

**IN THE COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
Common Law and Equity Division  
Claim No. 2023/CLE/gen/00347**

**BETWEEN:**

**ANTONIO FOWLER**

**Claimant**

**AND**

**BOLIE LLOYD  
(d.b.a. Master Lloyd Custom Cabinets and Construction)**

**Defendant**

Before: The Honourable Mr. Justice Leif Farquharson

Appearances: Mr. Arthur Minns for the Claimant  
Mr. Charles Mackay for the Defendant

Heard on the papers

---

**RULING**

**The Applications Before the Court**

1. There are two applications before the Court: (i) an application by the Claimant seeking an order striking out the Defendant's pleadings and for the Defendant to be held in contempt of court; (ii) an application by the Defendant seeking relief from sanctions for failure to comply with a Case Management Directions Order issued by Fraser, Sr. J (as she then was) (hereinafter, the "**CMC Order**" or "**Order**"). As the Defendant's application for relief, if successful, has the potential to dispose of the Claimant's application, I propose to address this first.

**Factual Background and Procedural History**

2. The current action was initiated by Standard Claim Form filed on 12 May 2023. According to his Statement of Claim, the Claimant sues the Defendant in trespass. The subject property is a lot situated on Armbrister Street in Fox Hill. In a nutshell, the Claimant alleges that he is the fee simple owner of the property, having purchased it for \$30,000 pursuant to a conveyance dated 21 February 2018 and duly recorded in

the Registry of Records. He alleges that since on or about December 2022, the Defendant entered the property and committed various acts of trespass, including clearing land, digging a trench, building a foundation and enclosing the entirety of the property with a chain-link fence. The Claimant states that despite verbal and written demands, the Defendant refuses to vacate. By way of relief, the Claimant primarily seeks a declaration confirming his ownership of the property, damages and permanent injunctive relief.

3. By Defence and Counterclaim filed on 18 August 2023, the Defendant denies all liability to the Claimant. The essence of his Defence is that both the Claimant's and the Defendant's respective predecessors in title derived title from a common owner; however, "*the title which came through the defendant's documents of title preceded the [Claimant's] ownership in terms [of] acquisition and recordation and consequently the defendant's title to the property through his predecessors in title rank [sic] in priority to the [Claimant's] title pursuant to Section 10 of the Registration of Records Act*" (see para.2 of Defence and Counterclaim). Particulars are provided to support this allegation. The Defendant also counterclaims against the Claimant for trespass. In doing so, he does not refer to any physical acts of trespass but relies on the self-same averments grounding his claim to ownership of the property as also giving rise to liability on the part of the Claimant in trespass.
4. By Reply and Defence to Counterclaim filed on 6 September 2023, the Claimant joined issue with the Defence except where it consisted of admissions and denied all liability on the Counterclaim.
5. A Case Management Conference was held before Fraser, Sr. J. on 11 April 2024. During that hearing, a series of directions were issued to move the matter towards trial. The Judge also set trial dates for 15 and 16 April 2025. Paragraph 16 of the CMC Order provided that failure by any party to comply with the directions in the Order "*shall result in their pleadings being struck out automatically, with judgment to the innocent party and an appropriate order as to costs being made.*" The Order further provided that the non-compliant party in such a scenario was at liberty to apply for relief from sanctions in accordance with CPR 26.8. The Order also included a provision addressing extensions of time for complying with the various directions.
6. The matter first came before me on 30 January 2025, the date specified in the CMC Order for the hearing of any interlocutory applications. In this vein, the Claimant had previously filed a Notice of Application on 3 January 2025 seeking an order to strike out the Defendant's pleadings pursuant to paragraph 16 of the Order and to hold the Defendant in contempt of court. The grounds for the application asserted that the Defendant failed to comply with the CMC Order as it related to the filing of his List of Documents, providing inspection, filing Witness Statements and participating in the preparation of the Statement of Facts and Issues (which was to be agreed upon). The Notice of Application also noted that the Defendant had not filed any application for an extension of time. For clarity, I would note that the alleged contempt was based on the very same failures to comply with the CMC Order, rather than any separate breach of a court order or other contemptuous conduct.
7. The hearing scheduled for 30 January 2025 did not proceed as planned because counsel for the Defendant, who appeared via Zoom, was not then in a position to fully participate due to health reasons. The Court was also informed that he was at the time

visiting his doctors in Miami. Consequently, the Claimant's application was adjourned to 11 February 2025, without objection. The Court also noted that based on the wording of paragraph 16 of Fraser, Sr. J's Order, I was provisionally of the view that if the Defendant wished to continue with the prosecution of his Defence and Counterclaim, he needed to make an application for relief from sanctions, which I would also be willing to hear on the adjourned date.

