[2021] JMCA Civ 46

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE V HARRIS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2020CV00053

BETWEEN	**KENRICK LAYTON**	**APPELLANT**
AND	**THE ISLAND TRAFFIC AUTHORITY**	**1st RESPONDENT**
AND	**THE ATTORNEY GENERAL**	**2st RESPONDENT**
AND	**THE TRANSPORT AUTHORITY**	**3rd RESPONDENT**

Written submissions filed by Samuels Samuels for the appellant

Written submissions filed by McDermott Reynolds McDermott for the 3rd respondent

15 October 2021

PROCEDURAL APPEAL

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

F WILLIAMS JA

[1] I have read in draft the judgment of my sister, Dunbar-Green JA (Ag). I agree with her reasons and conclusion and have nothing to add.

HARRIS JA

[2] I too have read, in draft, the judgment of my sister Dunbar-Green JA (Ag). I agree with her reasons and conclusion and have nothing useful to add.

DUNBAR-GREEN JA (AG)

Introduction

[3] The appellant, Kenrick Layton, an illiterate litigant, failed to comply with rule 29.4(2) of the Civil Procedure Rules, 2002 ('CPR'), which requires certification of his witness statement. He made an application for relief from sanction and it was refused by a judge of the Supreme Court ('the learned judge'). He has appealed the learned judge's decision and seeks the following orders:

(i) the appeal be allowed;

(ii) the order of the learned judge be set aside; and

(iii) the action be remitted to the court below for hearing.

Background to this appeal

[4] On 14 September 2009, the appellant's Toyota motor car was intercepted by members of the now defunct Island Special Constabulary Force ('the police') (represented herein by the 2nd respondent) and the Transport Authority ('the 3rd respondent') on suspicion that he was operating his private motor car as a public passenger vehicle without a road licence and the requisite insurance, contrary to provisions of the Road Traffic and Motor Vehicles Insurance (Third Party Risks) Acts. His motor car was seized and charges were laid against him.

[5] On 21 September 2009, the then acting Senior Resident Magistrate for the parish of Saint Mary ordered that the appellant's motor car be released on bond of $20,000.00 and upon the payment of storage and removal fees. This was not done.

[6] On 23 July 2010, the matter was determined in the appellant's favour and it was ordered that he be refunded all storage and removal fees associated with the seizure of his motor car. The motor car was subsequently released to the appellant.

[7] On 13 January 2012, by amended claim form (and its subsequent amendment on 28 January 2019), the appellant brought proceedings against the respondents for malicious prosecution, conversion, detinue and/or trespass to goods. The allegations were substantially that the respondents had unlawfully seized, carried away and converted his motor car to their use, causing him to suffer loss and damage.

[8] On 23 April 2012, the Director of State Proceedings filed a defence on behalf of the 2nd and 3rd respondents (see also amended defences filed on their behalf on 29 January 2019 and 28 September 2018, respectively).

[9] On 20 April 2015, the case management judge made the usual case management orders. These included: (i) that witness statements were to be filed and exchanged by 30 September 2015; and (ii) a trial date for 14 and 15 November 2016 (see formal order filed 27 April 2015).

[10] The appellant filed his witness statement on 28 January 2016. The delay was not explained. Further case management orders were made on 14 October 2016, extending the time to comply with the previous case management orders and setting a new trial date. Although only an unsigned copy of that case management order appears in the record of appeal, there is no dispute that the orders were made.

[11] The matter came on for trial on 30 January 2019, before the learned judge.

At the trial

[12] This is the 3rd respondent's account of what took place at the trial of the claim (as taken from submissions filed herein). At the commencement of trial, the appellant was sworn and he gave evidence to the effect that he had read over his witness statement and had verified its contents to be true. The witness statement was then tendered and

ordered to stand as his evidence in chief. The appellant was cross-examined by counsel for the 2nd respondent, without incident. However, whilst being cross-examined by counsel for the 3rd respondent, it was discovered that the appellant was unable to read. The 3rd respondent then made an application that his witness statement be struck out on the basis that it was not properly before the court. Eventually, the learned judge adjourned the trial to 1 April 2019, for the appellant to seek relief from sanction on the basis that he had failed to comply with rule 29.4(2) of the CPR. Under that rule, the witness statement of an illiterate person must be certified by a third party.

[13] On 15 March 2019, the appellant filed an amended notice of application for relief from sanction under rule 26.8 of the CPR. It was supported by affidavits of the appellant, filed on 7 February 2019 and 15 March 2019. The application was heard by the learned judge on 1 April 2009, and she refused to grant relief from sanction.

[14] A formal order was not produced to this court, but there was no objection to the appellant's representation that the learned judge found that the failure to comply with rule 29.4(2) was intentional, there had been no good explanation for the failure and there was no proper witness statement before the court. As a consequence, the appellant's statement of case was struck out and judgment entered for the 2nd and 3rd respondents, with costs. The learned judge also refused leave to appeal.

