NMLJ

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS: 56 & 95/03

BEFORE: **THE HON. MR. JUSTICE P. HARRISON, J.A.**
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A. (Ag.)

BEWTEEN: **INTERNATIONAL HOTELS JAMAICA LTD.** **APPELLANT**

AND **NEW FALMOUTH RESORTS LTD.** **RESPONDENT**

Dr. Lloyd Barnett and Conrad George instructed by Hart, Muirhead and Fatta for the appellant.

Miss Carol Davis for the respondent.

May 16, 17, 20 & November 18, 2005

P. HARRISON, J.A:

I have read the judgment of Mrs. McCalla, J.A. (Actg.) outlining our reasons for allowing the above appeal on May 20, 2005. I agree with the reasoning of the learned judge. These are my comments.

At the trial on July 21, 2003, Brooks, J. asserted that the defence of the appellant stood struck out on June 19, 2003, for non-compliance with the said learned judge's order on May 19, 2003. He refused the appellant's application for extension of time as well as its application for relief from sanctions and declared the said defence as struck out on July 22, 2003. Judgment was

accordingly entered for the respondent on its claim without trial in accordance with Rule 26.5. The assessment of damages followed. This appeal is from the said refusals.

Under the general powers of management as contained in Rule 26 of the Civil Procedure Rules, 2002 the Supreme Court has power to make orders and give directions. The non-compliance with any such order may result in the sanction of striking out of the statement of case of the party in breach – Rule 26.3. The said court also has the power to make "unless orders" – Rule 26.4. The sanction for the breach of an "unless order" may also be the striking out of the statement of case. Rule 26.4(7) reads:

> "(7) Where the defaulting party fails to comply with the terms of any "unless order" made by the court that party's statement of case shall be struck out."

However, such a defaulting party may obtain from the Court relief from such sanction. Rule 26.8(1) provides:

> "(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."

The said court is empowered to grant such relief in specific circumstances. Rule 26.8(2) reads:

> "(2) The court may grant relief only if it is satisfied that -
>
> (a) the failure 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." (Emphasis added)

These conditions must be considered cumulatively in order to satisfy a primary test.

Sub-paragraph 8(3) mandates a court considering the grant of relief from sanctions, in addition, to have regard to:

(1) the interests of the administration of justice;

(2) whether the failure was the party's or the party's attorney-at-law's fault;

(3) whether the failure has been or can be remedied within a reasonable time;

(4) whether the trial date can still be met if relief is granted; and

(5) the effect which the granting or refusal of leave would have on each party.

These are mitigatory factors which could influence favourably or otherwise the grant of relief from sanctions.

The Civil Procedure Rules, 1998 (England) and the authorities which relate to their interpretation, are helpful. Rule 3.9(1) captioned "Relief from sanctions", commences:

> "3.9-(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances including - ..."

Thereafter are listed nine circumstances (a to i), identical in substance to the factors contained in our Rule 26.8(2) & (3). They also include a provision similar to Rule 28.(1)(a) that the application for relief "must be ... made promptly." The footnote to Rule 3.9, inter alia, reads:

> "When considering an application for relief it is essential for courts to consider each matter listed in r..3. 9 (1) systematically ..."

In ***Biguzzi v Rank Leisure PLC*** [1999] 1 W.L.R. 1926, the Court of Appeal (England) considered its powers under rule 3.4 to strike out a case for non-compliance of time limits, under the Civil Procedure Rules 1998. The case was governed by the transitional provisions having been filed prior to the said Rules. Lord Woolf, M.R. (as he then was), at page 1933, said:

> "Under rule 3.4(2)(c) a judge has an unqualified discretion to strike out a case such as this where there has been a failure to comply with a rule. The fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of case. The advantage of the C.P.R. over the previous rules is that the court's powers are much broader than they were. <u>In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out</u>."
>
> (Emphasis added)

Emphasizing that the court's powers of managing cases must ensure that time limits are obeyed and delays are not ignored by the court, His Lordship continued at page 1933:

> "There are alternative powers which the courts have which they can exercise to make it clear that the courts will not tolerate delays other than striking out cases. In a great many situations those other powers will be the appropriate ones to adopt because they produce a more just result. In considering whether a result is just, the courts are not confined to considering the relative positions of the parties. They have to take into account the effect of what has happened on the administration of justice generally. That involves taking into account the effect of the court's ability to hear other cases if such defaults are allowed to occur. It will also involve taking into account the need for the courts to show by their conduct that they will not tolerate the parties not complying with dates for the reasons I have indicated."

