COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW & EQUITY SIDE

2017/CLE/GEN/00407

WILLIAM THOMPSON	**FIRST PLAINTIFF**
AND	
FREDERICKA THOMPSON	**SECOND PLAINTIFF**
AND	
UNITED SANITATION	**FIRST DEFENDANT**
AND	
BAHAMAS POWER & LIGHT (Formerly Bahamas Electricity Corporation Company)	**SECOND DEFENDANT**
AND	
CABLE BAHAMAS LIMITED	**THIRD DEFENDANT**
AND	
BAHAMAS TELECOMMUNICATIONS COMPANY LIMITED	**THIRD PARTY**

Before: **His Lordship The Honourable Mr. Justice Keith H. Thompson**

Appearances: Mrs. Cathleen Hassan along with Mrs. Khandra Hassan-Sawyer of Counsel for the Plaintiffs;

Mrs. Genell K. Sands of Counsel for the First Defendant;

Mr. Dywan Rodgers of Counsel for the Second Defendant

Ms. Camille Cleare of Counsel or the Third Defendant

Ms. Candice Ferguson of Counsel for the Third Party

Trial Dates: 19th July, 2019
14th August, 2019
12th September, 2019
03rd October, 2019
18th October, 2019

FACTS:

[1] The First Defendant is the owner, operator and manager of garbage trucks and the provider of Sanitation Services to several areas of New Providence, which included the Ridgeland Park West Subdivision. The Plaintiffs' property, Lot No. 6 Sayles Road is and was included in the area serviced by the First Defendant.

[2] The Second Defendant was the operator and provider of electricity and the owner and controller of the electrical supply, poles and wires, which supplied homeowners in the Ridgeland Park West Subdivision including Lot No. 6, Sayles Road on which was erected the residence of the Plaintiffs.

[3] The third Defendant was the provider of cable services and the owner and controller of cable services and wires, which were and are attached to electrical poles belonging to the Second Defendant.

[4] On Monday 12TH September, one of the First Defendant's garbage trucks was driving along the road west of the Teachers & Salaried Workers Co-operative Credit Union Building, which is adjacent to Sayles Road in the Ridgeland Park West area when it is alleged that one of the First Defendant's trucks made contact with the electrical wires of the Second Defendant thereby pulling down one or more of the wires. The pulling down of the wires caused and/or contributed to the snapping in half of the electrical pole at the end of the street.

[5] These series of events caused a surge of electricity along the wires as a result of wires coming into contact with each other, which said surge went directly into the Plaintiff's home causing an immediate fire which resulted in substantial damage and loss to the Plaintiff's home and its contents.

FILINGS:

[6] The Defence of the Second Defendant was filed on 22nd November, 2017. However, for whatever reason, the Second Defendant has been dilatory in the filing of certain documents and non-compliant with various orders issued by the Court.

[7] A. The Plaintiff filed an application to strike out the Second Defendant's defence and enter judgment which was heard on July 18th, 2019. The application was filed due to the Second Defendant's failure to comply with the Order on Case Management dated 12th December, 2018. On 18th July, 2019 the Court made an "UNLESS ORDER" against the Second Defendant seeking to give the Second Defendant a further opportunity to comply.

The action was commenced in 2017 by the Plaintiffs. At the Pre Trial Review on 19th July, 2019, counsel for the Second Defendant advised that the Second Defendant had gone through a number of Boards since the departure of Mrs. Clara Bell which included, he says, about three different attorneys and that the Second Defendant has been dealing with a substantial amount of cases.

Mr. Rodgers put to the court that it has wide powers under Order 31 A, inclusive of releasing a party from sanctions. He indicated that he didn't have the opportunity to read the Plaintiff's submissions but would be relying on two cases one being BIRKET V.JAMES.

He further put that the Second Defendant's position was that there was contributory negligence and the parties should be allowed to present their respective cases. Mr. Rodgers himself made the argument for the option of an UNLESS ORDER rather than striking out the Second Defendant's defence.

