[2012] JMCA Civ 64

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 57/2012

BETWEEN	**MORRIS ASTLEY**	**APPELLANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**1ST RESPONDENT**
AND	**THE BOARD OF MANAGEMENT OF THE THOMPSON TOWN HIGH SCHOOL**	**2ND RESPONDENT**

Written submissions filed by K. Churchill Neita & Co for the appellant

Written sumissions filed by the Director of State Proceedings for the respondents

27 December 2012

PROCEDURAL APPEAL

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

IN CHAMBERS

MORRISON JA

Background

[1] The appellant is the claimant in claim no. HCV 03552/2006 and the respondents are the defendants. This is an appeal against the decision of McIntosh J, made on 25

April 2012, to refuse the appellant's application for relief from sanctions imposed by the order of Beckford J made on 1 March 2011. The application was made pursuant to the provisions of rule 26.8 of the Civil Procedure Rules 2002 (CPR).

[2] The matter arises in the following way. On 6 October 2006, the appellant, who was at the material time an 18 year old student at the Thompson Town High School in the parish of Clarendon, filed an action against the respondents arising out of the alleged negligence of Mr Trevor Wright, who was at the time the woodwork teacher at the school.

[3] The appellant alleges that on 19 May 2004 he suffered serious injuries to his hand while attempting to carve a picture frame, using an electrical circular saw, during the course of a woodwork class supervised by Mr Wright. The accident which resulted in his injuries were, the appellant claims, occasioned by the failure of Mr Wright and the second named respondent to ensure that, among several other things, the saw was reasonably safe for use by students, when they knew or ought to have known that it was defective and inherently dangerous by reason of its age and state of disrepair; to provide protective wear to students; to ensure that teachers comply with proper safety procedures; and to provide a proper system of supervision in class. As a result, the appellant alleges, the respondents exposed him "to a risk of damage or injury of which they knew or ought to have known".

[4] The respondents for their part deny the allegations of negligence and contend that the accident and the appellant's injuries were caused or contributed to by his own

negligence and wilful disobedience of the reasonable orders of Mr Wright, his teacher. Further, the respondents contend, the appellant voluntarily consented to accept the risks involved in the circumstances in which the accident occurred and accordingly agreed to waive any claim in respect of injury or damage occasioned to him by the alleged conduct of Mr Wright and the second named respondent.

[5] By an application filed on 1 April 2010, the appellant sought an order dispensing with automatic mediation, pursuant to rule 74.3(3) of the CPR, but by an order made on 24 June 2010, Rattray J refused this application and ordered that the parties should go to mediation. The learned judge also made an order fixing a case management conference for hearing on 12 January 2011, pre-trial review for 25 July 2011 and the trial of the action for 21 and 22 September 2011.

[6] The parties duly attended a mediation session on 15 September 2010. However, they were unable to arrive at an agreement and the case management conference scheduled for 12 January 2011 duly took place as scheduled. Neither the appellant, who was represented by counsel, nor Mr Wright was present at the case management conference and Brooks J (as he then was) ordered that they should attend at the pre-trial review scheduled for 25 July 2011. The learned judge also made a number of usual case management orders, requiring the parties to, among other things, (i) file and exchange witness statements by 31 March 2011; (ii) file an agreed statement of facts and issues on or before 21 April 2011 (failing which each party should file a statement of facts and issues on or before 6 May 2011); and (iii) file their respective listing questionnaires by 11 July 2011.

[7] By the time the pre-trial review came on for hearing before Lawrence-Beswick J on 25 July 2011, the respondents had complied with all the case management orders, having filed their witness statements (in sealed envelopes) on 30 March 2011, their statement of facts and issues on 6 May 2011 and their listing questionnaire on 6 June 2011. Mr Wright and one other of the respondents' witnesses were present at the pre-trial review, but the appellant, although again represented by counsel, was not. As at that date, the appellant, although he did file his list of documents on 21 January 2011, had not complied with any of the case management orders, thus obliging his counsel to apply for an extension of time in which to comply with the orders. Lawrence-Beswick J accordingly vacated the trial dates of 21 and 22 September 2011, extended the time for compliance with the case management orders to 16 September 2011 and fixed new trial dates of 18 and 19 June 2012. The pre-trial review was rescheduled for 1 March 2012 and the appellant was ordered to pay the respondents' costs in the agreed sum of $10,000.00.

