[2019] JMCA App 29

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 7/2014

APPLICATION NO 56/2018

BEFORE: THE HON MRS JUSTICE McDONALD-BISHOP JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MR JUSTICE FRASER JA (AG)

BETWEEN	**ADVANTAGE GENERAL INSURANCE COMPANY LIMITED (FORMERLY UNITED GENERAL INSURANCE COMPANY LIMITED)**	**APPLICANT**
AND	**MARILYN HAMILTON**	**RESPONDENT**

Conrad George and Andre Sheckleford instructed by Hart Muirhead Fatta for the applicant

Captain Paul Beswick and Miss Gina Chang instructed by Ballentyne Beswick and Company for the respondent

27 May and 20 December 2019

MCDONALD-BISHOP JA

[1] I have read, in draft, the judgment of my learned sister, P Williams JA. I agree with her reasoning and conclusion and, with the exception of one particular issue of relative importance, on which I consider it fitting to comment, there is nothing useful that I could further add.

[2] My brief focus is directed at a single question of law, and that is, whether rule 26.8 of the Civil Procedure Rules, 2002 ("the CPR"), which provides for relief from sanctions, is applicable to applications for the setting aside of default costs certificates under rule 65.22(3) of the CPR, which is engaged in these proceedings. I would seize the opportunity to register, in some detail, my reasons for fully endorsing the reasoning of my learned sister, which culminated in the conclusion with which I agree, that rule 26.8 of the CPR does not apply to applications made pursuant to rule 65.22 of the CPR.

[3] Rule 26.8(1), in a nutshell, gives the Supreme Court the power to grant relief to a party from any sanction imposed on that party for a failure to comply with any rule, order or direction upon an application made for that purpose and provided that certain specified requirements are met. The rule specifies the circumstances under which relief should be granted (rule 26.8(2)) and matters that the court must have regard to in considering whether to grant relief (rule 26.8(3)).

[4] Rule 65.22 discretely makes provision for the setting aside of default costs certificate. It provides:

> "(1) The paying party may apply to set aside the default costs certificate.
>
> (2) The registrar must set aside a default costs certificate if the receiving party was not entitled to it.
>
> (3) The court may set aside a default costs certificate for good reason.
>
> (4) An application to the court to set aside a default costs certificate must be supported by affidavit and must exhibit the proposed Points of Dispute."

[5] The respondent, in strongly opposing the application for setting aside the default costs certificate, has relied heavily on authorities treating with the issue of relief from sanctions. In particular, and for the purposes of my discussion, reference was made to the Supreme Court's decision of **Canute Sadler and Michelle Sadler v Derrick Michael Thompson and another** [2019] JMSC Civ 11, in which Rattray J, in considering an application to set aside a default costs certificate, held that he was bound by the decision of Brooks JA in **Rodney Ramazan and Ocean Faith NV v Owners of Motor Vessel (CFS PAMPLONA)** [2012] JMCA App 37.

[6] In the latter case, Brooks JA, in treating with an application for the setting aside of a default costs certificate, while sitting in chambers as a single judge of this court, set out a non-exhaustive list of factors to be considered in deciding whether "good reason" exists for doing so, in keeping with the dictates of rule 65.22(3) of the CPR.

[7] Having laid down the requirements to satisfy the rule, he then proceeded to pronounce at paragraph [14] of the judgment that:

> "I find also that rule 2.20(4) of the [Court of Appeal Rules, 2002 ("the CAR")] which requires a consideration of the principles of relief from sanctions applies in these circumstances. The rule states:
>
> > '(4) CPR rule 26.8 (relief from sanctions) applies to any application for relief.'
>
> It would seem that an application to set aside a default costs certificate easily qualifies as an application for relief. In assessing the instant case I shall use the benchmark set out in rule 26.8, albeit in a somewhat adjusted order."

Thereafter, he conducted his analysis within the framework of rule 26.8 of the CPR, "albeit in a somewhat adjusted order" as he had declared.

[8] Regrettably, this court must depart from the pronouncement of Brooks JA in **Rodney Ramazan and Ocean Faith NV v Owners of Motor Vessel (CFS PAMPLONA)** that rule 2.20(4) of the CAR applies to applications for the setting aside of default costs certificates, thereby rendering rule 26.8 of the CPR, applicable to rule 65.22(3). An examination of the relevant provisions reveals that Brooks JA's dictum was, with the greatest of respect, *per incuriam*, and as such, ought not to be followed by the Supreme Court (as was done in **Canute Sadler and Michelle Sadler v Derrick Michael Thompson**) or by this court, in the instant case. I say so for the following reasons.

