[2023] JMCA Civ 45

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MR JUSTICE D FRASER JA

SUPREME COURT CIVIL APPEAL NO COA2022CV00045

BETWEEN	**DEPUTY SUPERINTENDENT JOHN MORRIS**	**1ST APPELLANT**
AND	**DETECTIVE SERGEANT RALPH GRANT**	**2ND APPELLANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**3RD APPELLANT**
AND	**DESMOND BLAIR**	**1ST RESPONDENT**
AND	**MICHAEL GRANDISON**	**2ND RESPONDENT**

Written submissions filed by the Director of State Proceedings for the appellants

Written submissions filed by Kazembe and Associates for the respondents

6 October 2023

Civil Procedure - Consequence of the failure to serve witness statement pursuant to rule 29.11 of the Supreme Court of Jamaica Civil Procedure Rules 2002 ('the CPR') – Should the requirements of rule 29.11 of the CPR be considered before hearing an application for relief from sanctions pursuant to rule 26.8 of the CPR – Whether there was an appropriate consideration of the provisions of rule 26.8 of the CPR

PROCEDURAL APPEAL

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

BROOKS P

[1] I have read in draft the judgment of my sister P Williams JA. I agree with her reasoning and conclusion and have nothing to add.

P WILLIAMS JA

[2] In this matter, Deputy Superintendent John Morris ('DSP Morris'), Detective Sergeant Ralph Grant ('Det Sgt Grant') and the Attorney-General ('the AG') ('the appellants') appeal the decision of Hutchinson J ('the learned judge'), contained in a written judgment (with neutral citation [2022] JMSC Civ 44). By that decision, the learned judge granted the application of Mr Desmond Blair ('Mr Blair') and Mr Michael Grandison ('Mr Grandison') ('the respondents') for relief from sanctions for non-compliance with an order made by Henry-McKenzie J, on 10 July 2020, to file their witness statements within a stipulated time.

[3] The appellants contend that the learned judge misunderstood the nature of the order sought by the appellants; erred in her interpretation of rule 29.11 of the Supreme Court of Jamaica Civil Procedure Rules 2002 ('the CPR'); and erred in her consideration of whether to grant the application for relief from sanctions.

Background

[4] In 2005, Mr Blair and Mr Grandison were arrested and charged with the murder of Ms Sandra McLeod, whose body was found at a hotel property in Negril in the parish of Westmoreland. Mr Grandison was the Chief Executive Officer and Managing Director of the property, and Mr Blair was a contractor who occasionally carried out construction work there. The men remained in custody for several months before being granted bail. After a preliminary enquiry that lasted four years, they were committed to stand trial in the Circuit Court. On 14 May 2012, the Crown offered no evidence against them in the Manchester Circuit Court. On 31 May 2013, Mr Grandison commenced proceedings by way of a claim against Det Sgt Grant and the AG. His claim was for damages arising from the arrest for false imprisonment, malicious prosecution and included claims for

aggravated, exemplary and special damages with interest. On that same date, Mr Blair commenced a similar claim against the appellants for damages for false imprisonment and malicious prosecution. He also sought aggravated, exemplary and special damages with interest.

[5] On 24 June 2013, the AG filed an acknowledgement of service of the claim, but the other appellants failed to do so. The appellants, thereafter, failed to file their defence within the stipulated time, and on 23 December 2013, the respondents filed applications seeking permission to enter judgment in default against the appellants. On 22 April 2015, the AG filed an application for extension of time to file a defence and for the claims to be consolidated. On 12 August 2016, her application for an extension of time was refused, default judgment was entered against the appellants, and the court ordered that both claims should proceed to assessment of damages. At that time, it was also ordered that the claims be consolidated.

[6] At the first date set for the assessment of damages, 12 June 2018, the matter was adjourned to 28 February 2019. The note on the record of proceedings (minute of orders) was "parties having discussion with a view to settle". On 28 February 2019, the matter was adjourned to 5 May 2020 with a similar note on the record of proceedings (minute of orders) that the "parties are engaged in settlement discussions". It was further stated, "[i]f necessary the parties are to approach the Registrar to vacate the scheduled date…and secure an earlier hearing date to announce a settlement in the form of a consent order".

[7] With the onset of COVID-19, the matter was not heard on 5 May 2020, but was back before the court on 10 July 2020. On that date, the following orders were made:

> "1. Assessment of Damages is adjourned to December 7, 2021 at 10:00 a.m.
>
> 2. Witness Statement to be filed and served on or before January 8, 2021

3. Parties are to file submission and list of Authorities on or before July 30, 2021

4. [Respondents] to file a Judge's Bundle on or before 17th September 2021

5. [Respondents'] Attorney-at-Law is to prepare, file and serve orders herein."

[8] On 17 September 2021, the respondents filed their witness statements, which were served on the Director of State Proceedings ('DSP'), for the AG, on 20 September 2021. On 29 November 2021, the DSP filed an application for the witness statements to be struck out. The grounds on which the orders were sought included reliance on rule 29.11(1) of the CPR and the fact that the respondents had without permission filed their witness statements after the time stipulated and had not made an application for relief from sanctions regarding the late filing of the statements. Miss Faith Hall ('Miss Hall'), an attorney-at-law instructed by the DSP, filed an affidavit in support of the application on behalf of the appellants in which she succinctly set out the relevant background. The notice of application was set for hearing on 7 December 2021, the date for the assessment of damages.

[9] Having been served with this notice of application on 29 November 2021, on 2 December 2021, the respondents filed a notice of application for the following orders:

"1. That permission be granted for the late filing of the [respondents'] Witness Statements be accepted as evidence within the case.

2. That permission be granted for the [respondents] to be called as witnesses within the case

3. Relief from sanctions.

…"

[10] The grounds on which the respondents sought the orders were pursuant to rule 26.8 of the CPR. Miss Ruthan Campbell ('Miss Campbell') filed an affidavit in support of

the application for relief from sanction. She asserted that she was the attorney-at-law for the respondents and was duly authorised to give the affidavit on their behalf. She stated that the parties engaged in numerous discussions and exchanges with a view to arriving at an "amicable resolution" to the matter. She said that the respondents were led to believe that a resolution was likely and imminent and, as a result, believed that the filing of witness statements was a mere formality. After the stipulated date had passed and as the date set for the hearing approached, the witness statements were filed, and further attempts were made to settle the matter. Miss Campbell explained that it was upon receipt of the appellants' notice of application that the respondents became aware that there was "a breakdown in settlement negotiations", and that the matter would indeed proceed to the assessment of damages. She asserted that the application for relief from sanction was made when they became aware that the appellants were unwilling to settle the matter. She pointed to difficulties caused by the onset of the COVID-19 pandemic, chief of which was that the principal at Kazembe & Associates, Mr Courtney Kazembe ('Mr Kazembe'), resided overseas and during the months March 2020 to about June 2021 was unable to travel to Jamaica.

