COMMONWEALTH OF THE BAHAMAS **2007/CLE/gen/No.00633**

IN THE SUPREME COURT

Common Law and Equity Division

BETWEEN

TIM WILSON

Plaintiff

AND

JOHN PRATT

Defendant

Before: The Chief Justice Sir Brian M. Moree, QC

Appearances: Mr. V. Alfred Gray of Messrs. V. Alfred Gray & Co. for the Plaintiff
Mr. Dywan Rogers of Meridian Law Chambers for the Defendant

R U L I N G

Civil Practice and Procedure - Rules of the Supreme Court (RSC 1978) - *Order 31A rule 25* – Unless Orders - Relief from Sanctions.

Moree, CJ:

Introduction

[1] I delivered my oral decision in this matter dismissing the two applications filed on behalf of the Plaintiff and, at that time, agreed to provide my reasons in writing. I now do so.

[2] There are two applications by the Plaintiff before the Court. The first in time is the Summons filed on 27 February, 2019 ("***the First Summons***") seeking an

Order to set aside the 'Unless Order' dated 7 February, 2019 and filed on 13 February, 2019 made by the Deputy Registrar ("***the Unless Order***"). The second application is the Summons filed on 26 September, 2019 seeking (i) relief from sanctions under the Unless Order pursuant to Order 31A rule 25 of the Rules of the Supreme Court, 1978 ("***the RSC***"); and (ii) an Order that costs of the application be costs in the cause ("***the Second Summons***").

[3] The First Summons and the Second Summons (together "***the Two Summonses***") are supported by the Affidavit of Ester Wilson filed on 16 April, 2019 and the Affidavit of V. Alfred Gray filed on 26 September, 2019 ("***the Gray Affidavit***"). Counsel for the Defendant relies on the two Affidavits of Gilbert A. Thompson filed 5 December, 2018 and 10 September, 2019 respectively in opposing the two applications.

Procedural History

[4] This action is grounded in negligence and was commenced on 18 May, 2007 by a Writ of Summons which is generally indorsed with a claim for, *inter alia,* damages arising from injuries sustained by the Plaintiff when he fell from a ladder while assisting the Defendant in putting up hurricane shutters at the Defendant's house. The Writ was served on the Defendant on 9 August, 2007 and on 26 May, 2008 the Plaintiff filed a Judgment in Default of Appearance against the Defendant. I observe in passing that the Judgment was irregular as it should have been an interlocutory judgment for damages to be assessed under Order 13 rule 2 of the RSC. However, nothing turns on this point as the Registrar made an Order on 13 July, 2012 (which was filed on 23 July, 2012) setting aside the Default Judgment. At that time the Registrar also ordered that certain admissions previously made by an attorney purporting to represent the Defendant be withdrawn and set aside.

[5] The Plaintiff filed a Notice of Appeal on 7 August, 2012 in respect of the Registrar's Orders setting aside (i) the Default Judgment; and (ii) the admissions

("***the Notice of Appeal***"). Having regard to the provisions of Order 58 rule 1(3) of the RSC, the Notice of Appeal was filed out of time. The Plaintiff sought to address this issue by filing a Summons on 4 April, 2013 ("***the April 2013 Summons***") - almost 8 months after filing the Notice of Appeal - seeking an extension of time to file an appeal or alternatively an order that the Notice filed on 7 August, 2012 was "*....properly filed within the time allowed by the rules*".

[6] It appears that the Plaintiff did not take any further action in this case until 2 February, 2015 when he filed a Notice of Intention to Proceed. This was a delay of approximately 22 months. Subsequently, on 22 April, 2015 a Notice was filed by the Plaintiff referring this case to a Case Management Conference and a second such Notice was filed on 30 September, 2016. These two Notices seem to have been filed prematurely bearing in mind that the Notice of Appeal (albeit filed late) and the April 2013 Summons were still extant and no pleadings (and specifically a Statement of Claim) had been filed.

