COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2020/CLE/gen/00662

BETWEEN

ANDREW SMITH
SOPHIA SMITH

Claimants

AND

FIRST CARIBBEAN INTERNATIONAL BANK (BAHAMAS) LIMITED

First Defendant

AND

INSURANCE MANAGEMENT (BAHAMAS) LIMITED

Second Defendant

Before Hon. Chief Justice Sir Ian R. Winder

Appearances: Beryn Duncanson and Lashanda Bain for the Claimants
Michelle Deveaux and Berchel Wilson for the First Defendant
Viola Major for the Second Defendant

19 July 2023

DECISION

Introduction

[1.] This is my decision on an application for relief from sanctions and case management directions made by the Claimants ("the Smiths") by summons filed on 8 June 2023 (the "Relief Summons"). The First Defendant ("FCIB") and the Second Defendant ("IMBL") both oppose the Relief Summons.

[2.] Having regard to the particular circumstances of this case I will set out the Relief Summons in full:

> LET ALL PARTIES CONCERNED attend before His Lordship the Honourable Sir Ian Winder, Chief Justice of the Supreme Court of the Commonwealth of the Bahamas, in chambers [or remotely via Zoom/Meeting online to be advised] at the Supreme Court Hansard Building, in chambers, on Wednesday the 19th July A.D. 2023, at 10 o'clock in the forenoon, or so soon thereafter as Counsel may be heard on an application on behalf of the Plaintiffs for an Order for Directions and other relief pursuant to the provisions of Order 31A, Rule 8(a) and Rule 25 of the Supreme Court (Amendment) Rules 2004 (RSC) ["hereinafter the Old Rules"], and/or in the alternative now Part V, Rules 26.1-26.9 (inclusive) under the Supreme Court Civil Procedure Rules 2022 (as *amended* by the Supreme Court Civil Procedure Rules 2023) [hereinafter "the New Rules"], and the inherent jurisdiction of the Court for an Order that:-
>
> 1. There be Directions for a new timetable with dates for Trial.
>
> 2. That the Plaintiffs do have relief from sanction for any manner of breach whether technical or material breach that this Court shall deem them to have committed in their attempts to comply with this Court's Unless Order dated 31st May 2022 by defective filing and/or serving of documents, such that time be hereby enlarged and/or extended for the purposes of Filing and Serving of all requisite documents and/or for the performance of any act founding wanting in the Plaintiffs' attempted compliance with this Honourable Court's Unless Order of 31st March 2022,
>
> 3. AND THAT the Grounds for this Notice of application herein be (i) Order 31A Rule 25 of the Old Rules and/or (ii) Rules 22.4-22.9 (inclusive) of the New Rules and (iii) the Affidavits of Joshua Leonard Forbes sworn 2nd June 2023 and otherwise filed herein; and (iv) The Inherent Jurisdiction of this Honourable Court; and (v) The Overriding Objective of the New Rules (Rules 1.1 1.2 & 1.3); and (vi) upon such further grounds as Counsel might advise and this Honourable Court Permit.

Evidence

[3.] The Smiths' application is supported by the affidavit of Joshua Leonard Forbes filed on 8 June 2023 (the "Forbes Affidavit"). The Defendants principally rely upon the affidavit of Samovia Miller filed on 3 July 2023 (the "Miller Affidavit") which was made in response to the Forbes Affidavit. IMBL also relies on an affidavit of service of Ganito

Saunders filed on 3 August 2022 and a supplemental affidavit of service filed on 6 June 2023.

Background

[4.] The relevant background may be summarized as follows.

[5.] The Smiths are the mortgagors of #22 Ashwater Drive, Devonshire Subdivision, Block 10, Unit 22, in Freeport, Grand Bahama (the "Subject Property"). FCIB is the mortgagee of the Subject Property pursuant to an Indenture of Mortgage dated 26 November 2003 entered into with the Smiths. IMBL is an insurance broker and agent connected with a policy of insurance that was formerly in place respecting the Subject Property which it says lapsed on 5 September 2018 and was not renewed.

[6.] The Smiths commenced these proceedings on 23 June 2020 by specially indorsed Writ of Summons alleging, in outline, that:

i) in or around September 2019, the Subject Property sustained significant damage due to Hurricane Dorian estimated at a total loss. FCIB negligently and in breach of contract failed to pay insurance premiums to IMBL with the result that the insurance policy on the Subject Property was cancelled without notice to the Smiths.

ii) FCIB and IMBL negligently and in breach of contract failed to: (a) advise the Smiths that insurance premiums had not been paid; (b) notify the Smiths that there was any default and/or expiry of the insurance policy over the Subject Property; (c) effect the renewal of an adequate homeowners insurance policy for the Subject Property; or (d) act with reasonable care and skill to ensure the Smiths' insurance needs were clearly met.

iii) In the circumstances, the Smiths are entitled to general damages, damages for emotional distress, aggravated damages, special damages comprising travel and relocation expenses, interest at commercial rates, and costs on the indemnity basis.

[7.] After the close of pleadings, the Smiths did not refer the matter to case management. IMBL caused the Registrar to fix a case management conference. IMBL filed a notice of referral to case management on 11 December 2020 and, in about January 2021, applied to the Listing Office for a hearing date.

[8.] A case management conference took place before me on 21 June 2021 at which all parties were present by their counsel. At that case management conference, I gave standard case management directions (the "First Case Management Directions"). Among other things, I ordered that:

i) each party was to file and serve a list of documents by 6 August 2021.
ii) mutual inspection of the documents contained in the parties' lists of documents was to take place by 21 August 2021.
iii) the Smiths' expert report was to be filed and served by 30 August 2021.
iv) the Defendants' expert reports in response were to be filed and served by 29 October 2021.
v) witness statements were to be filed by 14 January 2022.
vi) a pre-trial review was to be held on 31 May 2022 at 10:00 am.
vii) trial was to take place on 13, 14 and 15 July 2022.

[9.] The Smiths failed to comply with any of the First Case Management Directions. The Defendants filed their lists of documents on 6 August 2021 and 21 July 2021, respectively. Dissatisfied with the Smiths' failure to comply with the First Case Management Directions, IMBL took out a summons on 17 May 2022 (just before their appearance at the pre-trial review) seeking an unless order.

[10.] A pre-trial review took place before me on 31 May 2022 at which all parties were again present by their counsel. After hearing from counsel, I vacated the trial dates of 13 to 15 July 2022, issued new case management directions timetabling the matter to trial and acceded to IMBL's application for an unless order.

[11.] The unless order that I made on 31 May 2022 (the "Unless Order"), which was filed on 20 June 2022, was in the following terms:

> IT IS HEREBY ORDERED AND DIRECTED that the Case Management Directions Ordered on 21st July 2021 are hereby modified and extended as follows:
> 1. The Plaintiffs shall file and serve their List of Documents on or before 10 June 2022.
> 2. There shall be an inspection of the Plaintiffs' documents contained in their List of Documents on or before 30th June 2022.
> 3. The Plaintiffs' Expert Report shall be filed and served on or before 22nd July 2022.
> 4. Unless the Plaintiffs comply with each of the aforementioned case management directions (1) through (3), the Plaintiffs' Writ of Summons, filed herein on 23rd July 2020 shall be struck out and this action shall stand dismissed with costs to the Defendants, to be taxed if not agreed.
> 5. The Second Defendant shall have its costs of the application for an unless order in any event, to be taxed if not agreed but not paid until the substantive Action is determined.
> 6. In the event the Plaintiffs comply with directions (1) through (3) above, the following directions shall apply.
> 7. The Defendants' Expert Reports in response shall be filed and served on or before 22nd September 2022.
> 8. The parties' Experts shall meet on or before 28th October 2022 and produce a Joint Expert Report on or before 18th November 2022.

9. The Plaintiffs shall file and serve a Bundle of Pleadings and a Bundle of Agreed Documents on or before 5th January 2023. If necessary, the parties may file and serve Bundles of Non-Agreed Documents on or before 5th January 2023.
10. The parties shall file and exchange Witness Statements on or before 24th January 2023.
11. Any party wishing to file a Hearsay Notice shall file and serve same on or before 17th February 2023.
12. The Plaintiff shall file an Agreed Statement of Facts and Issues on or before 24th March 2023. If the parties cannot agree a statement of facts and issues, then each party shall file their own Statement of Facts and Issues on or before 24th March 2023.
13. A further Pre-Trial Review Hearing shall take place on 31st May 2023 at 9:00 am.
14. The Trial of the matter shall take place on 18th, 19th, 20th July 2023.

[Emphasis added]

[12.] On 10 June 2022, the deadline for compliance with paragraph 1 of the Unless Order, Counsel for the Smiths uploaded to the Court (via the eDocument Delivery Form on www.bahamasjudiciary.com), and emailed to opposing counsel, an unfiled list of documents in purported compliance with the Unless Order.

[13.] Counsel for the Smiths' email to opposing counsel, attaching the unfiled list of documents, stated:

> Dear Counsel,
>
> See attached List of Documents filed today and hereby served upon yourselves by the Plaintiffs pursuant to the Unless Order of 31st May 2022.
>
> Yours truly,
> Beyrn Duncanson
>
> [Emphasis added]

[14.] Nearly two weeks later, on 22 July 2022, the deadline for compliance with paragraph 3 of the Unless Order, Counsel for the Smiths sent an email at 3:58 pm to opposing counsel attaching an unfiled draft affidavit intended to be sworn by Brian Hanna ("Mr. Hanna") ("Mr.Hanna's Affidavit") in purported compliance with the Unless Order.

[15.] Counsel for the Smiths' email to opposing counsel, attaching Mr.Hanna's Affidavit, stated:

> Dear Mrs. Deveaux and Ms Cleare
>
> By way of earliest notice to yourselves see attached copy of Affidavit (Brian Hanna, Esq.) and Exhibits (3 docs being 'MLD-2' from Joint Affidavit of Marvin & Latalia Dames filed 4th Feb 2020, Affidavit of Latalia Dames filed 24th June 2020, and Affidavit of

Pamela Hanna filed 24th June 2020) coming from one of our panel of independent lawyers who will be tendered as an Expert Witness in this case – several of them all will attest to the exact same evidence shown hereto. We also await a financial services Accountant's report.