[11] Miss Campbell asserted that the application for relief from sanction was made promptly given that upon receiving the appellants' application and becoming aware that the ongoing settlement negotiations had ended, on 1 December 2021, Mr Kazembe returned to Jamaica so that the application for relief from sanction could be filed and served. The application was also set for hearing on 7 December 2021.

[12] On 6 December 2021, Miss Hall filed and served an affidavit in response, denying that there were ever any discussions with a view to settling the matter. She asserted that counsel for the respondents had written to the AG's Chambers enquiring whether they would be minded to settle the claims. The position of the AG's Chambers communicated to the counsel was that "whilst we might be minded to settle the claims prior to the assessment of damages … we have not yet been provided with details of the claim". She described the communication between the parties that followed and asserted that the AG's Chambers never communicated an offer to settle or that an out-of-court settlement

was imminent or misled or induced counsel for the respondents to think that the claim would be settled.

[13] On 7 December 2021, when the assessment for damages came on for hearing, the learned judge made several orders, including the following:

> "1. The Assessment of Damages scheduled for today is vacated as a number of applications have been filed which will have to be determined prior to the assessment hearing.
>
> 2. The Assessment of Damages is now scheduled for the 4th day of April, 2022, at 10:00 a.m. conditional on the outcome of the applications made herein.
>
> 3. The Applications filed on the 29th day of November, 2021 and of the 2nd day of December 2021 concerning applications to Strike Out Witness Statements and for Relief from Sanctions respectively, are scheduled for hearing on 23rd day of February, 2022 at 10:00 a.m."

[14] The learned judge also gave permission to the respondents to file and serve an affidavit in response to the affidavit of Miss Hall. This affidavit was filed on 15 December 2021. Miss Campbell then asserted that she was, in fact, a paralegal at the Kazembe & Associates. She set out details of the procedural history of the matter and exhibited various documents supportive of her account of this history, including an amended affidavit she had filed on 6 December 2021. Of significance, in that affidavit, she asserted that the witness statements were filed on 19 September 2021 "as a fail-safe measure in the event that negotiations failed and [the respondents] were required to proceed to the assessment of damages hearing". Miss Campbell also set out the history of the correspondence between the parties, and the challenges presented by the pandemic for Mr Kazembe and the firm itself. She explained that a senior attorney-at-law at the firm, Miss Akuna Noble ('Miss Noble'), left the firm in June 2021.

The decision of the learned judge

[15] In the introduction of her decision, the learned judge identified the "first in time" application as that filed by the AG "to strike out the [respondents'] statement of case". She noted that counsel for the respondents submitted as a preliminary point that the application ought not to be heard, and neither should the appellants be heard, given that they had failed to file Form 8A as required pursuant to rule 16.2(4) of the CPR.

[16] In her consideration of the applicable law and the analysis, the learned judge commenced by indicating that she had carefully considered rule 26.3(1) of the CPR, which provided that the court, on its own motion, has the power to strike out a statement of case if there has been a failure to comply with a rule. She stated that "[i]n their application, [the appellants] have asked that the powers under Rule 26.3(1)(a) of the CPR be exercised".

[17] She referred to the decision from this court of **Oneil Carter and others v Trevor South and others** [2020] JMCA Civ 54 ('**Oneil Carter**'), which she acknowledged, addressed the application of rule 29.11 of the CPR, where witness statements had not been filed by the stipulated deadline. She was satisfied that the reference to "at a trial" in rule 29.11(2) of the CPR included "an assessment hearing which is a trial of quantum". She noted also that the sanction for the failure to file the witness statements in time takes effect unless the court permits otherwise.

[18] She found that the respondents could not have had their application heard prior to the date set for the assessment of damages, having filed it so close to the hearing on 7 December 2021. They were, therefore, obliged to provide good reason on that date for their failure to make an application for relief prior to that date. She was satisfied that there was no good reason provided.

[19] She, however, found that the respondents were then faced with two challenges as not only were they at risk of their case being struck out on the basis that they had failed to comply with the court's orders, but they had also failed to seek relief prior to the

hearing date, and failed to provide a good excuse for this. She considered it prudent to determine whether the respondents' late application could still meet the threshold for relief to be granted. She then considered whether the requirements of rule 26.8(1) of the CPR were satisfied, thus entitling the respondents to relief from sanction.

[20] She first addressed the question was the application made promptly. She formed the opinion that the delay in filing the application had to be viewed in circumstances where the witness statement had been filed and served three months before the date of the hearing, "a situation in which it could be argued that it was still possible to meet the assessment date". She next considered whether the failure to comply was intentional. She noted that Miss Campbell, in her affidavit, revealed that there had been discussions between the parties as to the possibility of settling the matter. She observed that the records revealed that the court was informed on three separate occasions that the parties were so engaged. She recognised that the appellants had taken issue with this assertion. The learned judge, after examining the material concerning this issue, was satisfied that "there had been great emphasis placed on the possibility of bringing this matter to an end by settling same". She also accepted that that situation, along with the impact of the pandemic, resulted in the statement being filed outside the stipulated period. As such, she was satisfied that the respondents had not intentionally failed to comply with the court's order.

[21] The next matter the learned judge considered was whether there was a good explanation for the failure. She found that the explanation advanced was that it was not the fault of the respondents themselves but a result of challenges experienced by their attorney-at-law. She accepted that circumstances arose due to the pandemic, which had an adverse effect on the respondents' ability to comply with the orders.

