[2016] JMCA Civ 46

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS 106 & 117/2015

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA (AG)

BETWEEN	**DALE AUSTIN**	**APPELLANT**
AND	**THE PUBLIC SERVICE COMMISSION**	**1ST RESPONDENT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**2ND RESPONDENT**

Dale Austin in person and Mikhail Williams instructed by Duane Thomas for the appellant

Garth McBean QC, Lorenzo Eccleston and Miss Dian Johnson instructed by Jacqueline Samuels-Brown QC for the respondents

Miss Marlene Roper watching proceedings on behalf of the Public Service Commission

26, 27 April and 7 October 2016

MORRISON P

[1] I have read in draft the judgments of F Williams JA and Edwards JA (Ag). I agree with them and would also dismiss the appeals with no order as to costs.

F WILLIAMS JA

Background

[2] These matters have come before the court as interlocutory appeals from the orders of two judges of the Supreme Court. In a nutshell, the overarching position of the appellant in these appeals is that the learned judges in the court below erred, in that they misunderstood the true principles of law and the relevant evidence before them and failed to exercise their discretion judicially.

[3] By these appeals, the appellant has sought to challenge the judges' rulings on matters as diverse as an application to strike out a defence; the variation of an order awarding costs and an application as to whether two claims ought to have been separated or allowed to remain together.

[4] For a full appreciation of the issues involved in these matters and to see the way to their resolution, it is best to begin the journey by traversing the route that the matters have taken since their commencement.

Start of proceedings in the court below

[5] The appellant on 15 March 2012, filed a fixed date claim form (which was further amended and re-filed on 27 November 2014), seeking leave to apply for judicial review and constitutional relief. He is challenging the decision of the Public Service Commission (PSC) to remove him from public office, which decision was communicated in a letter dated 5 March 2012.

[6] On 16 March 2012, he was granted leave to apply for judicial review and the court also ordered a stay of the implementation of the PSC's decision.

[7] By affidavit filed and served on 17 January 2014, the appellant made a further claim for damages for defamation and breach of confidence arising from the publication of certain statements alleged by the appellant to be defamatory of him, contained in a report dated 16 February 2012. On 19 December 2014, the appellant filed and served on the respondents a further affidavit, particularizing the claims in defamation and breach of confidence.

[8] However, the respondents failed to file a defence or affidavit in response to these two affidavits filed by the appellant and served on them.

[9] On 8 April 2015, the appellant's fixed date claim form came up for hearing before the Full Court. On the application of the respondents, the court granted an adjournment and ordered, *inter alia,* that the appellant was to file further particulars of the damages claimed on or before 15 June 2015 and that the respondents were to file a defence on or before 6 July 2015.

[10] On 15 June 2015, the appellant filed further particulars of his claim in accordance with the order of the Full Court. However, no affidavit in response or defence was filed by the respondents within the time ordered by the Full Court. On 8 September 2015, the appellant filed and served a notice of application (amended and re-filed on 22 September 2015 and further amended on 12 October 2015) seeking:

(i) to have the issues in the claim dealt with summarily at the next court hearing;

(ii) to limit the respondents' right to give evidence as a consequence of their failure to file a defence within time; and

(iii) the entering of a default judgment in respect of the claim for defamation and breach of confidence, if that claim was separated from the claim for judicial review.

[11] On 9 September 2015 (the day after service of the above-mentioned original application), the respondents served on the appellant a notice of application, seeking an extension of time to file a defence to 21 days from the date of the hearing of that application. (That application bore the filing date of 28 July 2015.)

[12] The respondents' application for extension of time was supported by the affidavit of Lorenzo Eccleston, an attorney-at-law for the respondents, filed on 27 July 2015. No defence was exhibited to that affidavit.

[13] In response to the affidavit of Lorenzo Eccleston, the appellant filed and served an affidavit on 11 September 2015.

[14] After several adjournments of both applications, the respondents, on 21 September 2015, filed a defence. The appellant thereafter amended his notice of

application, to request that the defence and affidavit in response filed by the respondents on 21 September 2015 and 19 December 2014, respectively, be struck out.

[15] On 7 October 2015, the respondents served on the appellant a notice of application requesting that the appellant's claim for judicial review be tried separately from the claim for defamation.

The court's rulings on the applications below

Applications before G Fraser J (Ag)

[16] On 13, 21 and 22 October 2015, these applications were heard together by G Fraser J (Ag) (as she then was) and submissions made on behalf of the parties. The decision in the matter was delivered on 23 October 2015, with the following results:

A. *Respondent's notice of application dated 9 September 2015 for extension of time*

[17] With regard to the respondent's notice of application for extension of time to file defence, the learned judge, *inter alia*, granted 10 days from the date of that order (23 October 2015) for the respondents to file their defence and granted costs of the application to the appellant to be paid within 30 days, failing which the respondents' statement of case would stand struck out. (The amendment or variation of this order in relation to costs by Lindo J later gave rise to an issue on appeal.)

B. *Respondents' notice of application dated 7 October 2015 for separation of claims*

[18] The court ordered that the claim for judicial review was to be tried separately from the private-law claim for defamation and that the costs of that application were to be costs in the claim.

C. *Appellant's notice of application dated 12 October 2015 for claim to be dealt with summarily*

[19] The learned judge refused the application for: (i) the issues in the two claims to be disposed of summarily; (ii) the respondents' evidence to be limited and (iii) for default judgment to be entered in respect of the claim for defamation and breach of confidence in the event the court ruled (which, as it turns out, it did) that those claims were to have been separated. She also refused the appellant's application for leave to appeal.

Application before Lindo J

D. *Respondents' amended notice of application dated 20 November 2015 for variation of costs order*

[20] Subsequent to the making of the orders by G Fraser J, the respondents sought to vary the order for the payment of costs that had previously been made on the respondents' application for an extension of time to file the defence. On 25 November 2015, Lindo J ordered that costs were to be payable within 60 days of the registrar issuing a costs certificate in a sum to be agreed or taxed; the time for filing the notice of application was abridged and costs of the application were to be costs in the claim. The learned judge refused the appellant's application for leave to appeal that decision.

The appeal

[21] The appellant applied for permission to appeal the orders of both G Fraser J and Lindo J. On 4 December 2015, this court heard and granted the appellant's application for permission to appeal and ordered that both appeals be consolidated.