[8] The appellant filed his statement of facts and issues in time on 1 September 2011, but his witness statement was not filed until 6 October 2011 and his listing questionnaire until 28 October 2011. However, on 17 January 2012, the appellant did file notice of an application for permission to allow amended particulars of claim filed on his behalf on that same date "to stand as a proper filing".

Beckford J's order

[9] It is against this background that the rescheduled pre-trial review came on for hearing before Beckford J on 1 March 2012. The respondents were represented by counsel, but neither the appellant nor his counsel was present. The learned judge therefore made an order, (i) striking out the appellant's claim and statement of case for his failure to attend the pre-trial review in person and/or to be represented by his attorneys-at-law on the record (rule 27.8(5)(a)), and his failure to comply with the case management orders made by Brooks J on 12 January 2011 and the pre-trial review orders made by Lawrence-Beswick J on 25 July 2011 (rule 26.3(1)(a)); and (ii) striking out the notice of application for court orders dated 17 January 2012. Costs in the claim were awarded to the respondents.

The application for relief from sanctions

[10] By notice of application filed on 6 March 2012, the appellant moved the court for relief from the sanctions imposed by Beckford J on 1 March 2012, on the following grounds:

> "i. That the application for relief from sanctions is made promptly vide **rule 26.8(1)**;
>
> ii. The failure to attend the Pre-Trial Review was not intentional vide **rule 26.8(2)(a)**;
>
> iii. There is a good explanation for the failure to attend the Pre-Trial Review vide **rule 26.8(2)(b)**;
>
> iv. The Claimant has generally complied with all other relevant rules, practice directions, orders, and directions vide **rule 26.8(2)(c)**;

v. It is in the interests of justice that the claim be re-instated vide **rule 26.8(3)(a)**;

vi. The trial date can still be met if relief is granted vide **rule 26.8(3)(d)**;

vii. The effect of the granting of relief would not be prejudicial on the Defendant. That the failure to grant relief would be highly prejudicial to the Claimant vide **rule 26.8(3)(e)**;"

[11] The application was supported an affidavit sworn to and filed on 15 March 2012 by Mr Oraine Nelson, attorney-at-law of the firm of K. Churchill Neita & Co, attorneys-at-law on the record for the appellant. Though lengthy, I cannot avoid reproducing the affidavit virtually in full, from paragraph six to the end:

"6. That the circumstances surrounding my absence relate to my having matters before Court # 12, Court #2, and the Resident Magistrates' Court for the Corporate Area – criminal division.

7. That in this respect I attended the matter of Harold Spencer v Gary Robottom and ors (Claim No HCV 3361/2009) was scheduled for trial on the 29th February, 2012 and the 1st March, 2012. That exhibited hereto, marked **"ON1"** for identification, is a copy of the Case Management Conference Orders.

8. That on a review of the Court's list on the day of the 29th February, 2012 so as to ascertain the tribunal and number court before which the matter would be placed I observed that the matter was not on the list for the 29th.

9. Further, that I observed that Mr Justice D. Frazer [sic] was sitting in Court 12 on the 1st March, 2012. Accordingly, I attended Court 12 on the 1st March, 2012 with a view to having the matter heard whereupon I was advised that the court had put off Trial matters since the judge was sitting in assessment court. That the said information was provided me [sic] by the judge's clerk and to whom I indicated that in the circumstances of the matter not appearing on the list I wished to address the bench so as to make the reasons for the matter not proceeding clear to the Claimant.

10. That as a part-heard assessment of damages was being heard at the material time I had to wait for a convenient time before I could address the Court.

11. That while waiting I took the opportunity to attend on court 2 before His Lordship Mr Justice Gayle in respect of whom I had a criminal matter set for Trial – that being R v Dwayne Malabre and Kevin Malabre. That the matter, though having not proceeded to trial as expected, was not heard until approximately 10:30 a.m. or shortly thereafter.

12. That subsequent to same I returned to Court 12 to revisit the matter of Spencer v Robottom and ors.

13. Thereafter I proceeded to the Half Way Tree criminal court and in respect of which I had a Preliminary Enquiry in the matter of R v Fong, Grandison, Walker and ors. in a matter of murder.

