[2019] JMCA Civ 7

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 80/2018

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE P WILLIAMS JA

BETWEEN	**JAMAICA DEFENCE FORCE CO-OPERATIVE CREDIT UNION**	**APPELLANT**
AND	**GEORGETTE SMITH**	**RESPONDENT**

Written submissions filed by Scott, Bhoorasingh & Bonnick for the appellant

Written submissions filed by Malcolm Gordon for the respondent

22 March 2019

PROCEDURAL APPEAL

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

BROOKS JA

[1] I have read in draft the comprehensive judgment of McDonald-Bishop JA. I agree with her reasoning and conclusion that this appeal should be allowed.

[2] The judgment of my learned sister accurately reveals that the learned judge in the court below:

a. correctly identified that the claimant, Ms Georgette Smith, had made a grave procedural error in the claim that she had filed;

b. correctly assessed that it was an error that the court could rectify by "an order to put matters right" (rule 26.9 of the Civil Procedure Rules 2002 ("the CPR"); but

c. failed to make that order.

[3] Had the learned judge made the order that was required, and which he envisaged could be made, he would have realised that fairness demanded that the defendant, Jamaica Defence Force Co-operative Credit Union, should have been afforded an opportunity to file a response to the adjusted claim, which would have resulted from the rectification order.

[4] For those reasons, I agree that he made a manifestly incorrect decision in granting a default judgment in favour of Ms Georgette Smith on her defective claim. I agree with the orders suggested by McDonald-Bishop JA to get the matter back on track.

MCDONALD-BISHOP JA

Introduction

[5] The central question for consideration in this appeal is whether a judge of the Supreme Court erred in law when he entered judgment in default of defence, when the claim, which was for relief under the Constitution, was in breach of Part

56 of the CPR. Part 56 specifically deals with applications for administrative orders, which include applications for constitutional redress. The rules that are mainly engaged in this appeal are rules 56.9(1),(2) and (3); 56.11(3) and 26.9 of the CPR.

[6] The appeal emanates from the decision of K Anderson J, made in the Supreme Court on 9 March 2018, in which he entered judgment in default against the Jamaica Defence Force Co-operative Credit Union ("the appellant") with damages to be assessed in favour of Ms Georgette Smith ("the respondent"). Before entering judgment in default of defence, the learned judge had refused the appellant's application to strike out the respondent's statement of case (or a portion of it) as being in breach of Part 56 of the CPR or, alternatively, to permit its defence, filed out of time, to stand as filed.

[7] The learned judge granted permission to the appellant to file an appeal.

[8] The appellant by notice of appeal, filed on 30 July 2018, now seeks an order from this court that the order of the learned judge be set aside with costs in its favour.

[9] Having considered the grounds of appeal, the helpful submissions of the parties and the applicable law, I agree with the appellant that the learned judge erred in law when he entered judgment in default of defence in favour of the respondent. I am of the view that the appeal should be allowed and the order of the learned judge set aside.

[10] Before detailing my reasons for this conclusion, I believe it would be useful to provide a brief insight into the factual background to the appeal and the procedural history of the matter in an effort to promote a clearer understanding of the issues that have arisen for determination by this court.

The factual background and procedural history

[11] In November 2013, the appellant, as lender, entered into a loan agreement with the respondent, as borrower, for the purchase of a motor vehicle. The respondent subsequently defaulted on the loan repayments and fell in arrears. This led the appellant to commence proceedings in the Parish Court for the parish of Saint Catherine at Spanish Town, for recovery of the outstanding amount. Upon the respondent's admission of the debt at the Parish Court, judgment on admission was entered in favour of the appellant.

[12] The respondent failed to pay the judgment debt. The appellant eventually took steps to enforce the judgment, which led to the bailiff taking the respondent to the Duhaney Park Police Station lock-up, where she was detained in custody for a few days.

