COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

PROBATE DIVISION

2018/PRO/cpr/00035

IN THE MATTER OF THE JUDICIAL TRUSTEE ACT

IN THE MATTER OF THE ESTATE OF RAYMOND ADAMS

(DECEASED)

BETWEEN:

ROBERT ADAMS

(a beneficiary of the Estate of Raymond Adams)

Plaintiff

And

GREGORY COTTIS

(as Executor of the Estate of Raymond Adams)

Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Christopher Jenkins of Lennox Paton for the Plaintiff
Mr. Damian Gomez QC for the Defendant

Hearing Date: 9 December 2020

Practice – Order – 'Unless' Order – Non-compliance with 'unless' order – Consequences – Non-compliance with Order striking out defence unless act done within specified time – Relief from sanctions – Three mandatory conditions and criteria - History of non-compliance with previous orders – No good explanation for failure to comply – Failure to comply intentional – Additional factors to be considered – RSC O. 31A r.25 (2) and (3)

By Summons filed on 5 November 2020, the Defendant seeks an order of the Court relieving him from sanctions pursuant to RSC O. 31A r. 25A. The Summons is supported by an Affidavit of Anthony McKinney QC which essentially exhibits a letter dated 10 November 2020 from an eye doctor in the USA. The doctor diagnosed the Defendant as being legally blind. The Plaintiff opposes the application stating, among other things, that the Defendant has displayed utter contempt and disrespect for the Court since August 2018; he has failed to give a good reason for

the failure to comply when he has a legal team and administrative staff and he has intentionally and consistently breached orders of the Court. The Plaintiff also contends that ((i) to grant relief would undermine the administration of justice and encourage other litigants to follow suit; (ii) the failure was not due to his counsel; (iii) no evidence was adduced to demonstrate that the failure to comply can be remedied without compromising the impending trial dates and (iv) if the Court declines to grant relief, the Plaintiff will still have to prove his case.

HELD: Dismissing the application for relief from sanctions with costs of $12,650 to the Plaintiff.

1. The Defendant has not satisfied the Court of the mandactory requirements of Order 31A rule 25(2) of the Rules of the Supreme Court (RSC O.31A r.25(2). In particular:

    a. The Court is not satisfied that there is a good explanation for the Defendant's failure to produce a List of Documents in compliance with the Unless Order filed on 24 September 2021, which obligation was first ordered by Order dated 17 December 2019;

    b. The Defendant has also failed to satisfy the Court that his failure to comply with the Unless Order was not intentional, particularly given the Defendant's history of non-compliance in this matter with the relevant Rules of the Supreme Court, prior Orders of the Court, and his history of non-co-operation with the Judicial Trustee, as set out in the uncontested evidence filed on behalf of the Plaintiff;

    c. The Court also considers that the Defendant's history of non-compliance is also, separately, disqualifying of relief.

2. The Court has considered the factors set out in Order 31A, Rule 25(3), and determines that:

    a. it would not be in the interests of the administration of justice to provide relief from sanctions in these circumstances;

    b. the failure to comply was not due to any act or omission on the part of the Defendant's counsel;

    c. there is no evidence that the failure to produce the List of Documents had been or could be remedied within a reasonable time;

    d. the trial dates set for 2 – 5 March 2021 would not be possible should relief be granted; and

    e. The Plaintiff would still need to prove his case, even if the Defence remains struck out.

3. For the above reasons, the Defendant's application for Relief from Sanctions by summons filed on 6 November 2020 is hereby dismissed and the Defendant's Defence filed on 11 June 2019 remains struck out as of 13 November 2020 by operation of the Unless Order filed on 24 September 2020.

4. The Defendant shall pay to the Plaintiff forthwith the costs of the application fixed in the amount of $12,650.

5. The matter is set for mention at 3.45pm on 21 January 2021.

RULING

Charles J:

Introduction

[1] By Summons filed on 5 November 2020, the Defendant ("Mr. Cottis") seeks an order of the Court relieving him from sanctions pursuant to Order 31A rule 25A of the Rules of the Supreme Court ("RSC O. 31A r.25A"). The Summons is supported by an Affidavit of Anthony McKinney QC which was sworn to on 22 November 2020 and filed on 24 November 2020. It exhibits a letter dated 10 November 2020 from Dr. William E. Smiddy of the Bascom Palmer Eye Institute, Miami, Florida, United States of America.