14. That it was subsequent to leaving Half Way Tree Resident Magistrates' Court and returning to the office that it was brought to my attention that the matter of Astley Morris v The Attorney General was set for the said date and had not been attended to by Counsel from our chambers.

15. That it was never on account of deliberate or wilful refusal to attend the matter that I was absent. Rather, at all material times I was absent having been between several courts on the particular day and in the circumstances of trying to ensure that all matters were dealt with as also the relative timing of when each matter was eventually addressed by the respective courts that I failed to remember, wholly on account of inadvertence, that this matter was for Pre-Trial Review.

16. That as it pertains to the Claimant himself his absence from the proceedings was on account of my having advised him that he need not appear for the Pre-Trial Review given my belief that he was present at the Case Management Conference.

17. That it was in no way in contempt for the Court's order made at Case Management Conference that he attend in person. Indeed; it was not until I was apprised of the fact that the matter was struck out and the reasons therefor that I revised the Case Management Conference Orders and observed that it was specifically stated therein that the Claimant attend at the Pre-Trial Review. Further, as this was the second Pre-Trial

Review; the first having been on the 25th July, 2011 and at which I was not present I verily did believe that the Claimant was present on that occasion as well. That in this respect as the first Pre-Trial Review was adjourned to facilitate an extension of time for compliance with certain orders I verily did believe that the adjourned hearing would specifically be in relation to ascertaining compliance and accordingly the Claimant's attendance would not be necessary.

18. That as it relates to compliance with the Orders of the Court at Case Management Conference and Pre-Trial Review the Claimant made disclosure prior to the date set for same. That by so doing the Claimant clearly indicated his intention to put before the court, to include the Defendant, all the necessary documentary evidence that would be relied on in respect of his claim. That same was indicative of the Claimant's bona fides and appreciation for the expedition of the claim.

19. That while it is conceded that the Claimant's Witness Statement, Statement of Facts and Issues, and Listing Questionnaire were filed out of time with the Case Management Conference Orders and with the orders at Pre-trial Review for extension it is humbly submitted that same was not inordinate or contemptuous of the Court proceedings. In this respect the Claimant was permitted an extension until September 16, 2011 to comply with the remaining orders. That the Claimant thereafter filed, respectively, his Witness Statement on October 6, 2011; Statement of Facts and Issues on September 1, 2011 and his Listing Questionnaire on October 28, 2011.

20. That in respect of the Witness Statement immediate steps were taken, subsequent to the Pre-Trial Review, to have the Claimant attend the office to give instructions with respect to the preparation of same. That as the Claimant resides in rural Jamaica and is at present a student he has the twin challenges of balancing travel between home, school, and our offices to give instructions in respect to the matter as well as the financial constraints of travelling the several distances involved. That accordingly subsequent to taking oral instructions from him same had to be sent by way of e-mail for his confirmation and in respect of which he recommended amendments. That same were done and re-sent by e-mail and duly filed upon retrieval from Claimant.

21. That I aver that the Statement of Facts and Issues while not necessitating the immediate receipt of instructions from the Claimant to prepare same was filed late by inadvertence. That I aver that similar considerations resulted in the List of Documents being filed late.

22. That it has always been the Claimant's intention of pursuing the claim and having same adjudicated on by the Court. That in this regard the Claimant had filed an application for permission for amendment to his Particulars of Claim.

23. That in all the circumstances the Defendant will not be prejudiced by the granting of the order for relief from sanctions herein as he will be in the same position as he was before. That conversely the Claimant will be severely prejudiced.

24. That the application for relief from sanctions herein has been made promptly and in any event as soon as I was apprised of the fact that the Claimant's Statement of Case were struck out and I had procured the Minutes of Order to determine the reason thereofor.

25. That the foregoing circumstances establish that the failure to file the documents within the stipulated time was not intentional, and also evince a good explanation in respect of same. That the Claimant has otherwise complied with all orders, directions, practice directions, and relevant rules.

26. That the late filing of documents was remedied in a reasonable time in that same were filed ahead of the date for the adjourned Pre-Trial Review and ahead of the Trial date. That accordingly the Trial date may and can still be met were relief to be granted.

