[2018] JMCA Civ 13

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 47/2015

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE P WILLIAMS JA

BETWEEN	**NEW FALMOUTH RESORTS LIMITED**	**APPELLANT**
AND	**NATIONAL WATER COMMISSION**	**RESPONDENT**

Written submissions filed by Riam Esor & Company for the appellant

Written submissions filed by Williams, Alcott & Williams for the respondent

13 April 2018

MORRISON P

Introduction

[1] In an action filed in the Supreme Court[1], the appellant claimed against the respondent for damages for trespass to land and other consequential reliefs.

[2] On 27 March 2015, Lindo J (Ag), as she then was, made an order that, should the appellant fail to comply with an order previously made by G Brown J on 30 July 2013 ('the 30 July 2013 order') within 14 days of the date of her order, the appellant's case should stand as struck out. The appellant did not comply with Lindo J (Ag)'s order

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[1] Claim No 2012 HCV 06502

within the time ordered and, by an order made on 9 April 2015, Hibbert J ('the judge') refused to grant the appellant relief from sanctions under rule 26.8 of the Civil Procedure Rules 2002 (CPR). The result of this was that the appellant's claim was struck out as a consequence of the sanction of Lindo J (Ag)'s 'unless' order.

[3] Pursuant to the leave of the judge, the appellant now appeals against his order[2]. The appellant contends that (i) the judge erred in the exercise of his discretion to grant relief from sanctions, in particular by failing to recognise that the appellant's failure to comply with previous orders of the court was not intentional; and (ii) the judge erred as a matter of law in his approach to the application for relief from sanctions. The respondent submits, on the other hand, that the judge's order was fully justified by the appellant's long history of non-compliance with previous orders of the court and by the applicable provisions of the CPR.

CPR 26.8

[4] It may first be helpful to set out the rule under which the judge was asked to act and which forms the basis of this appeal:

> "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 –

[2] See notice of appeal filed on 21 April 2015

(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 appellant's costs in relation to any application for relief unless exceptional circumstances are shown."

The background to the application before the judge

[5] In order to understand the rival contentions, it is necessary to rehearse the procedural history of the matter in some detail. The appellant is the registered proprietor of various parcels of land in the parish of Trelawny. These parcels are comprised in Certificates of Title registered at Volume 1066 Folio 929, Volume 1066 Folio 930, Volume 1008 Folio 636, Volume 29 Folio 7, Volume 1109 Folio 439 and Volume 1109 Folios 441-446 of the Register Book of Titles.

[6] The respondent is a statutory body established pursuant to the provisions of the National Water Commission Act and is the primary provider of potable water in Jamaica.

[7] In its fixed date claim form filed on 21 November 2012, the appellant states as follows:

> "3. That the [respondent] has entered into agreements with squatters on the [appellant's] land for the sole purpose of providing water supply services to the squatters in exchange for monies, benefit [sic], earnings and gains.
>
> 4. That the [respondent] has entered multiple contracts for the provision of service to squatters on the [appellant's] land and has and continue [sic] to benefit, gain and earn from the [appellant's] land at the [appellant's] expense and loss.
>
> 5. That the [respondent] has installed on, over and underneath the [appellant's] land pipes, meters, manholes, equipment, infrastructure, tools and apparatus without the [appellant's] permission for the purpose of providing water supply service to squatters on the [appellant's land].
>
> 6. That the [respondent] has accessed and occupied and continues to access and occupy illegally the [appellant's] land and has misused and continue [sic] to misuse the [appellant's] property without the [appellant's] permission or authority for the purpose of providing commercial water supply service to squatters on the [appellant's] land.
>
> 7. That the [respondent] has trespassed and continues to trespass [sic] the [appellant's] land and utilize the [appellant's] property without the [appellant's] permission or authority for the purpose of facilitating its collection of information to further its commercial enterprise, profit and benefits from the squatters on the [appellant's] land.
>
> 8. That the [respondent] has constructed, maintain, repair, install, inspect, remove, replace, service, operate, read, treat and deal [sic] with its pipes, meters, manholes, equipment, infrastructure, tools and apparatus on, under and across the

> [appellant's] land without the [appellant's] knowledge, authorization or permission.
>
> 9. That the [respondent] has bushed, clear [sic], cut down, dig up, weed, destroy [sic], wacked, remove, change [sic] the landscape of, traversed on or otherwise deal with and alter the foundation, structure, landscape infrastructure and terrain of the [appellant's] property so as to establish its pipes, meters, manholes, equipment, infrastructure, tools and apparatus for the purpose of conducting its commercial enterprise for gain, benefit, value, income and profit from squatters on the [appellant's] land.
>
> 10. That the [respondent] has blatantly and deliberately refused to act on or heed the [appellant's] various notifications to it that the occupiers of its lands are there illegally and without the owner's permission and as such no water supply service should be provided to them by the [respondent].
>
> 11. That the [respondent] has deliberately and repeatedly failed to act on or to heed the [appellant's] notification to it that the occupiers of its lands are there illegally and without the owner's permission and as such no water supply service should be provided to them by the [respondent].
>
> 10[sic]. That the [respondent] has been knowingly and deliberately facilitating illegal squatters on the [appellant's] land on or before September 1993."

[8] In consequence of the various acts of trespass alleged against the respondent, the appellant claimed for, among other things, an order directing the respondent to remove its pipes, meters, manholes, equipment, infrastructure, and apparatus from the appellant's land. In addition, the appellant claimed damages for trespass, as well as aggravated and exemplary damages against the respondent.

[9] The fixed date claim form was supported by an affidavit sworn to by the appellant's chairman and chief executive officer, Mr James Chisholm ('Mr Chisholm'). In his affidavit, Mr Chisholm gave further details of the appellant's dealings with the respondent in relation to the alleged acts of trespass. The appellant's lands which were allegedly subject to acts of trespass by the respondent were identified by reference to their title description and the Volume and Folio numbers set out in the fixed date claim form. Mr Chisholm also referred to (i) correspondence with the respondent, dating back to 2003, in which the appellant complained to the respondent about the various acts of trespass which it alleged; and (ii) telephone calls to the respondent on various occasions, including its customer service department, "to admonish, advise and plead with then [sic] to desist their facilitation of squatters on the [appellant's] lands"[3].

[10] By acknowledgment of service dated 21 January 2013, the respondent confirmed receipt of the fixed date claim form on 14 January 2013. The acknowledgment of service, which did not admit any part of the claim, signified the respondent's intention to defend it.

