[2023] JMSC CIV.96

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2015HCV01614

BETWEEN	**EDDIE RICKETTS**	**RESPONDENT/CLAIMANT**
AND	**ASHWORTH ROSE**	**APPLICANT/1ST RESPONDENT**
AND	**CHADWICK STRAKER**	**2ND RESPONDENT**

IN CHAMBERS

Ms. Khadine Dixon instructed by Dixon and Associates Legal Practice for the Respondent/Claimant

Mr. Chevɇnt S.L. Hamilton Instructed by Samuda & Johnson for the Applicant/Defendant

CIVIL PROCEDURE: Application for an Extension of time to file Points of Dispute, Rules 1.1(2), 10.3, 26.1, 26.9 and 65.20 considered.

Heard: May 4, 2023, and June 2, 2023.

O. SMITH J., AG

[1] This is an application by the 1st Defendant for an Extension of Time to file Points of Dispute. The applicant seeks the following orders:

(1) The Default Costs Certificate issued in favour of the Claimant and all subsequent proceedings be set aside.

(2) Points of dispute filed herein on the 8th day of January 2020 be allowed to stand as filed and served within time.

(3) The cost of this application be the claimants to be taxed if not agreed;

[2] The grounds on which the applicant is seeking the orders are as follows:

1. CPR rule 65.22 permits the paying party, in this case the first defendant, to apply to set aside a default cost certificate.
2. The points of dispute were filed and served prior to the default cost certificate being issued.
3. The delay filing the points of dispute was not the fault of the first defendant but was a result of further instructions being taken by the Applicantôs insurers.
4. The delay was remedied as soon as the 1st Defendantôs attorneys at law became aware of it.
5. The costs claimed are exorbitant and unreasonable having regard to the nature of the claim.
6. The Points of Dispute were filed on March 19, 2015, and amended points of dispute filed on May 5, 2015.
7. The courtôs override and objective will be advanced by the making of this order.

[3] The application is supported by an affidavit from Roydine K. Graham. She's an Associate Attorney at Law with the law firm Samuda & Johnson Attorneys at law, attorneys representing the 1st Defendant. Ms. Graham deponed that on December 31, 2019, her firm received instructions from the 1st Defendants insurers, Advantage General Insurance Company Limited. She indicated that they informed her that they were in receipt of the Claimantôs Bill of Cost and that it contained items which were exorbitant, unreasonable and inflated. Her firm was then instructed to contest the Claimantôs Bill of Cost.

[4] Her affidavit goes on to state that Mr. Christopher Dawson, a Bearer, was instructed to conduct a search of the Supreme Court Registry to ascertain whether a Default Cost Certificate had been obtained by the claimant. The search revealed that no further documents had been filed up to the date of the search save and accept the Claimantôs Bill of Cost and supporting documents. As a consequence,

the firm filed and served points of dispute on the claimantôs attorney on January 8, 2020.

[5] She deponed that the late filing of the Applicants Points of Dispute was not the fault of her client but was as a result of his insurers taking further instructions and completing their internal checks. She went on to say that the failure to file the points of dispute was unintentional and they remedied the matter as soon as it came to their attention. According to Ms. Graham, the current claim before the court was a simple matter which was resolved at the stage of Assessment for Damages, she highlighted that it did not go to trial however the bill of course presented by the claimant it was exorbitant and unreasonable in the circumstances.

[6] Miss Graham further averred that the prejudice to her client would be far greater than any prejudice the claimant may suffer if she is not permitted to file the Points of Dispute.

BACKGROUND

[7] The Claim Form and Particulars of Claim was filed on March 13, 2015. It is a claim for damages for personal injuries arising out of a motor vehicle accident that occurred between the parties on April 9, 2009, along Melrose Hill in the parish of Manchester.

[8] An Affidavit of Service was filed on March 27, 2019, by the Claimant. It indicated that the Claim Form and Particulars of Claim along with the Prescribed Notes and other documents were served on the 1st and 2nd Defendants at stated address in Gregory Park, St. Catherine on March 23, 2015.

[9] No Acknowledgement of Service or Defence having been filed within the stipulated time, the Claimant filed a Request for Judgment in Default on May 20, 2015. This was granted on even date with damages to be assessed and costs to be taxed.

