[2020] JMCA Civ 20

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 108/2016

BEFORE: **THE HON MR JUSTICE MORRISON P**
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE P WILLIAMS JA

BETWEEN	**FREDRICA CROOKS**	**1ST APPELLANT**
	MICHELLE CROOKS	**2ND APPELLANT**
	HAROLD CROOKS	**3RDAPPELLANT**
AND	**MICHAEL JOHNSON (By his Attorney Roland Fitzgerald Barrett)**	**RESPONDENT**

Written submissions filed by Samuel Beckford for the appellants

Written submissions filed by Taylor Deacon and James for the respondent

28 June 2017 and 19 May 2020

PROCEDURAL APPEAL

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

MORRISON P

[1] I have had the advantage of reading in draft the judgment prepared by my sister Williams JA in this matter. I entirely agree with her reasoning and conclusions and there is nothing of value that I can possibly add.

SINCLAIR-HAYNES JA

[2] I too have read the draft reasons for judgment of P Williams JA and agree.

P WILLIAMS JA

[3] In this matter, Fredrica Crooks, Michelle Crooks, and Harold Crooks ("the appellants") appealed against the decision of Wint-Blair J (Ag) (as she then was) who, on 15 November 2016, refused their application to discharge the default costs certificate granted in favour of Michael Johnson ("the respondent") on 27 June 2016. She found that she had no jurisdiction to set aside the default costs certificate and remitted the matter to the Registrar for hearing.

[4] After considering the submissions filed by counsel, on 28 June 2017 we made the following orders:

> "1. Appeal is allowed.
>
> 2. The default costs certificate dated 27 June 2016 and granted in favour of the respondent is set aside.
>
> 3. Leave is granted to the applicant to file and serve within seven (7) days of the date hereof, 28 June 2017, a points of dispute in terms of the draft points of dispute exhibited in the affidavit of Fredrica Crooks in support of the notice of application for court orders dated 7 July 2016.
>
> 4. The respondent's bill of cost shall be taxed by a Registrar of the Supreme Court and the appellant shall be allowed an opportunity to participate in the taxation proceedings, and, in particular in respect to his points of dispute.

5. Cost of this appeal to the appellants such costs are to be taxed if not agreed."

[5] At that time, we promised to put our reasons in writing. We did not anticipate that there would have been this delay in doing so and apologise profusely that so much time has elapsed.

Background

[6] The respondent commenced an action on 22 April 2010 against the appellants seeking, among other things, to recover possession of property in Keystone Heights in the parish of Saint Catherine on the ground of trespass by way of an alleged encroachment by the appellants from their adjoining property.

[7] At a pre-trial review held on 13 April 2016, the following orders were made:

> "2. The Defendants, jointly and/or separately are to pay the Claimant's Attorney on or before 31st May, 2016, the reasonable expenses incurred for the Claimant's travel and stay in Jamaica for five (5) days on presentation of bills and receipts therefore [sic] and if not agreed to be taxed by the Registrar.
>
> 3. Costs of today's hearing to the Claimant in any event."

[8] On 20 April 2016, the respondent's attorneys-at-law sent a letter dated 19 April 2016 to the appellants' attorneys-at-law. In it was set out the amounts said to be the respondent's claim, which was pursuant to the order that had been made at the pre-trial review. It set out amounts for five days no paid leave, airfare, hotel accommodation and attorney's costs for one day. Copies of receipts in support of the

respondent's expenses were enclosed. The appellants were requested to make payment on or before 31 May 2016. The letter ended with the following request:

> "Kindly let us hear from you within seven (7) days of the date hereof, failing which we will apply to get an urgent date for Taxation of this bill."

[9] On 22 April 2016, the attorneys-at-law for the appellants responded. They indicated that they had requested instructions to permit compliance with the order for costs and would revert within a week with their client's specific instructions. A request was made for a copy of the respondent's boarding pass. Further, an invitation was issued for the reconsideration of the amount proposed for attorney's costs. Finally, an enquiry was made as to whether the sums eventually agreed could be paid in instalments.

[10] The respondent's attorneys-at-law responded by way of letter dated 25 April 2016. Both the request for the copy of the boarding pass and a reconsideration of the attorney's costs did not get a favourable response. However, there was no objection if the sums, once agreed, were paid in instalments so long as the payments were completed by 31 May 2016.

