

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MR JUSTICE BROOKS P  
THE HON MISS JUSTICE EDWARDS JA  
THE HON MR JUSTICE LAING JA (AG)**

**APPLICATION NOS COA2024APP00048 & COA2024APP00075**

<b>BETWEEN</b>	<b>MARVA JAMES</b>	<b>1<sup>ST</sup> APPLICANT</b>
<b>AND</b>	<b>DENESE JAMES</b>	<b>2<sup>ND</sup> APPLICANT</b>
<b>AND</b>	<b>CAREIF LTD</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>AND</b>	<b>ANTHONY THARPE</b>	<b>2<sup>ND</sup> RESPONDENT</b>

**Miss Nieoker Junor instructed by Knight Junor Samuels for the applicants**

**Anthony Tharpe in person and representing the 1<sup>st</sup> respondent**

**10 April and 10 May 2024**

**Civil practice and procedure – Application for leave to appeal – Application for stay of execution and application for stay of proceedings – Whether document is a witness statement – Whether the document has been signed and complies with the Civil Procedure Rules, 2002 – Whether application for relief from sanctions is necessary – Civil Procedure Rules, 2002, rr 29.4, 29.5 and 29.11**

**BROOKS P**

[1] The applicants, Ms Marva James and Denese James seek permission from this court to appeal the orders of a judge of the Supreme Court ('the learned judge') made on 15 February 2024. The learned judge, on that date, among other orders, ordered that Mr Anthony Tharpe, who represents himself and Careif Ltd (together referred to as 'the respondents'), should file and serve a supplemental witness statement outlining how he arrived at the figures set out in his witness statement filed on 19 December 2023. The learned judge also refused the applicants' application for leave to appeal. The applicants

also seek a stay of execution of the orders of the learned judge as well as a stay of the assessment of damages over which the learned judge was presiding.

## **Background**

[2] The respondents filed a claim against the applicants, seeking damages for breach of contract. The applicants failed to file their defence within time and the respondents obtained a judgment in default of defence against them with damages to be assessed. A case management conference ('CMC') was held on 12 July 2023, in preparation for the assessment of damages hearing. At the CMC, Mott Tulloch-Reid J ordered that the parties were to file and serve witness statements on or before 19 December 2023. Mott Tulloch-Reid J later varied that order, stating that the applicants' witness statements were to be confined to the issue of quantum.

[3] Mr Tharpe, the only witness on behalf of the respondents, filed a document ('the document') purporting to be a witness statement. This was done within the time stipulated by the order of Mott Tulloch-Reid J. The assessment of damages was set for a hearing on 12 February 2024. During that hearing, Mr Tharpe desired to tender the document as his evidence in chief. He admitted, however, that the document had been signed by his brother, Mr Delroy Tharpe ('Delroy') on his behalf, under a power of attorney. The applicants' counsel objected to the document being used as a witness statement. The learned judge adjourned the hearing of the assessment of damages and ordered that Mr Tharpe file a supplemental witness statement indicating how he arrived at the figures outlined in the document.

[4] The applicants seek leave to appeal from the learned judge's orders and a stay of execution pending the hearing of the appeal.

## **The applications**

[5] The applicants contend that the document did not comply with the order of Mott Tulloch-Reid J and that the learned judge erred in permitting Mr Tharpe to rely on it as his evidence in chief. Miss Junor, on behalf of the applicants, submitted that the applicants

have a reasonable prospect of success in an appeal against the learned judge's decision. She advanced two main reasons:

- a. Mr Tharpe did not execute the witness statement, Delroy did; and
- b. Having failed to execute the witness statement, Mr Tharpe breached the order of Mott Tulloch-Reid J for the filing and service of witness statements by 19 December 2023.

[6] Learned counsel submitted that under rule 29.4 of the Civil Procedure Rules, 2002, ('the CPR') the witness statement is to be signed by the person making it but Mr Tharpe did not sign his witness statement. She argued that the witness statement, therefore, runs afoul of rules 29.4(2) and 29.5 of the CPR. The result of this non-compliance, learned counsel argued, is that, under rule 29.11 of the CPR, Mr Tharpe may not be called as a witness without the court's permission. Miss Junor asserted that, to obtain the court's permission, Mr Tharpe must have a good reason for not seeking relief from sanctions under rule 26.8 of the CPR. She relied on **Oneil Carter and others v Trevor South and others** [2020] JMCA Civ 54 ('**Oneil Carter**'). Miss Junor argued that Mr Tharpe should therefore not be permitted to rely on the document until he first applies for relief from sanctions and gives a good reason for failing to seek relief from sanctions earlier.

[7] Learned counsel accepted that the court can correct procedural errors on its own initiative but, in this case, the learned judge was constrained to abide by rule 29.11 of the CPR which mandates that the defaulting party must seek relief from sanctions and the sanction remains in place until the defaulting party makes a successful application for relief from sanctions. In these circumstances, learned counsel argued that the learned judge erred in permitting Mr Tharpe to file a further witness statement without first obtaining relief from sanctions.