[11] By letter to the appellant's attorneys-at-law dated 25 January 2013, the respondent's attorney-at-law requested certain further and better particulars in respect of several paragraphs of Mr Chisholm's affidavit. In this regard, the respondent's attorney-at-law stated as follows:

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[3] At paras 8-15

> "My preliminary instruction is that the properties referred to in the Fixed Date Claim Form, contained in the Certificate of Titles vary in acreage up to One thousand (1000) acres in size. Thus, without a diagram illustrating precisely where the alleged trespass by the NWC occurred and continues to occur it would be very difficult for us to conduct our investigations into the matter."

[12] The requested particulars were not provided. As a result, the respondent filed a notice of application for court orders on 23 July 2013, by which it sought an order directing the appellant to provide the several items of further information which the respondent had previously requested by letter.

[13] This application came on for hearing on 30 July 2013 before G Brown J. The court made various orders for specific disclosure of documents by the appellant, including the following:

> "1) Within fourteen (14) days of the date of the Order herein the Claimant do provide the Defendant with further information as follows:
>
> a) Further and better particulars as it relates to paragraphs 6 through 10 of Affidavit of James Henry Chisholm filed on 21st November 2012:
>
> (I) Copies of the Certificates of Title and surveyors [sic] diagram(s) illustrating where the Claimant's property is situated and where the alleged trespass of the NWC's infrastructure has occurred;"

[14] On 20 January 2014, the respondent filed a defence putting the appellant to strict proof of the various allegations made in Mr Chisholm's affidavit. In particular, the

respondent denied trespassing on lands owned by the appellant, or that any damages were due to the appellant in respect thereof. The respondent stated further that, if and to the extent that the court were to find that it is in occupation of land belonging to the appellant, it has acquired title to the said land by reason of the operation of section 3 of the Limitation of Actions Act, having openly possessed the said land for the period required by that Act. And, further still, that if and to the extent that the respondent has been in occupation and or possession of the portion of the land that it occupies for a period in excess of 16 years prior to the filing of the claim, it has acquired prescriptive rights and/or title to the said land by reason of the operation of the Prescription Act, having openly possessed the said land for the period required by that Act.

[15] At the first hearing of the fixed date claim form on 21 January 2014, Sykes J (as he then was) made a number of orders with regard to the future conduct of the matter. For present purposes it is only necessary to mention three of them. First, Sykes J ordered that the matter should be treated as if commenced by way of claim form and that, as such, (i) the fixed date claim form filed on 21 November 2012 should stand as a claim form; and (ii) the respondent's defence filed on 20 January 2014 should stand as the defence to the claim form. Second, the trial of the matter was set for five days commencing 11 May 2015. And third, with respect to any outstanding issues of disclosure, Sykes J extended the time for the appellant to comply with paragraph 1(a)(I) (among others) of the 30 July 2013 order to 14 April 2014.

[16] Between March and April 2014, further pleadings were filed on both sides. These included an amended claim form and particulars of claim (both filed 28 March 2014), an amended defence (filed 24 April 2014) and a reply to the defence (filed 30 April 2014). In addition, the appellant filed its list of documents and Mr Chisholm's witness statement on 23 June 2014 and 22 October 2014 respectively, while the respondent filed its list of documents on 28 October 2014.

[17] By letter dated 9 April 2014, the appellant's attorneys-at-law supplied the respondent's attorney-at-law with several documents in purported compliance with paragraph 1(a)(I) of the 30 July 2013 order. Included among these documents were (i) copies of Certificates of Title registered at Volume 1066 Folio 930, Volume 1008 Folio 636, Volume 29 Folio 7 and Volume 1389 Folio 427 of the Register Book of Titles; and (ii) a survey diagram prepared by Wallace Smith, bearing a pre-checked date of 6 June 2006 which, the letter stated, "identifies by yellow highlight the areas of [the] property that the [appellant] contends that the [respondent] is trespassing on or otherwise in illegal use and occupation of".

[18] By letter dated 28 August 2014, the respondent's attorney-at-law advised the appellant's attorneys-at-law that an aspect of paragraph 1(a)(I) of the 30 July 2013 order remained outstanding, in that the latter had still not supplied "copies of the… surveyor's diagram(s) illustrating where the [appellant's] property is situated and where the alleged trespass of the [respondent's] infrastructure has occurred". The respondent's attorney-at-law warned the appellant's attorneys-at-law that, if "this long

outstanding portion of the Order of 30th July 2013" was not complied with within 14 days, "we will have no choice but to apply to the Court for an Order directing compliance, failing which sanctions be attached to your client for such non-compliance".

[19] By letter dated 2 September 2014, the appellant's attorneys-at-law advised the respondent's attorney-at-law that the appellant had "complied in full" with Sykes J's order of 21 January 2014, "in so far as it varied and extended the Order of Justice Glen Brown, to which your current letter refers". The letter continued:

> "Note that on April 14, 2014 your office did acknowledge receipt of the survey diagram prepared by Wallace Smith and bearing a pre-checked [sic] dated June 6, 2006 identifying by yellow highlight the areas of property that the [appellant] contends that the [respondent] is trespassing on or otherwise in illegal use and occupation of.
>
> We are mindful of the view of the [respondent] (outlined in correspondence dated January 25, 2013), that the Certificate of Titles on which we depend to prove our Claim varies in acreage up to One Thousand (1,000) acres in size. However, with copies of the related Titles been [sic] provided to you pursuant to the Formal Order of the Honourable Mr. Justice B. Sykes, made on the 21st day of January, 2014, and by extension our supporting survey diagram, we cannot share your view.
>
> If you continue to doubt the acreage or the areas we have identified as the one where [the respondent] continues to trespass, be reminded that by our letter to you dated February 10, 2014, we responded in the affirmative to your written request to conduct your own independent assessment on the property as identified in our Claim Form."

[20] In a letter dated 23 September 2014, the respondent's attorney-at-law sharply refuted the assertion that the appellant had complied fully with paragraph 1(a)(I) of the 30 July 2013 order:

> "…
>
> I have reviewed the content of the Order of 30th July 2013 made by the Hon. Mr. Justice Glen Brown (as varied only as to dates of compliance by the Order of the Hon. Mr. Justice Sykes in relation to the ordered disclosure by the Claimant) against my letter of August 28, 2014 and your response of 2nd September 2014 and do not share your view that your client has complied with paragraph 1(a)(I) of the Order of 30th July 2013.
>
> More specifically, nothing on the alleged survey of Mr. Wallace [sic] going back to 2004 shows any facility or pipeline belonging to [the respondent].
>
> Secondly, the Order of 30th July 2013 is clear that your client is to expressly disclose the information contained in that Order.
>
> In circumstances where this entire case turns on an alleged trespass on the part of the [respondent] on lands belonging to your client I fail to understand your client's difficulty in providing the survey information ordered by the Court.
>
> You ought to be aware that in circumstances of a claim based entirely on an alleged [sic] by my client on lands owned by your client, your client is hampering my client's compliance with the Case Management Conference Order and ultimately the preparation for the trial now fixed for early 2015.
>
> If I am not in receipt of a survey diagram complying with paragraph 1(a)(1) of the Order of 30th July 2013 on or before 26th September 2014 I intend to approach the court for an Order directing compliance with attendant sanctions for non-compliance.

