[2026] JMCA Civ 13

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MR JUSTICE D FRASER JA
THE HON MRS JUSTICE G FRASER JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2023CV00039

CONSOLIDATED WITH

SUPREME COURT CIVIL APPEAL NO COA2023CV00097

APPLICATION NOS COA2023APP00128 & COA2024APP00173

BETWEEN	**MELISA LEWIS**	**1ST APPELLANT**
AND	**JOAN LINDSAY LEWIS**	**2ND APPELLANT**
AND	**JENNIFER ELAINE ROYE**	**RESPONDENT**

Written submissions filed by Georgia Hamilton & Co for the appellants

Written submissions filed by Judith Clarke and Co for the respondent

15 May 2026

Civil Procedure – Application for relief from sanctions – Consequence of the failure to file and serve witness statement within the timeframe ordered by the Supreme Court – Relief from sanctions denied – Whether the criteria for granting relief from sanctions properly considered – Whether the exercise of discretion in refusing relief from sanctions properly exercised – The Civil Procedure Rules, 2002 ('CPR'), rules 26.8 and 29.11

Appeal – Fresh Evidence – Application for relief from sanctions in the Supreme Court denied – Application to admit fresh evidence on appeal – Whether the criteria for the admission of fresh evidence on appeal satisfied

Civil Procedure – Application for revocation of order refusing relief from sanctions – Revocation denied – Whether the discretion to refuse revocation properly exercised – CPR, rule 26.1(7)

PROCEDURAL APPEAL

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

P WILLIAMS AND D FRASER JJA, G FRASER JA (AG)

[1] This is the decision of the court.

[2] Before the court for determination are two separate, though interrelated appeals arising from decisions of Master Dickens (Ag) (as she then was) ('the learned Master'). In the first appeal (Supreme Court Civil Appeal No COA2023CV00039 ('SCCA No 39/2023')), Ms Melisa Lewis and Mrs Joan Lindsay Lewis ('the appellants') challenge the learned Master's decision, made on 6 June 2023, refusing their application for relief from sanctions contained in a written judgment (with neutral citation [2023] JMSC Civ. 124). In the second appeal (Supreme Court Civil Appeal No COA2023CV00097 ('SCCA No 97/2023')), the appellants challenge the learned Master's refusal on 17 November 2023 of their application for an order that the order refusing relief from sanctions be revoked.

[3] The appeals arise from the same facts, and the appellants, in an application filed on 16 February 2024 in this court, sought to have them consolidated. On 23 April 2024, a single judge granted their application. It is useful to set out the common background to properly frame the issues for determination by this court.

[4] Before setting out the relevant factual background, we extend our sincere apologies for the delay in delivering this decision. Regrettably, despite efforts to expedite the disposal of the matter, the delay could not be avoided. While we are mindful that no apology can fully alleviate the inconvenience and anxiety occasioned, it is nevertheless appropriate to express one.

The background and proceedings in the court below

[5] The appellants commenced proceedings by way of a claim form and particulars of claim filed on 26 September 2018, against Noel Lewis ('Mr Lewis') (who is not a party to this appeal) and Ms Jennifer Elaine Roye ('the respondent'), who is his daughter. The

substantive matter concerns the determination of the ownership of all that parcel of land known as part of Lynch and Ballards Patent called Dunder Hill in the parish of Saint Elizabeth, comprised in Volume 1490 Folio 884 of the Register Book of Titles ('the property').

[6] In their claim, the appellants sought several declarations in relation to the property flowing from the primary declaration that the 2nd appellant or alternatively both appellants, obtained title by adverse possession of the property. They also sought an order cancelling the certificate of title for the property on the grounds that the said title was procured by the fraud of Mr Lewis and further, or alternatively, on the grounds that the certificate of title that exists in the name of the respondent as the sole registered proprietor was irregular and was procured by a continuous series of fraud and or individual acts of fraud, perpetrated by Noel Lewis and the respondent. They also sought damages for nuisance and trespass.

[7] In the particulars of claim, it was asserted that the 2nd appellant, along with Stanley Radcliffe Lewis, her husband, were the original adverse possessors of the property, from 1983 until Stanley Radcliffe Lewis's death in June 2010. Thereafter, possession continued through the 2nd appellant's agent until it was passed to the 1st appellant, who is their child. In 1983, the 2nd appellant and Stanley Radcliffe Lewis commenced construction of a house on the property. In 1994, they fully relocated to the house on the property as returning residents. They maintained the property and the house until 2014. Since 2010, the 1st appellant had also assisted in maintaining the property. From 2014, she had been in possession of it, and she asserted that she wished "to tack on" her adverse possession to that of her parents.

[8] The appellants asserted that in 2015, Mr Lewis, who is the brother of Stanley Radcliffe Lewis, obtained a certificate of title to the property by fraud. The particulars of fraud set out included (i) a failure or refusal to disclose in his application for a registered title that the 1st appellant by herself and through her parents had been in open, continuous undisturbed and exclusive possession of the property in excess of 12 years;

(ii) failure or refusal to cause the appellants to be given notice of the application for registered title; and (iii) failure to disclose to the Registrar of Titles in the application, information relative to a survey which the 1st appellant had caused to be done in 2015. Also included as a particular of the fraud was that (iv) Mr Lewis had applied for registered title when he "fully well knew that he [was] never ordinarily resident in Jamaica and therefore was incapable of satisfying the most fundamental requirement for adverse possession".

[9] The appellants further asserted that Mr Lewis subsequently purported to sell the property to the respondent for the consideration of $7,000,000.00 and transferred the property to her on 2 March 2018. The particulars of fraud in relation to the respondent included that since her return to Jamaica in 2015, she had direct knowledge and actual notice that the 1st appellant lived on the land (v); and had acquired title to the land through the original adverse possessors (vi). Further, she had direct knowledge that Mr Lewis had acquired title to the property through fraud, and prior to taking a transfer of the said land failed or refused to carry out a search at the National Land Agency ('the NLA') or alternatively failed or refused to have due regard to the results of such search (vii). It was the appellants' assertion that the respondent is not a *bona fide* purchaser of the property. The appellants claim that the 2nd appellant remains the fee simple owner of the property, her interest not having been defeated by anyone since taking possession in 2014.

[10] The respondent filed a defence and counterclaim on 13 November 2018. She disputed the claim by denials of the significant assertions in the particulars of claim and putting the appellants to strict proof. She is seeking a declaration that the appellants are not entitled to any interest in the property. She maintains that she is a *bona fide* purchaser of the property for the consideration of $7,000,000.00, with the transfer being registered on 2 March 2018. She also seeks an order that the 1st appellant forthwith vacate and deliver up possession of the property. The appellants filed a reply to the defence and counterclaim on 8 January 2019.

[11] At a case management conference held on 19 July 2021, Stamp J made orders for an "early trial date", setting it for 19 to 21 April 2027, or any earlier date that the Registrar may fix. Among the orders made were that there be standard disclosure by 22 February 2022, and the filing and exchange of witness statements by 1 July 2022. He also ordered that a pre-trial review take place on 12 October 2026.

[12] On 6 December 2021, on the respondent's application for specific disclosure and for an expedited trial date, Master Orr varied the orders made by Stamp J, to facilitate the early trial of the claim. Among the orders made were that witness statements be filed and served by 13 May 2022 and that a listing questionnaire be filed by 20 May 2022. She also ordered that the pre-trial review now be held on 15 June 2022 and that any applications necessary for the speedy disposal of the claim not heard prior to 15 June 2022 were to be heard at the pre-trial review and were to be served no later than 27 May 2022. Master Orr also granted the respondent's application for specific disclosure.

[13] The respondent filed and served a list of documents on 22 February 2022 and a supplemental list on 13 May 2022. On 20 May 2022, the appellants filed their listing questionnaire in which it was admitted that the direction for the filing and service of the witness statements had not been carried out. The explanation offered for this was that one witness had fallen ill and was unable to meet with counsel in time to complete the preparation of the statement and that the appellants had an application pending for copies and inspection of documents relied on by Mr Lewis in securing title for the property, which documents they wished to have available in the preparation of their witness statements.

[14] The pre-trial review came on for hearing on 15 June 2022 before the learned Master. The trial of the matter was set for three days in open court before a judge alone in the Hilary Term of 2023, and a further pre-trial review was set for 14 November 2022. The learned Master also made an unless order extending the time for compliance with orders made by Master Orr in relation to the time for specific disclosure and for the filing of either an agreed or separate statements of facts and issues; as also for compliance

with the order of Stamp J in relation to standard disclosure. The statement of case of any party who failed to comply by 25 July 2022 would be struck out.

[15] On 17 August 2022, the appellants filed a request for information and disclosure of documents, including (i) those relative to the respondent's purchase of the property; (ii) those evidencing payment of relevant taxes and duty in respect of the sale; and (iii) the results of any due diligence checks made with respect to the title by the respondent which were to be validated by the NLA.

[16] By way of letter dated 12 September 2022, the attorneys-at-law for the respondent, in acknowledging this request, indicated their failure to appreciate "what is/are the matter(s) in dispute informing these requests". It was also pointed out that some of the documents requested could be obtained from the NLA at a very reasonable cost.

[17] On 4 November 2022, the appellants filed an application for court orders seeking firstly, an extension of time to file and serve their witness statements and secondly, relief from sanctions for failure to file their witness statements. They also sought an order requiring the respondent to make specific disclosure and provide inspection of the documents requested in the request for information filed on 17 August 2022. The application was supported by the affidavit of Gytana Pinnock ('Ms Pinnock') filed on 4 November 2022. Subsequently an affidavit of Ashley Clarke ('Ms Clarke') was filed on 11 November 2022. On 28 November 2022, the appellants filed a further affidavit of Ms Clarke in support of the application for relief from sanctions.

