[2020] JMCA Civ 26

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 95/2018

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MISS JUSTICE SIMMONS JA (AG)

BETWEEN	**NORDA WILLIAMS**	**APPELLANT**
AND	**CMK BAKERY LIMITED**	**RESPONDENT**

Written submissions filed by Lemar Neale instructed by Bignall Law for the appellant

Written submissions filed by Monroe Wisdom instructed by Nunes, Scholefield, Deleon & Co for the respondent

16 March and 31 July 2020

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

PHILLIPS JA

[1] I have read in draft the judgment of my sister Foster-Pusey JA. I agree with her reasoning and conclusion and have nothing to add.

FOSTER-PUSEY JA

Background

[2] This is a procedural appeal brought by the appellant, Ms Norda Williams, challenging a decision made by Shelly-Williams J ("the judge") on 25 September 2018. The judge refused to grant the appellant's application for relief from sanctions or to, alternatively, set aside the order made on 26 June 2017 striking out the appellant's statement of case.

Proceedings in the court below

The pleadings

[3] On 20 June 2012, by way of a claim form, the appellant instituted proceedings against the respondent to recover damages for negligence and/or breach of statutory duty under the Occupiers' Liability Act. The appellant, who was a janitor at all material times, claimed that the respondent, from March to August 2010, refused and/or failed to provide her with a safe system of work, or alternatively breached the Occupiers' Liability Act, in that, the respondent failed to ensure that she was safe when using its premises. The appellant developed significant discomfort and pain in her hands and carpal tunnel syndrome. As a consequence she suffered injury, loss, pain, damage and incurred expense.

[4] The respondent denied these assertions and required the appellant to provide strict proof of the allegations. The respondent stated that it took all reasonable precautions for the safety of the appellant while she was engaged in her duties as an employee. Further, it provided the appellant with an adequate and suitable system of

work and safe equipment, and it did not, at any time, expose the appellant to any risk of danger or injury, loss or damage.

Case management conferences

[5] The matter proceeded to case management conference ("CMC"). Several CMC dates were scheduled, but were subsequently adjourned primarily due to the appellant's absence. The first CMC came up for hearing on 8 January 2016 and was adjourned to 8 July 2016. On 8 July 2016, the appellant did not attend the CMC hearing. The matter was adjourned to 24 November 2016 and it was specifically ordered that the appellant was to attend on that date. On 24 November 2016, Master Mason (Ag) (as she was then) ("the master"), set trial dates for the matter over the period 14-16 October 2019. The appellant was absent from the November 2016 hearing. The master ordered that both the appellant and the respondent were to be present at the next CMC scheduled for 22 February 2017. Both the appellant and the respondent were absent on that date. The matter was again adjourned to 6 April 2017 and the master made an unless order in the terms that if the appellant failed to attend the CMC hearing, the case would be struck out.

[6] On 6 April 2017, the appellant attended chambers with her young child. It was inconvenient to proceed in those circumstances and as a result the master adjourned the hearing. Another unless order was made, this time including the respondent. The order stated that if both the appellant and respondent failed to attend the CMC the appellant's case would stand stuck out. The matter was adjourned to 26 June 2017.

[7] On 26 June 2017, the matter came up for hearing before Master Pettigrew-Collins (as she was then). The appellant failed to attend, which resulted in her case being struck out.

[8] The appellant then filed a notice of application on 10 July 2017 seeking to set aside this order and to obtain relief from sanctions. However, she did not, at the same time, file an affidavit in support of the notice of application. It was not until 15 and 20 November 2017 that the first and second affidavits respectively were filed in support of the application. The matter was scheduled for hearing on 27 November 2017.

[9] In the affidavit filed on 15 November 2017, the appellant outlined various reasons for her failure to attend the various court hearings. She deposed that:

> "1. She did not recall the court date set for 26 [sic] November 2016 and she did not receive a follow-up call from her attorney-at-law;
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> 2. She was informed of the new court date which was 22 February 2017. However, on that day she was running late because she did not have anyone to stay with her young child. In light of this, her attorney-at-law advised her not to come as she would be very late;
>
> 3. Her attorney-at-law advised her of the other court date, 6 April 2017. He warned her that she had to be present. On that day, she had challenges finding someone to stay with her young child, and attended court with the child. However, she was asked to step out of court with the child. She was not informed by her attorney-at-law that she needed to attend court after that. It was her belief that that was the end of the matter. Hence her reason for not attending court on 26 June 2017, when the case was struck out."