27. That the Claimant is willing to pay the Defendant's costs for the hearing of the application for relief from sanctions herein and recognizes and accepts that there are no exceptional circumstances that would dictate otherwise.

28. Wherefore I humbly pray that this Honourable Court will grant the Orders as prayed herein."

[12] It will be seen from this affidavit that, in it, Mr Nelson accepts full responsibility – as a result of "inadvertence" and misunderstanding on his part of all that had gone before - for the various failures of the appellant to comply with previous orders of the court, and for his own absence and that of the appellant from the pre-trial review before Beckford J on 1 March 2012. As regards the appellant's absence, in particular, Mr Nelson attributed this to his having advised him that he need not appear at the pre-trial review, "given my belief that he was present at the Case Management conference".

[13] Mr Nelson's affidavit was met by an affidavit sworn to and filed on 11 April 2012 by Ms Latoya Bernard, an attorney-at-law attached to the Attorney-General's Chambers. In that affidavit, Ms Bernard rehearsed the history of the matter and concluded with the prayer that the court "refuse the orders sought by the [appellant] and alternatively, to strike out the application, for disclosing no real prospect of success".

[14] As already indicated, when the application for relief from sanctions came on for hearing on 25 April 2012, McIntosh J refused to grant the orders sought and awarded costs to the respondents to be agreed or taxed. Although the court has not been provided with any written reasons for the judge's decision, the parties appear to be agreed that he did indicate that the appellant had in fact filed the incorrect application, in that, what ought to have been filed was an application to set aside Beckford J's order, rather than the application for relief from sanctions which was in fact made.

The grounds of appeal and the submissions

[15] By permission to appeal given by the learned judge (subject to a condition that is now no longer relevant), the appellant filed notice of appeal on 2 May 2012, on the following grounds:

> "(i) The application as filed "Notice of Application for Relief from Sanctions" was the correct application;
>
> (ii) The Claimant's application supported by its Affidavit Evidence deponed to by Oraine Nelson came within the principles of rule 26.8 for the relief from sanctions and did accordingly reveal a basis for granting relief as prayed;
>
> (iii) There was no substantial risk of a fair trial being lost to the Defendant;
>
> (iv) The default of the Claimant was not intentional;
>
> (v) There being no evidence that Counsel was contumacious the learned judge wrongly exercised his discretion or wrongfully failed to exercise his discretion in favour of allowing the appellant relief from sanctions;"

[16] The appellant supported the grounds of appeal with detailed written submissions. It was submitted firstly that the appellant had made the correct application to the court by applying under rule 26.8 for relief from sanctions and that, had that application been granted, Beckford J's order would have been thereby automatically set aside. The appellant having satisfied the requirements of rule 26.8(1) and (2), it was incumbent on the judge to have gone on to consider the "checklist of matters" set out in rule 26.8(3), and, had he done so, it would have been clear that sufficient material had been placed before the court to justify the favourable exercise of

the court's discretion in the appellant's favour. As regards the appellant's absence from the pre-trial review, it was submitted that this was as a result of Mr Nelson having advised him that he need not be present and there was no wilful or intentional default in attending on the part of either the appellant or his counsel. The appellant had "generally complied" with all case management and pre-trial review orders and the refusal of relief in this case would have an "immediate and severe prejudicial effect" on the appellant, but the respondents would not be affected in any way that could not be compensated for by an order for costs. In support of these submissions, the appellant placed reliance on the rules themselves, as well as on ***International Hotels Jamaica Ltd v New Falmouth Resorts Ltd*** (SCCA Nos 56 & 95/03, judgment delivered 18 November 2005) and ***Birkett v James*** [1977] 2 All ER 801.

