[2016] JMCA Civ 18

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 13/2015

APPLICATION NOS 108 & 187/2015

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE F WILLIAMS JA

BETWEEN	**PRICE WATERHOUSE (A FIRM)**	**APPELLANT**
AND	**HDX 9000 INC**	**RESPONDENT**

Written submissions filed by Livingston Alexander & Levy for the appellant

Written submissions filed by G Anthony Levy & Co for the respondent

8 April 2016

PROCEDURAL APPEAL

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

MORRISON P

[1] I have read, in draft, the judgment of Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

BROOKS JA

[2] On 28 February 2014, the claim by HDX 9000 Inc (HDX) against the firm of Price Waterhouse (PW) stood as dismissed because of HDX's failure to comply with certain procedural orders of the Commercial Division of the Supreme Court. On 1 October

2014, a judgment, which formally recognised the dismissal and awarded costs to PW, was entered in that court, in favour of PW.

[3] On 29 January 2015, a judge of the Commercial Division granted HDX relief from the sanction of the dismissal of its claim and set aside the judgment that had been entered in favour of PW. Being dissatisfied with that decision, PW contends that the learned judge improperly applied the provisions of the Civil Procedure Rules (the CPR) that deal with relief from sanctions. It has, therefore, with the permission of the learned judge, filed this procedural appeal, seeking to have his order set aside, and asking for the restoration of the judgment.

[4] In addition to the procedural appeal, it is also necessary to consider two applications by HDX. The first is for an extension of time within which to file a counter-notice of appeal. The second is an application for hearing oral submission. We considered that an oral hearing was unnecessary and refused the second application. In this judgment, the first application will be dealt with prior to considering the issues raised by the appeal. A background to the claim and an outline of the reasons for the grant of relief, would, however, assist the understanding of the reasoning to follow.

Background to the claim

[5] HDX filed its claim in 1996. At one point in the process of the litigation HDX was required to pay security for PW's costs of the litigation. In 2004, the claim was transferred to the Commercial Division. Nine years later, in May 2013, Sinclair-Haynes J, then a judge of the Commercial Division, made certain case management orders

including orders requiring HDX to file certain bundles and to redact certain documents which had previously been filed.

[6] On 27 January 2014, Sinclair-Haynes J, on the application of PW made further orders increasing the amount of the security for costs and directing the manner in which the funds should be held. Those orders were to be complied with within 30 days, failing which HDX's claim would "stand dismissed". The learned judge considered further applications on 25 February 2014. It was brought to her attention that HDX had not complied with the orders that she made in May 2013 concerning the redacting and filing of documents. She then made another "unless order", requiring compliance with the May 2013 orders, failing which HDX's claim would "stand dismissed". The relevant portion stated:

> "3. Unless the claimant complies with the orders made in paragraphs 2 and 7 of the Order made May 9, 2013 by February 28, 2014 **the claim stands dismissed and judgment entered for the Defendant**." (Emphasis supplied)

There is evidence that counsel, then appearing for HDX, were comfortable with their ability to meet the deadline that had been set by the learned judge.

[7] HDX did not meet either of the deadlines set by the orders of 27 January or 25 February, and on 28 February its claim stood dismissed. By 1 March 2014, PW was entitled to claim a judgment in its favour. Despite the breaches, there was further activity in respect of the litigation. There were even further appearances before Sinclair-

Haynes J, and, in particular, one on 11 March 2014, in which she ordered HDX to pay certain costs to PW, on or before 31 May 2014, "failing which the claim is stayed".

[8] It was in July 2014 that PW decided to act in respect of the previous "unless orders". It filed an application asking for the claim to be dismissed and for judgment to be entered in its favour. The application came before Sinclair-Haynes J on 23 September 2014. She ruled that the claim was already "at an end" and made no order on the application.

