[2012] JMCA Civ 36

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 3/2009

BEFORE: THE HON. MR JUSTICE PANTON, P
THE HON. MRS JUSTICE MCINTOSH, JA (Ag)
THE HON. MR JUSTICE BROOKS, JA (Ag)

BETWEEN	**THE ATTORNEY GENERAL**	**1ST APPELLANT**
AND	**CONSTABLE LLEWELYN MARTIN**	**2ND APPELLANT**
AND	**THE ADMINISTRATOR GENERAL OF JAMAICA (Administrator of the Estate of HERMAN MCKENZIE, deceased)**	**RESPONDENT**

Miss Lisa White and Mrs Trudi-Ann Dixon-Frith instructed by The Director of State Proceedings for the appellants

Mrs Nesta-Claire Smith-Hunter instructed by Judith Brown-Ramanand & Co for the respondent

14, 17 June 2010 and 20 July 2012

PANTON P

[1] I have had the benefit of reading in draft the reasons for judgment that have been written by my learned colleagues. The reasons that have been written by my learned brother, Brooks JA(Ag), are in keeping with my views on the determination of the issues that arose before King J. Procedurally, there is no doubt in my mind that

King J acted correctly. In the circumstances, I find it rather suprising that the Attorney-General would mount such a spirited appeal.

MCINTOSH JA (Ag) (Dissenting)

[2] I have had the opportunity of reading in draft the judgment of my brother Brooks JA (Ag) and must respectfully disagree with his reasoning and conclusions. Inasmuch as it appears that I am alone in my views I endeavour below to set out my reasons for arriving at a different conclusion.

[3] The main issue for the court's determination in this appeal is, in my opinion, the effect of non-compliance with part 29.4(2) of the Civil Procedure Rules, 2002 (the CPR) which deals with "Requirement to serve witness statements" and reads as follows:

> "(2) Where the person making the statement is illiterate or blind the statement must be made in the presence of a witness who must certify that –
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> (a) the statement was read to the person making the statement in the presence of the witness; and
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> (b) the person making the statement –
>
> (i) appeared to understand it; and
>
> (ii) signed the statement or made his or her mark in the presence of the witness."

The background facts

[4] On 3 December 2008, the trial of claim number CL 1998/M-196 commenced in the Supreme Court before King J. The action had been brought by Herman McKenzie against the Attorney General and Constable Llewelyn Martin, on 28 July 1997. Mr McKenzie claimed damages for assault and battery committed against him "by the

second defendant [2nd appellant] acting as servant and/or agent of the Crown whereby the second defendant maliciously and without reasonable or probable cause" assaulted him causing him to sustain severe injury, loss and damage. His pleadings disclosed the nature of the assault and battery as a gunshot injury to his abdomen with consequential internal injuries arising from an incident at his home in Blackwoods District, Beckford Kraal, Clarendon, on the morning of 16 January 1997.

[5] In their defence the appellants attributed the injuries sustained by Mr McKenzie to the action of his son, Gerald, for whose arrest they had a warrant that morning and who had engaged Constable Martin in a struggle while resisting arrest. According to the appellants, it was in that struggle that a bullet was fired from the firearm with which Constable Martin was armed, either by Gerald or accidentally during the struggle. Sadly, in 2002, after several applications in the steps leading up to trial and before the trial could commence, Mr McKenzie succumbed to his injuries and the action was continued by the Administrator General of Jamaica on behalf of his estate.

The trial

[6] The only witness for the estate was the widow of Herman McKenzie, Mrs Albertha McKenzie. The record of the proceedings included a statement which purported to be a witness statement made by Mrs McKenzie for the purposes of the trial (pursuant to a case management order) and the trial proceeded on the basis that it was in fact and in truth her witness statement, capable of being treated by the court as her evidence in chief. However, very early in cross examination it became clear (confirmed

by her own admission), that Mrs McKenzie was a witness to whom the provisions of part 29.4(2) of the CPR applied and that the document which was entitled "Witness Statement of Albertha McKenzie" was not recorded in the manner mandated by the said rule.

[7] How then was this non-compliance with the rule to be addressed? Miss White submitted on behalf of the appellants that the document which the learned trial judge had accepted as evidence-in-chief was not a proper witness statement and ought to be struck out. In response, Mrs McKenzie's attorney, while expressing her surprise at the discovery that her client was illiterate, submitted that she had given viva voce evidence that the document had been read over to her and that she had thereafter signed it as true. The absence of a certificate in proper form, she said, is a matter of form and not of substance. The learned trial judge then ruled as follows:

> "Witness Statement will stand since evidence is that it was read over to her and she signed it as true."

On that ruling the trial continued with cross-examination of Mrs McKenzie by the appellants' attorney.

[8] The case for the claimant [respondent] was followed by that for the defendants [appellants] and submissions from both sides. Then, on 3 December 2008 the learned trial judge handed down his decision in the following terms:

> "I ... find in favour of the claimant on the question of liability.
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> ...
>
> The award in respect of Special Damages is:

(i) J$ 21,409 (with interest at 6% per annum from 16/1/97- 22/6/06 and thereafter at 3% per annum to 5/12/08)

(ii) US$5,862.15 (with interest at 3% per annum from 31/9/99 to 5/12/08).

In respect of General Damages I awarded $6,000,000 with interest at 6% from 24/5/00 (date of service) to 22/6/06 and thereafter at 3% per annum to 5/12/08.

Costs awarded to the claimant to be agreed or taxed."

The appeal

[9] The appellants challenged the learned trial judge's findings of fact and law as reflected in the following grounds of appeal filed on 15 January 2009:

"1. The Learned Judge erred in finding that the document titled Witness Statement of Albertha McKenzie which lacked the appropriate Certificate of Truth for an illiterate person was a proper witness statement in law.

2. The Learned Judge erred in treating the document titled Witness Statement of Albertha McKenzie as evidence in chief.

3. The Learned Judge erred in finding Albertha McKenzie a credible witness in the circumstances.

4. The Learned Judge erred in treating the purported pay slips of Herman McKenzie as documents so called and relying on same to make an award for loss of earnings.

5. The Learned Judge erred in making an excessive award in the circumstances."

[10] On the other hand, the respondent was of the view that the award of $6,000,000.00 as general damages was less than adequate and filed a counter notice of appeal on 6 October 2009 seeking an upward adjustment of that figure to $8,000,000.00.