[10] Counsel, Mr Vaughn Bignall, in the affidavit filed on 20 November 2017, deposed, among other things, that:

1. When the matter came for CMC on "26 [sic] November 2016" the appellant, although advised of the date for the hearing, was absent;

2. On 22 February 2017, the appellant, who lived in Bog Walk, was on her way to court but could not have made it in time;

3. The appellant was informed of the unless order made that she had to attend court on 6 April 2017. She was advised to take the young child with her and find someone to attend to the child in the meantime. On 6 April 2017, the appellant had challenges in finding someone to stay with her child and so took the child with her to court. The master did not find it appropriate for a young child to be in chambers and adjourned the matter to 26 June 2017; and

4. Insofar as the hearing scheduled for 26 June 2017 was concerned, he did not call the appellant to advise her to be present as he was not aware that the order was an unless order. He thought the previous unless order

had been cured when she attended on 6 April 2017. He also thought that the matter had been adjourned to facilitate the respondent's application. He accepted full responsibility for her failure to attend.

[11] In response to these affidavits and on behalf of the respondent, Ms Arlene Williams filed an affidavit on 23 November 2017. She deposed, among other things, that the CMC hearing dates had not been adhered to by the appellant and had not been fruitful. On 26 June 2017 neither the appellant nor her attorney-at-law attended the hearing. In addition, the respondent would be severely prejudiced if the application for relief from sanctions was granted as it would be thereby deprived of a defence pursuant to the Limitation of Actions Act.

[12] The notice of application seeking relief from sanctions or to, alternatively, set aside the order made on 26 June 2017 was heard by the judge on 7 June 2018. On 25 September 2018 she refused the application.

The appeal

[13] Aggrieved by the decision of the judge, the appellant filed a notice and grounds of appeal on 9 October 2018 challenging the decision on the following bases:

> "a. The learned judge erred as a matter of fact and/or law and/or wrongly exercised her discretion when she refused to grant relief from sanctions.
>
> b. The learned judge erred in, and/or misdirected herself on the, [sic] law in finding that the application for relief from sanctions was not made promptly because the

affidavit in support was filed almost four months after the notice of application. In so finding, the learned judge failed to appreciate that:

(i) the notice of application is what grounds the court's jurisdiction;

(ii) there is no express requirement under Rule 26.8 for the affidavit in support of the application for relief from sanctions to be filed with the application;

(iii) there is no formal requirement for an application for relief from sanctions to be made in writing; and

(iv) the court has the power on its own initiative to grant relief from sanctions even in the absence of a formal application.

c. The learned judge erred in law in finding there was no good reason advanced as to the failure to comply with the case management order.

d. The learned judge erred in law in finding that [the respondent] would be deprived of a defence under the Limitation of Actions Act."

[14] The appellant therefore seeks the following orders:

"a. The appeal be allowed;

b. The orders made on September 25, 2018 by Honourable Mrs Justice Shelly-Williams be set aside;

c. [The Appellant] be granted relief from sanctions imposed by the order of Master Miss P. Mason (Ag.) for failure to attend the Case Management Conference; and

d. The costs of the appeal and in the court below be awarded to the Appellant to be taxed if not agreed."

Issues

[15] In resolving this appeal, the following are issues that this court must consider:

a. whether the judge erred in finding that the notice of application and the affidavit in support must be filed simultaneously and therefore, as the affidavits were filed four months later, the notice of application was not filed promptly.

b. whether the appellant's failure to attend the CMC scheduled for 26 June 2017 was intentional.

c. whether the judge erred in finding that the appellant did not proffer a good explanation for her failure to attend the CMC scheduled for 26 June 2017.

d. whether the appellant has generally complied with all other relevant rules, practice directions, orders and directions.

e. whether a defence of limitation is a relevant consideration in an application for relief from sanctions.

Submissions

Appellant's submissions

[16] Counsel, Mr Neale, who appeared for the appellant, filed written submissions in support of the appeal on 23 October 2018 and 3 April 2019. Counsel relied on the oft-cited cases of **Hadmor Productions Limited and others v Hamilton and others** [1982] 1 All ER 1042, 1046 and **Attorney General of Jamaica v John McKay** [2012] JMCA App 1, which outline the role of an appellate court in reviewing the exercise of discretion of a judge at first instance.

[17] Grounds of appeal (a), (b) and (c) were argued together. Counsel submitted that the judge erred in refusing to grant the application for relief from sanctions. Reference was made to rule 26.8 of the Civil Procedure Rules, 2002 ("CPR"), which sets out the criteria for granting such relief.

[18] Insofar as the question of promptitude was concerned, counsel referred to the fact that the judge had found that the application filed on 10 July 2017 could have been considered to have been filed promptly, but was incomplete as it was not supported by an affidavit. As such, the judge concluded that the application had not been filed promptly. Counsel submitted that on a literal application of the rule, only the application is required to be filed promptly. The language is clear and unambiguous. There is no express requirement for an affidavit in support of the application to be filed promptly. He submitted that if the rules were to be interpreted in the manner to which the judge referred, it would mean that, because affidavits could not be filed at the same time as

the application due to the unavailability of the witnesses, the application would not be considered to have been filed promptly.