[13] On 24 April 2017, the respondent, by way of a claim form and particulars of claim, commenced proceedings in the Supreme Court, seeking damages for breach of contract, breach of constitutional rights, negligence, false imprisonment and deceit along with interest and costs. She claimed the total sum of $15,049,825.00 ($15,000,000.00 for damages). The claim was advanced as one

for a specified sum and was, accordingly, set out in a claim form (form 1), pursuant to rule 8.1(3).

[14] With respect to the claim for damages for breach of constitutional rights and false imprisonment, the respondent's claim, as pleaded in the particulars of claim, was that the appellant through its agents, had "high handedly and unnecessarily" detained her on an unlawfully obtained warrant.

[15] The respondent further contended that the appellant had acted negligently and in breach of contract when it failed to notify its agent, the bailiff, that it had entered into an alternate payment plan with her. The appellant had wrongfully commenced enforcement proceedings against her, she averred. She also alleged deceit on the basis that the appellant had, through its agent, caused her to be driven in a vehicle purportedly on the basis that she was being taken to its place of business in order to verify her accounts, when, in fact, she was taken to the Duhaney Park Police Station lock-up to be detained.

[16] The claim form with the particulars of claim was served on the appellant on 25 April 2017.

[17] On 9 May 2017, the respondent filed an acknowledgment of service of the claim form. The respondent, however, failed to file its defence within the time required by the rules, and, on 9 June 2017, filed an application for extension of time to file its defence. This application was scheduled to be heard on 14 November 2017. Prior to the hearing of the application, however, the appellant

had filed its defence, albeit out of time. It then filed an amended notice of application on 2 November 2017 in which it sought an order that the respondent's claim form and particulars of claim be struck out for failing to comply with rules 56.9(1) and (2) of the CPR. It also sought, in the alternative, an order that its proposed defence, filed on 10 July 2017, be permitted to stand. The appellant filed affidavit evidence in support of its notice of application.

[18] With respect to the application for the claim to be struck out, the appellant's principal contention was that rules 56.9(1) and (2) of the CPR require claims for constitutional redress to be commenced by way of a fixed date claim form (form 2), accompanied by evidence on affidavit, and not by a claim form (form 1), with particulars of claim. The appellant contended also that claims alleging breaches of the Constitution are required by rule 56.9(3) to be properly particularized and that the claim must be served on the Attorney General in accordance with rule 56.11(3). This having not been done by the respondent, the appellant argued that the claim should be struck out for failure to comply with the rules of court, in accordance with rule 26.3(1)(a).

[19] The appellant further contended that if the learned judge was not minded to strike out the claim or any portion of it, then it was seeking permission for its defence to stand, as there were good reasons for the delay in filing it and it had a realistic prospect of success. Reliance was placed on such authorities as, **Philip Hamilton (Executor in the Estate of Arthur Ray Hutchinson, deceased,**

testate) v Frederick Flemmings and another [2010] JMCA Civ 19 and **John Ross Ricketts v David Williams and another** [2013] JMSC Civ 152.

[20] The respondent strongly opposed the application on both limbs. She contended that the power to strike out the claim should be exercised sparingly and so striking out the claim should be a matter of last resort. The claim, the respondent contended, did not consist only of a constitutional claim as such, the learned judge, in treating with the application, should manage the case, rather than simply strike it out, in order to give effect to the overriding objective of dealing with the case justly. The respondent also maintained that no extension of time should be granted to the appellant for the filing of its defence as there was no good reason for the delay and it would have been prejudicial to her if the defence, which was filed out of time, were allowed to stand.

The impugned decision

[21] The appellant's application for striking out of the claim and, alternatively, for the defence to stand was refused by the learned judge. He opined that the respondent had made a claim for constitutional redress that was sufficiently particularlised, albeit "inelegantly drafted". He accepted the appellant's contention that Part 56 of the CPR does require claims for constitutional redress to be by way of fixed date claim form supported by affidavit evidence and that the respondent's claim was not in compliance with the rules in that regard. He also accepted in paragraph [19] of his judgment, that the claim was not served on the Attorney General as required by rule 56.11(3).

