[2019] JMCA Civ 45

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 103/2018

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA

BETWEEN	**SEAN GREAVES**	**APPELLANT**
AND	**CALVIN CHUNG**	**RESPONDENT**

Written submissions filed by Messrs Dabdoub, Dabdoub & Co for the appellants

20 December 2019

PROCEDURAL APPEAL

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

MCDONALD-BISHOP JA

[1] I have read, in draft, the comprehensive judgment of my learned sister, Edwards JA and I agree with the reasoning and conclusion. There is nothing I could usefully add.

P WILLIAMS JA

[2] I too have read, in draft, the judgment of my learned sister, Edwards JA and agree.

EDWARDS JA

The background to this appeal

[3] On 19 October 2018, Wiltshire J (Ag) (as she then was), heard an application from Calvin Chung, who was the claimant in the court below, for relief from sanctions for non-compliance with an unless order made by Y Brown J (Ag), (as she then was). After hearing the application, Wiltshire J (Ag) (the judge) made the following orders:

> "1. The Claimant's Application for relief from sanctions is hereby granted.
>
> 2. Costs against the Claimant.
>
> 3. Leave to appeal granted.
>
> 4. The Notice of Application for Court Orders filed on the 13th of December 2016 is further adjourned to the 15th day of February 2019 at 12:00 noon for one hour.
>
> 5. Claimant's Attorneys-at-Law to prepare, file and serve this Order."

[4] Sean Greaves (hereinafter referred to as the appellant), who was the defendant in the court below, being aggrieved by the above orders, filed a notice of appeal on 1 November 2018, seeking to challenge the order of the judge which granted the relief from sanctions to Calvin Chung (hereinafter referred to as the respondent), with costs.

[5] The respondent, the stepfather of the appellant and widower of the appellant's deceased mother, Mrs Janneth Chung, by way of claim form filed 31 August 2015, sued the appellant in the court below for damages for breach of trust. This trust was allegedly created in the state of Florida, in the United States of America. Since the claim

is yet to be tried, it is not necessary to go into the details of it, which are also not relevant to this appeal.

[6] The appellant filed an acknowledgment of service of the claim, on 21 September 2015, in which he stated that he was not personally served. He later challenged the jurisdiction of the Supreme Court to hear the claim, having subsequently filed a notice of application for court orders on 21 September 2015, supported by an affidavit. The application sought a declaration that the court did not have jurisdiction to try the claim, and an order, therefore, that the claim be struck out, and/or alternatively, an order that the claim be struck out on the basis that it was statute barred and/or an abuse of process.

[7] The appellant's notice of application was subsequently amended on 1 June 2016, and the respondent filed an affidavit in response on 12 December 2016. On 13 December 2016, the respondent filed his own notice of application for court orders, supported by affidavit, seeking, *inter alia*, orders that the appellant had failed to comply with rule 9.6(4) of the Civil Procedure Rules (CPR), and therefore, that his application filed 1 June 2016 be struck out.

[8] On 16 December 2016, both applications came on for hearing before Tie J (Ag) (as she then was), who adjourned both applications and ordered, *inter alia*, that the parties were to file and exchange written submissions and authorities, "if any", by 28 April 2017. Tie J (Ag) also ordered that any further affidavits in support of the respective applications should be filed and served by 3 March 2017.

[9] On 20 June 2017, both applications came up for hearing again, this time before Y Brown J (Ag). Neither party seemed to have filed any submissions or authorities in support of their respective applications or in opposition to the other. On this occasion, however, unlike Tie J (Ag) who had adjourned both applications to 20 June 2017, Y Brown J (Ag) adjourned the "matter", and ordered that written submissions and authorities, "if any", were to be filed and exchanged on or before 15 February 2018. It is unclear from the perfected order which of the applications was adjourned by Y Brown J (Ag), or whether it was both.

[10] On 28 February 2018, the date previously set by Y Brown J (Ag) to hear the "matter", the parties still had not made use of the permission to file submissions and authorities. Y Brown J (Ag), as a consequence, again adjourned the "matter", and on this occasion she made an unless order, which formed part of the perfected orders of the court, in these terms:

> "**UPON** this matter coming on for hearing on this day and upon hearing **MRS. CAROLYN C. REID-CAMERON**, Attorney-at-Law instructed by **CAROLYN C. REID & COMPANY**, Attorneys-at-Law for and on behalf of the Claimant and **MISS SHAMOYA YOUNG**, Attorney-at-Law instructed by **DABDOUB & DABDOUB**, Attorneys-at-Law for and on behalf of the Defendant, the Claimant not appearing and Defendant being present **IT IS HEREBY ORDERED THAT**:
>
> 1. Written Submissions and any authorities in support are to be filed and exchanged by both parties on or before July 31, 2018.
>
> 2. Unless the order made herein is complied with, the claim filed on August 31, 2015 will stand as being struck out.

3. Matter is adjourned to September 27, 2018 at 11:00 am for 2 hours.

4. The Claimant's Attorney to prepare, file and serve orders made."

[11] Pursuant to the above orders, submissions and authorities were filed and served by the appellant on 31 July 2018 at the offices of the attorney-at-law for the respondent, at 3:55 pm, by handing it to a receptionist. However, the respondent, having filed submissions and authorities within time, did not serve them on the appellant until 4:27 pm on 31 July 2018, and did so by electronic mail (email). A physical copy was delivered to the appellant's attorney on 2 August 2018.

[12] Consequently, the appellant took the view that the respondent had failed to comply with the unless order made by Y Brown J (Ag), and that the claim was, as a result, struck out. On 13 August 2018, the appellant filed an affidavit to that effect and a bill of costs was filed on the same day by his attorneys-at-law. A notice to the claimant of the bill of costs was also filed on 13 August 2018. It is not clear, however, whether any of those documents were ever served, as they bear no stamp suggesting service and no affidavit of service was shown to this court. On 21 August 2018, the respondent filed an amended claim form and amended particulars of claim, to include an averment of the equivalent in Jamaican currency of the United States dollar (US) amount claimed, in keeping with rule 8.7(5) of the CPR.

[13] The parties next came before Wiltshire J (Ag) on 27 September 2018, which was the date previously scheduled by Y Brown J (Ag) for the hearing of the "matter". The position of the appellant with regard to the effect of the unless order having been

declared to the respondent's attorney-at-law and the judge, an oral application was made to the judge for relief from sanctions. The application, at the time, was not supported by affidavit evidence. However, the judge permitted the respondent to file an affidavit in support of the application, which he did on 4 October 2018. The appellant, as permitted, responded by way of his own affidavit filed 12 October 2018. The appellant also filed written submissions in opposition to the application for relief from sanctions.

[14] Subsequently, on 19 October 2018, having heard the respondent's application for relief from sanctions, the judge granted the relief sought in the orders set out at paragraph [3]. Unfortunately, no reasons for this decision or notes of proceedings were forthcoming from the judge in respect of this matter.

The appeal

[15] The notice and grounds of the appeal, filed on 1 November 2018 listed the following grounds of appeal:

> (a) "The learned judge erred in not following, or in the alternative, improperly applying, **H.B. Ramsay et al v Jamaica Redevelopment Foundation, Inc et al** [2013] JMCA Civ 1.
>
> (b) The learned judge failed to properly consider the fact that the application for relief of [sic] sanction was made almost two months after the non-compliance of the Honourable Ms. Justice Y. Brown's unless order and was made after the Respondent amended his claim form and particulars of claim despite the matter already being struck out for the non-compliance and therefore the learned judge erred in finding that the application for relief of [sic] sanctions was made promptly.

(c) The learned judge, having found that there was no good explanation for the failure to comply with the Honourable Ms. Justice Y. Brown's unless order erred in exercising a discretion that pursuant to Rule 26.8 of the Civil Procedure Rules (2002) she did not have.

(d) The learned judge erred in failing to consider the question of whether the Respondent's failure to comply with the Honourable Ms. Justice Y. Brown's unless order was intentional particularly in circumstances where the undisputed evidence was that the non-compliance was in [sic] clearly intentional.

