[2019] JMCA App 20

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NOS 228/2018 & COA2019APP00047

BEFORE: THE HON MISS JUSTICE PHILLIPS P (AG)
THE HON MISS JUSTICE STRAW JA
THE HON MR JUSTICE FRASER JA (AG)

BETWEEN	**ALICE MCPHERSON**	**APPLICANT**
AND	**PORTLAND PARISH COUNCIL**	**1ST RESPONDENT**
AND	**THE NATIONAL WORKS AGENCY**	**2ND RESPONDENT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**3RD RESPONDENT**

Hugh Wildman, Miss Esther Reid and Miss Sasha-Lee Hutchinson instructed by H S Dale & Co for the applicant

Joseph Jarrett instructed by Joseph Jarrett & Co for the 1st respondent

Miss Faith Hall instructed by the Director of State Proceedings for the 2nd and 3rd respondents

12, 13 February and 29 July 2019

PHILLIPS P (AG)

[1] I have read in draft the judgment of my brother Fraser JA (Ag). I agree with his reasoning and conclusion and have nothing to add.

STRAW JA

[2] I too have read the draft judgment of my brother Fraser JA (Ag) and agree with his reasoning and conclusion.

FRASER JA (AG)

The application

[3] The applicant, Ms Alice McPherson, filed this application on 12 October 2018, seeking permission to appeal the decision of K Anderson J, who on 18 September 2018 refused leave to appeal against his decision not to relist the matter in Claim No 2011 HCV 00573, after the claim was struck out by E Brown J on 6 May 2016.

[4] In oral arguments, Mr Wildman, counsel for the applicant, refined the position. He indicated that the application was for leave to appeal against the 6 July 2016 decision of K Anderson J not to set aside the 6 May 2016 striking out of the claim in this matter by E Brown J, who struck out the claim on the basis that the applicant was absent from the case management conference (CMC).

[5] The grounds in support of the application are:

> "1. That the Applicant/Appellant has a real prospect of succeeding on her Appeal against the decision made in this Honourable Court [sic].
>
> 2. That there is a serious issue to be tried. The Applicant/Appellant has brought an action against the Portland Parish Council, the 1st RESPONDENT, and the National Works Agency, the 2nd RESPONDENT, for damage done to her land when an incision was made with heavy duty work equipment in a drain maintenance exercise.

3. That both the 1st RESPONDENT and the 2nd RESPONDENT are responsible for the management and maintenance of drainage in the parish, and both parties have denied responsibility for the damage done to the property belonging to the Applicant/Appellant situate at Lot 3 Red Hassel Road, Port Antonio in the parish of Portland, registered at Volume 707 Folio 140, of the Register Book of Titles.

4. That this Honourable Court [sic] will need to make a determination about who should bear the responsibility of the damage done to the Applicant/Appellant's property, as both parties have denied any liability.

5. That the matter being struck out was not due to the fault of the Applicant/Appellant and that she would like her matter to be heard on its merits."

[6] The application is supported by an affidavit from the applicant filed on 11 February 2019. Both counsel for the respondents opposed the application on several bases that will be outlined later in the judgment. For now, it is important to establish the background to the application.

Background

[7] On 4 February 2011, the applicant filed a claim and particulars of claim in the Supreme Court seeking damages for trespass to her property situate at 3 Red Hassell Road, Port Antonio in the parish of Portland registered at Volume 707 Folio 140, of the Register Book of Titles, as well as interest and costs against the Portland Parish Council (PPC) (now renamed Portland Municipal Corporation) and the Attorney General of Jamaica (Attorney General). The Attorney General was sued in a representative capacity by virtue of the Crown Proceedings Act. The National Works Agency (NWA) was not named in her claim at that time.

