

## JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 120/2007

APPLICATION NO: 8/2009

BEFORE: THE HON. MR. JUSTICE SMITH, J.A.  
 THE HON. MRS. JUSTICE HARRIS, J.A.  
 THE HON. MR. JUSTICE DUKHARAN, J.A.

BETWEEN	JAMES WYLLIE	1 <sup>ST</sup> APPELLANT
	LORNA WYLLIE	2 <sup>ND</sup> APPELLANT
	RICHARD WINT	3 <sup>RD</sup> APPELLANT
A N D	DAVID WEST	1 <sup>ST</sup> RESPONDENT
	CHRISTOPHER WEST	2 <sup>ND</sup> RESPONDENT
	DOUGLAS WEST	3 <sup>RD</sup> RESPONDENT
	MARSHALEEN FORSYTHE	4 <sup>TH</sup> RESPONDENT
	JEROME SMITH	5 <sup>TH</sup> RESPONDENT
	RICHARD SMITH	6 <sup>TH</sup> RESPONDENT

Mr. Owen Crosbie instructed by Owen Crosbie and Company for the Appellants

Mr. Allan Wood and Mrs. Suzanne Riden-Foster instructed by Livingston, Alexander and Levy for the Respondents

April 27 and July 30, 2009

**SMITH, J.A:**

1. This procedural appeal concerns the validity of a Fixed Date Claim Form which the appellants claim was not signed by the claimants or their attorneys-at-law pursuant to Rule 22.1 of the Civil Procedure Rules 2002 (CPR).

**Background Facts**

2. On July 11, 2007 a Fixed Date Claim Form (FDCF) seeking injunctive relief and recovery of possession of property was filed in the Supreme Court on behalf of the respondents against the appellants.
3. An application for an interlocutory injunction went before Sinclair-Haynes J on September 27, 2007. Mr. Owen Crosbie, counsel for the appellants took a preliminary objection that the FDCF was a nullity in that it was not signed by the respondents or their attorneys-at-law in breach of Rule 22.1 of the CPR and section 149 of the Registration of Titles Act (RTA).
4. Mr. Seyon Hanson, counsel for the respondents applied for and obtained an adjournment to October 12, 2007. On October 3, 2007, an amended FDCF was filed by the respondents' attorneys-at-law. This amended FDCF was signed by the respondents' attorneys-at-law on their behalf.
5. On October 12, 2007 when the hearing resumed, Mr. Crosbie submitted that the original FDCF was fundamentally flawed. He argued that compliance with Rule 22.1 of the CPR and the proper filing of the FDCF were conditions precedent to the commencement of proceedings. A fundamental breach, he submitted, could not be cured, hence the claim is void. He further contended that the claim should be struck out as an abuse of the process of the court because the claim was filed contrary to the law by persons without lawful authority.

6. Mr. Allan Wood for the respondents submitted that Rule 26.9 permits the matter to be rectified. By virtue of this rule, he contended, a failure to comply with a rule does not invalidate the proceedings unless the judge so orders. He further submitted that the Supreme Court Annual Practice of 2007 of the United Kingdom states that the failure to have a proper certificate of truth is an irregularity that can be cured. He also relied on the decision of the Caribbean Court of Justice in **Gladston Watson v Rosedale Fernandez** (2007) CCJ 1CAJ delivered on January 25, 2007.

7. The learned judge dismissed the preliminary objection, holding that the FDCF as originally filed was not a nullity and that the irregularity in the execution of the claim form was one which could be remedied within the court's discretion. She held that the FDCF should stand as amended. Permission to appeal was granted.

8. On November 1, 2007, the appellants filed a notice of appeal. As a procedural appeal, it went before a single judge of the Court. The grounds of appeal were not set out clearly and concisely. Morrison J.A. summarised the grounds thus:

- (i) The Fixed Date Claim Form not having been signed by the claimants in person or by their attorneys-at-law (Rules 3.6 (3) (d) and 22.1), it could only properly have been signed on the claimants behalf by an agent as duly authorised pursuant to section 149 of the RTA.

- (ii) In the absence of any such signature, the Fixed Date Claim Form was void and ought accordingly to have been struck out.

9. The learned judge of appeal held that Sinclair-Haynes, J was correct in treating non-compliance with Rule 22.1 as an irregularity which did not render the proceedings a nullity. He also agreed with the learned trial judge that section 149 of the RTA had no relevance to the commencement or continuation of proceedings in the Supreme Court but was applicable only to cases where the proprietor of land or other registrable interest was desirous of appointing an agent to transfer or otherwise deal with such land or interest. Accordingly, he dismissed the appeal with costs to the respondents.

10. The application before this court is to discharge the order of Morrison J.A. dismissing the appeal and to allow the appeal with costs to the appellants.

11. The appellants have again failed to set out clearly and concisely the grounds on which they seek to discharge the order of Morrison J.A. It would seem that the grounds are essentially the same as before.

12. The first question for this court is whether the original FDCF is a nullity or merely an irregularity. If it is a nullity, it cannot be amended or cured on the principle that **ex nihilo nihil fit**. On the other hand, if it is merely irregular, it may be cured.

13. Before this Court, Mr. Crosbie submitted that the FDCF was fundamentally flawed in that it was not signed in accordance with the relevant rules. It purports to be signed by "a stranger not known to the law in the context of filing a suit." This 'stranger' he said, was one Sheila Smith who purports to be acting as an agent of the claimants without the benefit of a Power of Attorney pursuant to section 149 of the RTA. This flaw, he contends, cannot be cured by an amendment.

14. Counsel for the appellants complained that the learned trial judge Sinclair-Haynes J, after correctly setting out the appellants' preliminary objection, incorrectly identified the issue when she said at p.3 of her judgment:

"The pertinent question is, whether the signing of the certificate of truth by Miss Sheila Smith rendered the proceedings a nullity, as submitted by Mr. Crosbie or whether it is an irregularity which is curable."