[19] The absence of an affidavit, according to counsel, may be considered to be an irregularity and therefore not fatal to the application. He reiterated that rule 26.8 does not state that the application is not filed if it is filed without the supporting affidavit. There is no sanction for failure to comply with rule 26.8(1) and it was within the court's discretion to make an order under rule 26.9 to put matters right. For example, by extending the time to file the affidavits in support. He relied on **Chester Hamilton v Commissioner of Police** [2013] JMCA Civ 35 in support of his submissions.

[20] Alternatively, counsel argued that the judge could have granted relief from sanctions upon an informal application or in the absence of a formal application. Counsel cited the case of **Cutler v Barnet London Borough Council** [2014] EWHC 4445 (QB) to bolster his point that a court on its own initiative, where appropriate to do so, may grant relief from sanctions.

[21] Relying on **Prime Sports Jamaica Limited v Lori Morgan** [2017] JMCA Civ 32, counsel argued that this court adopted the principle that the court has jurisdiction to act on its own initiative in an appropriate case. In the **Prime Sports Jamaica Limited** case the court noted that the judge, in treating with the circumstances of the case, had the option of dispensing with the attendance of the respondent at the CMCs. Counsel argued that in the instant case, the judge had this option in light of the appellant's difficulty with her young child, among other things.

[22] Turning to the appellant's failure to attend the CMC on 26 June 2017, counsel submitted that the appellant, in her affidavit filed on 15 November 2017, deposed that she had not attended court that day as, after 6 April 2017, she had not heard from her attorney-at-law about attending court. Additionally, the appellant believed that having attended a CMC on 6 April 2017, that was the end of the matter.

[23] Counsel highlighted the evidence of Vaughn O Bignall in his affidavit filed on 20 November 2017, in which he deposed that he did not know that the order made on 6 April 2017 was an unless order, or that the appellant was required to attend court on 26 June 2017, and so had not informed her of the hearing. Mr Bignall stated that he thought that the appellant did not need to attend because she had already attended the hearing which had taken place on 6 April 2017. Mr Bignall took full responsibility for the appellant's failure to attend, and urged the court not to penalize her for his mistake.

[24] Counsel referred to the case of **Morris Astley v Attorney General of Jamaica et al** [2012] JMCA Civ 64, where the appellant's attorney-at-law failed to advise the appellant that he needed to attend the pre-trial review. In an affidavit sworn to on 15 March 2012, the appellant's attorney-at-law stated that because he believed that the appellant was present at the CMC he did not inform him of the need to attend the pre-trial review. In these circumstances, Morrison JA (as he was then) found that, in the absence of any challenge whatsoever, the reason given amounted to a good reason. Counsel relied also on the cases of **Patrick Allen v Theresa Allen** [2018] JMCA Civ 16 and **Villa Mora Cottages Limited and Anor v Adele Shtern** (unreported), Court of

Appeal, Jamaica, Supreme Court Civil Appeal No 49/2006, judgment delivered 14 December 2007, for the principles that the failure of an attorney-at-law to inform a client of a date of hearing may amount to a good reason, and that the fault of an attorney-at-law should not be sufficient to bar a litigant from proceeding in a claim. Counsel submitted that since the appellant was blameless, the judge ought to have found that the appellant had a good explanation for her failure to attend the CMC on 26 June 2017.

[25] Counsel for the appellant argued that the judge also incorrectly concluded that the respondent would have been deprived of a limitation defence if the application had been granted. He submitted that the effect of the relief from sanctions would have been to restore the appellant's claim and as such the respondent would not have been required to file a new defence, as the one it had previously filed would have remained applicable. He relied on **Circle Thirty Three Housing Trust Limited v Nelson** [2014] EWCA Civ 106. Counsel submitted that the judge therefore took into account an irrelevant consideration and in so doing she fell into error.

Respondent's submissions

[26] In written submissions filed on 10 April 2019, counsel for the respondent also relied on **Attorney General of Jamaica v John McKay** which outlines the approach that an appellate court ought to take in reviewing the exercise of discretion of a judge at first instance. Counsel emphasized that the material question is not whether another court would have come to a different conclusion. He also cautioned that the appeal is not an opportunity for a rehearing of the application.

[27] Counsel submitted that rule 26.8 lists the mandatory criteria that the appellant must satisfy in order for the court to exercise its jurisdiction to grant an application for relief from sanctions.

[28] Counsel referred to the case of **H B Ramsay & Associates Limited & Others v Jamaica Redevelopment Foundation & Another** [2013] JMCA Civ 1, where Brooks JA opined that an applicant must comply with the provisions of rule 26.8(1) in order to have his application considered. For example, if he fails to file the application promptly, the court need not consider the merits of the application. If the court proceeds to consider the merits of the application, the applicant must satisfy all the requirements set out in rule 26.8(2). If he fails to meet those requirements the court cannot grant relief.

[29] On the issue as to whether the application had been filed promptly, counsel submitted that the application for relief from sanctions must be supported by affidavit evidence at the time of filing. Counsel pointed out, however, that the judge's refusal of the application was not solely based on the appellant's failure to file the notice of application and affidavit promptly.