Notice and grounds of appeal

[22] The grounds of appeal set out in the notice and grounds of appeal filed on 28 October 2015 are as follows:

> "Ground 1
>
> The learned Judge erred in fact and in law in determining that the time limited for the Respondents to file their Defence/Affidavit in Response did not expire on January 31, 2015 but rather on July 6, 2015.
>
> Ground 2
>
> The learned Judge erred in fact and in law in finding that the Respondents were out of time by only twenty-three (23) days on the basis that their lapse in filing the statement of defence began from July 6, 2015 when the Respondents failed to file a Defence and ended on July 28, 2015 when the Respondents filed an application for extension of time.
>
> Ground 3
>
> The learned Judge erred in fact and in law in concluding that the Respondents had provided 'evidence' to the Court of their proposed/draft Defence.
>
> Ground 4
>
> The learned Judge erroneously and injudicially exercised her discretion to grant the Respondents an extension of time (to file a Defence) by failing to consider or to sufficiently consider the merits of the Defence to determine its arguability/real prospects of its success in respect of each of the claims advanced.
>
> Ground 5
>
> The learned Judge erroneously and injudicially exercised her discretion to grant the Respondents an extension of time (to file a Defence) by failing to correctly determine the length of the delay and in so doing erroneously overlooked the other elements of prejudice that were unique and germane in the instant circumstances.

Ground 6

The learned Judge erred in law by failing to give effect to the Claimant Mr. Austin's fundamental constitutional right as provided by section 16(2) of the Charter of Fundamental Rights and Freedoms of the Constitution of Jamaica in not considering or not sufficiently considering the questions of whether the statement of defence ought to be struck out and whether the proceedings in the matter herein should be separated.

Ground 7

The learned Judge erred in law and failed to exercise her discretion judicially when she failed to apply the proper test and/or consider all the relevant factors in deciding to make an order to separate the proceedings in the claim herein.

Ground 8

Having made an order to separate the proceedings by disaggregating the claim for Defamation, the learned Judge erred in law by concluding that she could not grant the Claimant leave to enter Default Judgment in respect of the Defamation claim on the basis that the disaggregated claim was still a Fixed Date claim.

Ground 9

The learned Judge erroneously and injudicially exercised her discretion by failing to properly consider and apply Rule 26.3(1) of the Civil Procedure Rules 2002 and specifically whether the filed statement of Defence ought to be struck out pursuant to Rule 26.3(1) (c) and/or Rule 26.3(1) (d), even if the Court had properly enlarged time for the Respondents to file their Defence and for the filed Defence to stand.

Ground 10

The learned Judge plainly erred in law in conflating and or otherwise interpreting the Claimant's application for an order for the summary trial/treatment of the issues pursuant to Rule 27.2(8) as an application for Summary Judgment pursuant to Part 15 of the Supreme Court of Jamaica Civil Procedure Rules 2002."

[23] As indicated in the grounds of appeal, several challenges have been directed at the rulings of the learned judges. However, there are no written reasons provided by the court below to demonstrate the considerations and exercise of discretion by the learned judges. Such reasons would, of course, have been of assistance to this court.

[24] In my view however, these are the main issues that have arisen on this appeal:

(a) whether the respondents ought to have been granted an extension of time to file their defence (grounds 1-5);

(b) whether the learned judge was correct not to have struck out the respondents' defence (grounds 6 & 9);

(c) whether the learned judge erred in separating the claim for judicial review from the claim for defamation and breach of confidence (grounds 6 & 7);

(d) whether the learned judge erred in not granting default judgment in the appellant's claim for defamation and breach of confidence (ground 8);

(e) whether the learned judge erred in not ordering that the issues in the claim be dealt with summarily (ground 10);

(f) whether Lindo J erred in varying the costs order of G Fraser J.

[25] I now propose to address the first issue, which requires consideration of G Fraser J's ruling on the respondents' application for extension of time to file defence.

Issue (a) whether the respondents ought to have been granted an extension of time to file the defence

Submissions for the appellant

[26] It was argued by the appellant that the learned judge erred in her computation of the period of the respondents' delay in filing the defence. The appellant submitted that time would have begun to run from 31 January 2015, (42 days after service of the last affidavit). Consequently, the defence would have been 77 days out of time. On that basis, the appellant contended, the learned judge was incorrect to have held that there was a delay of only 23 days, which would have started to run from 6 July 2015 (the date by which the Full Court ordered that the defence should have been filed).

[27] The appellant also argued that in the light of the learned judge's finding of (as he put it) an 'insubstantial 23 days delay', she failed to address her mind to the considerations for properly exercising her discretion, such as the degree of prejudice caused to the appellant in the circumstances, the lack of merit in the respondents' defence, (which defence, it was submitted, contained what amounted to bare denials) and the unsatisfactory reasons proffered for the respondents' delay.

[28] It was also submitted that the respondents' defence was irregularly filed and was not properly before the court and that, further, in respect of the appellant's claim for breaches of his constitutional right to privacy and family life (guaranteed by section 13(3)(j) of the Charter of Fundamental Rights and Freedoms) the defence of justification would fail, the defence having no reasonable prospect of success, as the

matters complained of are not demonstrably justified in a free and democratic society (**R v Oakes** [1986] 1 SCR 103 cited).

[29] It was also the submission of the appellant that the court misapplied the law regarding breach of confidence, thereby failing to recognize that the elements of the tort were made out and that the respondents' defence of qualified privilege was not established on the filed defence.

Submissions for the respondents

[30] On behalf of the respondents, Mr McBean QC first noted the limited circumstances in which this, an appellate court, may intervene in respect of the judgments and orders of a judge of a lower court, turning on the exercise of that judge's discretion. Learned Queen's Counsel also submitted that the time for the filing of the defence would have begun to run after 6 July 2015 (the date by which the Full Court ordered the defence to have been filed). He further argued that rule 13.3(a) of the Civil Procedure Rules (CPR) provides for the making of the application as soon as is reasonably practicable (as was done in this case) and so the computation of time by the learned judge was correct, such delay not having been inordinate. Further, he complained that the order of the Full Court unfairly shortened the time allotted by the CPR for filing the defence from 42 days to 22 days.

[31] Mr McBean also submitted that the court is able to grant an extension of time even after the time for filing a document has elapsed, and that, in the circumstances, the filing of the defence by the respondents would not have been irregular (as the

appellant asked the court to regard it). For this submission, Mr McBean relied on **The Attorney General v Keron Matthews** [2011] UKPC 38. Alternatively, it was argued that there is no provision in the CPR requiring the permission of the court to file a defence which is out of time. Further, there having been no condition attached to the order for the respondents to file a defence, no permission was needed for the respondents to file it, where the time had already expired.

