[2023] JMSC Civ 233

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2017HCV04330

IN THE MATTER of an application by DIANA THORBURN, RACHEL HERNOULD AND BARBARA THORBURN-McINTOSH to exercise jurisdiction over the financial affairs of ERNEST CARROLL THORBURN

AND

IN THE MATTER of Section 29 of the Mental Health Act

Re Diana Thornburn, Rachel Hernould and Barbara Thornburn-McIntosh and Ernest Carrol Thornburn.

Tana'ania Small Davis KC instructed by Livingston Alexander & Levy for the Applicants

Maurice Manning KC and Sherry Ann McGregor Instructed by Nunes, Scholefield, Deleon & Co. for the Interested Party / Respondent

Costs Regime –- Extension of Time to file Points of Dispute - Relief from Sanctions for failure to File Points of Dispute within Time- Default Costs Certificate - Default Judgment - Affidavit of Merit - Civil Procedure Rules - Part 65 - Rule 26.1, Rule 26.2, 26.8 and Rule 26.9

Heard: February 9, 2023, March 29, 2023, July 31, 2023

IN CHAMBERS BY VIDEOCONFERENCE

Master K. Henry-Anderson

Background

[1] In December 2017, the daughters of Ernest Carroll Thorburn, (“the Applicants”) initiated an action under section 29 of the Mental Health Act, seeking a declaration that their father, Mr. Ernest Thorburn, was incapable of managing and administering his financial affairs due to a mental disorder. They also requested an order appointing them to oversee his affairs. Concurrently, they filed an application for an interim injunction to prevent Mr. Thorburn from encashing Jamaica Money Market Brokers (JMMB) bonds.

[2] Mr. Thorburn's sister, Mrs. Pauline Lindo (“the Interested Party/Respondent”), was permitted to intervene in the proceedings and reports were filed from experts from both the Applicants and the Interested Party. Ultimately, the court ordered a joint medical report from Professor Hickling and Professor Abel which showed that Mr. Thorburn had full mental capacity and was capable of making his own decisions, in spite of his underlying mental issues. The Applicants subsequently discontinued their claim.

[3] After the claim was discontinued, the Court heard the parties on the issue of costs and ordered the Applicants to pay costs incurred by the Interested Party from January 10, 2018 to July 4, 2018. These costs were to be taxed if not agreed.

[4] It is the subsequent filing of a Bill of Costs by the Interested Party and the failure to file a Points of Dispute within time, that has led to the hearing of the instant Application for Extension of Time to File Points of Dispute and Relief from sanctions for Failure to Points of Dispute Within Time. Given the nature of how the events unfolded the Court has found it useful to create a timeline of the main events leading up to the hearing of the Application

The Timeline

- **December 12, 2017**: The Applicants, that is, the daughters of Ernest Carroll Thorburn filed a claim under the Mental Health Act, seeking to manage his affairs.

- **January 10, 2018**: The Interested Party was permitted to intervene as an interested party in the proceedings.

- **January 29, 2019**: Notice of Discontinuance was filed by the Applicants.

- **November 8, 2019**: The Court ordered that the Applicants pay the Interested Party's costs for the period between January 10, 2018, and July 4, 2018. However, for the period July 4, 2018 to January 25, 2019 the Applicants and interested party were to bear their own costs.

- **November 2, 2021**: A Bill of Costs seeking $13,895,891.85 in costs and Notice to Serve Points of Dispute was filed and served, by the Interested Party on the Applicants Attorneys – at – Law.

- **November 30, 2021**: This was the deadline for filing of the Points of Dispute and the Applicants' attorneys on that date requested consent to an extension of time until December 7, 2021 from the Interested Party through her attorneys, to file the Points of Dispute. The Interested Party acceded to the request.

- **December 7, 2021**: No points of Dispute were received on the agreed date.

- **December 13, 2021**: The Applicants' Attorneys requested via email a further extension of time until **December 23, 2021** to file the Points of Dispute.

- **December 17, 2021**: The Interested Party's attorney-at - law (Miss McGregor), responded to the request, stating that their instructions did not allow them to grant a further extension. They however urged the Applicants' attorneys to prepare the Points of Dispute as soon as possible but indicated that they were reserving the right to oppose any application for relief.

- **December 17, 2021**: On the said day, the Applicants filed the instant Application along with the 1st Affidavit of Analiese Minott in Support seeking

  (i) an extension of time to file the points of dispute to the Interested Party's Bill of Costs to 21 days from the date of the Order and/or

  (ii) relief from any Sanction for the failure to file their Points of Dispute within the time specified in the Rules.

- **January 25, 2022**: The Respondent having received no further communication from the Claimant filed a Request for Default Costs Certificate.