[8] On 10 June 2011, the applicant filed a notice of application for court orders seeking to obtain default judgment against the PPC for failure to file an acknowledgement of service and against the Attorney General for failure to file a defence. Default judgement was entered against the PPC. Further to an application made by the PPC to set aside the default judgment on the basis that it had not been properly served and had a real prospect of successfully defending the claim, on 27 June 2012, the court set aside the default judgment and ordered that the PPC be permitted to file its defence out of time. In this defence, the PPC averred that it was not responsible for the damage and laid the blame "at the feet" of the NWA.

[9] On the same 27 June 2012, in response to the PPC's defence, Ms McPherson successfully applied to the court to add the NWA as a party to the claim. The matter was then referred to mediation, which occurred on 15 January 2015. The applicant and her attorney-at-law Mr Heron Dale, as well as the defendants and their counsel, Mr Joseph Jarret and Mr Andre Moulton attended. Mediation was unsuccessful at resolving the matter and it was referred back to the Supreme Court.

[10] On 8 June 2015, a notice of appointment for case management conference (CMC) to be held on 29 January 2016 at 12:00 noon was issued by the Supreme Court to be sent to the respective addresses of the attorneys-at-law for the applicant, the PPC and the Attorney General. On 29 January 2016, at the time scheduled for the CMC before Lindo J, the PPC and the Attorney General were represented, but the applicant and her attorney-at-law were absent. Lindo J adjourned the CMC to 6 May 2016 at 12:00 noon

for half an hour and ordered the 1st respondent's attorneys-at-law to file and serve a notice of adjourned hearing on the other parties to the claim.

[11] The notice of adjourned hearing dated 29 January 2016 was filed by the 1st respondent on 1 February 2016 and served on the applicant's attorneys-at-law, H S Dale & Co, on 2 February 2016. The reason subsequently stated for their absence on 29 January 2016 as given by both Mr Dale and the applicant in their affidavits dated 4 July 2016 and 8 February 2019 respectively, is that no notice of appointment for the CMC was received by them from the Supreme Court. This assertion is in keeping with the first order made by Lindo J when adjourning the CMC on 29 January 2016 and which was reflected in the notice served which stated, "Claimant and legal representative absent. No proof of service of Case Management Notice".

[12] The matter came before E Brown J on 6 May 2016. The PPC and the Attorney General were present but the applicant and her attorney-at-law were again absent. It was proved that the applicant had been served through service on her attorney-at-law. E Brown J made the following order:

> "1) Claimant and legal representative absent. Legal representative accepted service of Notice of Adjourned Hearing on the 2nd February, 2016, filed on the 1st February, 2016. Claimant's Statement of Case is struck out.
>
> 2) Costs to the 1st and 2nd Defendants to be agreed or taxed.
>
> 3) 1st Defendant's Attorney-at-Law to prepare, file and serve the orders herein."

[13] The formal order was filed on 9 May 2016, but it was not perfected or served on the applicant. The applicant's attorney-at-law and the applicant became aware of the order striking out her claim on 6 May 2016 when the notice of taxation and bill of costs filed on behalf of the 1st respondent was served on H S Dale & Co on 22 June 2016. In their affidavits previously mentioned, the reason given by Mr Dale and the applicant for their absence on the 6 May 2016 occasion, is that the secretary who was dealing with the matter had left Mr Dale's firm without recording the matter in his diary, rendering him unaware of the date and consequently unable to inform the applicant.

[14] On 6 July 2016, the applicant filed an application supported by an affidavit of urgency seeking orders to set aside the order of E Brown J and the granting of such further and other relief as may be just. That application came before K Anderson J on 19 May 2017 who refused the orders prayed.

[15] The applicant failed to request leave to appeal before K Anderson J and instead filed a notice of appeal in the Court of Appeal on 9 June 2017 and then an amended notice of appeal on 20 June 2017 appealing the decision of K Anderson J and seeking a stay of execution of the taxation proceedings. The amended notice came before P Williams JA who denied the application for stay and indicated that permission to appeal not having been sought in the Supreme Court, the matter was not properly before the Court of Appeal.

