

[2019] JMCA Civ 29

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO 119/2018**

**BEFORE: THE HON MISS JUSTICE PHILLIPS JA  
THE HON MR JUSTICE F WILLIAMS JA  
THE HON MISS JUSTICE P WILLIAMS JA**

<b>BETWEEN</b>	<b>APPLE INC</b>	<b>APPELLANT</b>
<b>AND</b>	<b>SWATCH AG (SWATCH SA)</b>	<b>RESPONDENT</b>
	<b>SWATCH LTD</b>	

**Written submissions filed by Livingston Alexander & Levy for the appellant**

**Written submissions filed by Hart Muirhead Fatta for the respondent**

**11 October 2019**

**PROCEDURAL APPEAL**

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

**PHILLIPS JA**

[1] I have read in draft the judgment of my brother F Williams JA. I agree with his reasoning and conclusion and have nothing further to add.

## **F WILLIAMS JA**

### **Introduction**

[2] By notice of appeal filed on 5 December 2018, the appellant, Apple Inc (“Apple”) challenges the decision of Batts J (“the learned judge”). By that decision, made on 27 November 2018, the learned judge ordered that a document entitled “Notice of Appeal”, appealing against a decision of the Registrar of Industrial Property under the Trade Marks Act, stand as filed. The learned judge also ordered that the appeal continue as if commenced by a fixed date claim form, set a timetable for the filing of a record of appeal, affidavits and submissions; and set a date for the appeal to be heard.

[3] At the hearing at which the orders were made, the learned judge had before him a notice of a point *in limine*, filed by the attorneys-at-law for Apple. That notice sought to impugn the validity of the document purporting to initiate the appeal, filed by the respondent Swatch AG (Swatch SA) Swatch Ltd (“Swatch”). The main basis of Apple’s challenge was this: that the document filed by Swatch in an effort to appeal the decision of the Registrar of Industrial Property (“the Registrar”), was the wrong document, filed pursuant to the wrong section of the Civil Procedure Rules, 2002 (“the CPR”), and so a nullity. Rule 60 of the CPR requires such an appeal to be commenced by fixed date claim form, to which must be annexed the grounds of appeal and affidavit in support. Instead, Swatch filed a document entitled “Notice of Appeal” pursuant to rule 62 of the CPR. The appeal, it was argued, was therefore void *ab initio* and incapable of being cured by the orders made by the learned judge.

[4] At the hearing, the learned judge also considered Swatch's notice of application seeking orders that either: (a) the notice of appeal erroneously filed under rule 62 be allowed to stand and the appeal be treated as if properly commenced by fixed date claim form; or (b) that it be allowed until 30 November 2018 to file the required fixed date claim form.

[5] It may be convenient to note at this point as well that Swatch's notice of appeal that was filed on 5 September 2018, was not served until 8 November 2018, and therefore was not served within the 28 days stipulated by rule 60 of the CPR. This is another basis of Apple's challenge to the learned judge's decision.

[6] It may also be convenient to set out briefly at this juncture the background to the matter considered by the Registrar and from which this appeal has ultimately arisen. It began with Apple having been allowed to register the trade marks "iWATCH" (Registration # 61,585) and "IWATCH" (Registration # 61,586) in classes 9 and 14 of the Trade Marks Rules, 2001, as required by rule 7.

These classes are as follows:

Class 9

"Scientific, nautical, surveying, electric, photographic, cinematographic, optical, weighing, measuring, signalling, checking (supervision), lifesaving and teaching apparatus and instruments; apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers, recording discs; automatic vending machines and mechanisms for coin-operated apparatus; cash registers, calculating machines, data processing equipment and computers; fire-extinguishing apparatus."

Class 14:

“Precious metals and their alloys and goods in precious metals or coated therewith, not included in other Classes; jewellery, precious stones; horological and chronometric instruments.”

[7] Swatch applied to the Registrar to invalidate those trade marks on the following bases: (i) that those trade marks are similar to Swatch’s trade marks that were registered earlier; and, that, being similar or identical to Swatch’s trade marks, a real likelihood of confusion between the two sets of goods existed; additionally or alternatively (ii) that, although the goods might not be identical or similar, Apple’s use of the challenged trade marks would result in Apple taking unfair advantage of, or would be detrimental to the distinctive character of, Swatch’s reputation.

[8] The Registrar refused Swatch’s applications to invalidate those trade marks of Apple: hence Swatch’s attempt to appeal that decision.

### **The grounds of Apple’s appeal**

[9] The following summary (contained in Apple’s written submissions filed 19 December 2018) reflects the substance of the grounds of Apple’s appeal against the learned judge’s decision:

Ground a

“As a matter of law, the decision of the learned judge is unjust by reason of a serious procedural irregularity in that he failed to give reasons for his decision to make the Order that he did. The learned judge should have given reasons for his decision.”

Grounds b, c and d

“The notice of appeal filed by Swatch was a nullity which could not be remedied.”

Grounds e, f and g

“[The] learned judge failed to exercise his discretion judicially.”