[30] Turning to the appellant's failure to attend the CMC on 26 June 2017, Mr Wisdom, counsel for the respondent, described the explanation given by the appellant and her attorney-at-law as incredible. He observed that the appellant's attorney-at-law was claiming that although the unless order was made in his presence he did not make a note of it. However, there is no challenge to the fact that an unless order was made.

[31] Counsel referred to the case of **Attorney General of Trinidad and Tobago v Universal Projects Limited** [2011] UKPC 37 where the Privy Council agreed with the reasoning of Jamadar JA who indicated that counsel had a responsibility to pay attention when the judge was making an order and should obtain an office copy of it as soon as possible. In that matter, the court ruled that there was no good explanation for not serving the defence in time. He also relied on **Jamaica International Insurance Company Limited v The Administrator General for Jamaica** [2013] JMCA App 2.

[32] In addition, counsel relied on the case of **Trincan Oil Limited v Keith Schnake** Civil Appeal No 91 of 2009 (judgment delivered 3 February 2010), where the Court of Appeal of Trinidad and Tobago held that default by an attorney-at-law will not ordinarily constitute a good explanation for non-compliance with the rules except in exceptional circumstances. Counsel submitted that the circumstances in this case were not exceptional so as to excuse the attorney-at-law's default.

[33] Counsel then addressed the question as to whether the judge was correct to conclude that the grant of the application would have deprived the respondent of a limitation defence. Counsel submitted that the respondent would have been prejudiced if the application for relief from sanctions was granted, as it would have upended their entitlement to judgment in circumstances where more than six years had passed since the incident. In addition, the appellant had failed to enter an appearance, causing the matter to be marooned at CMC. According to rule 26.8(3)(e) the judge had a discretion

to consider the effect which the grant or refusal of relief would have on each party. The judge was therefore correct in her ruling on this issue.

Analysis

[34] The appellant has argued that the judge erred in the exercise of her discretion when she refused to grant the application for relief from sanctions. This court has on numerous occasions reiterated the applicable principles when it is reviewing the exercise of discretion by a judge at first instance (see **Attorney General of Jamaica v John McKay** and **Consetta Edwards et al v Joan May Black Valentine et al** [2012] JMCA Civ 61).

[35] In the latter case, Phillips JA helpfully summarized the circumstances where it would be appropriate for an appellate court to interfere with the exercise of discretion. At paragraph [39] she succinctly stated:

> "...It is clear therefore that this court will only interfere with the exercise of the decision [sic] of the judge sitting in the court below, if he has not considered relevant material or has considered irrelevant material, or has failed to apply the correct principles or his decision was just plainly wrong."

[36] With this in mind, I will now examine the pertinent issues in this matter. The appellant failed to comply with the unless order made on 6 April 2017 as she did not attend the case management hearing scheduled for 26 June 2017, and as a consequence her case was struck out. She then made an application for relief from sanctions pursuant to rule 26.8.

[37] Rule 26.8 states:

> "(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
>
> (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.
>
> (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;
>
> (d) whether the trial date or any likely trial date can still be met if relief is granted; and
>
> (e) the effect which the granting of relief or not would have on each party."

[38] After hearing the application Shelly-Williams J, at paragraphs [39] and [40] of her judgment, said:

> "[39] In making this decision as to whether to grant the relief from sanctions I considered: -

a. The failure of [the appellant] to comply with the four Case Management orders for her to attend court.

b. The fact that even after the order was made for the case to be struck out it took almost four months for the affidavits in support of the Notice of Application to be filed.

c. The fact that [the respondent] would be deprived of a defence in this matter.

d. The fact that [the respondent] had complied with the order of the court for a representative to attend the Case Management Conference.

e. The fact that no good reason was advanced as to the failure to comply with the case management order.

[40] Based on the foregoing, I would not be minded to grant the order for relief from sanctions or alternatively to set aside the order made on the 26th of June 2017, as sought by [the appellant]."

Issue (a): -

Whether the application was made promptly

[39] At paragraphs [23] - [27] of the judgment the judge highlighted the unusual nature of the case, in that, although the notice of application was filed promptly, the affidavits in support were filed some four months after the application. She interpreted rule 26.8 as requiring the affidavit evidence to be filed simultaneously with the application. She concluded that, in the circumstances of the matter, the application was not made promptly.

[40] At paragraph [25] of her judgment the judge opined that the notice of application would be incomplete without an affidavit, as it is the evidence that is contained in the affidavit that would ground the application to seek to move the court to consider granting the relief being sought.

[41] I note that counsel for the appellant has forcefully submitted that although rule 26.8(1)(a) and (b) stipulates that the notice of application must be filed promptly and must be supported by affidavit, it does not mean that they have to be filed simultaneously. Failure to file the affidavit, counsel submitted, would only amount, if anything, to an irregularity and not a nullity. Therefore, in these circumstances, the judge had a discretion to put matters right pursuant to rule 26.9, since there is no sanction for failure to comply with rule 26.8(1) (see **Chester Hamilton v Commissioner of Police**).

