (delivered 3rd April 2006, unreported) followed; Inna Gudavadze et al v Ivane Chkhartishvili BVIHCMAP2016/0037 (delivered 11th January 2017, unreported) followed.

2. There is no basis for criticising the judge for failing to examine whether Starlex and Sunglet's conduct was unintentional by reference to what steps they took to meet the deadline. As the relevant officials of Starlex and Sunglet say that they were unaware that the third ancillary claim was served on them, it could not be asked in any sensible way what reasonable steps they took to meet the deadline. They simply were not aware of the deadline, on their case. It was therefore open to the judge to conclude that Starlex and Sunglet's failure to file their defences was unintentional. Further, it has not been shown that the judge's order was perverse or clearly wrong. Accordingly, insofar as the first limb of the sub-rule is concerned, that the judge's decision is correct as a matter of law.

   Rule 26.8(2)(a) of the Civil Procedure Rules 2000 applied; Adam Bilzerian v Gerald Lou Weiner and Kathleen Ann Weiner SKBHCVAP2012/0028 (delivered 24th May 2013, unreported) distinguished; Ken I Young v The Attorney General of Saint Vincent and the Grenadines SVGHCV2014/0226 (delivered 20th July 2016, unreported) considered; Issa Nicholas (Grenada) Ltd v Time Bourke Holdings (Grenada) Ltd GDAHCVAP2015/0029 (delivered 8th December 2016, unreported) followed; The Attorney General v Universal Projects Limited [2011] UKPC 37 applied.

3. Misapprehension of the law, lack of diligence or volume of work does not constitute good explanations for a failure to comply with a rule or court order. Oversight may be excusable in certain circumstances. However, it is unlikely that inexcusable oversight or "administrative inefficiency" can ever amount to a good explanation. In the case at bar, it is evident that there was a breakdown in communication between Starlex and Sunglet's registered agents in Belize and the relevant persons in London, in circumstances where the 'engine room' of both companies seem to be in London and Moscow. The judge was fully aware of the matters that usually amounted to a good explanation and properly examined the facts of the case before him, including the excusable inadvertence and lack of awareness that the third ancillary claim had been served. Further, the judge's findings are unimpeachable when considering that Starlex and Sunglet conducted no business in Belize. In view of the totality of circumstances, there is no discernible error of law in the judge's conclusion that the good explanation limb had been satisfied.

   Rule 26.8(2)(b) of the Civil Procedure Rules 2000 applied; QVT Fund V LP et al v China Zenix Auto International Group Ltd. et al BVIH(COM)2014/0026 (delivered 2nd December 2016, unreported) applied; Attorney General v Universal Projects Limited [2011] UKPC 37 applied; Laudat v Ambo DOMHCVAP2010/0016 (delivered 15th December 2010, unreported) distinguished.

4. There is no basis to conclude that the judge erred in finding that Starlex and Sunglet had generally complied with all other relevant rules, practice directions, orders and directions in circumstances where they had not filed their

acknowledgments of service and defences. As Emmerson's claims are still in its infancy, Starlex and Sunglet would have been required to meet very few procedural requirements. The main failure that was at the heart of the application for relief from sanctions was Starlex and Sunglet's failure to file their defences. Accordingly, the judge correctly concluded that Starlex and Sunglet's failure to file their acknowledgments of service were part and parcel of their failure to file their defence on time.

Rule 26.8(2)(c) of the Civil Procedure Rules 2000 applied.

JUDGMENT

Introduction

[1] BLENMAN JA: This is an appeal by Emmerson International Corporation ("Emmerson") against the decision of the learned Justice Wallbank in which the judge granted relief from sanctions to Starlex Company Limited ("Starlex") and Sunglet International Inc. ("Sunglet") arising from their failure to file their respective defences to an ancillary claim. Emmerson says that the judge erred, as a matter of principle, in the exercise of his discretion and seeks to have this Court reverse the judge's decision. Starlex and Sunglet argue that, in any event, the judge exercised his discretion in a manner that cannot be impugned. They say that the judge's decision is a case management decision with which this Court ought not to lightly interfere.

[2] I propose to give a summary of the relevant background.