[10] Ground a originally arose as the learned judge did not initially give written reasons for his decision. The written reasons were provided to us by Apple (for which we are grateful) by letter dated 10 June 2019, after this judgment had been drafted. I have therefore considered the two positions: (i) the non-giving of written reasons (as the relevant ground of appeal has not been expressly withdrawn, although circumstances have now changed); and (ii) the written reasons given. I, however, consider the written reasons now provided to be adequate in indicating the learned judge’s thought process in ruling as he did.

## **Ground a- whether the learned judge failed to give reasons**

### **Summary of submissions**

#### **For Apple**

[11] On behalf of Apple, it was at first contended that the learned judge failed to give reasons for his decision. This failure, it was submitted, by itself constitutes a sufficient basis for the appeal to be allowed. Paragraphs 23 and 24 of Apple’s written submissions set out the pith and substance of Apple’s contention on this issue:

“23. This Court ought to set aside his decision on this basis as no reasons for the decision can be deduced from the learned judge’s utterances. [T]he decision of the learned judge was

unjust by reason of a serious procedural irregularity in that he failed to give reasons for his decision to make the Order.

24. This court would be well within proper judicial bounds to allow the appeal without an investigation into how the learned judge exercised his discretion because:

- (a) It is not possible to ascertain how he did so; and
- (b) The court cannot be satisfied that the learned judge gave himself the opportunity to do so.”

[12] However, it may also be useful to set out paragraph 25 of the said submissions, which considered the alternative possibility that the learned judge’s reasons might be possible to be ascertained from what he said:

“25. Insofar as the learned judge’s reasons can be ascertained from the Notes of Hearing, the decision of the learned judge was wrong as a matter of law because:

- (a) The learned judge misunderstood the law;
- (b) In the exercise of his discretion he failed to take into account relevant facts sufficiently or at all; and or
- (c) In the exercise of his discretion he took into account matters that were not relevant.”

[13] In support of its submissions on this issue, Apple cited a number of cases, some of which, along with the main principles for which they were cited, are set out below.

[14] Apple, for example, cited the case of **Flannery and another v Halifax Estate Agencies Limited (Trading as Colley’s Professional Services)** [2001] 1 WLR 377 and, in particular, the dicta of Henry LJ at pages 381-382, some of which are set out hereunder:

"We make the following general comments on the duty to give reasons.

(1) The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties especially the losing party should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know (as was said in *Ex parte Dave*) whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.

(2) The first of these aspects implies that want of reasons may be a good self-standing ground of appeal. Where because no reasons are given it is impossible to tell whether the judge has gone wrong on the law or the facts, the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons itself.

(3) The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject matter. Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt, summarised the evidence) to indicate simply that he believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where as here there is disputed expert evidence; but it is not necessarily limited to such cases.

(4) This is not to suggest that there is one rule for cases concerning the witnesses' truthfulness or recall of events, and another for cases where the issue depends on reasoning or analysis (with experts or otherwise). The rule is the same: the judge must explain why he has reached his decision. The question is always, what is required of the judge to do so; and that will differ from case to case. Transparency should be the watchword."

[15] The following cases were also cited as examples of the application of the principles enunciated in **Flannery and another v Halifax Estate Agencies Limited**: (i) **Orrett Bruce Golding and the Attorney General of Jamaica v Portia Simpson Miller** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 3/2008, judgment delivered 11 April 2008; (ii) **National Commercial Bank Jamaica Limited v International Asset Services Limited** [2015] JMCA Civ 7; (iii) **English v Emery Reimbold & Strick Ltd** [2002] 1 WLR 2409; (iv) **New Falmouth Resorts Limited v National Water Commission** [2018] JMCA Civ 13; and (v) **Russell Holdings Limited v L & W Enterprises Inc et al** [2016] JMCA Civ 39. Also cited was the case of **Smith (Personal Representative of Hugh Smith (Deceased)) and others v Molyneaux (British Virgin Islands)** [2016] UKPC 35, mainly for the following dictum of Dame Arden:

“36. ...It is an important duty of a judge to give at least one adequate reason for his material conclusions, that is, a reason which is sufficient to explain to the reader, and the appeal court, why one party has lost and the other has succeeded...”

37. If an appellate court cannot deduce the judge’s reasons for his conclusion in a case, it will set aside the conclusion and either direct a retrial or make findings of fact itself: see *English v Emery Reimbold* at para 26.”

### **For Swatch**

[16] The respondent, Swatch, for its part, has contended that it is apparent that, whilst not delving into “the intricacies that directed his mind” (paragraph 10 of its written submissions), the learned judge did give reasons for his decision. Swatch also referred to the case of **National Commercial Bank v International Asset Services Limited**,

mainly for the following dictum to be found at paragraph [49] of that judgment (per Phillips JA, discussing comments of Henry LJ in **Flannery and another v Halifax Estate Agencies Ltd**):

“If the circumstance is such that if no reasons are given, it would be impossible to tell whether the judge had gone wrong in law, that alone could be a self-standing ground of appeal. Of course, the learned judge of appeal was careful to point out, that the extent of the duty will depend on the particular facts, for instance in a negligence case, the statement of the judge that ‘I believe x as against y’ may be sufficient as against a case involving expert evidence. But in the final analysis there is no rule for one set of cases and another for others, the rule is the same, the judge must explain why he reached his decision.”