[11] On 11 May 2016, a bill of costs was filed on behalf of the respondent. The bill of costs, together with a notice to serve points of dispute, was served on the appellants' attorneys-at-law on 13 May 2016. The appellants failed to dispute any items in the bill by filing and serving points of dispute.

[12] On 27 June 2016, a default costs certificate was granted to the respondent in the sum of JA$348,237.38 and US$1,577.60. This was served on the appellants on 28 June 2016.

[13] On 8 July 2016, the appellants filed and served a notice of application, seeking, inter alia, the following orders:

> "1. That the Default Costs Certificate dated the 27th day of June, 2016 and granted in favour of the Claimant/Respondent be set aside.
>
> 2. That the taxation proceedings commenced by way of the Claimant's/Respondent's Bill of Costs filed on the 11th day of May, 2016, be stayed pending final determination of the claim herein.
>
> 3. Alternatively, that leave be granted to the Defendants/Applicants to file and serve, within seven (7) days of the date hereof, a Points of Dispute in terms of the draft Points of Dispute exhibited to the Affidavit of Fredrica Crooks in Support of Notice of Application for Court Orders dated the 7th day of July 2016.
>
> 4. That the execution of the Default Costs Certificate dated the 27th day of June, 2016 and granted in favour of the Claimant/Respondent be stayed pending the outcome of the Defendants/Applicants Notice of Application for Court Orders dated 7th day of July 2016."

[14] This application was heard by Wint-Blair J (Ag) on 20 October 2016 and on 15 November 2016, in a written judgment delivered on that day, she refused the application. She granted leave to appeal.

The decision of the judge

[15] The learned judge considered the decisions of this court of Brooks JA in **Harold Brady v General Legal Council** [2012] JMCA App 40, and **Rodney Ramazan & Ocean Faith N V v Owners of Motor Vessel (CFS Pamplona)** [2012] JMCA App 37. She also considered a judgment of Brooks J, as he then was, in **Charela Inn Ltd v United Church Corporation and others** (unreported) Supreme Court, Jamaica, Claim No 2004 HCV 02594, judgment delivered on 8 July 2011. In these decisions, Brooks JA sought to interpret rules 65.22 (1) and (2) of the Civil Procedure Rules (the "CPR"). The learned judge, however, ultimately indicated that, based on her reasoning, she "would wish to posit another view" on this issue.

[16] The learned judge recognised that the rules had been amended in 2011. She made the following observations:

> "[17]….In 2011, Rule 65.22 was amended to bring it in line with the UK Civil Procedure Rules of 2004. It now adds paragraph 3, which states that an application can be set aside for good reason and paragraph 4 which states that any application made must be supported by affidavit and proposed points of dispute. The amendment has not specified whether the application may be brought before a judge.
>
> [18] The procedure for setting aside a default costs certificate in the UK is commenced by an application to the court. The word court in their Rules includes a costs Judge which is not a position known in this jurisdiction. Rule 65.22 does not state the level of court to which an application should be made. However it does no [sic] use the word 'Judge' which is defined in the Civil Procedure Rules to exclude Registrar unless required by context. However, in the instant case, there is not cause to read the word Judge into the Rule which has been specifically omitted. The

> designation of court as the Supreme Court confers jurisdiction upon the Registrar to hear the application. It is easy to understand why based on **Charela Inn** it would appear that a Judge should also hear the application, as the definition of court includes Judge of the Supreme Court. But, it does not end there. I will follow both paths to their logical conclusion."

[17] The path the learned judge then embarked on involved a review of the procedure for setting aside a default costs certificate as set out in the CPR. She found thereafter that if the application to set aside a default costs certificate were made directly to a judge, then it would yield an anomalous result. She reasoned that it would mean that an aggrieved paying party could apply either to a judge or to the registrar. This party, if still aggrieved, could then apply to a judge to appeal the decision of the registrar and to this court, the decision of the judge.

[18] She also found that if the application to set aside were made to a judge in circumstances where the receiving party was not entitled to it, the judge would have to set it aside and remit the matter for taxation. This, she concluded, would result in any appeal from this process returning to a judge for hearing.