(e) The learned judge failed to consider or properly consider the Court's record, the submissions of the Appellant, and the affidavit evidence and therefore fell into error by finding that the Respondent had not otherwise failed to comply with orders of the Supreme Court.

(f) The learned judge erred in failing to take into consideration that on the Court's record and the affidavit evidence the Respondent had also failed to generally comply with the Civil Procedure Rules (2002).

(g) The learned judge misdirected herself by giving consideration to and making a determination on some of the factors listed in Rule 26.8(3) of the Civil Procedure Rules (2002) in circumstances where the Respondent had failed to meet the threshold test set out in Rules 26.8 (1) and (2) of the Civil Procedure Rules (2002).

(h) The learned judge erred in accepting the Respondent's evidence as credible despite certain assertions made by the Respondent being clearly contradicted by the Court's own record;

(i) The learned judge erred in failing to appreciate she had no discretion to grant a relief of [sic] sanction as the Respondent had failed to meet the threshold test mandated by Rules 26.8(1) and (2) of the Civil Procedure Rules (2002) and the Respondent's affidavit was patently unreliable.

(j) Alternatively, the learned judge erred in purporting to exercise her discretion in favour of the Respondent having regard to the lack of reliable evidence to support the Respondent's application for relief of [sic] sanctions.

(k) The learned judge erred in law in her interpretation of the Civil Procedure Rules (2002) in finding that service by electronic mail is good and valid service.

(l) The Appellant will, if necessary, seek leave to amend the grounds of appeal and to add additional grounds of appeal upon receipt of the written reasons of the Honourable Ms. Justice C. Wiltshire (A.g.)."

[16] Consequently, the appellant now seeks orders that the appeal be allowed, the orders of Wiltshire J (Ag) be discharged, the claim stands struck out, and that costs be granted to the appellant.

Preliminary issue

[17] A preliminary issue arose with regard to submissions filed by the respondent in this appeal. At the time the matter was scheduled to be considered, there were no submissions from the respondent. Rule 2.4(2) of the Court of Appeal Rules (CAR), stipulates that a respondent "may" file and serve any written submissions in opposition to the appeal within 14 days of receipt of the notice of appeal. There being no copy of the submissions from the respondent on file, a request was sent from the office of the registrar of the Court of Appeal for a copy of the submissions, if any, filed by the respondent to be made available to the court. In response, the respondent filed submissions on 13 September 2019. Unfortunately, this was 10 months after the notice of appeal had been served. Not surprisingly, the appellant, by way of letter to the registrar of this court dated 29 October 2019, and filed 30 October 2019, objected to the respondent's late submissions.

[18] Let me state, firstly, that the respondent is not obliged to file and serve written submissions in opposition to this appeal. Secondly, if he, however, chooses to do so, he must do so within 14 days of receipt of the notice of appeal pursuant to rule 2.4(2) of the CAR. If he is out of time, and still wishes to file submissions, he must apply to this court for an extension of time within which to do so. This court has the discretion to extend the time for compliance pursuant to rule 1.7(2)(b) of the CAR, which empowers the court to "extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed".

[19] In **RBC Royal Bank (Jamaica) Limited and Ors v Ocean Chimo Limited** [2016] JMCA App 22, at paragraph [28] this court made it clear that the failure to comply with the timelines stipulated in rule 2.4(1) of the CAR (as it then was), within which written submissions were to be filed in support of a notice of appeal, meant that the appellant was required to apply for an extension of time. A respondent who fails to comply with timelines is, therefore, no less required to apply for an extension of time. Rule 2.15(g) of the CAR gives the court the general power to make any incidental decision pending the determination of an appeal. Also rule 2.15(h) gives the court the power to make any order or give any direction which is necessary to determine the real question in issue between the parties to the appeal. It is clear, therefore, that although the court may grant an extension of time to file written submissions, the respondent who is out of time must make an application to this court for such an extension.

[20] In this case, the respondent has made no application for extension of time within which to file submissions. Therefore, the respondent having been served with the notice of appeal on 1 November 2018, the submissions filed 13 September 2019 are woefully out of time. No application for extension of time having been made, no account has been taken of them in this appeal.

The appellant's submissions

[21] The appellant challenges the decision of the judge on the following bases. Firstly, in respect of grounds a, b, c, and i, counsel for the appellant submitted that the judge misapplied the authorities of **HB Ramsay & Associates Ltd and others v Jamaica Redevelopment Foundation Inc and the Workers Bank** [2013] JMCA Civ 1 and **University Hospital Board of Management v Hyacinth Matthews**, [2015] JMCA Civ 49, which have made clear that, in considering an application for relief from sanctions, the applicant must systematically meet all the factors set out in rule 26.8, failing which the court is precluded from granting relief. In that regard, counsel submitted that the judge erred in finding that the respondent's application was made promptly, as the respondent's delay was protracted and showed a disregard for the court's orders and rules. Counsel submitted further that, even if the delay was not inordinate, having correctly found that there was no good explanation for the failure, the judge failed to appreciate that the three pre-conditions of rule 26.8(2) had not been satisfied, and that she was, therefore, precluded by law from granting relief.

[22] Secondly, in respect of grounds d, e, f, h, and j, counsel submitted that, even if the judge was empowered to exercise her discretion to grant relief, she did so

improperly, as she could not have been satisfied that based on the affidavit evidence, the court's record, and the submissions of counsel, the threshold test mandated by rule 26.8(2) had been met. In that regard counsel submitted that the judge:

a. failed to make a finding as to whether the non-compliance was intentional as required by rule 26.8(2) where the non-compliance was clearly intentional;

b. failed to make a finding as to whether the respondent had generally complied with the CPR, and wrongly found that the respondent had complied with other orders of the court when he had not;

c. wrongly accepted the respondent's evidence which was palpably unreliable, given it contradicted the court's record; and

d. wrongly decided that service of the submissions by the respondent after 4:00 pm was good service.

[23] Counsel submitted, therefore, that, in the circumstances, this court ought to exercise its power to set aside the decision in accordance with the principles set down in **The Attorney General v Universal Projects Ltd** [2011] UKPC 37, and **Attorney General of Jamaica v John MacKay** [2012] JMCA App 1.

[24] Thirdly, in respect of ground g counsel submitted that the judge further erred, when she considered and determined some of the factors set out in rule 26.8(3),

notwithstanding that the respondent had failed to meet the threshold tests set out in rule 26.8(1) and (2). Counsel relied on the case of **New Falmouth Resorts Limited v National Water Commission** [2018] JMCA Civ 13, at paragraph [46], in support of this submission.

[25] Fourthly, in respect of ground k, counsel contended that the judge erred in finding that 'service' by email was good and valid service, and as a result, erred in finding that the respondent had only failed to comply with Y Brown J's (Ag) unless order.

The role of this court

[26] The jurisdiction this court has in reviewing the exercise of a judge's discretion in interlocutory appeals was outlined in the judgments of this court in the cases of **National Solid Waste Management Authority v Johnson Louie et al** [2018] JMCA App 22 at paragraphs [29]-[30] and **The Attorney General of Jamaica v John MacKay**. This court will only interfere with the decision of a judge arrived at by exercise of a discretion, where it is satisfied that it was based on a misunderstanding of the law or evidence, an inference of fact that was demonstrably wrong, or was a decision so 'aberrant' that 'no judge regardful of his duty to act judicially could have reached it' (see **The Attorney General of Jamaica v John Mackay**, paragraph [20]). In determining this appeal, I have borne all the cautions therein in mind.

[27] Regretfully, the judge's reasons have not been provided to this court. In such circumstances, this court has to do the best it can to assess whether the judge's decision could successfully be challenged based on what was presented to her.