The attached affidavit is currently being sworn and filed at the time of this exchange, but we are mindful of getting to you the earliest notice of our Expert evidence before end of this day, per the Court order.

Yours truly,
Beryn Duncanson

[Emphasis added]

[16.] Mr. Hanna's Affidavit (i) exhibited a bundle of documents comprising evidence relied upon by the claimants in ***Martin Dames v Latalia Dames v FCIB et al 2019/CLE/gen/FP/00224*** (described as a "similar fact case" by Counsel for the Smiths) and a Ruling delivered by Hanna-Adderley J in that matter; (ii) opined on the admissibility of that evidence in this matter; and (iii) provided opinion evidence concerning banking practice surrounding direct debts and escrows.

[17.] In oral submissions before me, Counsel for the Smiths explained that, while he indicated in his email of 22 July 2022 that the Smiths were going to call additional expert evidence, the Smiths ultimately decided not to.

[18.] On 25 July 2022, Counsel for IMBL sent an email at 3:13 pm responding to Counsel for the Smiths' email of 22 July 2022 advising that it was their client's position that the Smiths had not complied with paragraphs 1 and 3 of the Unless Order and, therefore, this action stood dismissed against the Defendants. Counsel stated:

Dear Counsel,

Reference is made to the captioned and to your emails below.

Please be advised that we take the position that the Plaintiffs are not in compliance with terms 1 and 3 of the Unless Order made on 31st May 2022 and filed herein on 20th June 2022. As such, the action stands dismissed as against the Defendants.

Regards,
Viola C. Major

[Emphasis added]

[19.] At 4:57 pm on the same day, Counsel for the Smiths sent Counsel for IMBL the following response:

Dear Mrs. Major,

Last Friday 22nd July 2022 you have been served by email with Notice of the Expert Evidence upon which our clients intend to rely. You have an unsworn Affidavit of an Attorney Expert on the Laws of the Commonwealth of the Bahamas, in particular as to the status of and adducing of this evidence and the practice in local Banking on the salient issues, and you further have therein an Affidavit sworn in another matter from one of the Accountants, Mrs Pamela Hanna.

The Plaintiffs have to date observed the spirit and letter of His Lordship Justice Winder's Order, and this last hurdle of complying with the Unless Terms portion thereto is more of the same. To claim a breach of the letter of the Order invites possible sanction on costs for taking up the Court's time when the true mischief of the Directions order as part of aggressive case management by the Court is obviously to compel the parties to move with all dispatch towards preparations for trial.

It is unfortunate that your clients are so eager to use the merest of excuse to attempt to shut out our poor clients from justice in finally having their day in court. Should you wish to waste costs from your clients' doubtlessly bottomless bank account on a special application to dismiss for alleged 'lateness in receiving the actual stamped filed copy, or not having a document headed 'Expert's Report' but in an affidavit', that is your prerogative.

Just know that we are prepared for and shall delight in that particular fight. Bring it.

Yours truly,
Beryn Duncanson

[Emphasis added]

[20.] Two days later, on 27 July 2022, an affidavit sworn by Pamela Hanna ("Ms. Hanna") ("Ms. Hanna's Affidavit") was filed in the Supreme Court Registry in Freeport on behalf of the Smiths. Ms. Hanna's Affidavit largely covered the same ground intended to be covered by the Mr. Hanna's Affidavit. The material exhibited to Ms.Hanna's Affidavit suggests that the Smiths were not the only clients of FCIB that found out they had no insurance coverage after Hurricane Dorian due to the non-payment of premiums.

[21.] Counsel for the Smiths sent an email to opposing counsel on the same day Ms. Hanna's Affidavit was filed to provide them with a copy of it:

Dear Mrs Deveaux, Ms Cleare, Ms Wilson and Mrs Major,

We indeed served your defendant clients last Friday 22nd July 2022 by email proper notice of the substance of the evidence which would come from our Expert Witness. We have now got to hand that original evidence filed directly from Accountant Mrs Pamela Hanna – Expert Witness, as attached

> As you well know we have no *obligation* under the Rules to serve you with *sworn* affidavits as to the evidence to come from our Expert Witness. Simply their written statement. Last Friday we went well beyond that, and go even further today.
> Kindly review the Notes to the RSC from the UK White Book 1999, Supreme Court Practice, Order 38, Rule 35, as to the Court's almost certain application of our Bahamas Rules' equivalent Order 38, particularly Rules 33, 34, 36, 41 & 42.
>
> Yours truly,
> Beryn Duncanson
>
> [Emphasis added]

[22.] Nothing further transpired in this matter (other than Counsel for IMBL filing taxation documents) until counsel for the Defendants separately wrote to the Court on 22 September 2022 copying Counsel for the Smiths to advise the Court that the Unless Order had not been complied with by the Smiths and, therefore, this action stood dismissed.

[23.] There the matter rested until Counsel for the Smiths filed a notice of referral to case management on 23 February 2023, which he sought to move upon at the pre-trial review fixed for 31 May 2023. This matter was adjourned to 5 June 2023.

[24.] Counsel for the Smiths filed an amended notice of referral to case management on 5 June 2023 which purported to also seek relief from sanctions. I gave directions for the disposal of the Smiths' application for relief for sanctions. The Smiths subsequently filed the Relief Summons. In the course of these events, the trial dates of 18 to 20 July 2023 were vacated.

Preliminary Issues

[25.] Several issues in the nature of preliminary issues arose in the course of the hearing of the Smiths' application that it is expedient I address before I go on to consider the central question of whether relief from sanctions ought to be granted.

[26.] The issues that I address at this stage are:

i) the applicable rules of civil procedure;
ii) the effect of the alleged irregularity in the Relief Summons;
iii) the permissibility of the Relief Summons' recourse to the inherent jurisdiction;
iv) whether there has been non-compliance with the Unless Order; and
v) whether the Smiths were ever served with a perfected copy of the Unless Order.

The applicable rules of civil procedure

[27.] Counsel were divided on the question of whether the ***RSC*** or the ***Supreme Court Civil Procedure Rules, 2022*** (as amended by the ***Supreme Court Civil Procedure (Amendment) Rules, 2023***) (the "***CPR***") apply to the Smiths' application.

[28.] Counsel for the Smiths submitted that it is unclear whether the ***CPR*** apply because it is unclear whether the ***CPR*** apply to an application for relief from sanctions that is contemporaneously made when the proceedings were dismissed pursuant to an unless order made under the ***RSC*** and the non-compliance which triggered the dismissal took place prior to the commencement of the ***RSC***. On the other side, counsel for the Defendants submit that the ***CPR*** apply.

[29.] In my view, it is pellucid that the ***CPR*** govern the application before me.

[30.] The general position at law is that, subject to the express terms of the procedural enactment in question, no person has a vested right in any particular course of procedure but only a right to prosecute or defend a suit according to the rules for the conduct of an action in force for the time being: ***Yew Bon Tew v Kenderaan Bas Mara [1983] 1 AC 553*** per *Lord Brightman* at page 558.

[31.] The ***CPR*** specifically addresses its own application. ***Rule 2(1)(b)*** of the ***CPR*** provides that the ***CPR*** does not apply to civil proceedings commenced in the Court prior to the commencement of the ***CPR***, except where a trial date has not been fixed for those proceedings or a trial date has been fixed and the trial date has been adjourned. Rule 4 of the ***CPR*** provides that such proceedings are to continue under the ***RSC***.

[32.] The clear intention behind ***rules 2(1)(b)*** and ***4*** of the ***CPR*** is to permit civil proceedings commenced prior to the commencement of the ***CPR*** with established trial dates to proceed to trial under the ***RSC*** without being disturbed by the introduction of the ***CPR***, but only if and for so long as those trial dates are to be kept.

[33.] The trial dates in this matter have been vacated and, therefore, there are no fixed trial dates. There is no material difference between an existing trial date being adjourned and an existing trial date being vacated for the purposes of ***rule 2(1)(b)*** of the ***CPR***. These proceedings are therefore not proceedings to which ***rule 2(1)(b)*** of the ***CPR*** applies.

The effect of irregularity in the Relief Summons

[34.] In their written submissions dated 14 July 2023, Counsel for FCIB submitted that the Smiths' application for relief from sanctions is irregular as they have proceeded by

way of a summons and have placed reliance on ***Order 31A*** of the ***RSC***. Counsel further submitted that the Smiths should be required to file a notice of application in the prescribed form under the ***CPR*** to correct these irregularities if any relief is to be granted upon the Relief Summons.

[35.] To the extent that the Relief Summons is governed by the ***CPR***, it is plain that it is irregular. Part 11 of the ***CPR*** generally requires that applications must be made in writing in Form G14 and it is incorrect for applicants to invoke procedural rules under the ***RSC*** where the application is governed by the ***CPR***. However, under ***rule 26.9(2)*** of the ***CPR***, an error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in proceedings unless the Court so orders.

[36.] I accept Counsel for the Smiths' submission that the Court ought to disregard the procedural irregularity in the Relief Summons and dispose of the Smiths' application on its merits. It is consistent with the spirit of the ***CPR*** to deal with the substance of applications and claims and not to be diverted by venial technicalities. The use by a party of a defective form should not be fatal to proceedings in the absence of genuine prejudice: ***Szekeres v Alan Smeath & Co [2005] 4 Costs LR 707*** per *Pumfrey J* at para 10. The irregularities in the Relief Summons caused the Defendants no prejudice about which they could reasonably complain.

The permissibility of the Relief Summons' recourse to the inherent jurisdiction

[37.] The Relief Summons invoked the inherent jurisdiction of the Court as one of the sources of jurisdiction enabling the Court to grant the relief from sanctions and case management directions which the Smiths seek.

[38.] On the subject of the relationship between rules of court and the inherent jurisdiction of the Court, in ***Belgravia International Bank & Trust Company Ltd and another v Sigma Management and another [2022] 2 BHS J No 114***, an appeal decided under the ***RSC***, *Barnett P*, delivering the judgment of the Court of Appeal, said at para 64:

> 64 In my judgment, inherent jurisdiction only begins where rules of court end. Thus, to the extent that the RSC set out specific provisions (particularly O.31A, r.25) stipulating what was to occur in the case of a breach of an unless order, it would be inappropriate to ignore them in favor of the view that the court should exercise its inherent jurisdiction. If courts were to be permitted to ignore clear rules and merely rely on inherent jurisdiction, then all rules of court would be otiose.