[10] On June 19, 2017, another Affidavit of Service was filed on behalf of the Claimants indicating that the 1st and 2nd Defendants were served by Registered Post to their

Gregory Park address on June 9, 2017, with the Interlocutory Judgment and Notice of Assessment of Damages.

[11] Judgment in Default having been entered on May 20, 2015. The Claimant filed an Amended Particulars of Claim on June 20, 2017. An Affidavit of Service filed on June 23, 2017, indicates that on June 20, 2017, the 1st and 2nd Defendants were again served by Registered Post at the Gregory Park address, with the Amended Particulars of Claim, Notice to Tender into Evidence Hearsay Statements in a Document and Witness Statement.

[12] Assessment of Damages was completed on July 20, 2017. General Damages was awarded in the sum of $3,750,000.00 with interest of 3% from March 23, 2015, to July 20, 2017. Special Damages were awarded in the sum of $51,000.00 with interest of 3% from April 9, 2009, to July 20, 2017. Cost was ordered agreed or taxed.

[13] The Claimant filed his Bill of Costs on June 24, 2019, and Notice of Taxation on June 24, 2019. However, on this occasion, the Notice of Taxation was addressed to the Defendants, c/o Advantage General Insurance Company Limited and served them on Advantage General on July 25, 2019.

[14] For the first time since the commencement of the claim in 2015, the defendants showed proof of life as Points of Dispute were filed on behalf of the 1st Defendant on January 9, 2020.

SUBMISSIONS

[15] There is no issue that the Claimantôs Attorney served the Claimantôs Bill of Cost on Advantage General Insurance Company Limited on July 25, 2019. The reasons advanced for the delay did not go beyond those stated in the affidavit of Roydine Graham.

[16] The Applicant/1st Defendant identified two issues: Whether there is a clearly articulated dispute about the costs sought and whether there is a realistic prospect of successfully disputing the Claimantôs Bill of Costs.

[17] In relation to the first issue, it was argued that the disputed item is clearly highlighted and the basis for the dispute is also set out. Counsel submitted that the basis for the dispute is one of merit. They further argued that the Bill of Cost was exorbitant and unreasonable in the circumstances of the case having regard to the length of time taken to complete each itemized activity. Moreover, the claim was not a complex one given the nature of the claim and the fact that the claim was resolved at Assessment of Damages. Counsel further argued that some items were duplicitous and unnecessary.

[18] In relation to the second issue counsel argued, placing reliance on **Swain v Hillman** [2001] 1 All ER 91, that the Points of Dispute is of merit and as such should be subjected to analysis. Counsel submitted that the fact that one attorney charged more than another for perusing the same document could amount to a duplication. See **Harold Brady v The General Legal Council** [2012] JMCA App 40. On that basis he concluded that the 1st Defendant has a realistic prospect of successfully disputing the Claimants Bill of Cost. The question of whether costs are reasonable must benefit from closer assessment at Taxation.

[19] Counsel also argued that counsel representing the defendant fell within Band B of the Practice Directions on the Assessment of Costs which indicates attorneyôs fees for attorneys above five years but under 10 range from $16,000.00 to $25,000.00 per hour. Counsel was of the view that $25,000.00 was the higher end of the spectrum and the claimantôs attorney ought to have charged fees at the lower end of the scale of $16,000 per hour.

The Respondent/Claimant

[20] Counsel submitted that the claimant attempted to agree costs with the Applicant/1st Defendants insurers without success. This led to the filing of their Bill of Cost which

they in turn served on the 1st Defendants who failed to file their Points of Dispute within the stipulated time. Counsel identified five issues:

i) Does the Applicant/1st Defendant have a good reason for not filing their points of dispute?

ii) What constitutes a good reason?

iii) Was the application made promptly?

iv) Is there a clearly articulated dispute about the costs sought?

v) Is there a realistic prospect of the Applicant/1st Defendant successfully disputing the bill of costs.

i) Does the Applicant/1st Defendant have a good reason for not filing their points of dispute?