The appeal

[15] On 6 July 2020, the appellant obtained leave to appeal from this court and on 20 July 2020, filed a notice of appeal challenging the decision of the learned judge. These are the grounds of appeal:

> "(a) The learned judge erred in concluding that the failure to comply was intentional as the Appellant withheld information and failed to take into consideration that his action were [sic] not deliberate as he embarrassed [sic] as to anyone finding out that he could not read.
>
> (b) The learned judge erred in concluding that the appellant's explanation was inadequate and failed to take into

consideration the circumstances of the Applicant [sic] who did not want it to be known that he could not read and failed to take judicial notice of the context of revealing private information on one's self.

(c) The Learned Trial judge erred in taking into account irrelevant considerations that granting relief would countenance some form of illegality when such an issue did not arise on the claim and/or application as the application was for relief form [sic] sanctions and not the conduct of the applicant prior to the application.

(d) The learned judge erred in concluding that the application was not made promptly when said application was made within six (6) days of her order which [sic].

(e) The learned judge erred as a matter of fact and/or law in the exercise of her discretion when she concluded that the pleadings were not properly certified when the pleading contained a certificate of truth and there was no rule or practice direction which stipulated that a certificate of truth ought to be witnessed differently from someone who cannot read. Further the learned judge failed to take into consideration that [sic] certificate of truth purpose is to bind a party to confine himself to facts within his knowledge and to obviate contentions of fact in which a party had no honest belief and as such was not fatal to the Claim Form or Particulars of Claim and their subsequent amendments.

(f) The learned judge failed to take into consideration that a witness statement was filed as part 29.4 (2) of the Civil Procedure Rules fails to set out how a witness statement without the necessary requirement ought to be treated.

(g) The learned judge in coming to her decision erred in taking into consideration the time the matter took to reach to trial when that was not in the control of the Appellant and failed to take into account that the matter came up for trial on the 14th day October of 2016 and had to [be] adjourned as the 2nd Respondent sought new counsel who came on the record on the 1st day of October 2018.

(h) Further, the learned judge failed to apply the overriding objective, and the fundamental principle of access to justice whereby parties are to have a right to have their

cases heard on the merits and should not be defeated by a purely procedural and technical breach which does not in any way impact or[sic] justice of the case: **Watson v Fernandes** [2007] CCJ 1 (AJ).

(i) The learned judge erred as a matter of fact and/or law and failed to take into account the Applicant's right to a fair hearing and his right to be heard as guaranteed by s.16 (2) of the Charter of Fundamental Rights and Freedom (Constitutional Amendment) Act, 2011 in that the issue the Court would have to deal with is relevance and the weight of his evidence when compared to his Statement of case and the evidence given."

Issues

[16] The grounds of appeal raise five primary issues as follows:

I. Whether the appellant satisfied the conditions precedent for relief from sanction as prescribed by rules 26.8(1) and (2) (grounds (a), (b), (d));

II. Whether the court took into account irrelevant considerations when considering the application (grounds (c) and (g));

III. Whether the learned judge erred in fact and law in finding that the pleadings were not properly certified (ground (e));

IV. Whether the learned judge failed to realize that rule 29.4 did not set out a consequence for default and should, therefore, have exercised her discretion differently under 29.11(1) or 26.1(ground (f)); and

V. Whether the learned judge erred in failing to consider the overriding objective and the right to a fair hearing (grounds (h) and (i)).

Submissions

[17] On 20 July 2020, the appellant filed written submissions. These were served on the 3rd respondent on the same day. The 3rd respondent filed and served its submissions, in response, on 30 April 2021. There is no indication that submissions were served on the 2nd respondent. The appellant filed further submissions on 29 April 2021, but there is also no indication that those submissions were served on either respondent. The court has, therefore, declined to consider those further submissions.

[18] The 1st respondent, who was sued in error, has taken no part in these proceedings. Neither has the 2nd respondent.

The appellant's submissions

Issue 1: Whether the conditions precedent for relief from sanction were met (grounds (a), (b) and (d))

[19] Counsel for the appellant, Mr Samuels, contended that the appellant had filed his application for relief from sanction on 7 February 2019, and the order of the learned judge required it to be done "on or before the 8th February 2019." The application was, therefore, made within the specified time frame.

[20] As regards the requirement for certification of the witness statement, Mr Samuels pointed to evidence that the appellant had concealed his illiteracy from the attorney-at-law to whom he gave the witness statement because he was "not comfortable with letting anyone know this about [him]" or was ashamed to readily admit it. The non-disclosure of illiteracy to his attorney-at-law was, therefore, not evidence of an intention to violate the rule and was a good explanation for the failure to comply. In addition, he asserted that the appellant had been generally compliant with all rules, directions and orders. He explained that at a pre-trial hearing on 6 June 2016, further orders were made, but he stopped short of saying how those orders relate to the appellant (no such order is disclosed in the record). Counsel also made mention of delays in the progression of the

matter which he attributed to the 3rd respondent's tardiness in settling legal representation.

[21] In the alternative, counsel argued that the learned judge fell into error, when, having found that the breach was intentional, she did not go on to consider the factors in rule 26.8(3), as well as the overriding objective.