[16] On 8 March 2018, the applicant filed an application in the Supreme Court seeking permission to appeal under a new claim number 2018 HCV 00963. On 25 April 2018, the application came before Bertram-Linton J who indicated that the matter was wrongly filed under a new claim and not properly before the court. The learned judge indicated that the application should be withdrawn and a new application filed in the original claim and placed before K Anderson J for determination.

[17] An application for stay of execution, which had also been filed by the applicant on 13 November 2017, was heard by Sykes CJ on 7 May 2018. Neither the applicant nor her attorney-at-law was present. That application was dismissed.

[18] On 18 September 2018, in keeping with the indication of Bertram-Linton J, Miss Hutchinson, counsel for the applicant, went before K Anderson J seeking leave to appeal. That application was denied, after which on 12 October 2018, the applicant filed the application for leave to appeal which is now before this court for determination.

The hearing

The application to extend time to file the application for leave to appeal

[19] The hearing of the application for leave to appeal commenced on 12 February 2019. During the hearing, it was pointed out by counsel representing the NWA and the Attorney General that, in light of rule 1.8(1) of the Court of Appeal Rules (CAR), the application for leave to appeal was filed out of time by about 10 days. This led, on the same date the hearing commenced, to the applicant filing an application to extend the time to file the application for leave to appeal to the time the application was lodged, or

such time as the court sees fit. This application was supported by the affidavit of Miss Hutchinson, counsel for the applicant. In the affidavit, she explained that the reasons for the application being filed out of time were the following:

a) the aged applicant took time to consider the matter after her application for leave to appeal was refused by K Anderson J in light of the length of time the matter had been before the court and the great expense that she was incurring;

b) after some time had elapsed and unanswered telephone calls to the applicant, counsel attended upon the applicant's home whereupon she was advised by the applicant that she had been ill and her telephone was out of order, but that she wished to pursue her application;

c) that counsel prepared the necessary documents and filed the application, being of the mistaken view that the application was within time and this misapprehension was only pointed out to her by counsel for the 2nd and 3rd respondents, on her attendance at court on 12 February 2019.

[20] Quite graciously, no doubt in light of the several attempts the applicant had made to bring the matter before the Court of Appeal, and the relatively short period of delay, counsel for the respondents did not vigorously oppose the application. Accordingly, the application was granted by the court.

The submissions on the application for leave to appeal

Submissions of the applicant

[21] Mr Wildman submitted that the application was being made for leave to appeal against the decision of K Anderson J not to set aside the striking out of the applicant's case on the basis of the applicant's absence from the CMC. He indicated that the application was being made under rule 11.18 of the Civil Procedure Rules (CPR), which outlines that an application may be made to set aside or vary an order made in the absence of a party.

[22] Counsel submitted that K Anderson J's decision not to set aside the striking out was a wrong exercise of discretion, having regard to the history of the matter. He then established the chronology of events leading up to the present application, which have been captured in the background.

[23] According to Mr Wildman, K Anderson J's position was that the administrative mishap in Mr Dale's office was not a sufficient basis on which to set aside the striking out. He argued that the application before the learned trial judge was made under CPR Part 26, rule 26(1)(d), which allows a judge at CMC to adjourn and make an unless order. Such an order, he submitted, would have been more appropriate as from the history of the matter, this was the first real date the applicant should have been aware of through her attorneys.

[24] In his arguments before us, counsel recognised that before the learned judge, the submissions were geared towards relief from sanctions though the application did not say

so. He also recognised that rule 39.6 of the CPR was the appropriate rule that should have governed the applications. Counsel conceded that the affidavit in support of the application could have provided more material to satisfy the requirements of rule 39.6, which deals with applications to set aside a judgment given in a party's absence. He however maintained that the affidavit contained enough to show that the applicant had a real prospect of success if the appeal was permitted to proceed.