Background Summary

[3] Emmerson is a company incorporated in the British Virgin Islands. Starlex and Sunglet are companies incorporated in Belize which also have their registered agents located in Belize. However, they do not conduct any business in Belize. They are a part of the Renova Group of Companies ("Renova"). The substantive claim below involves a dispute, between the Renova parties and the Abyzov

parties,[1] concerning a joint venture known as IES Belize relating to certain Russian power generation and distribution of assets. At the heart of the substantive claim are the contentions that the Renova parties and the Abyzov parties concluded a joint venture agreement and entered into a written agreement called "the Principal Terms". Renova contends that it is binding on the parties. The Abyzov parties, which includes Emmerson, are the effective claimants in those proceedings brought against the Renova parties, which includes the respondents to this appeal. Emmerson has also brought an ancillary claim (the "third ancillary claim") against several defendants, which is of specific relevance to this appeal. The third ancillary claim alleges that a transfer of shares in one of the IES companies was made in order to strip that company of its assets so as to prevent the Abyzov parties recovering the sums which they had transferred under certain loan agreements.

[4] With leave of the court below, the claims against Starlex and Sunglet were added as part of the third ancillary claim. Emmerson unsuccessfully sought to have Starlex and Sunglet's BVI lawyers, Maples and Calder, accept service of the ancillary claim.

[5] Renova had lawyers both in Russia and London, all of whom seemed to be involved in some way in giving legal advice to Renova and companies associated with Renova including Starlex and Sunglet. Starlex and Sunglet were partly advised on legal matters by Renova officials, specifically Mr. Igor Cheremikin and Ms. Evgenia Loewe, who is herself a defendant to the third ancillary claim.

[6] Eventually, on 23rd September 2017, Emmerson was able to serve the third ancillary claim on Sunglet's registered agent. In accordance with the Civil Procedure Rules 2000 ("CPR"), Sunglet was required to file its acknowledgment of service within 28 days of receipt of the ancillary claim and the statement of

[1] "The Abyzov parties" refers to the defendants, the claimants by way of counterclaim and of ancillary claim as well as the claimant by way of third ancillary claim.

claim and was required to file the defence within 42 days. Starlex was served with the third ancillary claim at its registered office in Belize on 20th September 2017. The deadlines for them to have filed their defences to the third ancillary claim were in early November 2017. Starlex and Sunglet claim that due to inadvertence, which will be addressed in more detail shortly, the relevant officials were unaware that they had been served with the third ancillary claim. As a consequence, both companies failed to file their respective defences within the requisite timelines. CPR 18.12, however, provides that if a defendant to an ancillary claim fails to file its defence within the permitted time, it is deemed to admit the ancillary claim and is bound by any judgment or decision in the main proceedings.

[7] Both Starlex and Sunglet say that there was a breakdown in the chain of communication between their agents in Belize and relevant Renova officials based in London and Moscow. However, when the relevant Renova officials learnt that service of the third ancillary claim had been effected on Starlex on 22nd May 2018, Starlex filed an acknowledgment of service on 6th June 2018 and a defence to the third ancillary claim on 8th June 2018.

[8] On 16th May 2018, Emmerson filed an application seeking a declaration that Starlex and Sunglet should be deemed to admit the third ancillary claim since they did not file their defences within the prescribed times. Starlex and Sunglet thereafter filed an application seeking relief from sanctions and an extension of time within which to file their defences. The learned judge, having heard the application for relief from sanctions, granted the application.

[9] As indicated earlier, Emmerson has appealed against the judge's decision on the basis that he made errors of principle in granting relief from sanctions. They have filed several grounds of appeal.

Issues on appeal

[10] The issues which arise from the grounds of appeal can be refined into one main

issue, namely, whether the learned judge erred as a matter of law in granting relief from sanctions, on the basis that Starlex and Sunglet had satisfied all three pre-requisites of CPR 26.8(2).

[11] I turn now to look at the proceedings below in order to provide the requisite context.

The Application for Relief from Sanctions

[12] In support of the application for relief from sanctions were a number of affidavits filed on behalf of the Starlex and Sunglet. Chief among them were two affidavits that were sworn to by learned counsel, Ms. Arabella di Iorio, namely the fifth and sixth affidavits, in which she indicated the reasons that occasioned the non-filing of the defences to the third ancillary claim.

[13] I do not propose to recite the affidavits in any detail but it is sufficient to say that in relation to Sunglet, Ms. di Iorio said, among other things, that the representatives of Sunglet located at its registered office did not appreciate the true significance of receipt of the claim form, statement of claim and related documents in the third ancillary claim. She indicated that, when Mr. Max Samaylou, a Renova official, was handed the third ancillary claim, he was informed that Ms. Loewe already had the documents in question. That appears to have been based on the fact that a Renova staff member was aware that Ms. Loewe had already been provided with the third ancillary claim documents served on Renova Bahamas which is a majority shareholder in Sunglet. She said that it appears from the above that said Renova staff member did not appreciate the significance of the third ancillary documents being served on Sunglet itself.