[42] I agree with the submissions advanced by counsel for the appellant in this regard. Rules 26.8(1) provides that the application for relief from sanctions must be made promptly and must be supported by evidence on affidavit.

[43] Rule 11.9, which speaks to evidence in support of an application, provides:

> "(1) The applicant need not give evidence in support of an application unless it is required by –
>
> (a) a rule;
>
> (b) a practice direction; or
>
> (c) a court order.
>
> (2) Evidence in support of an application must be contained in an affidavit unless –

(a) a rule;

(b) a practice direction; or

(c) a court order, otherwise provides.

(Part 30 deals with affidavit evidence.)"

In the instant case, an affidavit was mandated by rule 26.8(1)(b).

[44] In my view, rule 26.8(1) is unclear as to whether the notice of application and the affidavit in support are to be filed simultaneously. This question is not explicitly addressed in the CPR. It would be prudent to file both documents simultaneously, but I acknowledge that it may not always be practicable to do so. Nevertheless, the affidavit should be filed within a reasonable timeframe taking into account, among other things, the date of the hearing and affording counsel on the other side ample time to review it and respond if necessary.

[45] Counsel for the appellant in his submissions referred to and relied on the case of **Chester Hamilton v Commissioner of Police**. I find that this case is instructive. In that case, this court underscored that it was within a judge's ambit to put matters right in light of a judge's vast case management powers. Pursuant to rule 26.9 the judge had the power to, if necessary, extend the time for the filing of the supporting affidavits.

[46] **Chester Hamilton v Commissioner of Police** was a matter concerning judicial review proceedings. The appellant had obtained leave from Daye J to make a claim for judicial review and had filed and served a fixed date claim form within the required time by the rules. However, the affidavit which was utilized in support of the claim was that

which had been filed in support of the application to obtain leave. The affidavit had not been refiled, as required, subsequent to the order of Daye J.

[47] Brooks J (as he was then) ordered that the fixed date claim form, not having been accompanied by a proper affidavit at the time that it was filed, was a nullity. The appellant appealed to this court against his decision. Phillips JA in her analysis of the matter noted at the following paragraphs:

> "[32] … A claimant must file with the claim form evidence on affidavit (rule 56.9(2)), and the affidavit must state the address of the claimant and the defendant and details identifying the nature of the relief sought (rule 56.9(3)). The rules do not state that a claim for judicial review is not made if the affidavit is not filed with the fixed date claim form. There is no sanction stated if the affidavit is not filed with the fixed date claim form. But what is clear, is that the rule does state that the application for an administrative order is 'made' by a fixed date claim form in form 2. Additionally, as already stated, proceedings are started when the claim form is filed (rule 8.1(2)).
>
> [33] Contrary to what the respondent has submitted, rule 56.4(12) does not say that the leave is conditional on the filing of the fixed date claim form with the accompanying affidavit. What the rule says is that the leave is conditional on the 'making of a claim' within 14 days of receipt of the order granting leave, and as stated the application for judicial review is made by fixed date claim form in form 2 (rule 56.9(1))…"

[48] She then referred to the general power of the court to rectify matters:

> "**[37] This brings me to the 'catch-all' rule 26.9, which deals with the general power of the court to rectify matters where there has been a procedural error. But there are restrictions. The rule only applies 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**… There is therefore no stated consequence in the facts of this case in respect of the failure to comply with a rule. In these circumstances, pursuant to rule 26.9(3) where there has been a failure to comply with a rule, the court can make an order to put matters right. In this case, the court could have ordered the affidavit to be refiled and the fixed date claim form to be reserved with it." (Emphasis added)

[49] Phillips JA then concluded:

> "[49] The issues identified on this appeal would therefore be answered in this way:
>
> …
>
> > (c) The failure to file the affidavit required by rule 56.9(2) with the fixed date claim form does not invalidate the claim, but is an irregularity. The affidavit filed in support of the application to obtain leave for judicial review does not satisfy the requirements of rule 56.9(2) and (3).
>
> (ii) The court is empowered under rule 26.9 to put matters right by extending the time to file the required affidavit, and/or directing the refiling of the affidavit filed in support of the application for leave to apply for judicial review, to be used in support of the fixed date claim form for judicial review, and ordering service of the fixed date claim form with the supporting affidavit on all interested persons, within the time frame in keeping with the rules."

[50] The CPR does not outline a consequence for the filing of a notice of application for relief from sanctions unaccompanied by an affidavit. Bearing in mind the approach taken by this court in **Chester Hamilton v Commissioner of Police**, it is my view that it was open to the judge to make matters right in this case by, if the necessity arose, extending the time for filing the supporting affidavits.