The issues

[28] The overarching issue in this appeal is whether the judge improperly exercised her discretion under rule 26.8 of the CPR in granting the respondent relief from sanctions. This question will be determined by a consideration of the following sub-issues:

a) whether the judge erred in finding that the application was made promptly;

b) whether the judge failed to consider that the failure to comply was intentional and whether the failure to comply was in fact intentional;

c) whether the judge had the discretion to grant relief under rule 26.8, having found that there was no good explanation for the failure to comply;

d) whether the judge erred in finding that the respondent had generally complied with all other relevant orders, rules and practice directions of

the court and whether the learned judge erred in accepting the respondent's evidence as credible in that regard; and

e) whether the judge erred in concluding that the threshold test in rules 26.8(1) and (2) had been met and therefore further erred in going on to consider rule 26.8(3).

Discussion

[29] The appellant has challenged the decision of the judge on the basis that the respondent had failed to meet the criteria set out in rule 26.8(1) and (2) of the CPR and that, consequently, the judge had no discretion to go on to consider rule 26.8(3), or to grant the relief sought. I will discuss each issue and sub-issue in turn, however, it is convenient to set out the provisions of rule 26.8 of the CPR at this juncture.

[30] Rule 26.8 of the CPR lays down the criteria that must be considered by a judge when determining whether to exercise his or her discretion to grant relief from sanctions. It provides:

> "26.8 (1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction **must** be -
>
> (a) made promptly; and
>
> (b) supported by evidence on affidavit.
>
> (2) The **court may grant relief only if** it is satisfied that –
>
> (a) the failure to comply was not intentional;
>
> (b) there is a good explanation for the failure; and

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

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

(a) the interests of the administration of justice;

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

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

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

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

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

[31] How a court is to treat with an application under rule 26.8 is set out by this court in **HB Ramsay** as well as in **Hyacinth Matthews**. This approach was followed in **Jamaica Public Service Company Limited v Vernon Francis et al** [2017] JMCA Civ 2 and more recently in **New Falmouth Resorts Limited v National Water Commission**. In those cases, this court considered and determined the proper approach to be taken in an application made pursuant to rule 26.8 for relief from sanctions.

[32] Those authorities have made clear that the provisions of rule 26.8 must be considered sequentially, and an applicant for relief must satisfy the court of all the

matters set out in rules 26.8(1) and 26.8(2) before the court can even go on to consider any of the criteria set out in rule 26.8(3), much less grant relief. In that regard, the court need not consider the merits of the application if it is not satisfied that the application has been made promptly in accordance with rule 26.8(1).

[33] In **New Falmouth Resorts Limited**, Morrison P outlined the following:

> "[47]...on an application for relief from sanctions under rule 26.8(2), (i) the court must be satisfied that the particular sanction was properly imposed; (ii) the default position in relation to an 'unless' order, that is, the position that will obtain in the absence of a case for relief from sanctions being made out by the applicant, is that the sanction imposed for failure to comply with the order will follow; (iii) if the application is combined with an application to vary or revoke a previous order, that application should generally be considered first; (iv) an applicant for relief from sanctions must comply with all three of the requirements of rule 26.8(2) as a precondition to obtaining relief; (v) in considering whether to grant relief once that threshold has been crossed, the court must also consider the factors listed in rule 26.8(3), together with any other relevant considerations that will, taking into account the circumstances of the particular case, enable the court to deal with the matter justly; and (vi) the judge hearing the application should demonstrate that he or she has considered and balanced appropriately all the factors relevant to the particular case and in keeping with the overriding objective."

[34] Since the complaint is that the respondent did not satisfy the criteria laid down in rule 26.8(1) and (2), it is necessary to look at the evidence that was before the judge touching and concerning those rules, to see if there was sufficient evidence to justify her exercising her discretion in the way she did.

A. *Whether the judge erred in finding that the application was made promptly*

[35] The appellant submitted that the respondent's application was not made promptly and that the judge should have refused to hear the application. In advancing this argument, the appellant contended that the application was not made until 27 September 2018, almost two months after the respondent's non-compliance, and after the claim stood struck out on 31 July 2018. It was further contended that the respondent continued to show disregard for the rules of court by ignoring the sanction and amending his claim form and particulars of claim on 16 August 2018, rather than applying for relief from sanctions. This delay, it was submitted, was far more protracted than that in **HB Ramsay**, and, as such, the judge erred in finding that the respondent had applied promptly.

[36] The question of whether an application is made promptly depends on the circumstances of each case. In **HB Ramsay**, Brooks JA, at paragraph [10] of his judgment, expressed the correct view that the word 'promptly' carried with it some amount of flexibility in its application.

[37] In that case, the application for relief had been made almost a month after the default and after the unless order in respect of the appellants' failure to comply with payment of a costs order had taken effect. In finding that the application had not been made promptly, Brooks JA concluded that it was inconceivable that the appellants' attorneys had waited so long to make the application, particularly in light of the evidence that one of the appellants had paid over the money to the attorneys two days before the deadline. Brooks JA was of the view that the attorneys should have been

eagerly awaiting the money from their clients, and the appellants, likewise, should have been awaiting communication from their attorneys that the unless order had been complied with. Compliance, in those circumstances, he found, ought to have been foremost in the minds of the litigants and their attorneys.

[38] In coming to his decision, Brooks JA distinguished the case of **Hyman v Matthews** [Consolidated Appeals] (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal Nos 64 and 73/2003, judgment delivered 8 November 2006, as a case belonging to the transitional era from the old rules to the CPR. In that case, an application made over three months following the default, was found to not have been made promptly, but nevertheless, the court held that relief from sanctions ought to have been granted. Brooks JA took the view that, since that transitional era had passed, the more modern approach may well be for the courts to take a more stringent approach to dilatory applications. Undoubtedly, this is the correct view to take of such matters. The rider to that, however, is that every case has to be considered on its own facts.

[39] In the instant case, there is no record of the judge's finding on the question of the promptness of the application. The appellant has submitted that she did so find. The question whether the application had been made promptly must be considered in the light of the respondent's overall conduct, the order itself, and the circumstances surrounding the failure to comply. In this case, the order was to file and exchange submissions by a certain date. The documents had been filed in time by the

respondent. However, the appellant presented for exchange of documents, pursuant to the order, five minutes before 4:00 pm on the relevant date and left the documents with a receptionist. The purported service by the respondent had been effected by email at 4:27 pm on the relevant date, that is, 27 minutes after the cut off time for valid service under the CPR. This meant that, although the submissions were technically exchanged on the requisite date, they having been served after 4:00 pm, would not be deemed to have been served until the next business day, pursuant to the deeming provisions in rule 6.6(2). This seems to have been a fact which escaped the notice of the respondent's attorneys. The hard copy was, however, served on the appellant's attorneys on the next business day. This was because 1 August was a public holiday.

[40] Of note is that the default took place on 31 July 2018, the last day of the term, and the application was made a few days short of two months, on the date set for hearing of the "matter" on 27 September 2018. It was at that hearing, when the respondent's attorney was seemingly caught flat-footed by the indication from counsel for the appellant that the matter stood struck out, that the application for relief from sanctions was made orally.

[41] It must also be considered that the parties were not idle during the legal vacation. The appellant filed a bill of costs, notice to the claimant and affidavit of the appellant on 13 August 2018. There is no indication that these documents, were, in fact, served during the legal vacation. No doubt if the appellant's bill of costs had been served, the respondent's attorney may have been galvanized into earlier action. The

appellant also makes heavy weather of the fact that the respondent filed an amended claim form and particulars of claim on 21 August 2018 after the claim stood struck out. Counsel for the appellant, therefore, took the view that the intervening legal vacation was no excuse for failing to apply for relief from sanctions promptly, as the respondent made good use of the filing procedures during the period.

[42] By the respondent's own admission, neither he nor his attorneys were aware that the breach had occurred, having emailed the documents on the relevant date, with a hard copy sent on the next business date, and the appellant's attorney having acknowledged receipt of them. Unfortunately, a breach did occur as a result of the deeming provisions and time does begin to run as soon as the breach occurs not when the breach is discovered.