[18] The appellants asserted that, in any event, their witness statements were filed on 9 November 2022.

[19] The application for relief from sanction came on for hearing on 30 January 2023 before the learned Master, and the decision was given on 6 June 2023. The learned Master, in refusing the application, awarded costs to the respondent and granted leave to appeal.

[20] Having obtained leave of the court below, the appellants filed their notice of appeal, SCCA No 39/2023, on 16 June 2023. On 20 June 2023, the appellants also filed, in this court, a notice of application to adduce fresh evidence.

[21] On 20 June 2023, another application was filed in the court below for court orders seeking relief from sanction for failure to file the witness statements, that the statements filed on 9 November 2022 be permitted to stand and that an extension of seven days be granted to serve the witness statements. Another affidavit of Ms Clarke was filed in support of that notice of application.

[22] On 29 September 2023, an amended notice application for court orders was filed, now seeking to include an order that the order of the learned Master made on 6 June 2023, refusing the appellants' application for relief from sanctions, be revoked. On 17 November 2023, the learned Master made the order refusing the application to revoke her previous orders and granted leave to appeal. On 30 November 2023, by notice of appeal, the second appeal, SCCA No 97/2023, was filed.

The decision of the learned Master in the first appeal – SCCA No 39/2023

[23] The learned Master refused the appellants' application for relief from sanctions, finding that the appellants failed to satisfy the requirements under rules 26.8(1)(a), 26.8(2)(a) and (b) of the Civil Procedure Rules, 2002 ('CPR'). Central to her reasoning was the absence of any proper admissible evidence explaining the non-compliance with the order to file and serve the witness statements within the stipulated time. She found it apposite at the outset to state that the relevant court order for the purpose of the application for relief from sanctions was that of Master Orr dated 6 December 2021, which required witness statements to be filed and served by 13 May 2022. She considered this necessary as, in the affidavit of Ms Pinnock, the order of Stamp J dated 19 July 2021 was identified as the order with which the appellants had failed to comply.

[24] In setting out the application before her, the learned Master noted that Ms Pinnock, in her affidavit, outlined the appellants' inability to complete their witness

statements in time due to "a series of unexpected and unfortunate events". The learned Master noted that Ms Pinnock deposed that, in June 2022, the 1st appellant contracted Covid-19 and was unwell for a considerable time thereafter. She further deposed that counsel for the appellants, Miss Georgia Hamilton ('Miss Hamilton') also contracted Covid-19 in late June 2022, which resulted in Ms Clarke being the only attorney in the office, and she was unable to meet the firm's deadlines. The learned Master also noted that, in her affidavit of 11 November 2022, Ms Clarke detailed how service on the attorneys-at-law for the respondents of the witness statements, filed on 9 November 2022, was attempted but rejected. Significantly, the learned Master referred to the further affidavit of Ms Clarke, which she accepted chronicled challenges faced by the appellants and counsel for the appellants, between June and October 2022.

[25] The learned Master identified the issue to be determined to be whether relief should be granted pursuant to the requirements of rule 26.8. In commencing her consideration of the law and conducting her analysis, the learned Master acknowledged rule 29.11, which provides that a party who fails to serve a witness statement within the time specified by the court, may not call the witness unless the court permits and the party is required to seek relief from sanction pursuant to rule 26.8. She noted that rule 26.8(1)(a) and (b) required that an application for relief be made promptly and be supported by affidavit evidence. She found that the appellants had satisfied rule 26.8(1)(b) in that their application was supported by affidavit evidence. However, she highlighted that the further affidavit of Ms Clarke, filed on 28 November, was not executed by the affiant and, as such, could not be relied on. The learned Master acknowledged that counsel for the appellants had sought an adjournment to have the issue rectified by having Ms Clarke attend at a later date, but having begun to hear the application, did not find it fit or fair to grant the request.

[26] In considering the question of whether the application was made promptly, the learned Master acknowledged the guidance given by this court in the seminal case of **H B Ramsay & Associates Ltd & another v Jamaica Redevelopment Foundation &**

the Workers Bank [2013] JMCA 1 ('**HB Ramsay**'), as also in **National Irrigation Commission Ltd v Conrad Gray and Marcia Gray** [2010] JMCA Civ 18.

[27] The learned Master noted that the application for relief was filed almost six months after the sanction was imposed. She found that the affidavit of Ms Pinnock and that of Ms Clarke, filed on 11 November 2022, offered no explanation as to why the appellants waited for so long before making the necessary application. This, she noted, was in circumstances where a speedy trial was ordered and, at the pre-trial review on 15 June 2022, the court addressed the failure to file witness statements and the necessity of applying for relief from sanction for the failure. It was also noted that the appellants applied for an extension of time to file witness statements in a 2nd further amended urgent application filed on 20 May 2022. The learned Master observed that this was an application for extension of time which could not have been granted without relief from the sanction first being granted. She thus highlighted that the witness statements should have been filed by 13 May 2022, and there was a pre-trial review hearing on 15 June 2022, yet the application was not made until 4 November 2022.

[28] The learned Master, in her conclusion on this issue, recognised that although alacrity was required for relief, there was some flexibility in determining whether an application was promptly made. However, she found that in the absence of any explanation for the delay of six months in filing the application, particularly, after the pre-trial review held on 15 June 2022, she was constrained to find that the application was not made promptly and, consequently, the application had to be dismissed. Having found that the appellants failed to satisfy the threshold requirement under rule 26.8(1)(a), the learned Master stated that although she was not obliged to consider the factors under rule 26.8(2), she would proceed to do so.

[29] In examining the provisions of rule 26.8(2)(a) (b), the learned Master treated both issues as a singular issue, "whether the failure to comply was intentional and whether there is a good explanation for the failure". She correctly emphasised that the affidavit evidence in support of the application is critical, as it must provide evidence which accords

with the criteria under rule 26.8(2), and it is based on such evidence that the court will be able to determine the issue. She relied on **Jamaica Public Service Company Limited v Charles Vernon Francis and others** [2017] JMCA Civ 2 ('**JPS v Francis**').

[30] The learned Master found that the court's examination of the relevant facts must be limited to the period between when the order was made and when compliance was due; in this case, from 6 December 2021 to 13 May 2022. She went on to find that the appellants provided no affidavit evidence covering the relevant period. In the absence of such evidence, there was no material upon which she could assess whether the failure to comply was unintentional or whether there was a good explanation. In her affidavit, Ms Pinnock referred to the 1st appellant and appellants' attorney experiencing challenges in June and July 2022, after the sanctions were imposed, with no explanation for events on or before 13 May 2022. Significantly, the learned Master expressed that even if the further affidavit of Ms Clarke had been admitted, it would not have assisted the appellants in meeting the criteria under rule 26.8(2)(a) and (b). Having failed to satisfy these hurdles, the learned Master found it unnecessary to consider the final criterion under rule 26.8(2)(c).

[31] The learned Master considered the arguments which were made by counsel for the appellants that they had been awaiting inspection of certain documents from the respondent and as such could not file witness statements within the time stipulated by the court. Counsel also submitted that an application for inspection of deeds, instruments, and documents retained by the Registrar of Titles which had been filed on 11 June 2021, amended on 23 June 2021, and further amended on 20 May 2022, was not disposed of, and this impacted on the appellants' ability to file their witness statements. The learned Master recognised that any document submitted to the Registrar of Titles in order to obtain title to the subject property would be relevant to the proceedings. She, however, emphasised that court orders must be complied with and they take effect unless and until they are set aside, varied or overturned on appeal. Thus, she found that notwithstanding the extant application, the appellants were still required to comply with the order to file

the statements. She observed that they had eventually done so, even though the application for inspection was still not addressed.

[32] Additionally, the learned Master highlighted that rule 29.4 permits a party to apply to file supplemental witness statements. Ultimately, it was her view that the outstanding application for inspection did not constitute a good explanation for the failure to file the witness statements. The learned Master acknowledged that, in any event, the affidavit in support of the application did not raise this fact as a reason for the failure to comply. Ms Pinnock had stated that a request for information was made of the respondent's counsel on 17 August 2022, some three months after the statements were due. Thus, this did not rise to the standard of a good reason for the failure to comply, not having been made within the relevant period.

[33] Accordingly, the learned Master found that the application for relief from sanction was not made promptly; she was not satisfied that the failure to file the witness statements was not intentional and that there was a good explanation for the failure. In those circumstances, she refused the application.

Applications in this court

[34] Having filed the notice of appeal on 16 June 2023, and the notice of application for fresh evidence on 20 June 2023, the appellants filed an amended notice of application dated 13 September 2023, seeking relief from sanction for failure to file and serve their written submissions within the time stipulated by the court and that the skeleton submissions filed and served late on the respondent be permitted to stand. They also sought an order that the hearing of the appeal be stayed pending the determination of their application for relief from sanctions filed in the court below on 28 September 2023. On 27 February 2024 a single judge of this court made orders granting the applications for relief from sanctions and permitting the skeleton submissions filed and served out of time to stand.

[35] As already noted above, the appellants filed a notice of application for consolidation of the two appeals on 16 February 2024. On 9 April 2024, the appellant filed a notice of application for orders in the second appeal seeking relief from sanction in relation to their failure to file and serve submissions in that appeal. On 24 April 2024 when the single judge of this court made the order for consolidation, general case management orders were also made including for the respondent to file and serve written submissions on or before 22 May 2024. On 11 July 2024, the respondent filed a notice of application for extension of time within which to serve their submissions.

[36] There are, therefore, two applications on the first appeal which must be determined before consideration of the consolidated appeals: the application from the respondent for an extension of time to serve submissions and a list of authorities, and that from the appellants for the admission of fresh evidence.