He stated that his preliminary objection had nothing to do with the certificate of truth. His objection, he said, concerns the improper signing of the FDCF, the filing of which marks the commencement of proceedings and gives the Court jurisdiction. He cited **Vinos Ltd. v Marks and Spencer** (2002) 3 All ER 784.

15. Mr. Crosbie further contended that the respondents had no power to amend a FDCF without the permission of the Court. He emphasized that the amended FDCF is not an amendment but a new claim form and

should be served afresh and the relevant rules complied with. In any event, he concluded, the FDCF was a nullity and could not be amended.

16. Mr. Alan Wood for the respondents in supporting the decision of Sinclair-Haynes J pointed to the fact that the FDCF was not filed by the claimants in person; it was filed by their attorneys-at-law. The form, he said, is also signed by the claimants' attorneys-at-law. The only irregularity, he conceded, in this matter concerns the certificate of truth which was signed by Sheila Smith and not by the claimants in person. This, he contended, does not render the FDCF a nullity. Such an irregularity, he submitted, is curable by amendment. In this regard he referred to Rule 26.9 and submitted that Sinclair-Haynes J properly exercised her discretion when she ordered that the FDCF should stand as amended and dismissed the preliminary objection. Among the authorities cited by Mr. Wood are ***Watson v Fernandez*** (supra) and ***General Legal Council ex parte Basil Whitter v Barrington Frankson*** P.C. Appeal No. 8 of 2008 delivered 27<sup>th</sup> July, 2006.

17. Mr. Wood further contended that even if the claimants had no right to amend the FDCF without leave of the court, the learned trial judge did authorise it by allowing the amendment to stand.

#### **Analysis of the Law and Submissions**

18. The following rules are relevant:

(a) Rule 8.1 which makes provisions as to how to start proceedings. It reads:

8.1 (1) A claimant who wishes to start proceedings must file in the registry of the court at the Supreme Court, King Street, Kingston (or at such other place as the Rules Committee may determine) the original and not less than one copy for each defendant (for sealing) of –

- (a) the claim form; and
- (b) unless either rule 8.2 (1) (b) or 8.2 (2) applies;
  - (i) the particulars of claim; or
  - (ii) where any rule or practice direction so requires or allows, an affidavit or other document, giving details of the claim required under this Part.

- (2) Proceedings are started when the claim form is filed.
- (3) ...
- (4) ... (This subsection states when Form 2 (FDCF) must be used).

(b) Rule 3.6 (3) (d) which reads:

“Every document to be filed at the court must –

(d) (except in the case of an affidavit) be signed by the person filing it”.

(c) Rule 22.1 which provides for the right to act in person. It states:

“22.1 Subject to the provisions of this Part and Part 23 (minors and patients) any person may begin, defend or carry on

proceedings in person or by an attorney-at-law".

In sum:

- (i) proceedings are begun by filing a claim form –Rule 8.1 (2);
- (ii) proceedings may be begun by the claimant in person or by his attorney-at-law (Rule 22.1);
- (iii) the person who files the claim must sign it – Rule 3.6 (3) (d).

19. The combined effect of Rules 8.1 (1) and (2), 3.6 (3) (d) and 22.1 is that a claimant may begin proceedings in the Supreme Court, by filing in the registry, in person or by an attorney-at-law, a claim form signed by the claimant or his attorney-at-law.

20. It seems tolerably clear to me that a claim form must be signed by the claimant himself or by his attorney-at-law. The principle **qui facit per alium facit per se** does not apply where the enactment requires a personal signature. Thus the effect of Rule 22.1 is to exclude an agent other than, of course, an attorney-at-law from beginning, defending or carrying on proceedings on behalf of the claimant. Accordingly, in my view, Miss Sheila Smith, the alleged agent of the claimants, had no authority to sign the FDCF.

21. The decision of their Lordships' Board in **General Legal Council v Frankson** was referred to by counsel for the respondents. In that case the question the Board had to deal with was whether pursuant to section 12 of the of the Legal Profession Act an aggrieved person must apply in



person to the Committee to require an Attorney to answer allegations of professional misconduct or whether he can authorize someone to apply on his behalf.

22. Their Lordships stated the general principle to be that when a statute gives someone the right to invoke some legal procedure by giving a notice or taking some other formal step, he may either do so in person or authorize someone else to do it on his behalf -**qui facit per alium facit per se** - paragraph 4 of judgment. However their Lordships recognized that- "There are statutes which, exceptionally, require a personal signature and exclude performance by an agent" – paragraph 5 *ibid*.

23. As stated before, in my view, the statutory scheme set out above requires the personal signature of a claimant or that of his attorney-at-law to commence proceedings in the Supreme Court.

24. Mr. Wood in his oral and written submissions stated that the preliminary objection taken in the court below and addressed in the procedural appeal is that the certificate of truth on the Fixed Date Claim Form having been signed by Sheila Smith as agent for the claimants amounts to non-compliance with Rule 22.1 of the CPR which Mr. Crosbie claims is one of the conditions precedent to the commencement of proceedings. He submitted that in fact the only irregularity in the FDCF is the signing of the certificate of truth by Miss Sheila Smith. The claim form itself, he said, was properly signed by the claimants' attorneys-at-law. It

seems to me that this contention treats with the certificate of truth as a separate part of the documentation. But is this so?

25. It might be helpful at this point to describe the relevant form. Form 2 in Appendix 1 of the CPR is the skeleton of the FDCF. Form 2 contains a certificate of truth as is required by Rule 3.12. This certificate appears immediately after the statement of the remedies sought by the intended claimants. Thereafter it is dated and signed. A "Notice to the Defendant" is endorsed on the form. This notice appears after the Claimant's signature. It should be sealed and dated. There is no indication that the Notice should be signed. However, the signature of the claimant's attorney-at-law and the date the signature was affixed appear between the stated address and other details of the Registry and of the claimants' address for service.