[8] Miss Junor submitted that the assessment of damages should be stayed because the appeal has a good prospect of success. She argued that the document filed on behalf

of Mr Tharpe was neither a witness statement nor a witness summary. The applicants say that they will be severely prejudiced since the appeal would be nugatory if the stay is not granted, the assessment of damages hearing proceeds and Mr Tharpe relies on his further witness statement. Additionally, Miss Junor contended that the applicants would not be able to challenge the learned judge's findings. She noted that there was no risk of injustice to the respondents since they do not have a monetary judgment in their favour. She submitted that the balance of convenience favoured the applicants.

[9] Mr Tharpe, on behalf of the respondents, contended that the applicants do not have a real chance of success on appeal. He contended that the witness statement was his and that he signed the document three times. He asserted that:

- a. he was overseas at the time the document was prepared for filing but he put his electronic signature on it;
- b. Delroy, acting under a power of attorney, also signed it on his behalf, which he, Mr Tharpe, confirmed under oath during the assessment of damages; and
- c. he re-signed and resubmitted his witness statement immediately after the applicants made an issue of the document.

[10] Further, he reasoned that rule 29.5 of the CPR noted that a witness statement must be signed or authenticated and he asserted that while he was under oath, he indicated that it was his witness statement, accordingly, he authenticated the document. Mr Tharpe stressed that his witness statement complied with the CPR. Additionally, Mr Tharpe argued that the application for permission to appeal has caused the respondents to suffer loss and damage and the delay will cause further loss and damage. He therefore impressed upon the court to refuse the applicants' applications.

## Discussion & analysis

### Permission to appeal

[11] It is settled that, an applicant who seeks permission to appeal civil cases must satisfy this court that the appeal has a real chance of success (see rule 1.8(7) of the CPR). The term “real chance of success” means real, and not merely a “fanciful” prospect of success (see **Duke St John-Paul Foote v University of Technology Jamaica (UTECH) and Another** [2015] JMCA App 27A at para. [21]).

[12] The CPR defines and sets certain standards for witness statements. Rule 29.4(1) defines a witness. It reads:

#### **“Requirement to serve witness statements**

29.4 (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.

...

- (3) The court may order a party to serve on any other party witness statements setting out the evidence on which that party intends to rely at the trial or other hearing

...” (Bold as in original, underlining for emphasis)

[13] Rule 29.5 of the CPR goes further to set out the mandatory requirements of a witness statement, so far as is relevant for these purposes, provides:

#### **“Form of witness statements**

29.5 (1) A witness statement must-

- (a) give the name, address and occupation of the witness;
- (b) so far as reasonably practicable, be in the intended witness’s own words;

...

- (f) be signed or otherwise authenticated by the intended witness

..." (Bold as in original, underlining for emphasis)

[14] The CPR also outlines the consequences for failing to serve a witness statement.

Rule 29.11 provides:

- "29.11 (1) Where a witness statement or witness summary is not served in respect of an intended witness within the time specified by the court then the witness may not be called unless the court permits.
- (2) The court may not give permission at the trial unless the party asking for permission has a good reason for not previously seeking relief under rule 26.8."

[15] Mr Tharpe's argument that he placed an electronic signature on the witness statement cannot be accepted. What appears on the document is Mr Tharpe's typed name, not an electronic signature. Secondly, this court cannot accept Mr Tharpe's contention that Delroy signed the document on his behalf, under a power of attorney, since there was no indication on the document that that was the basis for Delroy's signature appearing on the document and a power of attorney was not presented to the learned judge.

[16] Even Mr Tharpe's strongest point, in which he relies on rule 29.5(f), may have a fatal flaw. Rule 29.5(f) of the CPR permits an intended witness to authenticate a witness statement. Mr Tharpe asserts that it was during the hearing of the assessment of damages, that he authenticated the document as his witness statement; doing so, he said, by identifying the document to the learned judge, as his witness statement. It is arguable, however, that authentication has to take place for a document to become a witness statement. Since rules 29.4 and 29.11 require witness statements to be served before the witness stands in the witness box, it is further arguable that authentication cannot take place after the witness has taken the oath in court.

[17] Based on this reasoning, Miss Junor's submissions have a sound basis, and the applicants have a real chance of success on appeal. The learned judge, despite her efforts to move the case along, may have erred in accepting the document as Mr Tharpe's witness statement. This is a matter to be examined on appeal. Leave to appeal should be granted.

#### Stay of execution

[18] Although the learned judge sought to correct matters to move the case along, it is best that her orders and the proceedings be stayed until it is determined whether the assessment of damages would be proceeding on a sound footing. If the assessment of damages goes ahead and has not proceeded on a sound footing, it may well be found to be invalid, resulting in a waste of time and expense.

#### **EDWARDS JA**

[19] I have read in draft the judgment of my brother Brooks P and I agree with his reasoning and conclusion. I wish to add nothing further.

#### **LAING JA (AG)**

[20] I too have read the draft judgment of my brother Brooks P. I agree with his reasoning and conclusion and I have nothing to add.

#### **BROOKS P**

#### **ORDER**

1. The application for permission to appeal is granted.
2. The application for stay of execution is granted pending the hearing of the appeal.
3. The application for stay of proceedings is granted pending the hearing of the appeal.
4. Costs of the applications to be costs in the appeal.