- **February 25, 2022**: A requisition was received by the Interested Party from the Deputy Registrar indicating that the

Claimants had filed an Application for Relief from Sanctions and as such that would be heard before the request for Default Costs Certificate would be considered.

- **April 13, 2022**: The Interested Party received a copy of the Application without the Affidavit in Support from Ms. Knibb, the Deputy Registrar.

- **August 23, 2022**: The Application and Affidavit in Support were served on the Respondents Attorneys – at – Law and it was set for hearing for 15 minutes.

- **November 3, 2022**: The Application came before me (Master K. Henry Anderson) where the following orders were made:

1. *The hearing of the Notice of Application for Court Orders filed December 17, 2021 is adjourned to February 9, 2023 at 10:00 a.m. for two hours.*

2. *The Applicant is permitted to file and serve an Affidavit in Reply to Affidavit of Michelle Campbell filed on October 27, 2022 on or before November 18, 2022.*

3. *No further Affidavits are to be filed after December 16, 2022 without the leave of the Court.*

4. *Parties are to file and exchange Skeleton Arguments with Authorities in Support on or before January 27, 2023.*

5. *The Applicant is to file a Judge's Bundle and Index on or before February 1, 2023. The Applicant is to serve the Index to the bundle on the Respondent's Attorney – at – Law.*

6. *Costs to be costs in the application.*

7. *The Applicant's Attorneys-at-Law to prepare, file and serve the Formal Order.*

- **November 18, 2022:** The Second Affidavit of Analiese Minott was filed in Support of the Application
- **February 9, 2023**: The matter was part heard and adjourned for a date to be fixed for continuation of the hearing
- **February 15, 2023**: The Applicants filed their Points of Dispute.
- **March 29, 2023**: Oral submissions were completed and the matter was reserved for ruling on the application

[5] On July 31,2023 an Oral Ruling was delivered with a promise to reduce into writing and in fulfilment of that promise I now do so.

APPLICANTS SUBMISSIONS

[6] Both the Applicants and Respondent have filed extensive written submissions and amplified these submissions through oral arguments to aid in the resolution of the matter. I will now proceed to summarize the crucial points of both parties' submissions.

Court's Discretion to hear the Application

[7] The Applicants submitted firstly, that the Court is to look to the Costs Regime as contained within Rules 65.20 (3), (4), (5) and (6) of the Civil Procedure Rules (CPR) as the starting point for its assessment of the matter, that is, the Rules provide that the paying party is given 28 days within which to file a Points of Dispute after the date of service of the Bill of Costs on them. The Applicants also submitted that the Rules further provide that if a party fails to file and serve the Points of Dispute within the 28 days, then that party may not be heard further in the taxation proceedings unless the Registrar gives permission. It is that inability to be heard as of right, in the taxation process, once the Points of Dispute is filed and served outside of the time prescribed by the Rules, which the Applicants state may be viewed as a sanction from which relief is needed. Thereby prompting them to apply for Relief from Sanctions pursuant to Rule

26.8 of the Civil Procedure Rules as an additional or alternative order being sought in their application.

[8] The Applicants then went on to highlight **Rule 65.20(5)** which states that:

> *(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) files points of dispute before the issue of a default costs certificate the registrar may not issue the default costs certificate.*

[9] Counsel for the Applicants further stated that the reason for filing an Application for Extension of Time to Allow for the Filing of a Points of Dispute out of time, even though they had not filed a Points of Dispute at the time of filing the application, is due to a lacuna in the Rules. Specifically, it was argued, that there is no provision in the Costs Regime enabling a party to stop the Registrar or to stay her hand from issuing a Default Costs Certificate under subsection (6), should they anticipate a delay in filing their Points of Dispute. Therefore, without an extension of time being granted, if the points of dispute are not filed and served in a timely manner, and a request is made by the receiving party for the Default Cost Certificate, the paying party is at risk of the potential granting of the Default Costs Certificate.

[10] The Applicants, in support of their assertion that there is a right to apply for an extension of time in these circumstances, even though it is not expressly provided for in Part 65, relied on the general provisions of the Rules as stated in Rules **26.1(1) and 26.1(2)(c)** as well as **26.9(3)** of the CPR. Counsel for the Applicants indicated that they believe that Rule **26.1(2)(c)** applies universally across all sections of the CPR, including Part 65, which pertains to costs.