[17] In written submissions in response, the respondents raised the question at the outset whether McIntosh J had jurisdiction to set aside the order made by Beckford J, "a judge of the same level and jurisdiction". It was submitted (citing in support a passage from the judgment in ***Meehan v Glazier Holdings Pty Ltd*** [2002] NSWCA 22, para. 26) that, while a judge of the Supreme Court is empowered to grant relief from sanctions, judgments and orders such as that made by Beckford J can only be varied or discharged on appeal. But in any event, it was submitted, even if McIntosh J did have jurisdiction to entertain the application to set aside Beckford J's order, he had exercised his discretion correctly, as there was neither any evidence nor a legal basis to allow him to do so in the instant case. In the light of the fact that no good reason had been shown by the appellant or his attorney-at-law for their failure to attend the pre-

trial review and for the non-compliance with the rules, case management and pre-trial review orders, there was no material before him to enable McIntosh J to exercise his discretion to grant relief from sanctions. Setting aside Beckford J's orders would cause prejudice to the respondents and would again delay the trial of the action. As for the position in law, the respondents relied on the provisions of rules 11.18, 27.8(5) and (6) and 39.6, as well as the cases of ***Thelma Edwards v Robinson's Car Mart & Lorenzo Archer*** (SCCA No 81/2000, judgment delivered 19 March 2001), ***David Watson v Adolphus Sylvester Roper*** (SCCA No 42/2005, judgment delivered 18 November 2005) and ***Bowen v Shahine Robinson and others*** (Claim No 2007 HCV 03783, judgment delivered 23 June 2010).

The relevant rules

[18] The application for relief from sanctions was made pursuant to rule 26.8, which provides as follows:

> "(1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –
>
> (a) made promptly; and
>
> (b) supported by evidence on affidavit.
>
> (2) The court may grant relief only if it is satisfied that –
>
> (a) the failure to comply was not intentional;
>
> (b) there is a good explanation for the failure; and
>
> (c) the party in default has generally complied with all other relevant rules, practice directions orders and directions.

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

(a) the interests of the administration of justice;

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

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

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

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

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

[19] Under the general rubric, 'Application to set aside or vary order made in the absence of party', rule 11.18 provides as follows:

"(1) A party who was not present when an order was made may apply to set aside that order.

(2) The application must be made not more than 14 days after the date on which the order was served on the applicant.

(3) The application to set aside the order must be supported by evidence on affidavit showing –

(a) a good reason for failing to attend the hearing; and

(b) that it is likely that had the applicant attended some other order might have been made."

[20] Rule 27.8 deals with attendance at a case management conference or pre-trial review. Rule 27.8(1) requires that where a party is represented by an attorney-at-law, that attorney-at-law or another fully briefed attorney-at-law must attend the case management conference and any pre-trial review and the general rule is that the party or a representative (other than an attorney-at-law) must attend the case management conference (rule 27.8(2)). Particularly relevant is rule 27.8(4)-(6):

> "(4) Where the case management conference or pre-trial review is not attended by the attorney-at-law and the party or a representative the court may adjourn the case management conference or pre-trial review to a fixed date and may exercise any of its powers under Part 26 (Case management – the court's powers) or Part 64 (Costs).
>
> (5) Provided that the court is satisfied that notice of the hearing has been served on the absent party or parties in accordance with these Rules, then
>
> (a) if the claimant does not attend, the court may strike out the claim; and
>
> (b) if any defendant does not attend, the court may enter judgment against that defendant in default of such attendance.
>
> (6) The provisions of rule 39.6 (application to set aside judgment given in party's absence) apply to an order made under paragraph (5) as they do to failure to attend a trial."

[21] And finally, rule 39.6, to which rule 27.8(6) invites reference, provides as follows:

> "(1) A party was not present at a trial at which judgment was given or an order made in its absence may apply to set aside that judgment or order.

(2) The application must be made within 14 days after the date on which the judgment or order was served on the applicant.

(3) The application to set aside the judgment or order must be supported by evidence on affidavit showing –

(a) a good reason for failing to attend the hearing; and

(b) that it is likely that had the applicant attended some other judgment or order might have been given or made."

Discussion

[22] Against the backdrop provided by the parties' submissions and the applicable rules, it appears to me that the following issues arise for consideration in this appeal:

(i) Did McIntosh J have jurisdiction to entertain the appellant's application to grant him relief from sanctions and in particular to set aside Beckford J's order?

(ii) If so, was the application actually made by the appellant the correct one in the circumstances of this case?

(iii) Whether it was or not, did McIntosh J apply the rules correctly?