The Court eventually acceded to Mr. Rodgers' argument for the "unless order". At the hearing, the Unless Order was made with costs to the Plaintiffs and the First Defendant to be fixed and paid before trial. The initial trial dates were therefore vacated.

On 14 August, 2019, the parties appeared and there were several applications before the Court. Again counsel for the Second Defendant offered excuses for not being able to comply.

On 12 September, 2019, the parties appeared yet again. The time limits set out in the Order on Case Management were varied to allow the newly joined parties to be in a position to comply. At this hearing, Mr. Rodgers indicated to the Court that he was diligently working to comply.

On 3 October, 2019 the parties appeared again. It was at this juncture where counsel for the Plaintiffs advised the Court that counsel for the Second Defendant was refusing to sign off on the order thus preventing the Unless Order from being perfected.

Mr. Rodgers indicated to the Court that it can revisit the Order. Mrs. Hassan asked the Court to strike out the Second Defendant's defence for non-compliance of the Unless Order.

B. The Plaintiffs cite the Case of **MARCAN SHIPPING (LONDON) LTD. V. KEFNAS** and Another (2007) EWCA CIV 463 wherein;

"the Appellant sought to appeal an order striking out the Claimant's claim for failure to comply with the Unless Order on the basis that the striking out could not be justified unless the breach was so serious as to prevent there being a fair trial, that the judge had failed to consider that requirement and the requirement was not satisfied."

MOORE BRICK L.J. on page 378 at paragraph 34 stated;

"[34] In my view it should now be clearly recognized 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. This has a number of consequences, to three of which I think it is worth drawing particular attention. The first is that it is unnecessary, and indeed inappropriate, for a party who seeks to rely on non-compliance with an order of that kind to make an application to the court for the sanction to be imposed or, as the judge put it, 'activated'. The sanction prescribed by the order takes effect automatically as a result of the failure to comply with its terms. If an application to enter judgment is made under r 3.5(5), the court's function is limited to deciding what order should properly be made to reflect the sanction which has already taken effect. Unless the party in default applied for relief, or the court itself decides for some exceptional reason that it should act of its own initiative, the question whether the sanction ought to apply does not arise. It must be assumed that at the time of making the order the court considered all the relevant factors and reached the decision that the sanction should take effect in the event of default. If it is thought that the court should not have made an order in those terms in the first

place, the right course is to challenge it on appeal, but it may often be better to make all reasonable efforts to comply and to seek relief in the event of default."

[8] The Plaintiffs further argue that the Second Defendant's application for an extension should have been made before the expiration date set out in the Order. In support of this, the Plaintiffs cite Order 31 A rule 25 (1), (a) of the Rules of the Supreme Court which says that the application must be made promptly.

THE LAW:

[9] In the case of **MEGA MANAGEMENT V SOUTHWARD VENTURED DEPOSITORY TRUST et al.** SCC CivApp. No. 4 of 2007 wherein;

"the Appellant sought to appeal an Order of Thompson J. refusing to extend the time within which the Appellant was to comply with an Unless Order made by her, with the consent of the parties."

[10] J. A. Sawyer, President, stated at paragraph 94 while referring to re: **JOKAI TEA HOLDINGS Ltd. [1992] 1 WLR 1196.**

94. "At page 1202F to 1203C Sir Nicholas Browne-Wilkinson VC set out the principles which a court should consider when dealing with applications of this kind thus:

'In Samuels v Linzi Dresses Ltd [1981] QB 115, the court did not give any direct guidance as to the approach to the exercise of the court's direction in cases where a claim or defence has been struck out by reason of a failure to comply with an 'unless' order beyond saying that such a discretion should be exercised

'cautiously'. However, Roskill L.J. referred to the analogous case where the question is whether a plaintiff's claim should be struck out for want of prosecution to which the principles laid down in Birkett v James [1978] AC 297 apply. The first class of case considered in Birkett v James is where the plaintiff has been guilty of 'intentional and contumelious conduct'. Disobedience to a peremptory order is 'generally' to be treated as contumelious conduct: Tolley v. Morris [1979] 1 WLR 1389. The basis of the principle is that orders of the court must be obeyed and that a litigant who deliberately and without proper excuse disobeys such an order is not allowed to proceed. The rationale of such penalty being that it is contumelious to flout the order of the court, if a party can explain convincingly that outside circumstances account for the failure to obey the peremptory order and that there was no deliberate flouting of the court's order his conduct is not contumelious and therefore the consequences of contumely do not flow.