[11] **Rule 26.1 (2)(c)** provides that under the *Court's general powers of management*

> *(2) Except where these Rules provide otherwise, the Court may -*
>
> *(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.*

[12] Counsel for the Applicant also submitted that the Court also has the power to put things right by virtue of Rule 26.9, **in particular, Rules 26.9 (1), (3) and (4)** which states that:

> "26.9
>
> *(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.*

Principles Governing Extension of Time and Relief from Sanctions

Extension of Time

[13] Applying **Rule 26.1(2)(c)** the Applicants submitted that the Court enjoys wide discretionary powers to grant an extension of time and that though the Civil Procedure Rules do not mention the criteria which ought to guide a Court in deciding whether it ought to grant an extension of time. The Court can be guided by well-established common law principles.

[14] The Applicants referred to the case *of* ***Attorney General v Roshane Dixon and Sheldon Dockery***[1], specifically highlighting the factors that the Court acknowledged should be taken into account when exercising its discretion regarding the grant of an extension of time. It emphasized that the Court should consider:

1) The length of the delay;
2) The reasons for the delay;
3) Whether there is an arguable case for an appeal; and
4) The degree of prejudice to the other parties if the time is extended.

[15] The Court, as emphasized by counsel, also stated in ***Attorney General v Roshane Dixon and Sheldon Dockery*** that even in the absence of a compelling reason for the delay, it is not obligatory for the Court to dismiss an application for an extension of time as the paramount consideration is that justice must prevail.

[16] The Applicants also drew the Court's attention to the case of ***Hamilton v Flemmings and Flemmings***[2], where specific reference was made to a portion of the judgment of Harris JA. This excerpt highlighted the dictum of Lightman J, which outlined the principles governing the circumstances under which an application for an extension of time should be granted under the Rules. In this context, the Court articulated that:

[1] [2013] JMCA Civ 23
[2] [2010] JMCA Civ 19

> ***"In deciding whether an application for extension of time was to succeed under rule 3.1(2) it was no longer sufficient to apply a rigid formula in deciding whether an extension has to be granted. Each application has to be viewed by reference to the criterion of justice.***
>
> ***Among the factors which had to be taken into account were (i) the length of the delay, (ii)the explanation for the delay, (iii)the prejudice to the other party, (iv) the merits of the appeal, (v)the effect of the delay on public administration, (vi) the importance of compliance with time limits bearing in mind that they were there to be observed and (vii) the resources of the parties which might, in particular be relevant to the question of prejudice."***

Counsel then went on to address the issues raised in this case by looking at the above criteria.

Length of Delay

[17] With regards to the issue of the length of the delay after the time allotted for compliance had expired, Counsel submitted that the delay was not inordinate and that in fact, the Applicants had applied for an extension of time promptly, that is, some 17 days after the Points of Dispute had become due. Counsel cited in support the cases *of* ***Attorney-General of Jamaica v Roshane Dixon and Sheldon Dockery***, where the application for an extension of time was made approximately one month after the deadline for filing the defence had expired and that this was not considered by the Court as inordinate and the case of ***Charles E Piper and Associates***[3] where similarly a delay of 50 days in the circumstances was not considered as inordinate.

Reasons for the Delay

[3] [2020] JMSC Civ 211 Para 25

[18] The Applicants' counsel here agreed that the reason for the failure of the Applicants to comply within the requisite time is highly material and as a result some reason must be advanced for the delay. In support of this argument Counsel cited the case of ***Carlton Williams v Veda Mil*ler** [4], where Harris JA emphasized the significance of the reason behind the party's failure to comply within the specified time frame and that it is essential for the party seeking an extension of time to provide a valid explanation for the delay. However, the Court of Appeal went onto state that, in that case, the Court may still even in the absence of a good reason, grant an extension, if it deems it necessary to do so, in the interests of justice.

[19] The explanation provided by the Applicants in the instant case as to why the Points of Dispute was not filed within the time specified by the Rules, is that the Points of Dispute was due towards the end of the court term when all the litigation lawyers in the department were under extreme pressure with back-to-back trials. Further, the Bill of Costs was some 55 pages in length and given its voluminous nature, and the time-consuming checks and cross checks required to prepare the Points of Dispute, it necessitated the hiring of an experienced costs paralegal to review the files and papers in order to properly prepare it and that it was not easy to locate such a person within the available time allotted. It was submitted by Counsel that this explanation was a reasonable one, but that, even if this explanation was not accepted by the Court, since there was no cogent evidence of prejudice to the Interested Party, the Application should be granted.

Prejudice

[20] With regards to the issue of prejudice, the Applicants contended that the Court should consider the overriding objective and the issue of prejudice in the context of the Respondent's conduct in relation to the issue, that is, their actions or inactions as well. They emphasized that the Respondent's actions of delaying for a period of nearly 2 years, in filing the Bill of Costs after the date of

[4] [2012] JMCA App 39

the order granting the receiving party costs, instead of filing within the required three months as prescribed by the Rules should also be taken into account by the Court. The Applicants argued that both parties were in breach of the Rules, and that the Respondent having been so late in filing the Bill of Costs, was unreasonable in their refusal of the further extension of time amounting to a total of a month and their present opposition to the application in the circumstances can only be described as unreasonable as well.