[2] The essence of Dr. Smiddy's letter is that Mr. Cottis is unable to perform his usual duties since he has had retinal detachments and surgeries in both eyes and has and is still very limited in his visual function. According to the doctor, Mr. Cottis still is legally blind. The doctor further wrote:

> **"We are hoping that the surgeries on both eyes that were most recently done yesterday and about a week prior will restore some vision but this will take at least another month."**

[3] It is upon these brief facts that Mr. Cottis seeks relief from sanctions. The Plaintiff ("Mr. Adams") vehemently opposes the application and asserts, in a nutshell, that Mr. Cottis, a member of the Bahamas Bar and no stranger to litigation, has failed to give a good reason for the failure to comply when he has a legal team and administrative staff. In addition, Mr. Cottis has intentionally and consistently

breached orders of the Court. Mr. Adams further contends that ((i) to grant relief would undermine the administration of justice and encourage other litigants to follow suit; (ii) the failure was not due to his counsel; (iii) no evidence was adduced to demonstrate that the failure to comply can be remedied without compromising the impending trial dates and (iv) if the Court declines to grant relief, Mr. Adams will still have to prove his case.

Directions Order

[4] At the hearing on 17 December 2019, when Mr. Cottis was represented by his Counsel, Mr. Loren Klein (as he then was), the Court made an order requiring both parties to file and exchange their Lists of Documents by 20 March 2020 with inspection to occur within 14 days thereafter. The Court also directed that there be a further case management hearing on 25 March 2020 at 10:00 a.m. ("the December 2019 Order"). At the hearing, Mr. Klein informed the Court that Mr. Cottis had an eye condition and was not present in Court as he was unable to drive. Mr. Klein also advised that Mr. Cottis would be changing attorneys. It was for this reason that the Court gave a generous 12-week period to allow for exchange of Lists of Documents.

[5] Mr. Adams complied in full with the December 2019 Order and filed his List of Documents on 20 March 2020. On the same day, Mr. Jenkins appearing as Counsel for Mr. Adams, emailed Mr. Cottis' new attorney Mr. Gomez QC, indicating that his client was ready to exchange his List of Documents on that day. Mr. Gomez QC responded stating as follows:

> **"Due to the declaration of a state of emergency and the attendant regulations, our client is unable to comply with the Court order. Our offices are closed until the emergency expires. Moreover, you are aware of our client's eye problems."**

[6] The Court takes judicial notice that the Declaration of the State of Emergency and Emergency Powers (Covid-19) Order came into effect on or about 20 March 2020, the date of the deadline for compliance. Mr. Cottis has not (either before or since) applied for an extension of time or any relief from sanctions. It is beyond question

that an application for relief from sanctions must be made promptly. Indeed RSC O.31A r. 24 speaks to that. Mr. Cottis had at this stage never produced any evidence that his eye problem would prevent him with the asssistance of his office and/or his attorneys from complying with the December 2019 Order.

[7] Six months later on 17 June 2020, Mr. Adams issued a Summons for an Unless Order since Mr. Cottis had still not complied with the December 2019 Order and no application for Extension of Time had been made.

[8] The Unless Order Application was heard on 7 September 2020 in the presence of learned Queen's Counsel Mr. Gomez who appeared for Mr. Cottis ("the Unless Order"). The Unless Order included an order that Mr. Cottis was to pay Mr. Adams' costs fixed in the sum of $3,000 forthwith.

[9] The Unless Order was filed and served on 13 October 2020. A further letter demanding payment of the costs as ordered was sent on 15 October 2020. To date, Mr. Cottis has not complied with the Unless Order.

History of non-compliance

[10] In the Affidavit of Sebastian A. Masnyk, then a pupil at Lennox Paton, filed on 17 June 2020 in support of the Unless Order, Mr. Masnyk detailed the history of non-compliance with orders of the Court which commenced long before any eye problems: see paragraphs 11 to 18 of Mr. Masnyk's affidavit. I shall merely repeat them.

[11] Mr. Cottis has been ordered to provide disclosure of the documents relating to the administration of the Estate on three separate occasions and has not complied with any of those orders.