26. Form 2 does not indicate that a signature is necessary at the end of the Notice. It indicates that the claimant's signature should appear after the statement of case and the certificate. The certificate is in the following terms:

"I certify that all the facts set out in this Claim Form are true to the best of my knowledge, information and belief".

The provisions of Rule 3.12 are important in this regard. Rule 3.12 reads:

"(1) Every statement of case must be verified by a certificate of truth.

- (2) The general rule is that the certificate of truth must be signed by the lay party personally.
- (3) Where it is impracticable for the lay party personally to sign the certificate required by paragraph (1) it may be given by that person's attorney-at-law.
- (4) A certificate of truth given by the attorney-at-law must also certify –
  - (a) the reasons why it is impractical for the lay party to give the certificate; and
  - (b) that the certificate is given on the lay party's instructions.
- (5) ...
- (6) ...
- (7) ...
- (8) A certificate given by the attorney-at-law for a party must be in the following form –
  - 'I [name of the individual attorney-at-law giving the certificate] certify that –
    - (a) the [claimant or as the case may be] states that he believes that the facts stated in this [name document] are true; and
    - (b) this certificate is given on the [claimant's or as the case may be] instructions. The [claimant or as the case may be] cannot give the certificate because [state reason]'."

Where, as in the instant case, it is impracticable for the lay parties personally to sign the certificate of truth, it is proper for their attorneys-at-law to sign on their behalf. This signature must appear immediately after the certificate of truth which is inserted immediately after the statement of

case and Rule 3.12(4) must be complied with. A signature at the end of the "Notice to Defendant", in my view is not necessary.

27. Indeed the fact that on October 3, 2007, during the adjournment of the hearing of the preliminary objection, the claimants' attorneys-at-law filed what was described as an Amended Fixed Date Claim Form with a certificate of truth in the form prescribed by Rule 3.12(8) is an acknowledgment that the original form was not properly executed. This amended claim form is signed by the claimants' attorneys-at-law immediately after the certificate of truth which appears immediately after the statement of claim. Its execution was in accordance with the rules.

28. It seems to me that ordinarily a certificate of truth in a FDCF, fashioned after Form 2, should be treated as an integral part of the FDCF and no distinction should be drawn between the signing of the claim form and the signing of the certificate of truth. This obviously is the point Mr. Crosbie sought to make. Hence his ignoring the fact that the respondents' attorneys-at-law had signed the form at the end of the 'Notice to the Defendant' section. However there may be circumstances, I should think, in which it may be reasonable to make a distinction between the signing of the certificate of truth and the signing of the claim itself. Whether or not such a distinction should be made will depend on the circumstances of the particular case. For example where it is not impracticable for the lay party personally to sign the certificate he must do so (Rule 3.12) and

his attorney-at-law who files the claim form must also sign the claim – Rule 3.6 (3) (d).

29. In the instant case it was impracticable for the respondents/claimants to sign the certificate of truth. Thus it was permissible for the certificate to be given by their attorneys-at-law (Rule 3.12 (3)). The amended FDCF exemplifies how this should have been done initially. The question now is whether the original FDCF signed by Sheila Smith as agent for the claimants is incurably defective.

30. In the Court below Sinclair-Haynes, J seemed to have treated the signing of the certificate of truth as the signing of the claim form. At page 3 of her judgment the learned judge after setting out the provisions of Rule 22.1 said:

“The pertinent question is whether the signing of the certificate of truth by Miss Sheila Smith, rendered the proceedings a nullity, as submitted by Mr. Crosbie or whether it is an irregularity which is curable.

The signing of the certificate of truth by Miss Sheila Smith is a procedural error. The consequence of non-compliance with rule 22.1 has not been specified by any rule, practice direction or court order (see rule 26.9 (1) (sic)), in the circumstances rule 26.9 (2) is applicable”.

After restating the provisions of Rule 26.9 (3) the learned trial judge continued:

“It is therefore axiomatic that non-compliance with rule 22.1 is an irregularity which does not

render the proceedings a nullity. Remedy of the error is therefore within the courts discretion”.

31. Rule 26.9 states:

“(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”.

32. The learned trial judge relied on the CCJ case of **Watson v Fernandez**. (supra). In that case the issue was whether an attorney-at-law not “on the record” was entitled validly to sign a notice of appeal on behalf of his client – See paragraph 8 of judgment. After examining closely the relevant rules of Court, the current practice and procedure and the authorities, the Court at paragraph 31 said:

“In our judgment, when Order 11 rule 1 of the Court of Appeal Rules permits a notice of appeal to be signed by the appellant’s legal representative, it simply means that any attorney who in fact has the authority of the appellant so to do, is entitled to sign the notice of appeal ...”

33. A statement by the CCJ at paragraph 7, is I think, instructive. It is this – “of course, if Mr. Gibson had not in fact been authorized by the appellant to sign the notice of appeal, the appeal would indeed, have been a nullity as appears from **Re American Life Assurance Co. Ltd.** and **Heralall v Shivcharran ...**”

This statement appears to support Mr. Crosbie's contention that the unauthorized and unlawful signing of the FDCF renders it a nullity. In **Heralall v Shivcharrun** (1958) 1 WIR 29 at 30, Hallinan C.J. said:

“If proceedings are instituted by a member of the legal profession without the authority of the apparent plaintiff, this is so fundamental a flaw as to make the proceedings a nullity”.

It seems to me that it may be said, a fortiori, that proceedings commenced by the filing of a claim form which is signed by a person who has no authority so to do are so fundamentally flawed as to make them a nullity. The rationale for this, I would venture to think, is clear– if proceedings are instituted without the authority of the apparent claimant who is dissatisfied with the result, such claimant, if dishonest, may disavow such proceedings with a view to avoiding any consequential obligations.