[7] The Plaintiff eventually withdrew the appeal (which rendered the April 2013 Summons otiose) pursuant to the Notice of Withdrawal filed on 4 October, 2016, almost 4 years and 2 months after the appeal was filed. It bears noting that as of October, 2016 some 9 years and 4 months had elapsed since this case was commenced. The Plaintiff took no further steps in this action and it remained dormant until 24 August, 2018 when the Defendant filed a Summons seeking an Order that the Plaintiff provide security for costs ("***the Costs Summons***"). That application was supported by the Affidavit of Gilbert A. Thompson filed on 5 December, 2018. The hearing of the Costs Summons was initially fixed for 12 December, 2018 but was subsequently re-scheduled by the Deputy Registrar to 7 February, 2019.

[8] On 6 February, 2019 (one day before the re-scheduled hearing date of the Costs Summons) Counsel for the Plaintiff informed the court by letter that the date of 7 February, 2019 was not convenient due to prior arrangements out of the

jurisdiction and that he had difficulties in finding counsel to hold brief for him[1]. He stated in the letter that he had indicated that "*....there would be possible difficulties with* [the new date of 7 February, 2019][2]" when he was initially advised in December, 2018 of the re-scheduling of the hearing date of the Costs Summons to 7 February, 2019.

[9] On 7 February, 2019, as foreshadowed in his letter dated 6 February, 2019, Counsel for the Plaintiff did not attend the hearing. The Deputy Registrar declined to adjourn the hearing and proceeded to hear the Summons for security for costs in the absence of the Plaintiff's Counsel. She made the Unless Order in these terms:

> " *.....UNLESS the Plaintiff pay into the Supreme Court of the Commonwealth of The Bahamas the sum of Forty Thousand Dollars in the currency of the Commonwealth of The Bahamas ($40,000.00) within Twenty-one (21) days from the date of this Order the Writ of Summons herein will be struck out and this Action in its entirety will stand dismissed as against the Defendant AND that the costs of and occasioned by this application be taxed if not agreed and paid by the Plaintiff to the Defendant."*

[10] The Unless Order was perfected and filed on 13 February, 2019 and, according to the Gray Affidavit, it was "*served upon* [the] *chambers* [of the Plaintiff's counsel] *shortly after."*

[11] Counsel for the Plaintiff filed the First Summons on 27 February, 2019 seeking an Order to set aside the Unless Order.

[12] Approximately seven months later, the Plaintiff filed the Second Summons on 26 September, 2019 seeking relief from sanctions under the Unless Order pursuant to Order 31A rule 25 of the RSC.

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[1] See paragraphs 4 & 5 of the Gray Affidavit.
[2] See Exhibit "VAG2" of the Gray Affidavit.

[13] In his submissions at the initial hearing of the Two Summonses, Counsel for the Defendant informed the Court that the Defendant had died on 1 August, 2019. This was (i) after the Unless Order was made; (ii) after the effective date of the dismissal of this action under the sanction imposed by the Unless Order; (iii) after the filing of the First Summons; and (iv) before the issuance of the Second Summons.

The Civil Procedure Rules of England and Wales and the RSC

[14] It is helpful to generally consider the overall framework of the Rules which govern the disposition of the Two Summonses. On 26 April, 1999 the Civil Procedure Rules of England and Wales ("**the CPR**") came into effect in those jurisdictions. The CPR repealed and replaced the former Rules of the Supreme Court (commonly referred to as "the White Book") and, as judicially observed in a number of authorities,[3] is in its overall effect fundamentally different from the '*old'* system' under those Rules. The CPR is a "*new procedural code*" and contains the overriding objective in CPR 1.1 which is foundational to the new regime.

[15] Just over five years later, based substantially on parts of the CPR, the Rules of the Supreme Court of the Bahamas were amended to insert Order 31A which came into operation on 1 July, 2004. The insertion of Order 31A into the RSC did not introduce a "*new procedural code"* in the Bahamas. Rather it enacted a case management module without repealing the "*old"* system.

[16] In this regard, I am reminded of what I said (as an Acting Justice of the Supreme Court) in my Ruling on the appeal from the decision of the Deputy Registrar of the Supreme Court to strike out the action under Order 18 rule 19 of the Rules of the Supreme Court in the case of ***Dykton Mechanical Co. Ltd. v Paradise Blue Water Ltd. CLE/gen 00370 of 2010:***

[3] Biguzzi v Rank Leisure plc [1999] 1 WLR 1926; Vinos v Marks and Spencer plc [2001] 3 All ER 784 & SSQ Europe SA v Johann & Backes OHG [2002] 1 Lloyd's Rep 465.

