**[2013] JMCA Civ 5**

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO 67/2009**

**APPLICATION NO 92/2011**

**BEFORE: THE HON MR JUSTICE PANTON P**
**THE HON MISS JUSTICE PHILLIPS JA**
**THE HON MR JUSTICE BROOKS JA**

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| **BETWEEN** | **DESMOND GREENFIELD** | **APPELLANT** |
| **AND** | **ERAL BARTON** | **RESPONDENT** |

**Miss Althea McBean for the appellant**

**Miss Colleen Franklin instructed by Marion Rose-Green & Company for the respondent**

**5, 6 February and 1 March 2013**

**PANTON P**

[1] I have read, in draft, the judgment of Brooks JA. I am in full agreement with his reasoning and conclusions, and have nothing to add.

**PHILLIPS JA**

[2] I too have read the draft of the judgment by Brooks JA. I agree entirely with his reasoning on rules 27.8 and 39.6 as against rules 13.3 and 26.8 and his conclusions thereon.

**BROOKS JA**

[3] On 7 November 2005, the appellant, Mr Desmond Greenfield, failed to attend a case management conference held at the Supreme Court. His attorneys-at-law were also absent. At the time, Mr Greenfield was a defendant to a claim instituted by Mr Eral Barton, in which Mr Barton claimed:

a. a declaration that he was the owner of a portion of certain lands, situated at Haughton Court in Hanover, and

b. an order that Mr Greenfield's name be removed as the registered proprietor of the said lands.

[4] Campbell J presided over the case management conference. It would have been understandable if the learned judge were indignant at Mr Greenfield's absence. That was the second time that Mr Greenfield had failed to attend a case management conference in the claim, although his attorneys-at-law had been present on the first occasion. The learned judge, acting in accordance with rule 27.8(5) of the Civil Procedure Rules (CPR), entered judgment against Mr Greenfield, as a result of his non-attendance. That judgment included a declaration and an order along the lines sought by Mr Barton.

[5] Mr Greenfield acted promptly. On 21 November 2005 he filed an application to set aside the judgment and to restore his defence and counterclaim. Mr Barton opposed his application, and the contested application came on for hearing before Frank Williams J (Ag) (as he then was) on 6 and 13 May 2009. On the latter date, Williams J delivered an oral judgment in which he dismissed Mr Greenfield's application,

granted costs to Mr Barton and granted Mr Greenfield permission to appeal the ruling. Mr Greenfield filed his notice and grounds of appeal on 27 May 2009 and it has finally come on for hearing before us.

[6] The main issue to be decided is whether Williams J utilised the correct approach in assessing the application to set aside the judgment. Before dealing with that issue, however, it is necessary to consider an application by Mr Greenfield to admit fresh evidence for the purposes of the hearing of the appeal. Those will be assessed after a brief outline of the factual background to the dispute between the parties.

**The background facts**

[7] It is not disputed that Mr Altamont Brown and his wife Mrs Rose Brown were, up to 1984, the registered proprietors of the lands at Haughton Court. Mr Barton asserts that in February 1979 he entered into an agreement with the Browns for purchase of a portion of the land, which the Browns were, at the time proposing to subdivide. He contends that the portion that he sought to purchase was designated as being lot 5 of the subdivision and, for convenience only, will be referred to hereafter, as "lot 5".

[8] Mr Barton entered into possession of lot 5, placed a caravan on it and eventually rented it to Miss Lorraine Whittingham, who went into occupation thereof. Mr Barton, thereafter, returned to England where he was, apparently, ordinarily resident.

[9] Mr Greenfield asserts that in or about 1984, he purchased, from the Browns, the title to all the lands. The registered title was, on 11 June 1984, duly transferred into his name.

[10] In October 1991, Mr Greenfield was issued with a replacement title for the lands on the basis that the previous duplicate certificate of title was lost. He subsequently instituted proceedings for recovery of possession against Miss Whittingham in the Resident Magistrate's Court for the parish of Hanover.

[11] Those proceedings, apparently, gave rise to Mr Barton's claim in the Supreme Court, which he filed on 11 March 1997. The essence of the averments in the claim is that Mr Greenfield did not complete the purchase of the lands from the Browns and that he secured the transfer of the title into his name by fraud.

[12] At the time of filing his claim, Mr Barton also sought and secured from the Supreme Court, an injunction restraining Mr Greenfield from alienating the title to the lands. In this application, Mr Barton repeated his allegations of fraud. Mrs Brown supported him in those allegations. Apparently, Mr Brown had, by then, died. Mrs Brown was not, however, a party to the claim.