[17] The other main contentions on the part of Swatch might be seen in paragraphs 12, 13 and 19 of its said submissions. They read as follows:

“12. It is clear from what was said by Justice Batts that his reasoning was based on his appreciation of Rule 26.9 and his wide powers under Part 26. The learned judge expressed that under this rule he was empowered to cure what was what he believed [sic] to be a procedural irregularity and not a nullity as posited by APPLE.

13. The issue that arose dealt solely with a matter of law. There were no facts that the judge had to consider and weigh his mind to decide whether to grant or refuse SWATCH'S application to remedy the irregularity. It is not impossible to tell whether the judge had incorrectly directed himself in law as stated in **NCB**. The court need only consider whether Justice Batts [sic] powers under rule 26 were wide enough to do what SWATCH was asking the Court to do.

....

19. Therefore, we submit that the learned judge made the orders he did in accordance with Rule 26.9 of the CPR. If the court finds that no reason was given by the learned judge or

the reason given is insufficient, we ask the court to exercise its inherent jurisdiction and consider for itself whether the appeal against the Registrar can be rectified under the Rules or if it is a nullity. This ground of appeal must fail in light of the foregoing.”

[18] Swatch has also submitted that the absence of reasons would not prevent this appeal from being heard. In support of this, it cited **The Director of Public Prosecutions v Norton Wordworth Hinds et al** [2016] JMCA App 18, relying, in particular, on the dictum of Brooks JA at paragraph [30]:

“...Even if the transcript does not disclose the reasons, their absence would not preclude this court from hearing the appeal, which is said to be a procedural appeal, and therefore does not necessarily require the reasons for decision from the court below (see rules 1.11 and 2.4 of the CAR). In any event, while it is always helpful to have reasons from the lower court, this court has in the past, heard appeals in the absence of reasons, and is prepared to do so in this case.”

## **Discussion**

[19] As noted at paragraph [10] of this judgment, the learned judge did not at first provide any written reasons for his decision. Apple has, however, produced the notes that its attorneys-at-law took at the hearing; and Swatch has not challenged the accuracy of those notes.

[20] The notes taken by Apple, themselves record the learned judge as saying the following:

“The Court has wide powers under rule 26. I do not agree with you that it is a nullity. I do not agree that this error is incurable. I run a court of substance and not of form...”

[21] This, of course, was said in response to the point *in limine* that had sought to have Swatch's attempt to appeal by filing a notice of appeal (rather than using a fixed-date claim form) declared a nullity. The learned judge's words amount to a rejection of the contention that the process adopted amounted to a nullity. The words used suggest that the learned judge was of the view that the point being taken *in limine* was one that focussed more on form and less on resolving the substantive issues that fell for determination.

[22] To my mind, the most that could be said of the learned judge's reasons by way of comment (and not criticism, as none is warranted) would, perhaps, be that they are laconic. But once reasons are given, even if not stated at great length, then that raises a question as to whether Apple's contention that no reasons were given has been sufficiently made out.

[23] We consider this question against the background of some of the dicta stated in the cases cited by both parties. For example, in **Flannery and another v Halifax Estate Agencies Ltd**, Henry LJ at page 382 observed that:

"The judge must explain why he has reached his decision. The question is always, what is required of the judge to do so; and that will differ from case to case..." (Emphasis added)

[24] Similarly, as Morrison P pointed out at paragraph [50] of **New Falmouth Resorts v National Water Commission**:

"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."

[25] Morrison P, in that case, also considered the following dictum of Lord Brown of Eaton-under-Heywood in **South Bucks District Council and another v Porter (No 2)** [2004] UKHL 33 at paragraph [36]:

"36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision." (Emphasis added)

[26] In that case (**South Bucks District Council and another v Porter (No 2)**) and others, consideration was also given to the question of what could properly amount to a failure to give reasons and the adequacy of reasons given. Lord Brown of Eaton-under-Heywood also made the following observation at paragraph [36] of the judgment:

"...A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

[27] Similarly, Hoffmann LJ, in **South Somerset District Council v Secretary of State for the Environment and another** [1993] 1 PLR 80 (commenting on a challenge to reasons given by a planning inspector in granting planning permission for housing development) observed at page 83 that:

"The inspector is not writing an examination paper .... One must look at what the inspector thought the important planning issues were and decide whether it appears from the

way he dealt with them that he must have misunderstood a relevant policy . . ."

[28] It is to be remembered that the simple issue before the learned judge was whether the point *in limine* contending for a finding of nullity ought to have succeeded. That was really the only or main issue that he had for consideration. It was a simple point calling for a decision in respect of a binary choice: nullity or curable irregularity. It called for no exposition on the law; and/or dissertation on the facts. The learned judge honed in on the simple issue that was up for decision and gave his reason very succinctly. He gave reasons that were adequate, given the narrow nature of the issue that he was called upon to decide; and so Apple's contention on this ground must fail. My finding, therefore, is that the reasons given, both orally and in writing, are adequate.

[29] It may now be convenient to consider whether the reason given by the learned judge in deciding to deal with the matter the way he did, was in keeping with the rule pursuant to which he said that he was acting. This calls for an examination of grounds of appeal b, c and d.