> ***"25. …..unlike in England, the introduction of Order 31A*** *[in The Bahamas]* ***was not part of a wholesale replacement of the Rules of the Supreme Court but merely a Case Management module inserted into the existing Rules. Consequently, in the absence of a conflict governed by Order 31A rule 31, the new Case Management module must coexist within the general context of the entire code of rules comprising the Rules of the Supreme Rules."***

[17] Significantly, Order 31A did not statutorily recognize in the Bahamas the foundational principle in the CPR of the overriding objective as expressed in CPR 1.1. The result is that in the Bahamas we continue to operate under the RSC with the added emphasis on active case management by the judge under the provisions of Order 31A. While in this jurisdiction we have not yet moved to a complete revamping of the "*old system",* there should be no doubt that under Order 31A civil procedure in the Bahamas has moved from the vestiges of a largely 'lawyer / party driven' system to an era of judge controlled active case management.

[18] A culture of delay and non-compliance with Rules, Practice Directions and Court Orders adversely affects the civil justice system and must not be allowed to defeat the efficient conduct of litigation in this jurisdiction. Invariably, the failure to comply with timelines by one party begets missed time lines by other parties which then, all too often, results in adjournments or vacated hearing dates. These delays waste valuable judicial time, unduly extends the disposition cycle for civil cases and, at times, is a windfall for the non-compliant party who benefits from the delay. A balance must be struck by the court to ensure that strict compliance with timelines is not elevated above the interests of justice. However, at the same time it must be recognized that, even though the RSC have not yet been wholly replaced by a new civil procedure code modelled on the CPR, the paradigm in civil procedure in The Bahamas has shifted under Order 31A and judicial officers are now more engaged in active case management. Litigants and their counsel are expected to comply with Rules of Court, Orders and case management

directions including timelines set for filing court documents, exchanging written submissions and conducting discovery and inspection of documents. Non-compliance cannot be justified by pressure of other work or viewed in the context of how busy counsel may be with other matters. In exercising its case management powers under the RSC, the Court must recognize the importance of compliance and will be astute to avoid unnecessary adjournments throughout the interlocutory stage of an action and to affirm the general approach of trial date certainty.

[19] Part IV of Order 31A of the RSC is similar to Part 3 of the CPR. Therefore, when considering the English authorities relating specifically to Part 3 of the CPR I must bear in mind that there are certain important differences in the two regimes and Part IV in The Bahamas is to be applied in the overall context of the '*old system"* under the RSC subject to Order 31A r 31.

[19] In the English case of ***Biguzzi v Rank Leisure plc [1999] 1 WLR 1926*** Lord Woolf MR observed that decisions under the former Rules of the Supreme Court in England were likely to be of limited assistance in construing the CPR. However, notwithstanding the provisions of Order 31A, the RSC have not been wholly repealed and replaced by a new code of civil procedure and consequently that judicial caution is of limited application in this jurisdiction.

Unless Orders

[20] The Court has power to make an unless order, sometimes referred to as a conditional order, under Order 31A r 18(3)(b). The jurisdiction to make such an order can be traced as far back to the 19th century. This point was acknowledged by Moore-Bick LJ in the case of ***Marcan Shipping (London) Ltd. v. Kefales And Another [2007] 1 W.L.R. 1864*** when he said:

> ***"11. "Unless" orders have a long history dating back well into the 19th century and it was recognised at an early stage that once the condition on which it depended had been satisfied the sanction became effective without the need for any further order."***

[21] The authorities establish two important principles relating to unless orders. The first one is that non-compliance with an unless order causes the sanction to become effective without the need for a further order. This is now reflected in Order 31A r 24(2) of the RSC which provides that any sanction for non-compliance imposed by an unless order shall have effect unless the party in default applies for and obtains relief from the sanction or the Court of its own initiative exercises its powers under Order 31A r 19 to grant such relief. The ***Marcan Shipping*** case is instructive on this point. The headnote of the case reads:

> ***"The claimant commenced an action against the defendants alleging that they were in breach of an agency agreement. The defendants denied the agreement and on their application the judge made an order that, unless the claimant gave disclosure of specified documents and provided security for the defendants' cost by a specified time, the action would be dismissed and the claimant would have to pay the defendants' costs. The order not having been complied with, the defendants applied for judgment to be given in accordance with the terms of the order pursuant to CPR r 3.5.[4] The judge made an order in the terms sought.***
>
> [The claimant appealed. The Court of Appeal] ***held, dismissing the appeal, that, in accordance with CPR Pt 3, the sanction embodied in an "unless" order took effect without the need for any further order if the party to whom it was addressed failed to comply with it in any material respect; that on an application to enter judgment under rule 3.5 (5) the court's function was limited to deciding what order should properly be made to reflect the sanction which had already taken effect; that since the claimant had not applied for relief under rule 3.8[5] and the court had not decided to grant relief on its own initiative under rule 3.3[6], the question whether the sanction ought to apply did not arise; and that, accordingly, the action stood dismissed and the claimant became liable to pay the defendants' costs in an amount to be assessed."***

[4] Similar to O 31A r 22 of the RSC.
[5] Similar to O 31A r 24 of the RSC.
[6] Similar to O 31A r 19(1) of the RSC.

[22] In his judgment in ***Marcan Shipping***, after briefly reviewing the decision in ***Samuels v. Linzi Dresses Ltd. [1981] Q.B. 115*** Moore-Bick LJ observed that:

> ***"14. ….One can see, in fact, from the cases to which I have referred that it was accepted, both prior to and after the decision in Samuels v. Linzi Dresses Ltd. ([1981] Q.B. 115, that a failure to comply with an "unless" order caused the sanction to become effective without the need for any further order, and although this court held that there is jurisdiction to grant relief by extending time for compliance, it appears also to have accepted that the onus was on the person against whom the sanction operated to seek relief.."***

Later in his judgment Lord Justice Moore-Bick continued:

> ***"29. …If it is thought that the party seeking to take advantage of the default must apply to the court in order to render the sanction effective, in my view that is wrong. The sanction takes effect without further order and the statement of case is struck out; it follows, therefore, that it is unnecessary and inappropriate to make an application under rule 3.5(5) or rule 3.4(2)(c) for an order to that effect."***
>
> ***"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 rule 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 has 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. . .***

> ***35. The second consequence, which follows from the first, is that the party in default must apply for relief from the sanction under rule 3.8[7] if he wishes to escape its consequences. Although the court can act of its own motion, it is under no duty to do so and the party in default cannot complain if he fails to take appropriate steps to protect his own interests. Any application of this kind must deal with the matters which the court is required by rule 3.9[8] to consider.***
>
> ***36. The third consequence is that before making conditional orders, particularly orders for the striking out of statements of case or the dismissal of claims or counterclaims, the judge should consider carefully whether the sanction being imposed is appropriate in all the circumstances of the case…."***

[23] The second principle relating to unless orders is that the Court has the jurisdiction to extend the time to comply with an unless order even after a party has failed to follow its terms. This is now recognized in Order 31A r 18(2)(b) of the RSC. In ***Samuels v. Linzi Dresses Ltd. [1981] Q.B. 115*** (decided prior to the coming into force of the CPR in England and Wales and Order 31A in the Bahamas) the defendants failed to comply with an "unless" order to deliver Further and Better Particulars of their defence and counterclaim. After the time for doing so had expired the court granted an extension. After carefully reviewing the earlier authorities Roskill L. J. concluded his judgment in this way:

> ***"In my judgment, therefore, the law today is that a court has power to extend the time where an "unless" order has been made but not been complied with; but that it is a power that should be exercised cautiously and with due regard to the necessity for maintaining the principle that orders are made to be complied with and not to be ignored. Primarily, it is a question for the discretion of the master or the judge in chambers whether the necessary relief should be granted or not."***

[24] The scheme of the RSC relating to unless orders is clear. In adapting the words of Moore-Bick LJ in ***the Marcan case***, such orders mean what they say and the

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[7] Similar to O 31A r 24 of the RSC.
[8] Similar to O 31A r 25 of the RSC.

consequences of non-compliance take effect in accordance with the terms of the order, subject to the power of the court to do justice under Order 31A r 24(2) on the application of the party in default, or, in an exceptional case, acting on its own initiative under Order 31A r 19.