[13] Mr Beresford Miller, a land developer, also filed an affidavit supporting Mr Barton in his contentions. Mr Miller deposed that in or about 1984, Mr Brown had given him the duplicate certificate of title for the lands and instructions to prepare two agreements for execution between Mr Brown and Mr Greenfield. He stated that he prepared the agreements, but that they, along with the duplicate certificate were stolen from his car.

[14] It was not until 22 January 2002, that Mr Barton filed his statement of claim. Mr Greenfield filed his defence on 13 September 2002. In it, he denied all charges of fraud. He set out therein, the details of his transaction with the Browns and asserted that he was properly registered as the proprietor for the land. He attached a counterclaim in which he sought recovery of possession from Miss Whittingham and damages for use and occupation of the land for the period 1992-2002.

[15] On 1 January 2003, the transition from the previous regime of the Civil Procedure Code, to that governed by the CPR, overtook this very protracted claim. It was because of that transition that the claim came before Campbell J for the hearing of the case management conference.

**The fresh evidence question**

[16] Miss McBean, on behalf of Mr Greenfield sought to have admitted, as fresh evidence, copies of the original and the replacement certificates of title for the lands, a letter from a surveyor, a copy of a cheque and copies of orders made in the Resident Magistrate's Court for the parish of Hanover. Learned counsel submitted that the application was being made out of an abundance of caution, particularly as this court had, on 18 February 2010, granted Mr Barton permission to adduce fresh evidence at the hearing of the appeal.

[17] During the hearing of the present application, the court pointed out to Miss McBean that both certificates of title were already before the court. They had been exhibited to an affidavit filed in the court below as far back as 1997. In respect of the

admission of the other documents, learned counsel, based her arguments on the learning set out in **Ladd v Marshall** [1954] 3 All ER 745.

[18] The bases on which the reception of fresh evidence should be considered, were indeed set out in **Ladd v Marshall**. Lord Denning, at page 748 A-B of the report, outlined them as follows:

> "In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible."

This court, in **George Beckford v Gloria Cumper** (1987) 24 JLR 470, has approved the principles laid down in **Ladd v Marshall**. The instant application must now be examined in the context of the tests set out by Lord Denning.

a. **The documents were not available at the hearing of the application**

[19] Miss McBean candidly accepted that the documents were available to Mr Greenfield at the time of the hearing before Williams J. Learned counsel argued, however, that there was no occasion for the production of the documents. This is because the claim had not yet reached the stage of trial. In fact, she argued, there had not yet even been an order for disclosure. In addition, Miss McBean submitted that the emphasis of the application before Williams J was the reason for Mr Greenfield's failure

to attend before Campbell J and not the merits of his defence. Miss McBean also appealed to the fact that fresh evidence was allowed to Mr Barton, even though he was in a similar position when he made his application to this court.

[20] In my view, these attempts at justifying the application are not convincing. Mr Greenfield now seeks to produce the documents in support of the merits of his case. The issue of whether he had a real prospect of defending the claim was specifically raised in the opposition to his application to set aside the judgment. He did not seek to answer that issue. He did not produce the documents that he had in support of his claim. In my view, he cannot do so on appeal. The application to adduce fresh evidence fails to clear the first hurdle and must be refused. There is no need to consider the two remaining tests.

**Did Williams J utilise the correct approach in assessing the application to set aside the judgment**

[21] Mr Greenfield's application before Williams J was in two parts. He sought firstly, an order setting aside the judgment entered against him. Secondly, although Campbell J made no order in those terms, Mr Greenfield applied to restore his defence and counterclaim.

[22] Williams J approached the application along two distinct lines. Firstly, he considered the application to set aside the judgment of Campbell J as being an application made pursuant to Part 13 of the CPR, particularly rule 13.3. Secondly, he considered the application to restore the defence and counterclaim as being an application for relief from sanctions made pursuant to rules 26.7 and 26.8 of the CPR.

[23] In addressing the application to set aside the judgment, Williams J made specific findings along the lines required by rules 13.3 and 26.8. In respect of the requirements of rule 13.3, the learned judge ruled, firstly, that the primary consideration for the application was whether there was a real prospect of success. He found that there had been no answer to Mrs Brown's affidavit evidence denying that she had transferred the land to Mr Greenfield. On that basis, he held that Mr Greenfield had no real prospect of successfully defending the claim.

[24] Williams J's second finding was that the application to set aside the judgment, although promptly filed, was not pursued with any diligence, it having come on for hearing over three years after it had been filed. The learned judge's third finding was that Mr Greenfield's attorneys-at-law had given no reasonable explanation for their absence from the hearing.

