[2020] JMCA Civ 54

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2019CV00074

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA (AG)

BETWEEN	**ONEIL CARTER**	**1ST APPELLANT**
AND	**DAWNALEE HARRISON**	**2ND APPELLANT**
AND	**VERONICA KELLY**	**3RD APPELLANT**
AND	**TREVOR SOUTH**	**1ST RESPONDENT**
AND	**MORGAN'S TRUCKING COMPANY LIMITED**	**2ND RESPONDENT**
AND	**CLIVE MORGAN**	**3RD RESPONDENT**
AND	**HOPETON STONE**	**4TH RESPONDENT**

Written submissions filed by Reitzin and Hernandez for the appellants

No appearance for the 1st respondent

Written submissions filed by Frater, Ennis and Gordon for the 2nd, 3rd and 4th respondents

6 November 2020

PROCEDURAL APPEAL

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

MCDONALD-BISHOP JA

[1] I have had the privilege of reading, in draft, the well-reasoned judgment of my learned sister, Dunbar-Green JA (Ag). I agree with her reasoning, conclusion and orders proposed. There is nothing that I could usefully add.

EDWARDS JA

[2] I too have read, in draft, the well-reasoned and concise judgment of Dunbar-Green JA (Ag). I agree with her reasons, conclusion and proposed orders, and have nothing further to add.

DUNBAR-GREEN JA (AG)

[3] This is a procedural appeal against the order of a judge of the Supreme Court extending time for the respondents to file and exchange witness statements. The appellants are seeking to have that order set aside.

Background

[4] On 12 March 2013, Trevor South ("the 1st respondent", who does not appear in this appeal), commenced proceedings against O'Neil Carter ("the 1st appellant"), Morgan's Trucking Company ("the 2nd respondent"), Clive Morgan ("the 3rd respondent") and Hopeton Stone ("the 4th respondent") for damages in relation to injuries and loss he allegedly suffered as a result of a motor vehicle collision on or about 12 July 2012. On 18 August 2016, Dawnalee Harrison ("the 2nd appellant") and Veronica Kelly ("the 3rd appellant") respectively commenced separate proceedings against the 2nd, 3rd and 4th

respondents. On 5 October 2017, by order of Master Y Brown, all three claims were consolidated.

[5] On 18 December 2017, the matter came up for case management conference before Bertram Linton J who ordered, inter alia, that all parties were to file and exchange witness statements on or before 31 October 2018. None of the parties filed or exchanged witness statements by the date ordered. However, on 5 November 2018, the appellants filed an application for extension of time within which to file and exchange witness statements and for relief from sanctions, supported by an affidavit. The respondents did not file any such application or affidavit. Instead, on 22 July 2019, two witness statements, that of the 3rd and 4th respondents, were filed, which would have been nine months after the deadline for the filing of witness statements had passed.

[6] At the pre-trial review on 23 July 2019, Henry McKenzie J (Ag, as she then was) heard an oral application and submissions from the 2nd, 3rd and 4th respondents' attorneys-at-law by which they sought an order for the witness statements filed a day prior, to stand as properly filed. The learned judge made several orders, including the impugned order at number ii. Those orders are reproduced below, in summary:

i. Time for the parties to comply with case management conference orders is extended to 22 November 2019;

ii. Time for the parties to file and exchange witness statements is extended to 22 November 2019, failing which any party in

default shall not be permitted to rely on such witness statements at the trial of the matter;

iii. Order granted in terms of paragraphs one and two, as amended of the notice of application for court orders to call and to put in expert evidence filed on 10 July 2019;

iv. Pre-trial review hearing is adjourned to 15 January 2020 at 11:00 am for one hour;

v. Costs to be costs in the claim; and

vi. Leave to appeal is granted in relation to oral application made for extension of time to file witness statements.

[7] The parties are not in agreement about the nature and content of the respondents' oral application to the learned judge. The appellants contend that the respondents made an application for extension of time and relief from sanctions. The respondents deny making any application for relief from sanctions. They are content to say that their sole application was for permission to have their witness statements stand as if they had been filed in time.

Grounds of appeal

[8] The appellants filed notice and grounds of appeal on 26 July 2019, challenging the correctness of order ii of the learned judge's orders, extending time for the respondents to file and exchange witness statements. The primary contention is that the learned judge

erroneously exercised her discretion. Specifically, they aver that she misapplied the law, acted upon wrong principles and/or considered irrelevant matters.