> In the current dispensation of civil litigation in Jamaica your client is **NOT** permitted to raise allegations against my client and not be prepared to demonstrate that the allegations are in fact worthy of investigation. You can also rest assured that my client has no intention of trolling through several titles and over 1,000 acres of land, as alleged by your client, to satisfy itself of the allegations raised by the [appellant] on whom the burden of proof rests.
>
> I look forward to your urgent response so that the trial dates are not jeopardize [sic] in any regard." (Emphasis in the original)

[21] On 28 October 2014 the respondent applied for an order, among other things, directing the appellant to comply with the 30 July 2013 order within seven days. That application came on for hearing, as it happened, again before Sykes J, on 12 November 2014. On that date, the time within which to comply with the 30 July 2013 order was further extended to 19 January 2015. Further detailed orders were also made as to, among other things, the work to be completed by the surveyor, who was required to hand over completed diagrams to the appellant's attorneys-at-law no later than 22 December 2014.

[22] On 16 December 2014, the appellant filed an application to have Sykes J's order of 12 November 2014 varied and/or to have the time for compliance extended. In an affidavit sworn to in support of this application on 16 December 2014, Mr Chisholm explained the difficulties which the appellant was experiencing in complying with the 30 July 2013 order:

> "5. That the Court's intervention is required as a matter of URGENCY because despite Court Orders the illegal

occupants continues [sic] to make it impossible for [the appellant's] compliance with Court Order [sic] as they are threatening physical violence to anyone who has tried to enter the land.

6. That this hostile action on the part of the illegal occupants has heightened because in a similar action for trespass brought by New Falmouth Resorts Limited against the Jamaica Public Service, the public service company proceeded to disconnect several families on the [appellant's] land ... From the news report broadcasted on November 25, 2014, those illegal occupants reacted by taking to the street in angry protest that lasted for hours and was only quelled after intensive police involvement and restraint.

7. That the Formal Order of the Honourable Mr. Justice B. Sykes as [sic] made on the 12th day of November 2014 and was done before the illegal occupants were incited. Since then, all our efforts in accessing the land to comply with Justice Sykes Order has [sic] been futile and ended in threats to the wellbeing of the potential surveyors.

8. The illegal occupants on the [appellant's] land are hostile. In an effort to comply we have made contact with the police department at Falmouth. In direct discussions with the Deputy Superintendent of Police Mr. Wilson, I was advised that the area is volatile and no attempts for entry should be made without police protection as without the required protection, the police cannot be held accountable for anyone's wellbeing or safety.

9. I have also had conversation with Senior Superintendent Wilfred Campbell but although they are not refusing the protection to enter the property per se, they are saying that their resources are stretched at this time and in the season approaching. That the area is even now more volatile as they have been having increasing and surging challenges with crime and criminals seeking refuge and living in the legal settlement on our land.

10. The costs to carry out the Survey as requested by the Court in paragraph 2 have increased in value tremendously due to the threat to individuals' security. Where I am able to find a surveyor willing to act, their need for police protection is compulsory. I exhibit hereto one estimate I have received

> further [sic] the Court's Order that is conditional on this security being provided beforehand and marked Exhibit '1' for ease of identification herein.
>
> 11. In an effort to comply with the Court's Formal Order, I have obtained an aerial depiction of the land in issue. This aerial map on a scale of 1:12500 depicts clearly the structures on the land and I am petitioning the Court to be able to rely on the said aerial map in identifying the areas in occupation by the Respondent as trespassers. I exhibit hereto and marked Exhibit '2' for identification said map.
>
> 12. That in the prevailing circumstances as outlined above, I am requesting that the Court provides the [appellant] with the means required to comply with said Formal Order of 12th November 2014. In the alternative, that the Court accepts the aerial map in lieu of the surveyor's diagram or in addition thereto.
>
> 13. That under the circumstances the court extends the time within which it has given the [appellant] to comply with its order, as the [appellant] has no intention of defying the Orders of this honourable Court.
>
> 14**.** That New Falmouth Resorts Limited has sought repeatedly, the assistance of the government agencies with responsibility to prevent this illegal development, for years particularly the Trelawny Parish Council and the Housing Agency of Jamaica, to no avail. None of these agencies invoked their statutory authority to prevent the illegal occupation, to stem it or contain it. Perhaps the Court can marshal the [G]overnment to action.
>
> 15. That based on the above, I am humbly seeking the Courts [sic] intervention as a matter of urgency to stop this injustice."

[23] Exhibited to this affidavit was a copy of a surveyor's estimate (dated 26 November 2014) of the cost of surveying the property, in the sum of $938,000.00 (with

a deposit of 40% required for mobilisation). The surveyor (Mr Rixon E Richards) added the following:

> "Please note that this estimate is based on expectations of smooth implementation of work. In the eventuality of disturbances, adjustments will be a consideration. We are also requesting assistance from the police with regard to our security. We are therefore asking that you send a request to the Falmouth police to provide same for the duration of work."

[24] Also exhibited to Mr Chisholm's affidavit was a quotation (dated 2 December 2014) from Donovan Simpson and Associates Ltd, Commissioned Land Surveyors, giving an estimated cost, "To locate buildings, waterline and electrical poles", of $1,148,690.00 (with a deposit of 30% for mobilisation). This quotation was stated to include "travelling, labourers and miscellaneous expenses".

[25] After hearing the appellant's application on 5 January 2015, Rattray J made an order extending the time for compliance with the 30 July 2013 order to 5 March 2015. However, Rattray J made no order as to the variation of the order which Mr Chisholm had proposed.

[26] On 23 February 2015, the appellant, which had still not complied with the 30 July 2013 order, filed an application of its own, in which it sought the following orders against the respondent:

> "1. That the [respondent] carry out a search and specifically disclose to the [appellant] the service names and address, Customer Number and Premises Number or

> alternatively a copy of ALL the [respondent's] customers on lands owned by the [appellant] ... registered at Volume 1066 Folio 930, Volume 1109 Folio 442, Volume 1008 Folio 636 and Volume 29 Folio 7 of the Register Book of Titles from October 2003 to present;
>
> 2. That the [respondent] carry out the search and specifically disclose to the [appellant] number of meters, the number of manholes, the number of standpipes and the length/meters of pipe laid by the [respondent] on the lands owned by the [appellant] ... registered at Volume 1066 Folio 930, Volume 1109 Folio 442, Volume 1008 Folio 636 and Volume 29 Folio 7 of the Register Book of Titles from October 2003 to present;
>
> 3. Costs to be cost [sic] in the Claim."