Application for extension of time

[37] On 11 July 2024, the respondent filed the notice of application for an extension of time within which to serve written submissions on the consolidated appeals and a list of authorities. Notably, also included were submissions in opposition to the application to adduce fresh evidence. The respondent sought an order that the time for serving the submissions be extended such that the submissions filed on 22 May 2024, and served on 24 May 2024 be taken as having been served within time, together with such further or other relief as the court deemed just. The grounds on which the orders are sought were that the failure to comply was unintentional, there was a good reason for the failure, and it caused no prejudice. An affidavit in support of the application was filed by Ms Melissa Allen ('Ms Allen'), a legal assistant to the respondent's attorney-at-law. The appellants, as respondents to this application filed no submissions in opposition.

[38] Ms Allen deposed that, pursuant to the court's order of 23 April 2024, the respondent was required to file written submissions on or before 22 May 2024, which was duly done. A soft copy of the submissions was emailed to the appellants' attorney,

and the email was exhibited. Hard copies of the submissions and the list of authorities were served on the appellants on 24 May 2024, the following working day.

[39] She explained that by the time of filing the submissions, based on the location of the offices of the appellants' attorneys-at-law, the respondent's legal clerk, who had been given the documents for filing late in the afternoon of 22 May 2024, would not have been able to reach those offices in time to serve the appellants on that date.

Ruling on the application

[40] Rule 1.7(2)(b) of the Court of Appeal Rules, 2002 ('CAR'), provides that the court can 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.

[41] Having considered the application, the supporting affidavit, and the circumstances surrounding the delayed service, there can be no dispute that the submissions were indeed filed on time and that personal service was effected on the following working day. The explanation that the respondent's legal clerk could not complete personal service on 22 May 2024 due to the timing of the filing and the location of the appellants' offices is not unreasonable, and neither was the delay inordinate.

[42] The appellants, though not served with the physical documents on the required date, were in fact in possession of the contents thereof, they having been sent by email on the day specified by the court. The copy of the email proving this electronic communication was exhibited, along with the electronic communication in response, shortly after receipt, whereby it was indicated that they would still await the physical copy. Further, there is no indication that the brief delay in service caused any prejudice to the appellants. Significantly, before our consideration of this application, the appellants filed submissions in response to the respondent's authorities on 26 July 2024. Accordingly, the application for an extension of time is granted, and the respondent's written

submissions and list of authorities filed on 22 May 2024 and served on 24 May 2024 are deemed to have been served within time.

The application to adduce fresh evidence

[43] The notice of application to adduce fresh evidence seeks an "order for leave to file fresh evidence; that is the affidavit of Ashley Clarke sworn on 20 June 2023". The grounds on which the order is sought are that:

> "1. The evidence set out in the Further Affidavit of Ashley Clarke filed November 28, 2022 was not before the learned master at the hearing of the appellants' Application For Relief From Sanctions filed November 4, 2022 owing to defects in the said Further Affidavit and which defects were not discovered until during the hearing of the Appellants' said application for relief from sanctions.
>
> 2. The evidence is of such a nature that it will have an important influence on the result of the Appeal."

[44] In her affidavit, sworn on 20 June 2023 in support of the application to adduce fresh evidence, Ms Clarke deposed that she is an attorney-at-law employed by Mesdames Georgia Hamilton & Company. She stated that, on 28 November 2022, she gave a further affidavit in support of the appellants' application for relief from sanctions. Although she signed the affidavit before a Justice of the Peace ('JP'), the JP omitted to affix his signature, name, and seal, indicating he had witnessed her signature despite properly attesting the accompanying affidavit slip. The defect was discovered on 30 January 2023 during the hearing before the learned Master, which was by video conference on the Zoom platform.

[45] Ms Clarke, further stated that when the matter was being heard she was in office and was alerted by Ms Hamilton, counsel with conduct of the matter, about the defect. It was indicated to the learned Master that she was available to give oral evidence remotely via Zoom, consistent with established practice. Ms Clarke said the learned Master declined the request on the basis that she did not have facilities.

[46] Ms Clarke outlined that the un-attested further affidavit sought to explain the delay in filing witness statements. In particular, she noted what she described as the substantive portions which stated that (i) the 1st appellant was affected by the sudden death of her brother on 8 June 2022 and had contracted COVID-19 shortly before his passing; (ii) counsel, Ms Hamilton, also contracted COVID-19 in June 2022 and subsequently suffered from prolonged symptoms which impaired her ability to work; and (iii) further delays arose due to counsel's workload, staffing shortages which was a situation which had existed since March 2022, difficulties in securing a key witness, and the 2nd appellant experiencing episodes of vertigo which delayed her ability to give full instructions and settle her witness statement. She exhibited the further affidavit along with supporting medical and documentary evidence. Also exhibited was a copy of the affidavit of Ms Pinnock.

Submissions for the application to adduce fresh evidence

[47] Initially, no submissions were filed in support of the application on behalf of the appellants. However, it is apparent from the affidavit of Ms Clarke that the appellants' complaint was that they were denied the opportunity to place the evidence from the affidavit before the court below, even though the CPR allows for evidence to be taken through a video link without the witness being in the courtroom. They further contend that, in the absence of leave to adduce and rely on this evidence, their case is liable to be struck out. The appellants also assert that such an outcome would be of a serious nature, as it may result in the loss of property which has served as the first appellant's home for several years, thereby giving rise to prejudice that would not readily be remedied.

[48] In opposing the application, it was submitted that the appellants failed to satisfy the test for the admission of fresh evidence, as articulated in **Richard Reitzin v Jahkeem Thomas** [2023] JMCA App 31. It was pointed out that the evidence was available at the hearing and was in fact considered. It was thus contended that the application is, in any event, moot, since the affidavit which the appellants now seek to

adduce was already considered in proceedings before the court below and forms part of the subject of the second appeal. In those circumstances, it was submitted that the affidavit cannot properly be regarded as fresh evidence.

[49] Although no orders were made in this regard it was not until 26 July 2024 that the appellants filed an "index to the appellants' response to the respondents' authorities". In all the circumstances, especially the delay in the delivery of this court's decision, it is deemed fair to consider this response, which contained what amounts to full submissions on this issue.

[50] It was accepted that the principles governing applications to adduce fresh evidence in interlocutory proceedings have long been settled. Reliance was placed on the decision of this court in **Associated Gospel Assemblies (by Power of Attorney from Jeremy Karram, Executor for the Estate of Albert Teimer Karram, deceased) v Jamaica Co-Operative Credit Union League Limited and Registrar of Titles** [2022] JMCA Civ 36 ('**Associated Gospel Assemblies v JCCULL and another**').

[51] It was contended that given the defect in the further affidavit of Miss Clarke, the learned Master concluded that the evidence therein was not properly before the court. It was noted that the learned Master later referred to the affidavit in a way which suggested that she nonetheless "retroactively" considered the evidence. It was submitted that having refused to consider the affidavit or hear the deponent it was curious that the learned Master considered the affidavit and concluded it would in any case be of no assistance to the application. This was described as rather disturbing given that the appellants would not have been given any opportunity to refer to or make submissions on the affidavit, and this was intrinsically unfair.

[52] It was contended that there could not be a clearer case for an order permitting fresh evidence for the following reasons, which are set out in the submissions:

> "a. given the nature of the application –one for relief from sanctions-to set the appellants' house aright;

b. the circumstances that caused the evidence not to be before the Court were purely mischance occasioned by the jurat to the exhibit slip being duly completed but not the substantive portion of the Affidavit;

c. the Appellants' counsel only realized this defect in the Affidavit just before the start of the hearing and an oral application to have the affiant give viva voce evidence was flatly refused; and

d. the type of evidence was crucial to the Appellant. That affidavit evidence detailed, inter alia, the prolonged illness of Counsel, the 1st Appellant's inability to contact [sic] of her witnesses and the 2nd Appellant's own delay in providing instructions owing to her own illness. Further the defective affidavit exhibited proof of Counsel's diagnosis and email correspondence corroborating the delays due to illness. This satisfies the test of credibility."

[53] It was submitted that all these factors would have had an important impact on the outcome of the application for relief from sanction given that they addressed issues of promptitude and the explanation for failure to comply with the court's orders.

[54] There was what amounted to a complaint that the appellants were unaware that the learned Master did, in fact, consider the affidavit until sometime after the hearing, when the decision was published and discovered by chance on the court's website. It was described as particularly egregious that the parties had been excluded from the delivery of the judgment in which it was demonstrated that the learned Master had contemplated the defective affidavit. It was submitted that it was settled that the delivery of judgments should be in the presence of the parties. **Hector Earl and Ors v Victor Spence** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 69/1989, judgment delivered 22 June 1992 was relied on in support of this submission.

Ruling on the application to adduce fresh evidence

[55] The principles governing the exercise of this court's discretion to admit fresh evidence are indeed well settled. The established approach in civil matters is derived from the oft-cited decision of **Ladd v Marshall** [1954] 1 WLR 1489, which has been

consistently applied by this court in numerous decisions. In **Richard Reitzin v Jahkeem Thomas** and **Associated Gospel Assemblies v JCCULL** this court acknowledged that, as established in **Ladd v Marshall**, the criteria to be satisfied for this court to exercise its discretion to receive fresh evidence are as follows:

a. if the evidence the applicant seeks to adduce as fresh evidence was not available and could not have been obtained with reasonable diligence at the hearing on the merits;

b. if the evidence, had it been available, would probably have had an important impact on the outcome of the case, although it need not have been decisive; and

c. where, although the evidence may not be incontrovertible, it is presumably to be believed or is apparently credible.