[25] I note that the case of ***Samuels v. Linzi Dresses Ltd.*** was decided before the introduction of both the CPR in England and Wales and Order 31A in the Bahamas, and that the ***Marcan Shipping case*** was decided on the basis of the CPR which has not been fully adopted in the Bahamas. Nevertheless, Part IV of Order 31A is somewhat similar to the provisions in Part 3 of the CPR and I am of the view that both cases are helpful authorities when considering the effect of unless orders in this jurisdiction. In this regard, I note that after referring in paragraph 10 of his judgment in the ***Marcan Shipping*** case to the subject of dilatory litigants who fail to comply with court rules and orders and the power to make "unless" orders, Moore-Brick LJ observed that "[a]*though the CPR have given the court greater powers to control proceedings and a greater responsibility for ensuring that they are conducted fairly and efficiently*….. ***I do not think that there is a significant difference between the approach to this problem adopted under the former Rules of the Supreme Court and that which is now embodied in the CPR****."* [My emphasis]

The First Summons

[26] The Unless Order is dated 7th February, 2019 and was filed on 13th February, 2019. The initial challenge to that Order by the Plaintiff was through the First Summons which was filed on 27th February, 2019. It is important to note that this was after the Unless Order was perfected and consequently outside of the provisions of Order 32 rule 5(3) of the RSC which allows a re-hearing of a summons which was heard in the absence of a party before the order made on the hearing is perfected.

[27] The First Summons sought an order to "*set aside"* the Unless Order – not to re-hear it (which would, in any event, have been too late under O.32 r 5(3)), or to appeal it under Order 58 of the RSC. It was not contended that the First Summons should be regarded as, in effect, an appeal and, in any event, it would have been out of time under O.58 r 1(3) and the Summons did not seek an extension of time. Notably, the First Summons did not seek relief from sanctions under the Unless Order.

[28] In the Affidavit of Ester Wilson which was filed on 16th April, 2019 in support of the First Summons, the Court is asked to *"...remove the Order for Security for Costs…."* No authority has been cited to support the application to "*set aside"* or *"remove"* the Unless Order under the First Summons.

[29] It is stated in the Gray Affidavit that it was the view of counsel for the Plaintiff that the filing of the First Summons "…*arrested the Unless Order…."* I assume that this is intended to be a reference to a stay of that Order. There was no basis for that view as the mere filing of the First Summons could not, of and by itself, result in a stay of the Unless Order. Even if the First Summons was an appeal, which it was not, it is clear from Order 58 r1(4) of the RSC that the filing of an appeal does not operate as a stay of the proceedings in which the appeal is brought. There is no indication in the court file that the Plaintiff ever sought a stay of the Unless Order.

[30] It is apparent from the above that the First Summons did not seek a re-hearing of the application under O.32 r 5(3) which led to the Unless Order and did not seek to appeal that Order under Order 58 of the RSC. Further, the Unless Order was not an *ex parte* Order. The underlying Summons seeking security for costs was, clearly, an *inter partes* application and was served on counsel for the Plaintiff. It was heard in the absence of counsel for the Plaintiff in the circumstances set out in paragraphs 8 and 9 above, but that did not make it an *ex parte* hearing thereby resulting in an *ex parte* order.

[31] Therefore, in these circumstances, I am of the view that there is no proper basis for the court to *"set aside"* the Unless Order under the First Summons. Accordingly, I dismiss the First Summons.

The Second Summons – Relief from sanctions

[32] As stated earlier in this Ruling, the Plaintiff did not comply with the Unless Order. Therefore, under the terms of that Order, this action was dismissed as of 28 February, 2019 i.e. twenty one days after the date of the Order. The Plaintiff, by way of the Second Summons, seeks to get relief from that result to save this action. In doing so, the Plaintiff applies under Order 31A r 25. It reads as follows:

> ***(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.***
>
> ***(1) 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.***

[33] An application for relief from sanctions is properly made under Order 31A r 24 and I consider the Second Summons on this basis.