[27] This application, which was fixed for hearing on 24 April 2015, was again supported by an affidavit sworn to by Mr Chisholm. He deponed (at paragraph 6) to a request for information by the appellant's attorneys-at-law from the respondent's attorney-at-law dated 11 September 2014, in which the appellant had asked the respondent to "... kindly provide us with a copy of all the [respondent's] documentation relating to accounts for water consumption and services to occupants on the [appellant's] land ..." He stated that the respondent had not responded to this request, despite the fact, he added (at paragraph 9), "[t]hat to the best of my knowledge information and belief, the information requested ... is with the [respondent] and it would require very little effort and minimal costs for the [respondent] to produce the documents".

[28] Mr Chisholm also referred (at paragraph 10) to his unsuccessful request to the respondent for the information pursuant to the Access to Information Act. He

maintained (at paragraph 11) that, to the best of his knowledge, information and belief, the respondent was still supplying water to illegal occupants of the appellant's land and, to support this assertion, he exhibited what he described as "[w]ater bills for some ten (10) occupants on the [appellant's] land". He concluded as follows (at paragraphs 12-13):

> "12. Two of the issues to be determined at trial in this matter is whether or not the [respondent] supplies water to over 100 squatters on the [appellant's] land and whether or not the [respondent] installed water meters, standpipes, pipes and other such equipment to facilitate the supply of water to illegal occupants of the [appellant's] land. The information requested pursuant to the Orders being sought for Specific Disclosure will help to resolve these issues.
>
> 13. That given all the circumstances I have been advised by my Attorney at Law and do verily believe that Specific Disclosure is required to fairly dispose of this Claim and save costs."

[29] By 5 March 2015, the appellant had still not fully complied with the 30 July 2013 order. Accordingly, on 13 March 2015, the respondent filed a without notice application for an order that, within 14 days of the date of the order, the appellant be required to comply with paragraph 1(a)(I) of the 30 July 2013 order, failing which the appellant's statement of case "shall stand struck out and judgment be entered for the [respondent] without further order of the Court".

[30] In his affidavit filed on 13 March 2015 in support of this application, Mr Colin Alcott, one of the respondent's attorneys-at-law, after tracing the appellant's history of non-compliance, said this (at paragraph 28):

> "…the continued failure of the [appellant] to comply with the [30 July 2013 order] is hindering the [respondent] in its completion of instructions to its counsel and in its preparation for the trial of this Claim which is now set for **11th to 15th May 2015**." (Emphasis as in original)

[31] It is against this background that, on 27 March 2015, Lindo J (Ag) made an 'unless' Order in terms of the respondent's application.

[32] In an application for relief from sanctions filed on 31 March 2015, the appellant relied on the following grounds:

> "a. The failure to comply with the court order was not intentional;
>
> b. There is a good explanation for the failure;
>
> c. The [appellant] has generally complied with all other relevant rules, practice directions, orders and directions of the court whereas the [respondent] has not so complied;
>
> d. The relief sought, if granted would be in the interest of the administration of justice;
>
> e. The failure to comply was outside the purview and control of the [appellant];
>
> f. The failure to comply can be remedied within a reasonable time, due to recent developments and directions of the court in relation to the lands in issue;
>
> g. That a likely trial date can be met if the relief is granted; and
>
> h. That there is no prejudice to the [respondent] in granting the relief sought whereas the [appellant] would be deprived of its right to a fair hearing if the relief it seek [sic] is denied."

[33] The application was supported by a long affidavit sworn to on the appellant's behalf by Mr Chisholm on 31 March 2015. In it, Mr Chisholm reiterated many of the points he had previously made in his affidavit dated 16 December 2014, particularly with respect to the severe security challenges the appellant had been facing in accessing the property for the purpose of conducting the survey. Mr Chisholm maintained (at paragraph 8) that the appellant's failure to comply in full with the 30 July 2013 order was not intentional. He referred (at paragraph 9) to the appellant's application for specific disclosure dated 23 February 2015 (which was served on 26 February 2015), pointing out that it was scheduled to be heard on 24 April 2015, the same day set for the pre-trial review of the action. For this reason, Mr Chisholm asked the court to either set aside the 'unless' order or in the alternative extend the time for compliance "until the [respondent] discloses in full". He pointed out (at paragraph 17) that the appellant "has generally complied with all other relevant rules, practice directions, orders and directions [of the court] while the [respondent] has not". In this regard, he referred (at paragraph 18) particularly to the respondent's failure to meet the deadline set by the rules for the filing of its defence, which had therefore obliged it to apply to the court almost a year later for an extension of time to enable it to do so.

[34] I cannot avoid setting out in full the remaining paragraphs (25-34) of Mr Chisholm's affidavit:

> "25. That to the best of my knowledge, information and belief, the relief sought if granted, would be in the interest of the administration of justice. The [respondent] applied for and was granted an Unless Order without notice to the

[appellant], and at the same time neglecting its duty to assist the Court in its decision making process and the furthering of the overriding objective for the fair and timely disposal of a claim. The [respondent] failed to set out for the Courts [sic] consideration or present all the pertinent facts surrounding its request for an Unless Order.

26. Furthermore, the information requested as to 'infrastructure' placed on the [appellant's] land by the [respondent] is within the possession of the [respondent] and is easily accessible by the [respondent]. That the [respondent] is taking advantage of the prevailing volatility of the area that the [appellant] is encountering, and the [respondent] is knowingly withholding the information the [appellant] seek [sic], despite an existing Court Order for disclosure.

27. That on or about the 18th of June 2014 in compliance with the Order made, Standard Disclosure was filed and served on the [respondent]. That as part of the disclosure and so as to resolve several matters in issue, I was expecting to include in the Standard Disclosure the particulars for the over one hundred (100) persons squatting on the [appellant's] land with water supply from the [respondent]. Following the Order for Disclosure I have been advised by my Attorneys-at-Law and do verily believe that she wrote to the [respondent] by letter dated September 11, 2014 requesting all documentation relating to accounts for water supply to the squatters on the [appellant's] land which is the subject of this claim. To date there has been no response from the [respondent] to the said correspondence ...

28. In addition to the efforts made by my Attorneys-at-Law I have made personal attempts to visit the land to obtain the information but for fear for my life, due to threats made on my life by the squatters, I was unable to proceed on the land in order to obtain the information.