[32] Citing the decision of **Leymon Strachan v The Gleaner Co Ltd and Stokes** Motion No 12/1999, judgment delivered on 6 December 1999, for a statement of the principles which guide the court's consideration in a matter of this nature, Mr McBean submitted that the defence was one of merit and that there was no prejudice occasioned to the appellant by the granting of the extension of time. With regard to the claim for defamation, Mr McBean submitted that the defence of qualified privilege is applicable to the present circumstances as the alleged defamatory report was prepared pursuant to a legal and moral duty. Further, Mr McBean argued that the appellant's claim for breach of confidence was frivolous, vexatious and without merit as such a right would have to be balanced against the respondents' right to freedom of expression.

Discussion and analysis

[33] Part 10 of the CPR sets out the rules that apply to the filing of a defence. Rule 10.2(1) provides that a party who wishes to defend a claim must file a defence. The time period for filing such a defence is stipulated by rule 10.3(1) of the CPR, which provides that:

> "The general rule is that the period for filing a defence is the period of 42 days after the date of service of the claim form."

[34] The appellant's argument was that, ordinarily, the defence is to be filed 42 days after service of the fixed date claim form or other document setting out the claim. The affidavit particularizing the claims for defamation and breach of confidence having been filed and served on 19 December 2014, (the appellant's argument continued), the defence ought to have been filed and served by 31 January 2015. It not having been filed within that time, (the appellant further argued), in keeping with the general rule, the period of delay would have started to run as of that date. Even if that argument advanced by the appellant and the calculation of the time period should be accepted, it is my view that that would be a statement of the general rule.

[35] However, as stated in paragraph [8] hereof, in this case, there is a variation of the general rule, in that the Full Court made an order permitting the respondents to file their defence on or before 6 July 2015. That order would have cured any previous non-compliance. And where there was a failure to comply with that order, time would have started to run at the end of the stated period: that is, 6 July 2015.

[36] Rule 10.3(9) of the CPR provides that "[t]he defendant may apply for an order extending the time for filing a defence". The rule, however, does not stipulate the factors to be taken into consideration in the exercise of the discretion that is necessary when a judge is making such a decision. The case of **The Attorney General of Jamaica and Western Regional Health Authority v Rashaka Brooks Jnr (a minor) by Rashaka Brooks Snr (His father and next friend)** [2013] JMCA Civ 16,

is instructive in that regard. In that case, Brooks JA, in reviewing that learned judge's exercise of discretion in refusing to grant an extension of time to file a defence, stated at paragraph [14] that:

> "As is well known by now, the principle that operates is that, in the absence of specific guidance in a particular rule, the court is to have regard to the overriding objective in applying that rule. The overriding objective of the CPR is that courts are to strive to ensure that cases are dealt with justly. Rule 1.1(1) states:
>
> > '(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly'."

[37] Brooks JA continued at paragraph [15] of the judgment by recognising that a court should not be inflexible in exercising its discretion, but that rather "[g]enerally, each case is to be decided on its own facts..." Those statements pithily summarize how the discretion of the court is to be exercised.

[38] In the decision of **Fiesta Jamaica Limited v National Water Commission** [2010] JMCA Civ 4, this court (at paragraph [15] of the judgment) approved the dicta of Lightman J in **Commissioner of Customs & Excise v Eastwood Care Homes (Ilkeston) Limited and Ors** [(2000) Times, 7 March (delivered 18 January 2000)], where it was stated that:

> "In deciding whether an application for extension of time was to succeed under rule 3.1(2) it was no longer sufficient to apply a rigid formula in deciding whether an extension was to be granted. Each application had to be viewed by reference to the criterion of justice.

> Among the factors which had to be taken into account were the length of the delay, the explanation for the delay, the prejudice of the delay to the other party, the merits of the appeal, the effect of the delay on public administration, the importance of compliance with time limits bearing in mind that they were there to be observed and the resources of the parties which might, in particular be relevant to the question of prejudice."

Length of delay

[39] In my view, the learned judge was correct in finding that the period of delay was 23 days; time beginning to run from the date by which the Full Court had ordered that the defence be filed. There are authorities that indicate that such a period might not be inordinate (see, for example, the case of **Attorney-General of Jamaica v Roshane Dixon and Sheldon Dockery** [2013] JMCA Civ 23, at paragraph [19]). That case also indicates that the question of whether or not the period of delay ought to be viewed as inordinate, must be examined in light of the respondents' overall conduct. It is evident that there is a history of delay by the respondents: there was an initial failure to file the defence within 42 days of the service of the fixed date claim form and then another failure to file by 6 July 2015 as ordered by the Full Court. However, that is not the end of the matter. There are other considerations. What, for example, was the cause of the delay?

Reason for delay

[40] The affidavit of Lorenzo Eccleston addressed (though, perhaps, inadequately) the reason for the delay. At paragraphs 6 and 7, he deposed that the failure to file the defence in the stipulated time was due (i) to counsel not having received adequate

instructions regarding the further particulars of the appellant's claim which the appellant had been ordered to file by the Full Court; and (ii) that the time granted by the Full Court to file the defence or affidavit in response was shorter than the 42 days allowed by part 10.3(1) of the CPR.

[41] The appellant, in his affidavit in response, deposed that the respondents' reason advanced for the delay in filing the defence was without merit as the respondents had been aware of the particulars of claim for defamation from as early as 17 January 2014. Further, that at the time the Full Court had made the order for the filing of the defence the respondents were already out of time.

[42] In this instance, the main reason proffered for the delay was that counsel had received inadequate instructions concerning the claim. However, considering (i) the fact that the PSC was the entity which purported to terminate the appellant's employment and would have had all relevant employment records; and (ii) that the respondents would have been aware of the claim through prior negotiations and affidavit evidence accompanying the claim, I find that reason to be unsatisfactory. However, the court is mindful of the fact that even in cases where no reason is provided, or a poor reason is given, that factor by itself is not conclusive in the application being refused.

Shortening the time for filing the defence

[43] The respondents have made the complaint that the time which had been granted by the Full Court to file the defence was less than the 42 days permitted by the CPR.

However, that submission must be rejected in the light of rule 26.1(2) (c) of the CPR, which provides that the court may shorten the time for compliance with any rule.

