NMLG

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 107 OF 2007

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE COOKE, J.A.

BETWEEN	**RBTT BANK JAMAICA LIMITED**	**APPELLANT**
AND	**Y P SEATON**	**1ST RESPONDENT**
AND	**EARTHCRANE HAULAGE LIMITED**	**2ND RESPONDENT**
AND	**Y P SEATON & ASSOCIATES COMPANY LIMITED**	**3RD RESPONDENT**

Miss Hilary Phillips, Q.C., and Kevin Williams, instructed by Grant, Stewart, Phillips & Company for the Appellant

Mrs. Pamela Benka-Coker, Q.C., André Earle and Miss Anna Gracie, instructed by Rattray Patterson Rattray for the Respondents.

March 13, 14 and December 19, 2008

PANTON, P.

1. This appeal is against an order made by Sykes, J. on October 1, 2007. By that order he dismissed an application to vary his own order of April 26, 2007, which had required, among other things:

(1) the appellant's bank to serve a witness statement on or before 3.00 p.m. on July 30, 2007; and

(2) the fixing of a trial date by the Registrar.

Unless the statement was served in accordance with the order, the appellant's claim would be struck out, and judgment entered in favour of the respondents.

2. The variation sought was for the appellant to be permitted to file a witness summary instead of a witness statement in respect of the witness Keith Senior. In fact, a witness summary was filed on July 25, 2007, and the learned judge was being asked to allow that summary to stand. The appellant also sought that the date for compliance with the "unless" order above be extended. In the alternative, the appellant sought relief from sanction pursuant to Part 26.8 of the Civil Procedure Rules, 2002 and permission to file a witness statement at a later time.

3. The learned judge refused the applications. In doing so, his main concern was the fact that the appellant had not been able to secure the signature of the witness Senior on a witness statement, yet a trial date had been scheduled without the assurance of the attendance of the witness. The learned judge also dealt at length with the disobedience of earlier orders by the parties, and the fact that the Court's time was being wasted.

4. It is fitting and right for judges to be vigilant in respect of compliance with Court orders, as well as in relation to the use of the Court's resources and time.

The Civil Procedure Rules 2002 require this. The overriding objective is the enabling of the Court to deal justly with cases. That involves and includes expeditious and fair procedures, the saving of expense, and the allotment of an appropriate share of the court's resources and time in dealing with cases. [See Rule 1.1]

5. In considering the application, the learned judge turned his mind to the history of the case. He brought to the fore that which had transpired before three other judges during the claim's journey so far in the court system. In the end, he was not favourably disposed to the application as he felt that the applicant had not been as frank as it should have been to the court. The applicant's predicament, he felt, was due to this lack of frankness. The applicant ought to have made a clean breast of everything as it relates to its witnesses.

6. In my view, the learned judge fell into error by adopting this approach to the application. He had already given a command for a new trial date to be fixed. That had been complied with and a date set for March, 2009. He was simply being asked to replace the stipulation for a witness statement by a witness summary. Rule 29.6(1) of the Civil Procedure Rules, 2002, provides that a party who is required to serve a witness statement but is unable to obtain same, may serve a witness summary instead. In that situation, the party must certify the reason why the statement could not be obtained. The summary must

contain the name and address of the witness, and must be served within the period in which the statement would have been served.

7. In the circumstances, rule 29.6(1) was applicable. The learned judge ought to have been looking ahead, not backward. A trial date having been fixed, the focus ought to have been on facilitating the trial. The situation will be certainly different if the trial date arrives and the applicant is unable to proceed. For these brief reasons, therefore, I join with my learned brothers in saying that there is merit in the appeal, and it ought to be allowed.

SMITH, J.A

I have read in draft the judgment of Panton, P. and Cooke J.A. I agree with their reasoning and conclusions. There is nothing further that I wish to add.

COOKE, J.A.

1. Mrs. Benka-Coker, Q.C. the lead counsel for the respondents has submitted that in examining the challenged orders of the court below, this court should be especially mindful that the learned trial judge was exercising his discretion. In this regard she recommend for our consideration the following passage from the judgment of the English Court of Appeal in **Re Jokai Holdings Ltd.** [1993] 1. All E.R. 630 at p. 635 g — h.