8. Counsel next appeared before me on 11 February 2025, as scheduled. Learned counsel, Mr. Mackay, indicated that he had begun preparing the necessary application for relief from sanctions, but this was delayed due to his health condition. In the circumstances, the matter was again adjourned without objection. The new hearing date was set for 25 February 2025. Further directions were also issued regarding the Defendant's foreshadowed application for relief.
9. Counsel next appeared before me via Zoom on 25 February 2025, as scheduled. By that time, the Defendant had filed a notice of application seeking relief from sanctions on 20 February 2025, supported by an affidavit sworn to by himself and filed on 21 February 2025; however, no submissions had been laid over. Mr. Mackay then informed the Court that due to his medical condition, he was travelling for treatment the following day. He requested a further adjournment, which was not opposed. The new hearing date was set for 17 March 2025.
10. Counsel for the Claimant appeared on 17 March 2025 via Zoom as scheduled. Mr. Mackay did not appear, his office having informed the Court that he was ill and unable to attend the hearing. In all the circumstances, the Court determined to consider the Defendant's application for relief from sanctions on the papers and directed that both sides lay over and exchange any submissions in reference to the application on or before 31 March 2025. Both sides complied with the Order, albeit the Defendant's submissions were laid over just after the stipulated deadline on or about 2 April 2025, the Court being informed that counsel for the Claimant had agreed a very short extension.
11. The parties next appeared before me on 8 April 2025, which was the date originally scheduled for the Pre-trial Review. At this hearing, the Court invited both sides to lay over further submissions addressing the specific considerations arising in an application for relief from sanctions, which they did.
12. In the circumstances, the trial dates of 15 and 16 April 2025 unfortunately had to be vacated.

#### **Affidavit Evidence**

13. The Defendant relied on two affidavits in support of his application for relief: (i) the affidavit of the Defendant himself filed on 21 February 2025; and (ii) the affidavit of Chaunce Bastian of the firm of Mackay & Moxey, attorneys for the Defendant, sworn to on 30 April 2025 and filed on 21 January 2026.
14. The affidavit of Mr. Lloyd evidences that he was registered as a Bahamian citizen on 15 March 2017. He states that his chain of title dates back to 1967. He further states that the survey plan relied upon by the Claimant in the action was prepared by a

surveyor who was not qualified under the *Land Surveyors Act*. He also exhibits a survey report and accompanying plan prepared by Donald E. Thompson & Associates, registered land surveyors, dated 24 January 2025. Although not explicitly stated, the purpose of this survey report and plan appears to be to define the boundaries of a parcel originally owned by Alfred Davis and conveyed to Vincent de Paul Roberts on 6 December 1967 (which conveyance is stated to be the Defendant's root of title), and to establish the boundaries of the lot identified in the Claimant's conveyance. The apparent takeaway from the survey (and I put it no higher than that at this time) is that the lot purchased by the Claimant appears to fall within the boundaries of the parcel conveyed to Vincent de Paul Roberts. This information seems intended to support the allegations made in paragraph 2 of the Defence and Counterclaim mentioned earlier.