[21] It was further argued that though the Respondent is citing prejudice on behalf of the Interested Party, given her advanced age and the desire by her in the circumstances to conclude the matter within a reasonable time. That it was difficult to see any real prejudice to the Respondent as it was never disputed that the source of funds to finance the Interested Party's case was provided by her nephew and not by the Respondent.

Intention

[22] Given the fact that the Application sought also to seek Relief from Sanctions, if deemed necessary by the Court, the Applicant also dealt with the criteria for the granting of relief under CPR 26.8, in particular, the fact that the Applicants actions in not filing and serving within time was not intentional and that they had generally complied with all other relevant rules, practice directions, orders and directions.

[23] Counsel for the Applicants here asserted that the initial deadline to file the Points of Dispute was not intentionally missed as seen by the arguments advanced above and as evidenced by the content of the Affidavits of Analiese Minott filed in support of the Application which provided a valid explanation for the delay. Further, that the Applicants had complied with all other relevant rules, practice directions, orders and directions and that though the Respondent stated in her submissions to the contrary, not even one instance of non-compliance could be cited.

RESPONDENT'S SUBMISSIONS

Discretion of the court to hear Application for Extension of Time and Relief from Sanctions

[24] Counsel for the Respondent began their submissions by stating that the Applicants via their application are in fact seeking two (2) reliefs that is, An Extension of Time and Relief from Sanctions for Failure to File the Points of Dispute within the time prescribed by the Rules.

[25] They agreed with Counsel for the Applicants that the sanction that is provided for by the Rules, is, that where the Points of Dispute is filed outside of the time allotted by the Rules *the party in default may not be heard in the taxation process unless the Registrar gives permission.*

[26] Reference was made by Counsel to the case of ***Oneil Carter v Trevor South***[5] which is a case dealing with Applications for Relief from Sanctions being necessary where a witness statement has been filed and served out of time, and that the sanction from which relief is needed, is that the witness may not be called by the defaulting party unless the Court permits for same by granting relief. The consequence of non-compliance it was submitted is the sanction.

[27] The Respondents went on to state that by virtue of **Rule 65.20** the receiving party is permitted to obtain a Default Costs Certificate once they prove service of the Bill of Costs and that no Points of Dispute has been received by the receiving party. It was also highlighted that under the Costs Regime if the Points of Dispute is served out of time, then the Registrar cannot properly enter a Default Costs Certificate. The Registrar in that circumstance, is to consider whether to grant relief, that is, whether to allow the paying party to be heard. However, it was submitted very strongly by Counsel, that the Registrar in the instant circumstances where no Points of Dispute had been filed at the time the

[5] [2020] JMCA Civ 54

request for Default Costs Certificate had been made, should have signed the Default Costs Certificate.

[28] Counsel for the Respondent noted that though similar in many respects to the entry of a Default Judgment in Default of Defence under Part 12, the entry of a Default Costs Certificate, is distinguishable, in that Rule 12.5(e) was instituted via amendment of the Rules in 2006, which prevents the entry of the judgment in default of Defence where there is a pending application for an extension of time to file a Defence. It was noted by Counsel that by virtue of Rule 12.5(e) the Registrar is prevented from entering the Default Judgment if an application is pending, as distinct from the instant case where the Rule makes no such provision and as such the Registrar it is submitted, has no discretion to not issue a Default Costs Certificate, once the requirements have been satisfied under the Rules and a request has been made.

Relief from Sanctions

Promptness of the Application

[29] The Respondent is of the view that the Application was not made promptly as it is their submission that, on the Applicants realizing that they were unable to file the Points of Dispute within the 7 days' period consented to by the Respondent, they could have filed the Application. However, they waited some 10 days after to do so and seemingly did nothing to comply within the period.

[30] Counsel further argued that the reasons presented by the Applicant in their submissions and affidavits in support of the Application for the delay were unsatisfactory. It was contended that simply being occupied with the responsibilities of counsel and the fact that several counsel in the litigation department were handling court matters were inadequate reasons for the delay in compliance. Counsel stated that this was further compounded by the lack of information provided by the Applicants as to the size of the legal department, or why other attorneys in the firm could not have provided assistance. Further there was no explanation provided as to why external help beyond the firm was not sought, especially considering the time-sensitive nature of the obligation.

[31] Counsel also submitted that the factors raised by the Applicants regarding the Bill of Costs' extensive length of 55 pages and its complexity were known to the Applicants from the outset, as they had been served with the Bill of Costs. They were also actively involved in the proceedings and were therefore aware of the intricate nature of the case. It was therefore argued that these factors should have been taken into account by the Applicants when determining the appropriate timeframe for the consent.