> "It is common ground that the judge was right in treating the matter as being within his discretion. As Mr. Chadwick QC, for the bank, has rightly stressed, it follows that this court has no right to intervene and

> substitute its own decision unless in some way the judge misdirected himself with regard to the principles to be applied or, in exercising his discretion, has taken into account matters which he ought not to have done or has failed to take into account matters which he ought to have done, or if the decision of the judge is plainly wrong. Therefore the first, and basic, question is whether the judge erred in one or other of those ways in exercising his discretion."

I accept that formulation as correct.

2. In coming to a resolution in respect of this appeal there are two important factors which must always be kept in focus. The first is:

(a) what was the status of the litigation at the time of the application for court orders?

and secondly,

(b) what was it which was being sought in the application for court orders which was dismissed?

3. As Rules 29.6 (1), (2) and (3) as well as 33.2 (1) of the Civil Procedure Rules 2002 (C.P.R.) are germane to the debate these are now set out.

> "29.6 (1) A party who is —
> (a) required to serve; but
> (b) not able to obtain,
>
> a witness statement may serve a witness summary instead.
>
> (2) That party must certify on the witness summary the reason why a witness statement could not be obtained.
>
> (3) A "**witness summary**" is a summary of —

(a) the evidence, so far as is known, which would otherwise be included in a witness statement; or

(b) if the evidence is not known, the matters about which the party serving the witness summary proposes to question the witness."

Rule 33.2 (1) states:

"33.2 (1) A witness summons is a document issued by the court requiring a witness to attend court or in chambers –

(a) to give evidence; or

(b) to produce documents to the court."

(2) A witness summons must be in form 13.

4. I shall take the background facts from the judgment of Sykes, J.:

"3. The facts that gave rise to the litigation need not be gone into in any great detail because nothing turns on the facts in issue between the parties. Nonetheless a very brief summary is given. The summary for the first claim comes from Eagle's statement of claim. Eagle was a bank licensed to operate in Jamaica. Mr. Y. P. Seaton is the holder of the majority of shares in EarthCrane and SAC [Y.P. Seaton & Associates Company Limited]. Eagle acted as banker for a company known as Jamaica Commodity Trading Company Limited ("JCTC") and an overseas company, Prolacto S.A. It appears that Prolacto shipped quantities of skimmed milk to JCTC. JCTC maintained accounts at Eagle from which moneys would be deducted to pay Prolacto. Mr. Seaton,

EarthCrane and SAC also maintained accounts at Eagle. Eagle alleges that Mr. Y. P. Seaton and SAC were, at all material times, either servants or agents of Prolacto and would give instructions to Eagle on behalf of Prolacto. It alleged that for services provided by Eagle it was entitled to charge JA$1,514,656.00. In error, it is said, this sum was paid to the credit of all three defendants. It is alleged that the defendants were not entitled to any of the money.

4. Eagle further alleges that Prolacto shipped 1879.85 metric tonnes to JCTC. Acting on the instructions of the defendants Eagle paid money out of JCTC's accounts into the defendants' accounts. The sum allegedly paid was US$131,119.54. In respect of another shipment Eagle states that it erroneously paid into the accounts of the defendants moneys from JCTC's account. The sum involved in this alleged error was JA$8,905,408.10.

5. Eagle says that it discovered the error and when this was pointed out to the defendants, they refused to return the money. Eagle responded by debiting JA$15,254,583.69 from the defendants' accounts. This sum represents the total mistaken payments and interest. Eagle claimed the sums mistakenly paid and a declaration that they were entitled to debit the defendants' accounts in the sum of JA$15,254,583.69.

6. In the second claim Mr. Seaton's claim against the bank is simply that he had deposited money in Eagle which refused to pay over the money when asked to do so. He claims the sums deposited, interest on those sums and damages."

RBTT Bank Jamaica Limited acquired the interest of Eagle Commercial Bank.

5. On February 9, 1995 both claims were consolidated. The procedural steps with regard to litigation were then governed by what the learned trial judge described as the "ancien regime". On November 23, 1999 Eagle filed a certificate of readiness for trial and on June 18, 2002 the attorneys for Y.P. Seaton also filed a certificate of readiness. After this, as the learned trial judge observed, there was not much activity in the case. The Civil Procedure Rules 2002 came into operation on January 1, 2003. Accordingly, in accordance with this new regime the consolidated cases had to be subject to a case management conference. Three of the orders made by Donald McIntosh, J. on the 3rd November, 2004 are of relevance.