[51] Harris JA, in **Villa Mora Cottages Limited** considered the effect of rules 26.8(1) and 26.8(2) and had this to say at page 10 of her judgment:

> "It cannot be disputed that orders and rules of the Court must be obeyed. A party's non-compliance with a rule or an order of the Court may preclude him from continuing litigation. This, however, must be balanced against the principle that a litigant is entitled to have his case heard on the merits. As a consequence, a litigant ought not to be deprived of the right to pursue his case.
>
> The function of the Court is to do justice. 'The law is not a game, nor is the Court an arena. It is ... the function and duty of a judge to see that justice is done as far as may be according to the merits' per Wooding, C.J. in **Baptiste v. Supersad** [1967] 12 W.I.R. 140 at 144. **In its dispensation of justice, the Court must engage in a balancing exercise and seek to do what is just and reasonable in the circumstances of each case, in accordance with Rule 1 of the C.P.R. A court in the performance of such exercise, may rectify any mischief created by the non-compliance with any of its rules or order**." (Emphasis added)

[52] The application filed by the appellant, unaccompanied by supporting affidavits, reflected an irregularity. No point was taken so as to prevent the appellant from relying on the affidavits which had been filed four months after the filing of the notice of application. However, the judge concluded that the application had not been made promptly. At paragraphs [25] - [26] of the judgment she wrote:

> "[25] Rule 26.8(1) states that the application must be made promptly and that it must be supported by evidence on affidavit. Counsel for [the applicant] argued that the rule states that the Notice of Application must be made promptly but it does not so state in relation to the affidavit. In reviewing rule 26.8 it is clear that the Notice of Application and the affidavit must be filed simultaneously. The Notice of Application would be incomplete without an affidavit as it is

> the evidence that is contained in the affidavit that would ground the application to seek to move the court to consider granting the relief sought.
>
> [26] In light of this, the application would not be considered to be properly made before the 15th of November 2017. That is the date the affidavit was filed which would be almost four months after the statement of case was struck out. This could not be considered under any circumstances to be a prompt application, and as such the application for relief from sanctions would not be granted."

[53] In light of the principles which I outlined earlier, it is my view that while the rule does not require that the notice of application be filed simultaneously with the affidavit evidence in support, the judge was entitled to arrive at the conclusion that the application had not been filed promptly. It is true that the notice of application itself was filed promptly, however, as the judge correctly stated, it could not have proceeded to be considered and determined without affidavit evidence. While it is understandable that there may be times when it is not possible to file an affidavit simultaneously with a notice of application, the nature of the application is important. An application for relief from sanctions is to be filed promptly, reflecting the urgency of the circumstances, and it must be supported by affidavit evidence. The filing of affidavits in support four months later, barring special circumstances, did not reflect urgency. There was no explanation as to why it took so long for the supporting affidavits to have been filed. The judge was therefore entitled to find that the application, meaning a complete and regular application, had not been made promptly.

[54] In passing, it is important to note that our rules expressly require that an application for relief from sanctions must be supported by evidence on affidavit. This

means that the application must be in writing - see also paragraphs [83] - [85] of **Tingles Distributors Limited v Liquid Nitro Beverages Inc and Another** [2020] JMCA Civ 24 where P Williams JA explained that the statutory framework on which the case of **Cutler v Barnet London Borough Council** was decided, differs from our rules.

[55] Having found that the notice of application was not filed promptly, the judge nevertheless proceeded to examine the other matters arising for consideration pursuant to rule 26.8. She said at paragraph [27] of the judgment:

> "Normally this would settle the entire application but in the event that my decision is incorrect on this matter I will proceed to consider whether or not [the appellant] had fulfilled the other aspects of rule 26.8."

[56] In **H B Ramsay & Associates Limited & Others v Jamaica Redevelopment Foundation & Another** Brooks JA noted at paragraph [12]:

> "The judgment of Harrison P indicates that the reason for granting the relief was twofold. Firstly, the learned President held that the case was 'a transitional case', that is, it had already been in existence when the CPR came into force. **The second reason was that he held that the decision of this court in International Hotels Jamaica Ltd v New Falmouth Resorts Ltd SCCA No 56 and 95/2003 (delivered 18 November 2005) was that all the provisions of rule 26.8, should be read cumulatively."** (Emphasis added)

[57] At paragraph [31] he concluded:

> "An applicant who seeks relief from a sanction, imposed by his failure to obey an order of the court, must comply with the provisions of rule 26.8(1) in order to have his application considered. If he fails, for example, to make his application promptly the court need not consider the merits of the

> application. Promptitude does, however, allow some degree of flexibility and thus, if the court agrees to consider the application, **the next hurdle that the applicant has to clear is that he must meet all the requirements set out in rule 26.8(2).** Should he fail to meet those requirements then the court is precluded from granting him relief. There would, therefore, be no need for a court, which finds that the applicant has failed to cross the threshold created by rule 26.8(2), to consider the provisions of rule 26.8(3) in relation to that applicant." (Emphasis added)

It does seem to me that, perhaps, one or two of the factors listed in rule 26.8(3) could, on occasion, buttress or impact consideration of the matters listed in rule 26.8(2). However, the current view of this court is that reflected in **H B Ramsay & Associates Limited & Others v Jamaica Redevelopment Foundation & Another**.