[22] Ultimately, she made the following orders:

> "a. The application of the [appellants] to strike out the [respondents'] statement of case is refused.

b. The [respondents'] application for relief from sanctions is granted and the witness statement filed out of time is permitted to stand.

c. The [appellants are] to file and serve their Form 8A within 7 days of today's date.

d. The assessment of damages hearing scheduled for 4th April 2022 is vacated and the assessment will be heard on the 20th of July 2022 at 10 am

e. Each party is to bear their own cost [sic]."

She also gave the appellants leave to appeal.

The appeal and the issues that arise therefrom

[23] On 14 April 2022, the appellants filed their notice and grounds of appeal. The following are the grounds of appeal:

"i. The learned judge erred by failing to recognize that the appellants' application in the court below, was not an application to strike out the respondents' statement of case, but an application to find that the witness statements of the respondents are struck out by virtue of rule 29.11 of the [CPR].

ii. The learned judge erred by finding that the appellants asked the court that powers under rule 26.3(1)(a) of the CPR be exercised.

iii. The learned judge erred in considering and granting the respondents' application for relief from sanctions (under rule 26.8), after finding that there was no evidence provided by the respondents as to a good reason for not previously seeking relief, which is a precondition of rule 29.11(2) of the CPR.

iv. The learned judge erred, after having found that there was no evidence given by the respondents' that there was a good reason for not previously seeking relief under rule 26.8 of the CPR, in considering and granting the respondents' application for relief from sanctions.

v. The learned judge erred by failing to recognize that the sanction under rule 29.11(2) of the CPR took effect from January 8, 2021.

vi. The learned judge erred when she recognized the judgment of the Court of Appeal in [**Oneil Carter**] but then not proceeding to apply same to the circumstances of this case.

Further and/or alternate grounds:

vii. The learned judge erred, in the exercise of her discretion, under rule 26.8(1)(a), that the respondents' application for relief from sanction was made promptly, in the circumstances where the respondents' application was only made after the appellants had filed and served their application that the witness statements of the respondents are struck out.

viii. The learned judge erred in the exercise of her discretion in finding that the respondents had not intentionally failed to comply with the Court's order when in fact the respondents; filed their witness statements, submissions and list of authorities out of time and without the court's permission.

ix. The learned judge erred in not fully considering the evidence of the appellants that there was [sic] never any good faith negotiations being conducted by the parties.

x. The learned judge erred in finding that the failure was entirely attributed to the respondents' attorneys-at-law, when there was no evidence from the respondents' themselves explaining why the court's orders were not complied with.

xi. The learned judge erred in the exercise of her discretion in finding that there was a good explanation for the failure to comply with the orders of the court.

xii. The learned judge erred in the exercise of her discretion in finding that the [respondents] generally complied with all other relevant rules, practice directions and orders, when in fact the respondents

had failed to file their Submissions and List of Authorities in the time limited by the court's orders."

[24] The orders sought are:

> "i. The appeal is allowed.
>
> ii. The respondents' witness statements are struck out.
>
> iii. The matter is remitted to the Supreme Court for nominal damages to be assessed.
>
> iv. Costs of the appeal are awarded to the appellants to be taxed if not agreed."

[25] In their submissions filed on 28 April 2022, the appellants withdrew ground xii, identified the issues arising from the remaining several grounds of appeal, and grouped the grounds together in a manner that will be adopted, in part, for convenience in considering the appeal. The issues in this appeal are:

1. whether the learned judge misunderstood the nature of the order sought by the appellants (grounds i and ii);
2. whether, in the circumstances of this case, the requirements under rule 29.11 of the CPR must first be satisfied before an application can be heard under rule 26.8 of the CPR (grounds iii, iv, v and vi); and
3. whether the learned judge erred in her approach to the application for relief from sanctions (grounds vii, viii, ix, x and xi).

[26] This appeal seeks to challenge the exercise of the learned judge's discretion, and the approach of this court to such a challenge is now well settled. The guidance given by Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042, has formed the basis for this approach, as discussed and distilled in several

decisions from this court. In **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, Morrison P succinctly explained it this way at para. [20]:

> "This court will therefore only set aside the exercise of a 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 so 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'."

[27] Ultimately, for this court to disturb the learned judge's decision, it must be demonstrated that the learned judge's exercise of her discretion was based on a misunderstanding of the law or the evidence that was before her or that her decision was palpably wrong.

Preliminary issue

[28] At the commencement of the submissions made on behalf of the respondents, counsel makes what is described as an "overarching submission". It was contended that the appellants were and are subject to a default judgment and, as such, had no *locus standi* by virtue of rule 12.13 of the CPR, to make an application to strike out the respondents' witness statements or contest the respondents' application for relief from sanction. It was noted that similar submissions were made to the learned judge, but she had limited her consideration to whether the appellants ought to have been heard at the assessment hearing and failed to make a ruling on the issue the respondents had raised. It was submitted that the clear effect of rule 12.13 of the CPR is that with a default judgment having been obtained against them, which had not been set aside, the appellants could only be heard on the five issues specified in that rule. These were the assessment of damages (provided that they had indicated they wished to be heard by filing a notice pursuant to rule 16.2(4)); costs; the time for any payment for any judgment debt; enforcement of the judgment debt; and an application under rule 12.10(2) of the

CPR. Further, it was submitted that the appellants were subject to rule 12.13 of the CPR, and the effect of the clear wording of the rule meant that the appeal should be dismissed.

[29] In the submissions made on behalf of the appellants in response to this "overarching submission", it was noted that the respondents had not filed a counter-notice of appeal as required by rule 2.3 of the Jamaica Court of Appeal Rules 2002 ('the CAR'), and it was submitted that the appellants' submissions ought not to be entertained. It was further argued that notwithstanding the entry of the default judgment, counsel for the appellants had actively participated in the proceedings, had attended all the hearings and were subject to the orders made on 10 July 2020. It was contended that there was no rule or authority that precluded the appellants from making an application or being heard on an application in relation to an assessment of damages on the basis that the Form 8A was not filed.

[30] This approach by the respondents was, to my mind, a curious one since it was not a challenge to the learned judge's rejection of their attempt to prevent her from dealing with the applications before her; neither can it be viewed as a challenge to her granting permission to the appellants to file and serve their Form 8A. Additionally, it could not amount to a preliminary objection to the hearing of the appeal, which the learned judge had granted permission to the appellants to pursue. As was noted, the appellants had indeed participated, without objection, in the hearings that had followed their failure to have the default judgment set aside. The records of some of those hearings noted that the parties were in discussions for a possible settlement. The respondents and the appellants were made subject to orders to facilitate the assessment of damages hearing. It was the failure of the respondents to comply with the orders within the specified time that emboldened the appellants to make the application they did, although it must be noted they had themselves not complied with the orders. There having been no challenge to the appellants' participation up to the time they made their application, there was no basis to challenge their *locus standi* in the hearing of the application.