[39.] As there are express provisions under the ***CPR*** which stipulate what is to occur in the case of a breach of an unless order and in what circumstances the Court may grant relief from any sanction imposed by an unless order, it is not proper to invoke or have regard to the

powers of this Court under its inherent jurisdiction to relieve from the consequences of an unless order. I have accordingly disregarded that aspect of the Relief Summons.

Has there been non-compliance with the Unless Order?

[40.] The Relief Summons placed in issue the question of whether the Smiths failed to comply with the Unless Order in a way that has adversely affected them insofar as it prays for an Order that "*...the Plaintiffs do have relief from sanction for any manner of breach whether technical or material breach that this Court shall deem them to have committed in their attempts to comply with this Court's Unless Order...*" (emphasis added).

[41.] The Smiths' position in this regard, as I understand it, is that they substantially complied with the Unless Order and there has not been material non-compliance required to trigger its consequences in accordance with the guidance given by the English Court of Appeal in ***Marcan Shipping (London) Ltd v Kefalas [2007] 3 All ER 365***. In ***Marcan Shipping (London) Ltd v Kefalas [2007] 3 All ER 365***, *Moore-Bick LJ* said at para 34:

> 34 In my view it should now be clearly recognised that the sanction embodied in an "unless" order in traditional form takes effect without the need for any further order if the party to whom it is addressed fails to comply with it in any material respect.

[42.] In his skeleton argument dated 14 July 2023, Counsel for the Smiths asserted at para 3B that "*...the [Smiths] have not in any material respect breached this court's order whatsoever...*".

[43.] In my view, there is no room for reasonable debate that the Smiths have not complied with the Unless Order in material respects. The Smiths had not, up to the hearing of the Relief Summons, filed, let alone served, a list of documents, and the Smiths failed to file and serve all of the expert evidence on which they intended to rely by 22 August 2022. Instead, the Smiths circulated an unfiled, and therefore effectively tentative, list of documents and filed and served Ms. Hanna's Affidavit five days late on 27 August 2022. The Smiths' deficiencies in compliance were not *de minimis* on any properly informed and realistic analysis.

Were the Smiths ever served with the Unless Order?

[44.] The Smiths submitted that there was no evidence before the Court that the Unless Order was ever perfected or served on them. They submitted that, while an order may take effect when it is pronounced, very usually, the Court does not punish an errant litigant for failing to take positive steps required by an order until such time as he or she has been served with a perfected copy of the order.

[45.] IMBL submitted that the Smiths' submission was not well-founded in law because (i) it is clear from the ***Supreme Court Practice*** that, even if an order is not drawn up, much less not served, the parties are obligated to obey the order unless the order is of such a kind that obedience is contingent on service of the order and, in that respect; (ii) ***Metcalf v British Tea Association*** (relied on by the Smiths) was an outlier and is likely confined to its facts; (iii) the ***Arrow Air Ltd*** case (also relied on by the Smiths) is irrelevant; and (iv) the case of ***Lawrence Little v Bloomsbury Law Solicitors [2022] EWHC 3534 (Ch)*** is a modern illustration of the general rule that an unless order takes effect from the date on which it is made or pronounced.

[46.] The question of the service of the perfected Unless Order is a disputed fact. It would be inappropriate to attempt to resolve this issue by assessing competing, untested affidavit evidence and in any event it would not promote the overriding objective for me to extensively examine whether a copy of the perfected Unless Order was in fact served on the Smiths.

[47.] I accept the submissions made by IMBL on this point. In my opinion, service of an unless order is not necessary in order for it to take effect if the affected party was present or represented at the hearing at which it was made and the obligation imposed by the order is not expressed to be contingent upon service. It has long-been established that such unless orders may be effective even if they are not served on the party required to take the next step before they take effect.

[48.] The Court of Appeal decision in ***Mega Management Limited v. Southward Ventures Depositary Trust and others [2008] 5 BHS J No. 66*** is instructive. In that case, the Court of Appeal upheld a refusal by a judge to extend the time for compliance with an unless order, made by her (with the consent of the parties) requiring the provision of security within 30 days, in circumstances where the unless order had never been perfected. It was not suggested by any of the learned Justices of Appeal that the unless order was ineffective.

[49.] In the present case, Counsel for the Smiths was present at the hearing at which the Unless Order was made and he initialed a draft of the Unless Order. The dates for compliance stipulated in the Unless Order were calendar dates and therefore not tied to service of the Unless Order. The Unless Order was clear as to what it required and its consequences. Against this background, I cannot accept that any delay or failure in service of a perfected copy of the Unless Order (if any) would have released the Smiths of their obligation to comply with the Unless Order. I am fortified in this conclusion by ***Lawrence Little v Bloomsbury Law Solicitors [2022] EWHC 3534 (Ch)***, in which relief from the sanction imposed by an unless order made by the English High Court of its own

motion was refused notwithstanding it was only uploaded to the Court's electronic filing and case management system and was not served on the party in default.

Legal framework for relief from sanctions

[50.] ***Rule 26.7(2)*** of the ***CPR*** provides that if a party has failed to comply with any of the rules of the ***CPR***, or a direction or any order, any express sanction for non-compliance imposed by the rule, direction or the order (as the case may be) has effect unless the party in default applies for and obtains relief from the sanction. This is the same position that obtained under ***Order 31A, rule 24*** of the ***RSC***.

[51.] Accordingly, where an unless order has been made and there has been a failure to comply with it in any material respect, its consequences take effect immediately and without further order. The sanction imposed stands unless and until an application for relief from sanctions is successfully brought. *Barnett P* explained this in the ***Belgravia*** case at paras 49 to 50:

> 49 In my judgment, and in accordance with O.31A, r. 24(2)(b), when Sigma and Forbes failed to comply with the Unless Order, Sigma's Pleadings stood dismissed with costs to Belgravia. The authorities cited above show that the sanction took effect immediately on 26 July, 2019, without the requirement for any further order.
>
> 50 Pursuant to O.31A, r.24(2)(b), and consistent with the aforementioned decisions, it is clear that in order for the sanctions to not take effect, Sigma ought to have applied for and obtained relief from the sanction.
>
> [Emphasis added]

[52.] The jurisdiction of the Court to grant relief from sanctions is currently to be found in ***rule 26.8*** of the ***CPR***, which provides:

> (1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or Court order, the Court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need — (a) for litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with rules, practice directions and orders.
>
> (2) An application for relief must be supported by evidence.
>
> (3) The Court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown.

[53.] As ***rule 26.8*** of the ***CPR*** confers a discretion upon the Court, ***rule 1.2*** of the ***CPR***, which is in the following terms, is relevant:

> (1) The Court must seek to give effect to the overriding objective when —

(a) exercising any powers under these Rules;
(b) exercising any discretion given to it by the Rules; or
(c) interpreting these Rules.

(2) These Rules shall be liberally construed to give effect to the overriding objective and, in particular, to secure the just, most expeditious and least expensive determination of every cause or matter on its merits.

[54.] The overriding objective of the ***CPR*** is described in ***rule 1.1*** of the ***CPR*** as follows:

(1) The overriding objective of these Rules is to enable the Court to deal with cases justly and at proportionate cost.

(2) Dealing justly with a case includes, so far as is practicable:
(a) ensuring that the parties are on an equal footing;
(b) saving expense;
(c) dealing with the case in ways which are proportionate to —
(i) the amount of money involved;
(ii) the importance of the case;
(iii) the complexity of the issues; and (iv) the financial position of each party;
(d) ensuring that it is dealt with expeditiously and fairly;
(e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases; and
(f) enforcing compliance with rules, practice directions and orders.

[55.] The role of the Court under the ***CPR*** is not limited to doing substantive justice between the parties. In the Privy Council case of ***Bernard (Legal Representative of the Estate of Regan Nicky Bernard) v Ramesh Seebalack [2010] UKPC 15***, an appeal from the Court of Appeal of Trinidad and Tobago on a grant of permission to re-amend a statement of claim under the Trinidadian CPR, *Sir John Dyson* said at para 23:

> ... under the CPR (and the England and Wales CPR) it is no longer right to say that the court's function is to do substantive justice on the merits and no more. The overriding objective adds the imperatives of deciding cases expeditiously and using no more than proportionate resources. ...
>
> [Emphasis added]

[56.] I am mindful that this is an early case under the ***CPR***. This being so, there are four observations on the ***CPR*** in general and ***rule 26.8*** of the ***CPR*** that I consider it is appropriate that I make.

[57.] The first observation that I would make is that ***rule 26.8*** of the ***CPR*** confers upon the Court a wider discretion to grant relief from sanctions than existed under ***Order 31A, rule 25*** of the ***RSC***. The requirements in order for the Court to grant relief from sanctions contained in ***Order 31A, rule 25(2)*** of the ***RSC*** were mandatory and had to be satisfied

before the Court could grant relief from sanctions. No such fetter exists under the ***CPR***. The discretion conferred upon the Court by ***rule 26.8*** of the ***CPR*** is perfectly general and is to be exercised having regard to all the circumstances of the particular case so as to enable the Court to deal justly with the application.

[58.] The second observation that I would make is that the Court and parties to litigation must be astute when it is proposed to rely upon pre-***CPR*** authorities when interpreting and applying the ***CPR***. The ***CPR*** are intended to herald a major shift in approach to the resolution of disputes in this jurisdiction and, therefore, pre-***CPR*** authorities require caution of the user. In ***Biguzzi v Rank Leisure plc [1999] 4 All ER 934***, at page 941, *Lord Woolf MR* pertinently said of the English ***Civil Procedure Rules 1998*** (the "ECPR") that:

> The whole purpose of making the CPR a self-contained code was to send the message which now generally applies. Earlier authorities are no longer generally of any relevance once the CPR applies.