[12] The first such Order was made on 22 August 2018, which required, at paragraph 4, that Mr. Cottis:

> **"provide to the Judicial Trustee (with a copy to the Plaintiff's attorneys, Lennox Paton) within 14 days of the date of this Order a**

copy of all books and records of the Administration of the Estate in his possession or control, from 24 February 2004 to present, including all bank statements in relation to any bank account held in the name of the Testator, the Estate or the Defendant in his capacity as Executor or Co-executor (or which has been used by the Defendant for any transactions involving or on behalf of the Estate)".

[13] Mr. Cottis did not comply with this obligation, providing almost no documenation to Mr. Adams and very limited documentation to Mr. Wizman ("the Judicial Trustee"). Specifically, Mr. Cottis failed to provide Mr. Adams with any of the following:

1. Invoices, receipts, timesheets and other back-up to the cheques Mr. Cottis has written on the Scotiabank Account;

2. Correspondences produced during Mr. Cottis' tenure as Co-Executor;

3. Documents relating to Sulgrave Manor, its service providers, utilities, insurance;

4. Documents relating to the employees of the Estate;

5. Corporate files for the many companies forming a part of the Estate including:
   i. Dusbram Unternehmensbeteiligung GmBH ("the IBC"); and
   ii. Bellwood Limited.

6. Details of any investigations undertaken into the assets of the Estate.

[14] In respect of this failure, an application for leave to commence committal proceedings for breach of the ex parte order was filed on 5 March 2019.

[15] On 10 May 2019, Mr. Cottis resigned as Adminsitrator of the Estate. On 20 May 2019, in the presence of his then Counsel, Mr. Moree QC, this Court ordered and directed that:

"4. The former Co-Executor of the Estate shall file an affidavit within thirty (30) days from the date of this Order containing an explanation as to the variance between the reconciliation of the assets circulated

on 06 March 2019 and the former Co-Executor's Affidavit filed on 24 November 2005".

[16] In his Affidavit filed on 12 July 2019, Mr. Cottis stated that the Order was only filed on 9 July 2019 and a copy provided to him and his Counsel by email on the afternoon of 9 July 2019. He seemed to be complaining about the date when he received the Order but I should add that he was represented by learned Queen's Counsel, Mr. Moree on that day. That said, Mr. Cottis stated that he has been engaged throughout in an iterative and cooperative process with the Judicial Trustee seeking clarification of matters antecedent to addressing any concerns raised, as is evident in the correspondece which is exhibited.

[17] Also, on 20 May 2019, the Court made another Order in the presence of his Counsel as follows:

> **"2. The Judicial Trustee is entitled to take possession, custody and control of all the books and records (collectively "Records") of the Estate, and the former Co-Executor (including his employees or agents) will deliver up to the Judicial Trustee the Records within his possession, custody or control within twenty-one (21) days from the date of this Order."**

[18] However, in his Fifth Report of the Judicial Trustee to the Court dated 11 March 2020, the Judicial Trustee stated, at pages 19-20 under the "Books and Records" section, that:

> **"The May Order directed the Executor deliver up to me all records in his possession….However, the Executor was not compliant with this order and we did not receive all the records within the ordered period….During the month of September 2019, the Executor delivered two boxes…high-level review indicates they primarily contain billing invoices and receipts…we anticipated that more voluminous records would exist, however the documents received are limited."**

[19] As can be seen above, there has been a chain of non-compliance with Orders of the Court which existed prior to Mr. Cottis' medical disability.

Relief from sanctions

[20] RSC O.31A r. 25 deals with an application for relief from sanctions. The Court may grant relief from sanction if the defaulting party is able to satisfy the prescribed test, which is set out below:

> **"25. (1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be —**
>
> **(a) made promptly; and**
>
> **(b) supported by evidence on affidavit.**
>
> **(2) The Court may grant relief only if it is satisfied that —**
>
> **(a) the failure to comply was not intentional;**
>
> **(b) there is a good explanation for the failure; and**
>
> **(c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions.**
>
> **(3) In considering whether to grant relief, the Court must have regard to —**
>
> **(a) the interests of the administration of justice;**
>
> **(b) whether the failure to comply was due to the party or that party's counsel and attorney;**
>
> **(c) whether the failure to comply has been or can be remedied within a reasonable 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.**
>
> **(4) 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."**

"Unless" orders

[21] Learned Counsel Mr. Jenkins submits that the leading case in this jurisdiction on Unless Orders is **Mega Management Limited v Southward Ventures Depository Trust et al v E. Dawson Roberts and Lori Lowe** SCCivApp No. 4 of

2007, a case decided after the introduction of RSC O.31A, but which did not consider the effect of that Order. However, the case is of some assistance in the following paragraphs:

Paragraph 39

"Where a party to an application before a court seeks to persuade that court to exercise its discretion in that party's favour and where the law requires that party to adduce cogent evidence on which the court may be invited to exercise that discretion, it is unacceptable to make general averments as the only evidence on which the court is expected to decide. This, I think, is particularly so, where the party is ex facie, in breach of a peremptory order of the court."