[19] At paragraph [24] she had this to say:

> "On this interpretation, there would be no certainty as to the process. Parties would be able to choose their path with no distinction as to how appeals would be decided and by what level court until an application to set aside was made. This would be a rather curious application of the Rules. Particularly as Rule 65.27 provides that appeals from taxation are specifically to a Judge of the Supreme Court. There could be no appeal from a Judge to another Judge of equal jurisdiction. The appeal from the order of a Judge

> could only lie to the Court of Appeal, which is not provided for in the rules in respect of Rule 65.27."

[20] By relying on and applying the principles of statutory interpretation as set out by Lord Reid in **Maunsell v Olins** [1975] 3 AC 373 and as discussed by the authors of Cross on Statutory Interpretation 2nd Edition, the learned judge arrived at the following conclusion:

> "[33]....I hold the view that the application to apply to set aside a default costs certificate pursuant to Rule 65.22(1) is to be made to the Registrar and not to a single Judge of the Supreme Court. This is the preferable interpretation as it renders the application more certain, more reasonable and more easily applied."

[21] Thus, the learned judge concluded that the application was not properly before her.

The appeal

[22] The grounds of appeal were set out as follows:

> "a. The learned judge erred as a matter of law in refusing to accept submissions made on behalf of the Appellants - based on two Court of Appeal decisions in **Harold Brady v The General Legal Council (Ex parte, Alva Langley and Rarane Langley)** and **Rodney Ramazan and Another v Owners of Motor Vessel CFS & Pamplona)** and also the Supreme Court decision in **Charela Inn Ltd v United Church Corporation & Ors** – that a Judge has the jurisdiction to entertain an application to set aside a Default Costs Certificate under both 65.22 [as amended pursuant to the Judicature (Rules of Court) Act] and the Court's inherent jurisdiction.
>
> b. The learned judge erred as a matter of law in finding that the 'designation of court as the Supreme Court

confers jurisdiction upon the Registrar to hear the application' to set aside a default costs certificate to the exclusion of a Judge when:

i. By virtue of section 5 of the Judicature (Supreme Court) Act, the Supreme Court is constituted by the Chief Justice, a Senior Puisne Judge and a maximum of forty other Puisne Judges; and

ii. Rule 2.5 (1) of the Civil Procedure Rules contemplates that the functions of the court may be exercised in the first instance by a Judge unless otherwise provided and rule 65.22 (as amended) does not oust or exclude the jurisdiction of a Judge to hear an application to set aside a default costs certificate.

c. The learned judge additionally erred as a matter of law in refusing to accept submissions made on behalf of the Appellants that Rule 65.22 (as amended) does not establish any exclusive jurisdiction on the part of the Registrar to set aside a default costs certificate.

d. The learned judge fell into further error as a matter of law in failing to recognise that rule 65.22 (as amended) requires the exercise of a judicial discretion in respect of an application to set aside a default costs certificate, which said judicial discretion is not provided to the Registrar under the Judicature (Supreme Court) Act.

e. The learned judge additionally erred as a matter of law because of having found that:

i. 'Further Sections 13 and 43 of the Judicature (Supreme Court) Act also provide that any order of the Registrar may be made to a Judge' and

ii. 'Section 43 provides that a Judge may order the matters that shall be enquired into by the Registrar and the proviso

thereto, that appeals from a decision of the Registrar shall be to the Court.'

She failed to consider the following:

i. That section 12(1) of the said Act prescribes the duties of the Registrar, which are administrative or 'ministerial' in nature, and does not include the exercise of a judicial discretion that would naturally arise on an application to the court to set aside a default costs certificate under rule 65.22 (as amended).

f. The learned judge erred as a matter of law in finding:

i. That 'if the application to set aside a default costs certificate is made directly to a Judge then it would yield an anomalous result', and

ii that 'I rely upon the rules of statutory interpretation to buttress the foregoing reasoning',

because such findings are contrary to the meaning and effect of rule 26.22 (as amended) when read in the proper context of the Judicature (Supreme Court) Act and the Civil Procedure Rules.

g. The learned judge erred as a matter of law in finding that 'if the Registrar does not set aside a default costs certificate then the paying party may appeal to a Judge pursuant to rule 65.27' because that rule cannot apply in relation to an application to set aside a default costs certificate since there would be no 'decision of a registrar on taxation' as stated in the said rule.

h. The learned judge erred as a matter of fact and/or law when she found as she did that the Respondent was entitled to the Default Costs Certificate herein in circumstances where the undisputed evidence before

the Court is that he obtained the said Certificate by commencing taxation in breach of both rule 16.15 and the Court's Order dated April 13, 2016.