## **Whether the procedure adopted amounted to a nullity**

### **Summary of submissions**

#### **For Apple**

[30] The substance of Apple's contention that the proceedings amounted to a nullity is encapsulated in paragraphs 31, 32 and 43 of Apple's written submissions, which read as follows:

“31. The decision of the Registrar of Industrial Property is a decision made by a person under an enactment, namely the Trade Marks Act. Accordingly, an appeal from any such decision must be made pursuant to Part 60 of the CPR which mandates that it is initiated by way of a Fixed Date Claim Form and must be served within twenty-eight (28) days of the decision.

32. In the instant case, the ‘appeal’ was commenced by way of a Notice of Appeal and not a Fixed Date Form as prescribed by the rules and although it was filed within the twenty-eight (28) day time period, it was not served until 8<sup>th</sup> November 2018, well outside of the time mandated by the rules.

....

43. We submit that in the present case, filing a Notice of Appeal instead of a Fixed Date Claim Form as mandated by the CPR is fatal, as in fact no proceedings have been commenced before the Court. The Court therefore has no jurisdiction to rectify these proceedings. The defect in filing a Notice of Appeal instead of a Fixed Date Claim Form was not a mere irregularity but is a nullity which could not be waived and could not be cured by an order of the Court.”

[31] In support of its submission that the procedure adopted by Swatch amounted to a nullity that could not be cured, Apple relied on a number of cases. Among them were the following: (i) **Leymon Strachan v The Gleaner Company Limited and Another** [2005] UKPC 33; (ii) **Dorothy Vendryes v Dr Richard Keane and Karene Keane** [2011] JMCA Civ 15; (iii) **Hon Gordon Stewart OJ v Senator Noel Sloley Sr et al** [2013] JMCA App 4; and (iv) **Anthony Hendricks v Commissioner of Customs** [2018] JMCA Misc 1.

[32] **Leymon Strachan v The Gleaner Company Limited and Another** was cited by Apple mainly in an effort to illustrate the difference between an irregularity and a

nullity. Reliance was placed primarily on the following dicta at paragraphs 25 and 26 of the judgment:

**“25. The distinction between orders which are often (though in their Lordships' view somewhat inaccurately) described as nullities and those which are merely irregular is usually made to distinguish between those defects in procedure which the parties can waive and which the Court has a discretion to correct and those defects which the parties cannot waive and which give rise to proceedings which the defendant is entitled to have set aside *ex debito justitiae*...**

26. ... Upjohn LJ distinguished between defects in proceedings which could and should be rectified by the Court and those which were so fundamental that they made the whole proceedings a nullity. **These included (i) proceedings which ought to have been served but which have never come to the notice of the defendant at all; (ii) proceedings which have never started at all owing to some fundamental defect in issuing them; and (iii) proceedings which appear to be duly issued but fail to comply with a statutory requirement. These are all examples of orders of the court made in proceedings which are nullities because they have not been properly begun or served. None of them is an example of a case where an order has been made in proceedings which have been properly begun and continued...** (Emphasis added by Apple)

[33] The case of **Dorothy Vendryes v Dr Richard Keane and Karene Keane** was referred to mainly for its statement of the following:

“[31] Although a judge, under rule 26.2, is clothed with authority to make orders on his own initiative, the procedure adopted by the learned judge would not have accorded him a right to have proceeded as he had done. He would not have been authorized to employ case management powers at the time...”

....

[34] The general words of rule 26.9 cannot be extended to allow the learned judge to do that which would not have been possible. A judge can only apply a rule so far as he is permitted. The claim form was a nullity. It cannot be restored by an order of the court. The service of the requisite documents accompanying the claim form is a mandatory requirement..”

[34] The authority of **Hon Gordon Stewart OJ v Senator Noel Sloley Sr et al** was relied on in support of the argument that the overriding objective cannot be used to circumvent the plain terms of a provision in the CPR.

[35] The remaining cases were intended to be used to reinforce Apple’s contention as to the effect of a procedure which amounted to a nullity.

### **For Swatch**

[36] Not unnaturally, Swatch has tried to persuade the court to see matters in an entirely different light. It has sought, for example, to distinguish the case of **Dorothy Vendryes v Dr Richard Keane and Karene Keane** from the instant case by pointing out that in that case, no question arose as to the validity of the claim form itself. For example, for one, Swatch quotes the following words of Morrison JA (as he then was) at paragraph [32] of the judgment of **B & J Equipment Rental Limited v Joseph Nanco**

[2013] JMCA Civ 2:

“...no question arose as to the validity of the claim form itself and the only matter for consideration was the legal effect of the respondent’s failure to serve all the documents required by rule 8.16(1) to be served with the claim form.”