Paragraph 70

"70. The justification for [the power for the Court to make Unless Orders] was stated by Roskill LJ., in Samuels v Linzi Dresses Ltd [1981] QB 115 is the principle that "orders are made to be complied with not ignored" at page 126 – 127.

The learned authors of the Supreme Court Practice (cited above) go on to point out that the power is not as harsh as might be thought because –

"(a) mere failure to comply with a rule is not regarded as sufficient for its exercise; there must be disobedience of a direct peremptory order;

(b) it is unusual to make a peremptory order on the first occasion that the matter is before the court;

(c) if the defaulter has any reasonable explanation, he may obtain an extension of time even (though rarely) after the time expired;

(d) generally speaking, a defaulter can cure his default at any time before the order for dismissal is made (or, if postponed) takes effect."

In such circumstances, it is usually fair to conclude that a party who persists in his default either has no confidence in his case or has lost the desire to pursue it – at page 471 of the work cited."

Paragraph 87

"87. In this case, the order which had not been complied with was an "unless" order which is an order of "last resort" and which is usually only issued after there has been a history of a party failing to comply with the provisions of the rules of court or with peremptory orders issued by a court. In this case the history of the appellant's non-compliance with orders or rules of the court is not as extensive as in

> **some other cases, which have come before this court; and if one looks only at the time when the appellant's counsel was put in funds in order to comply with the order of 2 March, 2006, it would be difficult to say that there was a history of deliberate disobedience to peremptory orders of the court in this case. The matter, however, did start or stop there because there had been an earlier written request for security of the Fenders' costs in the sum of $250,000.00 which had apparently been ignored and although the deposit of the sum of $100,000.00 ordered by the learned judge could have been done either by bond or cash, counsel for the appellant apparently was specifically instructed by the principal/s behind the appellant, to deposit a bond when it was clearly easier to deposit the money in court without the intervention of a bank. These facts, among others were to be weighed by the court when it was deciding whether the appellant intended to obey or intended to disobey the "unless" order even though it was made by consent at a time when counsel for the appellant already had the money in hand."**

Submissions on behalf of Mr. Cottis

[22] Learned Queen's Counsel was laconic in his submissions. He relied heavily on the affidavit of Mr. McKinney QC which exhibits the medical report of Mr. Cottis. As already stated, Dr. Smiddy diagnosed Mr. Cottis with limited vision. According to the doctor, "*he has been and still is legally blind*". The report is dated 10 November 2020.

[23] Mr. Gomez QC urges the Court to consider that Mr. Cottis was experiencing eye problems since December 2019 although a medical report was submitted to the Court for the first time on or about 10 November 2020.

[24] Mr. Gomez QC also argues that the facts of the case of **Mega Management** are distinguishable from the facts of the present case since Mr. Cottis' eye problems (since December 2019) restricted him from complying with the order of the court. He also submits that the Covid-19 Pandemic contributed to the failure of Mr. Cottis to comply with the December 2019 Order.

[25] Learned Queen's Counsel also states that he did not receive the file until June 2020 so there was little he could have done in the circumstances.

Submissions on behalf of Mr. Adams

[26] Mr. Adams opposes the application for relief from sanctions. He asserts that Mr. Cottis, himself a member of the Bahamas Bar and no stranger to litigation, has displayed the utmost contempt and disrespect for the Rules of the Supreme Court, the Court itself, and its Orders since these proceedings were commenced in August 2018.

[27] Learned Counsel, Mr. Jenkins submits that RSC O.31A, r. 25(2) provides that the Court can **only** grant relief if it is satisfied that:

a. the failure to comply was not intentional; **and**
b. there is a good explanation for the failure; **and**
c. the party in default has generally complied with all other relevant rules, practice directions, orders and directions.

[28] Counsel correctly submits that a failure under **any** of these heads obliges a Court to refuse an application for relief from sanction.