[9] On 25 September 2014, HDX filed an application for relief from sanctions. It received a hearing date of 13 October 2014 but did not serve the notice of application. On 1 October 2014, PW entered the judgment in its favour. On 10 December 2014, HDX filed an amended application for relief from sanctions, which it served on 22 December 2014. It was the order granting that application that is the subject of this appeal.

The grant of relief

[10] The learned judge, who heard the application, handed down a careful and thorough judgment in which he assessed the application for relief from sanctions against the relevant provisions of the CPR. He found that the application had not been promptly made. He identified the issues of the breaches, which he respectively termed, "the bundles breach", "the redaction breach" and "the security account breach". He found that the bundles breach was intentional and unreasonable. He further found that HDX had not provided a good explanation for either the bundles breach or the redaction

breach. In respect of the security account breach, he found that counsel for both sides were culpable in HDX's failure to comply with the "unless order".

[11] In respect of the issue of whether HDX had been generally compliant with other rules and orders, the learned judge found that it had previously been in breach of other orders. He pointed specifically to the May 2013 order made by Sinclair-Haynes J, which was the forerunner to the "unless order" of February 2014.

[12] The learned judge, nonetheless, formed the view that the overriding objective established by the CPR required the grant of relief from sanction. He formed the view that the issues to be resolved were of "tremendous importance" to the parties, on which they had spent "huge sums". He found that HDX's failures were, in part, due to its legal representatives and that by changing to other attorneys-at-law it had evinced an "intention to take the case to trial and conclusion in the usual manner".

The application for extension of time

[13] Although PW filed and served its notice of appeal on 9 February 2015, and any counter-notice of appeal should have been filed within 14 days of the service of PW's notice of appeal, HDX did not meet the stipulated deadline. On 5 June 2015, it filed an application for an extension of time within which to file a counter-notice of appeal. It sought permission to challenge certain findings of the learned judge, who granted the relief from sanctions.

[14] Its explanation for failing to file the required notice within the prescribed time is due to yet another change in its legal representation. Mr Philpotts-Brown, who swore to

the affidavit in support of the application, deposed that HDX's present attorneys-at-law were retained on 29 May 2015. He stated that, having reviewed the documents, it was discovered that a counter-notice of appeal had not been filed. He contended that the research involved, and the need for consultation with previous attorneys-at-law who had had conduct of HDX's claim, resulted in the delay in filing the application for an extension of time in which to file the counter-notice of appeal.

[15] In the proposed counter-notice HDX sought to challenge the learned judge's finding that there was no good explanation for either the bundles breach or the redaction breach and that the bundles breach was intentional. HDX asked, in that document, for this court to find that the learned judge "erred in fact and in law in assessing the conduct of" HDX in respect of those breaches as intentional.

[16] The application was resisted by PW, whose position was that there was no good reason proffered for the failure to file the counter-notice or the delay in applying for the extension of time. In an affidavit, sworn to on behalf of PW, Mr Leighton McKnight deposed, among other things, that the possibility of filing a counter-notice of appeal was raised by HDX's counsel at a case management conference that was held in this court on 28 April 2015. Despite that contemplation, however, no application for an extension of time was filed for over five weeks thereafter.

[17] The time period for filing a counter-notice of appeal is set out in rule 2.3 of the Court of Appeal Rules (CAR). Rule 2.3(4) states as follows:

> "The counter-notice must be filed at the registry in accordance with rule 1.11 within 14 days of service of the notice of appeal."

By that rule HDX ought to have filed its counter-notice on or before 23 February 2015. It filed its application for extension of time 117 days after PW served the notice of appeal.

[18] The requirements for the grant of such an extension were recently assessed by this court in **Clive Banton and Another v Jamaican Redevelopment Foundation Inc** [2016] JMCA App 2. It was recognised in that case that in considering an application for extension of time the court should be guided by the principles set out in **Leymon Strachan v Gleaner Company Ltd and Dudley Stokes** (Motion No 12/1999 – judgment delivered 6 December 1999). Those principles require the court to consider the length of the delay, the reason for the delay and the prospects of success of the proposed appeal. Those factors are however to be considered in the overarching context of the prejudice to the other parties to the appeal and the overriding objective of dealing with cases justly.