Submissions

[11] It seems appropriate, in my view, to deal first with the submissions relating to grounds one, two and three before going on to those relating to grounds four and five. In her written submissions, Miss White referred to the case management order of the court for witness statements to be filed and served for the trial of the matter. Rule 29.4 of the CPR provides that a witness statement is to be in writing, counsel said, signed by the person making it and containing the evidence which it is intended that that person will give orally and she referred to the provisions of rule 29.4(2) of the CPR set out in paragraph [3] above. It was her contention that the document upon which the learned trial judge purported to place reliance was not a witness statement as it did not comply with the requirements of rule 29.4(2) and therefore that reliance was misplaced. In the event, there was no evidence in chief (grounds one and two).

[12] Miss White contended that:

> "Blind or illiterate witnesses cannot for themselves say without more that when presented with white paper with black figures or characters on it that what they have been presented with is anything in particular let alone their witness statement."

She further contended that the certificate in the prescribed form is particularly important as it illustrates to the tribunal that the person who is before him, although unable to read and write, has personal knowledge of what is in the document and could own same at the time of signing it. Only then, counsel said, could it be considered a witness statement.

[13] It was also her contention that "the claimant [respondent] cannot expect to establish his case from answers given in cross examination". Nor can the witness expect that his or her evidence will automatically be amplified at trial. Further, it was her opinion that the learned judge could not resort to the provisions of rule 26.9 which grants a general power to the court to rectify matters where there has been a procedural error. This was a substantial error which went to the root of the respondent's case and the order of the court that the statement should stand could not put matters right as what was done invalidated any other steps taken in the trial.

[14] Counsel made reference to what she regards as a trend developing in the Supreme Court where judges, when faced with an illiterate witness and non-compliance with rule 29.4(2), adopt either a literal or a purposive approach in seeking to resolve the issue. In the former the non-compliance is treated as a technicality which can be cured by the application of the overriding objective of the rules, allowing, for instance, the offending document to be read over, signed and witnessed in open court (see ***Radcliffe Segree v The Attorney General*** Suit No C.L. 2002/S-043 – a decision delivered on 25 January 2008). In the purposive approach the non-compliance

is viewed as a matter of substance and not form, going to the root of the litigant's case and rendering the document useless as evidence (see ***George Bryan v Grossett Harris*** Claim No CL 2000/B089 - a decision dated 21 October 2005). Showing a preference for the approach in ***Bryan v Harris***, Miss White said that there would need to be an application for relief from sanctions (there is the automatic sanction of barring the witness from being called without the permission of the court, for such a breach of the rules). In addition counsel submitted, there should be an application for Mrs McKenzie to give viva voce evidence. However, neither application was made.

[15] If there was no witness statement, Miss White argued, then there was no basis upon which the learned trial judge could properly find Albertha McKenzie a credible witness (ground three). There was no proof, she said, that Mrs McKenzie knew, understood and approved of the document upon which the learned judge relied to consider her a truthful witness. Counsel submitted that since there was no application for relief from sanctions in the instant case the learned trial judge ought to have acceded to the application of the appellants that judgment be entered in their favour.

[16] Mrs Nesta-Claire Smith-Hunter argued, on behalf of the respondent, that the primary purpose of a witness statement is as a basis for a finding of contempt of court in the event that the witness is shown to have no honest belief in the contents of the statement or if the statement is found to be untrue. Counsel relied on the case of ***Neville Constantine Smith v Delroye Salmon*** SCCA No 67/2004 in which Harrison

P (as he then was), in delivering the judgment of the court on 29 November 2006 had this to say:

> "The true purpose of the certificate is therefore relative to the witnesses' credibility. The substance of the statement as to the facts recited therein remains unaffected by the absence of the certificate. The Court is not therefore precluded from acting on the factual content of the statement which is signed without the certificate of truth. A court must be vigilant to insist that such a certificate is not omitted from a witness statement. Where therefore, such a certificate is included and signed prior to the judgment of the Court, that act ensures that if it transpires in the future by proof that the witness had no belief in its truth in it, he may be proceeded against in contempt of court."

[17] It was counsel's contention that the case of ***Bryan v Harris*** relied on by the appellants is distinguishable on the facts from the instant case as in that case the claimant had revealed in cross examination that he had not read the statement and because of that was uncertain as to its contents unlike Mrs McKenzie in the instant case who confirmed that the statement had been read over to her after which she had signed it. Therefore, counsel argued, Mrs McKenzie knew the contents of the statement but, in ***Bryan v Harris***, the court felt that the witness could not vouch for the contents of the statement. It was further contended in counsel's written submissions that the witness had complied with rule 29.4(1) in that the statement had been signed by the person making it and contains the evidence which it is intended that the person will give orally. There was no challenge that the document produced was not the statement that Mrs McKenzie had signed and no challenge to her signature and the respondent had obtained the judge's permission to use the statement, counsel submitted. She said the judge had accepted that the statement was that of Mrs McKenzie and he had the

discretion so to do (see Blackstone 2006 edition) (although it is to be observed that the discretion provided in the UK rules has no counterpart in the Jamaican rules).

[18] Finally on this aspect of the appeal counsel submitted that the judge's findings on credibility are findings of fact which an appellate court will not disturb unless it is satisfied that the decision of the judge cannot be explained by any advantage which he enjoyed by having seen and heard the witnesses and, in this regard, she referred us, inter alia to ***Watt v Thomas*** [1947] AC 484 and ***Green v Green*** [2003] UKPC 39. Counsel submitted that the learned judge was entitled to come to his findings on the issue of credibility based on the evidence before him (which included evidence elicited in cross examination) and his impressions of the witnesses before him.

My determination on the issue of the witness statement

[19] In my view, the submissions advanced on behalf of the appellants are well founded. Rule 29.4 is quite clear on what constitutes a witness statement and rule 29.4(2) clearly sets out the requirements for a statement from a blind or illiterate witness. There is no dispute that the respondent's witness is illiterate and the submission that the document relied on by the respondent as a witness statement complied with the requirements of rule 29.4(1) does not resolve the matter since by virtue of rule 29.4(2) there is an added mandatory requirement with which there was no compliance. This non-compliance was a breach of the rule with the result that there was no witness statement from Albertha McKenzie and therefore there was nothing to be admitted into evidence as evidence in chief.