[56] This court also emphasised that these criteria are cumulative and, as such, the applicant must satisfy each of them. However, it is also accepted that the **Ladd v Marshall** principles are to be strictly adhered to in applications to admit fresh evidence following a trial or hearing on the merits but less so where such applications are made in interlocutory proceedings (see **Russell Holdings Limited v L&W Enterprises Inc and Another** [2016] JMCA 39). Ultimately, the primary consideration must be that justice is done. Therefore, the principles are aimed at satisfying the interests of justice. In this regard, it must be borne in mind that the overriding objective does not apply to the court's discretion in dealing with a fresh evidence application, which is not the subject of any rule. (see **Rose Hall Development Limited v Minkah Mudda Hananot** [2010] JMCA App 26 and **Associated Gospel Assemblies v JCCUL**).

[57] In the instant appeal, it must first be observed that in the notice of application, the fresh evidence which leave is being sought to adduce, is identified as the affidavit sworn on 20 June 2023. This is the affidavit of Ms Clarke in support of the application. One of the grounds on which the application is made refers to the further affidavit of Ms

Clarke, filed on 28 November 2022, which contains the evidence which was not before the learned Master owing to defects therein. It is to be assumed that it is this further affidavit which is to be introduced as fresh evidence, and a determination of whether permission should be granted will be in relation to it.

[58] The first consideration is whether the evidence could not have been obtained with reasonable diligence for use at the hearing. The appellants, in their submissions, relied on the fact that this evidence was not before the court purely by mischance occasioned by the fact that the jurat was incomplete. This can be regarded as tacit recognition that the evidence was, in fact, available at the time of the hearing. There is no question as to whether it could have been obtained with reasonable diligence. The error in the preparation of the affidavit was discovered in the hearing, but with diligence, the error could have been avoided. The fact that the learned Master found that the affidavit could not be relied on at the hearing can hardly be considered a proper basis for asserting it can now be categorised as fresh evidence for the purposes of this appeal. The appellants have failed to satisfy the first criterion.

[59] The second consideration is whether the evidence is such that it would probably have an important influence on the decision as to whether relief from sanction should be granted. On our examination of it, the further affidavit is an expansion and further clarification of what was contained in the affidavit of Ms Pinnock. In both affidavits the explanation offered regarding why the witness statements had not been filed, concern events which occurred in and after June 2022. In the further affidavit, Ms Clarke is seeking to give more details about the dates in June that the events occurred. Also, Ms Clarke exhibited documents in proof of those events. She is also seeking to expand on the reasons for the delay. Notably that there were challenges contacting one witness until October 2022 and the fact that Miss Hamilton was unwell from June 2022, which impacted her ability to meet timelines, was compounded by the firm being short-staffed since March 2022.

[60] It is significant that in her affidavit, Ms Pinnock only referred to the order made by Stamp J, on 19 July 2021, for the statements to be exchanged by 1 July 2022. This demonstrates that the appellants were operating within the incorrect timeline. As the learned Master correctly pointed out, the relevant timeline was that ordered by Master Orr in December 2021. The witness statements were to be filed and exchanged by 13 May 2022. Thus, the evidence needed was to address the failure to comply with this timeline and any evidence, which purported to offer an explanation relying on events that occurred in the month following the date for compliance could have no influence on the decision whether to grant relief from sanctions, which took effect on 13 May 2022. The assertion that the firm was short-staffed since March 2022 pointed to issues of administrative inefficiency and could hardly be considered a good explanation for the failure to prepare the statements in time for the 13 May 2022 deadline in compliance with an order made in December of the previous year. Ultimately, the evidence contained in the further affidavit of Ms Clarke, relying largely on events post 13 May 2022, would not have resulted in a different decision than that arrived at by the learned Master. Hence the appellants have failed to satisfy the second criterion.

[61] The final criterion is whether the evidence is presumably to be believed or apparently credible. There is no basis to doubt that the evidence contained in the affidavit was anything other than credible, given its source and the fact that there was documentary proof to support relevant assertions. However, this is insufficient to resolve the matter of whether the application should be granted, given the conclusions reached in relation to the other two criteria.

[62] The appellants criticised the learned Master for having delivered a judgment, in which she demonstrates consideration of the further affidavit, which they allege they were not made aware of until the judgment was published long after the hearing. Although they asserted this occasioned some prejudice to them, we are not so convinced. The learned Master demonstrated fairness in considering the affidavit.

[63] The appellants have effectively admitted that the evidence was available at the time of the hearing, but for the error which rendered it inadmissible. There is a total failure to appreciate the fact that the learned Master was obliged to consider evidence relating to the period of non–compliance, which was from December 2021 to May 2022. The evidence contained in the affidavit would not have adequately addressed this period, in any event.

[64] Thus, for these reasons, the application for leave to adduce fresh evidence is refused.

The first appeal - SCCA No 39/2023

The appeal and the issues that arise therefrom

[65] In their notice and grounds of appeal, the appellants challenged findings of fact and law with the following grounds.

> "The learned Master failed to:
>
> i. Pay any or any sufficient regard to Rule 26.9(2) of the Civil Procedure Rules which provide[s] that, where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.
>
> ii. Pay any or any sufficient regard to the fact that pursuant to Rule 26.9(3), the court may make an order to put a procedural defect aright on or without an application by a party.
>
> iii. Pay regard to the fact that, in special circumstances, on the application of a party the court may dispense with compliance with any of these Rules and, in particular, where procedural defects in an affidavit in support of an application for relief from sanctions are discovered belatedly, to dispense with the need for an application for relief from sanctions to be supported by evidence on affidavit only.
>
> iv. Give any consideration to making some other order that would have achieved justice between the parties in circumstances where the Learned Master has gone on to

find that, relief from sanctions being refused, absent an order granting leave to appeal, she would be constrained to strike out the Claimants' claim.

v. Pay any regard to the commonplace practice of the Court accommodating viva voce evidence via video link and, by denying the Court's capabilities to facilitate the affiant giving oral evidence, further failed to have regard to the Remote Hearing Guidelines issued by the Hon. Chief Justice on 14 September 2021 which outlines the protocols for same.

vi. Have any or any sufficient regard to the overriding objectives [sic] of doing justice between the parties."

[66] The orders sought are:

"(a) The appeal be allowed, and the order of the Learned Master be set aside, and the [the appellants] be granted relief from sanction or alternatively that the matter be remitted to the Court below for reconsideration.

(b) Costs here and below to be paid by the respondent to the appellants."

[67] The issues arising from the grounds of appeal are:

a. Whether the learned Master failed to have proper regard to rule 26.9(2) and (3) of the CPR, in particular the court's power to cure procedural errors for non-compliance, with or without an application by a party (Grounds i and ii).

b. Whether the learned Master erred in failing to make some other order to allow the admission of the evidence in the further affidavit (Grounds iii, iv, v).

c. Whether the learned Master erred by failing to have regard to the overriding objective (Ground vi).

[68] This appeal challenges the exercise of the learned Master's discretion. The approach of this court to such a challenge is now well settled. The guidance of Lord

Diplock in **Hadmor Productions Ltd and others v Hamilton** and **others** [1982] 1 All ER 1042 has formed the basis for this approach and has been adopted in several decisions of this court. In **Attorney General of Jamaica v John Mackay** [2012] JMCA App 1**,** Morrison P succinctly summarised the position at para. [20]:

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

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

Whether the learned Master failed to have proper regard to rule 26.9(2) and (3) of the CPR, in particular the court's power to cure procedural errors or non-compliance, with or without an application by a party (Grounds i and ii)

<u>The submissions</u>

[70] The appellants conceded that the further affidavit of Ms Clarke did not comply with rules 30.4(1)(c) and (d) of the CPR, in that it did not bear the signature and seal of the JP who purportedly witnessed her signature. They submitted, however, that this non-compliance constituted a procedural error capable of being rectified under rule 26.9, in particular rule 26.9(3), there being no other rule prescribing a consequence for such non-compliance. Counsel further contended that the defective form of the evidence should not have been allowed to defeat the substance of the application for relief from sanctions. It was also argued that no prejudice was occasioned to the respondent, as the appellants took reasonable and timely steps to mitigate the breach, including filing the application for relief from sanctions and attempting to serve the witness statements promptly.

[71] In concluding, it was submitted that even if the further affidavit was to be regarded as wholly non-compliant with rule 30.4(1), the defect fell squarely within the scope of rule 26.9(3). Counsel argued that the non-compliance was a genuine oversight rather than a deliberate flouting of the rules, and that the learned Master ought, at a minimum, to have permitted the filing of a properly executed affidavit to regularise the position. Reliance was placed on **Sandra Moore v Patrick Cawley** (unreported), Supreme Court, Jamaica, Claim No 2006 HCV 02776. judgment delivered 20 July 2007 and **Homer Davis v Lawrence Granger and Derrick Kellier** [2016] JMSC Civ 67.

[72] On the respondent's behalf, it was submitted that these grounds are without merit, as the learned Master could not properly have invoked rule 26.9(3) to cure the defect in the further affidavit of Ms Clarke. It was argued that rule 26.9(3) is confined to addressing what it describes as an error of procedure or a failure to comply with a rule, practice direction, court order, or direction. In this case, it was contended, that the defect in the further affidavit of Ms Clarke does not fall within any of these categories. Rather, it constitutes a failure to satisfy the essential legal requirements for a document to qualify as an affidavit. Accordingly, it was submitted that an unwitnessed affidavit cannot properly be characterised as a mere procedural error amenable to correction under rule 26.9(3).

[73] In reliance on section 22(1) of the Judicature (Supreme Court) Act, it was submitted that the "taking" of an affidavit by a JP is not a procedural requirement but a legal one. **Sandra Moore v Patrick Cawley** was also relied on to emphasise that the jurat is not an empty formality. The decision in **Homer Davis v Lawrence Granger and Derrick Kellier** was distinguished on the basis that, in that case, the defect was one of form, whereas in the present case, the defect goes to the validity of the document as an affidavit in law.