[9] Rule 2.20(4) falls within the regime established by the CAR to treat with failure of an appellant or respondent to comply with any of the rules contained therein as they relate to an appeal or counter appeal. Rule 2.20 provides, in general, as follows:

> "2.20 (1) Where an appellant or a respondent who has filed a counter-notice fails to comply with any of these Rules, any other party may apply to the court to dismiss the appeal.
>
> (2) It is the duty of the registrar to see that all parties comply with the provisions of these rules and the registrar must report to the court before the end of each term any failure to comply.
>
> (3) On considering the report of the registrar under paragraph (2), the court may by order require any party to remedy any failure to comply with these Rules by a stated date and that in default of so doing -

(a) if the party in default is the appellant, the appeal be dismissed with costs against the appellant;

(b) if the party in default is a respondent who has filed a counter-notice, the counter-notice be struck out and the respondent do pay to all other parties such additional costs as such parties may have incurred as a result of the counter-notice; or

(c) in the case of any other respondent, that respondent be debarred from being heard on the appeal.

(4) CPR rule 26.8 (relief from sanctions) applies to any application for relief."

[10] It is clear that the above provision is specific to the Court of Appeal only and to the rules governing the court. Furthermore, the only provision of the CPR that is cross-referenced as being of particular application is rule 26.8 (relief from sanctions).

[11] The regime established to set aside default costs certificates fall within Part 65 of the CPR. That Part is rendered applicable to this court, by virtue of rule 1.18(1) of the CAR. This latter rule states:

"1.18 (1) The provisions of CPR Parts 64 and 65 apply to the award and quantification of costs of an appeal subject to any necessary modifications and in particular to the amendments set out in this rule."

[12] As can be seen, rule 1.18(1) of the CAR makes no reference, either expressly or by necessary implication, to rule 26.8 of the CPR, nor does it cross-reference rule 2.20(4) of the CAR, as being relevant to matters dealing with default costs certificates.

[13] I adopt the views of P Williams JA that rule 65.22 of the CPR is a "self-contained" provision. That is to say, that the regime it has established bears no correlation to the regime established by rule 2.20.(4) of the CAR. Therefore, rule 2.20(4) cannot be utilised

as a gate-way for rule 26.8 to be made applicable to rule 65.22(3), which is in issue in this case. Simply put, rule 2.20(4) is not at all applicable to applications made pursuant to rule 65.22(3).

[14] Accordingly, there is only one criterion to be satisfied for the setting aside of default costs certificates under rule 65.22(3), and that is, that "good reason" exists for so doing. Neither the CPR nor the relevant authorities has provided an exhaustive list or closed category of factors that may constitute "good reason". It may very well be that some of the matters that are required in the consideration of an application for relief from sanctions may be relevant considerations in determining whether good reason exists for the setting aside of a default costs certificate. The requirement for the application to be made promptly may be one such consideration.

[15] There cannot be, however, any hard and fast rule that the requirements under rule 26.8 of the CPR, must be applied, be it strictly or modified, to applications brought under rule 65.22(3). The question of what consitutes good reason for the purposes of the rule, falls to be determined upon an objective consideration of the particular facts and circumstances of each case, with the application of sound judgment and the overriding objective to deal with the case justly.

P WILLIAMS JA

[16] This is yet another of the several matters spawned from the efforts of Marilyn Hamilton, the respondent, to have the court pronounce on her purported dismissal from the United General Insurance Company Limited, now the Advantage General Insurance

Company, the applicant. This application is to set aside a default costs certificate issued by the registrar of this court on 12 March 2018.

[17] In its application filed on 13 March 2018, the applicant seeks the following orders:

> "1. The Default Cost Certificate issued by the Registrar on 12th March 2018 be set aside;
>
> 2. Time be extended to allow for the filing of the points of dispute to the Respondent's Bill of Costs filed herein on 8th February 2018;
>
> 3. Any further relief as this Honourable Court may deem fit."