34. In **Watson v Fernandez** (at para 24) the CCJ referred to **Mahabeer v Singh** (1966) 9 W.I.R 475 which provided the rationale for the statement of Hallinan, C.J. in the **Heralall** case. In **Mahabeer v Singh** at p.481 Luckhoo, J.A. said:

"... There is good sense in this requirement otherwise the opposite party or even the court may be subjected to the whimsical or capricious assertions of a dishonest client that his legal representative did not have his authority to do what he did or that he ceased to have any authority at all..."

In the **Mahabeer** case it was held that an injunction ought to be discharged on the ground that the undertaking as to damages given by a barrister was of no effect, as the barrister could not properly appear uninstructed by a solicitor. It was in this context that Luckhoo J.A. made the statement to which I have just referred.

35. Further it seems to me that, as Mr. Crosbie submitted, a court cannot properly assume jurisdiction over a matter which is not properly before it. Rules 3.6 (3) (d) and 8.1 (2) and Rule 22.1 together preclude Miss Sheila Smith from starting proceedings on behalf of the respondents/claimants. Indeed such proceedings in relation to the respondents' claim would not have been validly instituted. Thus Sinclair-Haynes J would not be seised of the respondents' claim. In point of law there would have been no proceedings before her. It is interesting to note that on the criminal side where a notice of appeal did not comply with the Court of Appeal Rules in that as required by the rule it was not signed by the appellant himself, the Court held that the notice was invalid – see **R v Moore** 12 JLR 809, 814; **R v Foster** 13 JLR 129 and **R v Mitchell** 25 JLR 383. In my opinion, Rule 26.9(3) can only be invoked after



proceedings have been instituted and there is *ex facie* a valid FDCF. In the circumstances, I am inclined to agree with counsel for the appellants that the unauthorized signing of a claim form is so fundamental as to render the proceedings a nullity not curable by any order of the court since **ex nihilo nihil fit**.

36. I must however consider the significance of the signature of the claimants' attorneys-at-law which was affixed to the end of the Notice. It seems to me that the 'Notice to the Defendant' is clearly a part of the claim form. The language of the Notice indicates that it is intended to be part and parcel of the claim form. It indicates that the claim form has no validity if it is not served within six (6) months of the date stated therein. It gives the claimants' address for service and specifies the name and address of the attorney-at-law filing the claim. Although, as I see it, the signature of the attorneys-at-law was misplaced, this error should not render the signature ineffective. It seems to me that the applicable principle in the circumstances is **ut res magis valeat quam pereat** (it is better for a thing to have effect than to be made void). In order to apply this principle, the signing of the claim form must be treated as distinct from the signing of the certificate of truth. I would therefore hold that the claim form, was effectively signed by the claimants' attorneys-at-law thereby indicating that they were acting on behalf of the claimants pursuant to Rule 22.1. Miss Sheila Smith's signing of the certificate should not be taken

to be the signing of the claim form since the claimants' attorneys-at-law also signed the form thereby claiming authorship of the claim. Thus, as Mr. Wood submitted, the only defect in the claim form was the signing of the certificate by Miss Smith.

37. We have seen that proceedings are started when the claim form is filed – Rule 8.1 (2). We have also seen that the person who files the claim form must also sign it – Rule 3.6 (3) (d). Therefore in the light of Rule 22.1 proceedings were properly commenced on behalf of the claimants when the claim form signed by their attorneys-at-law was filed by the attorneys. Thus the proceedings before Sinclair-Haynes J were, in my view, properly commenced even though the certificate of truth was admittedly defective.

38. I must now proceed to consider the effect of a defective certificate of truth. (Can a claim form with a defective certificate of truth be cured by amendment?) Does a failure to verify a statement of case make it a nullity? Mr. Wood argues that it does not. He relied on Rule 26.9, but Rule 26.9 (1) states that the rule does not apply where the consequences of failure have been specified by any rule or practice direction or court order. And Rule 3.13 provides for the failure to give a certificate of truth. This rule states:

"3.13 (1) The court may strike out any statement of case which has not been verified by a certificate of truth.

- (2) Any party may apply for an order under paragraph (1).

In my opinion, in the light of rule 13.3, the provisions of rule 26.9 cannot be invoked in respect of a failure to give a certificate of truth.

39. However Rule 13.3 gives the court a discretion to strike out the statement of case on the application of a party. The exercise of the power to strike out is not mandatory. Thus the failure to comply with Rule 3.12 must be treated as an irregularity and will not nullify the proceedings or any step taken in them. Indeed the statement of case will stand unless otherwise ordered by the court. As to whether the claim may be prosecuted without a certificate of truth is another matter.

40. The next and happily the final question is whether a FDCF can be amended without the leave of the court. It is the contention of Mr. Wood for the respondents that the Amended FDCF filed on the 30<sup>th</sup> of October, 2007 in which the certificate of truth was signed by their attorneys-at-law in accordance with rule 3.12 was properly before the court. He relied on Rule 20.1 which states:

"Any party may amend a statement of case at any time before the case management conference without the court's permission unless the amendment is one which either –

- (a) rule 19.4 (special provision about changing parties after the end of a relevant limitation period); or

- (b) rule 20.6 (amendments to statements of case after the end of relevant limitation period) applies".

Mr. Wood submitted that the learned trial judge was correct in ordering that the Amended FDCF should stand.

41. Mr. Crosbie submitted that the amendment of a Fixed Date Claim Form can only be done with the permission of the court. He contended that Rule 20.1 does not apply to a FDCF since rule 27.3 (1) does not require a case management conference in respect of a fixed date claim.

42. The rule Mr. Crosbie relies on, that is, Rule 27.3 (1) reads:

"The general rule is that the registry must fix a case management conference immediately upon the filling of a defence to a claim other than a fixed date claim".

Whereas it is true that there is no requirement for the registry to fix a case management conference in respect of a fixed date claim, Rule 27.2 (1) directs the registry to fix a date for the first hearing when a fixed date claim is issued and Rule 27.2 (7) empowers the court to treat the first hearing of a fixed date claim as a case management conference. Rule 27.2 (7) provides that:

"At the first hearing, in addition to any other powers that the court may have, the court shall have all the powers of a case management conference".