15. The affidavit of Ms. Bastian confirms (among other things) that Mr. Mackay, counsel with carriage of the matter for the Defendant, unfortunately fell ill in July of 2023. She further states that Mr. Joseph Moxey, who attended the CMC hearing before Fraser, Sr. J., appeared in a holding capacity for Mr. Mackay, who retained carriage of the matter. She confirms that due to his illness, Mr. Mackay had to undergo treatment at Mount Sinai Medical Center in Miami, which required frequent travel on his part to visit physicians. In this regard, she exhibits a letter dated 3 January 2024 from a medical specialist at Mount Sinai Medical Center discussing Mr. Mackay's condition and diagnosis at that time. I do not propose to address the full details here. I would merely observe that I regard Mr. Mackay's health challenges as outlined in the letter to be very serious and to require intensive treatment over an extended period of time, as stated by the medical specialist. At that time, the specialist confirmed that Mr. Mackay would be unable to appear in court for at least two months. Ms. Bastian also confirms that throughout the period of his illness, Mr. Mackay's work schedule was limited and his ability to appear in court was significantly affected. She also purports to address the merits of the Claimant's claim, essentially arguing that they are tenuous in light of the Defendant's clear title to the property at issue. Furthermore, she confirms that before proceedings began, Mr. Mackay wrote to the Claimant's attorneys demonstrating that the Defendant had good and marketable title to the property. She also notes that the Claimant's Bundle of Documents filed in the action includes references to the Defendant's documents of title.
16. The Claimant's application was supported by an affidavit sworn by himself and filed on 3 January 2025. This essentially referred to the Defendant's failure to comply with the CMC Order, including not filing a List of Documents, not participating in the preparation of the Bundle of Documents, not filing Witness Statements and not filing a Statement of Facts and Issues. The Claimant also confirmed that he had fully complied with the Order and asserted that the Defendant's conduct was contemptuous and warranted the striking out of his pleadings, with judgment being granted in his favour.

### **Submissions of the Parties in Summary**

#### ***The Defendant***

17. As indicated, the Defendant laid over two sets of Submissions in support of his application for relief. I will not address the points advanced in the same order in which they were presented in the Submissions. In summary, the Defendant contends that relief from sanctions is appropriate for the following reasons:

- (i) The breach of the CMC Order in the present case was not serious and could not have prejudiced the Claimant in preparing his case as he already possessed all relevant documents;
- (ii) The documents relied on by the Defendant to prove his ownership of the property were provided to the Claimant before the start of proceedings and were also specifically identified in his Defence and Counterclaim;
- (iii) There is no closed list of good or bad reasons for failing to comply with a rule, practice direction or order. In this regard, illness is generally recognised as a good reason;
- (iv) The Defendant has an overwhelmingly strong case on the merits. According to him, the Claimant cannot establish a title going back 30 years as required by the *Conveyancing and Law of Property Act*. Conversely, he argues that he has an unbroken chain going back to the 1960's. As a result, the Defendant claims that the Claimant is in fact a trespasser on the material lot and is actually liable to him;
- (v) The Claimant's focus on seeking to have the Defendant held in contempt of court for non-compliance with the CMC Order is misplaced;
- (vi) Refusing relief from sanctions in the present case would not accord with the overriding objective;
- (vii) The Defendant should not be liable for costs because (a) there being no prior acts of non-compliance, the CMC Order should not have included a sanction that resulted in a party's pleadings automatically being struck out for any non-compliance whatsoever, with judgment and costs being awarded to the other side, (b) the Defendant set out his position on ownership of the material property and disclosed his documents of title both before the action was commenced and by way of his Defence and Counterclaim, (c) the original application moved by the Claimant aimed to have the Defendant held liable in contempt, which, as stated, was misconceived.

***The Claimant***

18. The Claimant's position may be summarised thus:

- (i) The Defendant unquestionably breached the CMC Order. The Defendant did not file a list of documents, provide inspection, file witness statements or participate in the preparation of the Agreed Statement of Facts and Issues. The Defendant also failed to file an application for relief from sanctions within the time initially directed by the Court for him to do so. The Defendant's non-compliance with the Court's orders and directions in this matter has therefore been egregious, brazen and contemptuous;
- (ii) The Defendant significantly delayed in filing an application for relief from sanctions, only doing so on 20 February 2025;
- (iii) The affidavit of Bolie Lloyd filed on 21 February 2025 in support of the application for relief is formally defective because the exhibit page is not notarised. Furthermore, this affidavit does not raise any issue pertaining to relief from sanctions;
- (iv) The Defendant has not placed in evidence any legal document depicting his name as owner of the material lot;
- (v) The tax authorities acknowledged the Claimant's ownership of the material lot. Moreover, the Claimant has produced a recorded survey plan;
- (vi) The Defendant has failed to present any valid reason for not complying with the CMC Order;

- (vii) The Defendant's breach of the CMC Order is also prejudicial to the administration of justice;
- (viii) The overriding objective requires that the Court ensure that parties are on an equal footing;
- (ix) The Defendant has not made an application to purge his contempt;
- (x) Relying on the cases of *Dumas v. Attorney General and Anor.* 2008/COM/lab/00045 and *Fuchs and Anor. v. Lockhart & Co. and Anor.* 2023/CLE/ge/00763, final judgment in the Claimant's favour is justified.