[14] In relation to Starlex, Ms. di Iorio said that two employees of Starlex's directors, Costas Tsirides and Co. LLC forgot to notify anyone of the third ancillary claim documents when they received them. Ms. di Iorio says that the failure to pass on the documents was not intentional and that it has caused a great deal of

embarrassment and is a highly unusual occurrence. She further stated that "the directors of both Starlex and Starlex are aware of the general importance of complying with court orders and rules". Ms. di Iorio also stated that the failure, by Starlex and Sunglet, to file their defences was not intentional. Further, she stated that once the relevant officials became aware of the service of the third ancillary claim, they immediately took corrective measures to file their respective defences.

The Judgment Below

[15] The learned judge having heard the application by Starlex and Sunglet for relief from sanctions delivered an extempore judgment, in which he assessed the evidence and considered the submissions and ruled that they both had satisfied CPR 26.8(2). Applying his discretion in accordance with CPR 26.8(3), the judge granted both parties relief from sanctions. In this appeal, the complaint is not made in relation to CPR 26.8(3).

[16] Against that backdrop, I now turn to examine the main issue that has been identified on the appeal, namely, whether the learned judge erred as a matter of law in granting Starlex and Sunglet relief from sanctions on the basis that CPR 26.8(2) had been satisfied.

Appellant's Submissions

[17] Learned Queen's Counsel, Mr. Marshall, stated that the learned judge's decision was wrong as a matter of law. He emphasised that, in his view, the case at bar does not engage the question of whether the judge exercised his discretion properly, since the errors that were made are in relation to the judge's conclusion that Starlex and Sunglet had satisfied CPR 26.8(2). Having referred to a number of authorities, Mr. Marshall, QC reminded this Court that, in order to be able to obtain relief from sanctions, a litigant has to satisfy all three of the preconditions that are stated in CPR 26.8(2). He said that the judge erred in his application of CPR 26.8(2) to the facts.

[18] In relation to the first condition that the failure to comply must be unintentional, Mr. Marshall, QC also stated that the question that the judge asked himself, namely, whether Starlex and Sunglet had taken all reasonable steps to meet the deadline insofar as they were aware of it was the wrong question. He said that the test to be applied is whether they had taken reasonable steps to meet the deadline and if so, why did they still miss the deadline. On a related issue, Mr. Marshall, QC said that the judge took a wrong approach to the question of intention by looking at the conduct of Renova as a whole. He also said that the court should have determined whether the failure to comply was not intentional by looking at Starlex and Sunglet's conduct only. He argued that the court must therefore consider the intention of the party that fails to comply. He said that the judge wrongly determined that the relevant officials of Renova, who were handling the litigation, were among the relevant persons and in that context sought to determine the question of intention. He suggested that the judge should have confined himself to the registered agents of Starlex and Sunglet, who were in Belize.

[19] On the matter of good explanation, Mr. Marshall, QC said that the learned judge wrongly accepted that the explanations given by Starlex and Sunglet amounted to good explanations in law. Mr. Marshall, QC said that the case before the judge and the explanation given fell within the matters which the court has said are administrative inefficiencies, which do not amount to a good explanation. Accordingly, he said that the judge erred in holding that the explanation amounts to a good explanation.

[20] Mr. Marshall, QC said that the learned judge also erred in concluding that the defaulting party has generally complied with the rules, practice directions, and orders and pointed to the contrary. He said that the conduct of Starlex and Sunglet "demonstrated the polar opposite of general compliance" and the learned judge erred, as a matter of principle, in his conclusion on that pre-condition.

Respondent**s' Submissions**

[21] Learned Queen's Counsel, Mr. Birt, said that the learned judge was entitled to grant Starlex and Sunglet relief from sanctions if he considered that the pre-conditions set out in CPR 26.8(2) were satisfied and if he concluded, in the exercise of his discretion, that granting relief was appropriate in all the circumstances. He reminded this Court that the relevant preconditions are that: (i) the respondents' failure to serve their defences on time was "not intentional"; (ii) there was a "good explanation" for that failure; and (iii) Starlex and Sunglet had "generally complied with all other relevant rules, practice directions, orders and directions". He said that the judge was entitled to conclude that these preconditions were satisfied. If that is correct, the Court of Appeal may only interfere with the judge's decision to grant Starlex and Sunglet relief from sanctions if he erred in principle or if his decision was "plainly wrong" in the sense of being outside the generous ambit where reasonable decision makers may disagree. Mr. Birt, QC opined that the test was clearly not satisfied and Emmerson has not suggested to the contrary.