The claimant in the ***Biguzzi*** case, had sustained an injury at work in 1993 and served proceedings in 1995 on the defendant employer. In 1999 the latter's application to strike out the claim on the ground that the claimant had failed to give discovery on time, to prepare trial bundles, set the case down for trial in accordance with a court order and to prepare a calculation of special damages, was upheld by a deputy district judge, and the claim struck out. The claimant's appeal to a judge was allowed, on the grounds that both parties had been in breach of the rules, there was nothing unfair in allowing the trial to proceed and because of the delays the trial should be heard promptly. The Court of Appeal agreed with the latter decision.

The ***Biguzzi*** case, highlighting as it does in the exercise of the discretion, the alternatives to the draconian procedure of striking out a case for a breach under the new rules, is of assistance when considering the relief from sanctions under Rule 26.8.

In ***Finnegan v Parkside Health Authority*** [1998] 1 W.L.R. 411, a case governed by Order 3. r. 5 of the R.S.C. (UK), the old rules, the Court of Appeal in November 1997, allowed an appeal against a refusal to allow a plaintiff to file a notice of appeal out of time. The plaintiff's claim had been dismissed for want of prosecution due to delay. Order 3. r. 5 is similar to Rule 1.7(2) (b) of the Court of Appeal Rules (Jamaica), which empowers the Court to extend or abridge time for compliance with any rule:

> "(b) ... even if the application for an extension is made after the time for compliance has passed."

In Finnegan's case, the Court took the view that the rules of procedure imposing time limits should be obeyed. However, there was the widest discretion in a court in those circumstances to recognize "... the overriding principle that justice must be done ..." between the parties, that the absence of a good reason for non-observance of the rules was not an inflexible and automatic consequence that a court should refuse the exercise of its discretion and that the court should also consider any prejudice involved. Hirst L.J., at page 420, endorsed the rejection of:

> "... a rigid mechanistic approach ... and that dismissal of the action is an inevitable result if the applicant fails to show good reason for his procedural default."

The case was remitted for reconsideration.

In the instant case, the affidavit of Patrick Foster dated July 21, 2003, does give a reason why a material aspect of the order for disclosure made on May 19, 2003, was not complied with. He said at paragraph 2, inter alia:

> "... while I have now located the Minute Book, I have not yet located the transaction file, and need more time to do so ... I will need at least another month ..."

These documents were not in the possession of the appellant. Furthermore, the appellant's application for extension of time and relief from sanctions, albeit made orally to the trial court on July 21, 2003, should not properly be viewed as "not made promptly." The order for disclosure would have expired on June 19, 2003. One could well assume that neither party regarded the claimant's case as "struck out", due to the fact that on June 25, 2003, Reid, J. made orders, on the attendance of both parties and the trial date of July 21, 2003, was re-confirmed.

There is no evidence that the appellant had not complied with "... all other relevant rules ... and directions ..." The writ was filed on October 24, 2002. The consequential appearance entered and defence filed by the appellant attracted no complaint of non-compliance.

In addition, affidavits of Vincent Chen and David Kay were both filed on July 18, 2003, on behalf of the appellant, presumably in satisfaction of the order for "exchange of witness statements."

The appellant's counsel on July 21, 2003, had submitted that his client was prepared to proceed with the trial. In that regard the learned trial judge

should have considered the possibility of the trial proceeding and any necessary adjournment being taken after the scheduled five days, thereby obviating any waste of judicial time.

In all the circumstances, the learned trial judge seemed to have failed to consider that the provisions of Rule 26.8, relative to relief from sanctions, were in the main, satisfied. The overriding objective to deal justly and fairly with the parties seemed to have been overlooked. For these reasons, we made the order earlier referred to.