[37] A second basis on which Swatch seeks to distinguish **Dorothy Vendryes v Dr Richard Keane and Karene Keane** from the instant case is that, on Swatch's contention, that case treated with a rule (rule 8.16(1) of the CPR) which was a mandatory provision; whereas, neither the wording of rule 60 or 62 of the CPR, which are the two rules in issue, can fairly be deemed to be mandatory. The word "must" is not used in the rules that are relevant to this case, it was submitted, whilst, in contrast, it was used in the relevant rule in **Dorothy Vendryes v Dr Richard Keane and Karene Keane**. This point about the nature of the language used in the various rules, is also a basis for Swatch seeking to distinguish from the instant case, the case of **Anthony Hendricks v Commissioner of Customs**. The relevant provision in that case used the word "shall". The use of the words "must" and/or "shall" have the effect of removing a judge's discretion, it was contended. However, those words are not used in any of the rules in the instant case, and so the learned judge had a discretion to deal with the matter in the way that he did (the argument ran).

[38] In seeking to bolster its submissions, Swatch also relied on dicta in the case of **BUPA Insurance Limited (trading as BUPA GLOBAL) v Roger Hunter** [2017] JMCA Civ 3, per McDonald-Bishop JA, as meaning that, even if a rule uses mandatory language, that does not have the absolute effect of removing the discretion of a judge to deal with a matter pursuant to rule 26.9 of the CPR. Among the dicta of McDonald-Bishop JA that were relied on was the following dictum at paragraph [55] of the judgment:

"It is clear to me, in the light of rule 26.9, that the framers of the CPR did not intend for every breach of the rules to be taken as invalidating the proceedings and that would be so

whether or not the particular rule that is engaged is stated in mandatory terms. Once the consequence for breach of the rule is not provided for by the CPR or otherwise, then consideration must be given to the provisions of rule 26.9 in determining the way forward in the proceedings.”

[39] Another case relied on by Swatch is **Eldemire v Eldemire** (1990) 38 WIR 234, with dicta therein by Lord Templeman at page 238, paragraph h as follows:

“As a general rule, an originating summons is not an appropriate machinery for the resolution of disputed facts. **The modern practice varies. Sometimes when disputed facts appear in an originating summons proceeding, the court will direct the deponents who have given conflicting evidence by affidavit to be examined and cross-examined orally and will then decide the disputed facts. Sometimes the court will direct that the originating summons proceedings be treated as if they were begun by writ and may direct that an affidavit by the applicant be treated as a statement of claim. Sometimes, in order to ensure that the issues are properly deployed, the court will dismiss the originating summons proceedings and leave the applicant to bring a fresh proceeding by writ. In general, the modern practice is to save expense without taking technical objection, unless it is necessary to do so in order to produce fairness and clarification.**” (Emphasis added by Swatch)

[40] Swatch further submitted that, as rule 60.2 of the CPR is not absolute and is silent on the consequence of its breach, consideration must be given to rule 26.9 as the learned judge did.

## **Discussion**

[41] In giving reasons orally, the learned judge made reference to rule 26 of the CPR. Swatch has submitted that it is specifically rule 26.9 of the CPR that empowered the

learned judge to do as he did. The learned judge's written reasons, now to hand, confirm that it was pursuant to rule 26.9 that he acted. That rule reads as follows:

**"General power of the court to rectify matters where there has been a procedural error**

26.9 (1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order.

(2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.

(3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.

(4) The court may make such an order on or without an application by a party."

[42] So, the takeaway from rule 26.9 is this: not every procedural error or act of non-compliance brings about a nullity; and, in some cases, the court may do what is necessary to regularize matters. There is, however, a threshold requirement: that is, that, in order for the court's power to regularize matters to be triggered, there must be no sanction specified for the procedural error or non-compliance. That threshold requirement is specified in rule 26.9(1).

[43] Therefore, in seeking to ascertain whether the learned judge was correct in relying on rule 26 (and whether rule 26.9 empowered him to act as he did) it is necessary to first examine rule 60.2 of the CPR, pursuant to which the originating process (that is, the fixed date claim form) ought to have been filed. Rule 60.2 reads as follows:

## **“How to appeal to the court**

- 60.2 (1) An appeal to the court is made by issuing a fixed date claim form in form 2 to which must be annexed the grounds of appeal.
- (2) The appellant’s grounds of appeal must state -
- (a) the decision against which the appeal is made;
  - (b) the name of the tribunal or person whose decision is being appealed;
  - (c) the enactment enabling an appeal to be made to the court;
  - (d) the facts found by that tribunal; and
  - (e) the grounds of the appeal identifying –
    - (i) any finding of fact; and
    - (ii) any finding of law, which the claimant seeks to challenge.
- (3) The date for the first hearing must not be less than 28, nor more than 56, days after issue of the claim form.”

[44] It is also useful to look at rule 60.5, which deals with the requirement for service of the claim form, the terms of which rule are set out hereunder:

### **“Time within which claim form must be served**

- 60.5 The claim form and grounds of appeal must be served within 28 days of the date on which notice of the decision was given to the claimant.”

[45] It will be seen that neither of these provisions, nor any other provision of part 60, nor any other provision in the CPR (nor any practice direction or court order of which the court is aware), prescribes a penalty or sanction for non-compliance with rules 60.2 or 60.5. By virtue of this, and looking only at the CPR requirements, the threshold

requirement stated in rule 26.9(1) would therefore have been met, entitling the learned judge to make orders setting matters right. However, it will also be useful to consider some of the cases on which the parties place most weight.