Issue 2: Whether the learned judge took into account irrelevant considerations (grounds (c) and (g)

[22] Counsel submitted that it was not germane to the matter before the court below that the appellant had a driver's licence, despite his inability to read. Nor was it of any relevance to the appellant that there was inordinate delay in progressing the case since the reasons for the delay were outside the appellant's control. The learned judge had, therefore, erred in considering those irrelevant matters.

Issue 3: Whether the learned judge erred in finding that the pleadings were not properly certified (ground (e)

[23] Counsel pointed to the certificate of truth appended to the pleadings and asserted that no rule or practice direction stipulated that the certificate of truth from an illiterate person should be witnessed differently from any other witness. He went on to say that the learned judge, therefore, erred in concluding that the pleadings were not properly certified.

[24] He contended that the purpose of the certificate of truth is to bind a party to confine himself to facts within his knowledge and to obviate contentions of fact in which a party had no honest belief. He relied on the case of **Shakira Dixon (By her next friend Norrine Bennett) v Donald Jackson** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 120/2005, judgment delivered on 19 January 2006, ('**Shakira Dixon**'), for the purpose and effect of the certificate of truth.

Issue 4: Whether the learned judge should have exercised her discretion differently under rule 29.11(1) or rule 26.1 (ground (f))

[25] It was also counsel's submission that the learned judge had failed to consider that rule 29.4(2) does not set out any sanction for non-compliance with the requirements for certification. This meant that there would be no need for the appellant to make an application for relief from sanction. The court had the power to grant permission for the witness statement, which was already filed and admitted into evidence, to stand by virtue of rule 29.11(1). In the alternative, she might have exercised her discretion under rule 26.1, to grant an extension of time for compliance with rule 29.11. Counsel posited further, that although the CPR had curtailed the giving of oral evidence, rule 29.2(1) has preserved the general rule that evidence may be given orally.

Issue 5: Whether the learned judge erred in not considering the overriding objective and failed to consider the right to a fair hearing (grounds (h) and (j)

[26] Counsel relied on the case of **Warraich and Another v Ansari Solicitors (A Firm)** [2019] EWHC 1038 for the principle that even where a person is unable to fully understand the contents of his witness statement and the matter is one of credibility, the judge can admit the evidence in chief and weigh it against the evidence in cross-examination. He argued further that it was unfair and unjust for the learned judge to have revoked the witness statement in circumstances where it had been ordered to stand as the evidence in chief, the appellant had already been cross-examined by one respondent and there was no evidence that he could not understand his witness statement.

[27] Relying on **Watson v Fernandes** [2007] CCJ 1 (AJ), Mr Samuels submitted that options were available to the court for dealing with a technical breach and there could have been a short adjournment to remedy the matter. On the strength of para. 39 in **Watson**, he argued that the courts exist to do justice between litigants and justice is not served by depriving the appellant of the ability to have his case decided on the merits because of a technical breach. As alternatives to striking out, Mr Samuels was of the view

that the learned judge could have allowed the appellant to give oral evidence or grant an adjournment to allow for compliance with rule 29.4(2).

3rd respondent's submissions

[28] The 3rd respondent's counter began by characterizing rule 26.8 of the CPR as conjunctive in its terms. Therefore, if the learned judge was to have granted relief from sanction, she had to be satisfied that all the requirements under 26.8(2) were met, that is, (i) the failure to comply with the rule was not intentional; (ii) there was a good explanation for the failure; and (iii) the appellant had generally complied with all other relevant rules, practice directions, orders and directions. To succeed, the appellant needed to show that the learned judge erred in her consideration of those matters. Counsel indicated that the learned judge had refused the appellant's application for relief from sanction on the bases that the non-compliance with the rule for certification of his witness statement had been intentional, there was no good explanation for the failure to comply, and the applicant had not generally complied with other rules, practice directions, orders and directions.

[29] Counsel referred to **H B Ramsay & Associates Ltd and others v Jamaica Redevelopment Foundation Inc and another** [2013] JMCA Civ 1 ('**HB Ramsay**') in which this court reiterated the opinion of the Board in **The Attorney General v Universal Projects Ltd** [2011] UKPC 37, that a good explanation is not one which merely gives the reason for the non-compliance, but must be good in the true sense. It was pointed out that neither of the appellant's affidavits contained any evidence that he was unaware of the importance of the relevant certificate. So, in effect, what the appellant had sought to do was merely to explain how the breach had come about and not provide a reason for the breach. Additionally, by hiding his illiteracy, the appellant had deliberately misled his attorneys-at-law, the court and the respondents, and ultimately wasted the court's time. He had signed the witness statement, knowing that he had not read it over and could, therefore, not say whether what was contained in the document was true or false.

[30] Turning to the question of whether the appellant had complied with all the relevant rules, practice directions, directions and orders, counsel indicated that the pleadings came under the court's scrutiny when it was discovered that the appellant was illiterate. Since, at trial, a litigant can be confronted with his statement of case where it conflicts with his evidence, a witness is required to read over his statement of case before signing and certifying it (as is the case with the witness statement), she submitted. So, although there is no express provision as to the form an illiterate person's certificate of truth should take, in relation to his statement of case, it stands to reason that the certification must be similarly worded to one contained in the illiterate person's witness statement. Given the evidence that the appellant could not read, it could not, therefore, be said that the learned judge was plainly wrong when she had regard to the scheme of the rules and intent behind the giving of certifications, in coming to her decision.