[34] In considering the application for relief from sanctions, the Court is not dealing with an appeal of the Unless Order which, in the circumstances of this case, may have been the more appropriate course for the Plaintiff to take within the prescribed time period in seeking to challenge the Unless Order. Under the Second Summons the question for the court is whether the Plaintiff should be granted relief from the sanction imposed by the Unless Order. It is important to note that this is not a case where the Plaintiff paid the sum of $40,000.00 into court for security for costs later than the date specified in the Order, or a case where the Plaintiff is seeking additional time to pay the security. Rather, the Plaintiff is seeking relief from the sanction under the Unless Order on the basis that he will not pay security for costs at all. This is confirmed in paragraph 7 of the Gray Affidavit which reads that the Plaintiff *"….does not have a disposable sum of $40,000.00 BSD and simply cannot afford to pay the sum into Court*." Therefore, in seeking relief from the sanction, the Plaintiff is really wanting to avoid all together the payment of security for costs – in effect being able to ignore the order to pay security for costs with impunity. That is not a sustainable position.

[35] In his supplemental written submissions dealing with the death of the Defendant, counsel for the Plaintiff asks for the Unless Order "*….to be extended to 45 days…."* from the date of the submissions (i.e. 3 June, 2020). However, it is not clear why this extension is sought. To the extent that it might be contended that this 45 day extension would give the Plaintiff additional time to pay the security for costs under the Unless Order, it would be inconsistent with the unequivocal statement in the Gray Affidavit that the Plaintiff "*…cannot afford to pay the sum into Court*." That statement has not been withdrawn or varied and consequently there would be no utility in extending the twenty-one day period in the Unless Order to pay into court the sum of $40,000.00 when the Plaintiff has stated through his counsel that he cannot afford to make the payment at all.

Alternatively, if it is submitted that the extension would provide the Plaintiff with time to make an application under Order 15 r 8 of the RSC as a consequence of the death of the Defendant, that would not be sustainable as no further steps in this action can be taken unless and until the Plaintiff is granted relief from the sanction under the Unless Order. Bearing in mind my oral decision given some time ago that I would not grant the Plaintiff relief from the sanction under the Unless Order, this does not arise. Accordingly, in my view, no issue of an extension (whatever that is intended to mean or accomplish) arises in this matter.

[36] The reason advanced on behalf of the Plaintiff for relief from the sanction is that the Registrar did not have all the circumstances of the case before her when making the Unless Order. Specifically it is contended that the Registrar was not informed of an alleged land transaction between the Plaintiff and the Defendant which is described in the Affidavit of Ester Wilson, the wife of the Plaintiff, filed on 16 April, 2019. In that Affidavit Mrs. Wilson asks the Court to *"....remove the Order for Security for Costs...."* so the Plaintiff is not *"....driven from the seat of justice because of an apparent lack of funds or financial means."* The point here is that the Plaintiff was claiming to have an asset in The Bahamas which, he would say, should have led the Deputy Registrar to decline the application for security for costs. Certain of the material allegations in the Ester Wilson Affidavit relating to the purported land transaction are disputed and/or denied in the Affidavit of Gilbert A. Thompson filed on 10 September, 2019 and therefore that matter remains unresolved. That issue could have been addressed in an appeal of the Unless Order filed within the relevant time period to support the contention that the Order should be set aside. Such an appeal would have been a rehearing of the application for security of costs where the judge would have treated the matter as though it had come before him for the first time. On that basis, the judge would then have either declined the application bearing in mind the evidence in the Affidavits or made an order for security for costs in the amount which he deemed appropriate. However, the Plaintiff did not take that course through an appeal.