[9] Before this court, the appellants have also challenged a number of findings of fact and law, which they attribute to the learned judge. The grounds of appeal are as follows:

> "i. under rule 29.11 of the Civil Procedure Rules, the respondents' failure to file and exchange witness statements as ordered rendered them unable to call any witnesses unless the court permitted;
>
> ii. rule 29.11 thus provided, in and of itself, a sanction for failing to file and exchange witness statements as ordered at the case management conference;
>
> iii. the sanction applied unless and until relief from sanctions was applied for and obtained;
>
> iv. where applications to extend time were made after the time for compliance had expired and there was a sanction imposed for a failure to comply (as was, indeed, the case below), that sanction took effect unless and until there was a successful application for relief from sanctions;
>
> v. the exercise of the court's power to extend time under 26.1(2)(c) was unavailable since other rules provided otherwise;
>
> vi. rule 29.9, which gives the court power to rectify procedural defaults, does not apply in such cases either;
>
> vii. an application for relief from sanctions had to be made promptly;
>
> viii. an application for relief from sanctions had to be supported by evidence on affidavit;
>
> ix. before the court could begin to consider the factors in rule 26.8(3) it had to be satisfied that the threshold requirements in rule 26.8(2) had been met and that could only be done by considering evidence on affidavit; [and]

> x. in order to justify a court in extending the time during which some step in procedure is required to be taken there must be some material upon which the court can exercise its discretion."

The appellants' submissions

[10] Counsel for the appellants, Mr Richard Reitzin, submits that the court below was precluded by the Civil Procedure Rules, 2002 ("the CPR") from hearing and granting the orders for relief from sanctions and extension of time in the absence of an application under rule 26.8. Rule 29.11 imposes a sanction for failure to serve a witness statement within the time limited to do so, and for this sanction to be removed, a defaulting party must seek and obtain relief under rule 26.8. The appellants cite the decisions of this court in **Jamaica Public Service Company Limited v Charles Vernon Francis and Columbus Communications Limited** [2017] JMCA Civ 2 and **Garbage Disposal and Sanitations Systems Limited v Noel Green and others** [2017] JMCA App 2.

[11] Citing the case of **HB Ramsay and Associates Ltd and others v Jamaica Redevelopment Foundation Inc and Anor** [2013] JMCA Civ 1, counsel contends that the use of 'must' in rule 26.8(1) is a mandatory obligation requiring applications to be made promptly and supported by affidavit evidence. Following from that, he observes that the respondents' oral application was not prompt, having been made some nine months after default. Furthermore, there was no affidavit evidence in support. In such circumstances, the court had no justification for exercising its discretion to extend time. Counsel cites **Ratman v Cumarasamy and another** [1964] 3 All ER 933 as further support for the contention that there must be some material upon which the court can exercise its discretion. Paragraph 15 of **The Attorney General v Keron Mathews**

[2011] UKPC 38 is cited as further authority for the proposition that an application is required to be supported by evidence.

[12] In addressing the respondents' submission that sub-rules 29.11(1) and (2) are distinct, counsel submits that as a matter of statutory interpretation, both rules are to be read together and not treated as distinct. He relies on **Black– Clawson International Ltd v Papierwerke Waldhof Aschaffenburg AG** [1975] AC 591 per Lord Reid, at pages 613 to 615, as referred to in **Dennis Meadows and Others v The Attorney General of Jamaica and Others** [2012] JMSC Civ 110. He also contends that as both parts of the rule are grouped under the same sub – heading, they are meant to be read together.

[13] Counsel further submits that rule 29.11 is the only rule in the CPR which deals specifically with the consequences of failure to file and exchange witness statements, as ordered. It clearly demonstrates that an application, before a trial, in respect of the failure to file a witness statement, is required to be one for relief from sanction pursuant to rule 26.8. This is so because rule 29.11(1) provides that the consequence of not filing and exchanging a witness statement, as ordered, is that the intended witness may not be called. Counsel also submits that rule 29.11(2) compendiously refers to applications made at and before trial, and clearly contemplates applications for relief by parties in default being made before the trial.