[20] In his attempt to rectify the position, the learned trial judge sought to exercise a discretion which requires an examination of the CPR to see whether such a discretion was open to him. My examination of the rules has led me to two rules by virtue of which a trial judge may seek to resolve procedural errors which present themselves in the course of the proceedings before him. One is rule 26.9 which provides as follows:

> "26.9 (1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order.
>
> (2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.
>
> (3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.
>
> (4) The court may make such an order on or without an application by a party."

The other is rule 29.2(1)(a) which states:

> "The general rule is that any fact which needs to be proved by the evidence of witnesses is to be proved -
>
> (a) at trial, by their oral evidence given in public."

[21] In my opinion the powers given to the court under rule 26.9 to put matters right do not enable the court to clothe an invalid document with validity (see ***Vinos v Marks and Spencer plc*** [2001] 3 All ER 784 – "Interpretation to achieve the overriding objective did not enable the court to say that provisions which were quite plain meant

what they did not mean, nor that the plain meaning should be ignored" per May LJ). According to rule 26.9(2), the steps taken in having the matter ready and set for trial are not invalidated by the absence of a witness statement so that where there is no witness statement the trial judge would need to make an order for the evidence to be provided otherwise, thereby facilitating the conduct of the trial. To order that the non existent witness statement should stand as evidence in chief could not put matters right as the court has no power to make something out of nothing. There is only one method that the rules provide for the document to qualify as the statement of a blind or illiterate witness and in seeking to put matters right the judge cannot transform the offending document into what it is not.

[22] To have the witness read the document then have it signed and witnessed in court does not cure the defect as the rule requires the statement to be recorded prior to the trial with the appropriate certification not from the maker of the statement but from the person who witnessed the recording of the statement. This certificate is to include a mental element as the witness is required to give an assessment, as it were, of the maker's understanding of the contents of the statement. On the exchange of witness statements such a certification would alert the defendant as to the status of the statement's maker which may well impact the preparation of the defendant's case. Indeed Miss White pointed out that the defence was taken by surprise, not anticipating that the witness was illiterate.

[23] In the exercise of this general power pursuant to rule 26.9, it was open to the judge to adjourn the matter and allow for the statement to be taken afresh so as to comply with the requirements of rule 29.4(2), a course which it seems has been adopted by some judges. However, it seems to me that the better course is that provided by rule 29.2(1). When faced with a breach of rule 29.4(2), the court on its own volition could vacate the order made at case management for a witness statement and permit the general rule to take effect. If the discovery of the breach was made during cross-examination then the court would permit the claimant to reopen his or her case after which the defence would cross examine the witness on the oral evidence given. Neither course was adopted in the instant case.

[24] It is to be noted that the learned trial judge acted upon evidence from Mrs McKenzie that the document had been read over to her at the time it was recorded and that she had signed it. That however did not meet the requirements of the rule. The certificate regarding the mental element was still missing and the general power to put matters right did not empower the judge to make the document into what it was not. I therefore agree with the submission of Miss White that the learned trial judge did nothing to put matters right.

[25] The principles enunciated in ***Watt v Thomas, Green v Green*** and ***Orville Nembhard and Kenneth Aratram v Melrose Transport and Equipment Company Limited*** SCCA No 81/1994 delivered 30 November 1998 relied on by the respondent in relation to ground three are firmly established and, indeed, an appellate

court, recognizing that the trial judge has the distinct advantage of assessing credibility on the basis not only of the spoken word but on the demeanour of a witness will not interfere with the trial judge's assessment unless it can be shown, inter alia, that the judge's decision was unreasonable in light of the evidence. In the instant case, there was no evidence in chief and questions asked in cross examination based on the contents of an invalid document cannot, in my view, give rise to material upon which the learned judge could reasonably arrive at his findings of fact and a determination of the credibility of the witness, Albertha McKenzie.

[26] I am also of the opinion that the case of ***Smith v Salmon*** relied on by the respondent is to be distinguished from the instant case as the witness in that case was literate and had signed the statement as his own. Based upon his acknowledgment of the contents of the statement, the court was of the view (and correctly so, it seems to me) that the facts recited in the statement, remained unaffected by the absence of the certificate of truth and that it "was not precluded from acting on the factual content of the statement which is signed by the witness without the certificate of truth". However, in the case of an illiterate witness the certificate is not that of the witness but of the person who witnesses the recording of the statement. That person is required to take certain steps to satisfy the court that the contents of the statement were acknowledged by the witness and accepted as his own before it could reach to the level of the witness in ***Smith v Salmon.***

[27] To my mind, the views I have expressed above make it unnecessary for me to address grounds four and five and the counter notice of appeal as the trial was, in effect, a nullity. Accordingly the question of whether a re-trial should be ordered is not a consideration as there never was a trial in the first place and the matter would now need to be remitted to the Supreme Court for trial. This outcome is more than regrettable so much time having elapsed since that fateful morning in Blackwoods District, Kraal, in the parish of Clarendon. The court must however be vigilant to see that its rules are not ignored. Compliance with rule 29.4(2) is of particular importance being specially provided to ensure that those with special needs are protected and fairly treated. It seems to me to be a simple matter for attorneys-at-law to determine the literacy level of their clients when statements are being prepared and ensure that the statements are recorded in compliance with the rules. The witness may be permitted to give oral evidence but there is no guarantee that relief from sanctions will be granted.

[28] In conclusion, I would allow this appeal with an order that the matter be remitted to the Supreme Court and set for trial as soon as possible in the forthcoming term. To that end, I would dismiss the respondent's counter notice of appeal and would award the costs of the appeal to the appellants to be taxed if not agreed.

BROOKS JA (Ag)

[29] On 16 January 1997, Mr Herman McKenzie was shot in the abdomen. The bullet was fired from an Uzi submachine gun. It entered Mr McKenzie's left side, damaged

the internal organs lying in its path and lodged in his right hip joint. His injuries were debilitating and although he lived until 2002, he never fully recovered from them. The Uzi had been issued to Constable Llewelyn Martin of the Jamaica Constabulary Force. Constable Martin was a member of a party of police officers who had attended Mr McKenzie's home early that morning. The police party was in search of Mr Gerald McKenzie, one of Mr McKenzie's sons.