[31] In the circumstances, I view the overarching submission that the appeal be dismissed for this reason as unsustainable.

Issue 1: Whether the learned judge misunderstood the nature of the order sought by the appellants (grounds i and ii)

The submissions

[32] On behalf of the appellants, it was submitted that, on a perusal of their application, it was readily apparent that the appellants were not seeking to have the respondents' statement of case struck out, but was seeking to have their witness statements struck out pursuant to rule 29.11 of the CPR. Further, it was noted that since the appellants were not seeking to invoke the court's discretionary power to strike out the respondent's statement of case, they were not relying on rule 26.3(1)(a) of the CPR.

[33] In response, on behalf of the respondents, it was accepted that the appellants were correct that their application was one to strike out the respondents' witness statements and not the statement of case. It was contended, however, that the appellants failed to recognise that, based on the two competing applications, it was the respondents' application for relief from sanctions which was of paramount consideration and determinative of how the appellants' application would be treated. Having determined that the respondents were to have relief from sanctions, the appellants' application was rendered nugatory.

[34] It was submitted that the appellants' application was, in any event, inappropriate and unnecessary, given that there is an automatic sanction imposed by rule 29.11 of the CPR. There was, therefore, no need to strike out the witness statements, as such a sanction would be of no practical effect. It was concluded that the incorrect reference by the learned judge to an application to strike out the respondents' statement of case caused no injustice to the appellants, and did not affect the ultimate issue that the learned judge was required to determine. It was submitted that this did not amount to a basis, in law, on which her decision could be impugned.

Discussion

[35] It is irrefutable that the appellants are correct that the learned judge erred by referring to the appellants' application as one to strike out the respondents' statement of case. The application sought an order for the respondents' witness statements to be struck out. It is noted that the learned judge stated, "[i]n their application the [appellants] have asked that the powers under rule 26.3(1)(a) be exercised". It is equally apparent that this was, in fact, incorrect. The appellants relied on rule 29.11 of the CPR in support of the application.

[36] Rule 29.11 of the CPR provides that:

> "(1) Where a witness statement or 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 rule 26.8."

[37] The sanction stipulated by the rule for failure to comply with the timeline for service of the witness statement is that the witness may not be called unless the court permits, and this sanction takes effect immediately on the breach. To my mind, seeking to strike out a witness statement filed after the specified time is not a sanction recognised by the rules. I agree with the respondents' submission that this was an unnecessary application. However, the fact remains that the learned judge identified the application on a basis entirely different from the one on which the appellants relied.

[38] There is merit to grounds i and ii, and the appellants succeed on these grounds. However, I agree with the submissions made on behalf of the respondents that success on these grounds is not a basis for impugning the decision of the learned judge in its entirety.

Issue 2: Whether, in the circumstances of this case, the requirements under rule 29.11 of the CPR must first be satisfied before an application can be heard under rule 26.8 of the CPR (grounds iii, iv, v and vi).

The submissions

[39] On behalf of the appellants, it was contended that when the matter came on for assessment, and the applications were before the learned judge, notwithstanding that the assessment date was vacated, the respondents' application for relief from sanction had to be considered in light of rule 29.11 of the CPR. The learned judge ought to have first examined and determined whether the precondition under the rule was satisfied, namely, whether the respondents had a good reason for not previously seeking relief. It was noted that the learned judge had correctly identified the law upon which the applications were to be determined (see paras. [12] and [13] of her reasons for judgment). It was submitted that the learned judge had correctly found that, on 7 December 2021, the date on which the assessment of damages was to be heard, the respondents provided no evidence from which a good reason was shown for not previously seeking relief from sanctions. The submission continued that the learned judge, however, erred from that point onwards.

[40] It was pointed out that from paras. [17] to [34] of the reasons for judgment, the learned judge conducted an analysis of the evidence solely with reference to rule 26.8 of the CPR, without reference or regard to rule 29.11 of the CPR, or the appellants' application. It was submitted that given the stage of the proceedings, and the fact that the sanction under rule 29.11 had already taken effect, the learned judge should not have gone on to determine whether relief from sanctions should be granted without first determining whether there were good reasons for not previously seeking relief. **Oneil Carter** was relied on in support of those submissions.

[41] For the respondents, it was submitted that evidence was presented to show why an application for relief from sanction had not previously been made. It was noted that such evidence was contained in the affidavit of Miss Campbell, filed on 2 December 2021. Miss Campbell asserted that up to 29 November 2021, the parties were engaged in "good

faith attempts to settle the matter" and "[the respondents] had been waiting for a response from the Attorney General's Chambers". She explained that they were unaware of a "breakdown in settlement negotiations" and that the matter would proceed to assessment of damages hearing, until 29 November 2021, when the appellants' application to strike out the witness statements was received. Further, she explained that the application for relief from sanction was being made at that stage "as [the respondents] are now aware that the [appellants] are unwilling to settle the matter".

[42] It was submitted that this was evidence that appeared to have eluded the learned judge, but several paragraphs in the decision were highlighted where she recognised that there had been discussions pending settlement. Thus, it was submitted that had she considered this evidence, she would have been satisfied in relation to rule 29.11(2) of the CPR.

[43] In the alternative, it was submitted that, as a matter of law, the learned judge was not required to consider rule 29.11. It was pointed out that the application for relief from sanction was filed on 2 December 2021, which was before the date set for the assessment hearing. On the date for the assessment hearing, the learned judge vacated the hearing of the assessment of damages and set it for another date; set a date for the hearing of the applications filed by both parties; and made orders to facilitate that hearing. It was submitted that, in the circumstances, "there can be no serious contention that the respondents' application for relief from sanctions was heard 'at the trial' so as to require any consideration of [rule 29.11 of the CPR]". It was further contended that while an assessment of damages is a trial, it is beyond debate that an application for relief from sanctions made before a judge in chambers is not a trial.