[59.] In saying this, I do not wish to be understood as saying that ***pre-CPR*** cases do not have persuasive value. In ***Nomura International plc v Grenada Group Ltd [2007] 2 All ER (Comm) 878***, *Cooke J* said at para 25:

> [25] It is clear from numerous authorities that the CPR represents a departure from the Rules of Court previously in existence and that detailed reference to decisions on particular provisions of the RSC are of little value in interpreting provisions of the CPR where the wording and substance of a particular rule is different. Nonetheless, there are numerous instances where the courts have drawn upon decisions relating to the RSC where the new rule under the CPR follows the same form and appears to have the same underlying intention. In this context I was referred to Civil Procedure (2006) vol 1, pp 22–23 (para 1.3.9) and pp 46–48 (para 2.3.1). In *UCB Corporate Services Ltd v Halifax (SW) Ltd* ((1999) Times, 23 December) QBENI 99/0827/A2 Ward LJ at para 24, when referring to the Master of the Rolls' statement in *Biguzzi v Rank Leisure plc* [1999] 4 All ER 934, [1999] 1 WLR 1926, that 'earlier authorities are no longer generally of any relevance once the CPR applies', stated that the Master of the Rolls was not saying that the underlying thought processes that informed those judgments should be completely thrown overboard.
>
> [Emphasis added]

[60.] The third observation that I would make is that, in a transitional case, the fact that the parties were previously operating under the ***RSC*** is a relevant factor which the Court must consider when assessing their conduct in the context of procedural decisions and, in particular, those which may lead to the imposition of a sanction. In ***Biguzzi***, *Lord Woolf MR* said at page 939:

> [The judge] had to make a decision applying the principles under the CPR, not under the previous regime, in deciding whether this claim should be allowed to proceed. He could not, and should not, ignore the fact that the parties previously had been acting under a different regime. The fact that they were acting under a different regime does not mean that the judge is constrained to make the same sort of decision as would be made under the previous regime.
>
> [Emphasis added]

[61.] The final observation that I would make is that ***rule 26.8*** of the ***CPR*** is self-evidently modeled upon the current form of ***rule 3.9*** of the ***ECPR***, which was introduced as part of the "Jackson Reforms" to civil procedure effected in that country by the ***Civil Procedure (Amendment) Rules 2013 (S.I. 2013/262)***.

[62.] A consequence of this is that, while it will ultimately be up to the courts of The Bahamas to settle the practice and procedure relating to relief from sanctions under the ***CPR***, the similarities between ***rule 3.9*** of the ***ECPR*** and ***rule 26.8*** of the ***CPR*** are such that English cases decided under ***rule 3.9*** after the English ***Civil Procedure (Amendment) Rules 2013*** are likely to be highly persuasive.

[63.] As this appears to be one of the first applications for relief from sanctions to be decided under the ***CPR***, if not the first, it is important that the basic approach to be followed in relation to such applications be set out for future cases. This Court has considered, among other cases, the following:

(i) ***Mitchell v News Group Newspapers Limited [2014] 2 All ER 430*** ("Mitchell")

(ii) ***Denton v TH White Ltd [2015] 1 All ER 880*** ("Denton")

(iii) ***British Gas Trading Ltd v Oak Cash & Carry Ltd [2016] 4 All ER 129*** ("British Gas")

(iv) ***HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd [2015] 2 All ER 206*** ("Apex Global")

(v) ***Michael Wilson & Partners Ltd v Sinclair [2015] 4 Costs LR 707*** ("Michael Wilson")

(vi) ***McTear v Engelhard [2016] 4 WLR 108*** ("McTear")

(vii) ***Clearway Drainage Systems Limited v Miles Smith Limited [2016] EWCA Civ 1258*** ("Clearway")

(viii) ***Thevarajah v Riordan [2017] 1 All ER 329*** ("Thevrajah")

(ix) ***Diriye v Bojaj and another*** [2021] 1 WLR 1277 ("Diriye")

[64.] The principles set out below emerge from the cases and should be borne in mind by a judge faced with an application for relief from sanctions.

[65.] In the ordinary course there is a clear distinction between the initial imposition of a sanction and the exercise to be conducted in considering whether to grant relief from a sanction that has already taken effect. Where a sanction has been imposed under the ***CPR***, an application for relief from sanctions must proceed on the basis that the sanction was properly imposed. (***Mitchell*** at paras 44 to 45; ***Michael Wilson & Partners Ltd*** at para 38).

[66.] An application for relief from sanctions must be supported by evidence pursuant to ***rule 26.8(2)*** of the ***CPR***. Pursuant to ***rule 11.9*** of the ***CPR***, that evidence must be in an affidavit unless otherwise provided by a court order, a practice direction or a rule. If there is no evidence, or if the evidence is not in an affidavit without the sanction of a court order, a practice direction or a rule, the application for relief is irregular and the Court must decide how to deal with it.

[67.] A judge should address an application for relief from sanctions in three stages:

i) the first stage is to identify and assess the seriousness and significance of the "*failure to comply with any rule, practice direction or court order*" which engages rule ***26.8(1)***.

ii) the second stage is consider why the default occurred, i.e., the reason for the breach.

iii) the third stage is to consider all the circumstances of the case so as to enable the Court to deal justly with the application. (***Denton*** at para 24).

[68.] At the first stage of the analysis, it is not a matter of determining whether the breach which occurred may be described as "trivial". The focus should be on whether the breach was "serious or significant". There will be many circumstances in which "materiality", in the sense of whether the breach imperiled future hearing dates or disrupted the conduct of the particular litigation or impacted other litigation, will be the most useful measure of whether a breach has been serious or significant. However, some breaches may be serious even though they are not capable of affecting the efficient progress of the litigation. If the breach is neither serious nor significant, the Court is unlikely to need to spend much time on the second and third stages. In contrast, if the breach is serious and significant then the second and third stages assume greater importance. (***Denton*** at paras 26 and 28).

[69.] The assessment of the seriousness and significance of the breach should not, initially at least, involve a consideration of other unrelated failures that may have occurred in the past. At the first stage, the Court should concentrate on an assessment of the seriousness and significance of the "very breach" in respect of which relief from sanctions is sought. (***Denton*** at para 27). However, unless orders are an exception. Unless orders

do not stand on their own. Not every breach of an unless order is serious or significant. However, the very fact that a defaulting party has failed to comply with an unless order is a pointer towards seriousness and significance because the defaulting party is in breach of two successive obligations to do the same thing and the Court has already underlined the importance of doing that thing by specifying a sanction in default. (***British Gas*** at paras 38, 39, 41 and 42).

[70.] At the second stage of the analysis, the Court should consider why the failure or default has occurred. There is no closed list of good and bad reasons for a failure to comply with rules, practice directions or court orders. Good reasons, such as illness or accident, are likely to arise from circumstances outside the control of the party in default. Later developments in the course of the litigation process are likely to be a good reason if they show that the period for compliance originally imposed was unreasonable though the period seemed to be reasonable at the time. Simply overlooking a deadline, whether on account of overwork or otherwise, is unlikely to be a good reason. (***Mitchell*** at paras 41 and 33; ***Denton*** at paras 29 and 30).

[71.] At the third stage of the analysis, the Court must stand back and consider all the circumstances of the case so as to enable it to deal justly with the application. The Court should give particular weight or importance to the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with rules, practice directions and orders, which are specifically mentioned in ***rule 26.8(1)***. In doing so, the Court should take into account the seriousness and significance of the breach which it assessed at the first stage and any explanation which it considered at the second stage. The more serious or significant the breach, the less likely it is that relief will be granted unless there is a good reason for it. Where there is a good reason for a serious or significant breach, relief is likely to be granted. Where the breach is not serious or significant, relief is also likely to be granted. Importantly, however, the Court is not bound to refuse relief unless a default can be characterized as "trivial" or there is a good reason for the failure to comply. (***Denton*** at paras 33, 34, 35, 36, 38).

[72.] At the third stage of the analysis, among other factors, the promptness of the application for relief from sanctions, other past or current breaches of the rules, practice directions and court orders by the parties and the effect on the proceedings of relief being granted or the sanction taking effect may be taken into consideration and weighed in the balance. (***Denton*** at paras 36, 56, 65, 79; ***Clearway Drainage*** at para 71). The two factors specifically identified in rule ***26.8(1)*** must be given greater weight than other relevant factors. (***British Gas*** at para 53). The mere fact that a trial date may be kept and any default in compliance may be compensated by an award of costs does not necessarily mean relief from sanctions or an extension of time should be granted. (***Clearway***

Drainage at para 67). The strength of a party's case on the ultimate merits of the proceedings will generally be an irrelevant consideration except where a party has a case whose strength would entitle him to summary judgment and the Court is able to quickly be persuaded of this. (***Apex Global*** at paras 29 to 31).

[73.] Contested applications for relief from sanctions ordinarily require a hearing given their importance and judges should normally give reasons for their decisions on such applications, even if only brief and orally. Expensive satellite litigation is to be discouraged. Pursuant to ***rule 1.3*** of the ***CPR***, the parties have a duty to help the Court further the overriding objective. An unreasonable refusal to consent to an application for relief from sanctions may be taken into consideration when the Court deals with the costs of the application.

[74.] The preceding guidance is not intended to be exhaustive and will need to be developed and refined in subsequent cases.

Submissions

[75.] In advance of the hearing before this Court on 19 July 2023 at which the parties were permitted to make oral submissions, each of the parties laid over written submissions dated 14 July 2023 in support of their respective positions. Following the hearing on 19 July 2023, Counsel for the Smiths and Counsel for IMBL laid over written submissions with the leave of the Court concerning matters which I have already addressed in this decision. I set out below a summary of the parties' submissions on the core issue of whether relief from sanctions ought to be granted.

The Smiths' submissions

[76.] The Smiths submitted that it is clear in this case that, if relief from sanctions is required, relief from sanctions should be granted to them. The Defendants' positions are motivated by objections over form and not substance, and it is a "new day" with "new rules".

[77.] Counsel submitted that a dangerous precedent has built up whereby opposing counsel can simply assert slight non-compliance with an unless order and thereby derail any progress towards trial until the other side obtains relief from sanctions. Counsel submitted that the effect of not granting relief to the Smiths would be injustice to others like them upon the slightest arguable technical non-compliance with orders of the Court. This is a tactic used by deep-pocketed corporate defendants and the ***CPR*** was intended to discourage it.