[58] Rule 26.8(2) provides that relief from sanctions may only be granted if the failure to comply was not intentional, there is a good explanation for the failure and the party in default has generally complied with all other relevant rules, practice directions, orders and directions.

Issue (b):-

Whether the failure to attend the CMC scheduled on 26 June 2017 was intentional

[59] The judge did not, in her reasons, expressly state whether, in her view, the appellant's failure to attend the CMC scheduled for 26 June 2017 was intentional. It appears that she proceeded to consider the matter on the basis that, in light of the facts, the appellant did not intend to be absent because she had never been told about the court date.

Issue (c):-

Whether there was a good explanation for the appellant's failure to attend the CMC scheduled for 26 June 2017

[60] As indicated above, on 6 April 2017 the master made an unless order in the terms that if both the appellant and respondent failed to attend the CMC on 26 June 2017 the claim would be struck out. On 26 June 2017, when the matter came up for hearing before Master Pettigrew-Collins, both the appellant as well as her attorney-at-law failed to attend. This resulted in the appellant's case being struck out. The appellant, in her affidavit filed on 15 November 2017, deposed that she was not informed of the CMC scheduled for 26 June 2017 and she was also of the belief that when she had attended court on 6 April 2017 that was the end of the matter.

[61] I have noted the evidence of Vaughn O Bignall in his affidavit filed on 20 November 2017, in which he deposed that he did not know that the order made on 6 April 2017 was an unless order, or that the appellant was required to attend court on 26 June 2017, and so had not informed her of the hearing. He had thought that the appellant did not need to attend because she had already attended the hearing which had taken place on 6 April 2017. He took full responsibility for the appellant's failure to attend, and urged the court not to penalize her for his mistake. It is, however, clear from his affidavit that although no one from his Chambers attended court on 26 June 2017, he was aware that the matter had been adjourned to that date. There is no explanation as to why no counsel attended to represent the appellant.

[62] Relying on the authorities of **Attorney General of Trinidad and Tobago v Universal Projects Limited**, **Morris Astley v The Attorney General of Jamaica**, **Villa Mora Cottages Limited and Anor v Adele Shtern** and **Jamaica International Insurance Company Limited v The Administrator General for Jamaica**, the judge found that the reasons given by the appellant and her attorney-at-law for her absence from the CMC scheduled on 26 June 2017 were unreasonable and did not amount to a good explanation.

[63] Counsel for the appellant has contended that the judge erred in law in finding that there was no good reason advanced for the appellant's failure to comply with the case management order. He has argued that, in this case where counsel has assumed full responsibility for the appellant's non-attendance, the court should have granted the relief from sanctions.

[64] At paragraph [28] of the judgment, the judge indicated that the primary reason for the appellant's non-attendance to the CMC scheduled on 26 June 2017, was that the appellant's attorney-at-law failed to advise the appellant to attend.

[65] At paragraphs [32] – [34] of the judgment, the judge outlined why she thought the reason given could not be considered as a good explanation. She said:

> "[32] In this particular case there were four orders for [the appellant] to attend Case Management Conference. The attendance of the parties at a Case Management Conference is not optional. Rule 27.8 actually indicates that unless a party is excused the parties shall attend Case Management Conference. The importance for the parties to attend Case

> Management Conferences cannot be overstated as these conferences are utilised for among other things to:
>
> i) assess a case as to whether it should proceed to trial,
>
> ii) make applications either orally or in writing which may determine the case, and
>
> iii) to settle the cases.
>
> [32] [sic] These are some of the reasons that the attendance of the parties is required. The fact that [the appellant] may have attended one conference for about three minutes where she basically showed that she exists and was not a figment of the imagination of her Attorney, does not qualify as attending court.
>
> [33] Any Attorney-at-Law, being aware of the Rules, and knowing the importance of a Case Management Conference, could not have envisioned that the mere three minute appearance of his client could qualify as their client attending court. In addition, the fact that the Case Management Conference had been adjourned on four occasions for the attendance of [the appellant] must have alerted the attorney to the importance of having his client present. There was no order excusing her from attending (per rule 27.8(3)) which automatically means that she should have attended.
>
> [34] I note that [the appellant] had indicated in her affidavit that she was unaware that she was to attend court. [The appellant] would have been aware on at least three occasions, according to her affidavit, that she was to attend court for the Case Management Conference. On her evidence she even had to attend court with her young child as she had no one to leave her child with. It would, under the circumstances, be incumbent on her to make some enquires about any further attendance at court."

[66] It was clearly open to the judge to have concluded that the attorney-at-law ought to have known that his client was required to attend the CMC. On 6 April 2017 when the court made the unless order that both the appellant and the respondent were to attend

the next scheduled CMC, failing which the claim would have been struck out, the appellant was represented by counsel. It would have been incumbent on counsel to inform Mr Bignall of the unless order which had been made by the court. Thereafter, it would have been extremely important for Mr Bignall to urgently inform the appellant of the date of the upcoming CMC, and the dire consequences which would have arisen if she did not attend court on 26 June 2017.