[21] Counsel cited the case of **Henlin Gibson Henlin (A Firm) and Calvin Green v Lilieth Turnquest** [2015] JMCA App 54 for its definition of good reason. In that case WilliamsôJA (Ag) (as he then was) examined how ógood reasonôwas defined in the case of **Kleinwort Benson Ltd. v Barbrack Ltd and other appeals; The Myrto (No 3.)** [1987] 2 All ER 289. At page 300 of **Kleinwort**, Lord Brandon stated that,

> *"The question then arises as to what kind of matters can properly be regarded as amounting to 'good reason'. The answer is, I think that it is not possible to define or circumscribe the scope of that expression. Whether there is or is not good reason in any particular case must depend on all the circumstances of that case, and must therefore be left to the judgment of the Judge…"*

[22] On the matter of delay the case of **CVM Television Limited v Tewarie** SCCA No. 46/2003, delivered on May 11, 2005, was relied on for its treatment of delay in the filing and serving of Skeleton Arguments within the prescribed time. Harrison J at page 7 opined.

> *"In the instant case, although the reason given for the delay, namely: 'due to oversight and the heavy work schedule…' was good but not altogether adequate, it is not entirely nugatory."*

[23] They also relied on the case of **Canute Sadler & Michelle Sadler v Derrick Michael Thompson and Lori-Ann Thompson** Claim No. [2019] JMSC Civ 11 for the position that the Court of Appeal is now of the view that oversight and heavy workload is not a good explanation for non-compliance with the orders and rules of the court.

[24] The case of **Advantage General Insurance Company Limited (Formerly United General Insurance Company Limited) v Marilyn Hamilton** [2019] JMCA App 29, was cited by counsel for its position that an Application to set aside a Default Cost Certificate was similar in nature to an Application for Relief from Sanctions.

[25] In that vein counsel argued that the reasons proffered by Ms. Graham were tenuous and could not be deemed as good or satisfactory for the delay particularly since Advantage General had already paid out the judgment sum and all that remained was the issue of cost. Advantage General has a number of attorneys in their employ and any one of them could have filed the points of dispute within the relevant time period. Nothing in the Affidavit of Ms. Graham explains why the points of dispute were not filed in time.

iv) Is there a clearly articulated dispute about the costs sought?

vi) Is there a realistic prospect of the Applicant/1st Defendant successfully disputing the bill of costs.

[26] Counsel was of the view that the approach of the court when dealing with applications for extension of time should be adopted to deal with the current application. She argued that rules of court providing a timetable for the conduct of litigation, must, prima facie, be obeyed,

[27] Where there has been non-compliance with the timetable, the Court has a discretion to extend time. However, in exercising its discretion, the court will consider-

i) The length of delay

ii) The reasons for the delay

iii) Whether there is an arguable case for an appeal and;

iv) The degree of prejudice to the other parties if time is extended.

[28] She cited the case **Devon Davis v Karen Marajah** [2019] JMSC Civ 7 which approved the case of **Strachan v The Gleaner Company limited and Dudley Stokes, Motion No. 12/1999** delivered on December 6, 1999.

[29] However, counsel went on to cite **Fiesta Jamaica Limited v National Water Commission** [2010] JMCA Civ 4 which relied on the case of **Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd and Others** [2001] EWHC Ch 456 which states that the court should no longer apply a hard and fast rule when considering an application for extension of time. Rather, the case encouraged the courts to look foremost at the justice of the case. The other factors to be considered are the length of the delay, the explanation for the delay, the prejudice to the other party, the merits of the appeal, the effect of the delay on public administration, the importance of compliance with time limits bearing in mind that they were to be observed and the resources of the parties which might come up, in particular be relevant to the question of prejudice.

[30] Counsel submitted that if the application was granted this would prevent the claimant from taking steps to have the default cost certificate entered and argued that compensation of cost would not be adequate. See **Attorney General of Jamaica v Roshane Dixon and Sheldon Dockery** [2013] JMSC Civ 23.

[31] They also contended that the applicant's Points of Dispute did not clearly articulate a dispute and questioned the appropriateness of using the term "excessive" as it did not align with the defined meaning of clearly articulated points of dispute.

[32] The issues to be considered are similar to those examined when dealing with an application for an extension of time. They are stated at paragraphs 27 and 29.