[43] The fact is that, for whatever reason, the application for relief from sanctions was made almost two months following the breach and in the ordinary course of things would not be regarded as prompt. However, in this case a series of events affected the conduct of the respondent. Firstly, the respondent and his attorney seemed to have been oblivious that there was a breach or that the appellant would take the point that there was a breach; secondly, the appellant himself was only ready for the exchange five minutes before the deadline and served his submissions on a receptionist in the office of the respondent's attorneys, with no guarantee it would have come to the attorneys' attention before the deadline five minutes later and; thirdly, the breach itself was a technical breach and it is arguable that neither the respondent or his attorney

would have realized a breach had occurred, although an attorney is presumed to know the law; and finally, the submissions were filed on time.

[44] Also of note is the fact that a date had already been set for the hearing of the parties' applications on 27 September, in the new term, and there would have been no realistic guarantee that if the application had been made during the vacation period, it would have been heard before that date, in any event. To their credit too, is the fact that the respondent and his attorneys took full opportunity of the hearing date fixed on 27 September to apply for relief from sanctions, as soon as it became clear to them that there was a breach. In those circumstances, and applying some degree of flexibility, I am of the view that the application was made promptly. The issue of promptitude is a question of fact to be determined in the context of the whole case and the conclusion to be drawn on that issue, based on the circumstances of a particular case, remains within the ambit of judicial discretion (see paragraph 13 of the judgment of the Court of Appeal of Trinidad and Tobago in **The Attorney General of Trinidad and Tobago** v **Miguel Regis** (unreported), Civil Appeal No 79 of 2011, Judgment delivered 13 June 2011). In the circumstances of the instant case, the judge could not be faulted for finding that the application was made promptly.

B. *Whether the judge failed to consider that the failure to comply was intentional and whether the failure to comply was in fact intentional*

[45] The appellant complained that the judge failed to consider and make a finding as to whether the respondent's failure to comply was intentional, and that had she done

so, she would have been satisfied, on the facts before her, that the failure was, indeed, intentional.

[46] The rule is that the court may grant relief if the failure to comply was not intentional. In granting relief, this court must assume, in the absence of any reasons to the contrary, that the judge found that the failure to comply was not intentional. The only question for this court, therefore, is whether there was sufficient material on which the judge could have come to that conclusion.

[47] The appellant has argued that the failure was indeed intentional, as the evidence showed that the respondent's attorney knowingly failed to serve his submissions on the appellant who had attended on their office and personally handed his own submissions to the receptionist at approximately 3:55 pm on 31 July 2018. He claimed that when he did so, one of the respondent's attorneys Mrs Carolyn Reid-Cameron was present at the office. The respondent's attorneys, the appellant claimed, "deliberately refused to serve" the appellant, and chose, instead, to send the submissions by email at 4:27 pm to Ms Karen Dabdoub, one of the appellant's attorneys, after the deadline had expired and in breach of the CPR. In this email, it was indicated that the hard copy of the submissions would be served on 2 August 2018.

[48] The appellant contended that, from the email of the respondent's attorney, the respondent was well aware that he was required to serve the submissions on 31 July 2018, in accordance with Y Brown J's (Ag) orders and the CPR. This, the appellant

argued, should have given rise to an inevitable finding that the respondent's non-compliance was intentional.

[49] I am not persuaded by the assertions made by the appellant that counsel deliberately and intentionally chose not to serve the submissions when they could have. I can see no reason, and would not hasten to accept, in the absence of clear evidence to that effect, that counsel for the respondent would seek to jeopardize their client's case by intentionally failing to serve submissions that were in their possession and available to be served at the appointed time, and which were subject to an unless order. The evidence before this court and the court below, in respect of the failure to serve, came from the respondent, who maintained that his submissions were to be in response to the appellant's submissions, which were received late on the very day the unless order was to expire. Furthermore, the respondent maintained that he did not know of the non-compliance, having been told by his attorneys that it was validly served by email the said day, until the hearing on 27 September 2018 when opposing counsel took the point.

[50] It is also not to be overlooked that both parties had applications before the court below at the material time. The relevant order, however, was unclear as to whose application they were with respect to, and in what manner the submissions were to be exchanged. The word 'exchange', in its natural meaning, means "to give something and receive something of the same kind in return" (Oxford University Press, online dictionary, Lexico.com, 2019). Was it that both parties were to file and exchange

submissions in support of their own application and in opposition to the other? Was it expected that both would exchange at the same time, or was it that one could send theirs and the other later, but within the time limited? The order, therefore, was open to several different interpretations.

[51] Faced with the respondent's explanation that his submissions were to be in response to the appellant's, which, in the particular circumstances, is one reasonable interpretation of the order, and the immediacy with which attempts were made to serve the respondent's submissions by the quickest means possible (even if it was not a means authorised by the CPR or any practice direction without permission of the court, as will be discussed later), the judge could have come to no other conclusion than that the failure to exchange the submissions was not intentional. The interpretation taken by the respondent would have necessarily meant that he thought he had to wait to see the appellant's submissions first before issuing his own. This also has to be considered in light of the fact that the order was to file and exchange, and the document was timeously filed.

[52] The rule requires that the question of whether the failure to comply was intentional is to be determined by the judge. In the light of the decision that she arrived at, and in the absence of any written reasons to the contrary, I have no reason to believe that the judge failed to consider this question. This issue was one to be determined as a question of fact by the judge, in the exercise of her discretion and

based on the factual circumstances in this case, the judge could not be faulted for finding that the failure to comply was not intentional.

C. *Whether the judge had the discretion to grant relief under rule 26.8, having found that there was no good explanation for the failure to comply*

[53] The appellant submitted that whilst the judge was correct in finding that the respondent had not offered a good explanation, she failed to appreciate that the respondent did not satisfy the three pre-conditions pursuant to rule 26.8(2) and was therefore, precluded from granting relief by law.

[54] Again, in the absence of any written reasons or notes of proceedings or even an agreed set of notes between the attorneys as to a record of the judge's decision, in light of the rules and the decision she arrived at, there is no basis on which this court could say the judge rejected the respondent's explanation. The question for this court, therefore, is whether there was sufficient material on which she could have found that the respondent had given a good explanation for the failure to comply with the unless order.

[55] Relying on the authority of **HB Ramsay** and that of **The Attorney General v Universal Projects Ltd** , the appellant argued that it is trite that once there is no good explanation for the failure to comply, the application for relief from sanctions must fail, as the court is precluded from granting relief where all the requirements of rule 26.8(2) are not satisfied.

[56] In **H B Ramsay** at paragraph [22] Brooks JA, relying on the authority of **The Attorney General v Universal Projects Ltd**, a decision involving a rule of similar wording in the Civil Proceedings Rules of Trinidad and Tobago, stated that:

> "Where there is no good explanation for the default, the application for relief from sanctions must fail. Rule 26.8(2) stipulates that it is a precondition for granting relief, that the applicant must satisfy all three elements of the paragraph."

[57] In the latter case, the Board, at paragraph 18 said this:

> "The Board has reached the clear conclusion that there is no proper basis for challenging the decision of the courts below that there was no "good explanation" within the meaning of [the rule equivalent to rule 26.8(2)(b) of the CPR] for the failure to serve a defence by 13 March. **That is fatal to the Defendant's case** in relation to [the rule equivalent to rule 26.8 of the CPR] **and it is not necessary to consider the challenge to the other grounds on which the defendant's appeal was dismissed by the Court of Appeal**." (Emphasis mine)

[58] Undoubtedly, therefore, if there was no good explanation for the failure to comply, the judge would have erred in going on to grant the relief sought. Undoubtedly, too, what the judge is required to determine, at her discretion, is whether, as a question of fact, a good explanation has been provided, in all the circumstances of the case. The judge is not required to look for an infallible explanation.