I. Furthermore, the learned judge erred as a matter of fact and/or law and/or wrongly exercised her discretion in refusing the application to set aside *as of right* the Default Costs Certificate herein since the Respondent was not entitled to it.

j. Alternatively, the learned judge also erred as a matter of fact and/or law and/or wrongly exercised her discretion in refusing the application to set aside the Default Costs Certificate since the Appellants have demonstrated a good reason for it to be set aside in accordance with rule 65.22(3) and (4).

k. The learned judge erred as a matter of fact and/or law and/or wrongly exercised her discretion in refusing the application to set aside the Default Costs Certificate since the application had fulfilled all the requirements stipulated in both rule 65.22(3) and (4)."

The submissions for the appellants

[23] The submissions advanced on behalf of the appellants were largely an expansion of the detailed grounds of appeal. Hence, without disrespect to the obvious research and time spent by counsel in formulating the written submissions, I will not go into them in detail.

[24] Counsel commenced the submissions by considering the function of the appellate court in matters such as this. The well-known and established principles set out in **Hadmor Productions Limited v Hamilton** [1982] 1 All ER 1042 were referred

to. Also, reliance was placed on the observations of Morrison JA (as he then was) in **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1.

[25] In challenging the learned judge's decision that the respondent was entitled to the default costs certificate in all the circumstances, counsel urged that, contrary to this finding, the respondent was not entitled to commence taxation or obtain a default costs certificate prior to the conclusion of the proceedings. Counsel referred to rule 65.15 of the CPR.

[26] Counsel referred to decisions from this court and the Supreme Court in support of his submission that a party is required to demonstrate special circumstances before the court will depart from the 'general rule' by making an order permitting taxation before the conclusion of the proceedings. The cases referred to were **Pan Caribbean Financial Services Ltd v Robert Cartade and Ors** [2011] JMCA Civ 2 at paragraph [82], **Raziel Ofer v George Thomas & Ors** [2012] JMSC Civ 184 at paragraph [17] and **Michael Distant & Anor v Nicroja Ltd & Ors**, (unreported) Supreme Court, Jamaica, Claim No 2010 HCV 1276, judgment delivered on 8 March 2011.

[27] Counsel submitted that since there was no order for immediate taxation, or taxation before the conclusion of the proceedings, it was unlikely that the learned judge who conducted the pre-trial review intended for the order to have that effect.

[28] Further, counsel noted that the order made contemplated negotiation between the parties to agree what could be "reasonable expenses" and for this purpose the order fixed the obligation for the costs to be paid up to 31 May 2016. Having

commenced taxation in breach of the order on 11 May 2016, the respondent was not entitled to the default costs certificate.

[29] Counsel submitted that, in the event this court did not agree that the default costs certificate should be set aside as of right, then it should be set aside as a matter of discretion. Counsel then sought to demonstrate that the appellants could satisfy the criteria enunciated in **Ramazan & Anor v Owner of Motor Vessel (CFS Pamplona)** and **Brady v The General Legal Council**. He addressed the following questions:

(i) Was the application made promptly?

(ii) Was the application supported by evidence on affidavit?

(iii) Is there a good explanation for the failure?

(iv) Has the party generally complied with other orders, rules and directions?

(v) Was the default the party's or that of its attorneys-at-law?

(vi) Can the default be remedied within a reasonable time?

(vii) How soon can the taxation be held?

(viii) What effect would the granting of relief or not have on each party?

(ix) Is there a real prospect of success in having the claimed costs reduced?

(x) What do the interests of the administration of justice demand?