Compliance with all other relevant rules, parctice directions, orders and directions: r. 25(2)(c)

[29] Learned Counsel Mr. Jenkins submits that Mr. Cottis has repeatedly breached almost every order that the Court has made in this matter, as well as breaching every significant time limit imposed by the RSC. Specifically, Mr. Jenkins made the following arguments:

a. Mr. Cottis failed to comply with the *ex parte* Order of 22 August 2018, and has never provided the books and records of the administration to Mr. Adams as ordered **[Breach No. 1]** in paragraph 4 of that Order (see paragraphs 13-24 of Second Affidavit of Robert Adams filed on 19 December 2018). Furthermore, as reflected in the numerous reports of the Judicial Trustee, Mr. Cottis never fully complied with the obligation to provide the books and records of the Estate to the Judicial Trustee either [**Breach No. 2**] (See the Reports of the

Judicial Trustee dated 20 September 2018, 5 November 2018 and 12 December 2018 exhibited to the Second Affidavit of Robert Adams at pages 3, 15 and 33 of the Exhibit and referred to at paragraph 11). By summons filed on 5 March 2019, Mr. Adams applied for leave to commit Mr. Cottis to prison for his breaches of the *ex parte* order and decided only to not proceed with that application because discovery would soon be ordered in the case.

b. Mr. Cottis failed to file his Defence within the time limits imposed by the RSC by 26 January 2019 [**Breach No. 3**]. Mr. Adams agreed to an extension to 15 February 2019, which Mr. Cottis also missed [**Breach No. 4**], only applying for an extension of time on 22 February 2019. An extension was granted on 8 May 2019, requiring the Defence to be filed by 6 June 2019. Mr. Cottis also failed to comply with this deadline [**Breach No. 5**]. The Defence was then filed on 11 June 2019, almost 5 months after the original deadline (whereupon Mr. Cottis applied for an order validating the Defence filed late, to which Mr. Adams consented).

c. Mr. Cottis resigned on 10 May 2019 as Executor of the Estate. At the subsequent hearing on 20 May 2019, Mr. Cottis was again ordered to deliver up all the books and records of the Estate to the Judicial Trustee within 21 days from the date of the Order. Mr. Cottis failed to do so within this time [**Breach No. 6**], although he provided some (hard copy only) documents in his possession in September 2019 (over two months late) (See section 6 of the Fifth Report of the Judicial Trustee dated 11 March 2020 exhibited to the Affidavit of Mr. Masnyk). Mr. Cottis purportedly attempted to deliver the documents on 30 August 2019 at 3.30 pm. This was still over two months late.

d. On the same day (20 May 2019), a separate order was made by the Court requiring Mr. Cottis to file an affidavit explaining the variance

between the reconciliation of the assets circulated on 6 March 2019 and the former co-executor's affidavit filed on 24 November 2005 within 30 days. Mr. Cottis failed to do so [**Breach No. 7**] within this time, only filing an affidavit on 12 July 2019 in which no further explanation was in fact provided [**Breach No. 8**].

e. At the Case Management Hearing on 17 December 2019, Mr. Cottis (and Mr. Adams) were ordered to file their Lists of Documents by 20 March 2020 (an enlarged period, following representations from Mr. Cottis' counsel that by reason of his need to hire new counsel and by reason of medical difficulties he was having, Mr. Cottis would require extra time to comply). Mr. Adams complied with the deadline. Mr. Cottis did not [**Breach No. 9**]. In light of the restrictions placed upon physical meetings by the contemporaneous Emergency Orders, Mr. Jenkins emailed Mr. Cottis' current counsel, Mr. Gomez QC, on 20 March 2020, in order to see whether digital exchange could occur in lieu of physical exchange. The response was to dismiss the obligation to produce the List based on the closure of Mr. Gomez's office by reason of the Covid Order of that day and to rely again on his client's medical issues. There was no indication as to what stage Mr. Cottis and his legal team had reached in producing the List as ordered (See the affidavit of Sebastian Masnyk filed on 17 June 2020, at paragraphs 7- 8 and page 1 of the exhibit).