[22] The learned judge concluded, however, that these procedural errors did not constitute a sufficient basis for the court to exercise its power to strike out the claim and, in so doing, deprive a claimant of access to justice. He opined that that these were procedural errors, which the CPR empowers the court to rectify. In the light of those observations, the learned judge found that there was no merit in the application for striking out of the claim. He however, made no order to cure the defect in the proceedings but embarked on an examination of the appellant's application for the defence which was filed out of time to stand as properly filed.

[23] In assessing whether to exercise his discretion to extend time to allow the defence to stand, the learned judge stated that he was required to satisfy himself, firstly, that there were good reasons for the delay and that the proposed defence was meritorious. After his evaluation of the evidence on which the appellant relied, he concluded that no sufficient evidence was provided to substantiate the appellant's reasons for the delay and that the "proposed defence...without the evidence on affidavit to speak to its merits, contained only unsubstantiated denials of allegations". He denied the application to permit the defence, filed out of time, to stand as properly filed.

[24] The learned judge then proceeded to enter judgment in default of defence on the claim, without making any further order to treat with what was, and what

he clearly identified to be, a procedural flaw in the commencement of the proceedings and the service of the claim on the Attorney General.

The appeal

[25] The appellant filed 12 grounds of appeal from the learned judge's decision. Careful note is taken of the comprehensively drafted grounds of appeal and the submissions in support of them, as well as the equally comprehensive response on behalf of the respondent. However, given what I have extracted to be the kernel of the appellant's case, I will say that the pivotal grounds of appeal, which I have found to be determinative of the appeal, are grounds one, two, four and 12. These grounds touch and concern the learned judge's treatment of the procedural error in the proceedings, arising from his acknowledged breaches of Part 56.

[26] These grounds read:

> "1) The learned Judge, having found that the Respondent failed to commence the claim in accordance with Part 56, erred in permitting the Respondent's claim to proceed as filed."
>
> "2) The learned Judge, having found that there was no evidence to show that the Attorney-General's Chambers was served with the Claim pursuant to Rule 56.11(3) of the [CPR], failed to make an order that the Respondent serve the said Chambers."
>
> "4) The learned Judge erred in entering judgment in default in circumstances where his Lordship found that the Respondent has made a claim for constitutional redress which said Claim ought to have been brought by a Fixed Date Claim Form and supported by evidence on affidavit."

> "12) In the circumstances the learned Judge failed to properly direct himself on the applicable legal principles."

The issues

[27] The first issue that is extracted for consideration from these grounds of appeal is whether the learned judge erred in treating with the failure of the respondent to comply with rules 56.9(1), (2) and (3), and 56.11(3) of the CPR, relative to the commencement and service of the claim on the Attorney General. The second issue, which is closely related to the first, is whether the learned judge erred in entering judgment in default of defence on the claim in circumstances where the claim was defective for being in breach of the relevant rules of procedure.

Discussion and findings

Whether the learned judge erred in treating with the failure of the respondent to comply with rules 56.9(1), (2) and (3) and 56.11(3) of the CPR

[28] The respondent filed a claim form (form 1) in which she claimed the sum of $15,000,000.00 for "damages for breach of contract, for damages for breach of constitutional rights, negligence, false imprisonment and deceit". Under the heading "particulars of false imprisonment", the respondent averred that as a result of the appellant's detention, she "suffered loss and damage for constitutional breaches for which the ordinary measure of damages, remedies and redress are inadequate". She averred further that she "was deprived of her fundamental rights and freedom as a citizen of Jamaica to which she is and was

guaranteed by the Constitution of Jamaica". She has not identified the particular provisions of the Constitution which she alleged were infringed by the appellant, but she, having been detained and having averred a breach of her constitutional rights under the heading, "particulars of false imprisonment", it is readily inferable that she is alleging breaches of her right to liberty or freedom of the person, guaranteed by the Constitution. There is no question then that the respondent was making a claim for constitutional redress, although there was no heading specifically stated to be "particulars of breach of constitutional rights".