[30] Mr McKenzie accused Constable Martin of having shot him unlawfully, maliciously and without probable cause. In July 1997, he sued Constable Martin and the Attorney General of Jamaica, seeking to recover damages for his injuries. Mr McKenzie's death intervened and the Administrator General for Jamaica continued the prosecution of the claim on behalf of his estate. The appellants defended the claim on the basis that the weapon was either fired by Gerald, or it had gone off by accident during a struggle between Constable Martin and Gerald, when Gerald, allegedly, resisted arrest.

[31] The claim was tried on 3 December 2008. At the trial, Mrs Albertha McKenzie, who is Mr McKenzie's widow, was the only eye-witness to the shooting. At an early stage of being cross-examined, Mrs McKenzie disclosed that she was illiterate. Despite her status, there was no indication on her witness statement that there had been compliance with the relevant rule of the Civil Procedure Rules 2002 (CPR), concerning an illiterate witness. The appellants objected to her giving evidence on the basis of that statement. The court ruled that her witness statement should stand and the cross-examination continued to completion.

[32] At the end of the trial, judgment was given in favour of the respondent. On appeal, the appellants have, among other things, complained that the learned trial judge was wrong to have allowed the witness statement to stand. That complaint was segmented into two grounds of appeal but both were argued together as one. I shall first consider the consolidated ground and thereafter, each of the other grounds of appeal.

Ground 1 – The Learned Judge erred in finding that the document titled Witness Statement of Albertha McKenzie which lacked the appropriate Certificate of Truth for an illiterate person was a proper witness statement in law.

Ground 2 – The Learned Judge erred in treating the document titled Witness Statement of Albertha McKenzie as evidence in chief.

[33] In an attractive submission, Miss White, for the appellants, argued that the document which was made to stand as Mrs McKenzie's evidence in chief, lacked authenticity and should not have been considered as being a witness statement. Learned counsel submitted that without compliance with the provisions of rule 29.4 of the CPR, an illiterate witness cannot properly claim personal knowledge of the contents of the document purporting to be that person's witness statement or assert belief in the truth of its contents. In the absence of a witness statement as to the manner of the injury being inflicted, submitted learned counsel, the respondent had failed to prove its case and therefore its claim should fail.

[34] The kernel of Miss White's submission on the point may be found in paragraph 22 of her written submissions. There, she analysed, in this context, the importance of witness statements as required by the CPR:

> "...Blind or illiterate witnesses cannot for themselves say without more that when presented with white paper with black figures or characters on it that what they have been presented with is anything in particular let alone **their** witness statement. The sanctity of the process of recording a witness statement for persons who are illiterate is particularly important and the prescribed certificate that ought to be present at the end of a witness statement recorded from an illiterate person attests to the process of recording and illustrates to the tribunal that the person who is before him, may not be able to read and write (except her name) but is aware of what is contained in this document, has personal knowledge of what is in the document and could own same at the time of signing it. Only at that time, could it be considered a witness statement. It does not become a witness statement at the Pre-Trial Review or trial before or after the witness is sworn and same is in the witness box. It can become a witness statement only at the time of signing. The Claimant cannot expect to establish his case from answers given in cross-examination or that the witness' evidence will automatically be amplified at trial." (Emphasis as in the original)

[35] Learned counsel relied on the decision in the case of **Aquarius Financial Enterprises Inc. and Another v Certain Underwriters at Lloyd's subscribing to Contract Kd 970212 Certificate: No S/006633/97/L2, (The "Delphine")** [2001] 2 Lloyd's Rep. 542, as authority for the proposition that a witness statement must be comprised of the words of the relevant witness and not some other person. She also referred to a number of the provisions of the CPR, in support of her submissions. I intend no disrespect to those submissions by omitting to refer to all these provisions. It

is my view, however, that Miss White has not given sufficient attention to the power given to the court to control its process and in particular, the trial of any claim in which it is engaged. Several of the provisions cited by Miss White recognize the court's discretion not to impose a sanction in the event that there has been a breach of the rules of procedure. Undoubtedly, that discretion must be exercised judicially and not arbitrarily. In order to assess the learned trial judge's action in the instant matter, on the point, it is first necessary to set out the governing rule.

[36] The relevant part of rule 29.4 of the CPR states as follows:

> "(1) In this Part a "**witness statement**" means a written statement –
>
> (a) signed by the person making it; and
> (b) containing the evidence which it is intended that that person will give orally.
>
> (2) Where the person making the statement is illiterate or blind the statement must be made in the presence of a witness who must certify that –
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> (a) the statement was read to the person making the statement in the presence of the witness; and
>
> (b) the person making the statement –
>
> (i) appeared to understand it; and
> (ii) signed the statement or made his or her mark in the presence of the witness." (Emphasis as in the original.)

[37] It is recognized that there is a mandatory element to rule 29.4 (2). The word "must" is used twice, in short order. There is no gainsaying, therefore, that in the

instant case, rule 29.4 was not complied with. Mrs Smith-Hunter, for the respondent, did not seek to argue to the contrary. She submitted instead, that the learned trial judge had a discretion to allow the witness statement to stand and that he did so properly and within the context of achieving a just result to the trial.

[38] The learned trial judge's note of the submission, then made, on behalf of the respondent, is as follows:

> "[Mrs McKenzie] has given viva voce evidence that the statement [was] read over [to her] and she signed it as true. Therefore absence of the certificate in proper form is [a] matter of form and not substance."

The learned trial judge accepted the submission. In ruling that the document should stand as Mrs McKenzie's witness statement, he said:

> "Witness statement will stand since evidence is that it was read over to her and she signed it as true."

Was he entitled so to do? Other provisions of the CPR lead to the answer.

[39] Rule 26.9 gives a general power to the court to rectify matters where there has been a failure to comply with a rule, practice direction or court order. That power is only exercisable if the consequence of the failure to comply has not been specified by the particular rule, practice direction or order. The rule stipulates that in those circumstances the failure, "does not invalidate any step taken in the proceedings, unless the court so orders" (rule 26.9 (2). It also stipulates that in the event of such a failure, "the court may make an order to put matters right".