In Janov v Morris a plaintiff whose first action had been struck out for failure to comply with an 'unless' order brought a second action based on the same cause of action. The basis of the decision was that the failure to comply with the peremptory order was contumacious: see (1981) 1 WLR 1389, 1395H per Watkins L.J. It is clear that the court, in reaching the conclusion that the conduct was contumacious, placed much reliance on the fact that no explanation or excuse had been given by the plaintiff for his disobedience to the order.

In my judgment, in cases in which the court has to decide what are the consequences of a failure to comply with an 'unless' order, the relevant question is whether such failure is

intentional and contumelious. The court should not be astute to find excuses for such failure since obedience to orders of the court is the foundation on which the authority is founded. But if a party can clearly demonstrate that there was no intention to ignore or flour the order and that the failure to obey was due to extraneous circumstances, such failure to obey is not to be treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have enjoyed.' (Emphasis supplied)".

In lieu of any Affidavit evidence supporting the Second Defendant's application, we submit that the Second Defendant's breaches of the Unless Order must be considered by this Court as deliberate and contumelious.

J.A. Sawyer, President, in dismissing the appeal stated at paragraph 97:

"That, however, was not the only reason given by the learned judge for refusing to grant the extension of time; although the judge did not say so in so many words, reading her ruling as a whole, it seems clear to me that she refused the extension because of the history of delays in the prosecution of the appellant's claim and the failure to obey a peremptory order of the court when in the appellant's own evidence it was in a position to comply since the week of 20 March, 2006."

The Second Defendant's application for an extension of time and relief from sanctions must be considered in light of the Second Defendant's total non-compliance of the Order on Case Management dated the 12th day of December, A.D., 2018, which

breach was so severe and prolonged that the Second Defendant was ordered to pay significant costs to all parties to the Action at that time. We submit that in all of the circumstances, the Second Defendant's continuous flouting of the Court's orders, while failing to provide any evidence of any reasonable excuse or reason for its continuous flouting of the Court's orders warrants the Court refusing its application for an extension of time and relief from sanctions."

[11] In light of the non-compliance of the Second Defendant, the Plaintiffs filed an application by way of Summons and supported by an amended affidavit of Nakita Nesbitt. The affidavit sets out the sequence of the filings. That affidavit is set out below.

COMMONWEALTH OF THE BAHAMAS

2017/CLE/gen/00407

IN THE SUPREME COURT

Common Law & Equity Division

B E T W E E N

WILLIAM THOMPSON
and
FREDERICA THOMPSON

Plaintiffs

AND

UNITED SANITATION

First Defendant

AND

BAHAMAS POWER & LIGHT formerly BAHAMAS ELECTRICITY COMPANY

Second Defendant

AMENDED AFFIDAVIT

I, **NAKITA NESBITT** of the Eastern District of the Island of New Providence one of the Islands of the Commonwealth of The Bahamas, make oath and say as follows:

1. That I am employed at Johnson-Hassan & Co., the Attorneys for the Plaintiffs in this action.

2. That a Defence was filed on behalf of the Second Defendant, Bahamas Power & Light formerly Bahamas Electricity Company in this action on the 22nd day of November, A.D., 2017.

3. That by the Order on Case Management filed on the 16th day of January, A.D., 2019 for which hearing all of the parties were represented by Counsel, this Honourable Court ordered *inter alia* that:

   "1. List of Documents to be filed and served by the 15th day of February, A.D., 2019.