[19] An examination of the record demonstrates that HDX has not shown that it is entitled to an extension of time within which to file a counter-notice of appeal. Although there is a similarity between this case and **Banton v JRF**, in that there was a change of legal representation during the time that the case was before this court, the delay in this case is unjustifiable. It is particularly noted that although the filing of a counter-notice was raised at the time of the case management conference and that the orders

made at that case management conference permitted HDX to file and serve their submissions in respect of the appeal on or before 15 May 2015, the submissions were filed on 15 May 2015, but no application was filed for permission to file the counter-notice. Apart from the lengthy delay, HDX's actions were prejudicial to PW which was entitled to anticipate that the procedural appeal would be dealt with according to the map laid down at the case management conference.

[20] Even if a comparison between the two cases merited closer examination, because of the approach in the analysis of the substantive appeal, which is to follow, there would be no point in throwing further judicial resources on this issue. The application for extension of time should therefore be refused.

Appeal from the decision of the court below

[21] PW has appealed against the decision of the learned judge on the basis that the decision was wholly inconsistent with his findings that HDX had failed to comply with rules 26.8(1) and (2) of the CPR. The grounds of appeal are set out below:

> "(a) The decision of the learned Judge to grant relief from sanctions is wholly inconsistent with his findings that the (i) application for relief from sanctions was not made promptly; (ii) the Respondent did not provide any good explanation for the "Bundles Breach" (iii) the Respondent's actions in respect of the "Bundles Breach" were intentional and unreasonable; (iv) no good explanation was provided for the "Redaction Breach"; and (v) the Respondent did not generally comply with all other relevant rules, practice directions, orders and directions and there were no factors that saved or excused the Respondent's conduct. Further, these findings by the learned Judge were all fatal to the Respondent's application and

therefore relief from sanctions could not and should not have been granted.

(b) The language of CPR 26.8(1) is mandatory; an application for relief against sanctions must be made promptly. The learned judge erred in proceeding to considering the Respondent's application when the Respondent had not overcome the first hurdle, the learned judge having found that the application for relief against sanction being made eight months after the sanction had taken effect, had not been made promptly....

(c) ...the learned Judge erred in purporting to exercise a discretion which he did not have having found that the Respondent has not provided a good explanation for the failure to comply with the 25 February 2014 Unless Order in connection with the filing of the trial bundles ("the Bundles Breach") [para 24] or in connection with the redaction of the Claimant's Witness Statements (the Redaction Breach") [para 26] and that the Respondent has not generally complied with all other relevant rules practice directions and orders [para. 36]. Rule 26.8 (2) of the Civil Procedure Rules (CPR) confers on the court a discretion to grant relief **only** where each of the three conditions precedent set out therein has been satisfied:...

(d) The learned Judge erred in his application of the overriding objective and in doing so incorrectly used the overriding objective to undermine clear rules of the CPR.... Further, the stage at which the learned judge was entitled to rely on the overriding objective was the point at which he was conferred with jurisdiction, the Respondent having surmounted the threshold requirements of CPR 26.8 (1) and (2).

(e) The learned judge erred in his application of the overriding objective in that he failed to conduct a fair and proper balancing exercise between the parties with a view to dealing with the case justly between the parties and in the interests of the proper administration of justice and therefore his exercise of discretion was flawed:

…

(f) The finding of the learned Judge that the Appellant contributed to the delay in the opening of the account by not providing the due diligence information within a reasonable time of being called upon to do so is not supported by the evidence and the evidence is actually to the contrary....