[18] The grounds on which the applicant seeks the orders are as follows:

> "(i) This application is being made promptly;
>
> (ii) There is good reason to set aside the default costs certificate as:
>
> a. there is a clearly articulated dispute about the costs sought by the Respondent's attorneys;
>
> b. there is a realistic prospect of successfully disputing the bill of cost;
>
> c. the failure to file points of dispute was not Intentional;
>
> d. The default may be remedied within a reasonable time; the proposed points of dispute are exhibited to the affidavit in support of this application;
>
> e. The effect of granting the relief sought will have no material effect on the Respondent as no date would have reasonably been set for taxation as yet."

Background

[19] The respondent filed a claim in the Supreme Court in 2007 concerning her purported dismissal. There followed a number of interlocutory proceedings before both this court and the Supreme Court, culminating in the trial of the claim in 2013. Judgment was handed down in favour of the respondent in December 2013.

[20] The applicant filed a notice of appeal against that decision on 12 February 2014. On 25 April 2014, the respondent filed a counter-notice of appeal. The applicant failed to take steps to advance its appeal and the respondent filed an application for the appeal to be dismissed in 2017. The applicant then filed an application for extension of time to file relevant documents, namely skeleton arguments, chronology of events and record of appeal.

[21] These applications were heard and disposed of by this court in June 2017. The notice of application that the appeal be dismissed for want of prosecution was refused. The application for extension of time to file the relevant documents was granted.

[22] At that time, the following orders were among the several orders made by this court:

> "…3. The time is extended to the 28th July 2017 for UGI to file and serve record of appeal, skeleton arguments and chronology of events all prepared in accordance with the relevant provisions of the Court of Appeal Rules including cross referencing as stipulated in the rules and proper labels ascribed to the record.
>
> …

> 8. Unless UGI complies with the order set out at paragraph 3 within the time specified, the appeal shall stand struck out for failure to comply with the orders and rules of the court unless the court otherwise orders."

[23] The applicant filed and served the record of appeal and the chronology of events on 28 July 2017 within the time ordered by the court. It, however failed to file the skeleton arguments. As a result, the respondent filed an application seeking that the notice of appeal be dismissed for non-compliance with the Court of Appeal Rules ("the CAR") and, pursuant to order 8, with costs. This application was filed on 3 August 2017.

[24] The applicant, also on 3 August 2017, filed an application for relief from the sanction of striking out. The applicant was successful in its application, resulting in the time within which they were to file the documents being extended. The respondent's application to have the appeal dismissed was refused. The respondent, was, however granted costs on both these applications to be taxed if not agreed. Proceeding with taxation of those costs was also authorised.

[25] On 8 February 2018, the respondent filed a bill of costs, arising from the hearing of these applications, in the sum of $11,484,070.00. There being no points of dispute filed by the applicant within the 28 days permitted by rule 65.20(3) of the Civil Procedure Rules 2002 ("the CPR"), on 12 March 2018, the respondent obtained a default costs certificate in the full amount. The certificate was served on the attorneys-at-law for the applicant on 12 March 2018 at 1:53 pm.

[26] On 13 March 2018, the applicant filed this application accompanied by an affidavit of Andre Sheckleford, exhibiting the proposed points of dispute to the bill of costs.

[27] The applicant subsequently sought and obtained a stay of the default costs certificate on condition that it paid the sum of $475,230.00 on or before 10 August 2018. The applicant failed to pay the sum and instead filed an application seeking to vary the order or, alternatively, an extension of time for the payment of the sum. The application for extension of time was granted and the time for compliance was extended.

[28] In his affidavit in support of this application, Mr Sheckleford stated that the bill of costs did not come to the attention of the attorneys-at-law until receipt of the respondent's default costs certificate.

[29] On 29 June 2018, a bearer from the office of the applicant's attorneys-at-law filed an affidavit. She stated that on 12 March, after the default costs certificate had been served on the attorney-at-law, she was instructed to seek and retrieve the bill of costs to which the default costs certificate related. On retrieval of the bill of costs, she came to realise that, though she "accepted service of the document, it was not brought to the attention of any of the attorneys-at-law responsible for this matter". She asserted that to the best of her knowledge and belief, the failure to file points of dispute was not intentional as none of the attorneys-at-law responsible for the matter, nor the client, were aware of the existence of the bill of costs.

[30] Mrs Beswick-Reid swore to an affidavit in reply to that filed by Mr Sheckleford. She reminded this court of the long history of the matter. She stated that there was

consistent wanton abuse of the processes of the court by the applicant and further that it had paid little regard to court orders, rules and procedures. She further stated that the court has consistently exercised its discretion and granted relief. She urged the court to reject the application, as administrative inefficiencies, more so repeated ones, should not be sufficient cause for failing to adhere to the rules. She also urged that in seeking to balance the scales of justice, the court should not ignore the continued failure by the applicant to comply with the orders of the court.