[29] The learned judge cannot be faulted in his conclusion at paragraph [27] of his judgment where he stated that in his view, "a claim for an administrative order has been made by the [respondent], albeit that same was made, utilizing an incorrect legal form".

[30] There is no issue joined between the parties, and rightly so, that claims for relief under the Constitution are to be instituted and proceeded with, in accordance with Part 56 of the CPR. Rule 56.9(1) provides that a party wishing to obtain constitutional relief must commence its application by a fixed date claim form (form 2) and identify the nature of the relief that is being sought. A claimant must file with the fixed date claim form, evidence on affidavit as required by rule 56.9(2)). Rule 56.9(3) states what the affidavit should contain. Apart from the relief being sought, it should include the provision of the Constitution, which the claimant alleges has been, is being or is likely to be breached.

[31] Rule 56.11(3) dictates that a fixed date claim form relating to an application for relief under the Constitution must be served on the Attorney General. This rule is stated in mandatory, rather than discretionary, terms.

[32] It is indisputable that the respondent had failed to comply with the rules just explained. These failures were brought to the attention of the learned judge and he accepted that they existed. He, however, was of the view that the flaws could be corrected, especially as rule 56.10(1) allowed a joinder of other actions with a claim for an administrative order. The learned judge's focus on rule 56.10(1) could not assist the respondent's case, without more, because he still would have failed to remedy the flaws that he found, even with the joinder, before proceeding to treat the claim as if having been properly commenced.

[33] It should be noted also that rule 56.7 applies to cases where a claimant issues a claim for damages or for relief other than an administrative order but where the facts supporting such claim are such that the only or main relief is an administrative order. In such circumstances, rule 56.7(2) provides that the court may at any stage direct that the claim proceed by way of an application for an administrative order. This rule, however, could not avail the respondent as she had purportedly commenced the claim from the outset as an administrative claim, which the learned judge accepted it to be. Given his findings, he was not acting within the ambit of rule 56.7 and would have had to act within the provisions of rule 26.9 as he himself stated. Indeed, even if he could have properly invoked rule

56.7 in these circumstances, he would have failed to comply with the rule to give directions that the claim proceed as an application for administrative order, which would, again, necessitate the filing of affidavit evidence. In all the circumstances, the learned judge did not comply with the relevant rules in treating with the case.

[34] The respondent also failed to comply with rule 56.11(3), which provides for the service of the claim on the Attorney General. The argument of counsel for the respondent that the requirement for service on the Attorney General was rendered inappropriate and unnecessary by virtue of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, which permits private citizens to bring constitutional claims against each other inter se (to the exclusion of the State), is rejected. Until and unless the rule is expressly repealed or provides otherwise, or the court dispenses with the requirement, it is applicable and must be obeyed. There was, therefore, a mandatory requirement for service of the claim on the Attorney General.

[35] Accordingly, rule 26.1(2)(u), relied on by the respondent's counsel to argue that the requirement for service on the Attorney General was discretionary and not mandatory, cannot be accepted. Rule 26.1(2)(u) states that **except where the rules provide otherwise**, the court may "direct that notice of any proceedings or application be given to any other person". Rule 56.11(3), specifically, provides otherwise; it expressly requires service of claims for constitutional redress on the

Attorney General. Rule 26.1(2)(u), therefore, has no application to the requirement of Part 56 for service to be effected on the Attorney General.

[36] There was, indisputably, a substantial procedural error, relative to the institution and service of the respondent's claim for constitutional redress. In the light of that error in the proceedings, the appellant was on legitimate ground in making an application for the claim to be struck out for failure to comply with the rules of court, pursuant to rule 26.3(1)(a). The learned judge was charged with the duty of resolving these fundamental procedural errors in the light of the law as he accepted it to be.