In the circumstances, the Appellant was not provided with all the due diligence documents until after the deadline and the account could not have been opened without the Court Order which was not provided by the Respondent by the deadline." (Emphasis as in original)

Analysis of the grant of relief from sanctions

[22] This analysis is best commenced with an understanding of the rule in the CPR concerning a grant of relief from sanctions. The rule is set out in full below:

"26.8 (1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction **must** be –

(a) **made promptly**; and

(b) supported by evidence on affidavit.

(2) The court **may grant relief only if it is satisfied** that –

(a) **the failure to comply was not intentional**;

(b) **there is a good explanation for the failure**; and

(c) the party in default has generally complied with all other relevant rules, practice directions orders and directions.

(3) In considering whether to grant relief, the court must have regard to –

(a) the interests of the administration of justice;

(b) whether the failure to comply was due to the party or that party's attorney-at-law;

(c) whether the failure to comply has been or can be remedied within a reasonable time;

(d) whether the trial date or any likely trial date can still be met if relief is granted; and

(e) the effect which the granting of relief or not would have on each party.

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

[23] In their written submissions in respect of the appeal, learned counsel for HDX argued that the application for relief from sanctions was made promptly in the circumstances. Learned counsel further argued that even if the court finds that the application has not been made promptly, it is still required to consider the other aspects of rule 26.8 in assessing the application. The learned judge was right, learned counsel submitted, to consider all the provisions of rule 26.8 and was entitled to apply the overriding objective in coming to the view that the justice of the case required the grant of relief from sanctions.

[24] In respect of the submission that HDX did make its application promptly, learned counsel contended that HDX recognised that it was out of time in complying with the

"unless orders". They argued that HDX was, nonetheless, of the view that it would have been able to ask for relief at the time that the court heard PW's July 2014 application for judgment, on the basis that the claim stood dismissed. It is only when Sinclair-Haynes J ruled, on 25 September 2014, that PW's application was otiose and refused to hear an oral application for relief from sanctions, the submissions continue, that HDX realised that the application could not have been made in the way it contemplated. It thereafter acted promptly when it filed the original application on 28 September 2014. It was only the illness of the deponent, Mr Barakat, learned counsel argued, that delayed an affidavit in support and required an amended application to be filed in December 2014.

[25] On the point that all the provisions of rule 26.8 should be considered in any application for relief from sanctions, learned counsel relied, for support, on the decisions of this court in **International Hotels Jamaica Ltd v New Falmouth Resorts Ltd** SCCA Nos 56 and 95/2003 (delivered on 18 November 2005) and **H B Ramsay and Associates Ltd and Others v Jamaica Redevelopment Foundation Inc and Another** [2013] JMCA Civ 1.

[26] In response to the contention that HDX did act promptly in the circumstances, it must be said that HDX's stance and the substance of the submissions of counsel, in that regard, ignored a critical requirement in rule 26.8. The rule requires that the application should be supported by evidence on affidavit. There was no affidavit filed prior to 28 September 2014 in respect of an application for relief from sanctions. HDX's contention that it intended to make an oral application is, therefore, untenable. Its original

application was filed seven months after the sanction came into effect. The submission that it acted promptly in applying for relief from those sanctions is bereft of any factual support.

[27] In respect of the law on the point, the learned judge's approach, after making his findings of fact, and the submissions made by counsel to support that approach, cannot be supported. In **National Irrigation Commission Ltd v Conrad Gray and Another** [2010] JMCA Civ 18, this court had before it an appeal from a decision of the Supreme Court in which relief from sanctions was granted. The court ruled, at paragraph [10] of the judgment, that the "crucial issue for determination in the appeal" was whether the application for relief from sanction had been made promptly. It found that "[p]romptness...is the controlling factor under rule 26.8". The party in default in that case had delayed for six months in its application for relief from sanction. The court went on to state that having failed to act promptly, it was not entitled to relief from sanction. Implicit in that judgment is that there was no need to consider the other aspects of rule 26.8. K Harrison JA, who delivered the judgment of the court, said at paragraphs [16] and [17]:

> "[16] In our judgment, the application plainly could, and reasonably should, have been issued well before it was done. Six months was altogether too long a delay before making this application. Promptness, in our view, is the controlling factor under rule 26.8. It is plainly a very important factor, as is evident from the fact that it is singled-out in the rule as a matter to which the court must have regard. In our judgment, it is a very important factor because there is a strong public interest in the finality of litigation. Put simply, people are entitled to know where they stand.