[32] It was submitted that ultimately the assessment that a costs specialist was needed, was one that should have been made from day one, and that this should have been farmed out and as such the application for extension should have been made earlier in the day. There was also no evidence provided by the Applicants as to what efforts were made to identify a paralegal in the time allotted.

[33] The Courts it was submitted have also held that administrative inefficiency is not a good and acceptable reason for failure to comply with court orders, the Respondent here cited in support the case of the case of **Canute Sadler v P Morrison** [6] and in particular the dictum of Justice Rattray at paragraphs 26 and 27. On the basis of the dictum it was submitted that the workload of counsel when proffered as a reason for non- compliance is by no means a good excuse.

[34] In fact, Counsel for the Respondent argued that by stating that the attorneys were busy with other matters it should lead the Court to the conclusion that the filing of the Points of Dispute was not seen as an issue of high priority and therefore, seen as having been treated instead, as one of low priority, in favor of other matters that were deemed more important. This they argued rendered the failure to comply an intentional act.

---

[6] [2019] JMSC Civ. 11

Extension of Time and the Affidavit of Merit

[35] With regards to the Application for Extension of Time it was submitted that the Applicants at the time of the hearing of the Application had the greater obligation of not only explaining why they had not filed their Points of Dispute, within the 10 days after the consent period had passed, but had to also explain why it had just been filed, as this was now well over a year after the Application itself had been filed. It was noted by the Respondent that there was no evidence before the Court explaining the inordinately late filing nor was there an Affidavit of Merit filed exhibiting a draft Points of Dispute. It was submitted that all the authorities cited pointed to the need to file an Affidavit of Merit in an application for extension of time, speaking to why the Applicant should be allowed to file the relevant document out of time. Counsel also highlighted that a primary consideration for the Court in determining whether such an application ought to be granted would be based on the merits of the proposed document. However, it was noted here by the Counsel that the affidavits filed by the Applicant do not provide any such evidence, as there is nothing in the affidavits challenging the Bill of Costs.

[36] The Applicants further argued that the submissions by Counsel for the Applicant made at the hearing as to the merits of the proposed Points of Dispute are not evidence and ought not to be relied on by the Court as they are not contained within an Affidavit of Merit.

[37] In concluding this portion of his submissions, Counsel stated that when one looks at the totality of the circumstances, that is, in particular, the following: -

(i) that though the delay may not be lengthy in filing the application itself, it was inordinate in filing the points of dispute, as the points of dispute had been filed some 400 days after the time limited for doing so, though the application itself, only requested an extension of 21 days;

(ii) that there was no good reason for the delay and;

(iii) that up until the time of the hearing of the matter no Affidavit of Merit had been supplied as required by the authorities and it was only in exceptional circumstances (and that this case did not fall within the category of exceptional circumstances) that a Court would grant an application for extension of time without the filing of an Affidavit of Merit, citing here the case of ***Attorney General (The) and Another v Brooks Jnr (Rashaka)***[7]***.***

This court should therefore not exercise its discretion in the Applicants' favour and grant the application.

Prejudice

[38] It was also submitted to the Court on the issue of prejudice that the Court should not be persuaded by the argument of the Applicants that the effect of denying the application will be prejudicial to the Applicants, as the effect of so doing is that that they will be required to pay the full amount claimed for costs in the Bill of Costs, as a request for Default Costs Certificate is presently before the Registrar. The Respondent urged the Court not to be swayed by this line of argument, on the basis that the Applicants have not provided an Affidavit of Merit and therefore have not placed before the Court any evidence challenging the merits of the Bill of Costs. In fact, they stated, that the prejudice to the Interested Party if the time is extended and relief is granted, given her advanced age, and the lengthy delay thus far, would be greater than that of the Applicants if the application is denied. It was argued that if the Applicants are allowed to participate in the taxation process at this stage it would result in further delay of the Interested Party's ability to enjoy the fruits of the costs order.

Conduct of the Respondent

[39] On the issue of the Respondent's conduct it was submitted in response that though it is accepted that there is a 3 months' window for filing a Bill of Costs, and that the Respondent had not filed the Bill within the time as prescribed by the Rules, that the reasons as to what transpired in terms of the line up to the

[7] [2013] JMCA Civ 16

filing of the Bill of Costs was not a relevant consideration. That now at the time of the hearing of this Application, the Court had moved way past that, as the burden was now on the Applicants not the Respondent. Further it was submitted that one was not contingent on the other, that is, the time taken to file the Points of Dispute, is not contingent upon the filing of the Bill of Costs within the 3 months as specified by the Rules.