(1) Filing and exchange of witness statements and expert evidence on or before August 31, 2005.

(2) Pre-trial review on 23rd February, 2007.

(3) Trial before judge alone on 23rd to 27th April, 2007.

On the 23rd February, 2007 at the pre-trial review before Straw, J. the appellant had not filed and served any witness statement or witness summary. The respondents had only partially complied as the witness statement of Y.P. Seaton and Michael Salmon had not been filed or served. The appellant was ordered to comply before April 2, 2007. The pre-trial review was adjourned to the 18th April, 2007. This review was conducted by Cole-Smith, J. At this review the appellant had still not complied with the requirements of filing and exchanging any witness statement. The reasons given in the listing questionnaire were:

> "[d] despite the Claimant/defendant's best efforts since, and prior to, the case management conference to locate potential witnesses to give oral evidence on its behalf the claimant/defendant has been unable to do so. This arise (sic) from the fact that the original claimant/defendant in this matter Eagle Commercial Bank Limited, is now defunct and the whereabouts of all its former employees are not now known to the claimant/defendant."

At this pre-trial review the appellant sought a new trial date which was refused.

6. We now come to April 23, 2007 – the date fixed for trial of the consolidated claims. The learned trial judge described what ensued.

> "On April 23, 2007, the first day of a five day trial, the picture is this: RBTT had not filed any statements or witness summaries. However, no bundles were filed in accordance with the CPR (see rule 39.1) on the morning of the trial. The matter was adjourned to 2:00pm. On the resumption, YP had filed a bundle containing, (a) the pleadings, (b) their witness statements and supplemental witness statements. No agreed or indeed any bundle containing documents to be used at the trial had been filed. The matter was adjourned to April 26, 2007, for the bundle of documents to be filed. On April 23, it was ordered that the bundle of documents were to be filed by 2:00pm on April 26, 2007, if agreed and if there was no agreement each party to file its own bundle of documents. An agreed bundle was filed at 1:45pm on April 16, [sic] 2007. There was still no witness summary or statement from RBTT. In short, on the morning of trial the bank would not have been able to proceed with its case even if documents were agreed because it had no witness. RBTT's position was to apply for an adjournment."

7. The formal order dated 26th April, 2007 consequent on the hearing was as follows:

"1) Time within which Defendants **CLAIM NO. C.L. 1993/E. 083** and the Claimant in **CLAIM NO. C.L. 1993/S. 252** to comply with all Case Management Conference Orders and Orders made on the Pre-Trial Review varied and extended to 30th April 2007.

2) Time within which Claimant in **CLAIM NO. C.L. 1993/E. 083** and the Defendant in **CLAIM NO. C.L. 1993/S 252** to comply with Case Management Conference Orders and Orders made on the Pre-Trial Review varied and extended to 30th April 2007.

3) In respect of **CLAIM NO. C.L. 1993/E. 083** unless the Claimant file and serve a Witness Statement on or before the 30th July 2007 at 3:00p.m. the Claim is struck out and Judgment entered for the [sic] all the Defendants without further order.

4) Trial date to be fixed by the Registrar and the Court advised of that date.

5) Costs to be costs in the claim.

6) Claimant in Claim No. C.L. 1993/E. 083 to prepare, file and serve the Order herein."

8. It would seem to me that it was the absence of an agreed bundle of documents from the parties that occasioned the adjournment of the trial. The trial had been set down for five days. On the 23rd April it was adjourned to the 26th April, for the preparation of an agreed bundle of documents. Thus four of the five days of the allotted time was consumed by that activity. It does not appear that the fact that the appellant had not filed and served the required witness statement was a significant cause (if at all) for the adjournment. There

is no evidence that the appellant did on the morning of trial apply for an adjournment, because of it's difficulty. The learned trial judge in his précis (para. 6 above) did not speak of any ruling on any such application. The chronology of events submitted by the contending parties makes no mention of any such application. The formal order is silent as to that. I therefore have some difficulty in understanding the learned trial judge's statement in the last sentence of his précis (para. 6 above) that "RBTT's position was to apply for an adjournment". Perhaps, in considering the sentence in its entirety what the learned judge meant was RBTT's position would have been to apply for an adjournment. (Emphasis mine)