[25] In addressing the requirements of rule 26.8, the learned judge ruled:

a. that he was unable to say whether the failure to attend was intentional as there had been no material placed before him in respect of the failure by the attorneys-at-law;

b. that the failure seemed to be more the fault of Mr Greenfield's attorneys-at-law than his own default; and,

c. that given the history of inactivity by Mr Greenfield over the course of the three years, it could not be said that granting the application would be in the best interest of the administration of justice.

On the basis of those findings, Williams J refused the application.

[26] It does not appear that the learned judge's attention was drawn to the fact that the appropriate rules for the consideration of an application of this nature, are not rules 13.3 and 26.8, but rules 27.8 and 39.6 of the CPR. This is because the order for judgment was made pursuant to rule 27.8 and not pursuant to Part 26 as the learned judge had found. This court so ruled in the case of **Joscelyn Massop v Temar Morrison (by his mother and next friend Audrey White)** [2012] JMCA Civ 56. It is necessary to outline the terms of rule 27.8 and 39.6 to demonstrate their effect.

[27] Rule 27.8(5) authorises the court to enter judgment against a defendant who fails to appear at a case management conference. It states:

> "(5) Provided that the court is satisfied that notice of the hearing has been served on the absent party or parties in accordance with these Rules, then
>
> (a) if the claimant does not attend, the court may strike out the claim; and
> (b) **if any defendant does not attend, the court may enter judgment against that defendant in default of such attendance**." (Emphasis supplied)

It is rule 27.8(6) which directs the affected defendant to the path of relief:

> "(6) **The provisions of rule 39.6 (application to set aside judgment given in party's absence) apply**

**to an order made under paragraph (5) as they do to failure to attend a trial**." (Emphasis supplied)

[28] Rule 39.6 sets out the appropriate tests to be applied:

> "(1) A party who was not present at a trial at which judgment was given or an order made in its absence may apply to set aside that judgment or order.
>
> (2) **The application must be made within 14 days after the date on which the judgment or order was served on the applicant**.
>
> (3) The application to set aside the judgment or order must be supported by evidence on affidavit showing –
>
> (a) **a good reason for failing to attend the hearing**; **and**
> (b) **that it is likely that had the applicant attended some other judgment or order might have been given or made**." (Emphasis supplied)

[29] Although, in applying the overriding objective, the mere application of the incorrect rule is not necessarily fatal to the ruling of the court below, the fact remains that the rules are dealing with different situations and establish different tests. In contrast to rule 27.8(5), "[r]ule 13.3 is dealing with the setting aside of a default judgment where it has been entered in the circumstances specified in Part 12 ie where there has been a failure to enter an appearance or file a defence as required by the rules" (see paragraph 14 of **The Attorney General v Universal Projects Limited** [2011] UKPC 37).

[30] Their Lordships, in **The Attorney General v Universal Projects Limited** also explained, at paragraph 14, the context of an application under rule 26.8:

> "Rule 26.7 [the equivalent of Jamaica's rule 26.8] is dealing with applications for relief from any sanction, including any sanction for non-compliance with a rule, direction or court order where the sanction has been imposed by the rule or court order..." (Emphasis supplied)

[31] The court order, to which their Lordships refer, must, however, be an order from which no other rule directs the method of securing a remedy. In the instant case rule 27.8(6) stipulates that remedy. It states that rule 39.6 is the route to be followed. Neither rule 13.3 nor rule 26.8 may therefore be properly utilised.

[32] This court recently viewed the matter a little differently when it compared the relevant rules in **Morris Astley v The Attorney General of Jamaica and Another** [2012] JMCA Civ 64. In that case, Morrison JA, in delivering the judgment of the court, opined that the tests established by rule 39.6 are "analogous to an application to set aside a judgment in default under Part 13" of the CPR. The learned judge of appeal expressed that view at paragraph [27] of his judgment. He also referred to the distinction drawn in **The Attorney General v Keron Matthews** [2011] UKPC 38, between the provisions of Part 13 and the provisions of rule 26.8 of the CPR.

[33] Miss McBean submitted that the appropriate rule for considering Mr Greenfield's application, was rule 39.6 and not rule 13.3. When her attention was drawn to the opinion of Morrison JA, mentioned above, learned counsel submitted that the learned judge's opinon was expressed without reference to the fact that **The Attorney**

**General v Keron Matthews** was not concerned with a rule 39.6 situation but dealt with the issue of a defence that had been filed out of time.