THE LAW

[33] Rule 65.20 sets out the consequences for not filing Points of Dispute within the stipulated time. It states that:

> *(1) The paying party and any other party to the taxation proceedings may dispute any item in the bill of costs by filing points of dispute and serving a copy on -*
>
> *(a) The receiving party; and*
>
> *(b) Every other party to the taxation proceedings.*
>
> *(2) Points of dispute must -*
>
> *(a) Identify each item in the bill of costs which is disputed;*
>
> *(b) State the reasons for the objection; and*
>
> *(c) State the amount (if any) which the party serving the points of dispute considers should be allowed on taxation in respect of that item.*
>
> *(3) The period for filing and serving points of dispute is 28 days after the date of service of the copy bill in accordance with paragraph (1).*
>
> *(4) If a party files and serves points of dispute after the period set out in paragraph (3), that party may not be heard further in the taxation proceedings unless the registrar gives permission.*
>
> *(5) The receiving party may file a request for a default costs certificate if -*
>
> *(a) The period set out in paragraph (3) for serving points of dispute has expired; and*
>
> *(b) No points of dispute have been served on the receiving party.*

> *(6) If any party (including the paying party) serves points of dispute before the issue of a default costs certificate the registrar may not issue the default costs certificate.*

[34] Rattray J at paragraph 8 of his decision in **Canute Sadler v Derrick Michael Thompson** examined the judgment of Brooks JA, in the Court of Appeal decision of **Rodney Ramazan and Ocean Faith NV v Owners of Motor Vessel (CFS Pamplona)** [2012] JMCA App 37, as follows:

> *"[8] …an Application to set aside a Default Costs Certificate was similar in nature - 5 - to an Application for Relief from Sanction. The learned Judge of Appeal at paragraph 14 expressed the position as follows: -*
>
> *"I find also that rule 2.20(4) of the CAR which requires a consideration of the principles of relief from sanctions applies in these circumstances. The rule states:"*
>
> *(4) CPR rule 26.8 (relief from sanctions) applies to any application for relief."*
>
> *It would seem that an application to set aside a default costs certificate easily qualifies as an application for relief. In assessing the instant case I shall use the benchmark set out in rule 26.8, albeit in a somewhat adjusted order."[Emphasis supplied]"*

[35] This case clearly does not concern an application to set aside a Default Cost Certificate. Although one was filed it was never signed by the Registrar as the filing of the 1st Defendants Points of Dispute effectively stayed the hand of the registrar in accordance with Rule 65.20 (6) of the CPR. The provisions of Rule 26.8 of the CPR therefore do not apply.

[36] I see the late filing of the 1st Defendants Points of Dispute as non-compliance with the rules of the court. The CPR at rule 10.3 deals with the time period for filing a defence and stipulates what a defendant can do should he not comply with the rule.

> *(1) The general rule is that the period for filing a defence is the period of 42 days after the date of service of the claim form.*
>
> *(9) The defendant may apply for an order extending the time for filing a defence.*

[37] Rule 26.1 of the CPR addresses the courtôs general powers of management. Rule 26.1 (1) states that:

> *(1) The list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or by any enactment*
>
> *(2) Except where these Rules provide otherwise, the court may -*
>
> *(a) …*
>
> *(b) …;*
>
> *(c) Extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed;*

[38] Rule 26.9 gives the court the general power to rectify matters concerning errors in procedure or failure to comply with a rule, order or practice direction. It states that:

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

[39] In considering applications under Rule 26 of the CPR the court is asked to do a balancing act and must take into consideration the overriding objective in order to deal with cases justly.