[14] He contends that the words, "unless the court permits" in rule 29.11(1) raise the question of how the court may determine to grant permission where the sanction is

imposed. The answer is provided in rule 29.11(2). This rule, counsel submits, implies that applications for relief from sanctions before trial are to be made pursuant to rule 26.8. It provides not only a sanction but also signposts and dictates the sole avenue of escape from sanction.

[15] Turning specifically to rule 26(1)(2)(c), which deals with the court's power to extend time for compliance, counsel submits that it was inapplicable to this case because the qualifier "[e]xcept where these rules provide otherwise" takes account of rule 29.11 which provides "otherwise". It is also the case that rule 26.7(2), which gives the court power to rectify defaults, does not apply, as stated by the rule itself.

[16] He submits further that where the application precedes the date for compliance, the court will give due regard to the overriding objective. However, if an application is made after the expiry of time, the court's discretion is invoked only if the application complies with rule 26.8.1(a) and (b) and the threshold requirements of rule 26.8(2). In support of this submission, counsel relies on **Dale Austin v The Public Service Commissions and The Attorney General of Jamaica** [2016] JMCA Civ 46; **HB Ramsay and Associates Ltd and others v Jamaica Redevelopment Foundation Inc and Anor** and **Robert v Momentum Services Ltd** [2003] 1 WLR 1577.

[17] In reference to the application before the learned judge, counsel argues that it was not a case where the court could be said to have acted on its own motion because it did so in response to Mr Gordon's request to have the witness statements stand as properly filed. He relies on the decision in **Marcan Shipping (London) Limited v**

George Kefalas and Candida Corporation [2007] EWCA Civ 463, for the proposition that this was not a proper case for the court to have acted on its own motion as there was nothing unusual in the circumstances to justify it doing so. Furthermore, the power of the court to act on its own volition, is to be exercised rarely and in circumstances where evidence is placed before it to enable consideration of relevant factors. Reliance is placed on **Dale Austin v The Public Service Commissions and The Attorney General of Jamaica**, per F Williams JA at paragraph [73] and **Keen Phillips (a firm) v Field** [2006] EWCA Civ 1524.

[18] In dealing with whether the overriding objective was relevant to this case, counsel has referred us to **Winston Johnson v Norbert Lawrence** [2012] JMCA Civ 3, which applied the following dictum of Peter Gibson LJ in **Vinos v Marks & Spencer** [2000] EWCA Civ B526:

> "The court must seek to give effect to that objective [the overriding objective] when it exercises any power given to it by the rules or interprets any rule. But the use in rule 1.1 (2) of the word 'seek' acknowledges that the court can only do what is possible. The language of the rule to be interpreted may be so clear and jussive that the court may not be able to give effect to what it may otherwise consider to be the just way of dealing with the case."

[19] Accordingly, counsel submits that this is not a case in which the overriding objective could be prayed in aid.

[20] In his amended skeleton arguments, counsel further contends that there could hardly be more prejudice to a party than to be faced with an application for extension of time, which is made without notice and evidence on affidavit.

The respondents' submissions

[21] The respondents' main argument is that rules 29.11(1) and (2) of the CPR, apply to different circumstances, have different requirements and, therefore, cannot be read together.

[22] Counsel for the respondents, Mr Obika Gordon, submits that the phrase, "unless the court permits", in rule 29.11(1) gives the court a general discretion to extend the time for complying with an order to file within the time specified. This discretion can be exercised either on the court's volition or on an application. The judge hearing a pre-trial review has powers of case management, which include the power to extend or shorten time for compliance with the order, make orders for the purposes of furthering the overriding objective and or exercise her powers on her own initiative (rules 26.1(2)(c) and (v) and; 26.2 of the CPR).

[23] It is the contention of counsel for the respondents that rule 29.11(2) could only take effect at trial. That rule contemplates three scenarios: (i) where permission is being sought at the trial to call an intended witness; (ii) where a witness statement or a witness summary was not served within the time specified; and (iii) where the party seeking permission had not previously sought relief under rule 26.8. The rule was, therefore, inapplicable to this case since the parties were at pre-trial review.

[24] Counsel submits that although rule 29.11(2) stipulates that the party must seek relief under rule 26.8, it does not indicate that an application for relief must be made at pre- trial review. It stands to reason, he contends, that it can be made at any time before

trial. He also contends that the application does not have to be in writing. Accordingly, the learned judge had a discretion to consider the oral application that was made.