   2. Inspection of Documents by the 1st day of March, A.D., 2019.

3. Agreed Bundle of Documents to be prepared by the Plaintiff and filed and served by the 29th day of March, A.D., 2019. Each party shall file its own Bundle of Documents which are not agreed by the 5th day of April, A.D., 2019."

4. That the aforesaid Order on Case Management was signed by Counsel for each party before being signed by the Judge and filed. A copy of the signed and unfiled Order on Management is attached and marked "**NN1**".

5. That the Order on Case Management was served on Counsel for the Second Defendant on the 17th day of January, A.D., 2019 at 10:30 in the forenoon as evidenced by the Affidavit of Service of Ashley Hamilton filed on the 23rd day of January, A.D., 2019. A copy of the Affidavit of Ashley Hamilton is attached and marked "**NN2**".

6. The Second Defendant is in breach of all of the directions of the Order on Case Management.

7. That on this basis, the Defendant seeks an Order pursuant to Order 31A rule 20 and Order 24 rule 16 of the Rules of the Supreme Court striking out the Defence of the Second Defendant, Bahamas Power & Light formerly Bahamas Electricity Company filed on the 22nd day of November, A.D., 2017 and entering Judgment against the Second Defendant, Bahamas Power & Light formerly Bahamas Electricity Company, for its failure to comply with the Order on Case Management of this Honourable Court filed on the 16th day of January A.D., 2019 directing, inter alia, the Second Defendant to file and serve on all parties a List of

Documents or make discovery of documents or to produce any documents for the purpose of inspection or any other purpose in this matter with costs to be taxed if not agreed.

8. That save where otherwise stated, the contents of this Affidavit are true and correct to the best of my knowledge, information and belief.

SWORN TO at Western Law Advocates,)
)
No. 11 Shirley Park Avenue, Nassau, N.P.,)
)
The Bahamas this 17th day of July A.D. 2019)

Before me,

NOTARY PUBLIC

[12] The Second Defendant also filed a Summons seeking an Order that it be granted leave to extend the time to comply with various directions ordered by the court in an UNLESS ORDER and/or relief from sanctions imposed by the Unless Order.

UNLESS ORDER:

[13] Unless Orders (also known as HADKINSON ORDERS) were established in the case of **HADKINSON V HADKINSON [1952] P 285, CA.** Although these are relatively uncommon, in recent times a series of cases have reportedly been decided where Unless Orders have been granted. This approach is used where there is no other effective remedy to secure a party's compliance with an order.

[14] An Hadkinson Order is made where a party is in contempt or has failed to comply with a previous order as the Second Defendant in the instant case has done. Mr. Lord Justice Denning said in HADKINSON supra);

> **"It 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 where the party itself IMPEDES THE COURSE OF JUSTICE and no other effective means of securing his compliance."**

[15] The Plaintiffs rely on Order 31A rule 20 (1), (a), (b) ((c) and (d), Order 24 rule 16.

> 20. (1) **"In addition to any other powers under these Rules, the Court may strike out a pleading or part of a pleading, if it appears to the Court –**
>
> **(a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the Court in the proceedings;**

(b) that the pleading or the part to be struck out is an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings;

(c) that the pleading or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or

(d) that the pleading or the part to be struck out is prolix or does not comply with the requirements of any rule."

Order 24 r. 16:

(1) "If any party who is required by any of the foregoing rules, or by any order made thereunder, to make discovery of documents or to produce any documents for the purpose of inspection or any other purpose, fails to comply with any provision of that rule or with that order, as the case may be, then, without prejudice, in the case of a failure to comply with any other such provision, to rules 3(2) and 11(1), the Court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, order that the defence be struck out and judgment entered accordingly.

(2) If any party against whom an order for discovery or production of documents is made fails to comply with it, then, without prejudice to paragraph (1), he shall be liable to committal.