[31] The 3rd respondent referenced **George Bryan v Grossett Harris** (unreported), Supreme Court, Jamaica, Suit No CL 2000 B/089 judgment delivered 21 October 2005, in which Sykes J (as he then was) explained that witness statements are documents of significance and by extension, the certificate of truth is of paramount importance. So, by requiring the filing of witness statements which are verified by certificates of truth, the rules are seeking to ensure that the court can be assured that the statement is an accurate account of the intended witness. The necessary implication of this is: where someone certifies a witness statement and signs it, it is an important step and one of the foundations of the trial process under the CPR regime.

[32] The 3rd respondent's argument was developed to say that, in certifying that a witness statement is true, a witness is saying that it is his statement, he has read it over, the contents are true and he believes what is contained in it. Counsel concluded that the rules regarding the certification of witness statements require that the maker of the certificate consider all these things and certify the statement in agreement.

[33] On these planks, the 3rd respondent argued that the appeal should be dismissed, with costs to the respondents.

Discussion

[34] This appeal is against the exercise of the learned judge's discretion under rules 29.11 and 26.8 of the CPR. I, therefore, accept fully that this court must defer to the exercise of the discretion by the learned judge and must not interfere with it merely on the ground that we would have exercised our discretion differently. As such, we should only set aside the exercise of the learned judge's discretion where it was based on a misunderstanding of the law or evidence; based on an inference that can be shown to be demonstrably wrong; or was so 'aberrant' that no judge regardful of his duty to act judicially could have reached it (see Lord Diplock in the decision of **Hadmor Productions Ltd v Hamilton** [1982] 1 ALL ER 1042, 1046, Morrison P in **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, paras. [19] and [20] and Straw JA in **Juici Beef Limited (Trading as Juici Patties) v Yenneke Kidd** [2021] JMCA Civ 29, para. [27]).

[35] Unfortunately, this is another case in which no written reasons were provided for the learned judge's decision (even after a request through the administrative channel of the courts). This is most undesirable for the reasons stated by Morrison P, in **New Falmouth Resorts Ltd v National Water Commission** [2018] JMCA Civ 13. At para. [50]:

> "…I readily appreciate that judges hearing applications of this nature in chambers in the Supreme Court are usually under tremendous pressure to give their decisions as quickly as possible. However, as Lord Phillips MR said in **English v Emery Reimbold & Strick Ltd** [2002] 1 WLR 2409, '[t]here is a general recognition in the common law jurisdictions that it is desirable for judges to give reasons for their decisions ...' Such reasons can, as Lord Brown explained in **South Bucks District Council and another v Porter (No 2)** [2004] UKHL 33, 'be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision'. The important consideration, as the authorities make plain, is that the reasons given should be sufficient to give the parties, in particular the losing party, an intelligible indication of the basis for the court's decision."

[36] Faced with a similar situation in **Ray Dawkins v Damion Silvera** [2018] JMCA 25, at para. [47], P Williams JA observed that the treatment would be for this court to consider "…whether [the] decision, without reasons, demonstrates a proper exercise of the learned judge's discretion". That is how I will proceed.

[37] A convenient place to start is to set out rule 29.4 of the CPR, an aspect of which was breached by the appellant. It reads:

> "**Requirement to serve witness statements**
>
> 29.4 (1) In this Part a '**witness statement'** means a written statement -
>
> (a) signed by the person making it; and
>
> (b) containing the evidence which it is intended that that person will give orally.
>
> (2) Where the person making the statement is illiterate or blind the statement must be made in the presence of a witness who must certify that -
>
> (a) the statement was read to the person making the statement in the presence of the witness; and
>
> (b) the person making the statement -
>
> (i) appeared to understand it; and
>
> (ii) signed the statement or made his or her mark in the presence of the witness.
>
> (3) The court may order a party to serve on any other party witness statements setting out the evidence on which that party intends to rely at the trial or other hearing.

(4) A party's obligation to serve a witness statement is independent of any other party's obligation to serve such a statement.

(5) The court may give directions as to -

(a) the order in which witness statements are to be served; and

(b) when they are to be filed.

(6) A party may apply for permission to file supplemental witness statements."

[38] In the affidavits in support of his application for relief from sanction, the appellant averred that he had filed a witness statement in which he "certified the contents therein and signed his name". It emerged that he was not telling the truth. He was unable to read and deliberately kept it from his attorney-at-law. The statement was, therefore, not read over to him and certified in accordance with rule 29.4(2).

[39] This is not a trite matter. Certification is verification that the witness accepts the witness statement as his own. The requirement to do so is consistent with the principle that a witness statement must contain the evidence that the witness intended to give orally. If the position were otherwise, the witness statement would be perfunctory and cease to be efficacious.