[25] Turning to the court's power to extend time, counsel submits that the learned judge had discretion to extend the time for the parties to comply with case management orders, under the case management powers in part 26 of the CPR. He states that **Jamaica Public Service Company Limited v Charles Vernon Francis and Columbus Communications Limited** and **Garbage Disposal and Sanitations Systems Limited v Noel Green and others** can be distinguished by the fact that those cases were concerned with applications to strike out the defaulting party's statement of case.

[26] The respondents' position is that there would have been little basis for the learned judge to only grant the appellants extension of time on their written application, since both parties had defaulted, the trial date could be maintained and there would be little or no prejudice to the appellants.

The issues

[27] The main issues for determination are:

i. whether rule 29.11 is contingent on satisfaction of rule 26.8. That is, whether the party who fails to file and serve a witness statement in the time limited by order of the court must file a notice of application for relief from sanctions, supported by affidavit, in accordance with rule 26.8; and

ii. whether the judge's case management powers to extend time or act on her own motion under the CPR were limited or curtailed by the operation of rule 29.11.

Discussion and analysis

[28] I begin with the premise that compliance with the orders of the court and procedural rules augur well for good administration of justice. This is important in furthering the overriding objective of delivering swift justice at the least cost to everyone concerned. However, exigencies arise in judicial proceedings and the rules allow for judicial discretion, but this is not unfettered in every circumstance.

[29] In **Attorney General v McKay** [2012] JMCA App 1, Morrison JA (as he then was), after referring to Lord Diplock's exhortation in **Hadmor Productions Ltd and another v Hamilton and others** [1982] 1 All ER 1042 that the appellate court should not lightly interfere with the exercise of discretion by the court below, opined, at paragraph [20]:

> "This court will…only set aside the exercise of discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference – that particular facts existed or did not exist – which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

[30] In the Australian High Court decision of **House v The King** [1936] HCA 40, it was considered that appealable errors in the exercise of a judge's discretion include: acting upon a wrong principle; allowing extraneous or irrelevant matters to guide the discretion; and failing to take account of material considerations (page 41).

[31] This court will, therefore, not interfere to set aside the order of the learned judge unless it is satisfied that her discretion was exercised on a wrong principle of law or otherwise, improperly.

Issue (i): whether rule 29.11(1) is contingent on satisfaction of rule 26.8

[32] CPR rule 29.11, states as follows:

> "(1) Where a witness statement or a witness summary is not served in respect of an intended witness within the time specified by the court then the witness may not be called unless the court permits.
>
> (2) The court may not give permission at the trial unless the party asking for permission has a good reason for not previously seeking relief under the rule 26.8."

[33] The appellants are correct in their submission that the sub-rules comprised in rule 29.11 should be read together as one rule. The phrases, "unless the court permits", in sub-rule 1, and "the court may not give permission", in sub-rule 2, relate to the seeking of relief under rule 26.8. Furthermore, the words, "at the trial", in rule 29.11(2) are contextual, since a court may grant permission in different contexts and at different stages.

[34] The sanction for failing to file in the time allotted takes effect unless the court permits. The permission of the court can be achieved in an application for relief from sanctions under rule 26.8. So, rule 29.11 pre-supposes relief will be sought under rule 26.8 before trial. If it is not sought before trial, permission may be sought at trial but it will not be granted unless the additional hurdle is crossed, which is to show good reason why it was not sought before under rule 26.8. The import is that applications relating

to pre-trial orders are to be dealt with, in the main, prior to trial. That, in my opinion, is the plausible meaning of rule 29.11.

[35] It is well established that rule 29.11 imposes a sanction which takes effect unless a defaulting party applies for and obtains relief under rule 26.8. Reinforcing that point in **Jamaica Public Service v Charles Vernon Francis and Columbus Communications Limited**, Edwards JA (Ag, as she then was), opined at paragraphs [15]-[16]:

> "[15] However, under rule 29.11, the appellant's failure to file and exchange witness statements as ordered rendered it unable to call any witnesses unless it was granted relief from sanctions....
>
> [16] This in and of itself is a sanction and the appellant was therefore obliged to apply for relief from this sanction. Rule 29.11(2) refers expressly to rule 26.8 and applications for relief from sanctions are made pursuant to the provisions of rule 26.8…"

The learned judge of appeal continued at paragraph [19]:

> "[19] Where the application to extend time is made after the time for compliance has expired and there is a sanction imposed for a failure to comply, that sanction takes effect until and unless there is a successful application for relief."