[59] What was the explanation proffered by the respondent for the failure to comply on time? The only evidence as to the reason for the failure is contained in the affidavit of the respondent filed 4 October 2018, in which he averred, *inter alia*, as I have summarised, that:

(1) he was not aware that his attorney failed to comply with the order until he came to court on the 27 September 2018 and was made to understand that the appellant's attorney was taking the position that he failed to comply with the order;

(2) his attorneys prepared and filed the written submissions on 31 July 2018 which were emailed to the appellant's attorneys at 4:26 pm on 31 July 2018;

(3) he was informed by his attorneys and verily believed that his attorneys were of the view that, having brought the document to the attention of the appellant's attorneys by email, that would have sufficiently complied with the order to exchange submissions;

(4) if there was a failure, it was not intentional and not his fault;

(5) he had as best as possible complied with all other orders and directions of the court;

(6) at the date of the unless order it was the defendant who made the application to strike out the claim and he was not in possession of the appellant's written submissions in support of that application;

(7) his submissions were to be in response to the appellant's application and written submissions but he did not receive the appellant's written submissions until 31 July 2018; and

(8) the late service did not impact upon any trial date as none was set, nor could it have impacted upon the hearing set for 27 September 2018, as the appellant would have had 50 days to review the submissions and there were no further steps required to be taken by the parties.

[60] In my view, there was sufficient evidence in the affidavit of the respondent from which the judge could conclude that there was a good explanation for the failure to comply. The appellant himself admitted that he turned up for the exchange at 3:55 pm and left the document with a receptionist, although he claims that one of the respondent's attorneys was present. Perhaps, if the unless order had been more specific, the respondent would have been more aware of what was required of him to fully comply. The respondent having relied on his attorney's skill and competence ought not to be held responsible if the attorney failed to recognise the strictures of the law and advise accordingly, or failed to seek clarification of the judge's order. In **Austin v Newcastle Chronicle and Journal Ltd** [2001] All ER (D) 243, the English Court of Appeal held that it would be wrong, in that case, where the delay in filing a particulars of claim was due to the mistake of the claimant's solicitors, to "heap their mistake on the back of the claimant".

[61] In **Attorney General v Universal Projects Ltd***,* the Board considered what constituted a 'good explanation'. The facts were that the defendant/appellant had failed to file its defence in respect of a suit by the claimant/respondent for money due pursuant to a contract for highway improvement work. The claimant applied for a judgment in default of an appearance and defence. However, the defendant applied for and was granted an extension of time to file its defence within 21 days, failing which the claimant was permitted to enter judgment in default. The defendant failed to comply and the sanction took effect. The defendant subsequently applied, *inter alia*, to set aside the default judgment, and the judge, taking the view that the application should have been an application for relief from sanctions, treated it as such, refusing the application. The Court of Appeal, for the most part, upheld this decision. On appeal to the Board, in finding that there was no proper basis for challenging the judge's finding that there was no "good explanation", the Board considered the explanation of the defendant that it had needed to retain outside counsel, which was usually settled by the Solicitor General, but this was delayed, as, that post being vacant, the approval of the Attorney General was required. It was not until three days before the deadline that the defendant instructed outside counsel.

[62] In rejecting the submissions of defence counsel that a "good explanation" was one that properly explained how the breach came about, which may or may not involve an element of fault such as inefficiency or error in good faith', the Board stated, at paragraph 23 that:

> "...if the explanation for the breach ie the failure to serve a defence by 13 March connotes real or substantial fault on the part of the defendant, then it does not have a 'good' explanation for the breach. To describe a good explanation as one which "properly" explains how the breach came about simply begs the question of what is a 'proper' explanation. Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly [sic] if the explanation for the breach is administrative inefficiency."

[63] Thus, the Board found that the Court of Appeal was entitled to regard the delay as inexcusable.

[64] In **HB Ramsay**, the evidence in support of the application was that one of the applicants had paid the monies to their attorneys two days before the deadline. There was no explanation from the attorneys as to why it was not paid over. The attorneys however, told the appellant that the default occurred due to inadvertence. In rejecting that excuse as a good explanation, Brooks JA accepted the respondent's submission that 'inadvertence' was not an explanation in and of itself, and that, in the absence of any evidence from the attorneys themselves explaining the default, it would seem that at best, without speculating, their explanation would be one of oversight. Such oversight he found to be "inexcusable".

[65] The instant case, in my view, is distinguishable from the cases above as the respondent is not relying on inadvertence or oversight by his attorneys or himself as his explanation. Therefore, his explanation of his understanding of the order that he should see and respond to the appellant's submissions before submitting his, and that as a result of the appellant serving his submissions on the last day, his submissions in response inevitably came later, was an explanation, in my view, which the judge, in the

exercise of her discretion, could have accepted as a good one, even if the respondent's interpretation was incorrect. I am, therefore, also of the view that, if the judge did, in fact, find that there was no good explanation for the failure to comply in time, she would have been wrong in so doing.

[66] At paragraph [45] of this court's decision in **Jamaica Public Service Company Limited v Vernon Francis** it was said that a party may choose to wait until the last permissible day to comply with an order and that is their prerogative. However, if they so choose, they do so at their own peril and must face the consequences if they miss the deadline. This court, in that case, also recognised that there may be a good explanation, not only for missing the deadline but also for not acting earlier to meet the deadline. In my view, this is a case where such an explanation has been proffered.

[67] In the instant case, in asking the parties to exchange documents in addition to filing them, unless it simply meant each side was to serve the other, the order connotes an expectation of some co-operation between the parties. Implicit in a requirement to exchange documents is the expectation that the parties would indicate that they are ready to exchange and when and where the exchange would take place. Clearly this expected cooperation did not materialize.

[68] Furthermore, although there is no mention in the order that submissions were to be in response to the other (and in reality "exchange" is perhaps the antithesis of "in response to"), the reason for the order to exchange must be borne in mind. I could only presume that it is for each side to know what points the other is putting forward to the

court to persuade the court to its view, and be in a position to respond without having to do so whilst counsel is "on her feet" or having to ask for an adjournment to prepare a response. Having been given the opportunity to know what the other party's stance is, it is not unreasonable to expect that an attempt to counter that stance could be made by the other side. Therefore, in assessing whether the respondent's explanation was a good one, account has to be taken of the fact that the respondent was of one view of the reason for the exchange, for which he cannot be faulted, it being a reasonable interpretation of the order, in the circumstances of this case, where there were two opposing applications before the court.

[69] It is clear also that the rules contemplate that a good explanation may involve a default by a party's attorney-at-law, since in rule 26.8(3) the court is empowered to consider whether the fault is that of the attorneys. Clearly a court could not consider whether the default is that of the attorney unless a good explanation is given to that effect. So that, although a court in considering the factors to take into account in granting relief in rule 26.8(3) could only reach that segment if the threshold in rule 26.8(2) had been met, it is clear that a good explanation would have to have come earlier in 26.8(2) for the court to give regard to it in 26.8(3).

[70] In **Hyacinth Matthews** Phillips JA, in considering whether the respondent had a good explanation for failing to comply with an unless order, said at paragraph [44] that:

> "Counsel has a duty to act in the best interest of his client. In this case, he certainly failed to do so, having informed the respondent

> of the court date on the very day scheduled for the trial, in circumstances in which her attendance was the subject of an unless order. In my opinion, this was negligent to say the least. However, the real issue is whether the respondent should bear the draconian sanction of having her claim struck out for her failure to attend court when she was not even aware of the court date or the consequence of her non attendance, and in circumstances where the explanation for her non attendance appeared genuine. In my view, Batts J's decision that the explanation was a good one seems reasonable on the evidence before him. There was no evidence to suggest tardiness or lack of due diligence on the part of the respondent herself, with regard to her claim."

[71] In the instant case, likewise, there was no evidence of tardiness or lack of due diligence on the part of the respondent. He had what in the circumstances could not have been described as an unreasonable interpretation of the court order and no contrary advice was given to him by his attorneys. Also, the advice given by his attorneys is that the service by email was valid. He, a layman, in my view, cannot be faulted for relying on his attorney's advice.