The submissions

For the applicant

[31] In advancing the submissions on behalf of the applicant, Mr George reminded this court of what was described as the general principles regarding the setting aside of default processes. Reference was made to the statement of Lord Atkin in **Evans v Bartlam** [1937] AC 473, which was applied in **Strachan v The Gleaner Co Ltd and another** [2005] 1 WLR 3204. At page 480 of **Evans v Bartlam**, Lord Atkin stated the following:

> "The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."

[32] It was noted that the principles relevant to setting aside a default costs certificate are found in rule 65.22 of the CPR, which is made applicable to this court by its incorporation through rule 1.18 of the CAR.

[33] Counsel referred to the case of **Rodney Ramazan and Ocean Faith NV v Owners of Motor Vessel (CFS PAMPLONA)** [2012] JMCA App 37 where Brooks JA outlined factors, which should be taken into consideration in determining what amounts to good reason for setting aside a default costs certificate. These factors were identified at paragraph [14] of the judgment as follows:

> "(1) the circumstances leading to the default;
>
> (2) consideration of whether the application to set aside was made promptly;
>
> (3) consideration of whether there was a clearly articulated dispute about the costs sought;
>
> (4) Consideration of whether there was a realistic prospect of successfully disputing the bill of costs."

[34] It was noted that similar factors guided this court in **Harold Brady v General Legal Council** [2012] JMCA App 40 and were subsequently endorsed in **Kandekore (Lyjasu M) v COK Sodality Co-operative Credit Union Limited et al** [2018] JMCA App 2.

[35] The submissions continued with a consideration of the factors that were outlined by Brooks JA as being relevant to this application. The first being that of the circumstances leading to default, which counsel indicated were that the recipient of service of the bill of costs did not bring it to the attention of any of the attorneys-at-law involved in the matter. The circumstances were described as unfortunate and

embarrassing. However, it was urged that the default in filing points of dispute was not intentional.

[36] Counsel pointed out that the application to set aside the default costs certificate was prompt in two respects. Firstly, it was made the day after the certificate was served and relative to the due date of the points of dispute, the application was made four days after.

[37] It was submitted that the questions of whether there is a clearly articulated dispute about the costs sought and whether there is a realistic prospect of successfully disputing the bill of costs are the most important ones to consider. Counsel noted that the costs sought related to an application to dismiss the appeal because of the non-filing of skeletal submissions by a certain date as well as missing documents from the record of appeal and a disagreement as to the level of detail in the chronology of events filed. The hearing lasted, in effect, six hours. Counsel contended that the amount of $11,484,070.00 could only be described as "perversely exorbitant". He highlighted the fact that the proposed points of dispute result in the quantum of costs being $475,230.00, which represents approximately 4% of the sum being sought. These points of dispute include challenges to the rates of the attorneys involved, the hours stated for certain tasks, as well as the involvement of senior counsel in matters which would not properly involve senior counsel (for example in preparation of indices to bundles) and the wholly inapplicable and improperly applied concept of brief and refresher fees in contexts where counsel are, in essence, claiming to be given a brief in a matter where they prepared the documents which constitute the brief.

[38] It was submitted that the bill of costs was unreasonable in circumstances where bills of costs were a representation of what a lawyer actually billed his\her client and a charge of over $11 million for a two-day application is clearly exorbitant. Further, it was submitted that the usual phraseology of costs orders is that costs are to be taxed if not agreed, which suggests that agreement is therefore prioritised. Thus, patently exorbitant bills of costs render agreement next to impossible, forcing parties to taxation in circumstances where such may not be necessary.

[39] The submissions concluded that, in these circumstances, not only is there a clearly articulated dispute about the costs sought, which was exorbitant and unreasonable, but there was also a realistic prospect of successfully disputing such a bill. It was also contended that as the proposed points of dispute are prepared and exhibited, the default could be remedied the instant relief is granted.

For the respondents

[40] Mr Beswick commenced, on behalf of the respondents, by detailing the several hearings and applications that have taken place in this matter, commencing in May 2010. He submitted that there has been "consistent wanton abuse of the processes of the court by the appellant and the court has consistently exercised their discretion and granted them relief". Counsel also contended that "they pay little regard to court orders, rules and procedures and constantly seek relief form the court for their tardiness, non-compliance and inefficiency".