### **Discussion and Analysis**

19. As a preliminary matter, and before addressing the merits of the Defendant's application, I will direct that the affidavit of Bolie Lloyd filed on 21 February 2025 be re-filed with the exhibit page properly notarised.
20. CPR 26.8, which addresses relief from sanctions, provides as follows:
  - "(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."* [Emphasis supplied]
21. The **2024 Practice Guide** gives guidance on the operation of the rule. This materially states (at p.222):
 

*"... Non-compliance with the rules must be discouraged and not tolerated. However, the court must, in each application for relief, consider the seriousness and the significance of the breach. The court will also look at the underlying breach in order to assess the seriousness of the breach. The court will consider all the circumstances of the case. Such circumstances include the effect of the breach and the promptness of the application for relief."* [Emphasis supplied]
22. The case of **Andrew Smith v. First Caribbean International Bank [2023] 1 BHS J. No. 76** helpfully summarises the key principles to be considered in a request for relief from sanctions. After a thorough review of several leading authorities on the subject, Winder CJ stated as follows (at paras.57, 67-72):
 

"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.”

- ...
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 characterised 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)." [Emphasis supplied]

23. I will now briefly address the various considerations relevant to the application.

***The seriousness and significance of the Defendant's failure to comply with the CMC Order (Stage 1)***

24. It is not disputed that the Defendant failed to provide disclosure and inspection, failed to file witness statements and failed to participate in or contribute to the preparation of the Bundle of Documents and Statement of Facts and Issues, as required by the CMC Order. The Defendant's wholesale failure to comply with the CMC Order can only be characterised as exceedingly serious and significant. To compound the matter, by the time the Defendant filed a properly formulated application for relief from sanctions, the compromising of the trial date had become inevitable. I say no more about this factor.

***The reason for the Defendant's default (Stage 2)***

25. The affidavit of Bolie Lloyd, in my view, proffers no good reasons for the Defendant's default in complying with the CMC Order. For the most part, this appears to address matters going to the merits of the claim or defence (as the case may be) or to raise matters of little or no importance in explaining the reasons for the failure to comply with the CMC Order, including: the Defendant's citizenship status; the Claimant's hiring of

a surveyor who, allegedly, was not qualified under the *Land Surveyors Act*; and the fact that no application was made by the Claimant with respect to the Defendant's failure to comply with the CMC Order (which, in any event, is contradicted by the Claimant's application for the Defendant's pleadings to be struck out and for the Defendant to be held in contempt).

26. On the other hand, the affidavit of Chaunce Bastian shows that in July of 2023 Mr. Mackay, unfortunately, became ill. It also confirms that as of 3 January 2024, he was receiving intensive treatment for his condition at Mount Sinai Medical Center in Miami. As I have noted, I consider the health challenges Mr. Mackay was afflicted by to be very serious and of a kind that could significantly affect a person's work life. In fact, his doctors at that time confirmed that he would be unable to appear in court for at least two months. Additionally, Ms. Bastian herself confirmed (among other things) that during the period of his illness Mr. Mackay was required to make frequent trips abroad for medical treatment, his work schedule was limited and his ability to appear in court was greatly hindered. I also cannot ignore that when he appeared before me on 30 January 2025, Mr. Mackay was not then in a position to fully participate in the proceedings and he advised the Court that he was abroad for medical treatment. His health problems also seemingly persisted in the ensuing months, as can be seen from the discussion of the procedural history of the matter above.
  27. **Smith's** case, and the authorities cited therein, confirm that illness (including that of counsel) can be considered a good reason for default in compliance (see e.g. ***Mitchell v. News Group Newspapers Ltd.* [2014] 2 All ER 430, at para.41**). This is especially so if the illness is of a serious or debilitating nature, as opposed to a trivial illness.
  28. In the extremely unique and exceptional circumstances of this case, as outlined in the affidavit of Chaunce Bastian and the procedural chronology, I am therefore satisfied that the Defendant has provided valid reasons for non-compliance with the CMC Order.
  29. I should mention that I have considered the fact that Mr. Mackay is a member of a firm with a few other attorneys on staff. In my view, greater effort should have been made to address the challenges arising from his illness. I will not, however, treat this factor alone as negating my conclusion on the reasons for non-compliance with the Order.
- All the circumstances of the case, so as to enable the Court to deal justly with the application (Stage 3)***
30. At this 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. In doing so, it must specifically consider and give due 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 (see ***Smith*, para.72**).
  31. As indicated, the breach of the CMC Order in the present case was extremely serious by any possible standards. The Defendant committed multiple defaults which ultimately served to compromise the trial date.
  32. The application for relief from sanctions was also filed extremely late. The initial default in compliance with the Order (i.e. the failure to provide disclosure) occurred on 23 May 2024, which was followed by successive defaults. The Defendant's Notice of Application for relief from sanctions was only filed on 20 February 2025. Relatedly, the