f. By Summons filed on 17 June 2020 and supported by the affidavit of Sebastian Masnyk filed on the same date, Mr. Adams successfully applied for an Unless Order. The Unless Order was made on 7 September 2020. Mr. Gomez QC was in attendance. The Order was served on Mr. Cottis on 13 October 2020. It required him to file his List of Documents by 13 November 2020, again an enlarged period of time in recognition of Mr. Cottis's medical difficulties (at Mr. Gomez QC's request). Mr. Cottis failed to comply [**Breach No. 10**], and

neither Mr. Cottis nor Mr. Gomez QC appeared at the hearing which had been ordered in the Unless Order for 20 November 2020 [**Breach No. 11**].

g. Since the commencement of this action in August 2018, Mr. Cottis has not appeared at a single court hearing.

h. Even now, in respect of this application for relief from sanctions, Mr. Cottis did not give any evidence himself, and is relying, without explanation, on an affidavit from Anthony McKinney QC, which offers no real explanation for the non-compliance save for the general averment that Mr. Cottis has a medical condition impairing his eyesight (as to which see paragraph 87 of **Mega Management** case, supra). There is no reason why Mr. Cottis could not give first hand evidence of his own, which could be tested if necessary by cross-examination.

i. As is detailed in the numerous Judicial Trustee's reports, Mr. Cottis has continually obstructed, delayed, and complicated the work of the Judicial Trustee in administering the Estate, a process itself only necessary because of the incompetance displayed by Mr. Cottis and his late Co-executor Mr. Manzi, and Mr. Cottis' conduct in holding the Estate hostage to his own illegitimate attempts to recover more than his statutory entitlement for remuneration, over the course of the administration of the Estate of Mr. Adams' father, which administration has been ongoing since 2004 (over 16 years ago).

j. While Mr. Cottis filed a summons seeking relief from sanctions on 6 November 2020, this application was never served on Mr. Adams. Nor was it supported by any evidence until 24 November 2020, 11 days after the Unless Order had taken effect.

Good explanation for the failure to comply – RSC O. 31A, r. 25(2)(b)

[30] Mr. Cottis has been advised by very senior and very able counsel throughout the litigation (including 2 Queens Counsel) and has persons within his office that could have assisted in compiling the documents for the purposes of production of his List of Documents. While Mr. Cottis has had issues with his eyes during the last year, the Court has made numerous accomodations for him and granted him extra time to comply. The law applies equally to persons with impaired vision. Mr. Cottis has not explained why, with the assistance of his legal team and his administrative staff at his law firm, he could not produce a list of documents: see para 39 of **Mega Management**.

Was failure to comply intentional – O. 31A, r. 25(2)(a)

[31] Learned Counsel Mr. Jenkins asserts that the inevitable conclusion that must be drawn from Mr. Cottis' consistent misconduct in these proceedings (not to mention the conduct that caused these proceedings to arise) is that Mr. Cottis' non-compliance is intentional: para 87 of **Mega Management**.

Additonal factors to be considered –O. 31A r. 25(3)

[32] There are additional factors that the Court must consider which are set out at RSC O.31A r. 25(3) in deciding how to exercise its discretion. These are set out below:

a) The interests of the administration of justice

[33] Learned Counsel Mr. Jenkins submits that Mr. Cottis has brazenly and continuously ignored the directions of the Court. He submits that to grant relief in such circumstances would undermine the administration of justice, as Mr. Cottis has provided no good reasons for failing to adhere to the orders of the Court, and would encourage litigants to disregard both general orders of the court and one of the most serious sanctions of the Court – an unless order, as there would be precedent for such leniency: **Mega Management**.

[34] Mr. Jenkins further submits that it is a fair conclusion to reach that Mr. Cottis has no confidence in his case and seeks to delay the litigation indefinitely. He says that

this is supported by the absence of any *bona fide* attempts to produce a List of Documents, such attempts of which, had they been made, any reasonable litigant would wish the Court to be aware.

b) Whether the failure to comply was due to the party or that party's counsel and attorney

[35] According to Mr. Jenkins, there is no evidence before the Court that Mr. Cottis is asserting that his attorney is culpable. Such an assertion could be made, for example, had he sworn that he had produced his List of Documents, and his attorney had failed to file and serve it within the time permitted. There is nothing to suggest that is the case here. Consequently, Mr. Cottis should be held responsible for the default.

c) Whether the failure to comply has been or can be remedied within a reasonable time

[36] There is also no evidence to suggest that the failure to comply can be remedied within a reasonable time. Mr. Cottis has given no indication of what progress has been made with the List of Documents, nor when he would be in a position to file. Mr. Cottis has been aware of the requirement to produce the List of Documents since 17 December 2019. It would be reasonable to have acted, given his familiarity with his medical condition, as soon as possible due to the risk of further deterioration. Mr. Cottis has had nearly an entire year to work on the List of Documents and yet neither the Court nor Mr. Adams has been given any indication as to what stage that List of Documents is at. Past conduct suggest that if an extension of time was given by the Court, this also would not be complied with.