[37] In hearing the Second Summons I am required to consider the provisions of Order 31A r 25. The Second Summons seeking relief from the sanction in the Unless Order was supported by evidence on affidavit. However, it was not made promptly having been filed approximately seven (7) months after the Unless Order was made. I note that the First Summons was filed just 21 days after that Order was made and within the time period specified therein for paying into court the sum of $40,000.00 by way of security for costs. However, the First Summons is not an application under Order 31A r 25 and it was, in my view, misconceived as there is no jurisdiction to "*set aside*" the Unless Order outside of an appeal.

[38] The Plaintiff contends that his failure to comply with the Unless Order was because he could not afford to make the payment and it is said on his behalf that, as sated above, the filing of the First Summons was thought to have stayed (or *"arrested"*) the obligation to make the payment into court. I dealt with the latter point in paragraph 29 above and I do not accept that there was a reasonable basis for waiting seven months before filing the application for relief from the sanction under the Unless Order. Further, it cannot be said in this case that the Plaintiff (who is in default under the Unless Order) has generally complied with the relevant rules throughout these proceedings. As can be seen from the procedural history of this case, there were significant delays by the Plaintiff at various stages of this action. The Judgment in Default of Appearance filed by the Plaintiff on 26 May, 2008 was irregular. When it was ultimately set aside by the Registrar (in addition to the admissions which had been made by the Defendant's earlier counsel) on 13 July, 2012, over 4 years later (7 August, 2012), the Plaintiff filed an appeal out of time. After another 4 years had elapsed, the appeal was withdrawn. Thereafter the Plaintiff took no further steps to proceed with this action for almost 2 years when the Defendant applied for security for costs. Prior to filing the Second Summons, over twelve (12) years had elapsed since the filing of the generally indorsed Writ of Summons.

[39] Additionally, I have considered all of the factors set out in O31A r 25(3). The Defendant has now died. The incident giving rise to this action occurred on 18 August, 2005, over fifteen years ago. The elapse of that protracted period of time must negatively impact the ability of witnesses to recollect the material events in this case. Indeed, now that the Defendant has died, it is not clear whether there are any other witnesses to the incident other than the Plaintiff. In the circumstances of this case, as set out above, I have no doubt that it is not now possible to have a fair trial in this case.

[40] I have also had regard to the factors set out in Order 31A r 25(3)(b), (c) & (d). The failure to comply with the Unless Order seems to result from the Plaintiff's alleged impecuniosity. The only evidence on this point before the court is that the Plaintiff is unable to pay the amount of $40,000.00 into court pursuant to the Unless Order There is no evidence to suggest that this has been remedied or can be remedied within a reasonable time and, as stated above, this case is not anywhere near a trial date.

[41] I have also considered the effect which the granting of relief or not would have on each party in this case. If the relief is declined, the Plaintiff would not be able to proceed with this case. That is unfortunate but given the substantial delays attributable to the Plaintiff in this case prior to the filing of the Second Summons it is a consequence which, in large measure, he would have brought upon himself. On the other hand, if relief from the sanction under the Unless Order is granted, the case would proceed even though I have concluded that, for the reasons stated above, it is not now possible to have a fair trial in this case. That is not a viable option.

[42] Therefore, I will not grant the relief sought in the Second Summons. The application is dismissed.

Costs

[43] Mr. Gray submitted that, notwithstanding that the two applications by the Plaintiff have been dismissed, cost orders should not be made against the Plaintiff until and unless an application to replace the deceased Defendant is made in accordance with O.15 rule 7 of the RSC (or perhaps rule 8). He seems to contend that the failure to make such an application was "*an omission*" which should not prejudice the Plaintiff. I have difficulty in following that submission but in any event it must be remembered that this action was dismissed after the Plaintiff failed to comply with the terms of the Unless Order – see paragraphs 21-22 and 32 above. The only remaining point at that stage was whether the Plaintiff would be granted relief from that outcome under the Second Summons. If such relief had been granted, going forward, the issue of the death of the Defendant would have had to be addressed under O.15 r 8. However, in the circumstances of this case, the Court has declined to grant relief from the sanction under the Unless Order and therefore no further matter arises as the action is dismissed.

[44] In these circumstances, the Plaintiff is ordered to pay the costs of this action on the basis that such costs are to be taxed if not agreed.

Dated 5 November, 2021.

Sir Brian M. Moree
Chief Justice