### **A consideration of some of the authorities cited**

[46] In **Dorothy Vendryes v Dr Richard Keane and Karene Keane**, this court allowed an appeal against an order of a judge of the Supreme Court, that had: (i) set aside a default judgment entered, in relation to an agreement for the sale of land; and that had (ii) entered summary judgment on the basis that the appellant had no real prospect of success. The error of the learned judge in that case (this court found) was in proceeding to case management and summary judgment on an amended claim and particulars of claim, which had not been served. This court agreed with the learned judge that compliance with rule 8.16 was mandatory and so the default judgment entered in those circumstances of non-compliance had to be set aside *ex debito justitiae*. The non-compliance arose from the failure to serve with the claim form, forms of acknowledgement of service and defence; and prescribed notes for defendants, pursuant to rule 8.16(1) a, b and c, respectively. Paragraphs [27], [32] and [34] of the judgment set out this court's dicta (per Harris JA) that are of most relevance to this case. They read as follows:

“[27] The claim form upon which the learned judge proceeded lacked validity, in that it was not in compliance with rule 8.16(1). It would have been a nullity and ought not to have been acted upon...”

...

[32] ...The learned judge applied the correct rule in setting aside the judgment. Compliance with rule 8.16 (1) was mandatory. The default judgment was set aside under rule 13. 2 (1) which compelled the learned judge to do so, it being wrongly entered.”

...

[34] The general words of rule 26.9 cannot be extended to allow the learned judge to do that which would not have been possible. A judge can only apply a rule so far as he is permitted. The claim form was a nullity. It cannot be restored by an order of the court. The service of the requisite documents accompanying the claim form is a mandatory requirement. The amended pleadings must be served before any further steps can be taken in the proceedings.”

[47] It will be seen that the facts and circumstances of that case are different from those of the instant appeal, and that the two cases are not on all fours with each other. In **Dorothy Vendryes, v Dr Richard Keane and Karene Keane**, the court’s ruling (using the interpretation placed on it by Apple) is more easily understood given considerations of fairness in having the important accompanying documents served with the initiating or originating document, in some cases on persons who might be unfamiliar with litigation and its requirements. On the other hand, the antecedent history of the instant appeal saw the parties, represented by attorneys-at-law, in hotly-contested proceedings before the Registrar, whose decision on the matter runs to some 87 paragraphs. Swatch’s submission on this issue also has merit – that is, although there were some statements in **Dorothy Vendryes, v Dr Richard Keane and Karene Keane** that the claim form itself was invalid, that was not a specific issue in the case. Additionally, in the case of **B & J Equipment Rental Limited v Joseph Nanco**, Morrison JA (as he then was) in his judgment, questioned whether **Dorothy Vendryes**,

**v Dr Richard Keane and Karene Keane**, has been properly interpreted, given the issues in the case – namely, (i) if proceeding to case management and summary judgment on amended pleadings not served, was irregular; and (ii) if the dictum concerning whether the claim form was a nullity attributed to Harris JA, was not said obiter. Morrison JA, at paragraphs [36] to [38] of **B & J Equipment Rental Limited v Joseph Nanco**, analysed the case of **Dorothy Vendryes v Dr Richard Keane and Karene Keane** as follows:

“[36] Taken in the context which I have attempted to describe, it seems plain that what Harris JA was responding to, and accepting, in this passage, was the appellant’s submission that Sykes J erred in proceeding to case management and an assessment of whether there was a defence with a real prospect of success on the basis of the claim form and particulars of claim as originally filed, they having subsequently been amended. As Hodson LJ said in *Warner v Sampson* (at page 129) ‘[o]nce pleadings are amended, what stood before amendment is no longer material before the court and no longer defines the issues to be tried’. It is in this sense, it seems to me, that, as Harris JA said, the original claim form “lacked validity”. It is true that the learned judge went on to link the invalidity of the claim form in explicit terms to its non-compliance with rule 8.16(1), but I cannot, naturally with the greatest of respect, regard this as anything but a mistaken reference, since there is nothing in rule 8.16(1) which speaks to the conditions of validity of a claim form.

[37] Indeed, it is difficult to see why, as a matter of principle, it should follow from a failure to comply with rule 8.16(1), which has to do with what documents are to be served with a claim form, that a claim form served without the accompanying documents should itself be a nullity. While the purported service in such a case would obviously be irregular, as Sykes J and this court found in *Vendryes*, I would have thought that the validity of the claim form itself would depend on other factors, such as whether it was in accordance with Part 8 of the CPR, which governs how to start proceedings. It is equally difficult to see why a claimant, who has failed to effect proper service of a claim

form because of non-compliance with rule 8.16(1), should not be able to take the necessary steps to re-serve the same claim form accompanied by the requisite documents and by that means fully comply with the rule.