[67] It is not clear whether there was some breakdown of communication between counsel and Mr Bignall, however, the failure to advise the appellant of the date was a grave oversight for which no good explanation has been given in these circumstances. It is even more concerning that on that date no attorney attended the hearing to represent the appellant and no explanation has been given as to why this occurred. Each matter in which there is reliance on the default of counsel, in proof that a litigant had a good explanation for the breach of a court order, must be viewed in its own particular circumstances. This is a matter in which I would adopt the statement of Phillips JA in **Jamaica International Insurance Company Limited v The Administrator General for Jamaica**, where she said in part at paragraph [36], dealing with the delay of proceedings due to an attorney-at-law's default: "this was not a matter of mistake of the law or a misunderstanding of the rules but a careless approach to one's professional obligation." Likewise, in this case, the appellant's attorney-at-law had a duty to deal with the matter in a vigilant and diligent manner.

[68] I remind myself that, when reviewing the exercise of discretion by a judge, the question is not whether this court or another judge would have arrived at a different conclusion. Instead, it is whether the judge erred in law or on the facts or arrived at a conclusion to which no reasonable judge could have come. In my view, it was open to the judge to have found that there was no good explanation for the appellant's failure to attend the CMC on 26 June 2017. It was also open to the judge to have found that the appellant should have also expressed greater interest in the progress of the matter.

Issue (d): -

Whether the appellant had generally complied with all other relevant rules, practice directions, orders and directions

[69] CMCs were scheduled for 8 January 2016, 8 July 2016, 24 November 2016, 22 February 2017, 6 April 2017 and 26 June 2017. It was only on 6 April 2017 that the appellant, for the first time, attended a CMC. The matter did not proceed on that date because the appellant was accompanied by her young child.

[70] Rule 26.8(2)(c) states that the court may grant relief only if it is satisfied that the party in default has generally complied with all other relevant rules, practice directions orders and directions. The judge, at paragraph [36] of the judgment, indicated that in the circumstances this rule was inapplicable. At paragraph [39] of the judgment, under the rubric of the overriding objective and the administration of justice, she nevertheless took into account the fact that the appellant had failed to comply with four case management orders for her to attend court. In my respectful view, the judge erred in concluding that it was not necessary to consider whether the appellant had generally

complied with other orders of the court. Nevertheless, while the judge erroneously failed to consider the issue in the context of rule 26.8(2)(c), it is clear that she had found that the appellant had not been generally compliant with the orders of the court (see paragraph [39] of the judgment). On the evidence, it was open to her to make this finding.

Issue (e):-

Whether the limitation defence was a relevant consideration

[71] The judge, in assessing the overriding objective and the administration of justice in the matter, considered the arguments in relation to the respondent's limitation defence. At paragraph [37] of the judgment, the judge said:

> "In considering whether to grant the relief I have considered that [the appellant] would be deprived of the opportunity to pursue her case. [The appellant's] case concerns injuries she alleges she experienced at her workplace between March and August 2010. [The respondent] on the other hand for the same reason would be deprived of a defence under the **Limitation of Actions Act**."

[72] With respect, I believe that the judge erred in law in so finding. I agree with the submissions of the appellant that the question as to whether the respondent would be deprived of a limitation defence, were the application for relief from sanctions to have been granted, did not arise in the context of this matter and the application before the court. The appellant claimed that she suffered injury because the respondent breached the duty of care which it owed to her as an employee and as an occupier of the work premises, over the period March to August 2010. She filed a claim on 20 June 2012, well within the limitation period. If the application for relief from sanctions had been granted,

the claim would have continued with the defence filed by the respondent on 12 September 2012. No issue of the respondent being deprived of a limitation defence arose in the circumstances of the claim to which the respondent had already filed its defence and so the judge took into account an irrelevant consideration. However, there are other bases on which the judge relied to refuse the application, which were clearly proper.

Conclusion

[73] It was clearly open to the judge to have arrived at the conclusions that:

i. The application was not made promptly,

ii. There was no good explanation for the appellant's failure to attend the CMC scheduled for 26 June 2017, and

iii. The appellant had not generally complied with other orders made by the court.

[74] In light of the above conclusions, there is no basis on which, in my view, this court should interfere with the judge's decision.

[75] For these reasons, I propose the following orders:

(1) The appeal is dismissed.

(2) The orders made on 25 September 2018 by Shelly-Williams J are affirmed.

(3) Costs to the respondent to be agreed or taxed.

SIMMONS JA (AG)

[76] I too have read the draft judgment of my sister Foster-Pusey JA and agree with her reasoning and conclusion.

PHILLIPS JA

ORDER

(1) The appeal is dismissed.

(2) The orders made on 25 September 2018 by Shelly-Williams J are affirmed.

(3) Costs to the respondent to be agreed or taxed.