[22] Mr. Birt, QC said that when exercising his discretion, the learned judge was required to have regard to the factors set out in CPR 26.8(3). He said that it is also right to note, in relation to his decision that the pre-conditions in CPR 26.8(2) were satisfied, that "an element of discretion is inherent in [those] preconditions". He said that the factors set out in CPR 26.8(3) include the effect which granting relief would have on each party. It is, therefore, highly relevant that CPR 18.12(2)(a) imposes an immediate and "draconian" sanction on a party who fails to file a defence to an ancillary claim within the time permitted. Starlex and Sunglet have both filed defences disputing the allegations made in the third ancillary claim. He said that if the judge had not granted relief from sanctions, they would have been shut out from defending a claim worth potentially hundreds of millions of dollars and involving serious allegations of wrongdoing. Mr. Birt, QC pointed out that Starlex and Sunglet defend the third ancillary claim on exactly the same grounds as a number of other Renova parties and, as a result, the merits of that

defence will need to be investigated at trial, regardless of the outcome of this appeal.

[23] Mr. Birt, QC said that Emmerson suffered no prejudice at all as a result of the learned judge's decision. As the judge correctly recognised, Emmerson merely lost a windfall litigation advantage which, but for CPR 18.12(2)(a), it would not have obtained. Mr. Birt, QC further stated that the delay in Starlex and Sunglet filing and serving their defences has not caused any disruption to the proceedings because the third ancillary claim is in its infancy. He observed that no directions have yet been made for disclosure or witness statements relating to the third ancillary claim, no trial date has ever been set for the third ancillary claim, and a number of the defendants to the third ancillary claim may not even yet have been served.

[24] Turning now to the first condition that, the failure to comply was unintentional. Mr. Birt, QC said that CPR 26.8(2)(a) states that the court may grant relief from sanctions only if it is satisfied that the failure to comply with the rule was "not intentional". Having considered the evidence and the circumstances, the learned judge concluded that the failure of Starlex and Sunglet to file their defences within the time permitted was not intentional. He said that Emmerson challenges that conclusion by asserting that the judgment in Adam Bilzerian v Gerald Lou Weiner and Kathleen Ann Weiner[2] requires that a failure to comply with the deadline should be regarded as intentional unless the party in default can demonstrate that it "took all reasonable steps to meet the deadline". However, Mr. Birt, QC noted:

> "That is not what CPR 26.8(2)(a) says; the requirement is simply that the party in default must show that its failure to comply was "not intentional". (2) The judgment in Bilzerian did not purport to lay down a test that must be satisfied in all cases; [the court] was merely explaining that, if a party has taken all reasonable steps to meet a deadline, then that party's failure to comply with the relevant rule should not be regarded as intentional. But that is not the only way of demonstrating that a failure to meet a deadline

[2] SKBHCVAP2012/0028 (delivered 24th May 2013, unreported).

> was unintentional. (3) In any event, the relevant in-house lawyers representing [Starlex and Sunglet] did take all reasonable steps to file a defence as soon as possible after having become aware that service had validly been effected on [Starlex and Sunglet]; they could not have taken steps before that because they were not aware of the need to do so."

[25] Mr. Birt, QC pointed out that in Ken I Young v The Attorney General of Saint Vincent and the Grenadines,[3] it was made clear that: "a finding of intentional failure to comply with a rule or order appeared to require evidence (direct or indirect) of some conscious, deliberate decision not to comply". Mr. Birt, QC said that the judgment in Issa Nicholas (Grenada) Ltd v Time Bourke Holdings (Grenada) Ltd[4] is entirely consistent with that observation, because, whilst the defendant's conduct in that case was not regarded as "contumacious", the defendant nevertheless "clearly took a position" and was "aware of the risk it took".

[26] Mr. Birt, QC reminded this Court that in The Attorney General v Universal Projects Limited,[5] Lord Dyson said:

> "Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly, if the explanation for the breach is administrative inefficiency".