[40] Rule 1.1(2) explains what dealing justly with a case means:

> *"Dealing justly with a case includes-*
>
> *(a) Ensuring, so far as is practicable, that the parties are on an equal footing and are not prejudiced by their financial position;*
>
> *(b) Saving expense;*
>
> *(c) Dealing with it in ways which take into consideration-*
>
> *(i) The amount of money involved;*
>
> *(ii) The importance of the case;*
>
> *(iii) The complexity of the issues; and*
>
> *(iv) The financial position of each party;*
>
> *(d) Ensuring that it is dealt with expeditiously and fairly; and*
>
> *(e) Allotting to it an appropriate share of the court's recourses, while taking into account the need to allot resources to other cases."*

[41] In the Supreme Court decision of **Raymond Lewis v Dr. Eva Lewis Fuller, Violet Lewis Crutchley and Susan Lewis Forbes** [2016] JMSC Civ. 127, Anderson, K., J had to consider two applications by the 1st and 2nd defendants for extension of time to file affidavits on which they wished to rely in support of their defence. In so doing he embarked on an examination of the law regarding applications for extension of time. He referred to the Court of Appeal decision of **The Commissioner of Lands & Homeway Foods Ltd. & Stephanie Muir** [2016] JMCA Civ. 21 and expressed the view that the Court of Appeal has stated that applications for an extension of time should be dealt with pursuant to rule 26 of the **CPR**. He ultimately granted the applications, despite finding that the delay was lengthy, and that no explanation had been provided. Anderson K., J considered that if the applications were not granted the case would not be determined on its merits. In those circumstances he believed that the defendants should be allowed to ñpursue their defence, as fulsomely as possible.ò The case at bar can be

distinguished. The defendant chose not to participate in the matter at any stage. He tacitly accepted liability and is now seeking after five years to enter the proceedings for the sole purpose of disputing the claimants Bill of Costs.

[42] **In Sandals Royal Management Ltd v Mahoe Bay Co. Ltd** [2019] JMCA App 12 the learned Justice of Appeal considered the cases of **Attorney General v Roshane Dixon and Attorney General v Sheldon Dockery** [2013] JMCA Civ 23. Foster-Pusey JA at paragraph 80 stated that the cases:

> *"…were appeals in which the appellant sought to set aside orders made by the Master in which she refused to grant applications by the appellant to extend time within which to file defences. The principles which apply, where the court is asked to exercise its discretion on an application for an extension of time, involve consideration of the length of the delay, the reasons for the delay, whether there is an arguable case for an appeal, defence, or claim, as the case may be, and the degree of prejudice to the other parties if time is extended. Notwithstanding the absence of a good reason for delay, the court is not bound to reject an application for an extension of time as the overriding principle is that justice should be done."*

Length of the delay.

[43] The claimants Bill of Costs was served on July 25, 2019. The 1st Defendant did not file and serve his Points of Dispute until January 8, 2020, some five months after the date of service and four months after the expiration of time for filing and serving same. This delay in my view is inordinate. In **Raymond Lewis Anderson** k, J found delays of 1 to three months ñengthier than can properly be justified, as a matter of justice.ò

[44] However, that is not determinative of the matter. The delay must be considered based on the circumstances of the case. I take note of the fact that the Claimant waited a little over two months after the expiration of time to file the Default Cost Certificate on November 11, 2019, and has been waiting since then for this final leg of his claim to be brought to an end. The Points of Dispute were filed some two months later in circumstances where the Insurance Company had already paid the judgment sum to the Claimant. The circumstances of this case can be further evaluated in the context of the explanation given by the applicant.

The Explanation for the delay

[45] The only explanation provided for the delay was presented in the affidavit of Roydine Graham. She averred that the delay was not the fault of the 1st Defendant but rather resulted from the insurers taking further instructions and completing their internal checks. The affidavit did not clarify what those further instructions entailed or who was to provide them. This lack of explanation is problematic, particularly considering that the insurers had already paid out the judgment sum and based on submissions by the claimantôs attorney, had been in discussions with her in relation to cost. It remains unclear why further instructions were necessary for the filing of points of dispute when the insurers were aware that costs had to be paid. This attempt to erect a Chinese wall between the insurers and the 1st defendant is quite disingenuous since, as I understand it, the insurers retained the firm of Samuda and Johnson on behalf of the 1st defendant. They are one and the same. The delay of one is the delay of the other. The explanation is wholly inadequate.

Prejudice as a result of the delay.