[37] The learned judge's treatment of the issue is set out at paragraphs [20], [21] and [22] of his judgment, where, having accepted that there was non-compliance with the relevant Part 56 rules, he stated:

> "[20] Consequent upon those directions in the **C.P.R**, I agree with Ms. Freemantle that there was no evidence that those steps were done by the [respondent] when the claim was commenced against the [appellant]. The failure however, of an applicant to initiate its claim, using the correct form does not, by that failure alone, warrant the court to exercise its powers to strike out that claim and thereby deprive that litigant of access to a court of law, for the purpose of seeking redress for an alleged violation of that litigant's constitutional rights.
>
> [21] It is, for that reason, that the **C.P.R** outlines at rule **25.1**, that the court must further the over-riding [sic] objective, of dealing with cases justly, by actively managing the cases brought before it. This include: *'fixing the timetables or otherwise controlling the progress of the case'* **(rule 25.1(g));** *'consider*

> *whether the likely benefits of taking a particular step will justify the cost of taking it'* **(rule 25.1(h))***; 'direct a separate trial of any issue'* **(rule 26.1(g))***;* and *'try two or more claims on the same occasion'* **(rule 26.1(h))**.
>
> [22] Further to those general powers of the court to manage cases, the court is also empowered by virtue of **Rule 26.9**, to rectify matters where there has been a procedural error. This rule only applies where a consequence of failure to comply with a rule has not been specified by any rule, practice direction or court order. It is undisputed that the [respondent] did not comply with **Part 56** in initiating her claim for breach of constitutional rights. It is also very clear that **Part 56** does not specify any consequence for failure of a claimant or applicant to comply with Part 56, in initiating a claim for an 'administrative order.' It is therefore my view, that the court is then empowered to exercise its general powers of case management, to set matters right where a claimant has initiated a claim for alleged breach of constitutional rights, or in other words, 'an administrative order,' using an incorrect procedure or form." (Emphasis as in original)

[38] The learned judge was correct in his assessment at paragraphs [20] and [22] that the respondent had run afoul of the requirements of Part 56. He was also correct in stating that he was empowered, in furthering the overriding objective to deal with the case justly, to actively manage it, which would include, among other things, the power to rectify matters where there had been a procedural error. In short, the learned judge was correct in his declaration that he was empowered to invoke his general powers of case management, particularly those conferred on him by rule 26.9 of the CPR, in treating with the error in procedure.

[39] Rule 26.9 provides:

> "26.9 (1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order.
>
> (2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.
>
> (3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.
>
> (4) The court may make such an order on or without an application by a party."

[40] By virtue of the fact that the relevant rules that were breached by the respondent were silent as to the sanctions to be invoked for violation of them, rule 26.9 could have been engaged in the resolution of the issue before him, as the learned judge himself recognised. He had the power, therefore, to refuse to strike out the claim, as was urged on him by the appellant. That was a matter completely within his discretion. In **Bupa Insurance Limited (trading as Bupa Global) v Roger Hunter** [2017] JMCA Civ 3, this court stated that once the consequence for the breach of a rule is not provided by the CPR or otherwise, then rule 26.9 gives a judge an "unfettered discretion" as to how to proceed in resolving the breach.

[41] Similarly, in **Chester Hamilton v Commissioner of Police**, [2013] JMCA Civ 35, this court considered the question whether the provisions of rule 26.9 of the CPR could cure the failure of a party to file an affidavit with the fixed date

claim form as is required by rule 56.9(2) and (3) of the CPR. Phillips JA, in speaking for the court, reasoned, in allowing the appeal, that in cases where there had been a failure to comply with a rule, the court is empowered by virtue of rule 26.9(3), to make orders to put matters right.