[44] Further, there having been no objections by the respondents at the time of the making of that order and no appeal having been made against that specific order, then it might convincingly be argued and accepted that the respondents acquiesced in the making of the order for the filing of the defence within an abridged time period and so they cannot now be heard to complain.

Prejudice

Appellant's submissions

[45] The appellant, in his amended written submissions in support of the notice and grounds of appeal dated 17 November 2015, sets out what he contended is the prejudice occasioned to him by the granting to the respondents of a further extension of time to file a defence. The appellant stated that there had already been a three-year delay in the hearing of the substantive matter; and there is disparity between his resources and those of the respondents. That disparity, he claimed, is compounded by the respondents' refusal to pay the costs awarded to him. Further, although he has been reinstated in his job (by the order of the court that granted him leave to apply for judicial review) until the determination of the matter, he is unable to benefit from any salary increase, increments and benefits which accompany permanent employment, as his colleagues have been able to do.

Respondents' submissions

[46] On behalf of the respondents, it was submitted by Mr McBean that there was no prejudice suffered by the appellant when the application for extension of time was granted. Further, the appellant was awarded costs on the application in an effort to "ease the sting" (see paragraph 62 of the respondents' written submissions).

Discussion and analysis

[47] It is undoubtedly a matter of concern that the substantive matter as originally filed has not yet been heard and determined by the court below - especially given the fact that the original application is one for judicial review, which ought to be treated with, with all possible dispatch. However, the history of the matter shows the causes to which the delay has been due, not all of which can reasonably be laid at the feet of the respondents. And, even if it were otherwise, prejudice is not the only consideration.

[48] In relation to the complaint of the non-payments of costs, while this is also regrettable, it is to be remembered that there are means available to the appellant to attempt to recover his costs – by, for example, initiating taxation proceedings and requesting payment. Then again, a consideration of this possibility has to be counter-balanced by the recognition of what one may consider to be the harsh reality that it is impossible to levy execution against the Crown. It is to be remembered that section 20 of the Crown Proceedings Act, whilst setting out the procedure of serving on the Crown a certificate of any sum due to a litigant, specifically states at subsection (4) that:

> "Save as aforesaid no execution or attachment or process in the nature thereof shall be issued out of any Court for enforcing payment by the Crown of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Crown or any officer of the Crown as such, of any such money or costs."

[49] To my mind, however, everything considered, the appellant has not demonstrated any prejudice to him – certainly no prejudice to such an extent as to "tip the balance" in his favour. The challenges in recovering costs from the Crown are challenges that confront every litigant; and not the appellant alone.

Merit

[50] No defence was exhibited to the affidavit in support of the respondents' application for extension of time to file defence. In light of this, the appellant has maintained that the application should have been refused, as there was no proper affidavit of merit before the court. In **The Attorney General of Jamaica and Western Regional Health Authority v Rashaka Brooks Jnr (a minor) by Rashaka Brooks Snr (His father and next friend)**, Brooks JA examined the position of the court where there was no draft defence before the court. He stated that:

> "[19] In our view, it is only just that a defendant who expects to be able to file a defence, but anticipates that he will not be able to file it within the time prescribed, or realises that the time prescribed has passed, should not be shut out, as of course, from being able to apply successfully for an extension of time.
>
> [20] It may reasonably be argued that, if his application is to be considered, he is then placed in a better position than a defendant who has been able to produce a draft defence and, therefore, has that defence subjected to the scrutiny of the court. We certainly would not wish to open the

> floodgates for applications without evidence of merit to be made in an attempt to cure the sloth of attorneys-at-law or the parties whom they represent.
>
> [21] For that reason, it is our view that it is only in special circumstances that such an application should succeed. A defendant who has not produced evidence of merit should only be successful if he were able to convince the court that it would be just to extend the time. The decision should lie within the discretion of the judicial officer hearing the application. Without laying down any mandatory criteria, such an application should address the issues identified by Lightman J and explain to the satisfaction of the court the efforts made to secure the evidence concerning the element of merit and the reason for its absence." (Emphasis added).

[51] The respondents' defence, albeit having been irregularly filed, addressed the issue of merit in the appeal. It joined issue with the claim in every material particular. And, although the appellant sought to attack it as, in many respects, amounting to a bare denial, a close comparison of each paragraph of the defence with the corresponding paragraph of the particulars of the appellant's claim, does not support that contention. So that, for example: (i) the issue of the right to privacy appears to be dealt with in paragraphs 5-15 of the defence; (ii) defamation appears to be addressed in paragraphs 16-35; (iii) breach of confidence appears to be addressed in paragraphs 36-40; and so on. The defence, in my view, sufficiently puts forward the defences that the respondents are seeking to advance. It raises triable issues on each and every aspect of the appellant's claim.

[52] In light of all the above, I find myself unable to interfere with the decision of the learned judge. If there was no merit in the defence, that would be the end of the

matter. However, despite any irregularity, I am of the view that, in all the circumstances, the interests of justice demand that the matter be heard on its merits. This is my considered position, although I recognize that there has been some delay in the matter that might not conduce to good administration. I am also of the view that, broadly considered, any prejudice occasioned to the appellant might be regarded as ultimately having been addressed by the costs orders made by the court, the challenges in recovering them notwithstanding.

Issue (b) whether the learned judge was correct not to have struck out the respondents' defence

Appellant's submission

[53] The appellant's submission in relation to striking out hinged on the premise that he is entitled to a fair hearing as provided for in the constitution. In keeping with this, the submission was that, since the substantive matter has been adjourned on numerous occasions and there has been delay on the part of the respondents with the possibility of more interlocutory applications being brought to further delay the matter, the court below should have sought to bring an end to the proceedings.

Respondents' submissions

[54] It was the submission of Mr McBean for the respondents that the learned judge was correct to have refused the application to strike out the defence as there had been full compliance with rules 10.5(3)(c) and 10.5(5) of the CPR which require that a party set out his case. Further, that the order being appealed from in relation to the

application to strike out, resulted from the proper exercise of the learned judge's discretion and should not be disturbed.

Discussion and analysis

[55] The Supreme Court's power to strike out statements of case is provided for (so far as is relevant to this appeal) in rule 26.3(1) of the CPR. This is what that rule states:

> "26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –
>
> i. that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;
>
> ..."