Conclusion

[40] In conclusion, the Respondent submitted that the Applicants had failed to pass the threshold test for extending the time to file the Points of Dispute and should therefore not be relieved of the sanction of being denied the opportunity to participate in the taxation process, and that the Court should not exercise its discretion to grant either relief from sanction or to extend time.

[41] That further, based on the wording of Rule 65.20(6), it was argued that the Court should not grant any further time for the Points of Dispute to be filed. Instead, the Registrar ought to be directed to issue the Default Costs Certificate and costs should be awarded to the Interested Party.

Analysis and Disposition

[42] The first issue before this Court is whether it is appropriate for a party to seek an extension of time or relief from sanctions to enable the filing of a Points of Dispute when the defaulting party has not yet filed the Points of Dispute.

[43] This Court agrees with the Respondent on this issue, that is, that according to the abovementioned Costs Regime, there is no provision within the Rules that permits for such an application. In situations where a party has failed to file a Points of Dispute within the stipulated timeframe, and the receiving party has demonstrated that they have served the Bill of Costs on the paying party, it becomes the Registrar's obligation to issue the Default Costs Certificate. It is important to note that this scenario differs from the entry of default judgments under Part 12, primarily due to the introduction of Rule 12.5(e) in 2006, which

prevents the entry of a default judgment when there is a pending Application for an Extension of Time to file a Defence.

[44] In fact, this aligns with the perspective held by the Court of Appeal concerning the Registrar's duty to enter default judgments in the absence of a filed defence, where an application to file a defence out of time had been made prior to the addition of Rule 12.5(e) in 2006. This was clearly seen in the case of **Working Savings and Loan Bank v Bentley Rose**[8]. In that case, the Respondents initiated actions seeking judgment in default of defence on October 8, 1996. On October 9, 1996, the appellant filed a summons seeking permission to file a defence out of time in both actions, and these summonses were served on October 10, 1996. They were heard on October 18, 1996, with the judge dismissing them, granting leave to appeal, and imposing a stay of execution on the default judgments for 14 days. The judge's reasoning was that the documents submitted for the judgments were in order, and the appropriate course of action was to apply for setting aside the default judgments. The Appellate Court held that once the provisions of the Judicature (Civil Procedure Code) Law relating to the entry of default judgments are satisfied, which includes having the documents to enter default judgment found to be in proper order, the judgment should be entered. In such cases, the proper course of action is for the appellants to apply to set aside the judgment. It was emphasized that the Registrar has ministerial duties, including entering judgments, as outlined in section 12 of the Judicature (Supreme Court) Act, therefore the Registrar should have entered the default judgments in these actions.

[45] This Court shares a similar perspective to the Court of Appeal on the issue as far as it pertains to a Registrar's duty to issue a Default Costs Certificate. That is, the Registrar, once she is satisfied that a proper request has been made and that the requirements under the Rules have been met, is obligated, to issue the

[8] Motions No. 9&10/97

Default Costs Certificate. The burden at that stage now shifts to the paying party to apply for it to be set aside.

[46] This Court also holds the view that Rule 26.1(2)(c), which grants the Court powers of case management to "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" constitutes a general provision which is not applicable to the specific rules of the Costs Regime in Part 65. These specific rules do not make provision for Applications for Extensions of Time to be made in cases where no Points of Dispute have been filed. I do not perceive this however as a lacuna in the rules as submitted by Counsel for the Applicants, but rather a clear expression of the rule framers' intent that the paying party should not be granted a hearing in the taxation process unless a Points of Dispute has been filed.

[47] As revealed by the timeline however, a Points of Dispute was filed by the paying party on February 15, 2023 prior to the conclusion of the court hearing submissions. This action triggered the sanction outlined in Rule 65.20(4), which states that if a party files and serves points of dispute after the period specified in paragraph (3), that is, within the 28 days allocated for doing so after being served with the bill of costs, that party may not be further heard in the taxation proceedings unless the registrar grants permission.

[48] Consequently, this Court will now address the substantive aspects of the application, namely, the Application for Extension of Time and Relief from Sanctions.

Application for Extension of Time

[49] In relation to the principles governing Applications for an Extension of Time, it appears that there is no dispute regarding the factors that the Court should consider when exercising its discretion, as outlined in the case of **Attorney General v Roshane Dixon and Sheldon Dockery**. These factors include as was stated earlier:

(i) The length of the delay

(ii) The reasons for the delay

(iii) Whether there is an arguable case for an appeal (in this case an arguable case for disputing the bill of costs) and

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

The parties are however not in agreement as to whether the Applicants have satisfied them.