29. That the failure to comply can be remedied within a reasonable time. The [appellant's] Notice of Application for court orders is with the [respondent] and it would require very little effort and minimal costs for the [respondent] to produce the document and information requested. That the [appellant] has assisted the [respondent] in this regard, by

providing to it the names of some 100 persons that has [sic] come forward and [sic] before this Court as occupant [sic] on the [appellant's] Land on October 22, 2014 ...

30. In addition to providing the list with names to the [respondent], and subsequent to the January 5, 2015 Order of the Honourable Mr Justice Rattray, the [appellant] enquired at the National Water Commission office on Marescaux Road and confirmed that contrary to the representation of the [respondent], it is indeed providing services to illegal occupants on the [appellant's] land. The [appellant] provided the [respondent] with the names and account numbers already in its possession for ten (10) such illegal occupants, by service directly on the [respondent] on February 26, 2015. The [respondent] responded by seeking an Unless Order without notice, to sanction the Claimant.

31. That to the best of my knowledge, information and belief, a likely trial date can be met if the relief is granted. If the [respondent] is made to comply with disclosing the information in its possession, the said information the [appellant] is having difficulty in obtaining, the trial date can be met and as a matter of fact, the parties would not need to utilize the five days reserved for a trial in this matter, being May 11-15, 2015.

32. That there is no prejudice to the [respondent] in granting the relief sought whereas the [appellant] would be deprived of its right to a fair hearing if the relief it seek is denied. That the [appellant] would be deprived of a remedy for the wrong it has suffered and is suffering as a result of the actions of the [respondent]. That to the best of my knowledge information and belief, the information requested in the pending Notice of Application for Court Orders is with the [respondent] and it would require very little effort and minimal costs for the [respondent] to produce the document.

33. Further, that to the best of my knowledge information and belief the [respondent] is not handicapped to provide the document being requested as compared to the issues that the [appellant] is facing in accessing its own land, and as spelled out above. The [appellant] maintains that the [respondent] is enticing and facilitating the illegal occupants

> on its lands to its detriment while the [respondent] continues to profit and gain from said illegal occupation.
>
> 34. I humbly pray that the Court will grant the Orders being sought in the Notice of Application for Court Orders attached hereto."

[35] Mr Chisholm's affidavit was met by an affidavit in reply sworn to by Mr Alcott on 8 April 2015. Mr Alcott made a number of points, which I hope I do no disservice by summarising as follows.

i. The appellant's failure to comply which resulted in the 'unless' Order has nothing to do with any failure or default on the part of the respondent. Despite having received at least four extensions of time within which to comply, the appellant has yet to comply with the 30 July 2013 order (paragraphs 6-7).

ii. The respondent has filed its List of Documents (on 28 October 2014) and is withholding no document or information from the court (paragraph 9).

iii. The appellant has shown no good reason for its failure to comply with the 30 July 2013 order (paragraph 10).

iv. The appellant is "very aware that the document purporting to be a survey by Wallace Smith with markings thereon does not satisfy the Court's Orders" (paragraph 15).

v. At the time of the hearing of the respondent's without notice application for the 'unless' Order on 27 March 2015, the appellant's attorney-at-law was present and, in any event, the respondent disclosed all facts to the court (paragraph 18).

vi. The claim will not be ready for trial until the appellant complies with the 30 July 2013 order and the appellant's continued failure to comply "is in fact prejudicing the [respondent] in that the [respondent] is being hampered in preparing for trial" (paragraph 24).

[36] As already indicated, by his order made on 9 April 2015, the judge refused the appellant's application for relief from sanctions. It is a matter for regret that there is no record of anything said by the judge in refusing the application. This is a point to which I will have to return.

The appeal

[37] In its notice of appeal filed on 21 April 2015, the appellant relies on the following grounds of appeal:

"a. The learned Judge failed to exercise his discretion in favour of the Appellant in refusing the Appellant's Application for Relief from Sanction.

b. The learned Judge erred in the exercise of his discretion when he found that the failure of the Appellant to comply was intentional, since there was considerable evidence before the Court demonstrating the prevailing difficulties the [appellant] experienced, including the live threats of physical harm to its person, all of which resulted in the delay of the [appellant's] compliance.

c. The learned Judge erred in finding that there was no good explanation in the Affidavit of James Chisholm demonstrating the failure to comply as the uncontradicted evidence was that the illegal occupants on the [appellant's] land to whom the [respondent] is supply [sic] water without the [appellant's] permission, (the reason for the Appellant's claim of trespass against the Respondent) and said Squatters has [sic] threatened violence to anyone who enters the land, specifically the [appellant]. The [appellant] has sought the assistance of the police repeatedly and was advised against entering the property for any reason.

d. The learned Judge erred in failing to consider the sworn testimony of James Chisholm stating that the Jamaica Public Service Company Limited entered the same land to disconnect electricity supply that it was providing to the said squatters without the [appellant's] authorization, and the said squatters responded by blocking the neighbouring public roadway and rioted in Trelawny Falmouth disrupting traffic, tourist schedules all resulting in great costs and expenses to the Government to quell the uprising.

e. The learned Judge erred in the exercise of his discretion when he failed to consider that the [appellant] had applied to the Court for an Order of Specific Disclosure from the [respondent]. In the [appellant's] attempt to comply with Court Orders to provide this information to the [respondent] it discovered that the materials it was having extreme difficulty in obtaining were always in the [respondent's] possession. That the [appellant] having filed its request for Specific Disclosure on February 23, 2015 was advised by the Court Administrator that there was no available date on the Court's calendar to hear the

Application, and as such the Application for Specific Disclosure was scheduled to be heard on April 24, 2015 at Pretrial hearing.

f. That the Claimant's notice of Application for Specific Disclosure was served on the Respondent on February 26, 2015 and the Respondent responded by filing an Application for an Unless Order, 'without notice' on March 23, 2015. That the Honourable Mr. Justice Lloyd Hibbert failed to consider that the Application for Specific Disclosure was pending before the Court and should have granted the relief being sought by the Claimant, or in the alternative stay the matter before him, until the pending application for Specific Disclosure was heard, considering the importance and gravity of that hearing to the Claim.

g. The learned judge erred in law in failing to consider what are the facts that he ought to consider in determining the whether the Claimant's failure to comply was 'intentional'.

h. The learned Judge erred in the exercise of the discretion to hear the matter when he openly wondered whether he should heard [sic] the matter related to New Falmouth Resorts Limited, as there is a history of a bad relation with the said Judge and the company's Managing Director and the only Affiant before the Court at the time. That the bad relation would impact on how the said Judge considered the matters contained in the Claimant's sworn Affidavit before it. Further, the matter was placed before the Judge at the last minute taking from him the opportunity to become familiar with the claim, considering that the Judge had a prior schedule to meet and had time constraints."