[56] Rule 26.9 of the CPR is also relevant to the issue at hand, providing that:

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

[57] It is to be remembered that the court's power to strike out for non-compliance, (as in this case where no defence was filed within the requisite time period) does not exist in a vacuum. The court, pursuant to rule 26.9, also has the power to make an order to put matters right. In the circumstances of this case, the learned judge heard the submissions of the parties and, in the exercise of her discretion, granted an extension of time to file the defence. For the learned judge, it was one or the other: either to have extended the time for the filing of the defence or to have struck it out. The learned judge, in my finding, properly exercised her discretion in granting the extension of time to file the defence and also properly exercised her discretion in not striking out the defence. In doing so there was no discernible infringement of the appellant's right to a fair hearing. There is therefore no merit in the appellant's submissions on this issue.

Issue (c) whether the learned judge erred in separating the claim for judicial review from the claim for defamation and breach of contract

Appellant's submissions

[58] The appellant submitted that the learned judge was incorrect to have separated the claims, as they arise from the same matrix of facts and cannot properly be disentangled.

Respondents' submissions

[59] In support of the learned judge's decision to separate the claim, it was submitted by Mr McBean that, pursuant to part 56.10(3) of the CPR and under the general case management powers of the court, the court has a discretion to separate issues by

directing that a claim for an administrative order be dealt with separately from another claim. It was further submitted that the learned judge correctly considered and applied such principles. Additionally, it was submitted that, pursuant to rule 26.1(2)(g) of the CPR, the court, by virtue of its case management powers, could order that any issues be tried separately.

Discussion and analysis

[60] It is my view that it could not fairly be said that the learned judge was wrong to have separated the claims. Although they all originate from and are connected with the attempt to terminate the appellant's employment, separation of the claims could possibly have resulted in that part of the claim which was filed earlier in time being completed quickly and not being delayed by the later part of the claim. The possibility also exists that another judge might have declined to separate the claims. However, applying the principles that govern the limits on this court's powers of review (set out, for example in **The Attorney-General of Jamaica v John Mackay** [2012] JMCA App 1), I am unable to say that the judge, in the exercise of her discretion, was "palpably wrong" in deciding to separate the claims.

Issue (d) whether the learned judge erred in not granting default judgment in the appellant's claim for defamation and breach of confidence

Appellant's submissions

[61] The appellant contended that the learned judge's finding that default judgment could not be granted in light of the disaggregated claims was misconceived. Further, if

the court had struck out the defence pursuant to rule 26.3(1)(c) and or (d) of the CPR the appellant would have been entitled to default judgment in those circumstances.

Respondents' submissions

[62] The respondents submitted that a party is unable to obtain default judgement against the Crown without the leave of the court and that, further, as in this case, where the judicial review and defamation claims were separated, both having been initiated by a fixed date claim form, the learned judge was correct to have ruled as she did, as the rules prevented her from granting a default judgment on the appellant's application.

Discussion and analysis

[63] As is well known, a claim in the Supreme Court is initiated by the filing of a claim form (see rule 8.1(2) of the CPR). Further, rule 12.2(a) of the CPR clearly and unequivocally states that:

> "A claimant may not obtain default judgment where the claim
>
> – (a) is a fixed date claim."

[64] In this case, the claim was commenced by the filing of a fixed date claim form. The court below had ordered that the claims be separated. However, separating the claims would not operate to change the nature of the originating document. That could only have occurred by an express order of the court; and no such order was made in this case. It seems to me, therefore, that, the claims having been commenced via fixed

date claim form, in keeping with rule 12.2(a) of the CPR, it was not open to the learned judge to have granted a default judgment.

[65] On the basis of the foregoing, the appellant's contention that default judgment ought to have been granted on the claim for defamation and breach of confidence since it was separated from the claim for judicial review and breach of constitutional redress, cannot be entertained.

Issue (e) whether the learned judge erred in not ordering that the issues in the claim be dealt with summarily

Appellant's submissions

[66] The appellant contended that where one party has failed to put forward his case completely, the court is able to treat (and in this case ought to have treated) with the matter summarily in accordance with rule 27.2(8) of the CPR. Such an application (it was further submitted) was not the same as an application for summary judgment.

Respondents' submissions

[67] For the respondents, Mr McBean submitted that the learned judge was correct to have interpreted the appellant's application for the matter to be treated summarily as an application for summary judgment. However (the submission continued), summary judgment cannot be granted against the Crown without leave or in proceedings for redress under the Constitution, as that is expressly prohibited by rule 15.3(a) and (b) of the CPR.

Discussion and analysis

[68] Rule 27.2(8) of the CPR empowers the court to deal with the first hearing of a fixed date claim form summarily where the claim is not defended or the court considers that the claim can be dealt with summarily. In this case, the court treated with the applications together, and an extension of time to file the defence was granted. Rule 15.3 of the CPR prohibits the granting of summary judgment in claims for redress under the constitution, in proceedings against the Crown, and in proceedings by way of fixed date claim form and defamation proceedings. However, even accepting that an application to dispose of a matter summarily is not synonymous with an application for summary judgment, in the circumstances, the application, in my view, cannot fairly be said to have been incorrectly refused. This is so as the decision whether to grant a summary judgment application or treat with a matter summarily is one based on the exercise of the particular judge's discretion. In this case, no improper exercise of the learned judge's discretion has been established.

Issue (f) whether the learned judge erred in varying the costs order of G Fraser J

Appellant's submissions

[69] Lindo J, the appellant submitted, wrongly exercised her discretion in varying the costs order of G Fraser J, as the unless order could not have been varied where the period for compliance had already expired and the sanction had already taken effect. Further, there was no evidence before the court for it to have based the exercise of any discretion to vary the order.

Respondents' submissions

[70] On behalf of the respondents, Mr McBean argued that, pursuant to rule 26.1(7) of the CPR, the court has the power to vary or revoke an unless order. Additionally, even if the time for compliance has expired, a respondent is able to seek relief from sanctions under rule 26.7(2) of the CPR as well as pursuant to rules 26.1(2) (c) and 26.1(7). As such, it would still have been within the jurisdiction of Lindo J to vary the order despite the prior expiration of the time for compliance. In these circumstances the respondents would have had a realistic prospect of successfully seeking relief from sanctions.