[44] It was ultimately the submission that the respondents were not seeking permission at the trial, and so the requirement under rule 29.11(2) of the CPR was not applicable to this matter. **Oneil Carter** was also relied on in support of the submissions made on behalf of the respondents.

Discussion

[45] In **Oneil Carter**, this court considered a challenge to the correctness of a judge's order extending the time for respondents to file and exchange witness statements. One of the issues the court had to address was whether rule 29.11(2) of the CPR was contingent on satisfaction of rule 26.8 of the CPR. Writing on behalf of the court, Dunbar-Green JA (Ag) (as she then was) considered the provisions of rule 29.11 and said the following:

> "[32] The appellants are correct in their submission that the sub-rules comprised in rule 29.11 should be read together as one rule. The phrase '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.
>
> [33] 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."

[46] In the instant case, the application by the appellants to strike out the respondents' witness statements, seemed to have served the purpose of reminding the respondents that they could not call the witnesses unless the court permitted it, given that their statements had not served within the time specified. Within days of being made aware of the application, unsurprisingly, the respondents moved to remedy the failure and filed their application seeking relief from sanction on 2 December 2021, days before the hearing. The appellants' application was set for hearing on 7 December 2021, which was the date for the assessment hearing, and the application for relief from sanction was

subsequently set for the same date. This, in effect, meant that the applications were to be heard on the date set for the hearing. It is, however, indisputable that the application for relief from sanction was in fact made before the hearing. If none had been made the respondents would have to have sought permission to call the witnesses and then would have to satisfy the court with a good reason as to why an application for relief from sanction had not been made before.

[47] The learned judge correctly recognised that the application for relief from sanction could not have been heard before the date set for the hearing of the assessment. This was due to the fact that it was filed so close to the date set for the hearing. The learned judge erred when she treated the application as having been made at the hearing and further erred in finding that the appellants were required to provide a good reason for their failure to seek relief from sanction earlier. Rule 29.11 presumes that no application for relief for sanction had been made before the hearing. The fact is that the respondents once alerted that the appellants were making the unusual application to have their witness statement struck out, made the necessary application seeking relief from sanction before the date set for the hearing.

[48] Miss Campbell indicated that ongoing good-faith discussions pending settlement were the reason for the breach of the order to file the witness statements at the stipulated time. She asserted that, at all material times, the witness statements were ready to be filed and were eventually filed "approximately four (4) months before the date of hearing and thus the failure to file was remedied within a reasonable time". In an affidavit filed in response to Miss Campbell's, Miss Hall sought to deny that there were any such discussions. However, the records of the proceedings clearly indicate that the court was advised of the existence of discussions, and the matter was adjourned to facilitate the discussions. The parties were present when those orders were made. When the order was made for the filing of the witness statements, there was no indication that this was contingent on any further discussions. The parties were obliged to comply with the orders of the court, and failure to do so was at their peril.

[49] Thus, the respondents accept that having filed the statements some eight months after they should have been filed, it was not until the application was made for the witness statements to be struck out that they became aware that the matter would be proceeding to assessment, and, only then, did they recognise a need to apply for relief from sanction. The application was filed before the hearing and set for hearing on the same day of the trial and in these circumstances the respondents' submission that they were not seeking permission at the trial and so the requirement under rule 29.11 was not applicable to this matter, is correct.

[50] The learned judge, therefore, erred in concluding that there was a need for the respondents to provide a good reason for their failure to apply for relief from sanction before the date of the assessment hearing. They in fact had done so. The basis on which the appellants sought to challenge the exercise of her discretion in relation to rule 29.11 as stated in grounds iii, iv, v and vi cannot succeed. Ultimately, although she erred the learned judge was entitled to consider the provisions of rule 26.8.

Issue 3: Whether the learned judge erred in her approach to the application for relief from sanctions (grounds vii, viii, ix, x and xi)

The submissions

[51] For the appellants, it was submitted that pursuant to rule 26.8 of the CPR, in considering whether to exercise its discretion to grant relief from sanctions, a court must first consider whether the application was made promptly since the need for promptitude is mandatory. It was also submitted that if the court found that the application was not made promptly, then the court did not have to consider the application on its merits. If the application was made promptly, then the court could consider the threshold requirements under rule 26.8(2), and all requirements must be met. **H B Ramsay & Associates Ltd and others v Jamaica Redevelopment Foundation Inc and another** [2013] JMCA Civ 1 ('**HB Ramsay**') was relied to support of this submission.

[52] It was contended that, given the timeline of events, if the appellants had not filed their application, the respondents would not have been spurred into action to file their

application. It was submitted that this could not be seen as prompt in any context whatsoever. It was noted that Miss Campbell, in her affidavit, sought to address the issue of promptness by stating that the respondents were of the belief that settlement of the matter was imminent. It was only when they became aware that the appellants were unwilling to settle that the application for relief from sanctions was made. It was submitted that this could not be a good reason, especially since the appellants had never indicated they would settle the matter.

[53] It was noted that Miss Campbell laid blame on the COVID-19 pandemic, indicating that during the period March 2020 to June 2021, the attorney-at-law with conduct of the matter was unable to travel to Jamaica. It was pointed out that the orders were made at court, where the attorneys-at-law attended, in person, when the pandemic was still ongoing. The parties were given approximately six months to file and serve the witness statements. There was no evidence, in any of the affidavits, as to why the application was not filed sooner. It was contended that the application could have been drafted virtually and instructions given for another attorney-at-law employed by the firm to sign.

[54] It was submitted that although the learned judge indicated that she was guided by **Jeffrey William Meeks v Victoria Marie Meeks** [2020] JMCA Civ 7 ('**Meeks v Meeks**') and **Ray Dawkins v Damion Silvera** [2018] JMCA Civ 25 ('**Ray Dawkins**'), in determining the issue of promptness, on the evidence before her, the learned judge erred in the exercise of her discretion.

[55] On the issue of whether the failure to comply was not intentional, it was noted that Miss Campbell asserted that the witness statements were filed eight months after the time stipulated "as a fail-safe measure in the event that negotiations failed and [the respondents] were required to proceed to the assessment of damages hearing". It was accepted that the court was advised that there were discussions with a view to settlement, but it was contended that there were, in fact, no settlement discussions. It was also submitted that there were never any good-faith negotiations between the parties, as alleged by the respondents.