(3) Service on a party's attorney of an order for discovery or production of documents made against that party shall be sufficient service to found an application for committal

of the party disobeying the order, but the party may show in answer to the application that he had no notice or knowledge of the order.

(4) An attorney on whom such an order made against his client is served and who fails without reasonable excuse to give notice thereof to his client shall be liable to committal."

[16] The Plaintiffs argue that all parties were aware of the directions of the court regarding discovery, inspection and all other directions in the Order on Case Management. The Plaintiffs further allege that the Second Defendant failed to comply with not only providing the list of documents to all the parties, the first paragraph in the Order on Case Management but all other paragraphs in the said Order.

[17] The Plaintiffs say that the delay between 30 March, 2017 and the receipt of directions in 2019 has prejudiced the Plaintiffs. The Plaintiffs' expert witness died before the matter could be tried and any further delay in this matter by the Second Defendant would be unreasonable and unconscionable in light of the fact that the Plaintiffs are struggling to survive after having to come up out of pocket along with their children to put their lives back together.

[18] It has also been brought to the attention of the Court that the First Plaintiff is now disabled as he would have suffered a stroke previously. He is non-verbal and has difficulty moving around on his own.

[19] The Plaintiffs therefore say that the actions of the Second Defendant are intentional and contumelious and warrants the Court granting the relief being sought which is to strike out the defence of the Second Defendant and enter judgment against the Second Defendant.

[20] The Second Defendant takes the position that the Court has the power to extend the time to the Second Defendant to facilitate its compliance with the Unless Order. In this regard the Second Defendant relies on Order 3 rule 4 of the RSC, which provides;

> **"(1) The Court may, on such terms as it thinks just by order extend or abridge the period within which a person is required or authorized by these rules, or by any judgment, order or directions, to do any act in any proceedings. (2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period. "**

[21] In support of the above, the Second Defendant cites the case of R. v BLOOMSBURY and MARYLBONE COUNTY COURT, Exparte VILLERWEST LTD [1976] 1 ALL ER 897, wherein it was held:-

> **"The county court had a wide inherent jurisdiction to control its own procedure. That included the power to enlarge or extend anytime limits attaching to an order ..... The court's powers were not limited to what was expressly stated in the rules of practice and applied even where the application for an extension of time was made after the relevant period had elapsed."**

[22] In further support of its summons, the Second Defendant relies on, in the first instance Order 31 rule 15(1);

> **"15 (1) A party must apply to the judge if that party wishes to vary a date which the judge has fixed for (b) a party to do something where the order specified the consequence of failure to comply ..... (4) A party who applies after the**

date must apply (a) for relief from any sanctions to which the party has become subject under these rules or any court order; and (b) for an extension of time."

[23] The Second Defendant further relies on Order 31 A rule 15 (1) and Order 31 A rule 18 (2),

> **"18 (2) Except where these Rules provide otherwise, the Court may:- (b) extend or shorten the time for compliance with any rule, practice, direction of the Court even if the application for an extension is made after the time for compliance."**

[24] There is further reliance by the Second Defendant on Order 25 rule (1) of the Rules of the Supreme Court (Amendment) Rules which provides;

> **"An application for relief from any sanctions imposed for a failure to comply with any rule, order or direction MUST BE (our emphasis) (a) - promptly and (b) - supported by evidence on affidavit."**

[25] It is the Second Defendant's position that the non-compliance was not intentional and that the Affidavit of Gilbert Thompson speaks to it, in particular to number 2 of the Unless Order. The reason there given was that Samantha Rolle the Affiant had to attend to very serious meetings pertaining to BPL affairs and the affidavit had to be notarized and filed.

[26] The Second Defendant also relies on Order 25 r (3) of the Rules of the Supreme Court (Amendment) Rules which provides;

> **"In considering whether to grant relief, the Court must have regard to'**

(a) the interest of the administration of justice;

(c) whether the failure to comply has been or can be remedied within a reasonable period of time;

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

(e) the effect which the granting of relief or not would have on each party."