[25] Counsel advanced that the applicant's case should be heard as not only had she not done anything wrong, she had a real prospect of success as both the 1st and 2nd respondents were blaming each other for the damage caused to her premises. He creatively relied on the criminal case of **Mawaz Khan and another v R** [1967] 1 AC 454 (**Mawaz Khan)** in support of his contention that, since at least one of the respondents must be responsible for the damage done to the applicant's premises, the applicant should be permitted to pursue her case against both.

[26] Reliance was also placed on **Charmaine Bowen v Island Victoria Bank et al** [2014] JMCA App 14 (**Charmaine Bowen**), in which a stay of execution of the striking out of the claimant's claim after she had failed to comply with a court order because her lawyer had been ill, was granted. He cited the cases of **Boyle v Ford Motors Co Ltd** [1992] 1 WLR 476 (**Boyle**) and **Wilmot Perkins v Noel B Irving** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 80/1997, judgment delivered 31 July 1997, that endorsed **Boyle**, both of which were considered in **Charmaine Bowen**. Counsel relied on **Boyle** for the general point that while the court had a responsibility to avoid unnecessary delay by rigorous control over applications for adjournments, they

should be granted where it would be impossible to do justice if the hearing date was maintained. It was also noted that appropriate orders for costs should be made in such circumstances. Counsel advanced that E Brown J and K Anderson J should have followed that approach to do justice, rather than respectively striking out the claim and declining to set aside that striking out. He invited the court to grant the application being sought by the applicant for permission to appeal.

Submissions of the 2nd and 3rd respondents

[27] Due to the late receipt of the notice of the hearing of the application by counsel for the 1st respondent through no fault of his own, it was agreed that for convenience, counsel for the 2nd and 3rd respondents would submit first in response to the application.

[28] Miss Hall submitted that under rule 1.8(7) of the CAR, permission to appeal will only be given if the court, or the court below, considers that an appeal will have a "real chance of success", that phrase having been established to mean the same as "real prospect of succeeding", explained in **Swain v Hillman and another** [2001] 1 All ER 91 as being "whether there is a 'realistic' as opposed to a 'fanciful' prospect of success". See **Garbage Disposal & Sanitations Systems Ltd v Noel Green et al** [2017] JMCA App 2 (**Garbage Disposal & Sanitation Systems**).

[29] She maintained that in order to obtain leave, the applicant had to show that K Anderson J applied the wrong principle of law, or wrongly exercised his discretion in refusing to set aside the decision of E Brown J. Counsel noted that the application before K Anderson J, sought relief from sanctions under rule 26.6 of the CPR (setting aside

judgment entered after striking out) and rule 26.8 (relief from sanctions). Counsel noted further that the argument advanced in support of that application was that the failure to comply was not intentional and there was good reason for the failure, the circumstances prayed in aid being that the applicant's attorney-at-law did not deliberately miss the CMC, as he was unaware of the date and that as soon as he became aware of the striking out order, he made the application to set it aside.

[30] Counsel, however, indicated that the 2nd and 3rd respondents' submissions in response pointed out that the applicable rules when seeking to set aside a striking out at the CMC, were in fact CPR rules 27.8 and 39.6 and not rule 26.8. See **David Watson v Adolphus Sylvester Roper** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 42/2005, judgment delivered 18 November 2005, where K Harrison JA outlined the factors the court should consider in applications of this nature, and in particular, that the provisions of rule 39.6 must be read and applied collectively. Miss Hall further submitted that the explanation of administrative failings in the applicant's attorney-at-law's firm did not constitute a good reason for the applicant's failure to comply with the rules.

[31] She maintained that K Anderson J accepted the submissions of the respondents, correctly applied the principles of law to the issues, and rightly exercised his discretion to refuse the application to set aside. Hence, there is no merit in this appeal and this court should therefore not grant the applicant leave to appeal.

[32] Counsel however conceded that had the applicant been present, it is likely a different order would have been made.

Submissions of the 1st respondent

[33] Mr Jarrett, counsel for the 1st respondent, adopted the submissions of counsel for the 2nd respondent in so far as they sought to have the application dismissed for the reasons indicated.