[42] It is in the light of rule 26.9(3) and the relevant authorities that counsel for the appellant have posited, and rightly so, that the learned judge would have been empowered by the rules, to refuse the application to strike out the claim and instead, make orders to remedy the procedural error. In keeping with this position, counsel contended that the learned judge, having noted the procedural defect and the court's powers under rule 26.9, "ought to have made an order to put matters right" before proceeding to enter default judgment. They recommended the approach adopted by this court in **Business Ventures and Solutions Inc v Anthony Dennis Tharpe and Capital One NA (Trustee of the estate of Alexander Burnham)** [2012] JMCA Civ 49.

[43] The appellant's argument is accepted. The learned judge ought to have gone further to make matters right, by having the respondent's claim brought into conformity with the relevant Part 56 rules, before embarking on an examination of the appellant's alternative application for the defence to stand. The proceedings could not properly proceed on the claim form and particulars of claim and, so, in such circumstances, there could not have been a reasonable and legitimate requirement by the court for there to be a defence to that defective claim.

[44] The learned judge, having opted not to strike out the claim, could have made an order that the matter, as of that date, should be treated as if commenced by fixed date claim form or to be deemed as having been so commenced. It means that the claim form would have become in law, a fixed date claim form, for all intents and purposes. Once that order was made, then the particulars of claim could not stand in support of the claim because rule 56.9(3) requires evidence by affidavit and the particulars of claim, would not qualify as evidence for obvious reasons.

[45] An order would have had to be made for supporting affidavit evidence to be filed by the respondent, with the particularity required by rule 56.9(3) and having regard to Part 30 of the CPR (which treats with the rules governing affidavits). Once the respondent was required to file affidavit evidence, then, the rules of court and justice would demand that an order be made for the appellant, the Attorney General or any other interested party, who would be directly affected by the order, to be served. In this way, the issue relating to non-service on the Attorney General, which is highlighted by the appellant as a defect in the proceedings, would have been addressed by the learned judge.

[46] In these circumstances, the appellant would have been given the opportunity, upon being served, to properly respond to the respondent's statement of case with evidence of its own. In such a scenario, which is the

appropriate one, there would have been no need for any consideration of the appellant's application for the defence already filed to stand.

[47] Indeed, the learned judge also had the option, once the claim form was to be treated as a fixed date claim form, to make an order that an amended fixed date claim form be filed and served. This would have been prudent, because the claim form, as originally filed, was in the form of a claim for a specified sum of money, which was not in keeping with the form and contents of a fixed date claim form under rule 8.8 and/or part 56.9(1). In fact, the causes of action included in the claim all involve unliquidated damages and so it is rather curious that the claim is for a specified sum. An amended fixed date claim form, which omits a claim for liquidated damages as the claim now stands, would bring the claim in conformity with the requirements of Parts 8 and 56 of the CPR. All these steps would have served to put the proceedings on a smooth track for the issues in controversy between the parties to be properly identified and resolved within the framework of the applicable procedural law.

[48] The filing of an amended fixed date claim form would also have had the effect of preserving the original date of the commencement of the claim, thereby avoiding prejudice to the respondent, in terms of any statute of limitation that could adversely affect her case (given the various causes of action included in the claim).

[49] The learned judge, having failed to follow this, or a similar course, in making the necessary orders to put matters right in accordance with rule 26.9(3) was plainly wrong when he proceeded to examine the appellant's application for permission for the defence to stand. The defective claim ought to have been rectified before any further step was taken in the proceedings by the court. Therefore, the examination of the proposed defence was not warranted in the circumstances.

Whether the learned judge erred in entering judgment in default of defence on the claim

[50] The finding that the learned judge ought not to have proceeded to examine the proposed defence before first taking steps to cure the defect in the proceedings, leads inexorably to the finding that he erred in entering default judgment on the claim.

[51] There is, however, another legal basis on which the default judgment cannot be permitted to stand and that is rule 12.2 of the CPR. This rule provides, among other things, that "a claimant may not obtain default judgment where the claim is a fixed date claim form". Given that the respondent ought properly to have filed a fixed date claim form, it follows that had that been done, she would have been barred from obtaining default judgment. It means then, that she would not have been entitled to default judgment if an order was properly made by the learned judge that the matter should have been treated as if commenced by a

fixed date claim form, which was the only viable option he had having refused to strike out the claim.