[27] In this regard, the Second Defendant seeks to address (a), (c), (d) and (e) individually in paragraph 16 of its submissions.

"16. Addressing each consideration, we submit the following;

(a) **the Second Defendants non-compliance has not prejudiced any of the parties. The non-compliance cannot be said to be a serious one and it would be wrong in all the circumstances to strike out the Second Defendant's Defence and enter Judgment against the Second Defendant denying it the right and ability to defend itself at trial when prima facie on the face on the face of the Defence of the Second Defendant and the Witness Statement of Sterling Moss the Second Defendant has a very strong defence to the claim.**

(c) **the failure to comply has already been remedied. The Affidavit of Samantha Rolle was filed and served August 6th, the first working day after August 2nd. The Affidavit was accepted by Counsel for the First Defendant and**

originally there was no challenged to the failure to serve on August 2nd.

(d) The trial date is presently fixed for June 22, 23, 24, 25 and 26, 2020, same cannot be said to be affected should relief from sanctions be granted. In fact, a further directions Order is in the process of being granted and same makes further provision for discovery, filing of witness statements, filing of expert witness statements, etc.

(e) We respectfully submit that the effect of not granting the relief would be far more detrimental than the granting of relief. First when the Affidavit of Samantha Rolle was served no objections were taken or made until much later, hence the making of this application. Second if the relief from sanctions is not granted then the Second Defendant is not afforded the right and opportunity to defend the Action despite having a prima facie strong defence. Third there was no serious delay in compliance. Four and most important new directions have been handed down and thus new time lines for discovery etc."

[28] The Second Defendant relies on what it calls the **LOCUS CLASSICUS Case; DENTON V TH WHITE Ltd. [2014] EWCA Civ 906** and which it says are the relevant considerations in the **DENTON** Case at paragraph 24;

> **"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 3.9 (7). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider**

why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable the court to deal justly with the application including factors (a) and (b)."

[29] The Second Defendant says that the non-compliance of the Unless Order cannot be said to be serious or significant as the First Defendant who requested the affidavit of Samantha Rolle did not make any formal objection. They further aver that the non-compliance was minor and swiftly corrected. A just and fair trial can still be had due to the addition of new parties and a new order on directions can fix any deficiencies for the new trial date.

[30] The Second Defendant relies further on paragraphs 27 and 28 of DENTON.

> **27. "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.**
>
> **28. If a judge concludes that a breach is not serious or significant, then relief from sanctions will usually be granted and it will usually be unnecessary to spend much time on the second or third stages. If, however, the court decides that the breach is**

serious or significant, then the second and third stages assume greater importance."

[31] While the **DENTON** case sets out certain considerations to be taken into account, the facts of the instant case are quite similar in nature to those in the case of **PHILLIP JOHN EAGLESHAM V. MINISTRY OF DEFENCE [2016] EWCH 3011 (Q.B.),** the first seven (7) paragraphs in the first instance.

1. **"This is an application by the Defendant for an extension of time for compliance with an "Unless" Order and for relief from sanctions.**

2. **On 5 July 2016 Mrs. Justice Elizabeth Laing made an Order requiring the Defendant to comply in full with paragraph 1 of an Order of 9 September 2015, (an order made by consent for the disclosure of specified documents and classes of documents) by no later than 4 pm on 21 October 2016. She directed that between the date of her Order and 21 October 2016 the Defendant should provide disclosure on a "rolling" basis as documents became available for disclosure. Her Order provided that;**

   "Unless the Defendant complies with paragraph 1 of this Order in full by 4 pm on 21 October 2016 the Defence shall be struck out and Judgment shall be entered for the Claimant for damages to be assessed by the Court."

3. **The application notice was issued on 20 October 2016, the day before the deadline for compliance. Mr. Heppinstall, who appeared for the Defendant today, as he did before Laing J, submitted that the Defendant issued the application at the last**

possible minute because it only became apparent late in the day that it was going to be unable to comply with the Order. Quite apart from the fact that there was no evidence before me addressing, let alone explaining the lateness of the application, I regret that I cannot accept that submission. On the basis of the evidence that has been filed in support of the application, it must have been obvious to the Defendant long before 20 October that it was not going to comply with the Order.