[38] Accordingly, given that the validity of the claim form as such was not an issue before the court in Vendryes, I can only regard the statements that the claim form served in breach of rule 8.16(1) was a nullity as obiter, and not part of the court's reason for its decision in that case. In my view, there is therefore no basis to conclude in the instant case that the claim form is a nullity because it was not served with all the documents required to accompany it by rule 8.16(1)." (Emphasis added)

[48] I accept as well Swatch's submission that, by the absence of the use of mandatory words such as "must" and "shall" in relation to how the appeal is to be initiated, a discretion remained in the learned judge in this case to set matters right, and that this is a basis for distinguishing **Vendryes** from the instant case. Indeed, all that rule 60.2 states is that: "An appeal to the court is made by issuing a fixed date claim form..." (Emphasis added)

[49] However, even if words mandatory on their face, such as "must" and "shall", had been used in relation to the commencing of an appeal in rule 60.2; (and even though the word "must" is used in rule 60.5 in respect of service of the appeal document), the dictum of McDonald-Bishop JA at paragraph [55] in **BUPA Insurance Limited (trading as BUPA GLOBAL) v Roger Hunter** must be remembered and addressed. Its substance, it will be recalled, is this: mandatory language in a rule will not automatically or necessarily preclude a judge from relying on rule 26.9. The use of that rule will be triggered once no sanction is specified for the breach of or non-compliance with a rule. Therefore, the learned judge in this case was empowered by this rule not only to make

an order that the matter should have proceeded as if commenced by fixed date claim form; but also to cure the late service of the notice of appeal. Rule 26.9(3) gives a judge a wide discretion to “put matters right”. And, as rule 26.9(4) makes expressly clear, a judge may make whatever orders the particular situation calls for: “(4) ...on or without an application by a party”. No application for extension of time or otherwise was therefore necessary for the learned judge to have made the orders that he did.

[50] Like the learned judge (as he stated at paragraph [5] of his written reasons), I can discern no prejudice or disadvantage to Apple by having the matter proceed to be dealt with in substance. This is so especially where (as the learned judge also found at paragraph [4] of his reasons) the appeal document filed by Swatch contains all the information required by rule 60.2 (set out fully in paragraph [44] hereof) to be stated in grounds of appeal to be attached to the fixed date claim form. The only real discernible difference between the contents of the fixed date claim form and grounds of appeal required by rule 60.2(2) and the “notice of appeal” filed in this case is to be found in the title of both documents.

[51] In fact, looked at from the perspective of the attorneys-at-law involved in the matter, the breaches in this case could reasonably be seen as relatively minor ones which Apple could have waived.

[52] The modern relevance of the dicta relied on by Apple in the case of **Leymon Strachan v The Gleaner Company Limited and Another**, has also come in for question in a relatively-recent decision of the Privy Council, as will be seen in paragraphs

24 and 26 of **Causwell v The General Legal Council (Ex parte Elizabeth Hartley)** [2019] UKPC 9. In that case, the following comments were made in respect of the case of **In re Pritchard** [1963] Ch 502, on which Apple's quotations from **Leymon Strachan v The Gleaner Company Limited and Another** were based:

"24. Both the Court of Appeal and the Respondent placed reliance, in support of the view that the unauthorised initiation of a complaint was a complete nullity, upon the decision of the Court of Appeal in *In re Pritchard* [1963] Ch 502. That was (to modern eyes) a hard case in which proceedings commenced by Originating Summons under the Inheritance (Family Provision) Act 1938 were issued out of a District Registry rather than, as required by the then Rules of the Supreme Court, The Central Office. The Court of Appeal held that this was a fundamental defect which could not be put right by a transfer of the proceedings or a waiver by the defendants...

...

26. None of the other authorities relied upon by the Court of Appeal appear to the Board to afford material assistance. *Leymon Strachan v The Gleaner Company Ltd* [2005] UKPC 33; [2005] 1 WLR 3204 was a decision of the Board which, **in passing**, referred with approval to Upjohn LJ's categorisation of nullity in *In re Pritchard*. But the case was, as Lord Millett pointed out at para 27, nothing to do with the validity or otherwise of the commencement of proceedings, but rather whether an order of a judge of the Supreme Court made without jurisdiction is a nullity." (Emphasis added)

[53] These comments, along with the dicta in the cases that follow, raise doubt as to the relevance of **In Re Pritchard** to modern litigation. The authorities considered in the following paragraphs may reasonably be taken to suggest that the approach taken in **In Re Pritchard**, valuable though it might have been in its time, might now be out of step with modernity and could perhaps safely be regarded as a relic of a bygone era.

[54] Lord Templeman's guidance in **Eldemire v Eldemire**, as to the "modern practice" being to avoid taking technical objection, which was given in 1990, would apply equally, if not *a fortiori*, to litigation today. That approach, suggested by the learned law lord, commends itself strongly to me. In fact, the English court of Appeal as long ago as near the turn of the last century, in the case of **In the Matter of an Arbitration between Coles and Ravenshear** [1907] 1 KB 1, observed at page 4, per Collins MR, as follows:

"Although I agree that a court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case."