PANTON, J.A:

I agree with the submission of Dr. Barnett that in a matter of this nature, where new procedural rules are being applied to old proceedings, particular care should be taken to give ample time to the parties to adjust to the new requirements.

In my view, Brooks, J. erred in imposing the ultimate sanction on the appellant considering the circumstances of this particular case.

McCALLA, J. (Ag.)

The appellant International Hotels Jamaica Ltd. has appealed against the decision of Brooks J. that its statement of case stood struck out as a consequence of non-compliance with an order dated May 19, 2003. The appellant has also appealed against the dismissal of its application for relief from sanctions which has resulted in its statement of case remaining struck out.

On May 20, 2005 the Court made the following orders:

> "Appeal allowed and the order of Brooks J. refusing relief from sanctions, set aside. Judgment entered for the plaintiff and the assessment of damages set aside. The appellant's statement of case is restored and a new trial ordered. Appellant to comply with outstanding orders for case management and the specific order made on June 2, 2003, within 30 days of today's date. Registrar of the Supreme Court to fix the earliest possible trial date. Costs of the proceedings below to the respondent in any event. No order as to costs of this appeal."

On the date judgment was handed down we promised to put our reasons in writing and I now do so. Before dealing with the grounds of appeal and the appellant's challenges to the learned trial judge's findings of facts, it is necessary to give a brief summary of the historical background leading up to the orders made by Brooks J.

The life of the claim began as an action by the respondent, New Falmouth Resorts Limited, as the registered proprietor, to recover possession of property in the parish of Trelawny. The respondent also claimed damages for trespass and for the appellant's use and occupation of the said lands.

The statement of case is that the appellant is the assignee of a company, and that company had entered into an agreement with the respondent for the purchase of the lands and the appellant had entered into possession with the respondent's consent. The appellant denies being

wrongfully in possession and avers that it is entitled to be registered as proprietor of the said lands.

The Writ of Summons was filed on October 24, 2002 and appearance was entered on November 14, 2002. The defence was filed on November 28, 2002. The next event of importance was the application of the appellant for summary judgment. This application came on for hearing on April 8, 2003. By this time the new Civil Procedure Rules 2002 (CPR) had taken effect. Clarke J. dismissed the application but, as mandated by Rule 15.6 (3), he treated the hearing as a case management conference and made the following orders:

> "1. That the pre-trial review is set for Monday 19th May, 2003 at 2:00 p.m. for 1 hour.
>
> 2. That both parties give to the other Standard Disclosure within 30 days of the date hereof.
>
> 3. That there be inspection of documents within 7 days of disclosure.
>
> 4. That the Court directs that there be an agreed statement of issues and in the event that there is no agreement each party is to file and serve on the other its own statement of issues.
>
> 5. Each party is to prepare witness statements with regard to the witnesses to be called at trial, and the said witness statements to stand as evidence in chief with regard to the said witness, subject to liberty to apply to adduce additional evidence.

6. Witness statements to be exchanged on the date of the pre-trial review.

7. Listing questionnaire to be filed by both parties on or before Wednesday 14th May, 2003.

8. Trial to be by judge alone.

9. Formal order to be prepared by Plaintiff's Attorney-at-law.

10. Trial date to be set for Monday 21st July, 2003 for 5 days."

On May 19, 2003, Brooks J. heard the pre-trial review. Neither party had fully complied with the orders made by Clarke J. On that date the Court, in an effort to fulfill its mandate under the CPR, of its own initiative, made the following orders:

"1. The Defendant not being prepared to participate in a pre-trial review, the pre-trial review, is hereby adjourned to 19th June, 2003 at 3:00 p.m. for 1 hour.

2. The Defendant is to comply with the order made at Case Management Conference for standard disclosure within 14 days of the date hereof.

3. Both parties are to comply with the order made at case management conference for the preparation and exchange of witness statements within 30 days of date hereof.

4. Any party not complying within either period hereby specified shall have its statement of case stood as struck out.

5. The Claimant is to prepare file and serve the formal order.

6. Costs to the Claimant fixed at $8,000.00 inclusive of the costs of complying with order five (5) herein."

The matter next came before the Court on June 2, 2003 when the Court made an order pursuant to an application by the respondent, for specific disclosure within 21 days.