[40] Another rule assists the present analysis. Rule 29.1 speaks to the power of the court to control evidence. It states:

> "(1) The court may control the evidence to be given at any trial or hearing by giving appropriate directions as to–
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> (a) the issues on which it requires evidence;
> (b) the nature of the evidence which it requires to decide those issues; and
> (c) the way in which the evidence is to be placed before the court,
>
> at a case management conference or by other means.
>
> (2) The court may use its power under this rule to exclude evidence that would otherwise be admissible.
>
> (3) The court may limit cross–examination."

[41] The latter rule allows, and certainly does not restrict, the undoubted power of a judge presiding over a trial, to control the admission of evidence. Unfortunately, the circumstances under consideration in this ground, do occasionally arise. When faced with similar situations, other trial judges have had different approaches. Sykes J in **George Bryan v Grossett Harris** (CL 2000/B089 – delivered 21 October 2005) adopted the approach that the witness statement should be struck out as being in breach of a mandatory requirement. He then ordered that the trial be adjourned to allow the defaulting party time to apply to cure the defect. In refusing to strike out the claim, Sykes J said, at paragraph 16 of his very helpful judgment:

> "...A textual analysis of rule 29.11 [forbidding a witness to be called unless the witness statement had been served] suggests that **the door is not closed forever on a claimant who fails to comply with a court order for witness statements**. This being so it would be wrong to

> apply rule 29.11 to [strike out the claim]...An appropriate order as to costs, at this stage, is the proportionate response." (Emphasis supplied)

[42] Other judges have adopted a less stringent approach. That approach allows, upon the default being discovered, the document to be read to the witness, who, if he affirms its contents, then signs it as his witness statement. The person reading the document to the witness then prepares and signs the certificate required by rule 29.4 (2). The trial then resumes. This latter approach is attended by the difficulty that the person, certifying the signing of the witness statement, was not present when the statement was being made. There has, therefore, not been strict compliance with rule 29.4 (2). The benefit of this approach, however, is that the trial may be continued without undue loss of time to the parties and dislocation of the court's list. There is, therefore, no need to secure a new date for that trial to be continued and to oust another case from an available trial date.

[43] There remains yet a further method of addressing the problem caused by the breach of rule 29.4. It is, to disregard the offending witness statement and order that the witness' evidence in chief be given orally.

[44] I am not prepared to say that any of these approaches is incorrect; certainly, the last mentioned approach is permitted by rule 29.2 (1) which states the general rule is that evidence is to be given orally. Trial judges must consider a number of issues when faced with a situation such as that posed in the instant case. The effect of the proposed evidence on the parties, the state of the court's list, the amount of time that

would be lost if the trial were adjourned and how long it would take for the trial to be resumed, are prominent among those issues.

[45] As there is no penalty imposed for breaching the provisions of rule 29.4, the result of applying rule 26.9 (2) would be that, despite the breach, Mrs McKenzie's witness statement is not invalidated. Miss White's submission, that the document is not a witness statement, is therefore, in my respectful view, incorrect.

[46] Miss White submitted that although rule 26.9 (3) gave the court an opportunity to "put matters right", the learned trial judge failed to make use of the opportunity. He did not, she submitted, order the case adjourned for the error to be corrected, he did not order the statement to be read to the witness there and then and he did not order that Mrs McKenzie should give her evidence in chief orally. Learned counsel submitted that the learned trial judge "did nothing".

[47] I find that the ruling of the learned trial judge that the witness statement should stand as the evidence in chief, as he had ordered before the objection was made, was not a case of "doing nothing". The effect of his order was to allow the trial to continue with the document providing evidence which the court could consider in arriving at a decision. He exercised his discretion on the basis that Mrs Mckenzie had testified that the statement, when she gave it, "was read over to her and she signed it as true". It was a discretion judicially exercised.

[48] In my view, this was a case where the learned trial judge could apply the overriding objective. This was permissible on the basis, that there was no rule which provides a penalty for the failure to comply with rule 29.4 (2). I am, however, not to be understood to say that parties may flagrantly flout the requirements of the rules. Indeed, the current procedural climate is stoutly against such an inclination. In **Smith v Salmon** SCCA No 67/2004 (delivered 29 November 2006) Harrison P said, at page 19:

> "The true purpose of the certificate [of truth] is therefore relative to the witnesses' credibility. The substance of the statement as to the facts recited therein remains unaffected by the absence of the certificate. The Court is not therefore precluded from acting on the factual content of the statement which is signed without the certificate of truth. **A court must be vigilant to insist that such a certificate is not omitted from a witness statement**. Where therefore, such a certificate is included and signed prior to the judgment of the Court, that act ensures that if it transpires in the future by proof that the witness had no belief in its truth, he may be proceeded against in contempt of court." (Emphasis supplied)

The principle, set out in the emphasised portion of that quotation, may be applied to the instant case and to any case in which the failure to comply with rule 29.4 (2), is brought to the attention of the court.

[49] Based on the above analysis, I am of the view that the learned trial judge had a proper basis on which to find that the witness statement should stand as Mrs McKenzie's evidence in chief. As a result, grounds 1 and 2 must fail.

Ground 3 – The Learned Judge erred in finding Albertha McKenzie a credible witness in the circumstances.

[50] Miss White submitted that the learned trial judge erred in relying on Mrs McKenzie's witness statement. Learned counsel submitted that he did so, "without taking a critical look at its authenticity and the various inconsistencies that appeared as between" Mrs McKenzie's viva voce testimony and her witness statement. Learned counsel sought to hinge this submission, in part, on the submissions made in respect of grounds 1 and 2. I have already rejected those submissions.

[51] When faced with a complaint about findings of fact made by a trial judge, this court must consider "whether there was evidence before the trial judge from which he could properly have reached the conclusion that he did or whether, on evidence the reliability of which it was for him to assess, he was plainly wrong". This principle was stated by their Lordships' Board in **Industrial Chemical Co (Jamaica) Ltd. v Ellis** (1986) 35 WIR 303 at page 310 h.

[52] The relevant principles, concerning the approach of an appellate court on findings of fact made by the court at first instance, were admirably distilled by Smith JA in a judgment of this court in **Royes v Campbell and Campbell** SCCA No 133/2002 (delivered 3 November 2005). The first of those principles, set out on page 21 of the judgment, reiterated the point that this court "cannot interfere [with findings of fact] unless it can come to the clear conclusion that the first instance judge was 'plainly wrong' ".