[27] Mr. Birt, QC also sought to rely on Inteco Beteiligungs AG v Sylmord Trade Inc.[6] to bolster his argument. He said that it concerned an application to set aside a default judgment under CPR 13.3, which requires an applicant to provide a "good explanation" for the failure to file an acknowledgment of service or a defence. In that case, Bannister J defined a 'good explanation' as: "something other than mere indifference…[m]uddle, forgetfulness, an administrative mix up, are all capable of being good explanations…". There was no suggestion by the Court of Appeal in Sylmord Trade Inc. v Inteco Beteilligungs AG[7] nor any suggestion by the parties in that case, that the trial judge had adopted the wrong

[3] SVGHCV2014/0226 (delivered 20th July 2016, unreported).
[4] GDAHCVAP2015/0029 (delivered 8th December 2016, unreported).
[5] [2011] UKPC 37.
[6] BVIHC(COM)2012/0120 (delivered 9th May 2013, unreported).
[7] BVIHCMAP2013/0003 (delivered 24th March 2014, unreported).

test in assessing whether a 'good explanation' had been provided for the defendant's failure to file a defence on time. Emmerson appears to suggest that the decision in Sylmord was per incuriam because the Universal Projects case was not cited to the judge in that case. That is plainly incorrect as the judgment in Sylmord, given by Michel JA, expressly quoted Lord Dyson's judgment in Universal Projects.

[28] Mr. Birt, QC said that Emmerson relies on Laudat v Ambo,[8] in which this Court stated that misapprehension of the law, lack of diligence or volume of work does not constitute good explanations for a failure to comply with a rule or court order. However, he pointed out that in the case at bar, Justice Wallbank expressly referred to that case and said that the failure to file the defences within the prescribed times was not caused by a misapprehension of the law, lack of diligence or volume of work. It was caused by a breakdown in the normal channel of communication between the registered agents and the relevant officials of Starlex and Sunglet or, in a word, inadvertence.

[29] Mr. Birt, QC argued that the judge was entitled to conclude that Starlex and Sunglet had provided a good explanation for that failure, because it was not due to mere indifference, carelessness or a desire to be obstructive, it was unavoidable inadvertence. He said that, on this basis, Emmerson cannot succeed.

[30] Turning next to the third precondition relating to general compliance with rules, procedures, and orders. Mr. Birt, QC said that Emmerson's argument, in relation to the requirement in CPR 26.8(2)(c), that Starlex and Sunglet "breached every CPR requirement applicable to them" is misleading. That is because, first, the third ancillary claim is still in its infancy and very few procedural requirements have yet been applicable to the respondents. Secondly, although they filed their acknowledgments of service late, that is not relevant for this present purpose because, as the judge correctly recognized, it was "part and parcel" of their failure

[8] DOMHCVAP2010/0016 (delivered 15th December 2010, unreported).

to file defences on time. The breakdown in communication described above caused them to file both their acknowledgments of service and their defences late. Mr. Birt, QC stated that, given that this was not an independent failure to comply with a rule, it provides no basis at all for suggesting that they have generally failed to comply with other rules or orders.

[31] Mr. Birt, QC said the judge acknowledged that Starlex and Sunglet's evidence was "not perfect", but he was entitled to give it such weight as he thought appropriate and to conclude, in the circumstances, that the evidence presented enabled the respondents to satisfy the preconditions in CPR 26.8(2). There is no proper basis for the Court of Appeal to interfere with the judge's decision. He therefore urged this Court to dismiss the appeal.

Discussion

[32] The relevant statutory provisions provide a useful starting point. Rule 26.8(1) of CPR 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.

[33] Rule 26.8(2) of CPR provides that:

> "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."

[34] Relief from sanctions is a case management tool, the focus of which is to aid the efficient conduct and management of civil litigation. The CPR provide a mechanism to parties, who otherwise would have been sanctioned for failure to either comply with other orders of the court or the rules, to obtain relief from those sanctions.

[35] Insofar as the crux of this appeal is whether the judge erred, as a matter of law, in his determination that all three preconditions of CPR 26.8(2) had been satisfied, it is imperative that the focus of this decision be placed on the above three prerequisites.

[36] Insofar as Starlex and Sunglet had failed to file their respective defences to the ancillary claim within the 42 days stipulated by the CPR, this would have undermined their ability to lead defences. Emmerson was within its rights to have filed an application seeking a declaration that they were deemed to have admitted the claim.

[37] There is a strong stream of jurisprudence from this Court which has settled the law that all three limbs of the preconditions must be satisfied by an applicant who seeks relief and that a failure to satisfy any of the three pre-conditions is fatal to the application for relief from sanctions. Our courts have been consistent in stating that judges are to take a strict approach to compliance with the rules and the pre-conditions have been held to be uncompromising.