[41] The main thrust of the submissions, objecting to the setting aside of the default costs certificate, is that, in the application by the appellant the grounds specified do not contain any good ground for the failure of the appellant to comply with the rules of the court in relation to their failure to file their points of dispute.

[42] In considering the law applicable to this application, counsel referred to the decision of **Lijyasu M Kandekore v COK Sodality Co-operative Credit Union Limited et al** [2018] JMCA App 2. He relied on **Gordon Stewart v Noel Sloley et al** [2016] JMSC Civ 50, a decision of Sykes J (as he then was), which counsel submitted offers some guidance to this application although it was concerned with an application to set aside a without notice provisional charging order made pursuant to a default costs certificate issued out of this court.

[43] The submission was that the judgment of Sykes J makes it patently clear that the applicant, having failed to file its points of dispute within 28 days or at all, prior to the default costs certificate being granted, has no automatic right to having the certificate set aside. Counsel relied in particular on the comments of Sykes J at paragraph [34]:

> "It seems to this court that after an unsuccessful application to the registrar to set aside her default costs certificate, the next step after the registrar's refusal can only be by way of appeal but the condition precedent for that appeal to be properly constituted is that the paying party must have filed and served points of dispute. The consequence of all this is that the failure to file and serve points of dispute has far reaching consequences such as erecting an insurmountable barrier to an appeal from the registrar's refusal to set aside her own default costs certificate."

Counsel submitted that the applicant has placed itself in a position where its application to set aside the default costs certificate would appear to be futile and would have a low prospect of success. He contended that further, in keeping with the decision of Sykes J, once the receiving party was properly entitled to the certificate, the paying party has no right to set it aside.

[44] Counsel also relied on **Andrew Mitchell MP v News Group Newspaper Limited** [2013] EWCA Civ 1537, as a decision in which he said the English Court of Appeal evaluated the criteria to set aside a costs order in circumstances where the paying party failed to comply with the rules of the court.

[45] Counsel urged that the assertion of the applicant that the failure to file the points of dispute was due to "administrative inefficiency" did not amount to a good explanation of the failure. Counsel referred to **The Commissioner of Lands v Homeway Foods Limited and Stephanie Muir** [2016] JMCA Civ 21 and **The Attorney General v Universal Projects Limited** [2011] UKPC 37 in support of this submission.

[46] Counsel reviewed decisions from this court that dealt with the proper approach for dealing with applications for relief from sanctions. He referred to **Jamaica Public Service Company Limited v Francis (Charles Vernon) and Anor** [2017] JMCA Civ 2 and **Peter Haddad v Donald Silvera** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 31/2003, judgment delivered on 31 July 2007. He subsequently brought to this court's attention **Canute Sadler and Michelle Sadler v Derrick Michael Thompson and another** [2019] JMSC 11 where the judge considered

and applied the principles which govern an application for relief from sanctions to an application to set aside a default costs certificate.

[47] In conclusion, it was submitted that the application to set aside the default costs certificate should fail for reasons which were set out in a manner that will be repeated:-

> "a. there is no good excuse for the failure by the appellant to comply with the 28 day deadline, and in keeping with the authorities of **Mitchell** and **Kandekore** the explanation given by the Appellants should be rejected;
>
> b. the Court in seeking to balance the competing interests of the parties should send a clear message that the rules of the Court must be adhered to;
>
> c. the prejudice which the Respondent will suffer is significantly higher than that of the Appellant which is an insurance company with limitless resources and
>
> d. it is just, fair and equitable that the application be refused and the Respondent receive the costs which she is entitled."

Further submissions

[48] The applicant, in response to the authority of **Mitchell v News Group Newspaper Ltd**, submitted that the authority was of no application to this matter. It was contended that relief from sanctions provisions have no bearing on an application to set aside a default costs certificate. The Privy Council decision of **Attorney General v Keron Matthews** [2011] UKPC 38 was referred to in support of this submission.

[49] Further it was submitted that the authority of **Mitchell v News Group Newspaper Ltd** was misread and the observations of Lord Dyson in **Denton and Others v TH White Ltd and another et al** [2015] 1 All ER 880 represent the proper

approach to a consideration of the rules concerned with an application for relief from sanctions.

[50] The parties made further detailed submissions on other authorities that have been considered but which will only be addressed to the extent necessary.