[53] That case went on appeal to the Privy Council as **Carlton Campbell v Clarence Royes** PCA No 85/2006 (delivered 3 December 2007). In respect of this point, their Lordships said at paragraph 18:

> "When it comes to findings of primary fact or drawing instances from primary fact, **it is well established that an appellate tribunal should be slow to interfere with the findings made of a first instance tribunal.** In that connection, the Court of Appeal correctly referred to observations of Lord Thankerton in **Watt v Thomas** [1947] AC 484 at 487-488 and of Clarke LJ in **Assicurazioni Generali SpA v Arab Insurance Group** (Practice Note) [2003] 1 WLR 577, paras 11-16. These observations are well known and their effect was not in any way in dispute in this appeal." (Emphasis supplied)

[54] Mrs Smith-Hunter relied on the principle cited in the above quote. She brought a number of cases on the point, to our attention. Cognizant of that principle, I first examine Miss White's assessment of what was before the learned trial judge.

[55] With respect to the evidence given by Mrs McKenzie, Miss White sought to point out a number of differences between the witness statement and the oral testimony. When assessed however, Miss White's complaint is only borne out in one instance, and then, only equivocally so. Learned counsel stated at paragraph 66 g of her written submissions:

> "The purported witness statement said that Herman McKenzie spoke to Constable Martin yet in cross examination she said Herman McKenzie did not speak to Constable Martin."

The learned trial judge's notes do not fully support Miss White. They state, at page 98 of the record, in recording Mrs McKenzie's testimony:

> Constable Martin did speak to Herman McKenzie that morning – He said "Yu son Dog Heart da yah sah"...
>
> **Herman McKenzie did not speak to Constable Martin at all that morning. Herman did not say 'dem' don't sleep yah.**
>
> **He responded to Constable Martin** "I don't know – sometimes them sleep yah and sometimes dem don't sleep yah"...
>
> He did say "dem all big – sometimes dem come home and sometime dem don't"." (Emphasis supplied)

Based on that note, it is clear that Mrs Mckenzie did testify that Herman McKenzie spoke to Constable Martin, as was stated in her witness statement. Miss White's complaint, on this aspect of the evidence, is not well founded.

[56] The other instances, which Miss White complained about, are more concerned with the issue of credibility rather than differences between the testimony and the witness statement. A number of those instances also turned on learned counsel's interpretation of the evidence. For instance, Miss White complained that Mrs McKenzie's evidence that she didn't hear the report of the gun made "no sense". In my view, such issues were matters for the tribunal of fact. Contrary to Miss White's submissions, they did not demonstrate that Mrs McKenzie was not aware of the contents of her witness statement. It is my view that, save for the issue of Mr McKenzie's earnings, the testimony was very much in line with Mrs McKenzie's witness statement. In so far as Mr McKenzie's earnings were concerned, it was not a case of Mrs McKenzie not knowing what the contents of her statement were, but rather a case of her not being able to speak credibly with respect to that content. The latter failure

was because, on her evidence, she did not have much to do with Mr McKenzie's earnings while he was alive.

[57] It was for the learned trial judge to determine the issues of fact. He had to determine, among other things, how Mr McKenzie came by his injuries and who was present at the time. In my view, he adequately considered the contending versions. Having done so, he found (at page 114-115 of the record):

> "No explanation was offered for [defence witness] Inspector Bernard not being called, nor was it alleged that he was unavailable. On the issue of liability I was impressed with the demeanour and frankness of the evidence of the witnesses for the claimant. I found their account of this incident much more probable than that offered by Constable Martin."

This was the finding of the tribunal of fact. The learned trial judge had the opportunity to see and hear the witnesses. There is no basis on which this court could properly say that he was "plainly wrong" in coming to that impression of the witnesses, including Mrs McKenzie, who were before him. On this basis, ground 3 fails.

Ground 4 – The Learned Judge erred in treating the purported pay slips of Herman McKenzie as documents so called and relying on same to make an award for loss of earnings.

[58] A number of documents, purporting to be pay-slips issued to Mr McKenzie by his employers overseas, were tendered and admitted into evidence, in proof of his earnings while he was a farm worker. The learned trial judge used the pay-slips in calculating loss of earnings as an item of special damages. At page 6 of his reasons for judgment he stated:

> "The pay-slips tendered as exhibit '2' reveal average net weekly Earnings [sic] in excess of US$200.
>
> Having accepted that Herman McKenzie attended the Farm Work Programme and earned the sums indicated in exhibit '2' I awarded the Sum [sic] claimed of US$390.81 per month for 3 months for each of 5 years from 1997-2001, totaling [sic] US$5,862.15." (Emphasis as in original)

[59] Miss White complained that the documents were improperly admitted into evidence. Learned counsel submitted that the documents were deficient in that they bore "no stamp, seal or identifying mark to show who or which organization if any issued them". They also bore no signature to show who, if anyone, approved them and did not indicate the currency in which the figures were denominated. According to Miss White, in her skeleton submissions, the documents could have been designed by anyone, and "could have been fabricated".

[60] Mrs Smith-Hunter submitted that the complaint had no merit. In her submission, the appellants had placed themselves in a position where they could not properly object to the admission of the documents into evidence. She stated that the appellants had properly been given notice of the respondent's intention to tender the documents into evidence. When, on counsel's submission, the appellants failed (as they did fail) to object to the admission of the documents they were deemed to have accepted their authenticity.

[61] Learned counsel cited rule 28.19 of the CPR in support of her submissions. That rule states:

"**Notice to prove document**

(1) A party shall **be deemed to admit the authenticity of any document disclosed to that party under this part** unless that party serves notice that the document must be proved at trial.

(2) A notice to prove a document must be served not less than 42 days before the trial." (Emphasis supplied)

[62] I am of the view that Mrs Smith-Hunter's submission is flawed, in respect of the question of admissibility of the documents. Rule 28.19 cannot be viewed in isolation but must be considered in the context of part 28 as well as section 31E of the Evidence Act.

[63] Part 28 of the CPR, according to rule 28.1(1), "contains rules about the disclosure and inspection of documents". By rule 28.1(3), "[a] party "discloses" a document by revealing that the document exists or has existed" (Emphasis as in original). When disclosure is ordered, "[a] party's duty to disclose documents is limited to documents which are or have been in the control of that party" (rule 28.2).