Submissions for the respondent

[30] Counsel for the respondent first contended that the decisions in **Harold Brady v The General Legal Council** and **Rodney Ramazan and Anor v Owners of Motor Vessel (CFS Pamplona)** were arrived at *per incuriam.* Thus, counsel submitted, the learned judge was not bound to follow them. Counsel referred to **Young v Bristol Aeroplane Company Limited** [1944] KB 718, **Morelle Limited v Wakeling** [1955] 1 All ER 708 and **Brandwood and others v Bakewell Management Ltd** [2003] EWCA Civ 23 for the guidance given in determining whether a decision was *per incuriam*.

[31] Counsel submitted that the learned judge was correct as a matter of law in finding that the Registrar had been conferred with jurisdiction to set aside a default costs certificate based on provisions of the Judicature (Supreme Court) Act; the Judicature (Supreme Court) (Additional Powers of the Registrar) Act; the Judicature (Rules of Court) Act and rules 2.5(2), 65.17(4) 65.22(2) and 65.27(1) of the CPR.

[32] Counsel contended that the learned judge was also not bound to accept that a judge has the inherent jurisdiction to hear an application to set aside a default costs certificate as a judge of first instance, based on the division of labour within the Supreme Court.

The law

[33] The relevant provisions of rule 65 of the CPR provide:

> "**Time when taxation may be carried out**

65.15 The general rule is that the costs of any proceedings or any part of the proceedings are not to be taxed until the conclusion of the proceedings but the court may order them to be taxed immediately.

Commencement of taxation proceedings

65.18(1) Taxation proceedings are commenced by the receiving party-

(a) filing the bill of costs at the registry; and

(b) serving a copy of the bill on the paying party.

(2) The bill of costs must be filed and served not more than three months after the date of the order or event entitling the receiving party to the costs.

...

(6) The bill of costs served on the paying party or parties must contain or have attached to it a notice notifying the paying party of the need to serve points of dispute under rule 65.20 and the consequences of not doing so.

Points of dispute and consequence of not serving

65.20 (1) The paying party and any other party to taxation proceedings may dispute any item in the bill of costs by filing points of dispute and serving a copy on-

(a) the receiving party; and

(b) every other party to the taxation proceedings.

...

(3) The period for filing and serving points of dispute is 28 days after the date of service of the copy bill in accordance with paragraph (1).

...

(5) The receiving party may file a request for a default costs certificate if-

(a) the period set out in paragraph (3) for serving points of dispute has expired;

(b) and no points of dispute have been served on the receiving party.

(6) If any party (including the paying party) serves points of dispute before the issue of a default costs certificate the registrar may not issue the default costs certificate.

How to obtain default costs certificate

65.21 (1) A receiving party who is permitted by rule 65.20 to obtain a default costs certificate does so by filing-

(a) an affidavit proving-

(i) service of the copy bill of costs; and

(ii) that no points of dispute have been received by

the receiving party; and

(b) a default costs certificate in form 26 for signature by the registrar

(2) The registrar must then sign the default costs certificate.

(3) A default costs certificate will include an order to pay the costs to which it relates.

Setting aside default costs certificate

65.22 (1) The paying party may apply to set aside the

default costs certificate.

(2) The registrar must set aside a default costs certificate if the receiving party was not entitled to it.

(3) The court may set aside a default costs certificate for good reason.

(4) An application to the court to set aside a default costs certificate must be supported by

> affidavit and must exhibit the proposed Points of Dispute."

Discussion and analysis

[34] It is first to be noted that Brooks JA, in **Lijyasu M Kandekore v COK Sodality Co-Operative Credit Union Limited and Deidre Daley and Donnovan Ward** [2017] JMCA App 20, had this to say:

> "[30] In **Rodney Ramazan and Another v Owners of Motor Vessel (CFS Pamplona)** [2012] JMCA Civ App 37, I held that rule 65.22 did not prevent the registrar from setting aside a default costs certificate for reasons other than that the receiving party was not entitled to it (see paragraphs [10]–[11]). That decision did not take into account the fact that the rule had been amended in 2011. The decision must, therefore, be considered to be wrong in that regard.
>
> ...
>
> [66] The decision in **Rodney Ramazan and another v Owners of Motor Vessel (CFS Pamplona)** was also incorrect in holding that a single judge may consider an application under rule 65.22. Since the introduction, in November 2011, of rule 65.22(3), only the registrar or the court may consider applications to set aside a default costs certificate. The term 'court' as used in the rule can only mean a panel of at least three judges sitting as the court."