The law

[51] Rule 1.18(1) of the CAR provides:

> "The provisions of CPR Parts 64 and 65 apply to the award and quantification of costs of an appeal subject to any necessary modifications and in particular to the amendments set out in this rule."

[52] The rules in the CPR, relevant to the consideration of this application, commence with the requirement for the taxation proceedings to commence by the receiving party filing the bill of costs at the registry and serving a copy on the paying party (rule 65.18(1) of the CPR). The paying party and any other party to the taxation proceedings may dispute any item in the bill of costs by filing and serving points of dispute and the period for filing it is 28 days after the date of service of the copy bill (rules 65.20(1) and (3)).

[53] Rule 65.20(5) provides:

> "The receiving party may file a request for a default costs certificate if-
>
> (a) The period set out in paragraph (3) for serving points of dispute has expired; and
>
> (b) No points of dispute have been served on the receiving party."

[54] The provision of the CPR dealing with the setting aside of the default costs certificate is rule 65.22, which states:

> "(1) The paying party may apply to set aside the default costs certificate.
>
> (2) The registrar must set aside a default costs certificate if the receiving party was not entitled to it.
>
> (3) The court may set aside a default costs certificate for good reason.
>
> (4) An application to the court to set aside a default costs certificate must be supported by affidavit and must exhibit the proposed Points of Dispute."

Discussion and analysis

[55] It is pellucid that a party who failed to file the required points in dispute to challenge a bill of costs does not have an automatic right to have the default costs certificate set aside. The difference between rule 65.22(2) and rule 65.22(3) is that in the former a registrar is obliged to set aside the default cost certificate if the receiving party is not entitled to it, whereas in the latter the court has a discretion to set aside the certificate where good reason is shown.

[56] The consideration that arises for the court is therefore what amounts to good reason. In a decision of this court from an application made in chambers, **Henlin Gibson Henlin and Calvin Green v Lilieth Turnquest** [2015] JMCA App 54, F Williams JA (AG) (as he then was), stated the following at paragraphs [34] and [35]:

> "[34] The words 'good reason', (which are used in rule 65.22(3) of the CPR), have been judicially considered in several cases. One such case is **Kleinwort Benson Ltd v Barbrak Ltd and other appeals; The Myrto (No 3)**

[1987] 2 All ER 289. This is how the words were discussed at page 300 c, of the report:

> 'The question then arises as to what kind of matters can properly be regarded as amounting to 'good reason'. The answer is, I think, that it is not possible to define or circumscribe the scope of that expression. Whether there is or is not good reason in any particular case must depend on all the circumstances of that case, and must therefore be left to the judgment of the judge…'

[35] Many of the other cases that discuss the phrase 'good reason' cite the **Kleinwort Benson** case. What all these cases confirm is whether good reason exists or not is a matter left to the individual judge's discretion and is dependent on the particular facts and circumstances of each case."

[57] It is therefore accepted that what amounts to good reason is dependent on the facts and circumstances of each case. However there has been consideration as to what factors can assist the court in making this determination. In **Rodney Ramazan and Ocean Faith NV v Owners of Motor Vessel (CFS PAMPLONA)**, Brooks JA recommended some issues which should assist in deciding whether a good reason existed for setting aside a default certificate. It is of course now recognised, as acknowledged by Brooks JA, that some of the conclusions reached in that decision were incorrect since he had failed to take into account the fact that the rule had been amended in 2011 (see **Lijyasu M Kandekore v COK Sodality Co-Operative Credit Union Limited et al** [2017] JMCA App 20).

[58] The issues identified by Brooks JA came from his analysis of **Dr Adu Aezick Seray-Wurie v The Mayor and Burgess of the London Borough of Hackney**

[2002] EWCA Civ 909, a decision emanating from the English court, which is concerned with an application to set aside a default costs certificate pursuant to a rule somewhat similar to ours. The relevant rule is rule 47.12 of the CPR, which provides:

> "(1) The court must set aside default costs certificate if the receiving party was not entitled to it.
>
> (2) In any other case, the court may set aside or vary a default costs certificate if it appears to the court that there is some good reason why the detailed assessment proceedings should continue."

[59] At paragraph [14] of **Rodney Ramazan and Ocean Faith NV v Owners of Motor Vessel (CFS) PAMPLONA** Brooks JA stated inter alia:

> "[14] … Without attempting to stipulate mandatory requirements, it would seem that those issues would include:
>
> (1) the circumstances leading to the default;
>
> (2) consideration of whether the application to set aside was made promptly;
>
> (3) consideration of whether there was a clearly articulated dispute about the costs sought;
>
> (4) consideration of whether there was a realistic prospect of successfully disputing the bill of costs;…."