Issue (i) – jurisdiction

[23] A submission that a judicial officer acted or, as in this case, was invited to act, without jurisdiction naturally attracts attention and compels close scrutiny. In this case, the respondents based themselves for the point on the following dictum of Barwick CJ in ***Bailey v Marinoff*** [1971] HCA 49; (1971) 125 CLR 529, 530, which was treated as

an authoritative statement by the New South Wales Court of Appeal in ***Meehan v Glazier Holdings Pty Ltd*** (per Giles JA, at para. 26):

> "Once an order disposing of a proceeding has been perfected by being drawn up as the record of a court, that proceeding apart from any specific and relevant statutory provision is at an end in that court and is in its substance, in my opinion, beyond recall by that court. It would, in my opinion, not promote the due administration of the law or the promotion of justice for a court to have a power to reinstate a proceeding of which it has finally disposed."

[24] Taken by itself, this is an elegant, albeit wholly unremarkable, restatement of the old general rule that, "except by way of appeal, no court, judge, or master has power to rehear, review, alter, or vary any judgment or order after it has been entered or drawn up respectively, either in the original action or matter, or in a fresh action brought to review such judgment or order" (Halsbury's Laws of England, 3rd edn, vol. 22, para. 1665). The object of the rule is to promote finality in litigation, but it has always been subject to exceptions, some at common law. Thus, for instance, where there is a defect in the proceedings leading up to the judgment or order, which is so serious as to warrant the judgment or order being treated as a nullity, the court can in its inherent juurisdiction set aside its own order, without the need for an appeal (see ***Craig v Kanseen*** [1943] 1 All ER 108, 113, per Lord Greene MR).

[25] Similarly, rules of court have long provided for the setting aside of judgments in certain circumstances, notably where a judgment has been obtained in default of a party's appearance or compliance with a required procedural step, such as the filing of

a statement of case, or non appearance at the trial. This is the field covered in the CPR by Part 13 (setting aside or varying a judgment in default) and rule 39.6 (setting aside a judgment given in a party's absence at trial). Rule 26.8, under which the application for relief from sanctions was made in this case also contemplates that, provided certain conditions are satisfied, a judge of the Supreme Court may indeed vary or set aside, by way of relief from a sanction, an order previously made by a judge of co-ordinate jurisdiction. Rules of court in this jurisdiction, made pursuant to statutory authority, therefore provide clear examples of departures from the general principle embodied in the dictum relied on by the respondents. As a result, their jurisdictional point must necessarily fall away completely.

Issue (ii) – was the application before McIntosh J the correct one?

[26] The appellant's application for relief from sanctions was explicitly made pursuant to rule 26.8. As has been seen, rule 26.8(1) provides that such an application must be made (a) promptly and (b) supported by affidavit. Once these preconditions are met, rule 26.8(2) permits the court to grant relief from sanctions imposed for failure to comply with any rule, order or direction (only) if it is satisfied that (a) the failure to comply was not intentional, (b) there is a good explanation for the failure and (c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions. And rule 26.8(3) sets out the general factors to which the court asked to grant relief from sanctions must have regard, viz, (a) the interests of the administration of justice; (b) whether the failure to comply was that of the party or

his/her attorney-at-law; (c) whether the failure to comply can be remedied within a reasonable time; (d) the impact of granting relief on the actual or likely trial date; and (e) the effect on either party of granting or not granting the application for relief.

[27] The affidavit sworn to by Mr Nelson in support of the application for relief from sanctions, as well as the submissions made in the appeal on behalf of the appellant, all clearly had the requirements of rule 26.8 in mind (see para. [11] above). But it is clear that, one of the bases for the order made by Beckford J striking out his claim and statement of case having been his non-attendance at the pre-trial review, there was another critical dimension to the problem faced by the appellant as a result of the order. That order was expressly made pursuant to rule 27.8(5)(a), which empowers the making of such an order in the event of a claimant's non-attendance at a pre-trial review, and it is therefore clear from rule 27.8(6) that the matter was in this circumstance governed by rule 39.6. (In this regard, it seems to me that the application under rule 39.6 is plainly analogous to an application to set aside a judgment in default under Part 13, in which case, as the recent judgment of the Privy Council in ***Attorney-General v Keron Matthews*** [2011] UKPC 38 makes clear, the applicant will be required to satisfy the requirements of Part 13, rather those of rule 26.8 – see, in particular the judgment of Lord Dyson at para. 18.)