D. *Whether the judge erred in finding that the respondent had generally complied with all other relevant orders, rules and practice directions of the court and whether the learned judge erred in accepting the respondent's evidence as credible in that regard*

[72] The appellant argued that, in respect of rule 26.8(2), the judge erred in (a) failing to consider and make a finding as to whether the respondent had generally complied with all other rules; and/or alternatively (b) wrongfully finding that the respondent had generally complied with other orders of the court when the court's record and affidavit evidence clearly showed that the respondent had breached every order of the court. In that regard, the appellant submitted that the judge was 'palpably wrong' in granting relief without first satisfying herself that this requirement had been

met, and also wrongly finding that the respondent's only non-compliance was with Y Brown J's (Ag) unless order.

[73] In assessing this factor, in addition to the conduct of an applicant for relief prior to the application of the sanction, and depending on the circumstances of the case, the court may have regard to the applicant's conduct after the application of the sanction, which may demonstrate the applicant's attitude towards the progress of the matter. The court may also take into consideration the question of whether the defaulting party persistently flouts the rules and ignores the orders of the court (see **HB Ramsay**, paragraph [27]).

[74] The appellant submitted that the court's record, the affidavit evidence and the appellant's submissions, 'undisputedly' shows that the respondent failed to comply with the following:

a. Rule 8.7(5) of the CPR – by failing to state the equivalent in Jamaican currency of the foreign currency sum claimed and the basis upon which the calculation was made.

b. Rule 5.3 of the CPR – by failing to personally serve the appellant with the claim form and particulars of claim as evidenced by the acknowledgment of service which was filed on 21 September 2015.

c. Paragraph 3 of Tie J's order made on 16 December 2016 to file and exchange written submissions by 28 April 2017.

d. Paragraph 1 of Y Brown J's order made 20 June 2017 to file and exchange submissions by 15 February 2018.

e. Paragraph 1 of Y Brown J's order made 28 February 2018 requiring submissions to be filed and exchanged by 31 July 2018;

f. Rule 26.8(1) of the CPR – by failing to make his application for relief promptly and filing and serving instead an amended claim form and particulars of claim on 16 August 2018 when his case already stood struck out.

[75] It was further submitted that the fact that the respondent amended his claim to insert the requirements of rule 8.7(5), demonstrated that he was well aware of his failure to comply with that rule.

[76] It seems to me that the appellant's complaints with regard to this issue is an overreach. It is clear that, apart from the breach of rule 8.7(5) (which, in my view, is irrelevant for these purposes, as it deals with the substance of the claim, which was in any event amended), the respondent had generally complied with the rules, directions and orders of the court. Nor do I consider the respondent's failure to serve the claim form and attendant documents personally on the appellant relevant for these purposes. Moreover, the appellant filed an acknowledgement of service, and other than mentioning that he was not personally served, has not challenged the efficacy of this service. In any event, the rule requires general compliance and not absolute total compliance.

[77] Similarly, the respondent's failure to comply with Y Brown J (Ag)'s order, the breach of which led to the application for relief, cannot properly be considered as "other relevant...orders...". "Other" has to be given its ordinary meaning to 'refer to a thing different or distinct from the one already mentioned' (Oxford University Press, online dictionary, lexico.com, 2019).

[78] Then too, in respect of the complaint that the respondent amended his claim instead of applying for relief during the break, whilst his case stood struck out, I am not of the view that this could properly be considered as general non-compliance.

[79] That leaves Tie J (Ag)'s order of 16 December 2016 and Y Brown J (Ag)'s order of 20 June 2017. Neither order can be viewed as not having being complied with, since both orders, like the one considered in **HB Ramsay**, were merely permissive and not mandatory. Both orders were directed at both parties, neither of whom, not being obliged to do so, complied. Tie J (Ag)'s order required "written submissions and authorities, if any, to be filed and exchanged by the 28th April 2017". Brown J (Ag)'s order of 20 June was in a similar vein. The insertion of the words "if any", in my estimation, took the order out of the realm of a mandatory order, so that, a party could choose, if they so wished, to file or not to file written submissions on which to rely.

[80] In **HB Ramsay**, Brooks JA accepted the submission that where the appellant had failed to comply with an order setting a deadline within which to file a reply out of time, even where that same party had requested permission to so file, the order having been stated in terms that were "merely permissive, not mandatory", should not have

been considered by the trial judge as non-compliance for the purpose of rule 26.8(2) (see para [26]). I agree with this approach and find it applicable here.

[81] The same consideration applies to the order of Y Brown J (Ag)'s order made on 20 June 2017 in respect of the permission to file and exchange submissions, "if any". This, again, was merely permissive and not mandatory and was addressed to both parties, neither of whom took up the invitation. It is not true to state, therefore, that the record reflects that the respondent had breached every order of the court, and thus the respondent had not generally complied with all other orders, rules, and directions of the court.

[82] It is clear that the respondent had, in fact, generally complied with all the orders, rules and practice directions of the court. The appellant's complaint in this regard, therefore, lacks merit.

[83] The appellant further submitted that the judge erred in accepting the respondent's affidavit in support of the application as credible, and exercising her discretion in the respondent's favour, in circumstances where his evidence was disingenuous and contradicted the court's record. It was submitted that the respondent asserted at paragraph 11 of his affidavit that his written submissions were in response to the application and submissions of the appellant, when the court's record reflects that the orders made in respect of written submissions were made in respect of the applications of both parties. This, it is submitted, is evident in Tie J (Ag)'s perfected

order made 16 December 2016, as well as the respondent's own written submissions filed on 31 July 2018.

[84] The appellant relied on the authority of **ED & F Man Liquid Products Ltd v Patel and Another** [2003] EWCA Civ 472, as cited at paragraph [19] of **ASE Metals NV v Exclusive Holiday of Elegance Limited**, [2013] JMCA Civ 37, to support the proposition that "the court does not have to accept everything which a party places before it".

[85] It is clear from the orders of Tie J (Ag), which indicates that both applications were before her and considered by her, that both applications were adjourned for submissions to be exchanged. However, it is unclear from the record what was heard and considered by Y Brown J (Ag). In neither of the orders made by her was any reference made to the two applications. Both of Y Brown J (Ag)'s orders referenced the "matter", and I am not certain which application this was a reference to, or whether it was to both. On the appellant's own submission, and at paragraph 18 of his affidavit evidence filed 12 October 2018, it was stated, as his understanding, that the order of Y Brown J (Ag) was made because she was of the view that having brought the claim, the respondent ought to make submissions as to why the court had jurisdiction to hear his claim.

[86] If the appellant's assertions in his affidavit are correct, then the respondent would be correct in his view that he was to respond to the appellant's application that the respondent's claim be struck out for want of jurisdiction, and it would not have

been unreasonable for him to think, based on the wording of the order, that he should see the appellant's submissions before submitting his own. For my part, I would agree with the respondent's view because it is he who asserts who must prove. Further, and in actual fact, the respondent's written submission filed 31 July 2018 was in response to and in opposition to the appellant's application to strike out the claim for want of jurisdiction. This serves to support the respondent's position, contrary to the complaints by the appellant, stating otherwise.

[87] In his own written submissions, filed 31 July 2018, the appellant addresses the respondent's application to strike out his application only as a preliminary point, in three paragraphs, and the remainder of the submissions dealt entirely with his application challenging the jurisdiction of the court to hear the claim. As I said earlier, the respondent's submissions of the same date, dealt entirely with the appellant's application. It is clear, therefore, that arguably, both parties and definitely the respondent, were of the view that the unless order was in respect of the appellant's application.

[88] Furthermore, even the judge appeared to have been unclear as to whose application Y Brown J (Ag)'s unless order was in relation to, as, having granted relief to the respondent, the judge adjourned only the respondent's application to be heard at a later date. It is difficult, therefore, to blame the respondent if he was unclear as to which application the unless order related, when the unless order was equally unclear to the judge herself.

[89] The appellant's complaint in this regard, is, therefore, without merit.