Discussion and analysis

[71] Rule 26.7 of the CPR states as follows:

> "(1) Where the court makes an order or gives directions the court must whenever practicable also specify the consequences of failure to comply.
>
> (2) Where a party has failed to comply with any of these Rules, a direction or any order, any sanction for non-compliance imposed by the rule, direction or the order has effect unless the party in default applies for and obtains relief from the sanction, and rule 26.9 shall not apply.
>
> (3) Where a rule, practice direction or order –
>
> 1. requires a party to do something by a specified date; and
>
> 2. specifies the consequences of failure to comply, the time for doing the act in question may not be extended by agreement between the parties."

[72] The unless order made by G Fraser J was that:

> "(3) Costs of the application is [sic] awarded to the Claimant payable within thirty (30) days in the sum to be agreed or taxed, otherwise the Defendants' statement of case stands as struck out."

[73] The application to vary the unless order was made two days after the expiration of the date for compliance with the order. The case of **Robert v Momentum Services Ltd** (2003) 1 WLR 1577 recognized that there is a distinction between applying for extension of time for doing an act before time has expired and seeking relief from sanctions where there has been a failure to comply. Different principles apply in the two sets of circumstances. In these circumstances, in which the respondents were already in breach of the unless order at the time of making the application before the court below, their statement of case (if any) would have stood struck out. It is noted that there was no application for relief from sanctions (as there ought properly to have been) before the court below.

[74] I am of the view, however, that it is very important to a resolution of this issue to carefully consider counsel's reason for seeking a variation of the costs order. It was submitted by Mr McBean that the time of 30 days first given by the learned judge for the payment of the costs did not allow the respondents the requisite time provided by rule 65.20(3) of the CPR for the filing of points of dispute. That rule allows 28 days from service of the bill of costs for the filing of points of dispute. This submission cannot be ignored, as the filing of the points of dispute forms a very important part of the process of taxation, it being the only means by which the paying party may challenge a bill of costs. Even acknowledging the learned judge's power to abridge time periods, would justice have been achieved, had the appellant (for example) waited

until, say, the 29th day to serve the bill of costs? Clearly not. This example demonstrates the shortcoming in the order as it originally stood. The variation granted by Lindo J would have operated to cure such a shortcoming. If that had not been done, it is difficult to see how the costs order as originally framed could have been workable. To my mind, the overriding objective (to which Lindo J was required to have regard in coming to her decision), could never contemplate allowing a claim to stand struck out for failure to comply with an order, when the order itself was impossible, as it stood, to have been implemented. Whether the application ought properly to have been made as one for variation; or to extend time; or as relief from sanctions, the result, at the end of the day, must have been the same. Further, however, when one considers the criteria for a successful application for relief from sanctions, set out in rule 26.8(1)(2) and (3), it seems to me that these would comfortably have been met by the respondents – in particular that criterion calling for the taking into account of the administration of justice. In the circumstances, therefore, although, strictly speaking, the application before Lindo J ought to have been framed as one for relief from sanctions, to my mind no useful purpose would be served by remitting the matter for such a hearing to be held, when, an outcome in favour of the respondents is virtually assured. In these circumstances, I would not be minded to interfere with the order of Lindo J. This challenge on the part of the appellant should, therefore, also be rejected.

Conclusion

[75] The hearing of these appeals has featured the raising of a multiplicity of issues and the making of wide-ranging submissions. The presence of those features

notwithstanding, these consolidated matters are really relatively-simple interlocutory appeals that on this occasion have been decided in the respondents' favour. The matters complained of were orders made by the learned judges in the exercise of their discretion; and it has not been demonstrated in all the circumstances that they were "palpably wrong", warranting this court's intervention. If the view that I have taken of these appeals results in their dismissal, then that dismissal will clear the way for the hearing of the substantive matter, which I hope will be speedily dealt with and resolved, given the nature and particular circumstances of this case.

[76] In the result, I would be minded to dismiss these appeals.

Costs

[77] In the light of issues raised by the appellant concerning the resources of the respondents vis-á-vis his own, I would propose (unless persuaded otherwise) that there should be no order as to the costs of these appeals.

EDWARDS JA (AG)

[78] I too have read in draft the judgment of my brother, F Williams JA and I agree with his reasoning and conclusion but wish only to add a few words on the question raised in issue (f), that is, whether the learned judge erred in varying the costs order of G Fraser J, (Ag) (as she then was) made on 23 October 2015.

[79] By notice of application dated 9 September 2015, the respondent sought an application for extension of time to file defence. G Fraser J granted the application and extended the time by 10 days from 23 October 2015, the date of the order. The learned judge also made an unless order that the costs of the application were to be paid to the appellant within 30 days, failing which, the respondent's statement of case would stand struck out.

[80] Having not paid the costs and the time for such payment having expired, the respondent, by way of amended notice of application dated 20 November 2015, applied to vary the order of G Fraser J for an extension of time within which to pay. That application came before Lindo J on the 25 November 2015. Lindo J varied the order of G Fraser J by extending the time for payment of the costs to within 60 days of the Registrar issuing a costs certificate in a sum to be agreed or taxed.

[81] This extension by Lindo J became an issue in this appeal. The gravamen of the appellant's complaint, as I understand it, is that the unless order having taken effect immediately upon the expiration of the 30 days granted by Fraser J to the respondent to pay the costs, there was nothing for Lindo J to extend and therefore she was in error when she purported to do so. Put another way, the complaint is that the respondent having failed to apply for relief from sanctions, Lindo J had no basis upon which to make an order extending time.

[82] The respondent, on the other hand, argued that pursuant to rule 26.1(7) of the Civil Procedure Rule (CPR) the court has the power to vary or revoke an unless order.

Mr McBean QC, on behalf of the respondent, argued that a respondent may apply for relief from sanctions even after the time for compliance had expired. He further argued that Lindo J had the jurisdiction to vary the order, even after it had expired, in the exercise of her power to grant relief from sanctions. In essence therefore, his answer to the appellant's complaint is that it did not matter that the application before Lindo J was an application for the variation of the costs order to extend the time within which to comply and not an application for relief from sanctions.

Analysis

[84] In this case, both the appellant and the respondent are correct, in part, in their submissions.

[83] The appellant is correct, because the time limited in the unless order having expired, the respondent ought to have applied for relief from sanctions. This is because of the peculiar nature and effect of unless orders. But, we will soon see that the respondent is also correct, as ultimately based on the powers given to the learned judge by the CPR Part 26 and in the circumstances of this particular case, it, in the end, did not matter that the notice of application for court orders was for the variation of the cost order to extend the time for compliance and not for relief from sanctions.