Conclusion

> [17] In our opinion, the respondents had not acted with the requisite degree of alacrity. That having been said, we regarded the respondents as having failed in that obligation." (Emphasis as in original)

[28] A similar approach was adopted in **H B Ramsay and Associates**. The application for relief from sanctions was made less than a month after the sanction took effect. The court found that the application had not been made promptly. In supporting the decision of the court below, to refuse relief, this court held that since the application had not been made promptly it should not be considered. It is true that the court went on to consider the aspects of the explanation for the failure and whether the party in default had been in general compliance with other orders. Those considerations were, however, explained on the basis that the judge in the court below had also considered them. The import of the decision, as in the case of **National Irrigation**, was that if the application were not made promptly, the applicant was not entitled to relief from sanction.

[29] Counsel's reliance on **International Hotels** does not assist their cause. It was stated in **H B Ramsay and Associates** that the approach in **International Hotels** belonged to the era of the transition from the previous Civil Procedure Code to the current dispensation of the CPR. It was said at paragraph [13] of **H B Ramsay and Associates**, "that that era has already passed".

[30] In **Morris Astley v The Attorney General of Jamaica and Another** [2012] JMCA Civ 64, Morrison JA (as he then was) explained the import of rule 26.8. At paragraph [26] of his judgment he said:

> "...rule 26.8(1) provides that such an application must be made (a) promptly and (b) supported by affidavit. **Once these preconditions are met, rule 26.8(2) permits the court to grant relief from sanctions imposed for failure to comply with any rule, order or direction** (only) if it is satisfied that (a) the failure to comply was not intentional, (b) there is a good explanation for the failure and (c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions. And rule 26.8(3) sets out the general factors to which the court asked to grant relief from sanctions must have regard, viz, (a) the interests of the administration of justice; (b) whether the failure to comply was that of the party or his/her attorney-at-law; (c) whether the failure to comply can be remedied within a reasonable time; (d) the impact of granting relief on the actual or likely trial date; and (e) the effect on either party of granting or not granting the application for relief." (Emphasis supplied)

[31] It is noted that in the Eastern Caribbean, although their rule, which is the equivalent to rule 26.8 of the CPR, is in identical terms as rule 26.8, and even bears the same number, the court of appeal in that region has given a different interpretation to the requirement of promptitude in rule 26.8(1). In **Irma Paulette Robert v Cyrus Faulkner et al** St Lucia Civil Appeal No 29 of 2007 (delivered 25th October 2007), Edwards JA ruled that the court is not precluded from hearing an application for relief of sanctions that has not been made promptly. She explained her stance at paragraph [34] of her judgment:

> "It is important to note that our CPR 26.8(1)(b) establishes no criterion for granting an application for relief from sanctions, unlike Rule 2.9(1) (b) of the English CPR. CPR 26.8(1) does not create a sanction for failing to make an application for relief from sanction promptly. Any such sanction would have to be created by a court order or other rule. **CPR 26.8(1) does not preclude the Court from hearing an application for relief from sanction that has not been made promptly.** In such a case it appears that CPR 26.9 would be applicable. CPR 26.9 states that where the consequence of failure to comply with a rule has not been specified by any rule, the failure to comply with a rule does not invalidate any step taken in the proceedings unless the Court so orders, and the Court may make an order to put matters right on or without an application by a party, bearing in mind, of course, the overriding objective in CPR 1.1. and 1.2 which the Court must seek to give effect to." (Emphasis supplied)