The submissions

[38] In written submissions filed on 18 December 2015, the appellant rehearsed in detail the history of the matter. In summary, the appellant submitted that (a) its failure to comply with the 30 July 2013 order was not intentional; (b) there was a good

explanation for the failure to comply; and (c) it has generally complied with all relevant rules, practice directions and orders.

[39] In these circumstances, it was submitted, the judge should have granted the application for relief from sanctions and therefore fell into error by not doing so. The appellant complained that the respondent, which was at all times aware of the difficulties it was facing in complying with paragraph 1(a)(I) of the 30 July 2013 order, had acted unreasonably throughout the course of these proceedings. It had had therefore acted in breach of the spirit of the overriding objective of the CPR. The application for relief from sanctions, which was filed within four days of the making of the 'unless' order, was filed promptly and ought to have been granted in the light of the fact that the appellant had proffered a good explanation for the failure to comply. In any event, it was submitted, the sanction of striking out should not have been imposed without the appellant having first been heard on its pending application for specific disclosure from the respondent, which was filed before the respondent sought the 'unless' order and was already fixed for hearing on 24 April 2015. The appellant challenged the respondent's assertion that it had suffered prejudice as a result of the delay, observing that it had not clearly indicated in what way it was or would be prejudiced. In all the circumstances, it was unfair and unjust for the appellant to be ordered to pay costs, an order which amounted "to be a reward [to the respondent] for their contempt of the law and the requirements to be forthright and to assist the court".

[40] In support of these submissions, the appellant relied on a number of authorities, but it is, I think, necessary to refer to two of them only. First the appellant cited this court's decision in **North East Regional Health Authority v Ryan Anslip**[4], to support its contention that there is a duty on parties to litigation to act reasonably and in keeping with the spirit of the overriding objective. That was a case in which, although the appellant had prevailed in this court on a strict reading of the rules, it was nevertheless deprived of its costs because it had acted "unreasonably and in breach of the spirit of the overriding objective"[5].

[41] The appellant also relies on the decision of the Court of Appeal of England and Wales in **Andrew Mitchell MP v Newsgroup Newspapers Ltd**[6], to make the points that (i) on an application for relief from sanctions, "the starting point should be that the sanction has been properly imposed and complied with the overriding objective"; and (ii) if the application for relief from sanctions is "combined with an application to vary or revoke [a previous order] under CPR 3.1(7), then that should be considered first ..."[7]

[42] Accordingly, in this case, the appellant submitted, the judge ought to have considered whether the 'unless' order had been properly made in all the circumstances of the case and, in any event, ought not to have determined the application for relief

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[4] [2015] JMCA Civ 60
[5] Per Brooks JA at para. [38]
[6] [2013] EWCA Civ 1537
[7] Per Lord Dyson MR, at para. 45

from sanctions without the appellant's application for specific disclosure being first heard.

[43] In its written submissions dated 29 May 2015, the respondent submitted that the appeal was without merit and should be dismissed. The information which the 30 July 2013 order sought to elicit was critical in order to determine who was responsible for any pipes or other water appurtenances that might be on the appellant's land. This was in turn directly relevant to the issue of whether the appellant's claim disclosed an actionable trespass to land. It was submitted that, save for the fact that the application for relief from sanctions had been made promptly and was supported by affidavit, the appellant had not satisfied the other mandatory requirements of rule 26.8 of the CPR. Contrary to the appellant's submissions, its non-compliance with the repeatedly extended 30 July 2013 order was intentional and in any event unexplained. Following on from this, it was submitted, the requirements of the rule are cumulative, with the effect that a failure to satisfy any one of the three mandatory requirements was a decisive factor against the grant of relief from sanctions. Further, the appellant had also failed to satisfy the court in relation to the considerations set out in rule 26.8(3), including the interests of the administration of justice. The judge had taken into account all factors that are relevant to an application for relief from sanctions and there was no discussion before him relating to his recusal. In all the circumstances, no departure from the accepted principles having been shown, there is no basis upon which this court can interfere with the judge's exercise of his discretion.

[44] The respondent also referred us to some authorities and, again, I will mention two of them. The first is the decision of Aikens J at first instance in **Gallaher International Limited v Tlais Enterprises Limited**[8]. In that case, the default which necessitated a relief from sanctions also arose out of a failure to comply with an 'unless' order. After setting out the equivalent English rule[9], Aikens J said this[10]:

> "In ***R.C. Residuals v Linton Fuel Oils Limited [2002] 1 WLR 2782***, which was a case concerning a failure to comply with an 'unless' order (which debarred the applicant from relying upon an expert's report if it was served late), both Brooke LJ and Sir Swinton Thomas emphasised the very serious consequences of a failure to comply with an 'unless' order. The 'default' position is that if a party does not comply with an 'unless' order, the sanction imposed for that failure will follow. Relief from that sanction would be granted only if the court, having considered all the circumstances, regards it as proper to do so. In considering whether it should grant relief from sanctions, the court is obliged to ensure that it considers each of the factors listed at (a) – (i) of ***CPR 3.9(1)***[11]. The Court must also '...... *stand back and form a judgment in the aggregate of the relevant circumstances that have been identified in going through the list to see whether it is in accordance with the overriding objective in the CPR to lift the sanction*.' ..."

[45] The second of the respondent's authorities to which I will refer is the notable judgment of Sykes J in **Gloria Findlay v Gladstone Francis**[12], which was also a case

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[8] [2007] EWHC 527 (Comm)
[9] CPR 3.9(1)
[10] At para. 45
[11] Which combines the considerations set out in rule 26.8(2) and (3) into a single list of factors which the court must consider on an application for relief from sanctions.
[12] (unreported) Supreme Court of Judicature, Jamaica, Suit No. F 045 of 1994, judgment delivered 28 January 2005

concerned with an application for relief from sanctions. In considering the scope of rule 26.8, that learned judge pointed out[13] that rule 26.8(2) states that "[t]he court may grant relief **only if** it is satisfied" of the matters set out in rule 26.8(a), (b), and (c); accordingly, "subparagraphs (a), (b) and (c) of rule 26.8(2) **must** be met before the discretion can be exercised" (emphasis mine). With regard to rule 26.8(3), Sykes J went on to say this[14]:

> "26. It seems to me that paragraph (3) is not exhaustive of the matters the court can take into account. This is an immediate inference that can be drawn from the terms of the rule and rule 1.1(2). Rule 1.1(2) requires the court to deal with cases justly. The concept of 'justly' is not defined in the rule. Rule 1.1(2) says 'justly' includes and not 'justly' means. What is clear is that the matters listed at rule 26.8 (3) must be taken into account. This means that in dealing with this application I must have regard to the matters listed in the rule as well as any other relevant consideration that would enable me to deal with the case justly. It seems to me that I am not to have any rigid hierarchy of the matters listed in subparagraph (3) and apply them in any particular order of importance. What may be significant in one case may be of less significance in another. This means that I must have regard to the particular facts of the case before me. There is no one size fits all.
>
> 27. One point made by the English authorities which I accept is that the considerations in rule 26.8(3) should each be considered and a judge should demonstrate that he has (see ***Woodhouse v Consignia plc*** [2002] 1 W.L.R. 2559, ***RC Residuals Limited v Linton Fuels*** [2002] 1 W.L.R. 2782). The Court of Appeal, in both cases, indicated that unless the trial judge showed that he took into account the matters set out in the English rule, it would be difficult to conclude that he considered conscientiously all the factors listed in the

[13] At para. 24
[14] At paras 26-27

> rules. I take the same view in respect of our subparagraph (3). In my opinion, what is required is a balancing of the findings under each head using the principle of the overriding objective as the guiding light to the exercise of my discretion."