9. On 26th July, 2007 the appellant filed a Notice of Application for Court Orders. This application sought the following orders:

> "1) That paragraph 3 of the Order of the Honourable Mr. Justice Sykes dated the 26th April 2007 be varied to permit the filing of a Witness Summary and that the Witness Summary of Keith Senior filed on the 25th July 2007 do stand.
>
> 2) That the date for the compliance with the Unless Order of the Honourable Cr. [sic] Justice Sykes be extended.
>
> 3) That in the alternative the Claimant/Defendant, **RBTT BANK JAMAICA LIMITED**, be granted relief from sanction pursuant to PART 26.8 of the Civil Procedure Rules and be permitted to file a Witness Statement in this matter at a time to be fixed by the Court."

On the 1st October, 2007 paragraphs 1 and 2 of the appellant's application was dismissed. It is from this dismissal that this appeal now lies. The learned trial judge declined to consider the relief sought in paragraph 3 as the sanction had not yet been imposed and "logically a person cannot seek relief from something he has not suffered".

10. The appellant's application for court orders was supported by two affidavits of Rose Ann Davis an attorney-at-law and general counsel of the appellant's bank. The first dated 26th July, 2007 recounted the efforts made by the appellant to obtain a witness statement of Keith Senior subsequent to the "unless" order. The latter had been previously the Deputy General Manager of Eagle Commercial Bank. He had prepared the brief to counsel and the documentation which formed the basis of the claim No. L.C.L. 1993/E 083. Various and constant attempts were made to contact Senior and eventually a meeting was arranged for the 7th June, 2007. Senior had indicated that he was willing to execute the requisite witness statement. The witness statement was prepared and personally delivered by Rose Ann Davis to Senior's secretary under confidential cover. At the time of the delivery Senior was in a meeting. The second Davis' affidavit dated 3rd September, 2007 stated that there were continued – but unavailing efforts to communicate with Senior in respect of the execution of the prepared witness statement. On August 3, 2007 Senior indicated that he did not intend to sign a witness statement. In the first affidavit the appellant indicated its intention to file a witness summons under Part 33 of

the C.P.R. to secure the attendance of Mr. Senior as a witness in this matter. This was so if such a step becomes necessary. The second affidavit also spoke to the witness summary of Senior which had been filed on the 25th July, 2007.

11. I would not be able to do justice to the reasoning of the learned trial judge by attempting to summarize it. I therefore reproduce what I consider to be the relevant paragraphs.

> "36. I shall at this stage set out the provisions of rule 29.6 (3) of the CPR relating to witness statements. This is necessary so that the analysis which follows is more intelligible. The rule states:
>
> A "*witness summary*" is a summary of —
>
> a. *the evidence, so far as is known, which would otherwise be included 'in a witness statement; or*
>
> b. *if the evidence is not known, the matters about which the party serving the witness summary proposes to question the witness.* [Emphasis supplied]
>
> 37. I shall also refer to part 33 which makes provision for the summoning of witnesses. Miss Phillips Q.C. placed reliance on this part of the *CPR* to say that if the witness summary filed stands or more time is granted to file a witness statement, the court could issue the summons requiring the proposed witness to attend.
>
> 38. I proceed with the analysis of the relevant evidence regarding witness statements and witness summaries. Miss Rose Ann Davis, one of the attorneys at law employed to the bank, sought to explain why the bank could not have

filed a witness summary prior to April 23, 2007. In her affidavit dated September 18, 2007, she stated that the bank could not have filed a witness summary without first securing the agreement of the witness to attend. She added that the bank could not file a witness statement until there was a clear indication from the proposed witness that he was willing to execute a witness summary (see para. 8).

39. Regrettably, Miss Davis' explanation is at odds with the express and unambiguous position stated in rule 29.6 (3) (b) cited above and with part 33. Rule 29.6 (3) contemplates at least two situations. The first situation is that where the evidence is known, that is to say, the witness was interviewed but for some reason is unable to sign the witness statement. The second arises when the witness might not have been interviewed and his proposed evidence is unknown but there is some indication that the witness can speak to some aspect of the case. The difference in wording between paragraphs (a) and (b) of rule 29.6 (3) is deliberate. Paragraph (b) seems to contemplate that the witness may not be available until trial. This explains why the paragraph uses the expression "proposes to question the witness". The questioning here could not be referring to the interviewing process in counsel's chambers. It must be the trial. When coupled with part 33, the CPR makes clear provision for difficult witnesses.