[32] Although it seems that the reference by Edwards JA was to rule 3.9(1)(b) of the English CPR, rather than 2.9(1)(b), as it was to the former to which she had earlier made reference in her judgment, it is difficult to agree with her statement that rule 26.8(1) does not establish a criterion for granting an application for relief from sanctions. In fact, the situation is very much the reverse. Whereas, at the time that Edwards JA wrote her judgment, the English CPR listed promptitude as only one of nine criteria to be considered in such applications, rule 26.8(1) specifically requires the application to be made promptly and to be supported by evidence on affidavit.

[33] Rule 3.9 of the English CPR has been adjusted since 2013. It has been simplified but has not been made any more stringent. It now states:

> "(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of

the case, so as to enable it to deal justly with the application, including the need—

(a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders.

(2) An application for relief must be supported by evidence."

[34] In **Robert Mark Darby v LIAT (1974) Limited** HCVAP 2012/002, another decision of the Eastern Caribbean Court of Appeal, Pereira JA, as she then was, implicitly endorsed the stance taken by Edwards JA. The learned judge of appeal stated at paragraph [15] of her judgment that the critical part of rule 26.8 was paragraphs (2) and (3). She said:

> "This rule says in effect that an application for relief must be made promptly and be supported by affidavit. The relevant part of this rule which is critical to the court's exercise of its discretion to grant relief are contained in sub rules (2) and (3)."

At paragraph [16] of her judgment, the learned judge of appeal stated that promptitude "is not a prerequisite to the grant of relief". The learned judge did not, however, explain her dismissal of the element of promptitude as being an important requirement.

[35] It is respectfully opined that the stance of the decisions in this court is to be preferred. Indeed, in another decision of Eastern Caribbean Court of Appeal, namely, **Richard Frederick v Owen Joseph and Others** Civ App No 32 of 2005 (delivered 16 October 2006), Rawlins JA, as he then was, took a stance that is closer to that taken in this court. He said at paragraph [20] of his judgment:

> "[20] **Rule 26.8(1)(a) is stated in imperative terms. It requires an application for extension of time to be made promptly. I have found that the present application was not made promptly and that the explanation for the delay is unconvincing.** Rule 26.8(2), which states the only criteria on which the court may grant relief for non-compliance is compendious. The court may only extend time if all criteria are satisfied. I have found that the applicant has not provided a good explanation for the non-compliance and that the failure to comply was the result of a deliberate decision. Barrow JA held in [**Dominica Agricultural and Industrial Development Bank v Mavis Williams** Dominica Civil Appeal No 20 of 2005 (delivered 18 September 2006)] that the court would not extend time within which to appeal if it is satisfied that failure to appeal within the stipulated time was deliberate or intentional. In the foregoing premises, the procedural failures mentioned in this judgment were sufficient grounds on which to dismiss the application for the 2 orders prayed. I would go further and find that the failures amounted to an abuse of process." (Emphasis supplied)

[36] It was stated in **H B Ramsay**, that there was a degree of flexibility in the assessment of the promptitude of an application. It may well be that the explanation for what may at first blush seem a delay, demonstrates that the application was indeed made promptly. Each case would turn on its own facts. If however, the court is of the view that the application was not made promptly, and there is no application for extension of time, the application for relief from sanction should fail.