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

[37] The trial of this matter has been fixed for four days commencing 2 March 2021 until 5 March 2021. From the date of the hearing of the application for relief from sanctions was 11 weeks and 2 days before the trial is scheduled to commence.

Should relief from sanctions be granted, there would no longer be any prospect of that trial date being met by reason of Mr. Cottis' non-compliance.

e) The effect which the granting of relief or not would have on each party

[38] Learned Counsel Mr. Jenkins submits that if relief were granted, the parties would need to obtain new trial dates, which are likely to be a further year away. He next submits that the litigation which Mr. Cottis has obstructed and avoided since the summer of 2018 would continue to consume Mr. Adams' resources and would in all likelihood never in fact get to trial by reason of the likely future conduct of Mr. Cottis.

[39] According to Mr. Jenkins, the effect on Mr. Cottis of declining to grant relief would be that Mr. Adams would be entitled to file a request for judgment. However, the Court would still need to be satisfied that Mr. Adams is entitled to the relief sought. Even if the Court were to conclude that Mr. Adams was entitled to damages, it would then have to order an assessment of damages, where he would have to prove what those damages are.

Analysis and conclusion

Case Management: some general powers

[40] The Court's powers of case management are set out in RSC O.31A. The Court has broad powers to deal with cases actively. The Court may make orders of its own initiative: O. 31A, r. 19. It may impose sanctions by reason of the failure of a party to comply with the rules, a practice direction or an order of the court: O.31A r. 24 and it may relieve a party from sanctions for failure to comply with any rule, order or direction.

[41] Where there is a failure to comply with an "unless" order, the sanction specified in that order will take effect automatically. It is up to the party in default to apply for relief if he wishes to avoid the consequences of non-compliance which are otherwise inescapable: **Marcan Shipping (London) Ltd v Kefalas** [2007] 3 All ER 365.

[42] In **Barbados Rediffusion Services Ltd v Mirchandani** CCJ Appeal Civil No. 1 of 2005, the CCJ dealt with the issue of the exercise of the discretion to strike out a pleading for breach of an unless order in Barbados (which had not at that time adopted the new Civil Procedure Rules). The Court reviewed a wide range of modern authorities and stated at paragraphs 44-45 and 47:

> **"[44] The discretion is a wide and flexible one, to be exercised "as justice requires". And it is quite impossible to anticipate in advance, and it would be impractical to list, all the facts and circumstances which point the way to what justice requires in a particular case. A judge dealing with an application to strike out, should start off by reminding himself that to strike out a party's case and so deny him a hearing on the merits, is an extreme step not to be taken lightly. In fact, this is a conisderation which should be taken into account by the judge who is asked to make an unless order. He should not use the threat to strike out contained in such an order unless there is a real prospect that non-compliance with the order might warrant the imposition of such an extreme penalty.**
>
> **[45] Broadly speaking, strike out orders should be made either when that is necessary in order to achieve fairness or when it is necessary in order to maintain respect for the authority of the Court's orders….If there is a real risk that a fair trial may not be possible as a result of one party's failure to comply with an order of the Court, then that is a situation which calls for an order striking out that party's case and giving judgment against him. One way in which such a situation may come about, is if crucial documents which are not disclosed within the time prescribed by an order for discovery, are subsequently lost or destroyed, albeit without fault on the part of the non-disclosing party. Another is where a party has been so fraudulent in relation to the discovery process, for example, by forging or deliberately suppressing documents any lying about it, that it is impossible to place any reliance on what he has disclosed as being either authentic or complete, without a long and expensive discovery.**
>
> **[47] With regard to the use of strike out orders as a response to disobedience of court orders, we respectfully disagree (as other courts have done) with the view of Millett J expressed in the *Logicrose* case, that such disobedience can never justify the making of a strike out order. We prefer the view expressed by Arden LJ in the *Stolzenberg* case that the fact that a fair trial is still possible, does not preclude a court from making a strike out order. We accept with some qualifications the principle expounded and applied in cases such as *Tolley v Morris, Hytec Information Systems v Coventry City Council* and *Re Jokai Tea Holdings Ltd,* that defiant and persistent refusal to comply with an order of the Court, can justify the making of a strike out order. While the general purpose of the order in such circumstances may be described as punitive, it is to be seen not as**