On June 25, 2003, at a pre-trial review, Reid J. refused an application by the appellant for a stay of proceedings and made further orders. The matter came on for trial on July 21, 2003 and the state of affairs that existed was as follows:

a) The respondent had filed its witness statements on June 17, 2003 and a bundle of documents on July 16, 2003.

b) A bundle of documents containing affidavits of two witnesses had been filed by the appellant on July 18, 2003 and an affidavit of Patrick Foster had been filed on July 21, 2003, stating the need for more time to locate documents which were not in its possession.

The appellant therefore had not complied with the "unless" orders made by Brooks J. on May 19, 2003. Having heard submissions, the learned judge found that as there had been no extension of time granted for the

appellant to comply with the orders of May 19, the appellant's statement of case would have stood as struck out by June 20, 2003.

Relying on the affidavit of Patrick Foster, the appellant sought relief from sanctions. In his submissions counsel for the appellant stated that although documents requested had not been found the appellant was in a position to proceed to trial.

Counsel for the respondent resisted the application for relief from sanctions. She submitted that the conduct of the appellant was not deserving of such relief, having breached the requirements of the CPR in failing to ensure that the respondent had received all the information required and had the opportunity to be prepared for a five-day trial.

Brooks J. refused to grant relief from sanctions. He entered judgment for the respondent on the claim and went on to assess damages.

This appeal is against the decision that the statement of case stood struck out as well as the refusal to grant relief from sanctions. The grounds of appeal are as follows:

"(a)The Learned Judge erred in finding that the delay had been intentional;

(b)There being no evidence that the delay was contumacious the Learned Judge wrongly exercised his discretion or wrongfully failed to exercise his discretion in favour of allowing the Appellant the

opportunity to defend the claim although there were other sanctions available;

(c)The Learned Judge erred in law in holding that the Defence had automatically been struck out;

(d) Having so held, the Learned Judge erred in law in refusing to grant relief from sanctions and allowing the defence to be re-instated;

(e) The learned judge erred in law in failing to apply the principles laid down in Part 1 Rule 1 of the Civil Procedure Rules which require that in exercising any discretion the court should give effect to the overriding objective of the Rules which is to deal with cases justly."

Findings of Law

The appellant challenges the finding of law that the statement of case stood struck out automatically as a result of non-compliance with the Order of May 19, 2003 as:

a) The order had been made in the absence of counsel for the appellant after the Court had granted an adjournment on the application of its counsel.

b) Reid J. had made orders on June 25, 2003 that were inconsistent with the statement of case having been struck out on June 20, 2003.

Dr. Lloyd Barnett, on behalf of the appellant submitted that having regard to the serious issues raised by the defence, the sanction imposed in

a situation in which new rules were being applied to an old proceeding, was too stringent. He made reference to the case of **Biguzzi v. Rank Leisure plc** [1999] 1 WLR 1926 as to the approach taken by the court with regard to the exercise of its discretion under the English Rules. He said that ample time ought to have been given to the parties to adjust to the requirements of the CPR. Dr. Barnett argued that the procedural requirements of Rule 26.4 for an "unless order" to take effect have not been complied with.

In this matter it was the appellant's application for summary judgment which triggered the operation of Rule 15.6(3), which stipulates that when the proceedings are not brought to an end, the court must also treat the hearing as a case management conference.

Rule 26.4 deals with the Court's general power to strike out statement of case and is to the following effect:

> " 26.4 (1) Where a party has failed to comply with any of these Rules or any court order in respect of which no sanction for non-compliance has been imposed, any other party may apply to the court for an 'unless order'.
>
> (2) Such an application may be made without notice but must be accompanied by
>
> (a) evidence on affidavit which-
>
> (i) identifies the rule or order which has not been complied with
>
> (ii) states the nature of the breach; and
>
> (iii) certifies that the other party is in default; and

(b) a draft order.

(3)The registry must refer any such application immediately to a judge, master or registrar who may –

(a) grant the application;
(b) seek the views of the other party; or
(c) direct that an appointment be fixed to consider the application.