[60] Brooks JA then went on to state that an application of this nature "easily qualifies as an application for relief". He came to that conclusion largely due to his finding that rule 2.20(4) of the CAR, which requires a consideration of the principles in rule 26.8 of the CPR which deals with relief from sanctions, applies in these circumstances. Rule 2.20(4) provides:

> "(4) CPR rule 26.8 (relief from sanctions) applies to any application for relief."

[61] It must be borne in mind that my learned brother was attempting to provide guidance for the setting aside of a default costs certificate, when he was unaware that a rule, in fact, existed significantly in the terms he determined it should, after careful analysis. The rule as amended in 2011 is to be viewed as self-contained and as such rule 2.20(4) ought not to be viewed as applicable to applications of this nature. Rule 2.20 specifically deals with compliance with the rules related to civil appeals and it provides for the dismissal of an appeal in circumstances where a party has failed to comply with the provisions of these rules.

[62] To my mind, the entering of the default cost certificate is more akin to the entering of a default judgment for failure to acknowledge service or to file a defence. It is an administrative function of the registrar without a hearing or any consideration of the merits of the matter. As such, I find the observations of the Privy Council in **The Attorney General v Keron Matthews** useful. The Board, in interpreting a provision in the CPR of Trinidad and Tobago, which is similar to our rule 26.8, dealing with relief from sanctions, pointed out that the rule "provides for relief from any sanction *imposed* for a failure to comply inter alia with any rule". It was subsequently stated at paragraph 15:

> "In the view of the Board, this is aiming at rules which themselves impose or specify the consequences of a failure to comply."

[63] At paragraph 16 Lord Dyson, writing on behalf of the Board, had this to say:

> "It is striking that there is no similar provision in relation to a failure to file a defence within the time prescribed by the rules. There is no rule which states that, if the defendant fails to file a defence within the period specified by the CPR, no defence may be filed unless the court permits. The rules do, however, make provision for what the parties may do if the defendant fails to file a defence within the prescribed period…It is straining language to say that a sanction is imposed by the rules in such circumstances. At most, it can be said that, if the defendant fails to file a defence within the prescribed period and does not apply for an extension of time, he is at risk of a request by the claimant that judgment in default should be entered in his favour. That is not a sanction imposed by the rules. Sanctions imposed by the rules are consequences which the rules themselves explicitly specify and impose."

[64] It is possible to apply a similar consideration to rule 65.20. The rule does not state that if the paying party does not file points of dispute within the time specified no points of dispute may be filed unless the court permits. Indeed, the rule provides that if a party files points of dispute after the time specified, that party may not be heard unless the registrar gives permission (rule 65.20(4)).

[65] However, a paying party who fails to file points of dispute is at risk of a request by the receiving party that a default costs certificate be entered in his favour (rule 65.20 (5)). That is not a sanction imposed by the rule for which relief is required, hence an application for setting aside of the default costs certificate ought not to be subjected to the same considerations as an application for relief from a sanction.

[66] The respondent's reliance on those authorities that deal with applications for relief from sanctions is therefore misplaced. Given the heavy reliance placed on the case of **Mitchell v News Group Newspaper Ltd** it needs be noted that this case would be of further questionable assistance, in any event, since the English rule dealing with relief

from sanctions has been revised and is now substantially different from the rule, which previously existed (which was similar to our rule). It is sufficient to recognise this from the following statements in what was found to be held in the case:

> "The obligation in CPR 3.9 to consider the need for litigation to be conducted efficiently and at a proportionate cost, and to enforce compliance with rules, practices and court orders reflected a deliberate shift in emphasis from the previous wording of CPR 3.9. Those considerations were to be regarded as of paramount importance and given great weight. … Compliance with rules, practice directions and court orders was essential if litigation was to be conducted in an efficient manner; if departures were tolerated, then the relaxed approach to civil litigation, which the reforms had been intended to change, would continue."

[67] The courts have always retained wide powers to set aside default judgments on such terms as it thinks just since it is recognised that there was no decision on the merits of the claim and the CPR set out the procedure for setting aside or varying a default judgment at Part 13. There must be a similar power to set aside a default costs certificate. The guidance given by Brooks JA as to the issues that should factor into the exercise of this power are more appropriate than the factors that govern the exercise of the discretion in an application for relief. These issues therefore will be utilised in considering this application. While these issues will be considered separately, the ultimate question is whether there is overall good reason for setting aside the default costs certificate.