[56] After reviewing some of the contents of the letters exchanged between the parties, it was submitted that the letters proved that actual negotiations did not take place. Further, it was submitted that the evidence from Miss Campbell showed that they intentionally did not file the witness statements choosing to await the results of the negotiations. In conclusion, the submission was that the learned judge, therefore, erred in finding that the respondents had not intentionally failed to comply with the court's orders, and had erred in not considering the affidavit evidence from the appellants, which showed that there were never any good-faith negotiations between the parties.

[57] The next requirement that was addressed was whether there was a good explanation for the failure to comply. It was noted that the learned judge, in finding that there was a good explanation, accepted the respondents' assertion that there were circumstances, consequent on the effects of the pandemic that adversely affected the ability of the respondents to comply with the orders. In particular, she highlighted the fact that the principal attorney-at-law at the firm was outside of the jurisdiction, and unable to return. Further, the learned judge noted that counsel who was dealing with the matter had left the firm.

[58] It was pointed out that the period that falls to be considered in determining this issue was between 10 July 2020 and 8 January 2021. It was contended that during that period, the law firm representing the respondents was fully staffed. From the correspondence exhibited, the attorney-at-law with conduct of the matter was with the firm up to December 2020. There was conflicting evidence as to the dates the principal attorney-at-law was not in the jurisdiction. In any event, it was submitted that placing the blame on the pandemic did not sufficiently cover that period, or the period between 8 January 2021 and 7 December 2021. The evidence from Miss Campbell also failed to address how being unable to travel to Jamaica prevented or hindered the preparation of the witness statements. It was submitted that it was "quite incredible that in this age of instant communication and with the technological tools available that the respondents and their attorneys, could not have virtual meetings to discuss and prepare the witness statements". Further, it was submitted that a principal in Canada did not need to travel

to assist in the preparation of the statements. Accordingly, the learned judge erred in the exercise of her discretion.

[59] In response to the appellants' submissions, it was accepted that the learned judge was required to satisfy herself that the respondents had overcome the first mandatory hurdle by demonstrating that the application for relief from sanction was made promptly. Having overcome that hurdle, she was then required to analyse the conjunctive requirements set out in rule 26.8(2). It was also submitted that the learned judge was required to bear in mind the considerations set out in rule 26.8(3). **Jamaica Public Service Company Limited v Charles Vernon Francis and another** [2017] JMCA Civ 2 ('**JPS v Francis**') was referred to in support of this submission.

[60] It was noted that the learned judge, in considering whether the application for relief was made promptly, acknowledged that the respondents' application had been filed almost one year after the stipulated time for filing. She recognised, in keeping with the authorities of **Ray Dawkins** and **Meeks v Meeks**, that the question of whether an application is made promptly, depends on the circumstances of the case. She considered and accepted the affidavit evidence and found that the delay had to be viewed in the circumstances where the witness statements had been filed almost three months before the assessment of damages. It was submitted that the learned judge's factual findings on this issue were correct and based on the evidence, which led her to conclude that the application was prompt. It was concluded that the fact that the evidence may have been looked at differently by a different tribunal was not a reason to interfere with the learned judge's exercise of her discretion.

[61] On the issue of whether, in all the circumstances, the failure was intentional, it was noted that the learned judge considered and accepted the evidence of Miss Campbell that there were settlement discussions between the parties, especially in light of the minutes of orders and the written correspondence exchanged between the parties that were exhibited. It was submitted that "whereas it may have been errant on the part of the respondents' attorneys-at-law to rely on discussions with opposing counsel in the

belief that the matter would be settled, there was absolutely no evidence as to any intentional non-compliance of the court's order". It was noted that the learned judge considered the effects of the global pandemic on the respondents' non-compliance, and it was submitted that, based on the evidence before her, it could not be said that she erred in finding that the non-compliance was not intentional.

[62] The respondents' concluding submission on this issue was that the appellants had not demonstrated that the learned judge misdirected herself as to the law or the evidence, and so her decision should not be disturbed. The respondents submitted that the appellants' complaint was as to the weight the learned judge placed on the evidence before her, which led to her deciding in the respondents' favour, and this, without more, is not a proper basis to impugn her decision.

[63] On the question of whether there was a good explanation for the failure to comply, it was noted that based on her analysis, the learned judge was of the view that the failure to comply was due to difficulties that were being experienced by the respondents' attorneys-at-law. It was submitted that the learned judge appreciated the need for a "protective approach" towards a litigant when those whom he has paid to do so have failed him (see **Merlene Murray-Brown v Dunstan Harper and another** [2010] JMCA App 1). It was submitted that the appellants had, again, failed to demonstrate that the learned judge misdirected herself as to the law or the evidence.

Discussion

[64] It is appropriate to set out the relevant provisions of rule 26.8(1) below:

> "(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 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.

…"

[65] In **HB Ramsay**, Brooks JA (as he then was) succinctly explained the rule as follows at para. [31]:

> "[31] An applicant who seeks relief from a sanction, imposed by his failure to obey an order of the court, must comply with the provisions of rule 26.8(1) in order to have his application considered. If he fails, for example, to make his application promptly, the court need not consider the merits of the application. Promptitude does, however, allow some degree of flexibility and thus, if the court agrees to consider the application, the next hurdle that the applicant has to clear is that he must meet all the requirements set out in rule 26.8(2). Should he fail to meet those requirements then the court is precluded from granting him relief. There would, therefore, be no need for a court, which finds that the applicant has failed to cross the threshold created by rule 26.8(2), to consider the provisions of rule 26.8(3) in relation to that applicant."