[40] In **George Bryan v Grossett Harris**, a case which bears great similarity with this one, Sykes J correctly recognised that a court order requiring a witness statement was not a mere formality and that the steps in preparing one were critical to its effectiveness. He went on to observe that the criteria for a witness statement and certification, embodied in rule 29.4 (2), had to be met before the statement could properly be called a witness statement. This meant that if there was non-compliance with the requirements for certification, a party to a claim would have failed to file a witness statement in accordance with a case management order to file and exchange a witness statement within a specified time. The witness should, therefore, not be called to give

evidence unless the court gives permission (applying the sanction in rule 29.11 as well as rules 26.7(2) and 26.8). In short, non-compliance with the rule for certification of witness statements (rule 29.4) renders the witness statement a nullity and a defaulting party's remedy is found in rule 29.11 which points to relief under rule 26.8.

[41] In directing that an application be made for relief from sanction, the learned trial judge was adopting an approach consistent with that outlined in **George Bryan v Grossett Harris**.

[42] Clearly, rule 29.4 itself imposes no sanction for failure to certify the witness statement of an illiterate witness. This contrasts with rule 29.11(1) which expressly states that, where a witness statement or witness summary is not served within the time specified by the court, then the witness may not be called unless the court permits. Rule 29.11(2) states that the court may not give permission at trial unless the party asking for permission has a good reason for not previously seeking relief under rule 26.8.

[43] The contrast between rules 29.4 and 29.11(1) appears to be a stark one when set against the opinion of the Privy Council that sanctions imposed by the rules are consequences which the rules themselves explicitly specify and impose (see **Attorney General v Keron Matthews** [2011] UKPC 38, para. 16).

[44] Except for the decision in **George Bryan v Grossett Harris,** we were not provided with any case law which deals with the effect of non-compliance with the provision in the CPR to certify a witness statement of an illiterate litigant. It may, however, be doubtful that a provision which governs the preparation of a witness statement for an illiterate litigant should have the same consequence as failure to file a witness statement, without that intention being expressed in very clear terms by the rule.

[45] But, I need not resolve that issue because there has been no question raised as to whether the learned judge's invocation of rule 29.11 was correct. Neither were there submissions along that vein. The issues, as I understand them, are narrowly confined to

whether the learned judge had correctly exercised her discretion under that provision, as well as rule 26.8. I will now turn to those questions.

[46] The regime governing relief from sanction is found in rule 26.8 which provides, in part:

> "**Relief from sanctions**
>
> 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.
>
> (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…"

[47] It is well established that the criteria enumerated in rule 26.8 are to be considered systematically. What this means is that the merits of the application will only be considered if the application was made promptly (see Brooks JA (as he was then) in **HB Ramsay**). If there is promptness, the court goes on to consider the factors in 26.8(2). If this second hurdle is overcome, the administration of justice and doing justice to the parties are among further considerations that become paramount (requirements in 26.8(3)).

[48] The approach of this court in relation to the granting of relief from sanction, is set out in **Jamaica Public Service Company Limited v Charles Vernon Francis and Columbus Communications Jamaica Limited** [2017] JMCA Civ 2, at para. [57]:

> "…In this jurisdiction, a first instance judge faced with an application for relief from sanctions must begin from a point of principle that (a) the orders of the court must be obeyed; (b) all the requirements of rule 26.8 (1) and 26.8(2) must be met; (c) once those requirements have been met, it is the duty of the judge to 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. Taking all that into consideration, the approach to the application of the rule should be that taken in **H B Ramsay and Associates Ltd and another v**

> **Jamaica Redevelopment Foundation Inc and another.**"
> (Emphasis as in the original)

[49] This approach is consistent with the opinion articulated by the Privy Council in **Attorney General v Keron Matthews**, in considering a similarly worded rule in the Civil Procedure Rules of Trinidad and Tobago. At para.17, their Lordships opined that an application for relief from sanction must fail unless all three of the conditions precedent are satisfied (see also **H B Ramsay**, followed in **New Falmouth Resorts Limited v National Water Commission** and **Sean Greaves v Calvin Chung** [2019] JMCA Civ 45).

Whether the application was made promptly

[50] In **H B Ramsay**, this court considered an appeal arising from an application for relief from sanction in which the appellants had failed to obey an unless order. The application was made almost one month after the unless order had taken effect. Brooks JA found that the appellant's attorney-at-law had waited too long to make the application, in circumstances where the appellant had paid over sums of money to the attorney-at-law some two days before the deadline. In explaining the meaning of promptitude, His Lordship stated that the requirement in rule 26.8(1) demands compliance (see para. [9]), and at para. [10], he remarked that the question of whether the application was made promptly had some measure of flexibility and depended on the circumstances of the case.