[35] Brooks JA was there referring to 'court' as defined within the context of rules applicable to this court. The term 'court', as used in the CPR, means the Supreme Court (see rule 2.4 of the CPR that deals with definitions). By virtue of section 11 of the Judicature (Supreme Court) Act, the registrar is one of the officers attached to the Supreme Court.

[36] It is also useful to note rule 2.5(1) of the CPR which provides:

> "Except where any enactment, rule or practice direction provides otherwise the functions of the court may be exercised in accordance with these Rules and any direction made by the Chief Justice by-
>
> (a) a single judge of the court;
>
> (b) a master; or
>
> (c) a registrar."

[37] The position, therefore, is that with the amendment to rule 65 of the CPR, it is clear that for the purposes of the setting aside of a default costs certificate, the functions of the registrar is to be distinguished from that of the court. The registrar is obliged to set aside the default costs certificate if the receiving party is not entitled to it and a single judge of the Supreme Court has discretion to set aside the certificate where good reason is shown.

[38] The learned judge recognised the amendment but was content to say that it "has not specified whether the application may be brought before a judge". She did not seemingly recognise that by its very definition 'court', as used in rule 65.22(3), must include a judge of the Supreme Court.

[39] It is perhaps useful at this point to note that the grounds for the application to set aside the default costs certificate that referred specifically to rule 65.22 were set out in the following manner:

> "...

> 4. In the alternative, pursuant to rule 65.22 of the Civil Procedure Rules which has interpreted and applied by the Court of Appeal to permit the setting aside of default costs certificates for good reason.
>
> 5. In the circumstances there is good reason to set aside the Default Costs Certificate dated the 27th day of June 2016, in particular, the Defendants/Applicants have a good explanation for the failure to file a Points of Dispute in time, they also have a real prospect of successfully reducing the claimed costs and they will be seriously prejudiced if the said Default Costs Certificate is allowed to stand."

[40] From her reasoning, it seems the learned judge was focused on establishing that it was wrong to assert that a judge could exercise the function expressly given to the registrar in rule 65.22(1). This may well have been as a result of the submissions that were made to her which seemed to have relied on the decisions of **Rodney Ramazan and another v Owners of Motor Vessel (CFS Pamplona)**, **Harold Brady v the General Legal Council** and **Charela Inn Ltd v United Church Corporation & Ors**. Hence, her conclusion was limited to her finding that an application to set aside a default costs certificate pursuant to rule 65.22(1) is to be made to the registrar and not to a single judge of the Supreme Court. She cannot be said to have erred with that conclusion.

[41] Where she fell into error was in making an order that, as constituted, she had no jurisdiction to set aside the default costs certificate. The provisions of 65.22(3) gave her the jurisdiction to do so. The manner in which the grounds for the application were set out was an invitation for her to exercise her discretion to set aside the default costs certificate for good cause. Having been led to embark on a discussion on the functions

of the registrar as against that of a single judge pursuant to rule 65.22(1), she failed to consider and go on to exercise the discretion given her in rule 65.22(3).

[42] Since the learned judge did not purport to exercise her discretion at all, this court was therefore free to exercise an original jurisdiction in seeking to have a just resolution in this matter. Accordingly, the further consideration for this court was whether the default costs certificate should be set aside for good cause.

[43] At the time this matter was before the learned judge and at the time this procedural appeal was considered, the procedure for determining whether a default costs certificate should be set aside pursuant to rule 65.22(3) involved a consideration of the principles of relief from sanctions. However, in a recent decision from this court it was determined that that approach was inappropriate. In **Advantage General Insurance Company Limited** (**Formerly United General Insurance Company Limited**) **v Marilyn Hamilton** [2019] JMCA App 29, McDonald-Bishop JA stated:

> "[14] Accordingly, there is only one criterion to be satisfied for the setting aside of default costs certificates under rule 65.22(3), and that is, that 'good reason' exists for so doing. Neither the CPR nor the relevant authorities has provided an exhaustive list or closed category of factors that may constitute 'good reason'. It may very well be that some of the matters that are required in the consideration of an application for relief from sanctions may be relevant considerations in determining whether good reason exists for the setting aside of a default costs certificate. The requirement for the application to be made promptly may be one consideration.
>
> [15] There cannot be, however, any hard and fast rule that the requirements under rule 26.8 of the CPR, must be applied, be it strictly or modified, to applications brought

> under rule 65.22(3). The question of what constitutes good reason for the purposes of the rule, falls to be determined upon an objective consideration of the particular facts and circumstances of each case, with the application of sound judgment and the overriding objective to deal with the case justly."