[66] In **Ray Dawkins**, this court considered the question of what the word "promptly" meant and stated as follows:

> "[60] It is to be noted that the rule does not give any definition of the word 'promptly' neither is this requirement of promptness referable to any other event. There are rules where a party is required to make an application to avoid the consequence of its matter being determined due to failure to comply with a rule or a direction. For example, in an application to set aside or vary a judgment made in default 'the court must consider whether the defendant has applied to the court as soon as is reasonably practicable after finding out the that [sic] judgment has been entered' (see rule 13.3(2) of the CPR).
>
> [61] In **National Irrigation Commission Ltd v Conrad Gray and Marcia Gray** [[2010] JMCA Civ 18] Harrison JA stated that:
>
> > '[14] […] Promptly is an ordinary English word which we would have thought had a plain and obvious meaning, but if we need to be told a bit more about what it means, we do have the authority of **Regency Rolls Limited v Carnall** [2000] EWCA Civ. 379, where Arden, L.J. pointed out that the dictionary meaning of 'promptly' was 'with alacrity'. Simon Brown, L.J. said:
> >
> > > 'I would accordingly construe 'promptly' here to require, not that an applicant has been guilty of no needless delay whatever, but rather that he has acted with all reasonable celerity in the circumstances.'
>
> And at paragraph [16] he had this to say:
>
> > '[…] Promptness, in our view, is the controlling factor under rule 26.8. It is plainly a very important factor, as is evident from the fact that it is singled out in the rule as a matter to which the court must have regard. In our judgment, it is a very important factor because there is a strong public interest in the finality of litigation. Put simply, people are entitled to know where they stand.'"

[67] It is accepted that what amounts to promptness significantly depends upon the circumstances of the particular case (see **Meeks v Meeks**). In this case, I find that the question of promptness was relative to the time the breach had taken place with the consequential sanction taking effect. On 10 July 2020, the court ordered that the witness statements were to be filed and served on or before 8 January 2021. The sanction took effect on that date. The respondents did not file and serve the statements until 17 September 2021. The application for relief from sanction was made on 2 December 2021, only after they had been served with the appellants' application that the statements be struck out. It bears repeating that it was a significant admission by Miss Campbell that "the application [was] being made at this stage as [the respondents] are now aware that the [appellants] are unwilling to settle the matter". The respondents were not purporting to say that they were unaware of the fact that they were in breach of the court's order. They accepted that the witness statements had been filed late, they, however, did not accept the need to apply for relief from sanction for so doing, until three months later, when it was clear that the settlement they were anticipating would not be realised. In these circumstances, although the application can be viewed as having been made promptly in response to the application to strike out, to my mind, there was an inordinate delay in relation to when the breach had occurred. Thus, I find that the application for relief from sanction was not made promptly.

[68] In considering this issue, the learned judge had this to say:

> "[19] Rule 26.8(1)(a) and (b) outline that the application must be made promptly and supported by evidence. It is not in dispute that the application was filed on the 2nd of December 2021 almost 12 months after the date by which the statements should have been filed and almost 3 months after the [statements] were filed. In these circumstances I fully understood the [appellants'] description that the application was filed in response to their application to strike out. I take note however that in considering this issue, various Courts have found that whether the application was prompt would also depend on the circumstances and

> applications filed after a similar or longer period of time have been favourably considered….
>
> [20] In addition to the affidavit evidence, I carefully considered the guidance provided by the Courts in cases such as **Ray Dawkins** and **Meeks v Meeks**, as well as the submissions made by respective Counsel. I formed the opinion that the delay in filing the application had to be viewed in circumstances where the witness statement had been filed and served almost 3 months before the date for assessment a situation in which it could be argued that it was still possible to meet the assessment date."

[69] It is apparent that the learned judge sought to resolve the matter by considering the time the statements were filed and, in so doing, failed to recognise the significance of the fact that the sanction had already taken effect some eight months earlier. The respondents would not have been able to call the witnesses without the permission of the court and upon obtaining relief from the sanction. It was of no moment that the statements were filed before the date for assessment. The learned judge failed to consider the delay from the time the breach had occurred, especially since this was not a breach that could be remedied merely by filing the witnesses' statements at any time before the date set for the assessment hearing. Ultimately, I am satisfied that there is merit in the appellants' complaint that the learned judge erred in the exercise of her discretion in the manner she addressed this question of whether the application for relief had been made promptly.

[70] Although the fact that the learned judge had erred regarding the question of whether the application was made promptly may be sufficient to dispose of the appeal, I will consider whether the learned judge erred in considering the issues of whether the failure to comply was intentional, and whether there was a good explanation for the failure to comply.

[71] The primary reason given by the respondents for their failure to comply with the orders of the court was that they were awaiting the outcome of what they viewed as

ongoing good-faith discussions to settle the matter. The learned judge was satisfied that there had been great emphasis placed on the possibility of bringing the matter to an end by settling the same, and she accepted that this situation, along with the impact of the pandemic, resulted in the statements being filed outside the stipulated period. To my mind, she did not need to resolve the question of whether there were indeed ongoing discussions for a settlement. She was at liberty to find, as she did, on the evidence that for the respondents, there was indeed great emphasis on the possibility of settling the matter. It was on this basis that she was satisfied that the respondents did not intentionally fail to comply with the order of the court.

[72] It is, however, to be noted that Miss Campbell asserted that, at all material times, the respondents were led to believe that a settlement could be reached and, as a result, the respondents "did verily believe that the filing of [the respondents'] witness statements was a mere formality". Further, she asserted that, at all material times, the witness statements were ready to be filed. It seems to me that there was some deliberateness in the decision not to file the statements in the hope that the matter would have been settled. In all those circumstances, the learned judge erred in concluding that failing to comply with the order was not intentional.

[73] Turning to whether there was a good explanation for the failure to comply, a useful place to start is by recognising that this factor is subjective, and the rules do not indicate how a court is to determine whether an explanation is a good one or not (see **JPS v Francis**).

[74] In considering the issue, the learned judge said the following:

> "[23] The explanation which has been advanced indicates that the failure to comply with the date for filing was not the fault of the [respondents] themselves but as a result of challenges which were being experienced by their Attorney. This Court is aware that in March 2020, the island was impacted by the covid19 [sic] pandemic. This resulted in the airports being closed and similar restrictions were imposed in other nations, it is the

evidence of the affiant that Canada where Counsel with conduct resides was one such jurisdiction where similar restrictions existed. The challenges to Counsel at the firm in terms of their numbers and ability to work during the lockdown, curfews and no movement days were also highlighted. I also noted that there were challenges in putting things in place to interact with the [respondents] themselves in obtaining the instructions to place in the witness statements.