[90] The appellant also complained that the judge erred in finding that the only non-compliance by the respondent was that service of the submissions was approximately 30 minutes out of time and was acceptable as the appellant suffered no prejudice. The appellant argued that the judge was wrong in law to have found that service by email was 'valid and proper' service under the CPR. It was further contended, that in any event, based on rules 6.6(2) and (3) of the CPR, any document served after 4:00 pm on a business day, is to be treated as having been served on the next business day.

[91] Rule 6.2(d) of the CPR permits service by email only where there is a practice direction permitting such service, or some other rule or order of the court permitting same. It provides:

> "6.2 Where these Rules require **a document other than a claim form** to be served on any person it **may be served by** any of the following methods –
>
> (a) Any means of service in accordance with Part 5;
>
> (b) Leaving it at or sending it by prepaid post or courier delivery to any address for service in accordance with rule 6.3(1);
>
> (c) (where rule 6.3(2) applies) FAX; or
>
> **(d) Other means of electronic communication if this is permitted by a relevant practice direction, unless a rule otherwise provides or the court orders otherwise.**
>
> (Rule 3.6(2) enables the Chief Justice to make practice directions as to the electronic service of documents.)" (Emphasis mine)

[92] There is currently, and was, at the material time, no practice direction permitting service by email, nor was there in force any applicable rule or order of the court that permitted the respondent to serve the submissions by email. Further, the appellant is indeed correct that, pursuant to rule 6.6(2), service after 4:00 pm would not validly take effect until the following business day, and would, therefore, have been well over 27 minutes late.

[93] Service by email not being a method of service recognised by any rule or practice direction, the respondent's submissions would not have been validly served until 2 August 2018, when the physical copy was delivered to the appellant's attorneys. However, I disagree with the appellant's submission that the next business day would have been after the vacation period on 17 September 2018, as the term "business day" does not exclude the vacation period but rather, *inter alia*, days on which the registry is closed. The registry is open during the vacation period.

[94] Although, rule 6.2(a) of the CPR permits other documents to be served by any means of service in accordance with Part 5 of the CPR, the validity of service by email as an alternative method under rule 5.13 and 5.14 would be dependent on the approval of the court. At the point in time when the unless order expired, there was no such approval. Further, even if I am prepared to say the judge was empowered to certify service by email as an effective alternative method of service subsequent to the breach, pursuant to rule 5.13, there is no indication that she did in fact do so in coming to her decision, and this court is not prepared to find that she ought to have done so or that

the requirements of rule 5.13(1),(2) (3) and (4) would have been met. In the result, the respondent would have served the documents a day later than the date specified in Y Brown J (Ag)'s unless order, notwithstanding that the submissions had been filed in time. At that time his case would have already been automatically struck out (rule 26.4(7)).

[95] In any event, even if it were to be accepted that service by email was acceptable, this course would not have put the respondent in good stead, the submissions having, in any event, been served by email after 4:00 pm. Rule 6.6(2) would put the deemed date of service after 4:00 pm as "the next business day." Valid service of the documents would still, therefore, have been effected on the first business day next after the expiry of the unless order, 1 August being a public holiday.

[96] The judge would have, therefore, erred in finding that service by email was in compliance with the unless order in those circumstances. This, however, would not affect the eventual outcome of this appeal. It must have been clear to the judge that the submissions had come to the attention of the appellant albeit by an unauthorized means of service which was later corrected. The judge had the power to make an order validating that method of service or in the light of the deeming provisions, make an order waiving service altogether. In those circumstances, the judge cannot be faulted for deciding in favour of the respondent, and avoiding a tactical advantage being taken of the respondent's error, by the appellant, who could have cooperated with the respondent's attempt to meet the service deadline. See a similar approach taken by the

English Court of Appeal in **Chilton v Surrey County Council** [1999] Lexis Citation 4439, judgment delivered 24 June 1999 (unreported) and cited in Stuart Simes: A Practical Approach to Civil Procedure (15th Edition), at page 31 para 3.33. In that case Henry LJ, in giving the judgment of the court, said this:

> "I would only add that this application was made under the new procedural rules. The new procedural code has the overriding objective to enable the court to deal with cases justly. The parties are required to help the court to further that overriding objective. The court must further the overriding objective by effectively managing cases. Active case management includes under 'A' encouraging the parties to cooperate with each other in the conduct of proceedings. As a mistake had obviously been made here, it seems to me that such cooperation in this case would have revealed the mistake at a time when it could have been put right and the hearing date saved…The courts would then have been spared this satellite litigation."

[97] I would also sound a cautionary note and remind litigants and their attorneys that, where in an emergency, a party facing an opponent who is in jeopardy of a breach refuses to cooperate so that the time table can be met, notwithstanding that the party would have been entitled to refuse an unsanctioned method of service, that party may face an uphill battle in resisting an application for relief from sanctions (see also the approach of the English Courts in **RC Residuals Ltd v Linton Fuel Oils Ltd** [2002] 1 WLR 2782, paragraphs. 35 – 37, with respect to the refusal to agree to accept service by email).

E. *Whether the judge erred in concluding that the threshold test in rules 26.8(1) and (2) had been met and therefore further erred in going on to consider rule 26.8(3)*

[98] Counsel for the appellant contended that the requirements under rules 26.8(1) and (2) are threshold requirements that must be considered and a finding made in the

applicant's favour on all the factors, before the court could properly go on to consider the factors in rule 26.8(3). Counsel maintained that, since these requirements had not been met, the judge would have had no discretion to grant relief from sanctions. In this regard, the appellant contended the judge would have fallen into error.

[99] The application was supported by affidavit evidence and made promptly as required by rule 26.8(1). The failure to comply was not intentional and there was a good explanation for it. The respondent had generally complied with all other rules, orders, and directions of the court as required by rule 26.8(2). In those circumstances, the judge was entitled to consider the relevant factors in 26.8(3) of the CPR.

Did the judge improperly exercise her discretion to grant relief?

[100] The respondent having passed the threshold requirements in rule 26.8(1) and (2), I entertain absolutely no doubt that the judge properly took into account the factors in rule 26.8(3). In the circumstances of this case, I could come to no other conclusion other than that the judge had properly exercised her discretion to grant relief from sanctions. It seems to me that a refusal to grant relief from sanctions, in the circumstances of the case which was presented to the judge, would undermine the fair and proper administration of justice. There was no evidence that the failure to exchange submissions by 4:00 pm on 31 July 2018 caused any prejudice to the appellant, or that it tended, in any way, to bring the administration of justice into disrepute. The failure to completely comply had been remedied as soon as was reasonably practicable.

[101] The test for whether an unless order has expired without taking effect, is whether it has been completely complied with, subject only to *de minimis* exceptions (see the English case of **Jani-King (GB) Ltd v Prodger** [2007] ALL ER (D) 505 at para 13 in which MacKay J sets out the correct test of compliance to an unless order). Although the unless order in the instant case was not completely complied with, the fact that the submissions were filed on time and brought to the attention of the appellant on the day the order was to expire, albeit by an unauthorised method of service, and the fact that valid service was effected one business day later, in my view, meant the failure was a mere technicality, and in its effect was *de minimis*.

[102] In the English case of **Rogers v East Kent Hospitals NHS Trust** [2009] All ER (D) 182, at paragraphs 28-30, it was held that the submission that the claimant's particulars of claim was time barred for having been served one minute late (it having been served, by fax, one minute after 4:00 pm on a Friday and thereby deemed under rule 6.7 of the English CPR to have been served on the next business day after the date of transmission, which was Monday), was a technical point, was unmeritorious and there had been no demonstrable prejudice to the defendant.

[103] Therefore, in appropriate cases, applications to strike out, even if they have some merit, may be dismissed if they are based on a minor default and that which the court could view as "tactical posturing" (see the case of **TIP Communications LLC v Motorola Ltd** [2009] EWHC 212 and Simes, at paragraph 3.30).