[51] In **Meeks v Meeks** [2020] JMCA Civ 7, F Williams JA provided a framework for this court's treatment of the issue of promptness. Set out below is a helpful extract of that judgment:

> "[23] …What amounts to promptness is significantly dependent upon the circumstances of the particular case. In **Ray Dawkins v Damion Silvera** [2018] JMCA Civ 25 this court, in discussing some of the possibly relevant matters, opined as follows:
>
> > '[66] If the assessment of whether the application was made promptly should be dependent solely upon the time at which the breach occurred, the respondent's

> application was made approximately a year after the deadline for compliance and that could be viewed as amounting to inordinate delay. However, **the fact that there had been partial compliance and that there was in effect no negative delays to the matter proceeding to trial, were circumstances which ought to be taken into consideration.**
>
> [67] **Further, the circumstances under which the breach was brought to the attention of the court at the time of trial ought also to be considered…**'

[24] P Williams JA in **Ray Dawkins v Damion Silvera** cited the case of **National Irrigation Commission Ltd v Conrad Gray and Marcia Gray** [2010] JMCA Civ 18 in which K Harrison JA commented on the meaning of the word 'promptly':

> '[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'."

[52] In **Ray Dawkins v Damion Silvera**, the concern was a judge's grant of relief from sanction, in circumstances where the witness statement of the respondent was to be filed and served, failing which the claim would be struck out. There was partial compliance with the order, as the respondent had filed the witness statement, but failed to serve it until some three years after. That was about one year before the adjourned trial date, but after the time specified in the unless order by the court. It seems that the breach of the relevant unless order (there was more than one such order) was not discovered until it was pointed out by the appellant, a day following the further postponement of the trial. An application for relief from sanction was filed and served by

the respondent on the day the breach was brought to his attention, but the appellant nevertheless contended that the application was not made promptly.

[53] In dismissing the appeal, the court stated that in assessing whether the application was made promptly, the sole consideration could not be the date when the breach occurred. Some consideration had to be given to the circumstances under which the breach was discovered and whether there was partial compliance with the court order. A similar view was expressed in **The National Workers Union v Shirley Cooper** [2020] JMCA Civ 62, where this court stated that the meaning of prompt is a contextual matter and not purely a quantitative measure.

[54] Given the peculiarities of this case, the relevant time period would be that which was given by the learned judge for the filing of the application for relief from sanction. The period, as stipulated by the learned judge, was on or before 8 February 2019, and the application was filed on 7 February 2019. But as promptitude is not exclusively a quantitative measure, the circumstances in which the breach was discovered should also be considered. Significantly, the breach was not discovered until the trial had begun. This means that there was no earlier opportunity to attempt to remedy the breach. And at the point at which it was discovered no one, including the appellant and his attorney-at-law, seemed to have known that there was a violation of the rule.

[55] In my view, the crucial period, therefore, would be the six days after the learned judge adjourned the trial for the application to be made.

Whether the failure to comply was intentional

[56] In his affidavit, dated 7 February 2019, the appellant deposed that he did not advise his attorney-at-law that he was unable to read because he was not comfortable with anyone having that knowledge. The 3rd respondent has urged that the failure was intentional, as the appellant deliberately hid the fact that he was unable to read and signed the witness statement knowing very well that he did not know whether the contents of the statement were true or false. By that deliberate act, counsel argued, he

misled his attorney-at-law, the respondents and the court below. I do not agree with the conclusion that this meant an intentional breach.

[57] I see no basis on which to doubt the appellant's explanation about his state of mind and that it led, unwittingly, to the breach of rule 29.4(2). The rule is not meant to work against the illiterate person because of his unfortunate mental conditioning, including feeling ashamed. This is not to say illiteracy is a pass for lying, but it can explain why the appellant did not disclose that he was unable to read the document which he purported to sign. The lie was not 'intentional' in the true spirit of the word, but very much a human response to a feeling of shame.

[58] It was errant for the appellant to have withheld the fact of his illiteracy from his attorney-at-law, but I do not believe that he was aware at the time of signing the witness statement, and even up to the time of trial, that in hiding his inability to read, he was breaching the rule for certification of his witness statement or that it could have dire consequences. Without more, it could not be said that he was acting in deliberate disobedience of the rule. The breach was, therefore, unintentional.

Whether there was a good explanation for the failure to comply

[59] If there is no good explanation for the default, then the application must fail (per Brooks JA in **H B Ramsay** at para. [22], relying on the authority of **The Attorney General v Universal Projects Ltd**).

[60] The only evidence of an explanation was that the appellant failed to inform his attorney-at-law that he was unable to read at the time when he signed his witness statement because he was uncomfortable with divulging his illiteracy. It appears that he had formed the view that all he needed to do was sign a document prepared by his attorney-at-law. It does not follow that up to the point of the trial he was aware that by so doing, he would be violating the rule. The attorney-at-law, having been kept in the 'dark' so to speak, could not have properly advised the appellant. The information asymmetry and procedural conundrum which resulted could not, in the circumstances,

be treated as a blatant disregard of the rule by the defaulting party (see **Salter Rex & Co v Ghosh** [1971] 2 ALL ER 865).

[61] I accept the appellant's argument that the learned judge was in error when she found that there was no good explanation for the failure when there was evidence before her that suggested that the failure was not deliberate as the appellant was unaware of the consequences of his action. The learned judge was required to determine whether, as a matter of fact, a good explanation had been provided in all the circumstances of the case, but she was not required to look for an infallible explanation (see **Sean Greaves v Calvin Chung**, para. [58]).