[64] The tone of part 28 is the disclosure of documents. Rule 28.19 speaks to the authenticity of the documents disclosed. "Authentic", as defined by the Collins English Dictionary means, among other things, "1. of undisputed origin or authorship; genuine, 2. accurate in representation of the facts; trustworthy; reliable, 3. (of a deed or other document) duly executed, any necessary legal formalities having been complied with".

[65] Rule 28.19 does not speak to admissibility, which is a concept entirely different from authenticity. The difference between the two, for these purposes, is clearly identified in the case of **Sunley and Another v Gowland White (Surveyors and Estate Agents) Limited** [2003] EWCA Civ 240 (delivered 10 February 2003). That case involved the question of the admissibility of a soil report prepared by experts. Both parties referred to the report in their pleadings but the party wishing to have it admitted into evidence did not utilise the process equivalent to section 31E. In ruling the document admissible, Clarke LJ, sitting in the Court of Appeal of England and Wales, stated, at paragraph 36 of his judgment:

> "**Before considering admissibility, I note in passing that I do not understand the defendants to challenge the authenticity of the RPS report. They could scarcely do so, having given no notice of such an intention in accordance with the principle stated in CPR rule 32.19** [which is the equivalent of our rule 28.19]. Although... [the defendant's counsel] Mr Collett's final skeleton...says that the draft report is unsatisfactory and unreliable and that it carries neither the name nor the qualifications of the person making the report, not surprisingly Mr Collett does not challenge its authenticity." (Emphasis supplied)

[66] The learned judge then went on to rule that the document was admissible because it had been made clear that the claimant intended to rely upon it for the fact that it was made and the fact that it expressed the view of the experts. The paragraph is quoted to demonstrate that the learned trial judge clearly recognized that there was a difference between the matter of authenticity and the issue of admissibility.

[67] When a party wishes to have documents, of which it is not the maker, admitted into evidence, it is not part 28 on which that party relies; it is section 31E of the Evidence Act. It is section 31E which prescribes the procedure to be followed when a party wishes to have such documents admitted into evidence. The relevant portion of the section states:

> "(1) Subject to section 31G, in any civil proceedings, a statement made, whether orally or in a document or otherwise, by any person (whether called as a witness in those proceedings or not) shall subject to this section, be admissible as evidence of any facts stated therein of which direct oral evidence by him would be admissible.
>
> (2) Subject to subsection (6), the party intending to tender such statement in evidence shall, at least twenty-one days before the hearing at which the statement is to be tendered, notify every other party to the proceedings as to the statement to be tendered, and as to the person who made the statement.
>
> (3) Subject to subsection (4), every party so notified shall have the right to require that the person who made the statement be called as a witness."

Section 31G and subsections (4) and (6) of section 31E are not relevant to the instant case.

[68] It is to be noted that the respondent in the instant case, did give notice pursuant to section 31E. This was in or about the month of July in 2000; well in advance of the trial, held seven years later. The relevant pay-slips were mentioned in the notice and copies of the documents were provided to the defendants' attorneys-at-law.

[69] In or about April 2007, the respondent included reference to the pay-slips in complying with the order for standard disclosure which was made in September 2006. There is no record of any notice by the appellants objecting, pursuant to section 31E (3) to the admission of the pay-slips into evidence. Despite Miss White's submissions before us, the appellants did not object at the trial to the admission of the pay-slips. In my view, the appropriate notice having been given, it would not have been permissible for the appellants to seek, during the course of the trial, to object to their admission, on the basis that they are hearsay. Although the subsection does not specify a time within which the objection should be made, the overriding objective of dealing with cases justly, in my view, prohibits such an objection succeeding, unless exceptional circumstances exist. It would be for the trial judge in each case to determine whether exceptional circumstances exist or not.

[70] It is, in my opinion, clear that the pay-slips were not only hearsay but hearsay upon hearsay. Mr McKenzie was not the maker of those documents and it would seem that the respondent, in tendering them, would have been relying on Mr McKenzie having told someone else of the origin of the document. As the pay-slips bore no employer's name, stamp or other identifying mark, I would have been inclined to find that not even rule 28.19 could be used to authenticate them. I need not decide that point however. In the circumstances of the appellants having made no objection whatsoever, to these documents, I find that the combination of the provisions of rule 28.19 and section 31E did allow the pay-slips to be admitted into evidence and the learned trial judge was entitled to consider their contents in calculating the damages.

[71] Having found the documents admissible, the next question to be resolved is whether the learned trial judge used that evidence to good effect in determining the award for lost earnings. Miss White submitted that the payslips comprising exhibit 2 did not meet the required standard of proof for the learned trial judge to rely on them to make such an award. They did not have, she submitted, the consistency to assure the tribunal that Mr McKenzie would have worked for three months for the year. Learned counsel also submitted that there was no guarantee that Mr McKenzie would have been admitted to the farm work programme for the five years, for which the learned trial judge awarded damages.

[72] The evidence which the learned trial judge had before him on the point was that of Mrs McKenzie. At paragraph 24 of her witness statement she said:

> "My husband has been going overseas on Farm Work from about 1964. He would go every year and spend at least three (3) months, sometime more. I know that in 1996 my husband used to earn about United States THREE HUNDRED AND NINETY DOLLARS AND EIGHTY ONE CENTS (US$390.81) each month because I have seen his pay slips. He was supposed to go away on farm work the day he was shot."

[73] The learned trial judge accepted the figure of US$390.81, based on the pay-slips produced. That figure would represent the multiplicand in the calculation of the loss of future earnings. In determining the appropriate multiplier one must consider Mr McKenzie's age and remaining working life. According to the medical reports, Mr McKenzie was 53 years old at the time he was shot. There was no evidence as to the

age limit for participation in the Farm Work programme. The multiplier of 5 years, which was used by the learned trial judge, was in line with previously decided cases (see **Oswald Espeut v K. Sons Transport Ltd and others** 4 Khan 39, **Merdella Grant v Wyndham Hotel Co.** 4 Khan 194 and **Raymond Reid v Dalton Wilson** 6 Khan 16). I would not disturb it.

[74] Based on the foregoing, this ground fails, and the award for special damages under this head (US$5,862.15 with interest), must stand.

Ground 5 – The Learned Judge erred in making an excessive award in the circumstances.