> **retribution for some offence given to the Court but as a necessary and to some extent symbolic response to a challenge of the court's authority, in circumstances in which failure to make such a response might encourage others to disobey court orders and tend to undermine the rule of law. This is the type of disobedience that may properly be categoized as contumelious or contumacious".** [Emphasis added]

[43] In The Bahamas, there is a dearth of case law on the exercise of the power to grant relief from sanctions. However, there is a body of case law in the Eastern Caribbean Supreme Court. For instance, in **JR O'Neal and G.A. Cobham Ltd v Cliff Williams**, Civil Appeal No. 10 of 2006 (a decision of a single judge of the Court of Appeal), the appellant had been found by the Master to have failed to comply with EC CPR 10.5 by simply denying an allegation in the statement of claim without stating his reasons for the denial. The appellant had not complied with the Master's order to amend at the time of the adjourned case management conference or at the further adjourned conference. No one for the appellant attended that last conference and the Master entered judgment against the appellant. The appellant applied for an extension of time within which to apply for leave to appeal. It was held that EC CPR 26.8(2)(c) (same as BAH RSC O.31A r.25(2)(c)) makes it a condition for obtaining relief that a party seeking relief had complied with other rules and orders. The appellant was not entitled to relief because of his general non-compliance with the rules and an order of the court. In response to the appellant's contention that the master was wrong to strike out his defence without first giving him an opportunity to be heard and without making an unless order, the Court of Appeal pointed out that EC CPR 26.3(1) (b) and (c) provide that the court may strike out a statement of case that is an abuse of process or does not comply with the requirements of EC CPR 10. In the circumstances of the case, there was no need for the Master to fix a sanction and to give the appellant an opportunity of being heard before doing so.

[44] Then, in **Nevis Island Administration v La Copropriete du Navire J31** St. Christopher and Nevis Civil Appeal No. 7 of 2005, delivered 3 April 2006, and in **Ferdinand Frampton v Ian Pinard**, Civil Appeal No. 15 of 2005, Barrow JA first

applied the EC CPR 26.8 (which mirrors BAH RSC O.31A r.25) conditions and criteria to an application for an extension of time for appealing. He adjudged that the applicant had failed to satisfy the conditions in EC CPR 26.8(2) (same as BAH RSC O.31A r.25(2)) requiring him to establish an unintentional failure to comply, a good explanation for the failure and a general compliance with other orders and rules.

[45] In the present case, Mr. Cottis is unable to satisfy the three mandatory requirements at RSC O. 31A r. 25(2). As the evidence unfolded, it is plain that Mr. Cottis has had a long and blemished history of non-compliance with court orders, as well as non-cooperation with the Judicial Trustee. As Mr. Jenkins correctly submits, there is no reason to suppose that this conduct may change and every reason to surmise that this conduct is part of an intentional strategy to delay the action from proceeding. Furthermore, notwithstanding his medical condition, Mr. Cottis has offered no explanation as to why he has been unable to progress the work of drafting the List of Documents with the assistance of his very capable legal team and his own administrative staff. To date, Mr. Cottis has proffered not a shred of evidence as to when he intends to comply with the December 2019 Order.

[46] I therefore agree with Mr. Jenkins that to grant the relief from sanctions in the face of such brazen and consistent non-compliance would not be in the interests of the administration of justice. Orders must be obeyed, otherwise the rule of law tends to be undermined. The breaches have not and cannot be blamed on Mr. Cottis' legal team. Were relief to be granted, the March 2021 trial dates would be compromised and any extended deadline would, in all likelihood, also be compromised, given Mr. Cottis' past conduct. Another trial date in 2021 (of four days) would be an impossibility.

[47] Furthermore, even if the application for relief from sanctions is dismissed, Mr. Adams will still have to prove his case that he is entitled to the relief sought, and damages would still need to be assessed.

[48] For all of the reasons stated above, much of which I owe to Mr. Jenkins, I will dismiss the application for relief from sanctions with costs of $12,650 to Mr. Adams.

Dated this 29th day of December, A.D., 2020

Indra H. Charles
Justice