Defendant's affidavit evidence was effectively only completed when the affidavit of Chaunce Bastian was sworn and laid over in late-April of 2025.

33. Based on the limited information before me, I am unable to reach any conclusion on the merits of the Defendant's case. Mr. Minns rightly points out that the Defendant's conveyance is not before the Court. Also, as far as I can tell, there is no survey plan before the Court showing the Defendant's property as described in his actual conveyance. Several other documents listed in the Defence and Counterclaim, although referenced in correspondence, are also not before the Court. Therefore, I do not consider this as a case where I could be quickly persuaded to grant summary judgment in the Defendant's favour. As such, I regard the strength of the Defendant's case as a neutral factor.
34. The Defendant's breaches of the CMC Order directly undermined the efficient conduct of the present litigation and increased costs. Similarly, I readily accept the need to enforce compliance with the CPR, the Court's practice directions and orders, which, besides being expressly referenced in Rule 26.8, is encompassed within the overriding objective. These are both factors which weigh heavily against the grant of relief in the instant case.
35. Against this, the Court in the present case faces a situation where counsel has been beset by a serious and prolonged medical illness, which plainly impacted his ability to work as normal. Better arrangements could have been made to address the situation. I would not, however, characterise the breaches of the Order as deliberate or contumacious.
36. Weighing all the factors together, I am satisfied that this is an appropriate case for the Court, in the exercise of its discretion, to grant relief from sanctions and I so order. I will adjourn for a further directions hearing to address all outstanding matters and to set a tight timeline to get this matter in readiness for an expedited trial. The Defendant's representation moving forward will also be revisited. Needless to say, any further acts of non-compliance by the Defendant will not be tolerated.
37. In light of my decision to grant the Defendant relief from sanctions, the Claimant's application to strike out the Defendant's pleadings falls away (to the extent such an order was even required). Additionally, given the circumstances surrounding non-compliance with the CMC Order and my decision to grant relief, I do not see this as a case of contempt on the part of the Defendant.

#### **Costs**

38. Rule 26.8(3) provides, "*The Court may not order the respondent to pay the applicant's costs in relation to an application for relief unless exceptional circumstances are shown.*"
39. The Court's discretion regarding costs in applications for relief from sanctions was recently examined by Mr. Justice Marcus Smith in ***Swivel UK Ltd. v. Tecnolum GMBH and Anor.*** [2022] EWHC 825 (Ch), who made the following observations (at paras.13-16):

*"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 own costs 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 also 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."

16. That is what the Master did in this case. He ordered that the Appellant pay the Respondents' costs. .... [Emphasis supplied]

40. In this case, the Claimant's opposition to the Defendant's application for relief was, in my view, entirely reasonable. There was wholesale non-compliance with the CMC Order. The Defendant delayed greatly in making the application for relief. Until the laying over of the affidavit of Chaunce Bastian, there was very little by way of evidence before the Court to justify or even explain the breaches of the Order. Even after the laying over of that affidavit, there was still a legitimate dispute as to whether the Court ought to exercise its discretion in favour of granting relief. This was not a situation, for instance, of a party seeking to take opportunistic advantage of some very minor act of non-compliance, or the unreasonable refusal of consent to an application.
41. Given the circumstances, I am satisfied that the Claimant should be awarded his costs of the application for relief from sanctions, which I will summarily assess unless otherwise agreed.

*L. Farquharson*

Farquharson, J.  
9 March 2026