[74] It was further submitted that, in any event, the learned Master indicated that even if she were to admit and consider the further affidavit, her decision would have remained

unchanged, as it would not have assisted the appellants in satisfying the requirements of rule 26.8(2)(a) and (b) of the CPR.

Discussion

[75] The learned Master was seized of an application for relief from sanctions arising from the appellants' failure to file their witness statements within the time ordered by the court. It is useful to have in mind the provisions of rule 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 the 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."

[76] Notably, this is an application which must be supported by evidence on affidavit. It is not in dispute that the further affidavit in support of the application, on which the appellants sought to rely in the court below, was not in accordance with rule 30.4(1)(c) and (d). Rule 30.4 sets out the requirements for the making of an affidavit, which may be used as evidence as permitted or required by the court. It provides that an affidavit must be signed by each deponent, sworn or affirmed by each deponent, completed and signed by the person before whom it is sworn or affirmed, and must contain the full name of that person. Rule 30.4(2) requires that the statement authenticating the affidavit ('the jurat') must follow immediately from the text and not on a separate page.

[77] In **Sandra Moore v Patrick Cawley**, Sykes J (as he then was) sought to define "affidavit" and "jurat" by referring to Black's Law Dictionary (8th, 2004). He noted the definition of "affidavit" as being a voluntary declaration of facts written down and sworn to by the declarant before an officer authorised to administer oaths, such as a notary public. A "jurat" is defined as a certificate added to an affidavit or deposition stating when and before what authority the affidavit or deposition was made. The jurat, therefore, is to assist in determining whether the affidavit was properly sworn before a person authorised to administer oaths and thereby lends authenticity to the document. It is, therefore, a necessary legal requirement for the validity of an affidavit within our courts. The mandatory nature of this requirement is underscored by the use of the word "must," as opposed to "may." Any document which is not made in compliance with the requirements for the making of an affidavit cannot be regarded as an affidavit within the meaning of Part 30 of the CPR.

[78] Counsel for the appellants contended that the learned Master had general powers to rectify the defect in the further affidavit, which they maintained was a procedural error. It is, therefore, necessary to look at rule 26.9 of the CPR, which sets out the general powers of the court to rectify matters where there has been a procedural error.

> "26.9 (1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order

has not been specified by any rule, practice direction or court order.

(2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.

(3) **Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.**

(4) The court may make such an order on or without an application by a party." (Emphasis supplied)

[79] How then must the defect in the further affidavit of Ms Clarke be viewed? The requirements for making an affidavit are clearly mandatory. The defect, therefore, constitutes a failure to comply with a mandatory rule, which renders the affidavit defective. However, there are no consequences specified for the failure to comply with this rule. The absence of a proper jurat undermines the evidential integrity of the document, as it leaves the court without assurance that the contents were sworn or affirmed before a person duly authorised to administer oaths and accordingly there must follow consequences for its admissibility. Rule 26.8 (3) allows for a flexible and purposive approach to non-compliance with a rule. This must be the approach particularly where no prejudice is occasioned to the opposing party and where the interests of justice would be better served by permitting the defect to be cured.

[80] Accordingly, while the unattested affidavit is defective due to non-compliance with a rule, the learned Master had a discretion to consider whether the non-compliance could and should be regularised, taking into account factors such as the nature and seriousness of the non-compliance, the explanation provided, any prejudice to the respondent, and the need to uphold the integrity of the court's processes. On this issue, the learned Master had this to say:

"[21] Rule 26.8(1)(a) and (b) require that an application for relief from sanction be made promptly and be supported by affidavit evidence. The Claimants have satisfied rule 26.8(1)(b) in that their application is supported by affidavit

> evidence. It must however be highlighted that one of the affidavits being relied on by the Claimants, the further Affidavit of Ashley Clarke filed November 28, 2022, was not executed by the deponent and as such cannot be relied on by this Court. Counsel for the Claimants had sought an adjournment to have the issue of the affidavit rectified by having Ms Clarke attend at a later date to give oral evidence. **The Court having begun to hear the application did not find it fit and fair to grant an adjournment**." (Emphasis added)

[81] The learned Master did not explicitly refer to the powers she had under rule 26.9(2) and (3). However, she acknowledged her power to make orders to rectify the defect, including granting an adjournment, a power conferred by rule 26.9(2) and (3). So, although she did not expressly mention the rules, she considered acting within their scope to determine whether she should take steps to make matters right, that is, permitting the appellants to have the issue resolved. Having considered the option of rectifying the default, she concluded that it would not be fair to do so, given that the hearing had already commenced and she believed that an adjournment at that stage would be unjust. The decision to grant an adjournment is quintessentially discretionary. While the submission advanced for the appellant that the learned Master could have exercised her discretion to grant the adjournment can be accepted, it has not been shown that she was wrong in declining to do so. Importantly, no prejudice was occasioned to the appellants, as the substance of the further affidavit of Ms Clarke was already before the court by way of the affidavit of Ms Pinnock, and in any event, the learned Master in her written decision revealed that she nevertheless considered the contents of the further affidavit.

[82] In those circumstances, there is some merit to grounds i. and ii. in that the learned Master did not expressly state that she had regard to rule 26.9(2) and (3), but this does not mean that she failed to appreciate or exercise her discretion in accordance with the terms and spirit of the rules. She demonstrably considered whether she should take steps to rectify the breach or defect. Having considered the available course, she chose to make a case management decision within the wide ambit of her powers not to allow rectification. It cannot be said that this was a wrong or irrational exercise of her powers.

Accordingly, there is nothing in these grounds that provides a justifiable basis for impugning the final decision of the learned Master.

Whether, the learned Master erred in failing to make some other order to allow for the admission of the evidence in the further affidavit (Grounds iii, iv, and v)

Submissions

[83] It is considered best to deal with the remaining grounds together since the underlying position is that the learned Master erred in failing to dispense with the need for an application for relief from sanction to be supported by evidence on affidavit only when she could have accommodated viva voce evidence via video link.

[84] On behalf of the appellants, it was pointed out that Part 11 of the CPR outlines the general rules about applications for court orders and rule 11.6(2) allows for an application to be made orally if the court dispenses with the requirement for the application to be made in writing.

[85] It was submitted that this was an appropriate case for the learned Master to dispense with the provisions of rule 26.8(1), particularly given that the progress of their claim depended heavily on the granting of the orders sought. Reliance was placed on **Oneil Carter and others v Trevor South and Others** [2020] JMCA Civ 54 ('**Oneil Carter**') for the proposition that a written application is not always required, while acknowledging that the application must be supported by affidavit evidence. It was contended that, in the special circumstances of the case, the entire application could have been made orally, as the deponent of the further affidavit was available to give *viva voce* evidence at the hearing. It was accepted that the jurat of the affidavit is the authenticating element, and it was posited that the authenticating element of oral evidence is the oath or affirmation that precedes it. It was submitted that if the deponent had been sworn and permitted to give evidence, the same objective would have been achieved. Thus, the submission was that this alternative form of receiving the evidence was well within the wide discretion contemplated by rule 11.6.

[86] It was contended that, as a consequence of the refusal of their application for relief from sanctions, the appellants were barred from relying on their witness statements and, by extension, their witnesses would be precluded from giving evidence at trial unless permitted by the court. It was submitted that, in the interests of justice, the learned Master ought to have considered making alternative orders pursuant to rule 26.1(2). Specifically highlighted was the power to adjourn or bring forward a hearing to a specific date, or to hold a hearing and receive evidence by telephone or use any other method of direct oral communication. Thus, it was argued that less drastic measures were available, with an appropriate order as to costs in favour of the respondents.

[87] It was submitted that the learned Master's approach in refusing the application was a rather limited exercise of her wide discretion. Reliance was placed on **Cropper v Smith** [1884] Ch D 700, in particular the dissenting judgment of Bowen LJ, for the proposition that the court should not punish parties for mistakes made in the conduct of their cases and should, where possible, correct errors not made fraudulently or with an intention to overreach, provided that no injustice is occasioned.

[88] The appellants contend that rules 2.7(3) and 29.3 make express provision for the taking of *viva voce* evidence by way of video link. They also referred to the Remote Hearing Guidelines published by the Chief Justice in response to the COVID–19 crisis, in support of the availability and propriety of such a procedure. Against that background, the appellants questioned the learned Master's assertion that she lacked the necessary facilities to conduct a hearing utilising *viva voce* evidence via video link. In demonstrating the justification for permitting remote evidence, reliance was placed on **John Morris v Radio Jamaica Limited & Latoya Johnson** [2016] JMSC Civ 197 ('**Morris v Radio Jamaica**').

[89] The appellants complained that the learned Master failed to prioritise the substance of the evidence to be adduced, whether oral or written, and accorded insufficient weight to what was at stake between the parties. They submitted that the cost of adjourning the hearing was minimal when compared to the value of the appellants'

home. Further, it was contended that, by refusing the application for relief from sanctions, the learned Master permitted the respondent to avoid a full ventilation of the claim, thereby depriving the appellants of a substantial remedy on what was characterised as a mere technicality. This, they argued, was particularly egregious in circumstances where the matter had not yet been fixed for trial.

[90] In the submissions in response, it was contended that there was no need for the learned Master to consider rule 11.6 (1), which is concerned solely with dispensing with the requirement that an application be made in writing. Counsel pointed out that a written application was properly before the court and that the evidence in support of such an application is governed by rule 11.9.

[91] Counsel contended that the authorities relied on by the appellants, namely **Oneil Carter**, **Cropper v Smith**, and **Morris v Radio Jamaica Ltd**, were of no assistance. It was submitted that **Oneil Carter** is not authority for the proposition that the court may receive oral evidence on an application for relief from sanctions. It was emphasised that the learned Master, mindful of the need to ensure that justice was done, did, in fact, consider the contents of the further affidavit of Ms Clarke and correctly concluded that it would not have assisted the appellants in satisfying the requirements of rule 26.8.