[34] Counsel emphasised in his submission that there was no error in the exercise of discretion by either E Brown J or K Anderson J. He contended that the applicant's application and supporting affidavit of 6 July 2016 did not adequately explain why the service of the notice of adjourned hearing of the CMC on 2 February 2016, some three months before the actual hearing on 6 May 2016, was insufficient time to ensure representation of the applicant at the hearing. This, in the context of there having been a prior CMC scheduled and bearing in mind that it was the applicant who had brought the respondents before the court. He therefore submitted that the applicant had not established a good reason for her failure to attend or be represented at the CMC as required by rule 39.6 of the CPR. He highlighted that rule 27.8(5) of the CPR permitted the striking out of a party's statement of case for non-attendance, even on the first occasion that the matter comes on for CMC.

[35] It was conceded by counsel that another order may have been made if the applicant had been present. However, he further advanced that the applicant had no real prospect of success in her appeal as the evidence from the valuation report done by Mr

Keith Ripton Miller showed that the damage to the applicant's land was not caused by the PPC. He therefore contended that she had erred in bringing the 1st respondent before the court and also that there was no need for both respondents to "explain themselves" as submitted by counsel for the applicant. Accordingly, counsel submitted the application should be refused.

Discussion and Analysis

[36] Rule 1.8(7) of the CAR, which was previously 1.8(9) before their amendment in September 2015, provides that "[t]he general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success". The court below, having refused leave on 18 September 2018, leave has been sought before this court. In **Garbage Disposal & Sanitations Systems,** F Williams JA at paragraph [29], relied on earlier dicta from Morrison JA (as he then was) in **Duke St John-Paul Foote v University of Technology Jamaica (UTECH) and Wallace** [2015] JMCA App 27A, and noted that the phrase "real chance of success" in this rule, was "synonymous with the words 'realistic prospect of success' used by Lord Woolf in the case of **Swain v Hillman**". In **Swain v Hillman**, Lord Woolf considering the meaning of "no real prospect of succeeding" stated at page 92 that:

> "The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success…they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

[37] Lord Woolf's analysis is therefore applicable to rule 1.8(7) of the CAR. Accordingly, in the circumstances of this case, for the applicant to obtain leave, she has to show that

she has a real, not a fanciful chance, of establishing that K Anderson J wrongfully exercised his discretion in refusing her application to set aside the striking out of her claim for non-attendance at the CMC. That requires an assessment both of the factors that the applicant was required to establish before K Anderson J as well as the principles that guide appellate courts in determining whether to disturb the exercise of discretion by a judge at first instance.

[38] In respect of the first requirement, it was accepted by all counsel that the applicable rules for consideration in the application before K Anderson J were rules 27.8 and 39.6 of the CPR, not rule 26.8. Rule 27.8, which comes under the heading "Attendance at case management conference or pre-trial review", reads:

> "(1) Where a party is represented by an attorney-at-law, that attorney-at-law or another attorney-at-law who is fully authorised to negotiate on behalf of the client and competent to deal with the case must attend the case management conference and any pre-trial review.
>
> (2) The general rule is that the party or a person who is in a position to represent the interests of the party (other than the attorney-at-law) must attend the case management conference.
>
> (3) However the court may dispense with the attendance of a party or representative.
>
> (4) Where the case management conference or pre-trial review is not attended by the attorney-at-law and the party or a representative the court may adjourn the case management conference or pre-trial review to a fixed date and may exercise any of its powers under Part 26 (Case management – the court's powers) or Part 64 (Costs).
>
> (5) Provided that the court is satisfied that notice of the hearing has been served on the absent party or parties in accordance with these Rules, then

(a) if the claimant does not attend, the court may strike out the claim; and

(b) if any defendant does not attend, the court may enter judgment against that defendant in default of such attendance.

(6) The provisions of rule 39.6 (application to set aside judgment given in party's absence) apply to an order made under paragraph (5) as they do to failure to attend a trial."