[84] In analysing the issue before this court, my starting point is the CPR Part 26 and more specifically rules 26.1, 26.7 and 26.8. For our purposes the relevant rules begin with rule 26.1 (2)(c), 26.1(2)(v) and 26.1(7) which states:

"**The court's general powers of management**

...

26.1(2)(c) extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed.

...

26.1(2)(v) take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective.

...

26.1(7) A power of the court under these Rules to make an order includes a power to vary or revoke that order."

[85] The remaining sections under Part 26 so far as they are relevant state:

"**Court's power to make orders of its own initiative**

26.2(1) Except where a rule or other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative.

(2) Where the court proposes to make an order of its own initiative it must give any party likely to be affected a reasonable opportunity to make representations.

...

Sanctions have effect unless defaulting party obtains relief

26.7 (1) Where the court makes an order or gives directions the court must whenever practicable also specify the consequence of failure to comply.

(2) Where a party has failed to comply with any of these Rules, a direction or any order, any sanction for non-compliance imposed by the rule, direction or the order has effect unless the party in default applies for and obtains relief from the sanction, and rule 26.9 shall not apply.

(3) Where a rule, practice direction or order-

(a) requires a party to do something by a specified date; and

(b) specifies the consequences of failure to comply, the time for doing the act in question may not be extended by agreement between the parties.

Relief from sanctions

26.8 (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.

4. The court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown."

[86] By virtue of rule 26.1 (2)(c) therefore, the court, has a general power to extend time or abridge time even if time for compliance has expired. The court's power to make an order also includes the power to vary or revoke that order pursuant to rule 26.1(7).

[87] In determining whether to exercise a discretion to extend time for compliance, a judge will apply the overriding objective of dealing with cases justly. There is, however, a difference, in principle, between how a court treats with an application to extend the time for compliance with a rule, practice direction or order which is to be done by a time limited, where such time has not yet arrived (where rule 26.1 is the operative rule) and applying for relief from sanctions imposed for failing to comply with a rule, practice direction or order where such a sanction automatically takes effect (where rule 26.7 and 26.8 are the operative rules). An application made in the former case is not an application for relief from sanctions and in exercising its discretion the court will give due regard to the overriding objective of dealing with cases justly. See the case of **Robert v Momentum Services Ltd** [2003] 1 WLR 1577. In the case where the sanction has taken effect, the court, in deciding whether to grant relief, must give due regard to the factors in rule 26.8.

[88] The rule is that where a party fails to comply (within the time limited) with a rule, practice direction or court order imposing any sanction, that sanction will take effect unless the party in default, applies for and obtains relief from sanction. In principle, where the time limited for compliance has expired, there is no need for a further order from the court for the sanction to take effect. This is because the breach of an order imposing a sanction automatically results in the stated sanction taking effect. See **Marcan Shipping (London) Ltd v Kefalas and another** [2007] EWCA Civ 463. A party in default of compliance with such a time limit must seek relief from sanction, if he wishes the effect of the sanction to be removed. The court has to take

into consideration the several factors stated in rule 26.8 before granting relief because regard has to be given to the principle that where the court sets a timetable litigants are expected to comply.

[89] Part 26 of the CPR deals with the court's powers generally and it is clear from rule 26.1(2) and rules 26.7 and 26.8 that each is to be treated differently. Whereas rule 26.1(2) provides the power to extend or shorten time for compliance with any rule, practice direction, order or direction of the court, even when such time for compliance has expired, the court does so, taking into account the overriding objective. In the case of a failure to comply with any rule, order or direction which specifies a sanction for such a failure under rule 26.7 the sanction takes effect unless relief is granted. The rules provide for a regime under rule 26.8 by which the court is mandated to make that determination in the interest of the administration of justice. So where the defaulting party applies for relief from sanctions, the court hearing the application is bound to consider the factors in rule 26.8.

[90] However, counsel for the respondent is also correct in his submission regarding the jurisdiction of Lindo J, for, in granting relief from sanctions one of the orders which a court is empowered to make is an extension of the time table for compliance. In granting relief from sanctions by extending the time for compliance, the court acts under its general powers of management which it derives from rule 26.1(2) and 26.1(7). Nevertheless, in granting such relief, the court should give due regard to the factors set out in rule 26.8.

[91] In the instant case Lindo J was faced with a court order from Fraser J, which counsel for the respondent, in effect, submits was impossible to obey. It stated inter alia:

> "(3) Costs of the application awarded to the Claimant payable within thirty (30) days in the sum to be agreed or taxed, otherwise the Defendants statement of case stands as struck out."

[92] There was no agreement as to costs, and counsel for the respondent maintained that the time allotted did not allow for the filing of points of dispute for costs to be taxed pursuant to rule 65.20(3). Points of dispute are to be filed 28 days after the service of the bill of costs. The order, it can clearly be seen, had some shortcomings as far as the implementation of it was concerned. Costs would either have to be agreed and paid within 30 days or taxed and paid within 30 days. Either way, as it stood, it presented a clear difficulty.

[93] F Williams JA takes the view, with which I agree, that Lindo J was required to have regard to the overriding objective and that whether the application was for variation of the order, effectively to extend time for compliance, or for relief from sanctions, the result would still be the same. But I would go further to say, that Lindo J, in applying the overriding objective, and in determining, as a matter of fact, that what was before her was an order carrying a specified consequence (in other words an unless order) which had taken effect, had the power, acting on her own motion or initiative (pursuant to rule 26.2(1)), to treat the application for the variation of the

order as an application for relief from sanctions. That is so whether we consider that the power is derived from rules 26.1(2)(c) and (v), or 26.1(7).

[94] It would have been quite clear to Lindo J that, although the respondent filed a notice of application for court orders for the variation of the order for costs within the time limited, the time for compliance expired before the application came on for hearing, therefore the respondent would, in effect, be requiring relief from sanction.

[95] If further authority other than the rules is necessary to support this legal contention, I find persuasive support in the English case of **Keen Phillips (a firm) v Field** [2007] 1 WLR 686, where the time for compliance had expired and the learned judge had extended time to comply. On appeal, the appellate court determined that the only question for its consideration was whether the judge had the jurisdiction to grant relief from sanctions, where the defaulting party had made no application. The appellant in that case had argued that the judge had no jurisdiction to extend time for compliance with an unless order, as the time had expired, thus the sanction had taken effect and there had been no application for relief. The appellant also argued that the general powers under rule 3.1(2)(a) (the English equivalent of rule 26.1(2)(c)) to extend time was cut down" by rule 3.8 (the English equivalent of rule 26.7) so that a court could not exercise the power to extend time unless there is an application under rule 3.8 by the defaulting party. The sanction, he argued, "has effect" unless the defaulting party applies for and obtains relief from sanctions.