[36] **Chartwell Estate Agents Limited v Fergies Properties SA, Hyam Lehrer** [2014] EWCA Civ 506, referred to in **Jamaica Public Service Company Limited v Charles Vernon Francis and Columbus Communications Limited**, considered a similarly worded provision in the English CPR 32.10. Davis, LJ said, at paragraph 24:

"It can therefore be seen that CPR 32.10 provides its own sanction for failure to serve a witness statement within the time specified by the court: that is, that the witness may not be called to give oral evidence unless the court gives permission."

[37] His Lordship continued, at paragraph 27:

"…In my view, the sanction provided in CPR 32.10 is to be taken as having effect once the time limits for serving the witness statement has expired. It would be contrary to the overall purpose of the rules, and could lead to arbitrariness, were it otherwise."

[38] Similarly, in **Garbage Disposal and Sanitations Systems Limited v Noel Green and others**, F Williams JA affirmed that the sanction under rule 29.11(2) takes effect unless relief from sanctions is obtained from the court (paragraph [49]).

[39] Rule 26.8, in part, provides:

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

(a) made promptly; and

(b) supported by evidence on affidavit.

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

(a) the failure to comply was not intentional;

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

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

(3) In considering whether to grant relief, the court may 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) ..."

[40] The first consideration is whether the defaulting party had been prompt in bringing an application. If the party fails to do so, the court is unlikely to grant relief (See Brooks JA in **HB Ramsay and Associates Ltd and others v Jamaica Redevelopment Foundation Inc and Anor** paragraph [9]). The defaulting party is also mandated to put evidence before the court on which there can be a determination as to whether the non-compliance was unintentional and otherwise excusable by good explanation for the failure to comply, and that there was general compliance with all other relevant rules, orders and directions. These are the threshold requirements (per Phillips JA, in **University Hospital Board Management v Hyacinth Matthews** [2015] JMCA Civ 49).

[41] I should say that rule 11.6 does give the court the discretion to dispense with applications in writing. That rule provides:

"11.6 (1) The general rule is that an application must be in writing.

(2) An application may be made orally if –

(a) this is permitted by a rule or practise direction; or

(b) the court dispenses with the requirement for the application to be made in writing."

[42] A written application is not always necessary. However, under rule 26.8(1), the application must be supported by affidavit evidence, regardless of how it was made. The word "must" in rule 26.8(1) has been interpreted by this court to be mandatory (see **HB Ramsay and Associates Ltd and others v Jamaica Redevelopment Foundation Inc and Anor**, paragraph [9]). So, in the instant case, even were it to be presumed that the judge had dispensed with the requirement for writing and had heard an oral application, the respondents would have been obligated to provide evidence upon which the learned judge could exercise her discretion. In the absence of such evidence, the learned judge would not have had any material on which to justify the granting of relief from sanctions.

[43] On the respondents' own argument there was no application for relief from sanctions. The minute of order referred to an oral application for extension of time to file witness statement. From this, I conclude, that there was no application made by the respondents for relief from sanctions before the judge, consistent with rule 26.8.

[44] In my view, rule 29.11(1) is contingent on the application of rule 26.8. This is so, regardless of the fact that the matter was at pre-trial review and not trial.

Issue (ii): whether case management powers under part 26 are curtailed by rule 29.11

[45] A further question raised by this appeal is whether, in the absence of an application for relief from sanctions under rule 26.8, the court could exercise its case management powers under Part 26 and grant an extension of time. The applicable provisions are set out below:

> "26.1 (1) ...
>
> (2) Except where these Rules provide otherwise, the court may -
>
> ....
>
> (c) extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed;".

Rule 26.7(2) provides that:

> "Where a party has failed to comply with any of these Rules, a direction or any order, any sanction for non-compliance imposed by the rule, direction or the order has effect unless the party in default applies for and obtains relief from the sanction, and rule 26.9 shall not apply."

Additionally, rule 26.9(1), which provides for the general power of the court to rectify matters where there has been a procedural error, stipulates that:

> "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."

[46] The plain meaning of rule 26.7(2) is that in matters pertaining to relief from sanctions, the court's general powers to rectify errors cannot be invoked. Rule 26.7(2) expressly excludes the court's power under 26.9 to rectify matters. It is also the case that rule 26.9(1) is dispositive of the issue.