40. The conclusion in the immediately preceding paragraph is supported by the requirement that the party filing a witness summary "must [not may] certify on the witness summary why a witness statement could not be obtained" (see rule 29.6 (2)). The rationale is plain. The court and other parties at the pre-trial review, or trial where there is no pre-trial review, would immediately be put on notice that the witness has not vouched for the proposed

evidence and the reasons for that. The court is then placed in a position to deal with the case justly by making the necessary and appropriate orders to dispose of the case. I do not see any reason which prevented RBTT, well before the pre-trial review dates, from filing a witness summary of the proposed witness and indicating on it, as required by the rules why the witness has not signed. RBTT could have indicated that it was making efforts to find him but to the best of its knowledge what is contained in the summary are matter [sic] to which he can speak and about which then [sic] intend to ask him.

41. Orders directed to securing the attendance of the witness could have been made. For example, orders directing that advertisements be placed in the press which could be appropriately worded so as not to convey the impression that the witness is hiding from the court or the litigant. It may be that the witness might be in Jamaica but did not know he was required to give evidence. In short, the rules do not prevent a witness summary being filed unless the witness had indicated that he is willing to come forward. Unfortunately, I am unable to accept RBTT's explanation as satisfactory explanation for failing to file a witness summary in the time stated, at the case management conference and the pre-trial reviews, to file the witness statement. To put it bluntly, the CPR provided a solution to these difficulties being raised by Miss Davis and should have been utilised.

42. Added to this apparent failure to follow the rules on witness statements there is the apparent non-disclosure of the difficulties with the witnesses to her Ladyship Straw J. at the first pre-trial review. There is no evidence that the bank informed Donald McIntosh J. that it [sic] not just a problem with witnesses but no witness at all. This looks like a breach of duty

of all litigants to assist the court in furthering the overriding objective. Had this been known, it is extremely unlikely that his Lordship would have set aside five days for trial. The courts' resources could have been allocated to other litigants who could have appropriately utilised the five days set aside in April 2007 for the hearing of this matter. I make this comment in light of the bank's admission in its listing questionnaire that it was unable to since, and prior to, the case management conference to locate potential witnesses to give oral evidence on its behalf."

43. The bank has now filed a witness summary in an envelope and deposited it with the Registrar of the Supreme Court. From the affidavits filed on behalf of the bank, the potential witness, if anything has stated that he has no intention of coming to court or signing any witness statement. What this means is that the bank without the fulfillment of what it considered to be its own self-imposed necessary condition has found it possible to file a witness summary. Thus the bank's conduct in the final analysis is not consistent with its stated position. Therefore if the bank found it possible to file a witness statement in July 2007 without any assurance of a witness, why was this not done before?

44. My view was confirmed during the hearing of the application. Miss Phillips Q.C. was at pains to point out that all the information that led the bank to file the claim in the first instance came from the proposed witness. The claim was filed fourteen years ago.

45. It may be said that on June 7, 2007, when the witness indicated that he would sign a witness statement this would have enabled the bank to file a witness summary should he fail to sign the witness statement because the bank would now have been assured that the witness is now

willing to come forward. Thus my conclusion above is set at nought. What the evidence shows is that it was after he made this indication that the witness statement was sent to him. It was sent to him on June 7, 2007. He declined to sign and has still not signed. It means that when the clock was running down to July 30, 2007, when the unless order would take affect the bank knew that it had an unwilling witness. The bank knew that it had a witness who was not happy about signing the witness statement. All this was evident from his conduct. Thus when the witness summary was filed on July 25, 2007, the bank was able to do this without the assurance of a witness. All this reinforces by conclusion that I am not satisfied that the bank could not have filed a witness summary to meet the pre-trial reviews before Straw and Cole-Smith JJ.

...