Discussion and conclusions

[46] I begin by saying that I accept the authority of the cases cited by both sides. Insofar as relevant authority is concerned, I would only add the decision of this court in **H. B. Ramsay & Associates Ltd and others v Jamaica Redevelopment Foundation Inc and The Workers Bank**[15], in which Brooks JA also made the point[16] that rule 26.8(2) "requires an applicant to comply with all three of its requirements". He then went on to indicate[17] that, first, "[s]hould he fail to meet those requirements then the court is precluded from granting him relief"; and, second, in such a case, there would be "no need ... to consider the provisions of rule 26.8(3) in relation to that applicant".

[47] I accordingly approach the matter on the basis that, on an application for relief from sanctions under rule 26.8(2), (i) the court must be satisfied that the particular sanction was properly imposed; (ii) the default position in relation to an 'unless' order, that is, the position that will obtain in the absence of a case for relief from sanctions being made out by the applicant, is that the sanction imposed for failure to comply with the order will follow; (iii) if the application is combined with an application to vary or

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[15] [2013] JMCA Civ 1
[16] At para. [29]
[17] At para. [31]

revoke a previous order, that application should generally be considered first; (iv) an applicant for relief from sanctions must comply with all three of the requirements of rule 26.8(2) as a precondition to obtaining relief; (v) in considering whether to grant relief once that threshold has been crossed, the court must also consider the factors listed in rule 26.8(3), together with any other relevant considerations that will, taking into account the circumstances of the particular case, enable the court to deal with the matter justly; and (vi) the judge hearing the application should demonstrate that he or she has considered and balanced appropriately all the factors relevant to the particular case and in keeping with the overriding objective.

[48] This is an appeal against the judge's exercise of his discretion. It is therefore necessary for the appellant to demonstrate that the judge proceeded on some wrong principle, or otherwise either misunderstood the law which he was required to apply, or the evidence which the parties provided for his consideration.[18]

[49] In considering whether the appellant has crossed this bar, this court is obviously hampered by the absence of any reasons from the judge, although it may be gleaned from grounds of appeal (b) and (c) that the judge did not think that the appellant had satisfied the requirements of rule 26.8(2)(a) and (b). However, I am bound to say, naturally with the greatest of respect to the very experienced judge, that it is completely unsatisfactory that no reasons of even the most summary kind were given

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[18] **Hadmor Productions Ltd and others v Hamilton and others** [1981] 2 All ER 1024, per Lord Diplock at 1046

for a decision with as obviously far-reaching consequences for the appellant as the refusal of the application for relief from the sanction of striking out in this case.

[50] In so saying, I readily appreciate that judges hearing applications of this nature in chambers in the Supreme Court are usually under tremendous pressure to give their decisions as quickly as possible. However, as Lord Phillips MR said in **English v Emery Reimbold & Strick Ltd**[19], "[t]here is a general recognition in the common law jurisdictions that it is desirable for judges to give reasons for their decisions ..." Such reasons can, as Lord Brown explained in **South Bucks District Council and another v Porter (No 2)**[20], "be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision". The important consideration, as the authorities make plain, is that the reasons given should be sufficient to give the parties, in particular the losing party, an intelligible indication of the basis for the court's decision.

[51] But, that having been said, I must now consider whether, based on the history of this matter and the material relied on by the appellant, the judge's decision was one which was consistent with a proper exercise of his discretion to grant or refuse relief from sanctions.

[52] As the respondent realistically conceded, there is no dispute that the application for relief from sanctions, which was filed within four days of Lindo J (Ag)'s 'unless'

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[19] [2002] 1 WLR 2409, para. 15
[20] [2004] UKHL 33; [2004] 1 WLR 1953, para. [36]

order, was made promptly. As has been seen, it was also supported by Mr Chisholm's affidavit of 31 March 2015, thereby fully satisfying the requirements of rule 26.8(1)(a) and (b).

[53] The appellant was therefore required to satisfy the court that (i) the failure to comply with paragraph 1(a)(I) of the 31 July 2013 order was not intentional; (ii) there was a good explanation for the failure; and (iii) it had generally complied with all other rules, orders and directions. There being no real contention that the appellant had failed to satisfy the third requirement, the principal issue for the judge's consideration was whether the court could be satisfied as to the first two requirements. In the light of the history of the matter and the various explanations offered by the appellant for its non-compliance, it will be convenient to consider both aspects of this issue together.

[54] Up to the date of the hearing of the application for relief from sanctions on 9 April 2015, the appellant's non-compliance with paragraph 1(a)(I) of the 30 July 2013 order had continued for close to two years. The deadline for compliance had been extended at least three times (twice by Sykes J, on 21 January 2014 and 12 November 2014 respectively, and by Rattray J on 5 January 2015). If one counts the additional 14 days allowed by Lindo J (Ag) under the terms of the 'unless' order, there had in fact been four extensions.

[55] As will be recalled, paragraph 1(a)(I) of the 31 July 2013 order required the appellant to provide to the respondent, among other things, "surveyors [sic] diagram(s) illustrating where the Claimant's property is situated and where the alleged trespass of

the NWC's infrastructure has occurred". Although the order called for compliance within 14 days, there is no indication on the record of what steps the appellant took to comply in the several months immediately following.