(4)Where an appointment is fixed under paragraph (3) (c) the court must give 7 days notice of the date, time and place of such appointment to all parties.

(5) An "unless order" must identify the breach and require the party in default to remedy the default by a specified date.

(6) The general rule is that the respondent should be ordered to pay the costs of such an application.

(7) Where the defaulting party fails to comply with the terms of any "unless order" made by the court that party's statement of case shall be struck out.
(8) ..."

The "unless order" of May 19, 2003 not having been made at the request of the appellant, the procedural requirements stipulated in Rule 26.4 above would not have been applicable.

The Court is empowered by virtue of Rule 26.2 to make orders of its own initiative.

Rule 26.2 states:

"(1) Except where a rule or other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative.

(2) Where the court proposes to make an order of its own initiative **it must give any party likely to be affected a reasonable opportunity to make representations.**

(3) Such opportunity may be to make representations orally, in writing, telephonically or by such other means as the court considers reasonable.

(4) Where the court proposes-

(a) to make an order of its own initiative; and

(b) to hold a hearing to decide whether to do so, the registry must give each party likely to be affected by the order at least 7 days notice of the date time and place of the hearing." (Emphasis added)

Rule 26.3 (1) empowers the court, in addition to any other powers under the CPR, to strike out a statement of case or part of a statement of case if it appears to the court:

"(a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;
(b) ....
(c) ...
(d) ..."

The learned judge could therefore have exercised his discretion under the above Rule. I am in agreement with Miss Davis for the respondent that there had been ample opportunity for the appellant to seek an extension of time for compliance with the relevant orders or to seek relief from sanctions.

As there had been no application to extend the time for compliance with the orders made on May 19, 2003, by June 20, the applicant's statement of case stood as being struck out.

Relief from Sanctions

Rule 26.8 which deals with relief from sanctions, states:

> "(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 attorney-at-law;

(c) whether the failure to comply has been or can be remedied within a reasonable time;
(d) whether the trial date or any likely trial date can still be met if relief is granted; and
(e) the effect which the granting of relief or not would have on each party.

(4) The court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown."

The appellant challenges the following findings of Brooks J:

i) The failure to comply with the order of May 19, 2003 was intentional.

ii) The affidavit of Patrick Foster did not amount to a good reason for failure to comply with the said order.

iii) The Defendant had not complied with any order.

iv) There is an inconsistency in the appellant's position to the effect that it is ready for trial but that it still needs more time to find more documents.

The order of Clarke J. made on April 8, 2003, for standard disclosure, required the appellant, by virtue of Rule 28.4(i), to disclose all documents "which are directly relevant to the matters in question in the proceedings." A party "discloses" a document by revealing that the document exists or has existed. (Rule 28.1(3))

Rule 28.2 states:

> "(1) A party's duty to disclose documents is limited to documents which are or have been in the control of that party.
>
> (2) For this purpose a party has or has had control of a document if -
> (a) it is or was in the physical possession of that party;
> (b) that party has or has had a right to possession of it; or
> (c) that party has or has had a right to inspect or take copies of it."

Paragraph 2 of the affidavit of Patrick Foster states:

> "Clinton Hart and Co. has in the past acted for the Claimant and has been asked by the Defendant to provide relevant files including the transaction file relating to the sale of lands ... by the Claimant to National Hotels and Properties Limited. However, while I have now located the Minute Book, I have not yet located the transaction file, and need more time to do so. There are many files in storage, covered in dust, among which, I believe the transaction file must be located, and I will need at least another month in which to search through everything and, hopefully, find it."

The above paragraph makes it clear that the document was not in the physical possession of the appellant. The appellant could have complied with the order for standard disclosure simply by revealing that the document exists or has existed. I disagree with Dr. Barnett's submission that the appellant had not failed to give standard disclosure. Physical possession of the documents was not required in order for the appellant to give standard disclosure. However as the documents were in the possession of a third party, the appellant was not in

control of them. The appellant needed the documentary evidence in order to prepare for trial and had requested them. In these circumstances, it has not been established that the failure to disclose, although misconceived, was intentional.