59. I am concerned that this case, if the application succeeds, would have been allocated ten trial days, two pre-trial reviews and one case management in circumstances where the courts resources could have been better utilized not only in respect of other litigants but also in respect of this particular case. As stated earlier the bank's listing questionnaire confessed to its inability to find witnesses before the case management conference. The apparent omission to bring this very important fact to the attention of the judge prevented the court from managing the case in a more cost efficient manner. The lack of information caused the court to set a trial date nearly three years into the future when the bank apparently knew that it would have severe difficulty producing a witness. It is one thing for a litigant to have witnesses at the time of the case management and they are unavailable at trial but quite another to know that he has no witnesses and has no realistic

hope at the time of the case management conference of finding any but nonetheless allows the court to proceed on the basis that witnesses were indeed available and that the trial needed five days. Behaving in this matter[sic] amounts to a breach of the express obligation on litigants to assist the court in further[sic] the overriding objective (see rule 1.3). In these circumstance silence is not golden. This non-disclosure continued before Straw J.

60. What then is the appropriate sanction? After much reflection I have come to the conclusion that the most appropriate response is to allow the unless order to take effect. In addressing the matter mentioned in rule 1.1 (2) (a) I conclude that much expense could have been saved had the court been told about the witness problem from 2004 at the case management conference. The other litigants in the case would not have been put through the expense of retaining counsel for an addition [sic] two and one half years. The problem in this case did not arise because of the complexity. The case is an important one but that does not mean that the apparent withholding of information is justified.

61. Rule 1.3 imposes a high duty on litigants. The rule states: It is the duty of the parties to help the court to further the overriding objective. This means that litigants are under an obligation to disclose information that would assist the court in managing the case justly. I am obviously not referring to matters covered by legal professional privilege. Regardless of the extent of the duty, it seems to me that if there is a serious problem with the availability of witnesses this cannot be privileged or confidential information. The court ought to be informed so that it can act appropriately. It could be said that the unless order has produced the desired result, that is to say, the

defaulting party has been making every effort to comply with the order. The fact that the next trial date is in 2009 is no answer to the point. Why should the other litigants be exposed to an additional two years cost when at this point the proposed witness has declined to commit his proposed testimony to a witness statement? How can it be just to endure a further two years of expensive litigation after the ordeal of a fourteen year wait? The witness may not respond to the summons and if he comes he may prove quite uncooperative. If he turns up on the new trial dates and gives evidence, the other litigants may be hearing testimony that may depart from the witness summary. In the event that the evidence does depart from the summary the other parties would need time to digest his evidence — a development which points to more costs.

62. At the time when the unless order was made I had not appreciated how long this witness problem existed and how much of the courts' resources were being allocated on a case which undoubtedly would have been dealt with differently if the full extent of the problem had been understood. I do not believe that had Donald McIntosh, Straw and Cole-Smith JJ. understood that RBTT's problem was not so much tardiness in getting the statement as it was the lack of witnesses that they would have dealt with the matter in the way that they did. I am not convinced that any judge being told by a litigant that there is really no witness to prove the case would have allocated pre-trial review dates and five days for trial. What quite likely would have happened was that RBTT would have been given sufficient time to locate a witness and any trial date set would have been in respect of the claim by Mr. Y.P. Seaton alone. If RBTT could not find a witness after a reasonable time in all probability the claim would have been dismissed because of the inability to prove what was being alleged

against the defendants. But to have the court acting on the premise that witnesses are available is something that cannot be condoned.

63. One of the main objectives of the new rules is that litigation should be undertaken with proper expedition. The bank failed to assist in this process. I do not think that granting the application and making a costs order against the bank is the correct response. The court does not wish to encourage other litigants to engage in this kind of behaviour, that is to say, attend a case management conference and a pre-trial review with knowledge that there are no witnesses to prosecute the claim but nonetheless behave as if the claim can be effectively prosecuted. The better route is candour with the court and then the problem can be addressed. The aim of case management is to manage the particular case properly. The rules do not contemplate that all cases are managed in the same way. The rules presuppose that within the broad framework of the CPR, individual cases will be managed in a manner appropriate for the issues, complexity, money involved and making sure that it does not consume more resources than is necessary. Included in this is not imposing on other litigants high costs for an indefinite period.