[39] Rule 39.6, which falls under the heading "Application to set aside judgment given in party's absence", reads:

"(1) A party who was not present at a trial at which judgment was given or an order made in its absence may apply to set aside that judgment or order.

(2) The application must be made within 14 days after the date on which the judgment or order was served on the applicant.

(3) The application to set aside the judgment or order must be supported by evidence on affidavit showing –

(a) a good reason for failing to attend the hearing; and

(b) that it is likely that had the applicant attended some other judgment or order might have been given or made."

[40] In **David Watson v Adolphus Roper,** after outlining rule 39.6 of the CPR at page 8, K Harrison JA stated that:

"The predominant consideration therefore for the court in setting aside a judgement given after a trial in the absence of the applicant, is not whether there is a defence on the merits but the reason why the applicant had absented himself from the trial. If the absence was deliberate and not due to accident or mistake, the court would be unlikely to allow a rehearing. Other relevant considerations include the

> prospects of success of the applicant in a retrial; the delay in applying to set aside; the conduct of the applicant; whether the successful party would be prejudiced by the judgment being set aside; and the public interest in there being an end to litigation. This court has approved these principles, and have applied them, from time to time – See **Thelma Edwards v Robinson's Car Mart and Lorenzo Archer** SCCA 81/00 (unreported) delivered 19th March 2001.
>
> Rule 39.6 therefore gives the absent party the opportunity of explaining why he did not attend and that he has a reasonable prospect of success. It also gives the party in whose favour the judgment was given the chance of not having to prove his case all over again, with all the attendant expense that this will involve …, if a court is satisfied that there is in truth no reasonable prospect that the judgment would be reversed.
>
> The conditions in rule 39.6 … are cumulative. There is no residual discretion therefore, in the trial judge, to set aside the judgment, if any of the conditions is not satisfied: **Barclays Bank plc v Ellis** (2000) The Times, 24 October 2000."

[41] In light of the guidance offered by **David Watson v Adolphus Roper**, I will now look in turn at each criterion that needs to be satisfied under rule 39.6 of the CPR. If cumulatively there are bases on which a court could hold they have been met, I will then go on to consider whether, based on the relevant principles, there may be any basis to disturb the exercise of discretion by K Anderson J when he declined to set aside the striking out.

Was the application to set aside the striking out of the claim filed within time?

[42] Rule 39.6(2) of the CPR stipulates that an applicant seeking to have an order made in his absence set aside, should apply for that relief within 14 days after the order was served on him. The effect of rule 39.6(2) is that the time limited to apply to set aside an

order made against a party does not begin to run against that party until he is formally notified about that adverse order. In this case, the order striking out the applicant's claim was never served on her or her attorneys-at-law.

[43] Though no formal order of the striking out was served as required by rule 39.6(2), notice that such an order had been made was communicated to the applicant's attorneys-at-law through the service on them of the notice of taxation and bill of costs on 22 June 2016. This notice was based on the fact of the striking out. While the applicant did not receive formal notice of the striking out as contemplated by rule 39.2, the application to set aside the striking out was filed on 6 July 2016, within 14 days of having received notice of it, through the documents served to facilitate taxation. Therefore, the applicant sought to fulfil the spirit of rule 39.6(2), even though the rule was not complied with by the 1st respondent. Accordingly, it is clear there is no time bar to the application to set aside the striking out.

Did the applicant have a good reason for failing to attend the hearing?

[44] The evidence reveals that the applicant and her attorneys-at-law failed to attend the hearing on 6 May 2016 due to administrative failings in the office of the applicant's attorneys-at-law. The secretary, who had accepted service of the notice of adjourned hearing, had not placed the date in the diary to bring it to the attention of counsel and had subsequently left the firm. Counsel for the applicant posited this was an eminently good reason, while counsel for the respondents submitted the opposite view.