[96] Jonathan Parker LJ held that the court's power to extend time under rule 3.1(2)(a) and to act on its own motion in 3.3(1) (the English equivalent of rule 26.2 (1)) were not limited by rule 3.8, so that the judge had jurisdiction to make the order to extend the time within which to comply with the unless order, even though there was no formal application by the party in default. In other words the court had the jurisdiction to act on its own motion, in an appropriate case. In coming to his decision he said:

> "I am content to assume, for present purposes, that in granting an extension of time in the circumstances of the instant case Judge Reid QC was granting relief from the sanction imposed by his earlier order within the meaning of CPR r 3.8. However, even on that assumption, I am wholly unable to accept Mr Mallet's submission that the court's general case management powers (a) to extend time (see CPR r 3.1(2((a)) and (b) to act on its own initiative (see CPR r 3.3 (1)), are cut down by CPR r 3.8 (1), with the consequence that the court is powerless (that is to say has no jurisdiction) to extend time in circumstances such as those of the instant case unless and until an application for relief under CPR r 3.8 is made by the party in default. Indeed, I would regard such an interpretation of a civil procedure rule as perverse and as flying in the face of the overriding objective of dealing with cases justly.
>
> In my judgement, Mr Mallet has put the cart before the horse. It is CPR r 3.8 (1) which takes effect, subject to the court's general case management powers in CPR r 3.1 (2) (a) and CPR r 3.3 (1), rather than the other way around. I can think of no sensible reason why, in the circumstances such as those of the instant case, the court should be deprived of jurisdiction to exercise those powers by extending time or otherwise granting relief from a sanction, unless and until the party who would otherwise be in default applies for relief under CPR r 3.8. The words 'has effect' in CPR r 3.8 mean, in my judgment, no more than that, absent any exercise by the court of its general case management powers in extending time or otherwise granting relief from

> the sanction, the sanction will remain in effect until relief from it is granted by the court on an application made under CPR r 3.8 by the party in default."

[97] Jonathan Parker LJ went on to find, based on the transcript of proceedings which were before him, that there was in fact an oral application made to the judge for an extension of time for compliance, "that is to say for relief from the sanction imposed". It is perhaps, important to note that implicit in this judgment is the acceptance that the court has the power to extend time for compliance with an unless order, even after the time for such compliance had expired and the sanction imposed by the order had already taken effect. That power is derived from the court's general powers of management to extend time, even if the application for an extension is made after the time for compliance had expired. In the case of an unless order, where time is extended, then that is the relief which is given by the court from the sanction imposed.

[98] The Court of Appeal in **Marcan Shipping** referred to and approved the course taken in **Keen Phillips**. Of equal persuasion is the case of **Samuels v Linzi Dresses Ltd** [1981] QB 115, where an order was made that unless further and better particulars of the defence were served by a certain date the defence and counterclaim should be struck out and that the claimant was at liberty to sign judgment for damages to be assessed. The particulars were served three days late, but the defendant applied for, and obtained from the judge, an extension of time, the effect of the order being to relieve it from the sanction. It was held by the English Court of Appeal (per Roskill LJ) that the court does have the jurisdiction to extend time even after there has been a failure to comply with an "unless" order.

[99] In **Kinsley v Commissioner of Police for the Metropolis** [2010] EWCA Civ 953, the trial judge had considered of his own motion whether to grant relief from sanctions but refused relief in the circumstances. However, the Court of Appeal allowed the appeal against that refusal and granted the relief. The Court of Appeal noted that it was an appropriate case for the judge to have acted on his own initiative because the defaulting party was a self-represented litigant.

[100] For my part, I would agree with the appellant and litigants will do well to keep in mind, that where the time for compliance with an unless order has expired, it is necessary to apply for relief from sanctions. However, that does not mean that in this case, Lindo J, upon hearing from the parties, was wrong to have extended time for compliance. The power to extend time exercised by the learned judge after hearing the application, is the same whether she was hearing an application to extend time or an application for relief from sanctions. In that regard, in the circumstances of the case before her, in extending the time for compliance Lindo J, in effect, granted relief from sanctions.

[101] Having examined the issue and having looked at the rules and the authorities which I found to be highly persuasive, I am prepared to make the following propositions:

i. Where a party is of the view that he is unable to comply with any rule, practice direction, order or direction of the court within the time stipulated to do so, he may apply for an extension of time to

comply, before the time for compliance has expired and it will not be treated as an application for relief from sanctions. In determining whether to grant such an extension, the court will give due regard to the overriding objective. (Rule 26.1(2)(c) and rule 1.1; **Robert v Momentum Services Ltd**.)

ii. A party may apply for extension of time even though the time limited for compliance has expired. (Rule 26.1(2) (c))

iii. A party in default of compliance with an unless order may apply for relief from sanctions even after the sanction has taken effect. (Rule 26.1(2)(c); **Keen Phillips, Marcan Shipping and Samuels v Linzi Dresses Ltd**)

iv. One of the reliefs from sanction which a court may grant is an extension of time within which to comply with an unless order.

v. There need not be a formal application, and the court may act on its own motion or initiative even though it is under no duty to do so. (Rule 26.1(2)(v); 26.2 (1) and rule 26.1(7); **Marcan Shipping, Keen Phillips** and **Kinsey v Commissioner of Police for the Metropolis.**)

[102] Although the learned judge gave no reason for her decision, in the light of rules 26.8(1)(2) and (3) and the unworkable nature of the order of G Fraser J, it is clear that the interest of the administration of justice was best served by Lindo J exercising her

discretion in the way she did. Furthermore, the application was made promptly, having been filed before the expiration of the time limit and made two days after the time for compliance had expired. It was supported by affidavit evidence and there is no contention before this court that the respondent could not have satisfied the other requirements in rule 26.8 for the grant of relief from sanctions.

[103] In those circumstances, though I have come to my conclusions by a more roundabout and perhaps less elegant route, I agree with F Williams JA that in respect of the challenge to the order of Lindo J, there is no basis on which the appellant could succeed.

MORRISON P

ORDER

Appeals dismissed. No order as to costs.