[38] The stringent approach to the satisfaction of the three pre-conditions is consistently applied in the raft of decisions of this Court. In Ferdinand Frampton v Ian Pinard et al,[9] the learned Barrow JA (as he then was) stated at paragraph 19 that:

> "The rule is uncompromising that the court is prohibited from exercising its discretion to grant relief from sanctions if these conditions are not satisfied. (It is not as if though the applicants imperfectly complied by complying with the pre-CPR requirements for applying for an extension of time stated in the Quillen case [(No.1) [1999] ECLR 23].) The failure of the applicants to comply with the requirements of the rule puts the applicants in a hopeless position. The court is not permitted to guess and to supply the omissions in the application. In a matter as important as an election petition the duty of the applicants to act with care and expedition was all the greater, because of the public interest in the matter. It is not permissible for the applicants to violate clear rules and escape sanctions by leaving it to the court, impressed with the importance of the matter, to

[9] DOMHCVAP2005/0015 (delivered 3rd April 2006, unreported).

> find a way out for the applicants. The importance of an election petition is a two way street. The interest of the petitioners in advancing their case is balanced by the interest of the respondents in opposing the petition. It is a dispute that must be resolved by the court according to established and settled rules. The rules are not draconian; where a party has made a slip the rules provide a procedure and criteria for avoiding the consequence. It cannot be too much to ask that the party in default satisfy the reasonable conditions that the rules lay down for obtaining relief.

[39] In Inna Gudavadze et al v Ivane Chkhartishvili,[10] the learned Chief Justice Pereira helpfully pronounced as follows:

> "CPR 26.8 requires that the application for relief from sanctions be made promptly and must be supported by evidence on affidavit. It clearly requires more than a mere exercise by the court of correcting or putting right some procedural irregularity for which no sanction attaches using CPR 26.9. In considering the grant of relief from sanctions it has been stated in many decisions of our Court and also on authority from our highest court, namely, the Privy Council, in The Attorney General v Keron Matthews that the conditions contained in CPR 26.8(2) are cumulative. A failure to satisfy any one of the three conditions set out therein is fatal to the grant of relief. As has been stated in other cases, rule 26.8 is uncompromising. The framers of CPR clearly intended to ensure that the threat of a sanction imposed whether by a rule or order is not to be treated lightly."

[40] The relief from sanctions provisions of the CPR provide criteria which are fair, reasonable and just. The rules are not draconian. They provide recourse to a party, who has made a slip, to follow the procedure established by the rules in order to be relieved from the consequences of that slip.

[41] It is settled law and common ground that the evidence adduced in support of an application for relief from sanctions must be cogent, in the sense that it must be set out with sufficient particularly, so as to satisfy the court that the three pre-conditions have been met. In Issa Nicholas, the learned Chief Justice Pereira propounded that:

> "[T]he evidence adduced in support of an application for relief from a sanction must be cogent in the sense that it must be set out with sufficient particularity so as to satisfy the court that these three preconditions have

[10] BVIHCMAP2016/0037 (delivered 11th January 2017, unreported).

been met."[11]

[42] It is equally true that the fact that the court's refusal to grant relief from sanctions would have dire circumstances for the party who has applied is of little moment.

Unintentional

[43] Turning closely to the case at bar, the answer to the crucial question of whether the learned judge erred in his conclusion that Starlex and Sunglet's failure to file their respective defences was not intentional has to be addressed with reference to the factual context of the application that was before the court.

[44] The fundamental issue, therefore, is whether there is any discernible error of law by the learned judge when he concluded that neither Starlex nor Sunglet's failure to file their respective defences was unintentional. The main substantive debate revolved around whether the judge erred by looking at the positions of the relevant Renova officials, who were advising these matters in addition to the registered agents, and the manner in which they eventually filed their defences among other factors. Could it be said that there was any discernible error of law in the judge's approach and conclusion?

[45] In Bilzerian v Weiner, the Court held that:

> "[I]n order for an applicant to be able to rely on the conjunctive requirements of rule 26.8(2) in seeking relief from sanctions or failure to comply with a rule, order or direction, the court must be given a clear, detailed and accurate picture of what caused the failure and the steps to be taken in an effort to remedy same".

The above helpful pronouncement must be accorded every respect.

[46] In determining whether to grant relief from sanction, the specific factual matrix must be scrutinized. I am of the view that, in determining whether the party's conduct was intentional, it is open to the judge to examine the matters before and

[11] Issa Nicholas (n 4) at para. 9.

after the deadline for the filing of the defence and to draw the necessary conclusions and inferences. There is nothing new about this. Courts have always examined conduct before and subsequent to the issue in order to determine whether the relevant party had the requisite intention. It is not desirable to rehash the judge's finding, but it is accepted in its entirety. There is nothing wrong, as a matter of law, with the approach the judge adopted in an effort to determine whether the first condition was satisfied. The facts in Bilzerian are vastly different from those in the present appeal and I do not find it necessary to descend into the details of those facts. Bilzerian remains good law on the point. However, the factual circumstances of this case are distinguishable from Bilzerian.