[37] The learned judge in this case, having found that the application had not been made promptly, was, therefore, in error to have continued to consider the other aspects of rule 26.8. He compounded that error when he went on to consider the provisions of

rule 26.8(3), despite his finding HDX had not complied with all the provisions of rule 26.8(2). The learned judge found that certain failures by HDX were intentional. Rule 26.8(2) is definitive in its terms. It clearly states that the court may only grant relief if it were satisfied that all three aspects of paragraph (2) have been satisfied. The paragraph is repeated below for emphasis:

> "(2) The court **may grant relief only if it is satisfied** that –
>
> (a) the failure to comply was not intentional;
>
> (b) there is a good explanation for the failure; **and**
>
> (c) the party in default has generally complied with all other relevant rules, practice directions orders and directions." (Emphasis supplied)

The learned judge, not having been satisfied of the application of those three aspects, ought not to have granted relief from sanctions. His reference to the criteria in paragraph (3) on the basis of applying the overriding objective was misguided. Judges must be reminded that resort to the overriding objective may only be had in the absence of specific provisions which are clear in their meaning. Three cases make the point clear in this context.

[38] The first is **Vinos v Marks and Spencer** [2001] 3 All ER 784, where May LJ said at page 789 paragraph 20:

> "...Interpretation to achieve the overriding objective does not enable the court to say that provisions which are quite plain mean what they do not mean, not that the plain meaning should be ignored...."

In that case Peter Gibson LJ said at page 791 paragraph 26:

> "...The language of the rule to be interpreted may be so clear and jussive that the court may not be able to give effect to what it may otherwise consider to be the just way of dealing with the case..."

[39] The second case is a decision by the Court of Appeal of the Republic of Trinidad and Tobago, in **Trincan Oil Ltd and Others v Martin** (Civil Appeal No 65 of 2009). In treating with the equivalent of rule 26.8, the court stated at paragraph 27 of its judgment:

> "It is clear that the Claimant did not satisfy the requirements of [the equivalent of rule 26.8(1)] and could not have passed the threshold test set at [the equivalent of rule 26.8(2)]. **The resort by the judge solely to "the interest of justice" wholly disregarded the requirements of the Rule and was therefore plainly wrong.**" (Emphasis supplied)

[40] **The Attorney General v Universal Projects Ltd** [2011] UKPC 37 is the third case. The Privy Council, on an appeal from the Court of Appeal of the Republic of Trinidad and Tobago, dealt with a question similar to that in this case. In addressing the provisions of a rule, stated in almost identical terms as rule 26.8, their Lordships addressed the pre-conditions of the equivalent of paragraph (2). They found that the failure to provide a good explanation for the default was fatal to the application for relief from sanctions. Paragraph [18] of the judgment states:

> "The Board has reached the clear conclusion that there is no proper basis for challenging the decision of the courts below that there was no "good explanation" within the meaning of [the rule] for the failure to [comply with the 'unless order']. **That is fatal to the defendant's case in relation to [the rule]** and it is not necessary to consider the challenge

> to the other grounds on which the defendant's appeal was dismissed by the Court of Appeal." (Emphasis supplied)

[41] In response to a submission that the court had a residual power to grant relief from the sanction to prevent an abuse of process, their Lordships said such an argument "is an attempt to circumvent the stringent conditions to which [the relevant rule] is subject. It cannot be accepted" (paragraph 27 of the judgment).

Summary and conclusion

[42] HDX's application for extension of time to file a counter-notice of appeal is yet another default in its compliance with the procedural rules. It ought to be refused.

[43] HDX was woefully late in its application for relief from sanctions. Its explanation for the delay could not overcome the clear presumption that the application had not been made promptly. As a result the learned judge ought not to have considered the other aspects of rule 26.8 of the CPR and he ought not to have granted relief from sanctions. The appeal from his decision to do so should therefore be allowed.

F WILLIAMS JA

[44] I too have read the draft judgment of Brooks JA and agree with his reasoning and conclusion. I have nothing that I can usefully add.

MORRISON P

ORDER

1. The application for extension of time to file a counter-notice of appeal is refused.

2. The application for the admission of oral arguments is refused.

3. The appeal is allowed.

4. The judgment and orders of the court below made herein on 29 January 2015 are set aside.

5. The judgment entered herein on 1 October 2014 is restored.

6. Costs of the appeal and in the court below to the appellant, to be taxed if not agreed.