In light of Rule 27.2 (7), there is no justification in restricting the application of Rule 20.1 to a claim other than a fixed date claim. Thus in my

judgment, a fixed date claim may be amended at any time before the first hearing without the court's permission. Accordingly the learned trial judge was entitled to direct that the Amended Fixed Date Claim Form should stand.

**Conclusion**

43. For the above reasons, I would dismiss the appeal and affirm the order of Sinclair-Hynes, J.

**HARRIS, J.A.**

44. This is an application in which the appellants seek a review of an order of Morrison J.A. dismissing a procedural appeal which had been brought challenging an order of Sinclair-Haynes J.

45. The respondents, on July 11 2007, initiated proceedings against the appellants by way of a Fixed Date Claim Form, in which they sought an injunction against them as well as an order for the recovery of possession of property on behalf of the 1st, 2nd and 3rd respondents. The certificate of truth in verification of the Fixed Date Claim Form was executed by one Sheila Smith who signed in the capacity of agent for the respondents. The Notice To The Defendant was signed by the attorney-at-law for the respondents.

46. On September 27 2007, an application for an interlocutory injunction came on for hearing before Sinclair-Haynes, J. at which time a preliminary objection was taken by the appellants' attorney-at-law that the Fixed Date Claim Form be struck out for the reason that it had not been signed by the respondents or their attorneys-at-law. A hearing of the point in limine did not proceed on that date.

47. On October 3 2007, an amended Fixed Date Claim Form was filed by the respondents. The certificate of truth was signed by their attorneys-at-law on their behalf. On October 12 2007, the hearing of the preliminary

objection commenced. On October 19 2007, the learned judge refused to strike out the respondents' claim. She dismissed the objection brought in limine and ordered that the amended Fixed Date Claim Form should stand.

48. On November 1 2007, the appellant lodged an appeal against the order of Sinclair Haynes, J. The appeal was heard and dismissed by Morrison J.A. with costs to the respondents to be agreed or taxed. Following this, the appellant filed an application seeking to set aside that order.

49. The following were stated as the grounds on which reliance was placed: -

“(a) The CPR 2002, Rule 22.1 states:

**Right to act in person**

Subject to the provisions of this Part and Part 23 (minors and patients) any person may begin, defend or carry on proceedings in person or by an attorney-at-law.

(b) **Rule 3.6 (3) (d) states:**

Every document to be filed at the court must (except in the case of an affidavit) be signed by the person filing it.

Section 149 of the Registration of Titles Act requires Power of Attorney states:

The proprietor (including a married woman) of any land under the operation of this Act, or of any lease, mortgage or

charge, may appoint any person to act for him in transferring the same, or otherwise dealing therewith, by signing a power of attorney in the Form or to the effect contained in the Sixteenth Schedule.

Every such power or a duplicate or attested copy thereof shall be deposited with the Registrar, who shall note the effect thereof in a book to be kept for the purpose.

### **SIXTEENTH SCHEDULE**

#### Form of Power of Attorney

I, A.B., do hereby appoint \_\_\_\_\_ my attorney, to sell to any person all or any lands, leases, mortgages or charges whether now belonging to me or which shall hereafter belong to me under or by virtue of the Registration of Titles Act, or of which I am now or shall hereafter be the proprietor or owner under the said Act. Also to mortgage all or any such lands or leases for any sum at any rate of interest. Also to charge the same with any annuity of any amount. Also to lease all or any such lands as shall be of freehold tenure for any term of years not exceeding twenty-one years in possession at any rent. Also to surrender, or obtain or accept the surrender, of any lease in which I am or may be interested. Also to exercise and execute all powers which now are or shall hereafter be vested in or conferred on me as a lessor, mortgagee or annuitant under the said Act (or otherwise according to the nature and extent of the powers intended to be conferred). And for me and in my name to sign all such transfers and other instruments, and do all such acts, matters and things as may be necessary or expedient for carrying out the powers hereby given, and for recovering all sums of money that are now or may become due or owing to me in respect of the premises, and for enforcing or varying any





Co. v. M Aloon, 32 L. R. Ir. 368). Such departure from the prescribed form, however, do not render the proceedings void, but constitute an irregularity which can be dealt under O. 2. The statement of claim must be signed by counsel, if settled by him, and if not, by the solicitor, or the party in person. On the principle that "qui facit per alium facit per Se," the signature by the clerk to the plaintiffs solicitor is sufficient (France v. Dutton, [1891] 2 Q.B. 208). See Fick & Fick, Ltd. v. Assimakis, [1958] 1 W.L.R. 1006, C.A.

- (ii) Olafsson v. Gissurarson, [2006] WHC 3250 (Comm), The Times, December 22, 2006 (McKay J), it was held that the service of a claim out of the jurisdiction by a method of service that did not conform with the local law, and which therefore was not a method of service permitted by that (r.6.24), was not an error of procedure that could be rectified under this rule."

50. Mr. Crosby submitted that a claim form is the process by which the court assumes jurisdiction to hear and determine a matter but the Fixed Date Claim Form was not signed in accordance with Rule 3.12 (2) of the Civil Procedure Rules 2002 (C.P.R) and is therefore a nullity and accordingly, the purported amended Fixed Date Claim Form is invalid. He argued that the execution of the Fixed Date Claim Form by Sheila Smith as an agent for the respondents is ineffective as it is inconsistent with section 149 of the Registration of Titles Act, which enables an agent of a party to bring proceedings by way of a power of attorney.