[92] It was submitted that the use of the overriding objective to call into question the decision of the learned Master was misconceived, since that could not be applied without regard to the requirements for compliance with the provisions of the rules, particularly in this matter, rule 26.8, which governs an application for relief from sanction.

[93] It was, therefore, submitted that the grounds of the first appeal must fail, as they disclose no error on the part of the learned Master in the exercise of her discretion in refusing the appellants' application for relief from sanctions. It was contended that the legal basis for her refusal is settled and well-grounded.

Discussion

[94] Rule 11.6 gives the court the discretion to dispense with the requirement that applications be made in writing. Although the general rule is that applications are to be in writing, an application may properly be made orally where permitted by a rule, practice direction, or by order of the court. However, rule 26.8, which governs applications for relief from sanctions, makes it clear that such applications must be supported by affidavit evidence. While the requirement for a written application may be dispensed with, the requirement for affidavit evidence remains mandatory (see **HB Ramsay** and **Oneil Carter**).

[95] It is pellucid that rule 11.6(1) and (2) deals specifically with an application and has no bearing on the requirements relative to an affidavit. Rule 11.9(2) provides that evidence in support of an application must be contained in an affidavit unless a rule, practice direction or a court order otherwise provides. The requirement for an affidavit is mandated by rule 26.8(1)(b) and, as such, there is a need for an affidavit regardless of whether the application was in writing or made orally. The learned Master could not have waived the requirement that there be evidence in support of the application contained in an affidavit. She could not disregard the requirement for compliance with this rule, even in the circumstances of this case, which the appellants describe as special. Neither could she have accepted oral evidence in lieu of the affidavit evidence, which the rules mandate be given in support of an application for relief from sanction. Thus, the fact that there exist rules and protocols that permit the reception of *viva voce* evidence, whether via zoom or otherwise is of no relevance.

[96] The discretion exercised by the learned Master, in refusing to adjourn the hearing of the application to address the defect in the further affidavit, was squarely within her discretion. In any event, it cannot be overstated that the further affidavit of Ms Clarke would have largely replicated the evidence already contained in the affidavit of Ms Pinnock. Ultimately, it would not have been fair or just to further delay the matter by

affording time to rectify and introduce an affidavit which could not have assisted the application.

[97] It is difficult to envisage any alternative orders under rule 26.1(2), which outlines the court's general powers of management that would have materially advanced the appellants' application. Grounds iii, iv, and v are therefore without merit and fails.

Whether the learned Master erred by failing to have regard to the overriding objective (Ground vi.)

[98] Rule 1.1 establishes that the rules are a procedural code with the overriding objective of enabling the court to deal with cases justly. In dealing with a case justly, the court must, *inter alia*, save expenses and ensure, so far as is practicable, that the parties are on equal footing and not prejudiced by their financial position. It also places a duty on the court to ensure that cases are dealt with expeditiously and fairly and that it is allotted an appropriate share of the court's resources, while considering the need to allot resources to other cases. Rule 1.2 mandates that the court must "seek to give effect to the overriding objective when interpreting these rules or exercising any powers under these rules".

[99] One of the earlier decisions of this court, defining the scope of this requirement is **Charmin Blake v Alcoa Minerals of Jamaica Inc** [2010] JMCA Civ 31. Phillips JA, writing on behalf of the court, stated:

> "[19] …It is accepted though and the court must be mindful, as made clear in the judgment of Kay, L.J. in **Totty v Snowden** [2001] 4 All ER 577, that even though the rules require the court to have regard to the overriding objective in interpreting the rules 'where there are clear express words, as pointed out by Peter Gibson LJ in **Vinos**' case, the court cannot use the overriding objective to give effect to what it may otherwise consider to be the just way of dealing with the case'.' However, where there are no express words, the court is bound to look at which interpretation would better reflect the overriding objective'. There is no doubt therefore that the court in interpreting the rules must at all times give effect to the overriding objective, and to that

> extent in the circumstances of this case, in dealing with the case justly, would include although would not be limited to, being focused on and endeavouring to ensure that the matter was dealt with expeditiously and fairly, while saving expense and not utilizing too much of the court's time."

[100] Subsequently, in the case of **The Attorney General of Jamaica and Western Regional Health Authority v Rashaka Brooks Jnr (a minor) by Rashaka Brooks Snr (His father and next friend)** [2013] JMCA Civ 16, Brooks JA (as he then was) stated the following:

> "[14] As is well known by now, the principle that operates is that, in the absence of specific guidance in a particular rule, the court is to have regard to the overriding objective in applying that rule. The overriding objective of the CPR is that the courts are to strive to ensure that cases are dealt with justly…."

[101] Rule 26.8 stipulates the factors to be taken into consideration in the exercise of the discretion when deciding whether to grant relief from sanctions. As such, there is no need to have regard to the overriding objective. The learned Master demonstrated a commendable appreciation of the law relevant to the application before her. There is no challenge to her conclusion that the affidavits provided no explanation for the delay of six months in filing the application for relief from sanction. Neither is there any challenge to her finding that in the absence of evidence surrounding the period up to 13 May 2022, when the witness statements were due, she could not be satisfied that the failure to comply was not intentional and that there was a good explanation for the failure to file them. There could be no successful challenge to either conclusion. The learned Master having arrived at these conclusions, was obliged to refuse the application for relief from sanctions. She did not err by failing to have regard to the overriding objective. Accordingly ground vi fails.

<u>Conclusion</u>

[102] The learned Master did not explicitly consider the provisions of rule 26.9(2) which permitted her to make an order to correct the defect in the further affidavit of Ms Clarke

occasioned by the failure to comply with rule 30.4(1) but she did demonstrate that she considered the power conferred on her by the rule to take steps to rectify the breach. Having considered whether such step should be taken, she decided against it on the basis that it would not be fair and just to do so. This was not an improper exercise of her wide case management powers and her discretion to grant relief from sanction. In any event, the further affidavit was considered. Ultimately, the learned Master was correct in finding that the appellants had failed to present evidence which satisfactorily addressed the requirements of rule 26.8(1)(a) and 26.8(2)(a) and (b).

[103] Accordingly, this appeal is dismissed, with costs to the respondent to be agreed or taxed.

The second appeal – SCC97/2023

Background

[104] In an amended application, filed on 29 September 2023, the appellants sought the following orders:

> "1. That the order of Master T Dickens made 6 June 2023 refusing the Claimants' application for relief from sanctions filed 4 November 2022 be revoked.
>
> 2. That the Claimants be granted relief from sanctions for failure to file and serve their witness statements within the time stipulated by the Court.
>
> 3. That the witness statements filed on behalf of the Claimants herein on November 9, 2022 be permitted to stand.
>
> 4. That the Claimants be granted an extension of seven (7) days from the date hereof to serve the said witness statements.
>
> 5. That costs of the application be costs in the claim.
>
> 6. Such further relief as this Honourable Court deems fit."

[105] The grounds of the application included:

"i. The Applicants application for relief in terms similar to the application now being filed herein was heard and refused by order of Master T Dickens (Ag,) made herein on 6 June 2023.

ii. Pursuant to Rule 26.1(7), the power of the Court under these Rules to make an order includes a power to vary or revoke that order and, in the premises, the Court has jurisdiction to hear and consider a second application for relief from sanctions.

iii. This second application is based on the evidence, which was not before Master T. Dickens (Ag.) at the time of the Applicants' first application for relief from sanctions owing to a defect in the Further Affidavit of Ashley Clarke in support of the Notice of Application for Court Orders filed November 28, 2022 and which defect the Applicants were not allowed to cure by calling the said witness.

iv. The second application for relief from sanctions is being made as soon as possible after careful research and consideration of the issues.

...

vii. The Defendants will not be prejudiced if the Orders sought herein are granted as a trial date in the matter has not yet been set. The Applicants will suffer great prejudice, however, if their Witness Statements are not permitted to stand, as there is presently no evidence before the Court on which they can rely in making out their claim which rests primarily on the issue of fraud.

viii. In the circumstances the interests of justice requires that the above orders be granted."

[106] Ms Clarke swore an affidavit in support of the application. This affidavit was in terms similar to her further affidavit filed on 28 November 2022. Exhibited to this affidavit were the affidavit of Ms Pinnock in support of the application for relief from sanctions filed on 4 November 2022; the further affidavit of Ms Clarke which, exhibited a death certificate; COVID-19 test results; a home quarantine order; medical reports; some email correspondence, and a medical certificate.

[107] Ms Clarke outlined the background to the application, acknowledging that the appellants had failed to file their witness statements in compliance with the court's order. She indicated that an application for relief from sanctions had been filed, supported by her affidavit and a further affidavit, which she was subsequently informed was unattested. She deponed that, as a result, the learned Master did not have that affidavit before her, and proceeded to hear the application for relief from sanction without the benefit of the evidence contained therein. Counsel stated:

> "That on 4 November 2022, Miss Gytana Pinnock, a former employee of the Firm, gave an Affidavit herein and I now crave leave to refer and expand on same, as follows:
>
> a. That in respect of paragraph 5 of Miss Pinnock's said Affidavit, I wish to state that the 1st Claimant has reliably informed, and I do verily believe that her brother Oniel died suddenly on 8 June 2022 and that this was quite devastating for her and delayed her ability to attend to this matter. That a copy of Oniel's death certificate is exhibited hereto at page 1 of the Bundle.
>
> b. That the 1st Claimant also contracted CVD-19 in June 2022. I am seeing where Miss Pinnock states she did so after her brother's passing but this was an error, as the medical evidence shows that the 1st Claimant contracted CVD-19 a few days before her said brother died. That a copy of the 1st Claimant's CVD-19 test report is exhibited at page 2 of the Bundle.
>
> c. That in respect of the said paragraph, it is well-known in these parts that Miss Hamilton contracted CVD-19 in June 2022 and was placed in quarantine for four days resulting in her being unable to attend trial in another matter before the Supreme Court. Copies of her CVD-19 test results, email advising of quarantine order, the quarantine order, and email to the Court requesting an adjournment of the said trial are exhibited at pages 3 to 8 of the Bundle. That based on what I observed as well as what I have been advised by Miss Hamilton and do verily believe, Miss Hamilton not just had CVD-19 but she also experienced long CVD as she suffered from a number of complications involving her ear and stomach with the issues affecting her ear persisting until

September 2022. That from what I observed as well as what I have been advise [sic] by Miss Hamilton and do verily believe, the issues affecting her ears were quite disruptive and affected her functionality and ability to work. That specifically, Miss Hamilton was partly delaying attending to this matter, as she was persistently unwell. A copy of a medical report from Heron Edwards who saw and treated Miss Hamilton is exhibited at page 9 of the Bundle."