[75] The learned trial judge awarded the sum of $6,000,000.00 for pain and suffering and loss of amenities in respect of Mr McKenzie's injuries. The medical evidence upon which this award of general damages was awarded was contained in a number of medical reports. They chronicle the course of an injury bedevilled with complications, which caused chronic decline in Mr McKenzie's health and vitality.

[76] Mr Mckenzie was first admitted to the May Pen Public Hospital. A laporatomy was carried out and it revealed the following:

1. A large haemoperitoneum;
2. Multiple perforations of the small bowel;
3. One large laceration of the large bowel;
4. "Through and Through" [sic] perforation of the urinary bladder;
5. Large retroperitoneal haemotoma;

6. A bullet lodged in his right hip.

According to Dr P Duke, one of the attending physicians, "Mr McKenzie had a predicted long and eventful post-operative recovery" resulting from the abdominal injury.

[77] In respect of Mr McKenzie's orthopaedic injury, a medical report by Dr Winston Phillips revealed that the bullet caused Mr McKenzie to have debilitating pain in the right hip and to walk with a limp. It was determined that a surgical procedure was required to remove the bullet. When the required surgery was done over a year later, the bullet could not be located and post-operatively, Mr McKenzie developed a complicated urinary infection. He could not walk unaided after that surgery. He suffered 70 percent permanent disability of the right lower limb. The whole person disability was not quantified for the court.

[78] Miss White, in that context, complained that the sum awarded is manifestly excessive. Learned counsel submitted that awards to claimants with similar injuries were significantly lower. She cited **Barracks v Constable Oral Israel & others** 6 Khan 152, **Mary Hibbert v Reginald Parchment** 5 Khan 191 and **Christopher McKenzie (bnf Hortense Brown v The Attorney General & Another** Harrison's Assessment of Damages for Personal Injuries at page 383.

[79] Mrs Smith-Hunter, in support of a counter-notice of appeal which complained that the award for general damages was unreasonably small, submitted that the appropriate award should have been in the sum of $8,000,000.00. She cited, among others, the cases of **Mark Smith v Roy Green and Another** 4 Khan 118 and **Natalie**

Williams v Robert Stephenson 4 Khan 122, as being demonstrative of her submission.

[80] All but one of the cases cited by counsel on both sides, in respect of this ground involved gunshot injuries to the abdomen, with varying degrees of complications. Those cited by Miss White, on her calculations, when updated, resulted in an average award of approximately $3,000,000.00. Those cited by Mrs Smith-Hunter involved awards in excess of $8,000,000.00.

[81] I am not in agreement with the positions of either counsel. Firstly, I disregard the case of **Christopher McKenzie**. Although it appears to be a case which was brought on behalf of a child, the judgment was by virtue of the consent of the parties. Consent judgments are of limited, if any, value for the purposes of guidance, as the motivations driving the agreement are not known.

[82] I also reject, as being unhelpful, the other cases cited by Miss White. I do so because the results of the injuries involved in those cases were significantly less severe than in Mr McKenzie's case. In the **Barracks** case, after outlining the injuries and the initial treatment, the learned editor summarizes that claimant's life after surgery as follows:

> "He made steady and uneventful recovery and was discharged on October 13, 1997 for outpatient care. After attending the outpatient department for several weeks he was re-admitted for closure of his colostomy in February 1998. Recovery was uneventful. When last seen in Surgical Outpatient Department in April 1998 he was fully recovered."

The claimant in the **Hibbert** case was accidentally shot in June 1985. She had three surgical procedures. Two were for the closure of the colostomy. The last procedure was done in November 1985. She was also relatively fortunate in that, in November 1996, she was found "to be in fairly good health" albeit with some scarring on her abdomen.

[83] The cases cited by Mrs Smith-Hunter are also to be distinguished, but for a different reason; the reason being the period of suffering as a result of the injury. It is said that "it is the consequence of the disability [that results from the injury] which really measures the loss for which the disabled is to be compensated" (see **Dairy Farmers Ltd v Lloyd Gouldbourne** (1984) 21 JLR 10). This principle has its impact in the award of general damages to the injured party. Following that principle, Mr McKenzie's relatively short survival period after his, albeit severe, injury, must limit the level of compensation to which his estate is entitled. His award cannot be at comparable levels to that granted to Mr Mark Smith who was facing the rest of his life as a "severely handicapped" person, or the award to Ms Natalie Williams who, after suffering from post-operative complications, had a good long term prognosis but "was at risk for abdominal adhesions as she lost one kidney". Her award was made over six years after she was shot.

[84] Based on the above reasoning, I see no basis for disturbing the finding of the learned trial judge on the matter of the award of general damages. Ground five, as well as the counter notice of appeal, must, therefore fail.

Other Issues

[85] Two matters arise for mention, which were not the subject of any ground of appeal. Firstly, although it did not come on for comment during submissions, it is noted that the learned trial judge ascribed an exhibit number to the witness statement of each witness. I find that rule 29.8(2) does not permit that practice. Rule 29.8(2) states:

> "Where a witness is called to give oral evidence under paragraph (1), his or her witness statement **shall stand as evidence in chief** unless the court orders otherwise." (Emphasis supplied)

The rule does not authorize the admission of the statement into evidence, as an exhibit. It seems to me that the witness statement, in effect, substitutes as the judge's notes of that particular witness' evidence in chief. It should not therefore be ascribed an exhibit number.

[86] The second point is that we had asked counsel to make submissions in writing, in respect of the propriety of ordering a new trial, in the event that we ruled in favour of the appellants' submissions concerning Mrs McKenzie's witness statement. Based on my view of the submissions in respect of the statement, I need not consider the submissions concerning a new trial.

Conclusion

[87] Based on the reasons stated above, I find that the learned trial judge was entitled to admit into evidence, the witness statement of Mrs Albertha McKenzie and to

rely on her testimony in arriving at his findings of fact. He was also entitled to admit into evidence the pay-slips which were made the subject of a notice under section 31E of the Evidence Act and to rely on them in calculating Mr McKenzie's lost earnings. Finally the general damages awarded by the learned trial judge is in line with the awards granted in previously decided cases and I find no basis on which to disturb that award. The appeal must, in my view, be dismissed with costs to the respondent to be taxed if not agreed.

PANTON P

ORDER

By majority (Panton P and Brooks JA; McIntosh JA dissenting) appeal and counter notice of appeal dismissed. Order of King J affirmed. Costs to the respondent to be agreed or taxed.