The circumstances leading to the default

[68] The bearer who works for the applicant's attorneys-at-law has accepted full blame for the circumstances leading to the default. It is endorsed on the respondent's bill of costs that she accepted service of it on 8 February 2018. She admits to failing to bring

the bill of costs to the attention of the attorneys-at-law. She describes it as "a most unfortunate oversight on [her] part". Mr George is correct to have said that these circumstances are unfortunate and embarrassing. This is especially so in light of the other defaults that have been committed during the history of this matter before this court, which have led to strong comments from the court about the applicant's abysmal record of compliance. It is against that background that it is hard to imagine that the applicant would have received the bill of costs and failed to comply with the requirements for responding to them in a timely manner.

[69] Were this the only factor for consideration, it may have proved difficult for the applicant to convince this court that it was deserving of further indulgence. Nevertheless, the entire circumstances must be borne in mind, so I feel compelled to resist the temptation to shut out the applicant solely because of its history. This explanation falls into the category of one that may not be good but is not to be viewed as fatal to the application.

Whether the application to set aside was made promptly

[70] The applicant cannot be faulted in this regard. Having been served with the default costs certificate and, undoubtedly, when confronted with the amount for costs awarded, the applicant did in fact move with celerity. The default costs certificate was obtained on 12 March and served on the applicant's attorneys-at-law at 1:53 pm on the same day. The present application along with the accompanying affidavit exhibiting the proposed points of dispute was filed in this court on 13 March. There is no dispute that this application to set aside the default costs certificate was made promptly.

Whether there is a clearly articulated dispute about the costs sought

[71] The applicants, in its proposed points of dispute, identifies several areas in which it challenges the amount sought by the respondent. It seems that the underlying concern is that the costs could not have amounted to $11,484,070.00 given the nature of the application that was made and the time spent in presenting it to the court. The points of dispute include challenges to the rates for the attorneys-at-law, the hours stated for certain tasks and having a single task billed multiple times. The submission that each disputed item is clearly highlighted and the basis for the dispute set out as clearly has merit. I have no problem in finding that there is a clearly articulated dispute about the costs sought.

Whether there was a realistic prospect of successfully disputing the bill of costs

[72] The meaning of this phrase realistic or real prospect of success as defined by Lord Woolf MR in **Swain v Hillman** [2001] 1 All ER 91 has been accepted and approved in several decisions from this court. At page 92 Lord Woolf had this to say:

> "The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or… they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

[73] The several points of dispute set out by the applicant call for an analysis of the basis on which the amount is claimed. Whether the amount in the bill of costs is exorbitant and unreasonable, given the factors to be taken into account in deciding what is reasonable and fair to the paying party, requires closer assessment.

[74] In **Harold Brady v The General Legal Council,** Brooks JA noted that the fact that attorneys-at-law charged for more than one attorney-at-law perusing the same document could amount to a duplication of some charges. He found that, in the absence of authorisation from this court for such an approach, it would seem that the applicant had clearly articulated points of dispute with a realistic prospect of success in attacking the bill of costs. It is noted that there are charges in this matter for two attorneys-at-law reviewing the same documents. The applicant here also raises a challenge to the charging for tasks of 'drafting' as distinct from 'perfecting' certain documents carried out by both attorneys-at-law. In the circumstances, there are sufficient questions raised which may result in the applicant successfully disputing the bill of costs.

Conclusion

[75] On the overall analysis of the circumstances, I am satisfied that there exists good reason why this default costs certificate that was issued on 12 March 2018 ought to be set aside. In the result, it is my view that the application to set aside the default costs certificate ought to be granted with costs of the application to the respondent to be taxed if not agreed. The applicant should be granted an extension of time to file their points of dispute of the respondent's bill of costs no later than seven days from the date of this order.

FRASER JA (AG)

[76] I have read in draft the contribution of my sister McDonald-Bishop JA and the judgment of my sister P Williams JA and agree.

MCDONALD-BISHOP JA

ORDER

1. Application to set aside the default costs certificate, issued on 12 March 2018, is granted.

2. Applicant to file points of disputes within seven days of the date hereof.

3. Costs of this application to the respondent to be taxed if not agreed.