51. Mr. Wood argued that the Notice To The Defendants (the appellants) on the Fixed Date Claim Form, was signed by the respondents' (claimants) attorneys-at law. The signature of the Fixed Date Claim Form by Sheila Smith as agent for the respondents, he argued, would not render the Form a nullity, as the court, being authorized by the rules, has the jurisdiction to rectify any procedural defect. He argued that Rule 26.9 of the C.P.R gives the court the power to regularize any procedural breach and the learned judge was correct in ordering that the amended Fixed Date Claim Form should stand. He further argued that section 149 of the Registration of Titles Act is irrelevant to these proceedings.

52. Sinclair-Haynes J. stated that the execution of the certificate of truth by Miss Smith was a procedural error. She went on to say:

"The consequence of noncompliance with rule 22.1 has not been specified by any rule, practice direction or court order (see rule 29.2. [1]), in the circumstances rule 26.9 (2) is applicable. Rule 29.3 (1) states a (sic) follows:

"An error or 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."

It is therefore axiomatic that non-compliance with rule 22.1 is an irregularity which does not render the proceedings a nullity. Remedy of the error is therefore within the court's discretion.

This exercise of discretion must seek to give effect to the overriding objective of enabling the court

to deal with the case justly. An important consideration in so determining is whether the defendants have suffered or will suffer any prejudice as a consequence of the court acceding to the request of the claimants to remedy the error. It has not been submitted that the defendants have suffered any prejudice."

She reviewed the case of **Watson v. Fernandez** [2007] CCJ 1CAJ delivered on January 25, 2007 in which the CCJ dealt with the question of a practice and procedural irregularity. The issue which arose in that case was whether an attorney-at-law who was not on the record as appearing for his client was entitled to execute a notice of appeal on his behalf. That court, after construing the relevant rules of court held that the attorney was authorized to act for the appellant, having concluded that it was a breach which the court was empowered to rectify.

She then concluded by saying:

"In the instant case, the ends of justice will not be served by striking out the claimant's' case because of procedural irregularity where it had not been shown that the defendants have or will suffer any prejudice.

In the circumstances, the defendants' application to strike out the claimants' FDCF is dismissed."

53. Morrison J. A. stated that Rule 26.9 (2) – (4) makes it plain that non compliance with any rules of court will not be treated by the court as fatal and the court is endowed with wide discretionary powers to rectify procedural errors.

54. The fundamental issues arising in this appeal are whether the Fixed Date Claim Form, having not been executed by the respondents, is rendered a nullity or whether the failure of the respondents to sign the claim form is a procedural error which can be rectified by an amendment. Is the court empowered to permit an amendment to a claim form where, on its filing, the signature appended to the certificate of truth is neither that of the claimant nor of his attorney-at-law? The resolution of these issues invites an excursion into the provisions of the C.P.R.

55. Before giving consideration to the C.P.R. I think it is necessary to make reference to Mr. Crosbie's submission that the Fixed Date Claim Form could only have been properly signed on the respondents' behalf by their duly authorized agent in such circumstances as prescribed by section 149 of the Registration of Titles Act.

56. That section of the Act is inapplicable to the issues which were to be determined by the learned judge. Its applicability is confined to matters in which a registered proprietor of a legal or equitable interest in land can, by way of a power of attorney, appoint an agent for the purpose of transferring or otherwise dealing with such interest. Sinclair-Haynes J. refused to take cognizance of the section and the learned judge of this court rightly concluded that she was correct in so doing. He properly

concluded that the section has no relevance to the commencement or continuation of proceedings in the Supreme Court under the C.P.R.

57. I will now turn to the real issue which falls for consideration that is, whether the Fixed Date Claim Form lacks validity. It will first be necessary to refer to the following rules:

58. Rule 1.1 empowers the court, by virtue of its overriding objective to deal with matter justly.

59. By Rule 1.2 the court, when interpreting the rules or exercising any powers under them, must seek to give effect to the overriding objective.

60. Rule 3.6 (3) (d) provides, among other things, that every document filed in the court must be executed by the party filing it.

61. Rule 3.7 (1) makes provision as to the filing of documents. It reads:

- “(1) A document may be filed by –
  - (a) delivering it;
  - (b) posting it; or
  - (c) (except in the case of a claim form) sending it by fax, to the Registry where the claim is proceeding or intended to proceed. ”

62. Rule 3.12 prescribes that a statement of case must be verified by a certificate of truth which must be personally signed by the party filing it. Additionally, it provides for the execution of the certificate of truth by a

litigant's attorney-at-law where it is not practicable for that person to do

so. The section reads:

- "3.12 (1) Every statement of case must be verified by a certificate of truth.
- (2) The general rule is that the certificate of truth must be signed by the lay party personally
- (3) Where it is impracticable for the lay party personally to sign the certificate required by paragraph (1) it may be given by that person's attorney-at-law.
- (4) A certificate of truth given by the attorney-at-law must also certify –
- (a) the reasons why it is impractical for the lay party to give the certificate; and
- (b) that the certificate is given on the lay party's instructions.
- (5) ...
- (6) ...
- (7) A certificate of truth by a lay party personally must be in the following form-
- "I [name] certify that I believe that the facts stated in this [name of document] are true."
- (8) A certificate given by the attorney-at-law for a party must be in the following form –
- "I [name of the individual attorney-at law giving the certificate] certify that –

- (a) the [claimant or as the case may be] states that he believes that the facts stated in this [name of document] are true; and
- (b) this certificate is given on the [claimant's or as the case may be] instructions. The [claimant or as the case may be] cannot give the certificate because [state reason]."

63. By Rule 3.13 (1) the court is authorized to strike out a statement of case which has not been verified by a certificate of truth.

64. Under Rule 8.1 (1) a claimant who wishes to institute proceedings must file a claim form. By Rule 8.1 (2) the commencement of proceedings takes effect at the time of the filing of the claim form.

65. Rule 22.1 specifies the parties who may commence, defend or carry on proceedings. The rule reads:

"Subject to the provisions of this Part and Part 23 (minors and patients) any person may begin, defend or carry on proceedings in person or by an attorney-at-law."