[56] However, on 9 April 2014, no doubt following on from the extension of time allowed by Sykes J on 21 January 2014, the appellant delivered a document to the respondent which it described as a "survey diagram prepared by Wallace Smith and bearing a pre-checked date of June 6, 2006 ... [which] ... identifies by yellow highlight the areas of [the] property that the [appellant] contends that the [respondent] is trespassing on or otherwise in illegal use and occupation of". As will also be recalled, the respondent rejected the appellant's position that this document fulfilled the requirements of paragraph 1(a)(I) of the 31 July 2013 order[21]. It is now common ground, as the appellant's subsequent application for extensions of time and relief from sanctions have impliedly acknowledged, that the respondent was correct in its stance on this point. But I mention it now to observe that, given the position which the appellant had taken initially, it was not until 16 December 2014, when the appellant applied to extend time for compliance with Sykes J's order of 12 November 2014, that Mr Chisholm first made mention on the record of the difficulties the appellant was experiencing in complying with paragraph 1(a)(I).

[57] Since that time, the appellant's explanation for the delay, as proffered through Mr Chisholm's various affidavits, has remained constant: access to the land for the

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[21] See para. [20] above

purpose of conducting the necessary survey has been impeded by hostility and threats of physical violence by the illegal occupants, thus making it impossible for it to comply with the court's order.

[58] I have no reason to doubt the sincerity of Mr Chisholm's repeated statements to this effect. However, in my view, the material which he put forward in his affidavits fell far short of establishing that the appellant could not comply with paragraph 1(a)(I) of the 31 July 2013 order. Rather, what that material demonstrated, it seems to me, was that full compliance with the order was likely to be a difficult and perhaps costly exercise.

[59] Thus, in his affidavit sworn to on 16 December 2014[22], Mr Chisholm, after referring to the need for police protection and to the discussions he had had with a deputy superintendent and a senior superintendent of police in this regard, was careful to state that "although they are not refusing the protection to enter the property per se, they are saying that their resources are stretched at this time and in the season approaching". Further, making an essentially similar point[23], Mr Chisholm went on to observe that "[t]he costs to carry out the Survey as requested by the Court ... have increased in value tremendously due to the threat to individuals' security". Next, in order to make good his assertion[24] that "[w]here I am able to find a surveyor willing to act, their need for police protection is compulsory", Mr Chisholm evidenced Mr Richards'

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[22] At paras 8-9
[23] At para. 10
[24] Ibid

estimate dated 26 November 2014, which had emphasised the need for proper security to be provided as a precondition to the commencement of the survey. Then, I think tellingly, Mr Chisholm requested[25] that "the Court provides the [appellant] with the means to comply with [the court's order]". In addition to showing no basis upon which the court could make such an order, this request strongly implied, as it seems to me, that a significant part of the problem of getting the survey done had to do with funding the estimated costs put forward by Mr Richards ($938,000.00) and Mr Simpson ($1,148,690.00).

[60] But this was, as the respondent was in my view right to point out, the appellant's case, in which it was suing the respondent for trespass to its land. It was therefore the appellant's responsibility, not the respondent's – or indeed the court's – to do what was necessary to put itself in a position to carry on the litigation which it had launched. In this regard, being able to identify with precision the area upon which the respondent was said to be a trespasser was a necessary and obvious prerequisite. Nothing advanced by Mr Chisholm on the appellant's behalf indicated that it would not have been possible to secure police assistance to carry out the survey. Indeed, the evidence suggested that, with proper planning and adequate notice, such cooperation might have been made available. Nor was it contended in so many words that the appellant would find the expense of complying with the court's order prohibitive or beyond its

[25] At para. 12

means. Nor was there any evidence of what steps the appellant had taken – and with what results – to secure financing for the purpose of carrying out the survey.

[61] In these circumstances, it seems to me that it would have been well within the proper ambit of the judge's discretion for him to conclude that the appellant's sustained and persistent delay in complying with paragraph 1(a)(I) of the 31 July 2013 order was (i) intentional; and (ii) inadequately explained. It would follow from this conclusion that neither sub-paragraph (a) nor (b) of rule 26.8(2) would have been satisfied. Taking this view of the matter, there would then have been no need for the judge to move on to the rule 26.8(3) considerations.

[62] A subsidiary issue which also arises is whether, as the appellant submits, the judge ought to have postponed consideration of the application for relief from sanctions until after the hearing of the appellant's application for specific disclosure, which was fixed for hearing on 24 April 2015. I accept that, in general, where there are two applications before the court, one of which will, if granted, obviate the need to pursue the other, the sensible and most efficient course for the court to adopt will usually be to postpone consideration of the latter until after the former has been heard and determined. In this court, the paradigm instance of this is where there are applications (i) to strike out an appeal for failure to comply with a rule or court order requiring that something be done within a particular time; and (ii) to extend time within which to comply with the said order. In such a case, good sense would usually dictate that the application to extend time should be heard before the application to strike out.

[63] In my view, this case does not fall within this category: what the appellant proposed to apply for on 24 April 2015 was neither a variation nor a revocation of paragraph 1(a)(I) of the 31 July 2013 order. Had it been either, I agree that it would have been obvious good sense for the judge to have awaited the outcome of that application before considering the application for relief from sanctions. However, far from that, the appellant clearly viewed the application for specific disclosure from the respondent as an alternative means of proving its own case. But whether that application succeeded or not, the appellant's continued non-compliance with paragraph 1(a)(I) of the 31 July 2013 order would still have required to be excused by the court on the basis of the same rule 26.8(2) criteria set out above. I therefore I find it impossible to say that the judge exercised his discretion wrongly by declining to postpone the application for relief from sanctions (which was, after all, the appellant's application) to after the hearing of the application for specific disclosure.

Conclusion

[64] In all but the most obvious of cases, and I do not suggest that this is one of them, any action by the court which has the effect of terminating a party's campaign for redress without a trial inevitably generates great anxiety. But in this case, it cannot be contended, it seems to me, that the sanction of the 'unless' order was, against the extended background of non-compliance which I have described, not properly imposed. In these circumstances, as Lord Dyson MR explained in **Andrew Mitchell MP v**

Newsgroup Newspapers Ltd[26], "[i]f the non-compliance cannot be characterised as trivial, then the burden is on the defaulting party to persuade the court to grant relief". For all the reasons I have attempted to give, I have therefore come to the conclusion, not without a degree of regret, that it has not been demonstrated on this appeal that the judge's exercise of his discretion to refuse relief from sanctions was such as to justify this court's intervention.

Disposal of the appeal

[65] The appeal is therefore dismissed, with costs to the respondent, to be agreed or taxed.

An apology

[66] I cannot leave this matter without a word about the regrettable delay in rendering this judgment. Although some of the principal reasons for such delays are now well known, we fully accept that they in no way mitigate the inconvenience to the parties. For this, we apologise unreservedly.

PHILLIPS JA

[67] I have had an opportunity to read the judgment of the learned President in draft. I agree with it and have nothing to add.

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[26] At para. 41

P WILLIAMS JA

[68] I also agree.

MORRISON P

ORDER

Appeal dismissed, with costs to the respondent to be agreed or taxed.