(i) The length of the Delay and Reasons for the Delay

[50] Addressing the issue of delay, this Court agrees with Counsel for the Applicant, that the time for filing of the Application was not inordinately long as it was just some 17 days after the points of dispute was due. What was clearly inordinate however, was the length of time for the filing of the Points of Dispute itself, that is, some 1 year and 2 months after it was due. The reasons that have been provided as to why the initial delay occurred, are duly noted by this court, that is (i) the fact that counsel in the litigation department were very busy at the time the points of dispute was due, (ii) that the bill of costs was some 55 pages in length and given its complexity, warranted an experienced costs paralegal to review the files and papers in order to properly prepare it, and lastly, (iii) that it was not easy to locate such a person within the available time allotted. However, though these could be seen as understandable reasons in the context of a 21-day request for extension, they could not be seen as clear and cogent reasons for the further delay of over a year. In fact, though a further Affidavit was provided by Analiese Minott in November 2022, which the Court anticipated would have dealt with the delay from the time of the filing of the Application to when this later Affidavit was filed, that is, just some two months before the date fixed for the hearing of the Application, it did not do so. As such, this Court finds that there was no good reason provided by the Applicants for the inordinate delay in filing the Points of Dispute when it did.

ii. Extension of time and the Affidavit of merit

[51] The Applicants had also implored the Court not to adhere strictly to a predetermined formula when deciding whether an extension should be granted. Instead, they urged the Court to bear in mind the guiding statement in ***Attorney General v Roshane Dixon and Sheldon Dockery***, which emphasizes that even in the absence of a compelling reason for the delay, the Court is not bound to dismiss an application for an extension of time. This is because the paramount consideration is that justice must prevail. In applying this principle, a crucial factor to consider is the merits of the points of dispute themselves. Specifically, whether the Applicant has a plausible or strong case in terms of challenging the bill of costs. A court should not hastily reject a party, even if they have experienced delay and have not provided a strong reason for it, when they have a legitimate case to present before the tribunal for determination.

[52] For this Court to assess the merits, it must once again turn to the affidavits submitted by the Applicants. These affidavits are to be looked at, in the context of the dictum of a long line of authorities on the importance of the Affidavit of Merit in the courts' consideration of applications for extension of time. One of the most recent cases from our own Court of Appeal is the case *of* ***Barrington Green, Andrea Green v Christopher Williams, Christine Williams, Wayne Williams, Nadine Williams*** [9]. In this case, the Court deliberated on appeal the denial of the Court below of an application for default judgment and the granting of an extension of time to file a defence. The Court of Appeal here specifically addressed the relevance of needing an Affidavit of Merit in support of an extension of time application. It determined that evidence of merit was crucial in such an application, and that a defence alone cannot suffice to demonstrate its merit. The Court further explained that a proposed defence, being a pleading, does not meet the requirement for evidence of merit. The ***Barrington Green*** case also emphasized that an extension of time to file a defence without evidence of merit is only granted under very specific and exceptional circumstances. One such instance was observed in the ***Rashaka Brooks*** case, where the Attorney General's Department was unable to obtain specific

[9] [2023] JMCA Civ 5

instructions, so that an Affidavit of Merit could have been properly filed and placed before the Court for its consideration.

[53] In the instant case, as highlighted by the Respondents, the Applicant failed to submit any Affidavit of Merit. That is, neither of the two affidavits of Analiese Minott addresses the merits of the proposed Points of Dispute, (as it would have been at the time the affidavits were filed) nor was a draft of the points of dispute exhibited to either of the 2 Affidavits.

[54] This Court is of the view that the reasoning that is applied to the importance of the filing of an Affidavit of Merit to an Application for an Extension of Time in Filing a Defence, should similarly be applied to an Application for an Extension of Time for the Filing of a Points of Dispute, as in both instances, the court has to consider whether the applicant has a legitimate case to put before the tribunal for determination. In the same way, that the Court of Appeal determined that the Defence that was filed out of time was a mere pleading and not evidence before the court for its consideration, this court also finds that the Points of Dispute filed out of time, having not been properly exhibited to an Affidavit of Merit, cannot properly be considered as evidence of merit. The mere filing of a Points of Dispute on its own is insufficient.

[55] It should be noted that during oral submissions, Counsel for the Applicant attempted to address this issue, by highlighting some of the merits of the proposed points of disputes, but this was rightfully objected to by Counsel for the Respondent, as such details needed to have been contained in an affidavit for the Court to properly take them into consideration.