[104] Furthermore, in the instant case, there was no trial date set and the next date for hearing of the matter was in the new term. Where the default is minor and in the absence of prejudice to the innocent party, the court ought to recognise the timely attempt by a defaulting party to put matters right. (See the approach in **Collier's International Property Consultants v Colliers Jordon Lee Jafaar SDN BHD** [2008] EWHC 1524 (Comm) at paragraphs 27 and 28, in which the court in dealing with an application to set aside an ex-parte order made for a final arbitration award, on the basis of non-compliance with certain rules, albeit not an unless order, permitted the defaulting party to rectify the matter, in the absence of prejudice to the innocent party).

[105] The prejudice to the respondent, if the relief was not granted, would have been acute. The unless order was made in respect of both parties but for no apparent reason the sanction was attached to the respondent only. This meant that, in theory, the appellant could have failed to carry out the order without fear of any sanction but in doing so would have placed the respondent in immediate jeopardy of having his claim struck out, even though he had complied. What confidence could any litigant have in a fair system of justice in those circumstances? Furthermore, there was absolutely no prejudice to the appellant having received the respondent's submissions 27 minutes or even one day late.

[106] In **Woodward v Finch** [1999] CPLR 699, which considered **Biguzzi v Rank Leisure Plc** (1999) 4 All ER 934, a seminal case dealing with the keeping of time limits

under the English CPR, the claimant was three weeks late in complying with an unless order to serve witness statements. The English Court of Appeal refused to interfere with the judge's decision to grant relief. The main reason for not interfering with the discretion to grant relief was that the application for relief was made promptly; the default was due mainly to the claimant's "muddle-headedness"; there was little or no prejudice to the defendant occasioned by the default, it did not affect the trial period and refusing relief would have had a devastating effect on the claimant. Although the English rules and the court's approach to relief from sanctions differ from that in this jurisdiction, some of the statements of principle made in the English cases, are still of general application and are commendable nevertheless.

[107] Referring to the new approach required by the CPR, as outlined in **Biguzzi,** the English Court of Appeal in **Woodward v Finch** approved the statements made by Lord Woolf MR in that case. Lord Woolf MR, in considering the correctness of the judge's decision in that case, was of the view that judges have to be trusted to exercise their wide discretion fairly and justly in all the circumstances. In doing so, they must also consider their responsibility to litigants not to allow the same defaults to occur in the future as they have occurred in the past. An appellate court, it was said, ought not to interfere with a judge's discretion, when they seek to take that approach, unless they have contravened some relevant principle.

[108] In coming to the decision I have arrived at in this case, I am also mindful of the fact that this unless order was attached to an order of the court requiring both parties

to do an act by a stated date. However, inexplicably, the unless order placed the coercive and draconian sanction only on the respondent, who was the claimant below. It was also imposed when neither party had been delinquent in obeying any court order. This is so because the orders made were permissive and not mandatory. So onerous was the unless order imposed by Y Brown J (Ag), that, on a literal reading of it, if the appellant, who was the defendant in the court below, had failed to comply, then the respondent's statement of case would have stood struck out, whilst the appellant would have faced no sanction whatsoever. In my view, this clearly demonstrates the shortcomings in the order as imposed by Y Brown J (Ag).

[109] Although Y Brown J (Ag) had the discretion to impose an unless order there were several less draconian sanctions that might have been imposed for failing to serve or exchange submissions in the time stipulated to do so, for example not being permitted to make them or rely on them (see the statement of the Master of the Rolls in **Biguzzi**, at page 1933, on the utility in using the alternative powers which the courts have, other than striking out). It seems to me that the sanction imposed in this case by Y Brown J (Ag) was disproportionate to any perceived ill which it was meant to cure. Unless orders with these draconian sanctions should only be imposed where the court is satisfied it is justifiable and appropriate in all the circumstances. The imposition of an unless order, with the sanction of striking out a party's statement of case, is no less subject to the doctrine of proportionality than the exercise of the judge's power to strike out a statement of case (see **Lambeth LBC v Onayomake** (2007) The Times, 2 November 2007 where striking out for a minor default was regarded as disproportionate).

[110] A judge at first instance, faced with an application for relief from sanctions, having given due regard to the principle that the orders of the court must be obeyed, must, once the requirements of rule 28.6(1) and (2) of the CPR have been met, have regard to:

> "...the interest of the administration of justice and ensure that justice is done in accordance with the overriding objective, without resort to needless technicalities, in keeping with the factors set out in rule 26.8(3); (d) a litigant is entitled to have his case heard on the merits and should not lightly be denied that right; and (e) the court must balance the right of the litigant against the need for timely compliance." (See paragraph [57] **Jamaica Public Service Company Limited v Vernon Francis**)."

[111] In applying the overriding objective of the CPR, the primary concern of the court is to do justice between the parties. This means that a litigant ought not to be shut out of the courts as a result of a mere technical breach. A failure to comply which might be viewed as a technical breach will largely depend on the circumstances of each case and the rule, order or practice direction which was breached. Shutting a litigant out because of a technical breach is not consistent with the primary purpose of the civil courts, which is to decide cases on their merits (See Sime at paragraphs 3.28-3.33).

[112] The provisions of our rule 26.8 being the same as rule 26.7 of the Trinidad and Tobago CPR, and the courts of that jurisdiction having taken the same approach as our courts, when dealing with their rule 26.7, I believe it is apt to quote from **The Attorney General of Trinidad and Tobago v Miguel Regis.** In that case the Court of Appeal, at paragraphs 52-54, opined as follows:

> "52. Part 26.7 is therefore full of opportunities for the exercise of judicial discretion. However this discretion is regulated by the structure of the rule in order to reduce subjectivity, prioritize values and to achieve a specific aim with reasonable predictability and equality.
>
> 53. In addition, as the Court of Appeal has been at pains to explain, context and circumstance are the primary factors in the analysis and evaluation of the Part 26.7 requirements. Thus, what may be considered a good explanation may vary not only in the evaluation under each limb in the circumstances of each case, but also with the stage of proceedings; for example what may be a good explanation when the filing of an application occurs early in the process may not be so later on or after judgment and on an appeal. So also in relation to whether the application for relief is prompt or whether there is intentionality or general compliance. These are all matters for the discretion of the judge…
>
> 54. As this case illustrates, the Court of Appeal will respect the exercise of judicial discretion, even when it may have exercised that discretion differently, once it cannot be shown to have been plainly wrong. The CPR, 1998 places unprecedented trust in the hands of judges. Part 26.7 is no exception. The approach of the Court of Appeal to the interpretation and application of Part 26.7 facilitates that trust. It is for the trial judges in the exercise of their judicial discretion to determine whether and when to grant relief from sanctions."

[113] It is difficult to see how the judge, in this case, faced with the task of interpreting and applying rule 26.8 of the CPR and ultimately with giving effect to the overriding objective, could have arrived at any other decision than the one she did arrive at. The respondent having satisfied the requirements of rule 26.8(1) and (2), and the judge, having considered the factors set out in rule 26.8(3), correctly granted the relief from sanctions.

[114] In this case, the appellant has failed to show that the judge exercised her discretion in a way which contravenes any relevant principle. Therefore, there is no

basis upon which this court could interfere with the judge's discretion, properly exercised, to grant relief from sanctions to the respondent in this case.

[115] The appellant's complaints, with the exception of the issue regarding the validity of the service by email which would not affect the outcome of this appeal, are without merit and these grounds of appeal would necessarily fail. I would, therefore, dismiss the appeal but in the light of the fact that no submissions had been made by the respondent, in time for consideration in this appeal, I would make no order as to costs.

MCDONALD-BISHOP JA

ORDER

1. The appeal is dismissed.

2. Order 1 of the orders of Wiltshire J (Ag) made on 19 October 2018 granting the respondent's application for relief from sanction is affirmed.

3. The Registrar of the Supreme Court is to fix a date for the hearing of the notices of application for court orders filed by each of the parties as soon as is reasonably practical, in consultation with the parties.

4. No order as to costs.