General compliance

[62] The fourth criterion for a successful application is general compliance with all other relevant rules, practice direction, directions and court orders. This does not mean that there had to be compliance in every instance. Being generally compliant is a matter of degree. In assessing general compliance, the court is not restricted to the conduct of a party prior to seeking relief. Consideration can also be given to the subsequent actions of the party, which may demonstrate his attitude towards the progress of the matter (see **H B Ramsay**, para. [27]).

[63] The 3rd respondent referred to the certificate of truth appended to the pleadings and said that those pleadings would also be in jeopardy because the certificate of truth presupposes that the party has either read the statement of case or had it read to him. Be that as it may, there is no requirement that an illiterate person's pleadings need to be certified by a third party. And I have seen no evidence as to whether the pleadings had been read over to the appellant before he signed.

[64] Moreover, nothing has been presented in the record to suggest that the appellant was not in general compliance with rules, practice directions, orders and directions. Specifically, there was no evidence brought to the court's attention that showed a failure on the appellant's part to observe time limits generally. Although the witness statement

was served on the Director of State Proceedings after the date ordered at the initial case management conference, there was no material pointed to, which might explain the delay. The only failure proved, on the appellant's part, was that associated with the breach of the rule for certification of the witness statement. In the circumstances, the learned judge made an error in the exercise of her discretion under rules 26.8(1) and (2).

Other requirements under rule 26.8

[65] Counsel for the appellant asserted that, having found that the threshold requirements had not been met, the learned judge needed to go on to consider the provisions under rule 26.8(3). This is an incorrect interpretation of the rule. As I indicated earlier, the authorities have established that the provisions in rule 26.8 are to be considered systematically. Therefore, if the conditions under rule 26.8(1) and (2) are not met, there is no requirement for a judge to consider the remaining factors in rule 26.8.

Consideration of irrelevant/relevant material

[66] The issue of whether the learned judge took into account irrelevant considerations can be disposed of briefly. It is a matter of grave concern that the appellant possessed a driver's licence because to do so, it is a requirement that he should be capable of reading and writing English. But, the Road Traffic Act provides an appropriate sanction for that breach. It would have been an irrelevant consideration in the application for relief from sanction, except if it had been established that there was some direct bearing on the requirements under rule 26.8. That link has not been established by the arguments advanced.

[67] In the exercise of her case management powers generally, the learned judge was obliged to take account of all matters that impacted the progress of the case. She was also required to do so when considering the issue of promptitude in relation to the application for relief from sanction. We note that aspects of the delay in moving the matter forward have not been explained. However, as we did not receive her reasons nothing further can be said one way or the other.

Certification of the pleadings

[68] Turning to the issue surrounding the pleadings, it is not clear from the record at which point the learned judge made the finding that the pleadings were not properly certified and whether any aspect of her decision flowed from or was specifically related to that finding. Notwithstanding, I will go on to consider this issue in light of the effect this would have had on the appellant's statement of case.

[69] Under rule 2.4 of the CPR, a statement of case is defined as "a claim form, particulars of claim, defence, counterclaim, ancillary claim or defence and a reply…". Rule 3.12(1) states that every statement of case must be verified by a certificate of truth. Subsection (2) stipulates that, generally, the certificate of truth must be signed by the lay party, personally. There is no requirement for the statement of case to be read to an illiterate litigant.

[70] The court has the discretion to strike out any statement of case which has not been verified by a certificate of truth. That is the sanction imposed by rule 3.13 (1) which reads as follows:

> "3:13 (1) The court may strike out any statement of case which has not been verified by a certificate of truth."

[71] At the time that the claim form, in this case, was verified, the certificate of truth for a lay party was to be stated as: "I [name] certify that all the facts set out in [name document] are true to the best of my knowledge, information and belief". Such a certificate was appended to the appellant's statement of case. His signature also appears on the documents.

[72] Based on the submissions, the learned judge would have taken the view that since the appellant was unable to read, he could not have verified the statement of case without it having been read to him. It is not clear whether there was any evidence before her as to the circumstances in which the appellant verified his statement of case. The record of appeal has disclosed no such evidence.

[73] In **Shakira Dixon**, the court was concerned with the absence of a certificate of truth in the respondent's defence. At page 3 of his dictum, Harrison P stated that the failure to verify a defence was not fatal. The court held that rule 3.13 of the CPR confers discretion on the court and as such, it does not have to strike out a statement of case for the absence of a certificate of truth. This may be too extreme a sanction, in some circumstances. The court held the view that in many cases there will be alternatives and striking out should be a last resort (see **Biguzzi v Rank Leisure Plc** [1999] 1 WLR 1926). The court also considered and applied the principle enunciated in **Clarke v Marlborough Fine Art (London) Ltd** [2002] 1 WLR 1731 that the purpose of a certificate of truth is to bind a party to confine himself to facts within his knowledge and to obviate contention of facts in which he had no honest belief. It was also stated that the court must always give effect to the overriding objective (rule 1.1(1)) in interpreting the rules.