[28] As has been seen, rule 39.6(2) requires a litigant seeking to set aside a judgment or order made in his/her absence to make the application within 14 days of

the date the judgment or order was served on the applicant, while rule 39.6(3) requires that the application be supported by an affidavit showing (a) a good reason for the failure to attend the hearing and (b) that "it is likely that had the applicant attended some other judgment or order might have been given or made".

[29] In ***Watson v Roper***, a case decided under rule 39.6, this court cited with approval (at page 8) the following statement taken from the judgment of Langrin JA in ***Edwards v Robinson's Car Mart and another*** (page 6), a case decided under section 354 of the repealed Judicature (Civil Procedure Code) Act:

> "The predominant consideration for the court in setting aside a judgment given after a trial in the absence of the applicant is not whether there is a defence on the merits but the reason why the applicant had absented himself at the trial. If the absence was deliberate and not due to accident or mistake, the court would be unlikely to allow a rehearing. Other relevant considerations include the prospects of success of the applicant in a retrial; the delay in applying to set aside; the conduct of the applicant; whether the successful party would be prejudiced by the judgment being set aside; and the public interest in there being an end to litigation."

[30] Speaking for the court (P. Harrison, K. Harrison and Harris JJA) in ***Watson v Roper***, K. Harrison JA observed that "[t]his court has approved these principles, and have applied them, from time to time". The learned judge then went on to state (at pages 8-9) that the conditions laid down in rule 39.6 "are cumulative...There is no residual discretion therefore, in the trial judge, to set aside the judgment, if any of the conditions is not satisfied".

Issue (iii) – applying the rules

[31] Although it would undoubtedly have been helpful to see the learned judge's reasons for refusing the application for relief from sanctions, it may well be that rule 39.6 is what McIntosh J had in mind when he made the remark attributed to him by both parties that the appellant had made the "wrong application" in the instant case. But that was not, in my view, an end to the matter. The core principle of the CPR is that the court "must seek to give effect to the overriding objective when interpreting these rules or exercising any powers under these rules" (rule 1.2). As Mr Stuart Sime observes in his work, 'A Practical Approach to Civil Procedure' (10th edn, para. 3.28), "[s]hutting a litigant out through a technical breach of the rules will not often be consistent with...[this objective], because the primary purpose of the civil courts is to decide cases on their merits". As an example of the overriding objective in action, Mr Sime cites ***Re Holcrest Ltd*** [2000] 1 WLR 414, in which the Court of Appeal allowed a claim commenced by the wrong form of originating process to continue as though it had been commenced in appropriate form, rather than forcing the claimant to start again by issuing fresh proceedings.

[32] The requirement under rule 26.8(1)(a) that an application for relief from sanctions must be made promptly finds an echo in rule 39.6(2), under which an application to set aside a judgment given or an order made in a party's absence must be made within 14 days of the date on which the judgment or order was served on the applicant: it is clear that both rules are designed to ensure that such applications are

made expeditiously. An application under either rule is required to be supported by evidence on affidavit (rules 26.8(1)(b) and 39.6(3)), and the applicant under each must show that there is a good explanation/reason for the failure that it is sought to excuse (rules 26.8(2)(b) and 39.6(3)(a)). Rule 26.8(2)(a), which mandates the court on an application for relief from sanctions to have regard to "the interests of the administration of justice", is also wide enough to embrace rule 39.6(3)(b), under which a party applying to set aside a judgment or order given or made in his/her absence must show that, had he/she attended at the trial, "some other judgment or order might have been given or made": the interests of the administration of justice are surely not generally served by setting aside a judgment given or an order made against a party in a patently hopeless cause.

[33] To this extent, the requirements of a rule 26.8 application are generally similar to those prescribed under a rule 39.6 application. However, as regards the additional matters of which the court must be satisfied on a rule 26.8 application (for example, that the applicant "has generally complied with all other relevant rules, practice directions, orders and directions" and "that the trial date or any likely trial date can still be met if relief is granted" – rule 26.8(2)(c) and 26.8(3)(d)), it may in fact be arguable that this rule sets a higher bar to relief than rule 39.6.