[56] In the circumstances, the Court has no evidence upon which it can properly find that there is any merit to the challenge of the Bill of Costs and the Applicants have not provided any evidence of special or exceptional circumstances for the lack of evidence of merit to be excused, as was done by the Court of Appeal in the ***Rashaka Brooks*** case**.**

[57] The failure to place an Affidavit of Merit in support of its application before this Court for its consideration without more could have been viewed as fatal to the Applicant's success as it relates to its Application for Extension of Time. This failure however was compounded by the inordinate delay in filing the points of dispute and the absence of a good reason for the delay, and as such, this Court finds that, in the interests of justice, it cannot grant the request for an extension of time for filing the Points of Dispute.

Relief from Sanctions

Civil Procedure Rules 2002 Jamaica

Rule 26.8(1)

Rule 26.8(1) of the Civil Procedure rules 2002 Jamaica reads:

> *(1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –*
>
> *(a) made promptly; and*
>
> *(b) supported by evidence on affidavit.*

Rules 26.8(2)

> *(2) The court may grant relief only if it is satisfied that –*
>
> *(a) the failure to comply was not intentional;*
>
> *(b) there is a good explanation for the failure; and*
>
> *(c) the party in default has generally complied with all other relevant rules, practice directions orders and directions.*

Rule 26.8(3)

(3) In considering whether to grant relief, the court must have regard to –

(a) the interests of the administration of justice;

(b) whether the failure to comply was due to the party or that party's attorney-at-law;

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

(c) whether the trial date or any likely trial date can still be met if relief is granted; and

(d) the effect which the granting of relief or not would have on each party.

Rule 26.8 (4)

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

[58] Rule 26.8(1) sets out the mandatory requirements for making an application for relief from any sanction that has been imposed for a failure to comply with any rule, order or direction of the court. To apply for relief, the party in default must do so promptly and provide evidence in the form of an affidavit to support their application. Promptness is therefore a crucial factor in making an application for relief. The party in default must act quickly to apply for relief, as delays in doing so may affect the success of their application.

[59] The Application for Relief from Sanctions must as was stated above be supported by evidence on affidavit. That is, the party in default should provide a sworn statement setting out the reasons why they failed to comply with the rule, order or direction, and the steps they have taken to remedy the default. The affidavit should also provide any other relevant information that may support the application.

[60] The authorities have stated that the Court should also consider the reasons for the delay and the prejudice caused to the other party when deciding whether to grant the application for relief.

[61] With regards to the issue of promptitude, this Court agrees with the Applicants submissions that the Application for Relief from Sanctions was made promptly as it was made some 10 days after the agreed extension of time between the parties had elapsed and 17 days after the original time allotted for filing it. The Application was supported by evidence on affidavit and therefore the issue for the Court is whether the evidence presented, satisfies the criteria in Rule 26.8(2).

Intention and "good reason" for failing to comply

***Was the failure to comply intentional and did the Applicants have a good reason for failing to comply*?**

[62] Based on this Courts earlier reasoning with regards to the Application for Extension of Time, even if it is of the view, that initially non-compliance was not intentional based on the reasons provided by the Applicants. It could not find that the Applicants' actions were not intentional after over a year of non-compliance with no good reason being advanced for the continuing default.

[63] The authorities have indicated on numerous occasions with regards to Applications for Relief from Sanctions that the court ought not to grant relief unless, all the conditions, in Rule 26.8(2) have been satisfied. That is, the Court must be satisfied that the defaulting party's actions were:

> *(i) not intentional*
> *(ii) that it had a justifiable reason for not complying with the relevant rule, order or direction and*
> *(iii) that they had generally complied with all other relevant rules, practice directions orders and directions.*

[64] Applying the dictum of the Court of Appeal of Brooks JA as he then was in ***HB Ramsey and Associates***[10].which stated that "where there has been no good explanation for the default, the application for relief for sanctions **must fail.** Rule 26.8(2) stipulates that it is a precondition for granting relief, that the Applicant must satisfy ***all three elements*** of the paragraph."

[65] This Court is of the view that the issues as addressed above, are decisive in determining the outcome of the Application for Relief. That is, the Court finds that the actions of the Applicant were intentional, and that there was no valid reason provided for the Applicant's default, that is, in failing to file the Points of Dispute for over a year after the time stipulated by the Rules, a point dealt with at length in paragraph 50 above. Consequently, the Court deems it unnecessary to delve into the other matters raised by the parties in their submissions, including considerations of prejudice and the conduct of the parties. Therefore, the Applicants' Application for Relief from Sanctions is also denied.

DISPOSITION

1. The orders as sought in paragraphs 1 and 2 of the Application for Extension of time and Relief from Sanctions filed December 17, 2021 are refused.
2. Costs of the Application are awarded to the Respondent/Interested Party to be taxed, if not sooner agreed.
3. Leave to appeal is granted.
4. The Applicants Attorneys at Law are to prepare, file and serve the Formal Order.

……

[10] [2013] JMCA Civ 1 at paragraph 22

Master K. Henry Anderson