[45] Counsel for the 2nd and 3rd respondents argued that it is well settled that administrative inefficiency cannot suffice as a good reason. She submitted that the information provided by the applicant outlining why she missed the court date could be seen as a good explanation as to what happened, but not a good reason. During the course of oral submissions, counsel however softened her position somewhat, and indicated that the explanation "might" be a good reason, though she would fully rely on the cases which held that administrative inefficiency was not a good reason if the court allowed the appeal to proceed. Counsel for the 1st respondent adopted the submission that administrative inefficiency was not a good reason and also advanced that the situation should additionally be viewed in the context that it was the applicant who had brought the respondents before the court and had a duty to see to the due prosecution of the matter.

[46] In **David Watson v Adolphus Roper**, the court made a distinction between absence which was deliberate, in which case it would be unlikely a rehearing would be allowed, and absence which was caused by accident or mistake, in which event the clear implication was the likelihood of a rehearing being granted was much greater. The Judicial Committee of the Privy Council in the later case of **The Attorney General v Universal Projects Limited** [2011] UKPC 37, seemed to set a stricter standard, in the context of considering what was a good explanation that would support an application for a relief from any sanction, for a failure to comply with any rule, court order or direction. Lord Dyson stated at paragraph 23 that:

> " … To describe a good explanation as one which 'properly' explains how the breach came about simply begs the question of what is a 'proper' explanation. Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly if the explanation for the breach is administrative inefficiency."

[47] The approach to the understanding of what is a "good explanation" for the purposes of the rule that deals with relief from sanctions is clearly transferable to the concept of a "good reason", in the context of explaining absence from a hearing, which led to an adverse order being made against the absent party.

[48] The above quotation undermines the submission of counsel for the 2nd and 3rd respondents that the explanation proffered by the applicant may qualify as a good explanation but not a good reason. A "proper" or "good" explanation or reason must be one which not only adequately reveals why the default occurred, it must also show that the default is excusable in the circumstances. Put another way, an explanation or reason may comprehensively outline what caused a particular failing, but to be "good", it also has to have the additional quality of justifying the relief, forbearance or favourable exercise of discretion sought.

[49] It is true that in the current dispensation, the court is less sympathetic than it used to be of administrative inefficiency as a reason to set aside orders made in the absence of a party. It is also the case that the claim having been brought by the applicant, she, through counsel on her behalf, had the responsibility to see to the due prosecution of the matter which could have included making checks on the progress of the matter. Such checks may have negated the failure of the secretary that embarrassed counsel.

[50] However, in a context where the main cause of the applicant's non-compliance with her obligation to attend the adjourned CMC was the failure of the secretary to diarise the date, and then her departure without the information having been shared with the applicant's counsel, a court could be minded to view the failings of counsel as excusable oversight, rather than mere administrative inefficiency. The court is also well aware of the oft cited words of Lord Denning MR in **Salter Rex & Co v Ghosh** [1971] 2 All ER 865 at page 866 where he said, "We never like a litigant to suffer by the mistake of his lawyers". Accordingly, we conclude that there is a realistic prospect that a court may find that the applicant's reason for her non-attendance at the CMC was a good one.

Is it likely that had the applicant attended the CMC her claim would not have been struck out?

[51] Both counsel for the respondents conceded that had the applicant been present at the adjourned CMC it is likely that a different order would have been made. Counsel for the 1st respondent however maintained that the applicant had no real prospect of success against the 1st respondent, based on the findings of the valuator Mr Keith Ripton Miller on whose report she relies.

[52] On page 2 of the valuation report, Mr Miller gives a value of the amount of land, "…taken by the National Works Agent [sic] (NWC) [sic] to construct flood water drain from the main road through the land at different sections…". There is however no indication of the basis on which Mr Miller came to the conclusion as to who took the land; a matter which is ultimately for the court's determination, the 2nd respondent having denied liability.

[53] There does not appear to be any dispute that significant damage was caused to the applicant's land. The applicant maintains that this was caused by the 1st and 2nd respondent which are the only entities responsible for the drainage system in the country. The 1st respondent in its defence has laid the blame at the feet of the 2nd respondent, while, as indicated above, the 2nd respondent denies causing the damage.