66. Rule 26.9 empowers the court to remedy procedural errors.

67. The object of the new rules is to give the court greater flexibility in dealing with the striking out of an action than that which existed under the old rules. The court may, in the exercise of its discretion, strike out a



claim. Guidance as to the court's approach in dealing with an application to strike out can be obtained from the following dicta of May L. J., in **Purdy v. Cambran** CCRT1 1999/0847/B1 at paragraph 46 he said:

"The Civil Procedure Rules are a new procedural code with an overriding objective enabling the court to deal with cases in accordance with considerations which include those to be found in rule 1.1 (2) One element expressly included in rule 1.1(2) as guiding the court towards dealing with cases justly is that the court should ensure, so far as is practical, that cases are dealt with expeditiously and fairly... The court has to seek to give effect to the overriding objective when it exercises any powers given to it by the rules. This applies to applications to strike out a claim. When the court is considering, in a case to be decided under Civil Procedure Rules, whether or not it is just in accordance with the overriding objective to strike out a claim, it is not necessary or appropriate to analyze that question by reference to the rigid and overloaded structure which a large body of a decision under the former rules had constructed."

68. In general, noncompliance with a procedural rule does not render proceedings null and void. Accordingly, it is readily accepted that failure to comply with a procedural rule amounts to an irregularity which may be cured, the court being endowed with discretionary powers to regularize any defect arising in proceedings. However, the court may, in an appropriate case, strike out a statement of case for noncompliance with a rule or an order or a practice direction.

69. In the application of its discretionary powers, the court is

constrained to pay due regard to all the circumstances of a particular case. In so doing it must take into account the overriding objective, which, as specified by Rule 1.1 and 1.2 deal with cases justly. Accordingly, the court's quest, in the exercise of its powers under Rule 1.1 and 1.2 in construing the rules, must effectively apply the overriding objective. This imposes on the court the task of dispensing justice. In its search for justice the focus must be directed to what is fair and just in a particular case.

70. There is a line of authorities which illustrates that a court, in its endeavour to deal justly with a case, may refrain from striking out where no undue prejudice would accrue to a defendant and no injustice would be encountered by him if a case were to proceed to trial. See **Biguzzi v. Rank Leisure Plc** CCRT1 1999 /07/00/2; **Purdy v. Cambran** (supra) **Walsh v. Misseldine** CCRT1 1999/09/99/2 and **Woodhouse v Consignia Plc** [2002] 275, (March 7, 2002).

71. Under the new rules, pleadings must contain a certificate of truth and as ordained by Rule 3.12(1), every statement of case must be verified by a certificate of truth.

72. By Rule 3.12(2) a claimant must execute the certificate of truth. The use of the word "may" in Rule 3.13(1) is of manifest significance. "May" as used in that rule does not impose on the court a mandatory obligation to strike out an unverified statement of case. Importantly, it bestows on the

court a discretion as to whether such a statement of case should be struck out. It is clear that the court, being armed with discretionary powers, is at liberty to decide whether non compliance with Rule 3.12 (2) is a nullity and warrants the striking out of a claim or whether it is a procedural defect which can be remedied by an amendment.

73. Under Rule 22.1 proceedings can only be initiated by a claimant or his attorney at law. Rule 22.1, by its express provision as to who can commence an action, shows that no party other than a claimant or his attorney-at-law may commence proceedings. However, Rule 3.12 (3) makes it permissible for a claimant's attorney-at-law to execute the certificate of truth where it is impracticable for the claimant so to do. In the present case, it cannot be said that the statement of case had been verified, it having been signed by a party who is not designated by the rules to sign. The lack of verification is without doubt a defect.

74. The question is whether it can be said that this defect renders the Fixed Date Claim Form a nullity. This leads me to make special reference to the Fixed Date Claim Form as filed. It is necessary to fully outline its contents hereunder:

"The Claimants David West, Pharmacist,  
Christopher West, Engineer and Douglas Alrick  
West, Architect all of 196-52 NEW 62<sup>nd</sup> Court  
Miami Florida 33015, United States of America.  
Marshaleen Forsythe nee Henriques, Medical  
Doctor, Jerome Smith Student and Richard Smith

Bank Clerk, all of 23 Queens Way Kingston 10, Saint Andrew being the registered proprietors of the land claims against the Defendants James Wylie and Lorna Wylie both of Spalding, Spalding P.O. Clarendon and Richard Wint of Spitzbergen Manchester.

- 1) An injunction to restrain the Defendants and prohibit either of them from constructing or continuing the construction of any building or structure on the land.
- 2) An injunction against the Defendants to restrain and prohibit them, or either of them from entering, remaining on, or otherwise trespassing on the land.
- 3) An Order that the First, Second and Third Defendants deliver up possession of the land to the Claimants forthwith, or in such other time frame as this Honourable Court deems just.
- 4) An order that the First, Second and Third Defendants pay the Claimant's legal costs.
- 5) Such further and/or other relief as this Honourable Court deems fit.

I certify that all the facts set out in this Claim Form are true to the best of my knowledge, information and belief."

Dated the 11th day of July 2007

Sheila Smith

---

Sheila Smith Agent for the Claimants

### **NOTICE TO THE DEFENDANT**

"The first hearing of this claim will take place at the Supreme Court, Public buildings, King Street, Kingston, on the 12th day of October 2007 at 12:00 p.m.

If you do not attend at the hearing, judgment may be entered against you in accordance with the claim.

If you do attend, the judge may

- (a) deal with the claim
- (b) give directions for the preparation of the case for a further hearing.

A Particulars of Claim or an affidavit giving full details of the Claimant's claim should be served on you with this Claim Form. If this has not been done and there is no order permitting the Claimant not to serve the Particulars of Claim or Affidavit you should contact the court immediately.

You should complete the form of Acknowledgement of Service served on you with this claim form and deliver it to the registry (address below) so that they receive it within FOURTEEN days of service of this Claim Form on you. The form of Acknowledgement of Service may be completed by you or an Attorney-at-law, acting for you. See rules 9.3(1) and 9.4(3)

You should consider obtaining legal advice with regard to this claim. See notes in form 2A served with this Claim Form.