64. In the final analysis, we have two competing values. The right of a litigant to pursue his claim as best he sees fit on the one hand and the duty of the court to see that is [sic] resources and processes are not squandered. The right of the litigant is circumscribed by the express duty on him to assist the court to further the overriding objective. Included in that duty is an affirmative obligation to prevent the courts' resources being misallocated and not depriving other litigants of their day in court by withholding vital information and so

> causing the court to allocate time to [sic] case which has serious impediments on the way to the commencement of the trial when other cases could have been set down in the trial time allocated to the particular case. It is my view that the omission by the bank is sufficiently serious to have its claim struck out for failure to comply with the unless order and judgment entered for the defendants in claim No. E 083/1993. The bank caused the court to act on the premise that witnesses were available from the time of the case management conference and would have been available at the trial dates. For how long before the case management conference in 2004 did this problem exist? If this problem with witnesses existed since the demise of Eagle on what basis did the bank file a certificate of readiness in 2002?"

12. I find it curious that the learned trial judge in para. 36 of his judgment appears to have considered 29.6 (3) of the C.P.R. as the foundation of his analysis which was to follow "relating to witness statements". In fact Part 29.6 pertains to witness summaries (see para. 3 above) rather than to witness statements. It is my view that the most important aspect of Part 29.6 is 29.6 (i) which authorizes the use of a witness summary. This Rule, 29.6 (i) does not need the intervention of the court before a party serves "a witness summary instead" of a witness statement. Rule 29.6 (i) pertains to a party who is "required to serve" a witness statement. There are no words of qualification in respect of the word "required". It would seem to me, therefore, that a party is "required to serve" a witness statement within the specific time limit, when such an obligation is imposed on that party. I am inclined to the view that the

"unless" order of Sykes, J. in para. 3 of the formal order dated 26th April, 2007 was a requirement within 29.6 (i) (a) of the C.P.R. If this is correct the "unless order" could have been satisfied by the appellant serving the witness summary of Senior – in which case the application for court orders would have been quite unnecessary. However, as there were no submissions on this issue, despite my inclination I am somewhat reluctant to be definitive. What is clear is that the learned trial judge did not take into consideration Rule 29.6 (i).

13. It was quite irrelevant for the learned trial judge in view of the application before the court, to have embarked on an unwarranted rationale of the definition of what constitutes a witness summary (Para. 39). Rule 29.6 (3) states simply and in simple terms what should guide a party who is desirous of utilizing a witness summary. At the time of the hearing of the application a witness summary of Senior was in existence. It had been lodged with the registry in a sealed envelope, purportedly pursuant to Rule 29.7 of the C.P.R. That rule does not make provision for such lodgment. However, be that as it may, that summary was before the court. I have perused it. It is in accordance with Rule 29.3 (a) and there was the requisite certification pursuant to Rule 29.6 (2). It is indeed true that in a third affidavit of Rose Ann Davis dated 18th September, 2007 she stated as the learned trial judge said the reason why a witness summary was not filed before. This para. 8 was in response to paras. 7 and 9 of an affidavit filed on behalf of the respondents in opposition to the appellant's application for court orders which stated that a witness summary should have

long since been served. I am at a loss to appreciate how it can be said that "Miss Davis explanation (as to why a witness summary had not been served) is at odds with the express and unambiguous position stated in Rule 29.6 (3) (b)" [sic] (para. 39). As already stated the sole value of Rule 26.3 is to say what constitutes a witness summary.

14. In para. 40 of his judgment the learned trial judge made two points.

> (a) "I do not see any reason which prevented RBTT, well before the pre-trial review dated, from filing a witness summary ...;"
>
> and
>
> (b) "If the witness summary had been filed before the pre-trial review dates then the court would have been placed in a position to deal with the case justly by making the necessary and appropriate orders to dispose of the case..."

In para. 41 the learned judge suggested orders which presumably the pre-trial review court could have made if a witness summary had been filed.

15. In respect of 14 (a) above the view expressed does seem somewhat inconsistent with the "unless order". When that order was made the appellant had been blatantly delinquent as regards the requirement as to the filing and service of the witness statement. Nonetheless, the court extended time to remedy that situation. Rule 29.6 (i) permits a party to utilize a witness summary if such party is not able to obtain a witness statement. In coming to this view the learned trial judge appears to have neglected this Rule. If there was

forbearance as to the requirement to file and serve the witness statement, why should not the same apply to a witness summary? More importantly, the approach of the learned judge would preclude the appellant from the benefit of a provision provided for it by the C.P.R.

16. In respect of 14 (b) above I am unaware of any Rule in the C.P.R. which speaks to the involvement of the court in the management of cases to act on its own initiative in making the suggested orders contained in para. 41 of his judgment. I fear, that, here the learned trial judge has wandered out on the proverbial limb.