[108] Counsel continued:

"6. That I have been further reliably informed by Miss Hamilton and do verily believe that when she was able to resume duties, she experienced further delays in completing the witness statements because of the following:

a. She had by then, owing to being unwell, missed a number of deadlines in other matters and she was trying to juggle all these matters, a situation which is compounded by the fact that, not for want of trying, we have been short-staffed at the Firm since March 2022.

b. The 1st Claimant had issues making contact with one of her witnesses, Mr. Jimmy Lewis, and the 1st Claimant did not reach him until 26 October 2022 despite her best efforts. Thereafter, owing to her schedule and Mr. Jimmy Lewis', it was difficult agreeing convenient dates and times to fully record his evidence and settle his witness statement. That the process of settling his witness statement was done over the course of 26 October to 1 November 2022

c. The 2nd Claimant had experienced episodes of vertigo, and this delayed her ability to take [sic] full instructions and settle her witness statements ahead of the date when this was done."

[109] The formal order, filed on 30 November 2023, in which the details of the order made by the learned Master on 17 November 2023 were recorded, states as follows:

> "1. The Claimants' Amended Application to Revoke Order filed September 29, 2023 is refused.
>
> 2. Leave to appeal is granted to the Claimants.
>
> 3. Costs to the 2nd Defendant to be taxed if not agreed.
>
> 4. Claimants Attorney-at-Law to prepare, file and serve this Order."

The appeal

[110] This second appeal is, therefore, against the learned Master's decision, in the exercise of her discretion, refusing to revoke the order made on 6 June 2023. There is also an attempt to have this court reconsider the application for, and grant relief from sanction. In their notice and grounds of appeal, filed on 30 November 2023, the appellants challenged the learned Master's discretion on the following grounds:

> "(a) The learned Master made a material error of fact in finding that there was no material change in circumstances where the evidence on an affidavit that was mistakenly not attested (which was thereby not before her on the occasion of the application for relief from sanctions) was now before her on the occasion of the application to revoke her earlier order refusing to grant relief from sanctions.
>
> (b) The learned Master failed to pay any or any sufficient regard to applicable principles governing the Court's power to revoke its earlier orders and, in particular, the well-settled principle that the list of categories for the exercise of such discretion or jurisdiction is never closed, as the rule is 'apparently broad and unfettered'.
>
> (c) The learned Master misdirected herself on the assessment of the circumstances in which the Court can revoke its earlier orders, insisting that the proper course of redress is an appeal when the authorities are clear that the jurisdiction to revoke may properly be exercised where it offers a simpler and less costly process than an appeal, thereby avoiding the unnecessary waste of time and expense of going down the appellate route. This is in circumstances where all the parties contemplated an early trial date, and the result of

insisting that the Appellants proceed by way of an appeal has simply resulted in further delaying the disposal of the matter.

(d) The learned Master erred in refusing to revoke her earlier order refusing relief from sanctions, as the effect of the refusal of relief would effectively bring the proceedings against the 2nd Defendant/Respondent to an end in circumstances where the Appellants are alleging that the 2nd Defendant/Respondent procured title to the 2nd Appellant's property, which the 1st Appellant now calls home, by a fraudulent scheme involving the 1st Defendant in the proceedings below.

(e) The learned Master erred in awarding costs in favour of the Respondent in circumstances where the application should not have been resisted.

(f) The learned Master failed to have any or any sufficient regard to the duty of the Court to give effect to the overriding objective to deal with cases justly when interpreting the Civil Procedure Rules ('CPR') and exercising its powers under the CPR, in circumstances where the Appellant had always manifested a clear intention to seek relief from sanctions.

(g) In all the circumstances of the foregoing, the learned Master did not properly assess the evidence before her and the applicable principles to be applied on an application for revocation of an earlier order."

[111] The learned Master did not provide written reasons for her decision, and the consideration for this court must be whether the decision demonstrates a proper exercise of her discretion. For this court to disturb her decision, it must be found that the exercise of her discretion was based on a misunderstanding of the law or the evidence that was before her or that her decision was palpably wrong.

Submissions in Summary

<u>The appellants</u>

[112] The appellants did not address each of their grounds as listed. Instead, they identified and addressed several issues in the following manner:

1) Whether there was a material change in circumstances that would ground the application for revocation of the learned Master's earlier order refusing relief from sanctions;

2) Whether the list of circumstances in which the court can vary or revoke an earlier order is not exhaustive;

3) Whether an appeal was the proper recourse in the circumstances of the case;

4) Whether the learned Master erred in not revisiting and thereafter revoking her earlier order refusing relief, and thereby failed to assess the evidence before her; and

5) Whether the learned Master failed to give effect to the overriding objective and that the costs order should be set aside.

[113] The overarching submission was that the learned Master ought to have exercised her discretion to revoke her earlier orders, as the inclusion of the further affidavit of Ms Clarke amounted to a material change in the circumstances. It was accepted as settled that one of the primary instances in which the court's jurisdiction or discretion may be exercised in changing a previous order is where an applicant is able to show a material change in circumstances. The nature of this test means that what comprises a material change in circumstances will vary from case to case. **Tibbles v SIG Plc (Trading as Asphaltic Roofing Supplies)** [2012] EWCA Civ 518 ('**Tibbles v SIG Plc**') was referred to in support of this submission.

[114] It was contended that the evidence in the further affidavit of Ms Clarke, which was meant to expand on the initial affidavits, would have gone to issues of promptitude, as well as whether there was a good explanation for the non-compliance. It was submitted that this evidence would, by virtue of the additional dimensions it added, amount to a material change in circumstances. It was further submitted that this was not an instance

of the appellant deliberately withholding evidence which was available at the time of hearing, but, due to an error, the inclusion of evidence which was not properly before the learned Master and resulted in her reaching a decision without the benefit of facts that quite likely would have swayed that decision. It was emphasised that the defect in the affidavit was a mere mishap and not deliberate, and that a refusal to revisit the matter would effectively penalise the appellants for counsel's error.

[115] It was further submitted that, although the power is to be exercised sparingly, the court retains a wide discretion under rule 26.1(7) to vary or revoke its orders, and that the circumstances in which such power may be exercised are not closed since the list of circumstances in which an order may be varied or revoked is not exhaustive. **Tibbles v SIG Plc** was again relied on as supportive of this submission.

[116] It was contended that the unfortunate and unusual circumstances of this case would justify the exercise of her discretion by the learned Master to revoke her order refusing relief from sanction, even if there was no material change in circumstances that precluded her from revisiting the matter.

[117] It was recognised that recourse to rule 26.1(7) should not be to undermine the concept of appeal. However, it was submitted that in making the application under this rule, the appellants placed before the court evidence not previously before it owing to a mishap. This evidence, it was contended, went to the formulation of the order and afforded a proper basis for the order to be re-visited rather than the more costly and time-consuming pursuit of an appeal. In the face of the special circumstances that led to the evidence not being before the court, and given that this is not a final order, insisting on the appellants going the appellate route amounts to an unnecessary waste of time and expense. Reference was made to **Deutsche Bank AG and others v Unitech Global Ltd and others** [2014] EWHC 3117 (Comm).

[118] It was submitted that the effect of the learned Master failing to revisit her order, was that she did not reconsider the additional evidence before her which would have

provided a proper basis for a finding that the application for relief from sanction was properly made. It was maintained that the evidence not previously before her spoke to difficulties faced by the appellant's attorneys-at-law starting in March 2022 and continuing up to the time of the signing of the further affidavit in November 2022. This, it was submitted, was a good explanation for failing to comply with the period preceding the deadline and the delay ensuing thereafter. Reference was made to **Jamaica Public Service Co Ltd v Charles Vernon Francis and Columbus Communication Jamaica Ltd (trading as Flow)** [2017] JMCA Civ 2 ('**JPS V Francis**') and **Nardia Beatrice Clarke Executor of the Will of Erolita Rancharan v Nairobi Rancharan** (unreported) Supreme Court of Belize Claim No 10 of 2018, judgment delivered on 2 April 2019.

[119] It was further submitted that there was evidence before the court that the appellants were generally compliant with all the other rules, practice directions, orders, as well as the factors to be considered pursuant to rule 26.8(3), which generally weighed in favour of a revocation of the order refusing relief from sanctions. It was posited that the courts have made it clear that general compliance does not mean strict or full compliance. Reference was made to **Paul White v Homel Grant and Carlos Daley** (unreported), Supreme Court, Jamaica, Suit No CL 1993 /W127 delivered on 7 April 2006. Further, it was pointed out that non-compliance ahead of the expiry of the deadline was the fault of counsel, and this was due to the staffing issues faced by counsel, which arose in March 2022. It was highlighted that the failure to file the statements had been remedied, and it was the appellants who were now being frustrated by the refusal of the attorneys-at-law of the respondent to accept service.