[78.] Counsel submitted that the Defendants have not done anything to forward their position nor to obey and fulfil their own obligations under the Unless Order that they invoke against the Smiths. Counsel submitted that the Defendants have not produced their own expert evidence and a litigant must keep their own house in order when seeking something so draconian as the final dismissal of a case. The Defendants could not act as if the Smiths' slight breaches of the Unless Order gave them cause and excuse to ignore the Court's directions in the Unless Order.

[79.] Counsel for the Smiths submitted that the case ***Debra Rose v Sharon Wilson SCCivApp No. 38 of 2018*** is indicative of the Court's general reluctance to punish litigants with the harshest penalties available to the Court – imprisonment in the ***Rose*** case – for even apparently deliberate non-compliance with the Court's orders where there is insufficient evidence adduced by the accusatory party or parties that the party in default deliberately, intentionally or contumaciously disobeyed the Court's Order.

[80.] Counsel for the Smiths submitted that, like the alleged contemnor in ***Rose***, the Smiths did not contumaciously fail to comply with the Court's Order. The Smiths have endured extreme financial hardship in gathering funds just to comply with the Court's Order. Counsel submitted that it would be "splitting hairs" for the Defendants to complain that Ms. Hanna's Affidavit was not entitled "Expert Report" or that the Smiths did not serve stamped and filed evidence on 22 July 2022 when the Defendants were served the evidence electronically.

[81.] Counsel submitted that the Defendants are "barred by issue estoppel" from any challenge to the manner of service or filing of the Smiths' list of documents because they took no objection to it until 25 July 2022 and requested inspection of the Smiths' documents. Counsel further submitted that, once the Defendants accepted electronic service of the Smiths' list of documents, they could not object to the electronic filing and service of the Smiths' expert evidence.

[82.] As Counsel for the Smiths recalled events, in June and July 2022, the prevailing manner of filing and serving court documents in The Bahamas was still by electronic means as a result of the COVID-19 pandemic. The Freeport Registry rejected Mr. Hanna's Affidavit (which was unsworn) exhibiting the already filed expert evidence from Ms. Hanna in the ***Dames*** case. Mr. Hanna's Affidavit was then served on opposing counsel electronically, giving them the "heart of the documents", and the evidence was re-sworn by Ms. Hanna and filed and circulated on 27 July 2022. Counsel submitted that three business days' delay in getting re-sworn and stamp-filed any court document where notice of it was given on 22 July 2022 cannot be described as contumacious disobedience.

[83.] The Smiths submitted that the whole reason for pre-trial directions such as the exchange of lists of documents is so that the opposing sides know in advance of trial the substance of the central evidence to be adduced at trial. The Smiths submitted that, in the present case, the Defendants were put on notice that they were going to re-file evidence relied upon in the similar-fact ***Dames*** case and the Defendants were long aware of the substance of that evidence as both of them are co-defendants in the ***Dames*** case and both are represented by the same counsel in that litigation.

[84.] Counsel for the Smiths submitted that the Smiths exceeded what was required by the Unless Order as they obtained sworn affidavit evidence from their expert rather than merely relying on an expert report which says what the expert intends to say at trial.

[85.] Counsel for the Smiths relied upon the case of ***William Thompson v Frederick Thompson et al 2017/CLE/gen/00407*** as an example of a case in which this Court allowed a defendant to breach an unless order several times before taking the draconian step of striking out the action.

[86.] Counsel for the Smiths referred this Court to the dictum of *Denning LJ* in ***Hadkinson v Hadkinson [1952] P 285*** at page 295 that "[i]*t is a strong thing for a court to refuse to hear a party to a cause, and it is only to be justified by great considerations of public policy. It is a step which a court will only take when the party itself impedes the course of justice and there is no other effective means of securing his compliance*".

[87.] Counsel for the Smiths also referred this Court to ***Costellow v Somerset County Council [1993] 1 All ER 952*** as authority for the proposition that two principles must be considered by the Court before striking out a matter for non-compliance: the first being that rules are meant to promote the expeditious dispatch of litigation and the second being that a plaintiff should not be denied an adjudication of his claim on its merits because of procedural default unless the default caused prejudice to his opponent which cannot be compensated by an award of costs.

[88.] Relying on ***Philip John Eaglesham v Ministry of Defence [2016] EWHC 3011 (QB)***, Counsel for the Smiths submitted that an unless order is an order of last resort and, as all the parties are now in default of the Court's directions, it would be unfair to punish only the Smiths.

[89.] Counsel for the Smiths submitted that the most significant assistance that may be gained on unless orders in The Bahamas today is from the Court of Appeal's decision in the ***Belgravia*** case. In the ***Belgravia*** case, *Barnett P* cited with approval the case of ***Marcan Shipping*** and ***Marcan Shipping*** has been approved by the Court of Appeal s in

Gregory Cottis v Robert Adams [2021] 1 BHS J. No. 121 and ***Darlene Allen-Haye v Kenenan Baldwin SCCivApp No. 186 of 2019***. In ***Marcan Shipping,*** at para 34, *Moore-Bick LJ* said that the sanction embodied in an unless order takes effect if there has been a failure to comply with the unless order "in any material respect". ***Marcan Shipping*** requires "gross breaches of the order".

[90.] Counsel for the Smiths commended the case of ***Logicrose Ltd v Southend United Football Club***, referred to by *Moore-Bick LJ* at para 18 of ***Marcan Shipping***, which he (Counsel for the Smiths) submitted established that, (i) even in a case of deliberately suppressing a document, it would not be right to drive a litigant from the judgment seat without a determination of the issues as a punishment for his conduct, however deplorable, unless there was a real risk that that conduct would render further conduct of the proceedings unsatisfactory; and (ii) the Court must always guard itself against the temptation of allowing its indignation to lead to a miscarriage of justice. Counsel submitted that to enforce the Unless Order would lead to a miscarriage of justice for the Smiths.

[91.] The Smiths submitted that it is in the interests of justice and also the public interest for this case to be resolved as expeditiously as possible. The Smiths' application should be granted so that the Court does not pursue procedural justice "at the cost of throwing out the baby with the bath water". The Court should make further case management directions to move this matter to trial.

[92.] Counsel for the Smiths submitted that, if relief from sanctions is required and granted, there should be no costs consequences. The Smiths' breaches were slight, mild and not contumacious. There were no breaches intentionally committed to insult or flout the authority of the Court or to obtain a material benefit or advantage for the Smiths.

FCIB's submissions

[93.] FCIB submitted that this Court should apply the three-stage analysis promoted by the English Court of Appeal in ***Denton*** in order to determine whether the Smiths should be granted relief from sanctions.

[94.] With respect to the first stage, FCIB submitted that the question for the Court is not whether the breach is "trivial" but rather the appropriate test is one of "immateriality", and an "immaterial" breach should be defined as one which neither imperils future hearing dates nor otherwise disrupts the conduct of the litigation. FCIB submitted that the Smiths' failure to file their list of documents and their failure to file their expert report constitute serious and significant breaches because they disrupted the conduct of this action as the trial dates of 18 to 20 July 2023 have been vacated. (Parenthetically, Counsel for FCIB

also took issue with the fact that Ms. Hanna's Affidavit was not labelled an "expert report" because it circumvents the rules of evidence in relation to filing documents before trial.)
[95.] FCIB submitted that the Smiths' contentions regarding the seriousness of the breach do not render the breach immaterial. Whether the parties were aware of the documents to be filed pursuant to the Unless Order does not render the failure to file "immaterial" in the context of the ***Denton*** first stage requirement.

[96.] FCIB submitted that the materiality of filing a document is not merely to put parties on notice of its content but to advance the action towards trial. FCIB submitted that the Defendants could not respond to unfiled documents and, in any case, paragraph 6 of the Unless Order contemplated that the Defendants need only comply with the Unless Order's directions relating to them if the Smiths complied with paragraphs 1 through 3 of the Unless Order.

[97.] FCIB referred this Court to the guidance of the English Court of Appeal in ***British Gas*** on the relevance of the fact that it is an unless order that has been breached in the context of the ***Denton*** first stage requirement (I quote from ***British Gas*** at para 108 below). Counsel submitted that the Smiths failed to comply with the First Case Management Directions, that non-compliance led to the previously set trial dates of 13 to 15 July 2022 being vacated, and, with the Smiths' latest breach of the Unless Order, the Smiths have therefore caused two trial dates to be vacated, prejudicing FCIB's interests and the overriding objective to deal with matters expeditiously.

[98.] With respect to the second stage, FCIB submitted that the Smiths have not given adequate evidence of the reason or reasons for their failure to comply with the Unless Order. Counsel for FCIB referred this Court to ***Rapid Display Inc. v Ahkye [2022] EWHC 274 (Comm)*** in which *HHJ Pearce* (sitting as a judge of the English High Court) said at para 129:

> A party who is seeking relief from sanction can be expected to come before the court with a full explanation of how the need for the application comes about. It is not for the parties' advocate to have to postulate matters that are not verified in evidence on a central issue, where the party is seeking the court's indulgence.

[99.] Counsel further submitted that it was not sufficiently clear that financial hardship was the reason the Smiths' list of documents and expert evidence were not filed and, if it was, financial hardship is not a good reason for the breaches because it is not relevant to them, the Smiths have been able to fund the prosecution of this action, and the Smiths would have properly been advised to be prepared to fund their expert given an unless order had been made by this Court. Counsel observed that, in ***Gregory Cottis v Robert Adams 2018/PRO/cpr/00035***, the Court refused to grant relief from sanctions where

there was no good explanation for the non-compliance with the Courts's order and, on the facts, even the evidence of a medical condition was not a sufficient reason for failing to comply with a filing deadline.

[100.] With respect to the third stage, Counsel for FCIB submitted that the Court must consider all the circumstances of the case inclusive of the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with rules, practice directions and orders so that it may deal justly with the application.

[101.] FCIB submitted that, in ***Denton***, the English Court of Appeal specifically pointed to the timing of the application and the litigation history as relevant factors to weigh in the balance when considering all the circumstances. Counsel submitted that, here, the Smiths have demonstrated no effort to move with alacrity in the wake of non-compliance and have demonstrated a continued disregard for compliance with this Court's orders. Counsel pointed to the fact that, after the breach of the First Case Management Directions, the Smiths took no steps for almost a year until faced with IMBL's application for an unless order and, after the Smiths breached the Unless Order, the Smiths failed to promptly request relief from sanctions even after three separate opportunities arose for them to do so.