17. In para. 42 of his judgment the learned trial judge is very concerned that because of the non-disclosure by the appellant of its difficulties, the court mistakenly set a trial date which allotted five days. The aspect of non-disclosure has been hotly contested. It is unnecessary for me to resolve this. At the time when the court heard the appellant's application a new trial date of the 3rd March, 2009 had already been set. That was the status of the litigation in respect of a hearing date. It means therefore that at this stage the court should not be casting its eyes backward. The future beckoned. In my view the court below should have concentrated on the application before it. Alas, it seemed it was more interested in punishing the appellant for its past delinquency. The application ought to have been determined, within the context of the circumstances which then obtained.

18. Paras. 59 - 64 of the judgment of the court below in general terms allude to issues which have already attracted my attention. In para. 61 the learned judge worries that to grant the application would expose the litigants to an additional two years of costs. This cannot be a legitimate consideration in this case, if in law, the appellant was entitled to succeed in its application. The concluding part of this paragraph is to say the least on excursion in the realm of speculation. If it is open to a party to invoke Rule 33.2 of the C.P.R. why should a court express views to the effect that such an exercise might well be (a) ineffective and (b) inimical to the efficient conduct of the trial?

19. I now, return to the opening paragraph of this judgment, which postulated guidelines which should inform the approach of an appellate court in the scrutiny of the discretion exercised by the learned trial judge in the court below. By my analysis of the judgment of Sykes, J. I believe I have demonstrated that this is a case that calls for our intervention. I will summarise my reasons for this view.

(i) The learned trial judge failed to properly appreciate the status of the litigation at the time of the consideration of the application for court orders.

(ii) In considering the application before the court, the learned trial judge failed to take into account Rule 29.6 (i) of the C.P.R. Regrettably he chose to focus on Rule 29.6 (3) as to which I have already commented.

(iii) The learned trial judge prematurely envisaged what would be the likely outcome of a successful application under Rule 33.2 (1).

(iv) The tenor of the judgment indicates that the learned trial judge appeared to be directing his mind to the issue of whether or not the appellant's case should be struck out (see particularly para. 64 of the judgment). There was no application before the court for any such relief.

(v) The learned trial judge failed to properly consider the application before him within the ambit of his judgment he gave scant regard to the substance of the affidavit of Rose Davis.

I would, as indicated, allow the appeal.

20. Before I depart from this case, I wish to say, that there were submissions as to the overriding objective of the C.P.R. and various rules calculated to achieve the aim of dealing justly with cases. The learned trial judge also dealt with this. However, in the instant case the central issue was whether or not the learned trial judge properly exercised his discretion. If he did not, it is impossible to say that the case was dealt with justly. I do not therefore think it is necessary for me in the context of this case to decide other than the question as to the proper exercise of the discretion of the learned trial judge. This has been the focus of my attention, and as such I think it is only those Rules of the C.P.R. which directly related to this critical issue that should be paramount in my consideration. That has been my approach. There were a number of grounds of appeal. I have not dealt with them seriatim as these grounds all challenged the correctness of the exercise of the discretion of the court below.

21. Finally, I would grant paragraphs (I) (II) and (IV) of the order sought by the appellant. These are:

> "I. That the Order of the Honourable Mr. Justice Sykes dated the 1st day of October 2007 be set aside and that the Appellant's claim in **CLAIM NO. C.L. 1993/E. 083** be restored, consolidated with **CLAIM NO. C.L. 1993/S.252**.
>
> II. That the trial date of 9th March 2009 be restored or that any earlier date assigned to this matter by the Registrar of the Supreme Court be a date in the consolidated action.
>
> III. ...
>
> IV. That the costs of this Appeal be that of the Appellant."

PANTON, P.

ORDER

1. The appeal is allowed.

2. The order of the Honourable Mr. Justice Sykes dated the 1st October 2007 is set aside.

3. The appellant's claim in the Claim No. CL 1993/E 083 is restored; consolidated with claim No. CL 1993/S252.

4. The trial date of 2nd March 2009 is restored; any earlier date assigned to this matter by the Registrar of the Supreme Court is to be a date in the consolidated action.

5. The costs of the appeal are to be the appellant's, such costs to be taxed if not agreed.