4. The Defendant has still not fully complied, although four more weeks have passed; and it is seeking up to a further two months' indulgence. 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.

5. The effect of issuing an application notice at the latest possible moment was that although it was impossible to list a hearing before the deadline for compliance expired, technically this is not an application for relief against sanctions because the sanction has yet to bite, see ***Hallam Estates Ltd v Baker [2014] EWCA Civ661.*** However, Mr. Heppinstall realistically conceded that the Court of Appeal's reasoning and approach in ***Denton v TH White Ltd [2014] 1 WLR 3926*** should be applied, as they were by Laing J on the previous occasion. The observations of Jackson LJ in ***Oak Cash & Carry Ltd. v British Gas Trading Ltd [-2016] EWCA Civ 153*** at [38]-[41] are also relevant, giving that this is a case of non-compliance with an Unless Order.

6. **As Flaux J said in another case involving non-compliance with an Unless Order, *Suez Fortune Investments Ltd and others v Talbot Underwriting Ltd. and others* [2016] EWHC 1085 (Comm) at [50] the underlying assumption in *Denton v White* is that relief may be granted if either (i) the relevant default has been cured (in other words, the rule, practice direction or Order has been complied with or is about to be complied with) or (ii) that compliance can somehow be dispensed with, perhaps on terms, without doing injustice between the parties.**

7. **As in the case, the Court in the present case imposed a tailor-made Unless Order designed to meet the circumstances of the particular case. It was imposed because Laing J considered that the justice of the case required such an order to be made and complied with. It was made against a background of serious and substantial non-compliance over a lengthy period, for which there was absolutely no excuse. It was made on the understanding (indeed on the express assurance) that the Defendant would devote the necessary time and resources to ensuring compliance."**

[32] At paragraphs 39 – 44 Mr. Justice Andrews states;

"39. The burden is on the Defendant to persuade the Court that this is an appropriate case in which to grant the extension of time for compliance. In dealing with this application I must, of course, bear in mind the overriding objective. In the present context the factors listed in CPR 1.2 (d) (e) and (f) are of particular importance. The Court must endeavor to ensure that cases are dealt with expeditiously and fairly; it must allot to a case an appropriate share of the court's resources, whilst

taking into account the need to allot resources to other cases, and it must seek to enforce compliance with rules, practice directions and orders. An "Unless Order" is an order of last resort and the nature of the Court's indulgence to the Defendant in this present case was underlined by Laing J's warning that if the Defendant did not comply it was very unlikely to be given any further leeway to do so.

40. The starting-point, as Mr. Heppinstall conceded, is that there has been a substantial and serious breach of an "Unless Order" made against the background of what was accepted before Laing J to be the "highly regrettable" failure by the Defendant to comply with its disclosure obligations for over a year, without any real excuse. The previous breach was classed by Laing J as serious, significant and long-standing and she regarded the explanation for it as inadequate. She was reluctantly persuaded to give the Defendant a further 3 ½ months for compliance. As at the time of the hearing of the application there still has not been full compliance and the default cannot be described as "trivial". The effect of acceding to the application would be to grant the Defendant another 3 months and even then the Court could not be confident that it would comply.

41. I have already indicated that I am un-impressed by the litany of excuses put forward for non-compliance, apart from the failures of technology which appear to have played only a minor role in the delay. This is not a case, in my judgment, in which the volume of documentation generated by the searches could not have been foreseen and in which the delay has been caused by matters beyond the Defendant's control. I am not persuaded that the Defendant went about the searches in a sufficiently

thorough manner to begin with and I am highly skeptical as to whether Laing J was presented with a realistic timetable on the basis of what was known at the time, though I make it clear that I am not criticizing Mr. Duke-Evans, who was reliant on what he was being told by other people.