[102.] Counsel for FCIB submitted that the Smiths should not be granted relief from sanctions for their failure to comply with the Unless Order and the sanction imposed by the Unless Order should stand.

[103.] Counsel for FCIB submitted that FCIB is entitled to the costs of and occasioned by the Smiths' application whether or not the Smiths are successful. Relying on ***rule 26.8(3)*** of the ***CPR***, Counsel submitted that the primary costs order on a relief from sanctions application is that the party who seeks relief shall bear the costs of the application. The Court may only exercise its discretion to depart from such an order if exceptional circumstances warrant an alternative costs order.

[104.] Counsel submitted that the principles governing costs on a relief from sanctions application were considered and discussed by *Marcus Smith J* in ***Swivel UK Limited v Tecnolumen GmbH [2022] EWHC 825 (Ch)*** where he said at paras 13 to 15 and 22:

> 13.Turning then to this case, as a matter of general principle a party that must apply to court for relief from sanction, including where a judgment in default or order in default has been obtained, is the party who ought to bear his or her <u>own costs</u> of that application.
>
> 14.It may be that the rule in many cases goes further than that, so that in addition to bearing his or her own costs, the party applying for relief from sanction needs <u>also</u> to

bear the costs of the party resisting that application, even where relief from sanction is granted. (The point is clear if the application for relief from sanction fails.)

15.In a matter so discretionary as costs, there can be no hard and fast general rule, but it seems to me that that is the approach that should inform a judge in hearing such applications. Rules exist for a reason, and the relief from sanctions jurisdiction exists both to buttress those rules and to ensure that overall justice is done in those cases where the rules are breached. A party is perfectly entitled to oppose an application for relief from sanctions – and the court will often be assisted by such opposition, where it is considered, proportionate and not opportunistic. In such cases, in general terms, the costs so incurred by the respondent ought, in the usual case, be paid for by the party seeking relief, even if relief is granted in the face of the respondent's resistance.

...

22. It seems to me clear and important that I underline that there is no immediate and inextricable correlation between succeeding in an application for relief from sanction and the party so applying getting his or her costs from the opposing side. The usual rule is quite the opposite: there must be something particular to vary the usual rule as to incidence of costs and to bring the case within [41] of *Denton*. That should occur where the opposition to the application for relief from sanction is sufficiently unreasonable that it needs to be marked by an order for costs going in the opposite to the usual direction.

[105.] Counsel for FCIB submitted that there is no evidence of exceptional circumstances which might justify a deviation from the general principle that the Smiths ought to bear the costs of the application and nothing in FCIB opposing the Smiths' application went beyond FCIB's general entitlement to resist the grant of relief from sanctions on solid grounds. Counsel submitted that FCIB's costs of the application should be awarded separate from IMBL's costs having regard to the fact that FCIB and IMBL have separate interests.

IMBL's submissions

[106.] IMBL submitted that this Court should apply the three-stage analysis promoted by the English Court of Appeal in ***Denton*** in order to determine whether the Smiths should be granted relief from sanctions.

[107.] With respect to the first stage, IMBL submitted that the Smiths' breaches were both serious and significant. IMBL submitted that providing full and frank disclosure is a fundamental requirement in litigation and, to date, the Smiths had still not provided a filed list of documents; the unfiled list of documents the Smiths emailed is and was subject to change. IMBL also submitted that the Defendants breaches of the Unless Order in relation to expert evidence were continuing as the Defendants still had not received the filed

expert report of Mr. Hanna or any other member of the Smiths' "panel of independent lawyers".

[108.] Counsel for IMBL referred this Court to the ***British Gas*** case and the guidance given by the English Court of Appeal at paras 34 to 44:

> 34.The central issue which has emerged in relation to stage 1 is this. Should the court look at the breach of the unless order in isolation, namely filing the PTC two days late? Or should the court also take into account that the defendant had had three months in which to comply with the 8th November order and was 18 days late under the terms of that order.
>
> 35.Judge Harris appears to have taken the former view in paragraph 14 of his judgment. McGowan J took the latter view in paragraph 18 (i) of her judgment.
>
> 36.In relation to this issue, the crucial passage in the authorities is paragraph 27 of *Denton*. In that paragraph the Master of the Rolls and Vos LJ ("the majority") said:
>
> > "The assessment of the seriousness or significance of the breach should not, initially at least, involve a consideration of other unrelated failures that may have occurred in the past. At the first stage, the court should concentrate on an assessment of the seriousness and significance of the very breach in respect of which relief from sanctions is sought. We accept that the court may wish to take into account, as one of the relevant circumstances of the case, the defaulter's previous conduct in the litigation (for example, if the breach is the latest in a series of failures to comply with orders concerning, say, the service of witness statements). We consider that this is better done at the third stage (see para 36 below) rather than as part of the assessment of seriousness or significance of the breach."
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> 37.In my view the reference in the first sentence of that paragraph to "unrelated failures" is a reference to earlier breaches of rules or orders which the applicant has committed during the course of the litigation. At stage 1 it is not legitimate to say "this breach is trivial but, set against X's history of failures and delays, this breach is the last straw. It becomes a serious matter." At stage 1 the court must ignore X's historic breaches and assess the breach in respect of which X is seeking relief.
>
> 38.An "unless" order, however, does not stand on its own. The court usually only makes an unless order against a party which is already in breach. The unless order gives that party additional time for compliance with the original obligation and specifies an automatic sanction in default of compliance. It is not possible to look at an unless order in isolation. A party who fails to comply with an unless order is normally in breach of an original order or rule as well as the unless order.
>
> 39.In order to assess the seriousness and significance of a breach of an unless order, it is necessary also to look at the underlying breach. The court must look at what X failed to do in the first place, when assessing X's failure to take advantage of the second chance which he was given.

> 40. In my view the phrase "the very breach" in paragraph 27 of *Denton*, when applied to an unless order, means this: the failure to carry out the obligation which was (a) imposed by the original order or rule and (b) extended by the unless order.
>
> 41.The very fact that X has failed to comply with an unless order (as opposed to an 'ordinary' order) is undoubtedly a pointer towards seriousness and significance. This is for two reasons. First, X is in breach of two successive obligations to do the same thing. Secondly, the court has underlined the importance of doing that thing by specifying an automatic sanction in default (in this case the Draconian sanction of strike out).
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> 42.On the other hand, as Mr Weston rightly says, not every breach of an unless order is serious or significant. In *Utilise* the claimant was just 45 minutes late in complying with an unless order. He filed his budget by 4.45 p.m., rather than 4 p.m. when it was due. The Court of Appeal held that a delay of only 45 minutes in compliance was "trivial". The court also noted that, contrary to the district judge's view, there was no underlying breach of the rules onto which the unless order was attached.
>
> 43.After this review of the authorities, let me return to the present case. BB had three months to comply with the 1st November order. They did not do so. They filed their PTC 18 days late by reference to that order. BB received the unless order on 13th February (not 17th February as Judge Harris was led to believe). They had six days in which to comply with the unless order. They failed to do so. The document which they filed on 18th February was not a PTC. Furthermore its contents bore no sensible relationship to the current litigation. It proposed that all sorts of steps should be taken long after the fixed trial date.
>
> 44.The defendant did not file a PTC until two days after the expiry of the unless order. In my view McGowan J was right. It is not possible to classify the defendant's breach as anything other than significant and serious.

[109.] Counsel drew this Court's attention to the fact that ***British Gas*** was a case in which the English Court of Appeal refused relief from a sanction which took effect because the party in default had breached an unless order requiring it to file a pre-trial checklist (PTC), and in that case the English Court of Appeal had said (at para 56):

> As at 21st February the late filing of the listing questionnaire had not had any adverse impact on the smooth conduct of the action. The moderately late filing of a PTC is not like the late service of evidence or the late disclosure of documents. It does not disrupt the work schedule of any other party to the action. The PTC is needed for administrative reasons, except in those cases where the court dispenses with that procedural step. The late provision of the PTC in this case did not have any adverse effect on the administrative processes of the Oxford County Court.

[110.] Counsel submitted that this case involved both the late service of evidence and the late disclosure of documents which severely disrupted the work schedule of the Defendants and the schedule of this matter. Counsel further submitted that, as a result of the Smiths' defaults, the Defendants could not proceed further with preparation for trial, and, as such, the Smiths' defaults were both serious and significant.

[111.] With respect to the second stage, IMBL submitted that the Smiths have not provided a good or reasonable excuse for either of their defaults.

[112.] Counsel submitted that no reasonable explanation has been provided by the Smiths for their failure to file their list of documents prior to sending it via email on 10 June 2022 or for failing to file it at any point thereafter. At the relevant time, the Supreme Court had no provision for the electronic filing of documents and the Smiths' erroneous assumption that uploading a document to the Court's eDocument platform is tantamount to filing is in no way a "good reason" for their failure to comply (particularly as the Smiths were and are represented by counsel).

[113.] IMBL submitted that the Smiths' reliance on impecuniosity as an explanation for their failure to file their expert evidence is not a good or reasonable excuse as, if the Smiths were impecunious, they ought to have made an application to the Court prior to 22 July 2022. Counsel referred the Court to ***Darlene Allen-Haye v Kenenan Baldwin SCCivApp No. 186 of 2019***, where the defaulting party claimed that she did not comply with the Court's unless order because she was initially unrepresented and unaware of her obligations and she was not in a position to financially retain counsel sooner than she did. That excuse was rejected on the facts of that case because the defaulting party was present when the unless order was made and its ramifications were explained to her and neither she, nor her counsel, when she retained one, formally applied for an extension of time.

[114.] With respect to the third stage, IMBL submitted that the Court should consider all the circumstances of the case, including the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with rules, practice directions and orders.

[115.] Addressing the need for litigation to be conducted efficiently, Counsel for IMBL submitted that it is no longer possible for this litigation to be conducted efficiently because almost four years has passed since the events giving rise to these proceedings and, due to the action of the Smiths, the very first step of general disclosure has not yet been completed.