[47] Suffice it to say that CPR 26.8(2) requires the applicant to establish that the failure to comply with the order, practice or rule was not intentional. I agree with Mr. Birt, QC that there is no requirement by the sub-rule that there must be evidence that the party in default has taken all reasonable steps to meet the deadline, failing which the application would fail. I agree with Mr. Birt, QC that the judgment in Bilzerian did not purport to lay down any requirement to lead evidence as to what steps were taken to meet the deadline, which must be satisfied in all cases. It is clear that the Court was helpfully explaining that if a party has taken all reasonable steps to meet a deadline, then that party's failure to comply with the relevant rule should not be regarded as intentional. This, in my respectful view, is a correct exposition of the law. It is noteworthy, however, that this is not the only way of demonstrating that a failure to meet a deadline was unintentional. There could be other ways of demonstrating that the failure was unintentional. An examination of reasonable steps taken is but one way of so demonstrating.

[48] It bears repeating that Issa Nicholas remains good law and there is absolutely no tension between that case and the finding of the learned judge in the present case. In fact, to the contrary, the learned judge correctly and steadfastly applied the principles that were propounded by the learned Chief Justice Pereira in Issa Nicholas. The distinguishing feature in Issa Nicholas is that, the defendant in

that case "took a position" and was "aware of the risk it took". I accept and apply the very helpful principles that were enunciated in Issa Nicholas to the case at bar and find that in relation to the first limb of the rule, there is no error of law.

[49] Indeed, there is no basis for criticising the judge for failing to examine whether Starlex and Sunglet's conduct was unintentional by way of reference to what steps they took to meet the deadline. It would be a circular argument, if not absurd, to adopt that approach to these facts. The judge's approach was helpful given the factual circumstances of the case. To reiterate, both Starlex and Sunglet say that they were unaware that the documents were served on them, so it could not be asked in any sensible way "what reasonable steps they took to meet the deadline". They simply were not aware of the deadline, on their case. I agree that this addendum is not part of the sub-rule. In my view, it was clearly open to the judge to conclude that there was no evidence that Starlex and Sunglet's failure to file the defence was intentional. If the judge accepted, as he did, that the evidence proffered on their behalf indicated "excusable inadvertence", the judge was entitled to conclude that the failure was not intentional.

[50] It is useful to recall that it was a case management order. It has to be shown on appeal, that the judge's order was perverse or clearly wrong. In my view, there is no tenable argument to suggest that, insofar as the first limb of the sub-rule is concerned, the judge's decision was wrong as a matter of law.

[51] In view of the totality of the circumstances, including the actions of Renova's officials and Starlex and Sunglet's registered agents, there is no doubt that the learned judge was entitled to find that Starlex and Sunglet's failure to file the defence was not intentional.

[52] The other two sub-rules can be addressed more succinctly. I turn firstly to good explanation.

Good Explanation

[53] The question of what constitutes good explanation for the purpose of CPR 26.8(2)(b) is fact sensitive. I find helpful the pronouncements made by Davis-White J [Ag.] (as he then was) in QVT Fund V LP et al v China Zenix Auto International Group Ltd. et al[12] and adopt them. His Lordship expressed himself thus:

> "The quality of the explanation has to be viewed against all the circumstances and not simply by reference to the question of whether all was done that could have been done. A 'good explanation' is a universal standard, in the same way that the duty of care in negligence is, but what is required to discharge that standard will depend on the particular facts and circumstances." (emphasis mine)

[54] Those pronouncements are applicable to the case at bar. I also find very attractive and persuasive the pronouncements of Lord Dyson in Attorney General v Universal Projects Ltd. when he said:

> "Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly, if the explanation for the breach is administrative inefficiency".

I can do no more than adopt and apply them to the present case.

[55] The learned judge, having examined the evidence, made findings of fact, the effect of which is that Starlex and Sunglet were so inextricably linked to Renova that the "right persons" to make the decisions were not Starlex and Sunglet simpliciter. The learned judge's findings are unimpeachable when considering the fact that Starlex and Sunglet conducted no business in Belize. There is great force in Mr. Birt, QC's suggestion that when addressing whether the limb of good explanation is satisfied, the court had to examine that against these factual matters as found by the learned judge. The notable features of this case make them different from the factual circumstances of the cases that were relied on by Emmerson. The judge's conclusions on the factual context do not indicate that there was any misapprehension of law, mistake by counsel, lack of diligence,

[12] BVIHC(COM)2014/0026 (delivered 2nd December 2016, unreported) at para. 27.

heavy volume or work, difficulty in communicating with client, or secretarial incompetence. Those observations must be accorded the proper place since Laudat v Ambo, upon which Emmerson relied, is authority for the proposition that this Court has consistently held that those matters do not amount to good explanation. I accept the correctness of Laudat v Ambo but hasten to add that the judge correctly found that the underlying facts do not fall within those categories.