42. The pressure of other work and demands on the time of staff, including SMEs, is also an insufficient excuse, since those factors were known at the time when the original estimate was given and were built into the supposedly "realistic" timetable put before Laing J. If a team of six counsel was insufficient to carry out the filtering exercise in time, the Defendant could and should have instructed more. I am not persuaded that the time and effort involved in educating new team members would outweigh the efficiencies to be gained by bringing them on board if further human resources become necessary.

43. I turn, therefore, to the third factor in *Denton*. The failures of the Defendant in this case have already undermined the conduct of the litigation by causing the trial date to be vacated, and now they have caused the CMC to be postponed until 2017 with the likelihood that a trial would not take place until 2018, five years after the claim form was issued and four years after the issues crystalised.

44. The Claimant is suffering from the depressive disorder to which Laing J alluded in paragraph 29 of her judgment, and his CFS has a poor prognosis. He faces the prospect of having the claim hanging over him for at least another year, for reasons which are not his fault. On the face of it the claim stands a real prospect of success, the disclosure, if and insofar as it relates

to the state of the Defendant's knowledge, may well support it. It is said, on the other hand, that the Defendant has a good arguable defence which is supported by the evidence of an eminent expert in the field of Tropical Medicine. Quantum is estimated to be in the order of £6-8 million; but if the order is enforced, the effect will be that judgment is entered for liability only and there is nothing to preclude the Defendant from challenging quantum."

[33] And lastly at paragraph 46, Mr. Justice Andrews states;

46. **"Nor am I particularly impressed by the point that there is a risk of inconsistent judgments. The risk that was taken in not making sufficient effort to comply with the Unless Order was that judgment on liability would be entered with the result that the merits cannot be fully aired; but nobody could describe this as a claim which is of little or no merit. At the end of the day, Unless Orders should mean what they say. The Defendant knew the risk. Even though this was not a case of a deliberate flouting of a court order it is not an appropriate case in which to grant the Defendant any further indulgence. I therefore refuse the application, with the consequence that judgment will be entered on liability with damages to be assessed. There will need to be provision in the order for further directions in respect of the trial on quantum, and I will consider any further proposals that counsel make in that regard."**

[34] There has been an inordinate delay by the Second Defendant to comply with the Unless Order.

[35] The court is unimpressed by the litany of excuses put forward by the Second Defendant for non-compliance. Paragraphs 41-43 of the EAGLESHAM case are particularly applicable in the instant case. In particular paragraph 43 speaks to the failures of the Defendant in the EAGLESHAM case undermining the conduct of the litigation by causing the trial date to be vacated. Counsel for the Second Defendant gave as an excuse serious meetings and travel of the in-house counsel of the Second Defendant, however, paragraph 42 also addresses these issues.

> **"42. The pressure of work and demands on the time of staff, including SMEs, is also insufficient excuse, since those factors were known at the time when the original estimate was given and were built into the supposedly "realistic" timetable put before LAING J. If a team of six counsel was insufficient to carry out the filtering exercise in time, the Defendant could and should have instructed more. I am not persuaded that the time and effort involved in educating new team members would outweigh the efficiencies to be gained by bringing them on board if further human resources becomes necessary."**

[36] In my considered opinion, the EAGLESHAM case is aptly applicable to the instant case. In light of the evidence in support of the application to strike out the Second Defendant's defence, and in consideration of what was presented by the Second Defendant in opposition to the Plaintiff's application I accede to the plaintiff's application to strike out the Second Defendant's defence with the consequence that judgment will be entered on liability subject to a hearing on contributory negligence by the other Defendants with damages to be assessed.

[37] Upon the delivery of this decision there will be provision for further directions in respect of trial on quantum. Further proposals will be considered that counsel may make as to the further directions.

[38] Costs for this application is that of the Plaintiffs as against the Second Defendant to be taxed if not agreed.

Dated this 02nd day of March A.D., 2020.

Keith H. Thompson

Justice