This Claim Form has no validity if it is not served within six months of the date below unless it is accompanied by an order extending that time. See rule 8.14(1)

The Registry is at King Street, Kingston, telephone numbers (876) 922-8300-9, fax (876) 967-0669. The office is open between 9:00 a.m. and 4:00 p.m. Mondays to Thursdays and 9:00a.m. to 3:00p.m.

on Fridays except on Public Holidays.

Dated the 11th day of July, 2007  
LIVINGSTON, ALEXANDER & LEVY

PER: S. Hanson

---

Attorneys-at-Law for the Claimants

The Claimant's address for service is that of his Attorneys-at-Law, Livingston, Alexander & Levy of No. 72 Harbour Street, Kingston, telephone numbers (876) 922-6310-9, Fax (876) 922-0713.

Filed by LIVINGSTON, ALEXANDER & LEVY of No. 72 Harbour Street, Kingston, Attorneys-at-Law for and on behalf of the Claimants herein."

75. As shown, the Fixed Date Claim Form incorporates the statement of case a certificate of truth and a Notice to the Defendant. The statement of case, the certificate of truth and Notice to the Defendant are bound together as part and parcel of the Fixed Date Claim Form. It would have been the intention of the framers of the rules that they form one document and must be construed as such. It cannot be denied that the certificate of truth had not been signed by either the claimants or their attorneys at law. It must be observed, however, that the attorneys-at-law for the claimants affixed their signature at the end of the Notice to the Defendants. Form 2 specifies that the signature of a claimant or his attorney at law should be placed immediately after the certificate of truth.

76. The further question arising is what is the effect of the signature of the attorneys-at-law for the claimants appearing after the Notice to the Defendant, they, having not signed the certificate of truth in verification of the statement of case? The format of a certificate of truth which is to be executed by an attorney-at-law, requires that the attorney-at-law state that he believes the facts stated in the statement of case are true, that he is authorized by the claimant to give the certificate. He must also state the reason why the claimant is unable to give the certificate. Would the absence of a certificate of truth bearing these words in anyway invalidate the claim form? I think not.

77. Proceedings may be commenced by a Claim Form or by a Fixed Date Claim Form. Rule 3.6 (3) (d) specifies that every document filed must be signed by the party filing it. The Fixed Date Claim Form was filed by the attorney-at law for the respondents. Their signature, appearing at the end of the Notice to the Defendant in my view demonstrates that the form had been filed in accordance with Rule 3.6 (3) (d).

78. Rule 22.1 having expressly conferred a right on the attorney at law for a claimant to commence an action clearly shows that it had been the intention of the framers of the rules that once the signature of the attorney at law appears on the claim form containing all the requisite information as prescribed by Form 2 the document has been properly filed. In light of

the overriding objective the Fixed Date Claim Form ought to be treated as valid and subsisting. In my judgment, the Fixed Date Claim having been signed and filed by the respondents' attorneys at law, had undoubtedly been properly filed. This being so, as prescribed by Rule 8.1 (2) the document remains valid and subsisting and proceedings had effectively begun on its filing.

79. The failure to have had the proper party execute the certificate of truth ought to be classified as a procedural defect and clearly not one which would render the proceedings void ab initio. Rule 26.9 grants the court powers of amendment. The Fixed Date Claim Form contains a reasonable cause of action. The appellants filed a defence and counter claim to the respondents claim. The defect as to the execution of the certificate of truth by the proper party, is one which would fall within the scope of the rules as being capable of being regularized by an amendment. The amended Fixed Date Claim Form accords with the requirements of the rules. There is nothing to show that any undue prejudice would be suffered by the appellants if the amended claim proceeds. The justice of the case demands that the respondents be afforded the opportunity to pursue their claim.

80. A further question is whether the Fixed Date Claim Form could have been amended without the court's permission. Mr. Crosbie, relying on



Rule 27.3(1) submitted that a Fixed Date Claim Form cannot be amended without leave of the court as in the case of a fixed date claim a Case Management Conference is unnecessary. In contrast, Mr. Wood argued that Rule 20.1 permits an amendment of the Fixed Date Claim Form, without leave, at any time prior to the Case Management Conference.

Rule 20.1 states as follows:

"Any party may amend a statement of case at any time before the case management conference without the court's permission unless the amendment is one which either

- (a) rule 19.4 (special provision about changing parties after the end of a relevant limitation period ; or
- (b) rule 20.6 (amendments to statements of case after the end of relevant limitation period) applies"

Rule 27. 3 (1) reads:

"The general rule is that the registry must fix a case management conference immediately upon filing of a defence to a claim other than a fixed date claim"

81. It is perfectly true that Rule 27.3 (1) does not impose an obligation for the holding of a Case Management Conference in circumstances where a Fixed Date Claim Form is filed. However, under Rule 27.2 (7) the court is authorized to treat the first hearing of a Fixed Date Claim Form as a Case Management Conference. It would have been open to the

learned judge at the time on which the preliminary objection was taken, to have conducted a Case Management Conference and could have ordered that the Amended Fixed Date Claim Form be substituted for the Fixed Date Claim Form. The preliminary objection was taken at an adjourned first hearing, at which time the learned judge had properly pronounced on the validity of the amended Fixed Date Claim Form.

82. It is my view that Sinclair Haynes J. was correct in ordering that the amended Fixed Date Claim Form should stand and Morrison J.A. was right in upholding the decision of Sinclair Haynes J.

83. I would dismiss the appeal with no order as to costs.

**DUKHARAN, J.A.**

I have read in draft the judgments of Smith and Harris, JJ.A. I agree with their reasonings and conclusion. There is nothing further that I desire to add.

**SMITH, J.A.**

**ORDER:**

The appeal is dismissed with no order as to costs.