[47] In **George Freckleton v Aston East** [2013] JMCA Civ 39, an appeal from an order dismissing an application for an extension of time within which to file a defence, this court reasoned, at paragraph [21] of the judgement, that rule 26.1(2)(c) must be read subject to rule 26.7(1) and (2). The court said at paragraph [22]:

> "Rule 26.9, which allows the court, of its own motion, to make an order 'to put matters right', is expressly stated by rule 26.7(2) to have no application to cases in which the consequence of non-compliance with any rule, practice direction, order or direction has been stated by the rules or the court. It therefore seems…that neither rule 26. (1)(2)(c) nor rule 26.9 could have availed the appellant in the instant case, in which the unless order imposed the sanction for non-compliance, which was that the appellant's statement of case should be struck out."

[48] The effect is that once a sanction is imposed, whether by an order of the court or a rule, the only recourse for a defaulting party is by way of an application for relief from sanctions under rule 26.8. Rule 26.1(2)(c) does not apply. The respondents, therefore, would not have been entitled to any relief under 26.1(2)(c) on the oral application made for extension of time.

[49] The respondents aver that the court had power to act on its own initiative in making the order to extend time. The relevant rule is 26.2, which states, inter-alia:

> "(1) Except where a rule or other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative.
>
> (2) Where the court proposes to make an order of its own initiative it must give any party likely to be affected a reasonable opportunity to make representations."

[50] The introductory words in this rule preclude the court from acting on its own initiative for non-compliance with rule 29.11, and this is for the simple reason that rule 29.11 sets up its own procedure for dealing with non-compliance.

[51] I have taken note of a converse decision in **Keen Phillips v Field**, which dealt with similarly worded rules in England. It was said that the court's general case management powers to extend time are not cut down by the provision for relief from sanction and that a time limit, in an order imposing sanctions for delay, can be extended, even if no application is made for relief from sanctions. This decision suggests that the extension of time provision could be used to bypass the strictures imposed by the relief from sanctions regime.

[52] In **Marcan Shipping (London) v George Kefalas and Candida Corporation**, at paragraph 33, Lord Justice Moore-Bick postulated:

> "***Keen Philips v Field*** was a very unusual case. The only question for decision was whether the court had jurisdiction to grant relief from sanctions under rule 3.8 in the absence of an application by the party in default. This court held that despite the wording of rule 3.8, which naturally assumes that the party in default will make an application for relief, the court has jurisdiction to act of its own initiative in an appropriate case. However, the jurisdiction is one which is likely to be exercised only rarely because it will usually be

> necessary for evidence to be placed before the court to enable it to consider the various matters to which rule 3.9 refers."

[53] I am guided by this court's decision in **Meeks v Meeks** [2020] JMCA Civ 7 where, at paragraph [42], the following was stated:

> "It is very important to observe, however, that the relevant English provisions differ from our own in that the English court's general case-management powers are unfettered by rule 3.8. Additionally, the considerations stipulated for granting relief from sanction under the English CPR differ in material respects from ours."

[54] With regards to what obtains in Jamaica, the court held, at paragraph [47]:

> "…the court below has no general power to grant relief from sanctions imposed for instances of default in the face of unless orders or to make orders to put things right of its own motion: such action ought to be taken pursuant to an application for relief from sanction. Thus, where a breach of an unless order has already occurred, the unless order could not then be varied to effect compliance."

[55] That conclusion was derived from an assessment of the decision of this court in **George Freckleton v Aston East**. In alluding to that case, F Williams JA distinguished aspects of the case of **Dale Austin v The Public Service Commissions and The Attorney General of Jamaica**, in which Edwards JA (Ag, as she then was), provided valuable assistance in construing certain provisions in respect of the court's case management powers under part 26 of the CPR. In the course of her judgment, Edwards JA (Ag) made the following observations at paragraph [93]:

> "…[The judge], in applying the overriding objective, and in determining, as a matter of fact, that what was before her was an order carrying a specified consequence (in other words an unless order) which had taken effect, had the

> power, acting on her own motion or initiative (pursuant to rule 26.2(1)), to treat the application for the variation of the order as an application for relief from sanctions. That is so whether we consider that the power is derived from rules 26.1(2)(c) and (v), or 26.1(7)."