[56] The pronouncements of Lord Dyson in Attorney General v Universal Projects Limited are relevant to the case at bar. For effect, I repeat and apply them. To describe a good explanation as one which "properly" explains how the breach came about simply begs the question what is a "proper explanation". Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly, if the explanation for the breach is "administrative inefficiency". The judge concluded on the evidence, that it was inadvertence. It would be extraordinary if a court were to hold that inadvertence of the type that obtained in the case at bar could never amount to a good explanation. To my mind, there was nothing wrong with the judge's approach to determining whether the explanation proffered amounted to a good explanation and it was clearly open to him to so conclude.

[57] It must be emphasised that, the good explanation limb is fact dependent and care must be taken in applying the principles of law to the specific facts that are before the court. In the case at bar, it is evident that there was a breakdown in communication between Starlex and Sunglet's registered agents and the relevant persons in London. It is of significance that the registered agents, who were served, are located in Belize and the 'engine room' of both companies seem to be in London and Moscow. It emerges from a close reading of Wallbank J's judgment that the judge was fully aware of the matters that usually amounted to a good explanation. He, however, quite properly examined the particular facts of the case before him, including the excusable inadvertence and lack of awareness that the

third ancillary claim had been served at Starlex and Sunglet's registered offices. In fact, the learned judge referred to Laudat v Ambo, but correctly stated that the facts before him were different. In view of the totality of circumstances, there is no discernible error of law in the judge's conclusion that the good explanation limb had been satisfied.

General compliance with all other relevant rules, practice directions, orders

[58] I turn now to address the third pre-condition of CPR 26.8(2), which requires an examination of whether the judge erred in concluding that Starlex and Sunglet had generally complied with all other relevant rules, orders and directions and the complaints in relation to them. This is a very short but important point. The pronouncements of this Court in Bilzerian are helpful, namely, that this is a free-standing precondition and must be addressed as such.

[59] It is significant that Emmerson's claims are still in its infancy, and therefore Starlex and Sunglet would have been required to meet very few procedural requirements. The main failure that was at the heart of the application was Starlex and Sunglet's failure to file their defences.

[60] Of particular importance, for present purposes, is whether it was open to the judge to say that Starlex and Sunglet have satisfied sub-rule (c) of CPR 26.8(2), in circumstances where they had not filed their acknowledgments of service. It appears that it was arguably a fair characterisation by the judge to say that, "they were part and parcel of the respondent's failure to file their defence on time". Even if the judge was wrong in so concluding, the question which remains to be answered is whether despite one failure, namely, the failure to file the acknowledgment of service, it was still open to the judge to conclude that Starlex and Sunglet have generally complied with the rules? In my view, there can only be one answer to that question, which is, the same answer given by the judge. Accordingly, the judge was plainly correct in concluding that Starlex and Sunglet had satisfied CPR 26.8(2). There is no basis to conclude that the judge has

committed an error of principle in relation to the third sub rule.

[61] In view of the totality of circumstances, and in considering that Starlex and Sunglet's registered offices are located in Belize and that they did not carry on business in Belize as well as the actions of Starlex and Sunglet's registered agents in Belize and the fact that the documents were served on them in Belize and that the "right people" of the two companies were based in London who only became aware of the third ancillary claim long after the deadline for filing the defence had passed, I am satisfied that the judge did not err in the exercise of his discretion and there is no basis on which this Court should interfere with his decision. It follows that his decision to grant relief from sanctions to Starlex and Sunglet cannot be impugned.

Costs

[62] In the court below, the judge made no order as to costs. In view of the circumstances and in exercise of my discretion, the appropriate order should be that each party should bear its own costs.

Conclusion

[63] For the above reasons, Emmerson's appeal against the judgment of Wallbank J is dismissed. Each party shall bear its own costs.

[64] I gratefully acknowledge the assistance of all learned counsel.

I concur.
Paul Webster
Justice of Appeal [Ag.]

I concur.
Godfrey Smith
Justice of Appeal [Ag.]

By the Court

Chief Registrar