[54] At the point at which the applicant's case was struck out, the stage had not yet been reached for the applicant's disclosure of the evidence on which she would rely. Hence, it would be premature for the court to come to any determination that the applicant's case had no real prospect of success.

[55] In fact, the converse is likely to be the case. With the main issue being whether the 1st respondent and/or the 2nd respondent, both agencies at different levels of government, caused the damage, the process of discovery that would flow from the regular CMC orders, absent abysmal record keeping at the respondents' offices, should disclose evidence tending to answer this issue. The applicant therefore stands a good chance of being successful under this head.

Is there a basis on which the exercise of the discretion by the learned trial judge not to set aside the striking out of the applicant's claim might be disturbed?

[56] In **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1 (**John Mackay**), this court adopted the guiding principles outlined by Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042 (**Hadmor**) which delineated the limited bases on which an appellate court may interfere

with the exercise of the discretion by a trial judge. As pointed out by Morrison JA (as he then was) in **John Mackay**, although the **Hadmor** principles were originally stated in the context of an appeal from the grant of an interlocutory injunction, they have subsequently been accorded general application.

[57] Those principles indicate that the appellate court should defer to the exercise of the discretion by the trial judge unless it finds that the discretion was informed by a misunderstanding of the law or the evidence, or by an inference drawn that a fact does or does not exist which is subsequently shown to be wrong. The principles also indicate that interference may also be warranted where there has been a change of circumstances after the decision appealed from, that would have justified the trial judge varying his initial order. Finally, even where no erroneous assumption of law or fact can be identified, if the judge's exercise of discretion is so aberrant that no reasonable judge acting judicially could have made the decision appealed from, then that is a basis to have it set aside. Lord Diplock, however, made it clear that simply because the members of the appellate panel would have exercised the discretion differently is not a basis for interfering.

[58] Before stating my conclusion, I pause to note that the cases of **Mawaz Khan** and **Charmaine Bowen** relied on by counsel for the applicant were not very helpful in assisting the court's resolution of this application. Concerning **Mawaz Khan**, the recourse to the criminal law, while interesting, necessarily gives way to relevant civil cases. In respect of the **Charmaine Bowen** matter, while the stay of execution was granted and

the appeal allowed to proceed, when the appeal was heard, the striking out of the applicant's claim in that case was actually upheld.

[59] This was reflected in the decision **Charmaine Bowen v Island Victoria Bank Ltd et al** [2017] JMCA Civ 23. The applicant gains some limited measure of assistance from this case however to the extent that the default of the applicant in **Charmaine Bowen** was more severe, including having four trial dates vacated at her instance. The Court of Appeal found that that was sufficient evidence to hold that it had not been demonstrated that the exercise of the learned trial judge's discretion in that case was plainly wrong. In the applicant's favour in this case is that her default is much more limited than in **Charmaine Bowen.**

[60] As noted earlier, Mr Wildman acknowledged that more detail could have been included in the supporting affidavits. Bearing in mind that concession and the **Hadmor** caution, what is the position in this matter? The review of the available evidence against the criteria established by rule 39.6 of the CPR, interpreted by relevant case law, has led the court to conclude that: i) there is no time bar to the application to set aside the striking out; ii) there is a realistic prospect of the applicant establishing that there was a good reason for her default; and iii) it is likely that had the applicant been in attendance at the CMC, a different order would have been made.

[61] Those being the three factors which should have properly been under consideration before the learned judge, it follows there is a realistic prospect that a court could conclude that there is a basis, within the principles outlined in **Hadmor**, to set

aside the learned judge's exercise of his discretion not to set aside the striking out of the applicant's claim. In the circumstances therefore, I hold that the applicant is entitled to obtain the leave to appeal sought.

PHILLIPS P (AG)

ORDER

1) The application to extend time to file the application for leave to appeal is granted.

2) The application for leave to appeal is granted.

3) Costs to the respondents to be agreed or taxed.