[56] And at paragraph 97, the learned appellate judge, in reference to the decision by Parker LJ in **Keen Phillips v Field**, opined:

> "…implicit in this judgment is the acceptance that the court has the power to extend time for compliance with an unless order, even after the time for such compliance had expired and the sanction imposed by the order had already taken effect. That power is derived from the court's general powers of management to extend time, even if the application for an extension is made after the time for compliance had expired. In the case of an unless order, where time is extended, then that is the relief which is given by the court from the sanction imposed."

[57] These remarks are to be construed narrowly, as having been made in the unique context of **Dale Austin v The Public Service Commissions and The Attorney General of Jamaica**, where the order with which the respondent was in non-compliance, was itself impossible of performance (paragraph [74] per F Williams JA). The plain premise of rule 29.11, with which the present case is concerned, is that there existed a feasible order, not an impossible one, which ought to have been obeyed within the time specified by the order of the court made at case management conference.

[58] Where a rule imposes a sanction, as rule 29.11 has done, it should be construed similarly to a sanction imposed by an unless order. They have the same purpose, which is to enforce the adherence to time limits that are set by the court for the proper

management of cases, and they take effect similarly, that is, upon non-compliance, unless relief from the sanction is obtained. That is the essence of rule 26.7.

[59] One of the arguments which the respondents advance is that the court was acting in accordance with rule 26.1(2)(v), which states:

> "Except where these Rules provide otherwise, the court may-
>
> ....
>
> (v) take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective."

[60] The phrase, "except where these rules provide otherwise", is limiting as has already been stated and explained. Before the judge could get to the point of furthering the overriding objective in the exercise of her case management powers under part 26, she would have had to be satisfied that no other rule was applicable to the management of the case. That was not so having regard to rule 29.11 of the CPR and the specific procedure which would guide the court under rule 26.8.

[61] Regrettably, we do not have the benefit of the judge's reasons for the order she made. The minute of order, which has been produced, does not state the basis on which the extension of time (which might be interpreted as relief from the sanction) was granted. The only other information before us is what the parties have represented, and the extent of their agreement is that on the date when the matter came up for trial the court acceded to hear an oral request from the respondents to treat witness statements, filed a day prior, as if they had been filed in time.

[62] In the circumstances, this court has had to infer reasons for the learned judge's decision from the factual background and the decision. The judge was entitled to consider that the respondents were dilatory, as the application was made some nine months after the date ordered for compliance, that there was no written application before her and no affidavit evidence to explain the delay and satisfy the other criteria in rule 26.8 of the CPR. On the latter point, the guiding principle, articulated by the Privy Council, in **Ratman v Cumarasamy and another** at page 935, is that:

> "…in order to justify a Court in extending the time during which some step in procedure requires to be taken there must be some material upon which the Court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation."

[63] The case management powers of the learned judge to extend time for the filing and exchange of the witness statements by the respondents were curtailed by rule 29.11, which had imposed a sanction for non-compliance with the case management order regarding the service of witness statements.

Conclusion

[64] Under rule 29.11, a party which has failed to serve a witness statement within the time specified by the court must seek and obtain relief from sanctions under rule 26.8, in order to call the witness at trial. It must satisfy the criteria under rule 26.8, by evidence on affidavit, to obtain a favourable exercise of the judge's discretion. The court's case management powers under rules 26.1(2)(c) and (v) and 26.2(1) are inapplicable in a case where rule 29.11 is operational.

[65] On the facts of this case, the learned judge would have failed to apply the correct legal principles and procedure when she exercised her discretion in extending time to the respondents for the filing and service of their witness statements. The appellants are correct that by so doing, she erred in law. For these reasons, I would make the orders below.

i. The appeal is allowed.

ii. Paragraph ii of the order of Henry McKenzie J (Ag), made on 23 July 2019, extending time for the respondents to file and exchange witness statements, is set aside and substituted therefor is an order that the respondents' oral application for extension of time within which to file and serve witness statements is refused.

iii. Costs of the appeal to the appellants against the 2nd, 3rd and 4th respondents to be agreed or taxed.

MCDONALD-BISHOP JA

ORDER

i. The appeal is allowed.

ii. Paragraph ii of the order of Henry McKenzie J (Ag), made on 23 July 2019, extending time for the respondents to file and exchange witness statements, is set aside and substituted therefor is an order that the respondents' oral application for extension of time within which to file and serve witness statements is refused.

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