[74] This approach was affirmed and adopted in **Peter Kavanaugh v The Attorney General and another** [2015] JMCA Civ 9 ('**Peter Kavanaugh**'). That case concerned an application to strike out a defence. One of the issues that arose on the application was, the effect of the certificate of truth which was filed by an attorney-at-law on behalf of the Crown, in non-compliance with rule 3.1(8) of the CPR. The contention was that under rule 3.12(8), an attorney-at-law certifying the facts in a statement of case should also certify that the party supplying the facts believed them to be true and that the certificate was given on that party's instructions. This was not done.

[75] F Williams J (as he then was), in addressing this issue, found that the certificate of truth did not comply with rule 3.12(8), as the defence did not contain a certificate by the attorney-at-law to the effect that the layperson, from whom she got the instructions, believed the facts to be true. However, the court held that there had been substantial compliance with the rules, there was no ascertainable prejudice to the claimant and to strike out the case on a technicality would not be in keeping with the overriding objective.

[76] On appeal, this court found that there was no basis on which to disturb the findings of the learned judge as there was no misunderstanding of the law and he was exercising his discretion under rule 3.13 which gives the option to strike out the statement of case.

[77] The cases of **Shakira Dixon** and **Peter Kavanaugh** establish that the absence of a certificate of truth does not automatically render a party's statement of case liable to be struck out. It depends on the circumstances of the case.

[78] It can be seen quite readily how easily the absence of certain safeguards during the signing of documents requiring certificates of truth could make a mockery of the rule. If, as was held in **Shakira Dixon**, the purpose is to bind a party to confine himself to facts within his knowledge and to obviate contention of facts in which he had no honest belief, it must mean that the person verifying his statement of case should know whether the pleadings, at the very least, reflect the instructions to his attorney-at-law. However, there has been no evidence shown, that the pleadings did not reflect the appellant's instructions to his attorney-at-law or that the appellant was not made aware of the contents of his statement of case. This appears to have been assumed on account of his illiteracy.

[79] It has been shown that even where the statement of case is not verified by a statement of truth, it is not a nullity and the irregularity may be cured, for example, by an unless order requiring that within a specified time, verification is served on the other party, failing which the case is struck out (see the UK's Practice Direction 16 (Statements of Case) para. 4.2, referenced by the learned authors of the White Book in Part 22.3.2). So, even though the certificate of truth signed by the appellant might have been shown to be a sham, and the witness statement was not certified as required by the CPR, the court had alternatives to striking out, which in my view was a harsh outcome in the circumstances of this case.

The overriding objective and right to a fair hearing

[80] There is no merit in the appellant's contention that the learned judge failed to consider the overriding objective. Having found that the threshold requirements were not met, the specific application of the overriding objective would not have assisted the appellant. As it relates to the submission that there was a denial of the appellant's right to a fair hearing, there is no evidence which supports this claim.

Costs

[81] On the issue of costs, I am of the view that the general rule - costs follow the event - should not apply in this case. The appellant's conduct has contributed to the protracted period over which this matter is before the court and he has also caused judicial time to be wasted. The 3rd respondent, on the other hand, was ready but the case was halted because of the appellant's indiscretion. The appellant should, therefore, not be rewarded with costs.

Conclusion

[82] The rules of the CPR are to ensure that the court operates efficiently, but they are not designed to dispense with cases purely on the basis of technicalities. The learned judge was plainly wrong when she decided that the appellant had not met the threshold conditions under rule 26.8. Her discretion was exercised incorrectly when she struck out the appellant's case and awarded judgment to the respondents. This was not an appropriate case in which to do so, particularly as the statute of limitations had run.

[83] Having concluded that the exercise of the learned judge's discretion should be set aside for the reasons stated, this court is now entitled "to exercise an original discretion of its own" (per Lord Diplock in **Hadmor Productions Ltd v Hamilton** at page 220 C – E of the judgment). I have, therefore, exercised the discretion afresh and decided that the application for relief from sanction should succeed.

Disposition

[84] Accordingly, I propose the following orders:

1) The appeal is allowed.

2) The order made by the learned judge on 1 April 2019, refusing relief from sanction, is set aside.

3) Judgment entered for the respondents, with costs, is set aside.

4) The statement of case of the appellant is re-instated.

5) The case is remitted to the Supreme Court for trial with the following directions:

   (i) a certified witness statement (restricted to the same content) is to be filed and served on the respondents within 14 days of the date of this order;

   (ii) an affidavit of service is to be filed upon service of the certified witness statement;

   (iii) on confirmation of service, the registrar of the Supreme Court is to set a trial date and a pre-trial review date, if necessary; and

   (iv) the trial is to be presided over by another judge.

6) The appellant is to bear the costs of the 3rd respondent in this appeal. If the appellant is of the view that a different order as to costs should be made in respect of the proceedings in this court, he shall within seven days from the date of this order, file and serve written submissions for such different order as might be proposed. The 3rd respondent shall have a right to file submissions, in reply,

within seven days of being served with any submissions by the appellant. If there are no submissions filed, by the appellant, within the seven days specified for service of submissions, the costs order herein shall take effect.

F WILLIAMS JA

ORDER

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