[34] Miss McBean may find some support for her position, from a portion of a judgment delivered by K. Harrison JA in **Watson v Roper** SCCA No 42/2005 (delivered 18 November 2005). In that case, the appellant sought to set aside a judgment that was entered because of his failure to attend at the trial of the claim. At page 7 of the judgment, delivered on behalf of the court, Harrison JA rejected a submission that Part 13 was applicable to the application. He said, in part:

> "The rules contained in Part 13 deal with setting aside or varying default judgments made in the default of appearance and/or default of a defence. **Those rules have no relevance where a trial date has been fixed and one of the parties failed to attend the trial**." (Emphasis supplied)

[35] Despite that firm stance, Harrison JA, after quoting rule 39.6 at page 8 of the judgment, expressed the view that the considerations required by rule 39.6 are:

a. the reason for the failure to attend,

b. the applicant's prospects of success in a retrial;

c. the delay in applying to set aside the judgment;

d. whether the successful party would be prejudiced by the judgment being set aside; and,

e. the public's interest in there being an end to litigation.

It would have been noticed that there is some similarity between those considerations and the provisions of rule 26.8(3), which provides:

"(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."

[36] Harrison JA gave his opinion of the effect of rule 39.6 at page 8 of his judgment:

> "Rule 39.6 therefore gives the absent party the opportunity of explaining why he did not attend and that he has a reasonable prospect of success. It also gives the party in whose favour the judgment was given, the chance of not having to prove his case all over again, with all the attendant expense that this will involve and, if a court is satisfied that there is in truth no reasonable prospect of success that the judgment would be reversed."

[37] Bearing in mind the impact of the decision in **The Attorney General v Universal Projects Limited**, in requiring different treatment as different rules direct, it may be said, with some justification, that the considerations enumerated by Harrison JA go further than rule 39.6 requires. This point is emphasised where the application is being made, not after a missed trial date, on which all the statements of case and witness statements were before the trial judge, but after a case management conference, where a real possibility exists that only the statements of case are on the court's file at the time of the conference.

[38] It is also to be noted that the equivalent provisions of the English Civil Procedure Rules to rule 39.6, expressly require the applicant to demonstrate that he has a reasonable prospect of success at trial. That country's rule 39.3(5) states:

> "(5) Where an application is made under paragraph (2) or (3) by a party who failed to attend the trial, the court may grant the application [to restore the procedings or set aside the judgment] only if the applicant-
>
> (a) acted promptly when he found out that the court had exercised its power to strike out or to enter judgment or make an order against him;
> (b) had a good reason for not attending the trial; and
> (c) **had a reasonable prospect of success at the trial**. (Emphasis supplied)

There is no provision equivalent to paragraph (c) above, in part 39 of the CPR. It may well be that the framers of the rule did not require proof of the prospects of success in such an application.

[39] Based on that analysis, it is my view that rule 39.6 requires an applicant to satisfy all three of the following tests, especially when the application is being made after a failure to attend a case management conference:

a. Has the application been made within 14 days?

b. Has a good reason has been given for the failure to attend?

c. Might some other order have been made, had the applicant attended?

It may be fairly said, however, that the merits of the applicant's case could be considered in addressing whether some other order would have been made, had he attended the hearing or trial. Again, a less stringent level of enquiry in this regard would be required if the application were being made after a missed case management conference than would have been likely after a missed trial date.

[40] It is those three tests, last mentioned, that will be now addressed in the context of the instant case.

**Application to the instant case**

a. **Was the application made within 14 days?**

[41] There can be no dispute that the application to set aside the judgment was filed in compliance with rule 39.6. Campbell J's order was made on 7 November 2005, and Mr Greenfield filed his application on 21 November 2005. It was filed even before Mr Barton served Campbell J's order on Mr Greenfield. Williams J accepted that the application had been filed "fairly shortly…after the judgment was entered". He was concerned, however, about the fact that the application had taken over three years to come on for hearing. It was his view that Mr Greenfield's attorneys-at-law ought to have done more to "move the matter along".

[42] Whereas the sentiments expressed by Williams J may be aimed in the right direction, I am of the opinion that they have ignored two relevant matters. Firstly, the rule speaks to making the application within 14 days. It does not speak to pursuing the

processing of the application with the registry of the Supreme Court. Rule 11.4 defines when an application is made. It states:

> "Where an application must be made within a specified period, it is so made if it is received by the registry or made orally to the court within that period."

Based on that rule, I respectfully find that Williams J was in error in deciding that the application was not in compliance with the time requirements of the rule.