[52] The respondent cannot be allowed to reap the fruits of a judgment improperly entered on a defective claim, which she would not have been entitled to, had the defect been cured. This judgment entered on the defective claim is a nullity, or at least, a fundamental irregularity, and must be set aside.

Conclusion

[53] Regrettably, the learned judge's treatment of the case was, ultimately, not in keeping with the relevant rules of court, particularly rule 26.9(3), which was expressly recognised by him as being applicable, as well as the overriding objective to deal with the case justly. This failure on the part of the learned judge to treat with the case, in accordance with the relevant rules of court, lends credence to the appellant's complaint in ground 12 that he failed to properly direct himself on the applicable legal principles, which translates into an error of law on his part.

[54] This court has repeatedly expressed its limitation in interfering with the exercise of the discretion of a judge at first instance on an interlocutory application, in keeping with the dictates of Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042**.** It is quite clear, however, that this is a case in which this court would be justified in disturbing the exercise of the learned judge's discretion because his treatment of the appellant's

application demonstrates either a misunderstanding of the law or, at any rate, a failure to follow the relevant law. For these reasons, his decision is flawed and cannot be permitted to stand.

[55] This finding, in my view, is enough to be determinative of the appeal. There is, therefore, no need for any further consideration of whether the learned judge erred in refusing the appellant's alternate application to permit the defence to stand as if filed within time.

Disposal of the appeal

[56] It is for the foregoing reasons that I would allow the appeal, set aside the order of the learned judge made on 9 March 2018, with costs to the appellant to be agreed or taxed.

[57] I would also propose that this court makes consequential orders, in the terms detailed in the sub-paragraphs below, in an effort to put matters right, as the learned judge ought to have done, and in keeping with the overriding objective to deal with the case justly. I propose these orders:

(1) The appeal is allowed.

(2) Paragraphs (1)–(5) of the order of K Anderson J made on 9 March 2018 are set aside.

(3) The claim form filed on 24 April 2017 is allowed to stand as if filed as a fixed date claim form and the proceedings are to proceed as if commenced by a fixed date claim form.

(4) Unless the respondent, within 30 days of the date of this order, files and serves on the appellant and the Attorney General an amended fixed date claim form with supporting affidavit(s), in compliance with Part 56 of the CPR (and any other relevant rule of the CPR), the respondent's statement of case, filed on 24 April 2017, shall stand struck out.

(5) The appellant and/or any other person served with the amended fixed date claim form and affidavit(s) in support are to file and serve their response, if any, in accordance with rule 56.12 of the CPR.

(6) Any further case management orders must be made by the Supreme Court.

(7) Costs of the appeal and the application in the court below to the appellant to be agreed or taxed.

P WILLIAMS JA

[58] I too have read in draft the judgment of McDonald-Bishop JA. I agree with her reasoning and conclusion and I have nothing further to add.

BROOKS JA

ORDER

(1) The appeal is allowed.

(2) Paragraphs (1)–(5) of the order of K Anderson J made on 9 March 2018 are set aside.

(3) The claim form filed on 24 April 2017 is allowed to stand as if filed as a fixed date claim form and the proceedings are to proceed as if commenced by a fixed date claim form.

(4) Unless the respondent, within 30 days of the date of this order, files and serves on the appellant and the Attorney General an amended fixed date claim form with supporting affidavit(s), in compliance with Part 56 of the CPR (and any other relevant rule of the CPR), the respondent's statement of case, filed on 24 April 2017, shall stand struck out.

(5) The appellant and/or any other person served with the amended fixed date claim form and affidavit(s) in support are to file and serve their response, if any, in accordance with rule 56.12 of the CPR.

(6) Any further case management orders must be made by the Supreme Court.

(7) Costs of the appeal and the application in the court below to the appellant to be agreed or taxed.