[116.] Addressing the need to enforce compliance with rules, practice directions and orders, IMBL submitted that the Smiths have exhibited a history of non-compliance with the Court's orders which should not be condoned by granting them relief from sanctions. The Smiths failed to comply with the First Case Management Directions which led IMBL to seek an unless order. The Smiths then failed to comply with the Unless Order. As a result of their non-compliance, two trial dates have been vacated.

[117.] IMBL submitted that the Smiths have displayed a similar disregard for practice directions. First, Practice Direction No. 4 of 1974 requires that the form of a draft order be agreed before it is sent to a judge for initialing. Here, Counsel for the Smiths did not indicate his agreement to a draft Unless Order until after the draft Order had been sent to the Court and nearly two weeks after the draft was circulated to counsel for approval. Second, Practice Direction No.1 of 2001 requires that attorneys respond to all reasonable requests to ascertain convenient dates for hearings. Here, Counsel for the Smiths did not respond to a request from Counsel for IMBL for available dates for a case management conference in January 2021.

[118.] IMBL submitted that, at the third stage of the analysis, the Court is entitled to take into account how promptly the application for relief for sanctions has been made. Counsel for IMBL referred the Court to ***British Gas***, in which the defaulting party applied for relief from sanctions less than six weeks after their default and the English Court of Appeal refused to grant relief because the defaulting party had not made the application promptly enough and had lost the possibility of maintaining the original trial date.

[119.] Counsel submitted that, here, the Smiths did not apply for relief from sanctions promptly. The Smiths ought to have applied for relief from sanctions as soon as they realized they would not be able to comply, or had not complied, with the Unless Order, and that caused the wasting of a second trial fixture. As regards the filing and serving of their list of documents, the Smiths knew as of the afternoon of 10 June 2022 that they would not be able to comply with the Unless Order. And, as regards the filing and service of their expert evidence, the Smiths knew for weeks leading up to 22 July 2022 that they might not be able to comply with the Unless Order. The Smiths did not apply for relief from sanctions until this year.

[120.] IMBL submitted that the impact of trial dates being vacated on the parties and others was aptly described by *Jackson LJ* at para 89 of ***Denton***, though his comments must be "amplified by two" in the present case. *Jackson LJ* said:

> ...The judge's order that the claimants pay "the defendant's costs thrown away by the vacation of the trial" does not begin to meet the justice of the case. There are many hidden costs flowing from adjournment of the trial: witness statements and reports need updating; fee earners handling the litigation may change with a need for newcomers to read into the case; both legal teams continue to work upon the litigation and so forth. In addition to the increased costs there is wastage of resources. Lawyers, experts, factual witnesses and other busy people who had cleared their diaries to attend the trial (probably cancelling other commitments) will have to clear their diaries yet again for another trial a year later. There is also the continuing strain on the parties to consider. What litigants need is finality, not procrastination. Quite apart from its

impact on the immediate parties in *Denton*, the judge's order has caused unnecessary delay for many other litigants awaiting their day in court.

[121.] On the issue of prejudice, IMBL relied upon the comments made by *Crane-Scott JA*, delivering the judgment of the Court of Appeal in ***Darlene Allen-Haye***, at para 70 where she said:

> Prejudice: At paragraph 7 of her affidavit-in-support, Mrs. Allen-Haye claims that the Baldwins would suffer no prejudice if time were extended to permit her intended appeal to be heard. Admittedly, the Baldwins filed no affidavit to establish any specific or actual prejudice they would suffer if time were to be extended to allow the appeal to be heard. However, it is well established that mere delay can amount to prejudice and there is inevitably always some element of prejudice inherent in any delay, including the further delay which will arise if the application is granted. **Pamplin** (above); and **Yasmine Michelle Johnson** (above). Furthermore, prejudice may be presumed from delay for which there is no justification. **Colebrooke** (above.)

[122.] IMBL submitted that if relief from sanctions is granted, trial will have been delayed by at least two years, which is "untenable".

[123.] Counsel for IMBL made submissions on whether relief from sanctions should be granted under the ***RSC*** but I need not rehearse those submissions.

[124.] Counsel for IMBL submitted that, no matter the outcome of the Smiths' application, the Defendants should be entitled to their costs as this application was only required because of the Smiths' conduct.

Discussion and analysis

[125.] I approach the question of whether the Smiths should be granted relief from sanctions by applying the three-stage framework summarized above:

i) the first stage is to identify and assess the seriousness and significance of the "*failure to comply with any rule, practice direction or court order*" which engages ***rule 26.8(1)***.

ii) the second stage is consider why the default occurred, i.e., the reason for the breach; and

iii) the third stage is to consider all the circumstances of the case so as to enable the Court to deal justly with the application.

[126.] I must take into consideration the overriding objective at the third stage of the analysis.

Stage 1 – Assessing seriousness and significance

[127.] The first question that I must decide is whether the Smiths' breaches of the Unless Order were serious or significant taking into consideration the guidance set out at paras 68 and 69 above. The breaches that I must consider are the Smiths' failure to file and serve their list of documents by 10 June 2022 and their failure to file and serve all their expert evidence by 22 August 2022. At this stage, I must consider the effect of these breaches separately.

[128.] The starting point in relation to each breach is the observation that the Smiths have not complied with the unless order. As I noted above, the fact that a defaulting party has failed to comply with an unless order is a pointer towards seriousness and significance. In ***Sinclair and Another v Dorsey & Whitney (Europe) LLP and Others [2016] 1 Costs LR 19***, *Popplewell J* aptly said at para 26:

> ...I have no doubt that in this case the breach ought properly to be categorised as very serious. The starting point is that breach of an unless order will almost always be treated as serious. It is a failure to comply with a court order in the knowledge that the court has already attached sufficient importance to the need to comply with it so as to impose the sanction of strike out as the proportionate consequence of non- compliance...

[129.] I was not persuaded by Counsel for the Smiths' attempts to downplay the gravity of the Smiths' breaches of the Unless Order on the basis that (i) they were not contumacious, (ii) the Smiths had (in his submission) materially complied with the Unless Order by emailing an unfiled list of documents to the Defendants and an unfiled expert report to the Defendants on the dates on which compliance was required by the Unless Order and (iii) the Defendants may have been aware of the material the Smiths intended to rely on.

[130.] As I see the matter, the Smiths breached an unless order, which is an order that is, by its nature, "*intended to mark the end of the line for a party who has failed to comply with it...*" (to adopt the words of *Auld LJ* in ***Hytec Information Systems Ltd v Coventry City Council [1997] 1 WLR 1666*** at page 1676). In addition, the Smiths' breaches of the Unless Order disrupted the progress of this action. Not only would one ordinarily not expect a litigant under the ***RSC*** to proceed with preparations for trial when served with unfiled documents in breach of an unless order and in the face of the uncertainty that surrounded the status of the Smiths' expert evidence, but there was no obligation on the Defendants to continue to prepare for trial once this action stood dismissed pursuant to

paragraph 6 of the Unless Order. That paragraph expressly made the case management directions applicable to the Defendants contingent upon compliance by the Smiths with their obligations under paragraphs 1 and 3 of the Unless Order. The Smiths failed to mitigate the disruption caused by their breaches by a prompt application for relief and the result is this Court has now had to vacate two trial dates, which is a serious matter. The Smiths' conduct has had an impact not only on these proceedings but on other court users whose matters are before the Court and has unnecessarily wasted time and expense. In my judgment, the Smiths' breaches of the Unless Order were serious and significant.

Stage 2 – Assessing the reasons for the breaches

[131.] The next step in the analysis that I am required to undertake is to consider the reason or reasons for the Smiths' breaches of the Unless Order, taking into consideration the guidance set out at para 70 above and being mindful of the dictum of *Turner J* in ***EXN v East Lancashire Hospitals NHS Trust and another [2022] 4 WLR 70*** at para 29 that "*...reasons, rather like people, are not normally either wholly good or wholly bad*".

[132.] While the Court is able to grant relief from sanctions even if good reasons for the very breaches in question are not demonstrated by the defaulting party, if they are to be demonstrated in this case, the onus is on the Smiths to persuade me that there were good reasons for their failures to comply with the Unless Order.

[133.] In this connection, I have considerable sympathy for FCIB's submission that the Smiths have not given sufficient evidence of the reasons for their non-compliance with the Unless Order. Like the evidence before the judge in ***RC Residuals Ltd v Linton Fuel Oils Ltd and another [2002] 1 WLR 2782***, the evidence relied on by the Smiths here does not speak much to the circumstances that led the Smiths to only attempt to comply with the Unless Order at the final hour. In addition, impecuniosity is not a self-proving condition. The evidence relied on by the Smiths does not enable me to form a clear view of the Smiths' assets and liabilities or their ability to raise funds. Nevertheless, I ultimately share the IMBL's view that it is possible to glean purported reasons for the Smiths' non-compliance from their evidence.

[134.] So far as concerns the Smiths' failure to file a list of documents, paragraph 6 of the Forbes Affidavit suggests that the reason the Smiths' list of documents was not filed and served in compliance with the Unless Order is because the Smiths thought that uploading a document to the Court's eDocument platform is the equivalent of filing and serving the document:

> 6. On the 10th June 2022 Mr Duncanson and BCA staff filed and served the Plaintiffs' List of Documents *electronically* by uploading it to the Supreme Court's 'e-Document'

system and simultaneously copied the same to the learned Justice and all co-counsel [as indeed shown by the print screens and the official court emailed receipt in the Exhibit Bundle detailed below]. Defence counsel of both sides never raised the slightest objection to this form of electronic 'File and serve' and in fact requested inspection subsequent to it, in acceptance of it [as shown by their emails in my Exhibit Bundle].

[Emphasis added]

[135.] I accept the submission of IMBL that this error cannot amount to a good reason for the Smiths' failure to with the Unless Order. The ***RSC*** does not make provision for the electronic filing of documents and it is known to even the most inexperienced practitioner regularly appearing before this Court that this Court does not yet have a system for electronically filing documents. In my judgment, such a fundamental misunderstanding of local practice cannot be a good reason for a legally represented party's failure to comply with a court order, rule or practice direction.