[34] It accordingly seems to me that, in furtherance of the overriding objective, it was clearly open to McIntosh J to have treated with the appellant's application, albeit

made under rule 26.8, as if it had been made under rule 39.6. Notwithstanding the fact that there is no ground of appeal to this effect, I consider that, given (i) the power of this court to "give any judgment or make any order which, in its opinion, ought to have been made by the court below" (Court of Appeal Rules 2002, rule 2.15(b)(b)); and (ii) the fact that rule 1.1 of the CPR applies equally to proceedings in this court (Court of Appeal Rules, rule 1.1(10)(a)), it is nevertheless appropriate for me to consider what order could have been made by McIntosh J under rule 39.6 in the circumstances of this case.

[35] The application for relief from sanctions was made 6 March 2012, that is, within five days of Beckford J's order. The actual language of rule 39.6(2) is that the application must be made within 14 days "after the date on which the judgment or order was served on the applicant". Even in the absence of proof of the date of service of Beckford J's order, the fact that the appellant moved the court within 14 days of it having been made to set it aside is in my view sufficient evidence that it had been brought to his attention beforehand. In any event, the copy of Beckford J's order in the record of appeal reveals that it was served on the appellant's attorneys-at-law on 9 March 2012. The object of rule 39.6(2) has therefore plainly been satisfied.

[36] The appellant's application for relief from sanctions was supported by Mr Nelson's affidavit, sworn to on 15 March 2012 (para. [11] above). The reason for the appellant's non-attendance at the pre-trial review was stated by Mr Nelson to be "my

having advised him that he need not appear for the Pre-Trial Review given my belief that he was present at the Case Management Conference". Mr Nelson was, of course, egregiously off the mark in this belief, since it appears to be clear that Brooks J's order that the appellant should attend the pre-trial review was prompted by his absence at the case management conference. While it would obviously have been helpful to see an affidavit sworn to by the appellant himself, it seems to me to be that the fact of Mr Nelson's advice that there was no need for him to attend the pre-trial review, in the absence of any challenge whatsoever, must in the circumstances amount to a good reason for his non-attendance. I therefore consider that the requirement of rule 39.6(3)(a) has also been satisfied on this evidence.

[37] Which brings me to rule 39.6(3)(b), which requires the affidavit in support of the application to set aside the judgment or order to show "that it is likely that had the applicant attended some other judgment or order might have been given or made". In the usual case of a judgment given at trial in the absence of a party, this aspect of the rule could well prove to be the most difficult hurdle, requiring the applicant as it does to demonstrate that, on the merits, he/she could have prevailed had there been an opportunity to advance the case in person. Despite the fact that Beckford J's strike out order cited the appellant's failure to comply with the earlier case management and pre-trial orders as one of the reasons for striking out his claim, it seems to me that the predominant reason for the order must have been the appellant's non-attendance, his having previously been absent from the case management conference and the first pre-

trial review. By that time (1 March 2012), the appellant had filed his statement of facts and issues, witness statement and his listing questionnaire, albeit, in the case of the two last documents, outside the time limited by the order of Lawrence-Beswick J at the first pre-trial review and there is no reason to suppose that the trial date, which had already been set by Lawrence-Beswick J for 18 and 19 June 2012, would not have been attainable. It therefore seems to me to be plain that, had the appellant been present at the pre-trial review before Beckford J, it is likely that the order striking out his claim would not have been made. I accordingly consider that rule 39.6(3)(b) has also been satisfied.

Disposal of the appeal

[38] It follows from the foregoing discussion that, in my view, had McIntosh J, in pursuance of the overriding objective, considered the appellant's application under rule 39.6, the appellant would have been entitled to an order reinstating his claim. I would therefore make the following order:

> 1. The appeal is allowed and the order of McIntosh J refusing the appellant's application for relief from sanctions is set aside.
>
> 2. The order made by Beckford J on 1 March 2011 striking out the appellant's claim and statement of case is set aside.
>
> 3. The parties are to attend before the Registrar of the Supreme Court within 14 days of the date of this order, for the purpose of fixing a date for a case management conference, to set a date for trial of the action and to deal with any outstanding pre-trial matters.
>
> 4. The appellant is to have the costs of the appeal, to be taxed if not agreed.