[46] It is acknowledged that delay can lead to prejudice. The claimant initiated this claim in 2015 and six years later has not been able to see an end to this matter. It must be borne in mind that despite being served with the claim, notices and other documents pertinent to this matter on multiple occasions the 1st defendant neglected to respond or participate, allowing the matter to progress to an

assessment of damages without any input. The Claimant has diligently followed the proper procedure to advance this case through the court. His Bill of Cost was filed and served in July 2019, yet to date the matter remains unresolved, likely resulting in additional costs for the claimant. Counsel has argued that the passage of time between 2020 and 2023 cannot be laid at their feet. I disagree. Had the Points of Dispute been filed within the stipulated time, the issue of costs would have likely, long been determined.

Whether there is an arguable case

[47] The Affidavit of Roydine Graham is the only evidence before the court. It was submitted that the case was a simple one which was resolved at an Assessment of Damages without the claimant having to undergo a trial. In those circumstances it was submitted that the Bill of Cost was exorbitant and unreasonable. I quite agree with counsel that the case was a simple one. However, due to the lack of participation by the 1st Defendant the case dragged on for far longer than necessary. Ms. Graham did not seek to expound on what she meant by ñexorbitant and unreasonableò, while the Points of Dispute only stated that the Bill of Cost is unreasonable and excessive.

[48] More clarity was provided to the court by counselôs submissions. He raised an issue with the claimantôs attorney charging $25,000.00 per hour suggesting that a lower rate of $16,000.00 should have been charged. Practice Direction No. 2 of 2018, paragraphs 13 and 14 sets out the fees and hourly rates that should guide the Court in considering costs. By virtue of paragraph 13, an attorney who has been in the practice for over five years but under 10 years falls into Band B. Attorneys in Band B may charge fees ranging between $16,000.00 to $25,000.00. Counsel for the first defendant conceded that counsel representing the claimant at the time of filing the Bill of Cost had up to nine yearsôexperience. This indicates that the attorney was entitled to charge the fees that she did. Nonetheless, the applicantôs attorney argued that she should have charged fees at the lowest end of the range. He further submitted that certain documents related task, for example

drafting letters and filing out specific forms required by the court need not have detained the claimantôs attorney for more than 10 minutes, 15 minutes at the most making the half an hour she claimed was excessive. This was counselsôcomplaint for each item in the Bill of Cost. He also highlighted that the length of time noted to take instructions was unnecessary.

CONCLUSION

[49] The orders, rules and practice directions of the court are meant to be followed. In this culture of delay which has overtaken the practice in this jurisdiction it is of utmost importance that time limits are complied with. I bear in mind that the rules allow a party to make an application for an extension of time and also gives a judge the authority to extend or shorten timelines. I observe that the 1st defendant has not sought an extension of time but rather, has asked that the Points of Dispute filed on January 8, 2020, be allowed to stand as filed and served within time. I do not see that as detrimental as it is within my authority to treat it as an application for extension.

[50] On the other hand, I have also considered the overriding objective and I am of the view that any further delay in this matter will only incur further cost which would be prejudicial to the respondent who has been engaged in the pursuance of this matter in the court for several years. As I have said the culture of delay/ noncompliance with the rules has now become chronic, more so the belief/attitude that once an application for an extension is made the court will grant it, almost as a matter of course. The result is, that the multiplicity of applications for extension of time and for relief from sanctions have diverted the resources of the court from dealing expeditiously with the substantive matters before it and have also delayed the timely disposal of the cases affected by the applications. The 1st Defendant allowed this matter to make its way through the courts and did not enter an appearance to shorten proceedings in order to save costs. It must be borne in mind that this matter had been before the court for up to five years at the time that the Points of Dispute was filed. The Bill of Costs represents five years of legal fees. I

must ensure that matters brought before this court are dealt with expeditiously and fairly. I do not believe that keeping this matter before the Court because of the singular complaint that the fees charged are excessive is an appropriate use of the courtôs recourses. I also quite agree with counsel for the respondent that a complaint the fees are excessive does not satisfy the requirement of a clearly articulated dispute.

[51] In the circumstances, the Notice of Application for Court Orders filed on January 9, 2020, is denied.

[52] Costs of the application to the Respondent to be taxed if not agreed.

[53] Applicantsôattorney to prepare file and serve the orders herein.

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Opal Smith

Puisne Judge (Ag.)