[44] In any event, at the time the orders were made in this matter it was not necessary for detailed consideration to be given to whether the requirements for an application for relief from sanctions were applicable.

[45] To my mind, the first thing to be considered is the order that led to the respondent, as the receiving party, laying a bill of cost. It may be useful to set out the order again:

> "The Defendants jointly and/or separately are to pay the Claimant's Attorney on or before the 31st May, 2016 the reasonable expenses incurred for the Claimant's travel and stay in Jamaica for five (5) days on presentation of bills and receipts therefore [sic] and if not agreed to be taxed by the Registrar."

[46] The order clearly afforded the parties up to 31 May 2016 to settle the issue of the payment of the reasonable expenses incurred by the respondent for travel and stay in Jamaica for five days. The discussions with a view to an agreement had stopped with an apparent acceptance for payments to be made in instalments, such payments to be completed by 31 May. Against this background, it was premature for the respondent to lay a bill of cost on 11 May 2016, well inside the time afforded in the order itself.

[47] The order, whilst permitting taxation by the registrar, was silent as to when such taxation should take place. Hence, the general rule regarding taxation would have been

applicable (see rule 65.15 of the CPR). There being no order for immediate taxation, these costs could have been taxed at the conclusion of the proceedings.

[48] In spite of this, the appellants, as the paying party, ought properly to have responded to the bill of costs within the 28 days provided by rule 65.20(3) of the CPR. An attempt at providing an explanation for their failure to do so was contained in the affidavit of the 1st appellant filed in support of the application to set aside the default costs certificate. She had this to say:

> "16. The failure to file the points in dispute within the time limited by the rules of court was not intentional. At all material times the Defendants/Applicants intended to comply with the orders and rules of court. However, in light of the Claimant's/Respondent's decision to commence taxation before expiration of the time stipulated by the court's order to reach agreement on costs, and further in light of their refusal and/or failure to clarify their claim for costs as requested in good faith, the Defendants'/Applicants' attorneys-at-law were put in the invidious position of being unable to determine if an agreement could still be reached in compliance with the court's order or if significant time and resources ought to be expended on preparing Points of Dispute."

This could hardly have qualified as a good explanation. However, this would not be considered fatal to the application to set aside the default costs certificate.

[49] The respondent was therefore entitled to request the default costs certificate since the period for serving points of dispute had expired and no points of dispute had been served on them pursuant to rule 65.20(5) of the CPR. However, the fact remained that the terms of the order did not permit immediate taxation, hence the entitlement to request the default costs certificate would be subject to this fact.

[50] Having been served with the default costs certificate on 28 June 2016, the filing of the application to set it aside on 8 July was sufficiently prompt to be considered a factor in favour of the appellants.

[51] It is noted that the appellants, in their draft points of dispute, raised a challenge to the total figure claimed by the respondent, which it was contended, failed to bear any relation to the actual costs incurred for a one-day hearing. This seems to be a matter that was of some merit. The bill of costs did in fact include charges to receive and peruse the points of dispute, to prepare the notice of taxation and other costs, which would possibly flow from the taxation procedure. The appellants would therefore be correct to seek to challenge these amounts because these costs were yet to have been incurred. The sums awarded in the default costs certificate were however less than the total amount sought in the bill of costs. It is not immediately clear which charges were actually included in the default costs certificate. Whether the amount in the bill of costs was reasonable required closer assessment.

[52] In all the circumstances the interests of justice would best be served by the setting aside of the default costs certificate. The respondent's bill of costs should be taxed and the appellants should be allowed an opportunity to participate in the taxation process in respect to their points of dispute.

[53] It was for these reasons that I agreed with the orders made at paragraph [4] above.