[43] The learned judge also ignored, or paid insufficient regard to, the fact that although the three year delay was due to the fault of the Supreme Court's registry (in fact the registry had lost the file), Mr Greenfield's attorneys-at-law had written to the Registry on 11 April 2008 complaining that no date had been set for the hearing of the application. In the circumstances, Williams J ought to have found that the test, concerning the time of making the application, had been met.

b. **Has a good reason been given for the failure to attend?**

[44] In respect of the second test, Mr Greenfield deposed that he was not aware of either date for the hearing of the case management conference. He stated that the letter advising of the first date arrived after that date had already passed. Although the letter advising of the adjourned hearing did arrive in good time, it stated that the hearing would have been on 10 November 2005 rather than 7 November. That evidence was not challenged. It established that Mr Greenfield, personally, had a good reason for failure to attend the hearing.

[45] Williams J rightly criticised the fact that Mr Greenfield's attorneys-at-law did not seek to explain their absence from the hearing before Campbell J. They also did not seek to explain the miscommunication of the date of the hearing. Miss McBean submitted that the court ought not to visit the sins of a party's attorneys-at-law on the party. She relied on the decision in **Auburn Court Ltd v The Town and Country Planning Appeal Tribunal** SCCA No 70/2004 (delivered 28 March 2006) in support of her submission. In **Auburn Court Ltd**, this court endorsed the opinion of P. Harrison JA in **C.V.M. TV v Tewari** SCCA No 46/2003 (delivered 11 May 2005) that:

> "The interest of the respondent not to be excluded from the appeal process due to the fault of his counsel, is an aspect of doing justice between the parties."

[46] Assuming, therefore, that Mr Greenfield's attorneys-at-law had an explanation which, even if it were not a good explanation, was not nugatory, the third test will be examined.

c. **Might some other order have been made, had Mr Greenfield attended?**

[47] Ostensibly, this test is easily met where the application is being made after absence from a case management conference. Had Mr Greenfield attended the hearing, Campbell J would not have made the order that he did. Most likely, orders would have been made for disclosure, and bearing in mind the allegations of fraud, orders concerning handwriting experts might have been, at least, considered.

[48] On this question, Miss Franklin, on behalf of Mr Barton, sought to stress the fact that Mr Greenfield seems to have given three different explanations for parting with the

duplicate certificate of title that was alleged to have been lost. The court noted, however, that Mr Greenfield had been registered on the certificate of title from 1984, while the application for the replacement certificate of title was made in 1991. Nonetheless, these explanations are matters that may best be evaluated at a trial.

[49] The allegations made by Mrs Brown and Mr Beresford Miller concerning an agreement between the Browns and Mr Greenfield, included significant portions of hearsay and were not supported by any documentation whatsoever. It cannot fairly be said that Mr Greenfield should be deprived of his rights of ownership, bestowed by the Registration of Titles Act, on the basis of that evidence.

[50] It is to be noted that although the Browns were not a party to the proceedings, Campbell J's order would have resulted in:

a. the Browns being restored as the registered proprietors of the land, without there being a judgment or any other instrument to which the Browns were a party, and,

b. Mr Barton being declared the owner of a portion of land that was registered in the name of the Browns, without there being proof of authorisation for subdivision of that land.

In those circumstances, it is likely that had Mr Greenfield attended the case management conference, the orders, which were in fact made, would not have been made.

[51] Based on the above reasoning, Williams J did err in his approach to the application to set aside the judgment. In light of that finding, his decision ought to be set aside and a ruling made setting aside the judgment entered by Campbell J on 7 November 2005.

**Conclusion**

[52] Mr Greenfield's application to adduce fresh evidence fails the first test laid down in **Ladd v Marshall**. This is because the documents were available to Mr Greenfield at the time of the hearing before Williams J. That application, in my view, should be refused.

[53] I respectfully find that Williams J erred in his approach to the test to be applied in considering Mr Greenfield's application. The learned judge ought to have applied the tests set out in rule 39.6 rather than the tests set out in rule 13.3 and 26.8 of the CPR.

[54] Considered in the context of the tests laid down in rule 39.6, Mr Greenfield's application, I find, satisfies every aspect of the requirements of that rule. His application ought, therefore, to have been granted.

[55] The orders, therefore, should be:

a. The application to admit fresh evidence is refused;

b. The appeal is allowed and the decision of F. Williams J made on 13 May 2009 is set aside;

c. The default judgment entered herein on 7 November 2005 is set aside;

d. The claim shall be set for a case management conference to be held as soon as is practicable;

e. Costs to the appellant to be taxed if not agreed.

**PANTON P**

**ORDER**

a. The application to admit fresh evidence is refused;

b. The appeal is allowed and the decision of F. Williams J made on 13 May 2009 is set aside;

c. The default judgment entered herein on 7 November 2005 is set aside;

d. The claim shall be set for a case management conference to be held as soon as is practicable;

e. Costs to the appellant to be taxed if not agreed.