[55] More recently, in dealing with an appeal from Mauritius, the Judicial Committee of the Privy Council gave uncharacteristically-strong and direct advice to that country in respect of a line of authorities that had upheld technical objections in respect of a jurisdictional point. In the case of **Margaret Toumany and John Mullegadoo v Mardaynaiken Veerasamy** [2012] UKPC 13, the Board considered the treatment by the Mauritius Supreme Court of a preliminary objection that had been raised on technical grounds. At paragraph 18 of the Board's advice, the objection is succinctly stated: "The bald point taken was that certain of the formal Court documents launching this appeal erroneously referred to 'The Supreme Court of Mauritius, Court of Civil Appeal'". In granting conditional leave to the appellant to appeal to the Privy Council, to which the appellant was entitled as of right, the Supreme Court of Mauritius indicated that, in addition to granting conditional leave as of right, it also did so: "... in view of the state of

our jurisprudence in respect of appeals which have been either lodged before or directed to the wrong jurisdiction..." (see paragraph 20 of the judgment).

[56] The following excerpts from paragraphs 20, 21, and 23 of the judgment are instructive. They read as follows:

"20.... Should this appeal to the Supreme Court have been dismissed on jurisdictional grounds as it was? That is the critical first question now for decision by the Board and we should be dissimulating were we to answer it other than by a categorical and resounding NO.

21. The Board is aware that this is by no means the only case where the Court has adopted a highly technical approach to the jurisdictional point here raised. Indeed a series of such cases is rehearsed in the Supreme Court's judgment, dated 28 April 2011, given by the Chief Justice and the Senior Puisne Judge in *Begue v The Mauritius Union Assurance Co Ltd* [2011] SCJ 104, a judgment which itself dismissed an appeal – from a judge's award of damages in a fatal accident claim – because the notice of appeal bore the heading 'In the Supreme Court of Mauritius' instead of, as the subsequent proeipce did, 'In the Supreme Court of Mauritius, Court of Civil Appeal'.

....

23. The Board has sought in the past to encourage the courts of Mauritius to be less technical and more flexible in their approach to jurisdictional issues and objections – see in particular *Woventex Ltd (In Receivership) v J I Benichou and Others* [2005] PRV 27 (para 17 of Lord Walker's judgment) and *Fun World Co Ltd v The Municipal Council of Quatre Bornes* [2008] PRV 46 (paras 24 and 25 of Lord Mance's judgment)..." (Emphasis added)

[57] Even more instructive, however, are paragraphs 24 and 25 of the judgment of the Board, whose guidance, expressed in robust language, must be set out in full. Said the Board:

"24. Let the Board now state as emphatically as it can its clear conclusion on this appeal. In cases like these, where mistakes appear in the documentation as to which particular appellate jurisdiction of the Supreme Court has been invoked, those mistakes should be identified and corrected (without penalty unless they have genuinely created a problem) as soon as practicable and the Court should proceed without delay to deal with the substantive issues raised before it on the merits.

25. The line of authority represented by the Supreme Court's decision in the present case constitutes a blot on Mauritius's generally estimable record for the fair administration of justice. It must not be allowed to continue." (Emphasis added)

[58] In my view, there are similar bases for distinguishing the other cases cited by Apple in support of this appeal as have been discussed in respect of **Dorothy Vendryes, v Dr Richard Keane and Karene Keane.**

[59] Another consideration as well is that the error in beginning the appeal would not have been the fault of Swatch, but of its attorneys-at-law. As was observed by Lord Denning in the case of **Salter Rex & Co v Ghosh** [1971] 2 All ER 865, 866: "We never like a litigant to suffer by the mistake of his lawyers". Had rule 26.9 not permitted the learned judge to proceed as he did, then Swatch would have been penalized as a result of its lawyers' mistake. However, with the powers available to him under rule 26.9, the learned judge spared Swatch from this consequence.

### **Other submissions**

[60] Apple made other submissions in relation to the substance of the appeal. However, having regard to how the foregoing issues have been dealt with, it is, in my view, unnecessary to consider those issues, though they will no doubt make for interesting discussion at the hearing of the substantive appeal.

[61] In the result, I propose that the appeal be dismissed with costs to the respondent and that the matter be remitted to the Commercial Division of the Supreme Court for a new date for the hearing of the appeal (originally set for 25 April 2019) to be fixed; and for any other order to be made that might be conducive to the hearing of the appeal. For the avoidance of doubt, I also propose that the following orders of Batts J be affirmed:

- “1. The matter will continue as if commenced by Fixed Date Claim Form pursuant to Rule 26.9.
2. Costs thrown away to the respondent to be taxed if not agreed.
3. The Notice of Appeal and the grounds filed on the 5<sup>th</sup> September 2018 will stand.”

#### **P WILLIAMS JA**

[62] I too have read the draft judgment of my brother F Williams JA and agree with his reasoning and conclusion. I have nothing to add.

#### **PHILLIPS JA**

#### **ORDER**

1. Appeal dismissed.
2. The following orders of Batts J affirmed:

“1. The matter will continue as if commenced by Fixed Date Claim Form pursuant to Rule 26.9.

2. Costs thrown away to the respondent to be taxed if not agreed.

3. The Notice of Appeal and the grounds filed on the 5<sup>th</sup> September 2018 will stand.”

3. Matter remitted to the Commercial Division of the Supreme Court for a new date to be fixed for the hearing of the appeal, and for any other order to be made that is conducive to the hearing of the appeal.

4. Costs of this appeal to the respondent to be agreed or taxed.