[24] In ordinary circumstances, while the period of time which elapsed between the order of the Court and the filing of the statement would have been far outside of a period which could be considered reasonable, these were no ordinary circumstances and I accept that they would have had an adverse effect on the [respondents'] ability to comply with these orders, particularly in circumstances where the principal attorney was outside of the jurisdiction and Counsel who had been assisting had moved on from the firm. While I have accepted the explanation as a good one in the circumstances, I also considered the dicta of Phillips JA in **University Hospital Board [of Management] v Hyacinth Matthews** [2015] JMCA Civ 49 to be useful as well as applicable, where she stated:

> [49] Batts J referred to a powerful statement of Sykes J in **Gloria Findley v Gladstone Francis**[(unreported), Supreme Court, Jamaica, Suit No F045/1994, judgment delivered 28 January 2005], which I am of the view warrants repetition here, being apt to the circumstances of the case at bar. He said:
>
> > *'I recognize that the good administration of justice requires that cases be dealt with expeditiously but this has to be measured against the risk of injustice to a litigant because of his lawyer's default, particularly where the defendant did not personally contribute to the state of affairs that has come about. The administration of justice while receiving a blow in this*

case will not be undermined…"' (Italicised as in original)

[75] The court orders gave the respondents a period of some six months, from 10 July 2020 to 8 January 2021, to file the witnesses' statements. They were obliged to provide a good explanation for the failure to comply within that time. The learned judge was prepared to accept the respondents' assertion that the failure was due to the attorneys-at-law. However, there are some matters which cause me to question whether the assertion can stand up to scrutiny. Firstly, the learned judge apparently accepted that there were challenges in putting things in place to interact with the respondents to obtain instructions to place in the witness statements. However, it must again be noted that Miss Campbell asserted, in her first affidavit, "at all material times the witness statements of the [respondents] were ready to be filed".

[76] The learned judge further accepted that circumstances arising from the pandemic caused Mr Kazembe to be out of the jurisdiction and accepted that Miss Noble had left the firm. However, Miss Campbell asserted that Mr Kazembe was out of the jurisdiction and unable to return from March 2020 to June 2021. She explained, in her subsequent affidavit, that Miss Noble left the firm in June 2021, and it was a few days before Miss Noble left that Mr Kazembe returned and remained on the island for a few days at a time, between June 2021 and September 2021. Certainly, if the witness statements were ready "at all material times", and Miss Noble was at the firm up to June 2021, and Mr Kazembe, thereafter, this explanation falls short of addressing why they failed to file the statements between June 2021 and 8 July 2021. This distinctly pointed to administrative inefficiencies where the view was held that the filing of the statements was a mere formality. This court has held that administrative inefficiency does not amount to a good explanation (see **JPS v Francis**)

[77] To my mind, the circumstances relied on by the respondents to explain the delay in filing the witness statements at the stipulated time called for a more careful examination by the learned judge. She failed to do so, and I find that if she had, she would not have been satisfied that the explanation was a good one.

Conclusion

[78] The learned judge erred in identifying the appellants' application as one to strike out the respondents' statement of case and which had called on her to exercise her powers under rule 26.3 of the CPR. The appellants sought to have the witness statements filed after the stipulated time by the court and therefore rendered untenable by rule 29.11 struck out. Having failed to recognise that, at the hearing, an application for relief from sanction had been filed, the learned judge erred in ultimately finding that respondents were obliged to provide a good reason for not previously seeking relief from sanction and had failed to do so.

[79] The learned judge, having gone on to consider whether the requirements of rule 26.8(1) and (2) of the CPR were satisfied, erred in the manner she addressed the question of whether the application for relief from sanction had been made promptly. In the light of the averments made by Miss Campbell in her affidavits, the learned judge also erred in concluding that the respondents had not intentionally failed to comply with the court's orders to file the witness statements by a stipulated time. She failed to properly consider the evidence relating to the respondents' explanation as to why they had not complied with the orders. There was no good reason for the failure to file the witness statements in the time specified. Thus, she was precluded from granting the relief sought.

[80] The respondents, without more, will not be able to call a witness at the assessment of damages. This result is similar to one that was arrived at by this court in **JPS v Francis**, where Edwards JA (Ag) (as she then was) made an observation that is appropriate to this matter at para. [70]. She stated the following:

> "The result is that the appellant will not be able to call a witness at the trial. Though this result may appear to be draconian, it is the rule and litigants will best give regard to it or suffer the consequences. It is no use to say that the appellant will be prejudiced if it is not able to call witnesses at the trial. **Inherent in the existence of rule 29.11 of the CPR is an acceptance that there will be prejudicial effect; nonetheless the rule still exists and attorneys**

> **and their clients must be mindful of it and the effect of non-compliance.** As the Board stated in the case of **The Attorney General v Universal Projects Limited** [[2011] UKPC 37], it serves the useful purpose of improving the efficiency of litigation." (Emphasis supplied)

[81] In light of the foregoing, I would allow the appeal and set aside orders made by Hutchinson J on 31 March 2022. The respondents' witness statements filed on 17 September 2021 should be struck out. In the event that the appellants were awaiting this decision and have not yet filed and served their Form 8A in the time stipulated by the court, I would propose that they be permitted to do so within seven days of the date of this judgment.

[82] The appellants sought an order that the matter be remitted to the Supreme Court for nominal damages to be assessed. While I agree that the matter ought to be remitted for the damages to be assessed, the appellants have failed to present any arguments to support an order that those damages should be nominal in these circumstances.

[83] On the issue of costs of the appeal although the respondents have succeeded on one aspect, the ultimate result is such that I see no basis to depart from the usual principle that costs follow the event and, therefore, propose that the costs of the appeal be awarded to the appellants to be agreed or taxed, unless the respondents within 14 days of the date of this order file and serve written submissions for a different order to be made. The appellants should then file submissions in response within seven days of service upon them of the respondents' submissions.

D FRASER JA

[84] I, too, have read the draft judgment of my sister P Williams JA and agree with her reasoning and conclusion.

BROOKS P

ORDER

1. The appeal is allowed.

2. Paragraphs a. and b. of the order made by Hutchinson J on 31 March 2022 are set aside.

3. The appellants are permitted to comply with paragraph c. of the order made by Hutchinson J within seven days of today's date.

4. The respondents' witness statements are struck out.

5. The case is remitted to the Supreme Court for damages to be assessed.

6. Costs of the appeal to the appellants to be taxed if not agreed unless the respondents within 14 days of the date of this order file and serve written submissions for a different order to be made. The appellants shall file written submissions in response to the respondents' submission within seven days of service upon them of those submissions.