The issue of the explanation for the delay is bound up in the failure of the appellant to give standard disclosure. Paragraph 2 of Mr. Foster's affidavit (supra) does not state the date when the request was made for documents. However, there was no challenge to the assertion that the documents were not in the possession of the appellant and a request had been made for them. Brooks J. held that the issue of the explanation for the delay, even if genuine was insufficient to allow the Court to grant relief from sanctions. While the explanation for the delay by itself would not be sufficient to allow the Court to grant relief from sanctions, it has not been shown that the explanation given was not genuine.

I now consider whether or not the third requirement for a grant of relief from sanctions, namely, whether the appellant "has generally complied with all other relevant rules, practice direction, orders and directions," has been satisfied.

The appellant was required to satisfy all the requirements mandated by Rule 26.8(2) in order for its application to succeed.

In considering this rule, Brooks J found that:

> "The defendant has not complied with any of the orders on the case management conference and this therefore belies its assertion that its failure

> concerning disclosure and the witness statements were not intentional."

Brooks J. correctly found that the appellant had failed to comply with any of the orders made on case management. However the question arises as to whether or not the appellant had failed to comply with **"all other relevant rules, practice directions, orders and directions".** The record shows that the appellant had complied with the time stipulated for appearance to be entered and for the filing of its defence. There is no evidence of any breach of other relevant rules, practice directions or orders, save and except the order made on June 2, 2003 for specific disclosure.

Brooks J. was mindful of the overriding objective of the CPR but there is no indication that he considered whether the appellant had generally complied with all **other** relevant rules, practice directions and orders.

In considering whether to grant relief the learned judge was required to have regard to all the matters stipulated in Rule 26.8 (3). Having found, incorrectly, in my view, that the appellant had not satisfied the requirements of Rule 26.8 (2), he failed to have regard to the requirements of Rule 26.8 (3) and unfortunately fell into error.

On the trial date the appellant's attorney-at-law had stated its readiness to proceed to trial notwithstanding that it had made a request for more time to locate documents. Brooks J. felt, understandably, that that position was inconsistent. However, on July 16, 2003, the appellant had filed a list of documents, albeit out of time. Affidavits from witnesses were also filed on July

18, 2003 instead of witness statements. The trial had been set down for five days. There is no record regarding an enquiry as to whether by agreement, the trial could have been deferred to a date within the five-day period or whether if part-heard, an early date would have been available for a continuation or whether or not an early trial date was then available.

In considering whether or not to grant relief from sanctions, the court should in the circumstances of this case have considered the imposition of a lesser sanction on the appellant, such as an order to proceed to trial without the required document, if the respondent's attorney-at-law had no objection.

The statement of case had been struck out in circumstances where the procedure laid down by Rule 26.4 did not apply as the order was made on the Court's own initiative. Under Rule 26.2 the appellant as a party likely to be affected by the order, was entitled to a reasonable opportunity to make representations before the order was made. The Court was empowered to make the "unless order" under Rule 26.3 but it seems to me that the learned judge should in the circumstances of this case have allowed the statement of case to be reinstated subject to the imposition of a lesser sanction.

On June 20, 2003 the appellant's statement of case stood struck out. However, on June 25, 2003, the appellant made an application for the trial date to be vacated. The application was refused. The appellant did not thereafter seek relief from sanctions and the respondent did not apply to have judgment entered in its favour. Presumably this was because the parties felt that compliance with

the orders made could have been achieved before the trial date. The application for relief from sanctions, although made at the invitation of the Court on the trial date, had been made within four weeks of the expiration of the time limit and could in the circumstances be considered as having been made promptly.

The CPR requires the Court to maintain a firm control over the matters coming before it. Litigants must obey the time limits stipulated by the Court. The Court is required to strike a balance and deal with cases justly. I am of the view that in the circumstances of this case, Brooks J. ought to have exercised his discretion in favour of allowing the appellant the opportunity it requested, albeit belatedly, to defend the claim. I agree with Dr. Barnett's submissions that the learned judge's failure to grant any relief from sanctions was too stringent.

In failing to do so the overriding objective of the CPR was not met and accordingly, grounds a, b, d and e of this appeal ought to succeed. It was for these reasons that I agreed with the orders made on May 20, 2005, stated herein.