[136.] So far as concerns the Smiths' failure to file an expert report, paragraphs 13(v.) and 14 of the Forbes Affidavit suggest that the reasons why the Smiths' expert evidence was not filed and served in compliance with the Unless Order is because of difficulties the Smiths encountered when attempting to get Mr. Hanna's Affidavit sworn and filed and because of the Smiths' inability to secure funds to pay their expert:

13. Now produced and shown to me is a Bundle of Exhibits being true copies of the various correspondence, printscreens, and Court receipt evidencing electronic filings and service of due Notice to the opposing parties:-

...

v. Email to BCA staff from Mr Duncanson on the 22nd July 2022 instructing the printing of the Brian Hanna affidavit and exhibits, all included there, but unfortunately delays with Mr Hanna being unavailable all day for swearing of same. In addition Freeport staff were instructed by Mr Duncason to simply file the unsworn version of the Brian Hanna affidavit pending obtaining the sworn copy to come [a practice he says is common in the Turks & Caicos Islands, especially where witnesses or counsel are overseas, so that the parties and the court have the earliest advance notice of intended evidence] but I can state form our records that Ms Pitter reported to Mr Duncanson that the Freeport Supreme Court Registry flatly refused to accept for filing the unsworn affidavit and that eh phoned Mr Duncanson from the Court directly on her cell to report that fact on the day, and neither he by phone nor she in person could convince the reception lady or anyone else there at the Registry to stamp file that document. In any event, the underlying exhibited affidavits had all been filed long ago and so BCA resolved to simply get on with re-swearing and *re-filing them*, namely the Pamela Hanna one, as soon as possible, which we did achieve getting stamped 3 business days later ...

14. That I am told by Mr Duncanson and do verily believe by direct inference from numerous emails to the Plaintiff clients and Freeport staff for weeks leading up to the

> 22nd July 2022, that the said clients, Mr and Mrs Smith simply struggled under continued severe financial hardship because of the Defendants' own negligence, a dilapidated mostly destroyed uninhabitable house, with continuing outside accommodation rental expense, all whilst bank mortgage payments still continued/continue, and that they absolutely and simply struggled financially to come up with the money to pay their expert Mrs Pamela Hanna for her work and evidence in support of their case. But that this they did in fact eventually succeed in doing, albeit extremely last minute at the time.

[137.] I am unable to accept that these reasons constitute good reasons for the Smiths' failure to comply with the Unless Order. A party that only attempts to comply with an unless order at the last minute does so at their own peril. As *Kay LJ* remarked in the ***RC Residuals*** case, at para 22, when an unless order is made "*the obligation on the parties is to comply with the order as soon as possible, but no later than the deadline provided by the order.*" Furthermore, it should have been obvious in advance of the deadline for compliance that non-compliance with the Unless Order was a real possibility. At that point, the proper course was for the Smiths to apply for a variation of the trial timetable or an extension of time. *Andrews J* made this point well in ***Philip John Eaglesham v Ministry of Defence [2016] EWHC 3011 (QB)***, where he said at para 4:

> A party who faces genuine difficulties in compliance with a court Order, particularly an Unless Order, should come back to the Court and explain the problems that it is facing as soon as they arise, if those problems are sufficiently serious to give rise to a real risk of non-compliance.

[138.] In my judgment, the Smiths have not justified their failures to comply with the Unless Order in this case. The best that can be said is that Smiths' breaches were not contumacious or deliberate, as Counsel for the Smiths submitted. However, that is no excuse for what transpired. In my judgment, the Smiths, whether on their own account or by virtue of counsel conducting the matter, adopted an excessively casual and lackadaisical approach to this litigation which led to difficulties in compliance which were exacerbated by their apparent unfamiliarity with the practices and procedures of this Court despite being represented by counsel.

Stage 3 – Considering all the circumstances of the case

[139.] Having assessed the serious and significance of the Smiths' breaches of the Unless Order and the reasons they have proffered for those breaches, I must now stand back and consider whether relief should be granted in all the circumstances of the case, giving particular weight to the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with rules, practice directions and orders. This is a fact-specific and evaluative judgment of where the justice of the case lies which must be informed by the overriding objective.

[140.] In relation to the need for litigation to be conducted efficiently and at proportionate cost, it cannot be doubted that the Smiths' breaches of the Unless Order prevented this litigation from being conducted efficiently. The short of it is that the preparation of this matter for trial has been delayed for over a year as a result of the Smiths' breaches of the Unless Order and the parties will require additional time to ready this matter for trial if relief from sanctions is granted. This is a consideration which weighs against the grant of relief from sanctions in the balance.

[141.] In relation to the need to enforce compliance with rules, practice directions and orders, I have found that the Smiths' breaches of the Unless Order were serious and significant breaches of an unless order for which no good excuse has been given, though the excuses that have been proffered by the Smiths are not at the worst end of the spectrum. These were not isolated incidents. The Smiths breached the First Case Management Directions (which they have not explained) and I accept also that the Smiths breached practice directions issued by this Court through the conduct of their counsel. Though I am prepared to proceed on the basis that none of the Smiths' breaches have been contumacious, the Smiths have not taken the rules, practice directions and orders of the Court seriously enough. This is therefore another consideration which also weighs against the grant of relief from sanctions in the balance.

[142.] An additional consideration that weighs against the grant of relief from sanctions here is that the Smiths failed to promptly apply for relief from sanctions. The Smiths inexplicably delayed in applying for relief from sanctions until this year despite the Defendants indicating as early as 25 July 2022 (in the case of IMBL) and in any case by September 2022 that they regarded the Unless Order as having taken effect. A reasonably diligent litigant would have sought relief from sanctions from September 2022 at the latest. While it may perhaps be that the Smiths were not certain they had failed to materially comply with the Unless Order, if that were so, the Smiths ought to have put the matter before the Court. In oral submissions, Counsel for the Smiths suggested that no application for relief from sanctions was more timely brought because the breaches the Smiths committed in this case would be regarded less seriously in the Turks & Caicos Islands where he primarily practices. That is no excuse for the delay. Counsel appearing in matters before this Court are bound to conduct themselves according to the standards of this Court.

[143.] The question that I must in the final analysis ask myself is whether the factors favouring the grant of relief from sanctions here are collectively sufficiently weighty so as to outweigh the considerations I have identified above which weigh against the grant of relief from sanctions. In my view, the answer to this question is "yes". The Smiths did attempt to comply with the Unless Order, however inadequate those attempts at compliance may have been. The Smiths' breaches were not contumacious and the blame for the Smiths' breaches appears to lie, to some extent at least, with Counsel for the

Smiths. If these proceedings are dismissed, the Smiths will be driven from the seat of judgment and will have only a claim against their legal advisors. On the other hand, if the Court grants relief from sanctions, the parties need only prepare for trial in the usual way. The Defendants would be at liberty to object to the Smiths' disclosure or expert evidence if they so wish. While I accept that it is well established that mere delay can amount to prejudice and there is inevitably always some element of prejudice inherent in any delay, this action appears to be a relatively straightforward one and the Defendants have not adduced specific evidence of prejudice. These proceedings are also at a relatively early stage and the Unless Order was drawn in a way that minimized wasted expense (by making the directions applicable to the Defendants conditional). The Smiths were also operating under the ***RSC*** at the time of their breaches, which was a less strict procedural regime than the ***CPR*** in many respects (though, ironically, not in the area of relief for sanctions).

[144.] In my judgment, weighing the competing considerations, it is appropriate that I grant the Smiths relief from sanctions in the exercise of my discretion. In doing so, I emphasize that the Smiths can expect no further indulgences in the event of future non-compliance.

Costs

[145.] The costs of this application are governed by ***rule 26.8(3)*** of the ***CPR*** and ***Part 71*** of the ***CPR***.

[146.] ***Rule 26.8(3)*** of the ***CPR*** provides that the Court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown.

[147.] ***Rule 71.12*** of the ***CPR*** provides that, as a general rule, a judge hearing an application will summarily assess the costs of that application immediately or as soon as practicable after the same is disposed of, though a judge retains discretion to order that the whole or any part of the costs payable be subject to a detailed assessment.

[148.] ***Rule 72.26*** of the ***CPR*** deals with assessed costs on procedural applications. The rule provides, *inter alia*, that in deciding which party, if any, should pay the costs of the application the general rule is that the unsuccessful party must pay the costs of the successful party and that, where the application is an application for relief under ***rule 26.8*** of the ***CPR***, the Court must order to pay the applicant to pay the costs of the respondent unless there are special circumstances.

[149.] in ***Swivel UK Limited v Tecnolumen GmbH [2022] EWHC 825 (Ch),*** *Marcus Smith J* said at para 15:

> 15. ... Rules exist for a reason, and the relief from sanctions jurisdiction exists both to buttress those rules and to ensure that overall justice is done in those cases where the rules are breached. A party is perfectly entitled to oppose an application for relief from sanctions – and the court will often be assisted by such opposition, where it is considered, proportionate and not opportunistic. In such cases, in general terms, the costs so incurred by the respondent ought, in the usual case, be paid for by the party seeking relief, even if relief is granted in the face of the respondent's resistance.
>
> [Emphasis added]

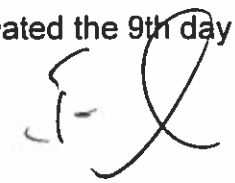
[150.] In my judgment, there are no special circumstances capable of absolving the Smiths of being required to pay the Defendants' costs of and occasioned by the Relief Summons in accordance with the usual rule.

[151.] This has been a reasonably straightforward application and therefore it is appropriate that costs be summarily assessed. I am, however, not presently in a position to summarily assess costs. I will therefore have to deal with this aspect of the matter on another occasion.

Conclusion

[152.] For the foregoing reasons, I accede to the Relief Summons with costs to the Defendants to be summarily assessed. The Smiths' Writ of Summons is reinstated and this action is restored to the list. The Smiths must physically file their list of documents on or before 11 August 2023 and must serve a filed copy of that list of documents on the Defendants by 5:00 pm on that date. Ms. Hanna's Affidavit shall stand as the Smiths' expert report in these proceedings. The Defendants are to file and serve a statement of the costs that they have incurred in connection with this application by 4:00 pm on 16 August 2023. These proceedings are adjourned to a case management conference at 9:30 am on 17 August 2023 at which I will hear the parties on directions to ready this matter for trial.

Dated the 9th day of August, 2023



Sir Ian R. Winder
Chief Justice