[120] It was contended that no trial date had yet been set despite the fact that both parties were interested in a speedy trial. It was urged that the interests of the administration of justice, as well as the effect that refusing relief from the sanction would have on each party, should be considered. Also to be considered was the fact that there were outstanding applications on behalf of the appellant for disclosure and inspection, which could have prevented the matter from being set down for trial, in any event. It was

also for these reasons that it was contended that the learned Master failed and/or refused to give effect to the overriding objective.

[121] Regarding costs, it was posited that the general rule should be displaced, and that an order of no costs should be made, particularly given that the contest between the parties concerned allegations of fraud. It was submitted that courts have highlighted the need for judges to be wary of parties who unreasonably and opportunistically oppose an application for relief from sanction. Reliance was placed on **Viridor Waste Management Ltd v Veolia** [2015] EWHC 2321 (Comm).

The respondent

[122] In the submissions made on behalf of the respondents, grounds (a), (b), and (c) were dealt with together, then ground (g) was considered.

[123] It was submitted that the learned Master correctly considered and applied the appropriate test in determining the application to revoke her earlier order, and that in refusing the application, she properly exercised her discretion. It was argued that the power to vary or revoke an order should only be exercised in exceptional cases or where there is something out of the ordinary, particularly in the absence of any change in circumstances. The appellants, it was contended, had not provided a sufficient basis for the learned Master to exercise this power, as none of the requisite conditions were met; specifically, they had not demonstrated (i) a change in circumstances or (ii) that the judge who made the order had been misled. The authorities of **Desmond Gregory Mair v Phyllis Mitchell** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 123/2008, judgment delivered 30 January 2009 (**'Mair v Mitchell'**) and **Norman Harley v Doreen Harley** [2010] JMCA Civ 11(**'Harley v Harley'**) were relied on in support of this submission.

[124] It was further emphasised that, whether framed as a material change in circumstances or as "compelling/exceptional reasons", the outcome remains the same: the further affidavit of Ms Clarke did not establish any material change in circumstances,

and, in any event, the learned Master already had the benefit of the evidence contained therein. It was observed that, in their application to revoke the earlier order refusing relief from sanctions, the appellants relied on the same further affidavit of Ms Clarke that had been before the learned Master when she determined the original application. In those circumstances, it was submitted that there was no new material to justify the invocation of the court's power to revoke its order. It was further argued that the appellants ought properly to have awaited the determination of their appeal against the refusal of relief from sanctions, rather than seeking to revisit the matter by way of an application for revocation. It was, therefore, submitted that grounds (a), (b) and (c) must fail as the learned Master did not err in applying the relevant principles to the circumstances of the cases before her.

[125] In relation to the complaint that the learned Master did not properly assess the evidence before her and the applicable principles to be applied on an application for revocation of an earlier order, it was contended that in their application for the revocation of the previous order and for relief from sanctions itself, the appellants relied on the same evidence, and the learned Master correctly refused the application. A review of the material and evidence before the learned Master relating to the application for relief from sanction was conducted, leading to the conclusion that, in any event, the appellants ultimately did not satisfy the requirements of rule 26.8, in that they failed to demonstrate (i) promptitude, (ii) a good explanation for the breach, and (iii) that the non-compliance was not intentional. Notably, in relation to the contention that the further affidavit of Ms Clarke addressed the period leading up to the date for compliance, it was submitted that the evidence with respect to the shortage of staff was given in the context of an explanation as to why there was further delay in completing the witness statements after Ms Hamilton had returned to work after her illness.

[126] The respondents also argued that the mere fact that the dismissal of the application for relief from sanctions would preclude the appellants from relying on their witness statements ought not, without more, to justify the grant of such relief.

[127] In all the circumstances, the respondents submitted that the learned Master's refusal of both the application for relief from sanctions and the application to revoke her earlier orders ought not to be disturbed. Accordingly, the appeal should be dismissed with costs to the respondents, to be agreed or taxed.

Discussion

[128] Given the overlapping nature of the grounds, it is considered best to first come to an appreciation of the law applicable to the nature of the application made by the appellants. Rule 26.1(7) of the CPR gives the court power to vary or revoke an order. The rules do not stipulate the manner in which the court is to exercise this power. In **Harley v Harley**, Harris JA, writing on behalf of the court examined the circumstances in which a judge may revoke an order made by another judge exercising parallel jurisdiction. Following a review of the relevant authorities including **Mair v Mitchell**, which applied the reasoning in **Lloyd's Investment (Scandinavia) Limited v Christen Ager-Harrisens** [2003] EHWC 1740 (Ch), this court concluded that an order may only be varied or revoked where there is some change of circumstances or it is demonstrated that a judge who made an earlier order had been misled. At paras. [39] and [40] of that judgment, Harris JA stated as follows:

> "[39] ... The case of **Mair v Mitchell and Others** SCCA 123/08 delivered in February 2009, affords guidance as to the principles which the court ought to employ in dealing with an application under rule 26.1 (7). In that case Smith J.A., in considering the question as to the power of the Court to vary an order under rule 26.1(7), relied on the ratio decidendi as enunciated by Patten J, in **Lloyd's Investment (Scandinavia) Limited v Ager-Harrisen** [2003] EWHC 1740. Patten J, in dealing with an application to vary an order under Part 3.1 (7) of the English CPR, at paragraph 11 said: Although this is not to be an exhaustive definition of the circumstances in which the power under CPR Part 3.1 (7) is exercisable, it seems to me that, for the High Court to revisit one of its earlier orders, the applicant must either show some material change of circumstances or that the judge

> who made the earlier order was misled in some way, whether, innocently or otherwise, as to the correct factual position before him.
>
> [40] Smith J.A. in adopting the ratio pronounced by Patten J, said:
>
>> 'Although Patten J. was dealing with an application to vary the conditions attached to an order setting aside a default judgment and not one to vary a procedural regime, as in the instant case, I am of the view, that the reason for his decision represents a correct statement of the principle of law applicable to the exercise of the judge's discretion, under Rule 26.1(7) of the CPR. Indeed this principle was approved by the English Court of Appeal in **Collier v Williams** [2006] EWCA Civ 20'."

[129] Similarly, in **Mair v Mitchell**, this court considered the circumstances in which a judge may properly exercise his or her discretion to vary case management orders and a trial date fixed by another judge. That case concerned the variation of directions and trial dates by a judge pursuant to an amended notice of application for court orders seeking to vary directions in relation to an election petition.

[130] At para. [19] of that decision, Smith JA, writing on behalf of the court, stated the law as follows:

> "19. In my judgment, the principles applied by the English Courts should be followed in this jurisdiction when the power of the Court to vary an order under R.26 1(7) of the CPR is invoked. **The applicant must show that there has been a significant change of circumstances since the order was made or that the judge who made the order was misled in some way**. Otherwise it would be open to a judge of the Supreme Court to entertain what would in effect be an appeal from an order of another judge exercising parallel jurisdiction." (Emphasis added)

[131] In **Tibbles v SIG Plc**, upon which the appellants relied, the issue was whether a district judge had the power under 3.1(7) of the United Kingdom Civil Procedure Rules, a provision analogous to rule 26.1(7) of the Jamaican CPR, to vary or revoke his earlier

order reallocating the matter from the small claims track to the fast track. After an extensive review of several authorities on the issue, Lord Justice Rix, writing on behalf of the Court of Appeal, at para 39, outlined conclusions to be drawn from this jurisprudence. The conclusions were largely consistent with the principles identified in the cases from this court. However, there is one conclusion that must be noted as follows:

> "39 …
>
> (vii) The cases considered above suggest that the successful invocation of the rule is rare. Exceptional is a dangerous and sometimes misleading word: however, such is the interests of justice in the finality of a court's orders that it ought normally to take something out of the ordinary to lead to variation or revocation of an order, especially in the absence of a change of circumstances in an interlocutory situation."

[132] With this appreciation of what should have guided the learned Master in the exercise of her discretion in this application, we must examine the evidence and material before her to see whether there was any error warranting the intervention of this court. In seeking to establish that there was a material change in circumstances, the appellants assert that the affidavit, which was not attested and thus was not before the learned Master at the time of the initial hearing, was then before her. This has been demonstrated to be incorrect, as in her written reasons for the refusal to grant relief from sanction, it is apparent that the learned Master appreciated the contents of the further affidavit of Ms Clarke. There is no other discernible material change in circumstances, and there being no suggestion that the learned Master was misled, the appellants would be left to rely on the existence of exceptional circumstances. As such, the appellants relied on the personal mishaps and challenging circumstances faced by the appellants and their attorneys-at-law. However, the learned Master was already apprised of those matters, and nothing new or substantial was presented to justify a revocation of her previous order.

[133] Thus, the matter on which the appellants rely to establish a material change of circumstance falls well short of so doing. There was no other basis on which her discretion

could properly have been exercised. Although the circumstances in which a court may vary or revoke an earlier order are not exhaustive, the circumstances of this case do not meet the threshold for an exception to the established principles On our assessment of the evidence which was before her and the applicable principles for an application of this nature, it has not been shown that the learned Master committed any error in refusing to revoke her previous order. There was no error demonstrated in the manner in which she considered and concluded that the appellants could not be granted relief from sanction. There is no basis for this court to interfere with that decision. Accordingly, grounds (a), (b), and (g) fail.

[134] We note that the appellants rightly acknowledged that rule 26.1(7) ought not to be used as a mechanism to undermine the concept of appeal. Given this court's finding that revocation of the order was unjustified, if the appellants wish to pursue the same application for relief from sanction, based on the same evidence, their proper recourse is by way of an appeal. In this regard, the words of Patten J in **Lloyd's Investment (Scandinavia) Ltd v Ager-Harrisen,** at para. [7], are relevant:

> " … it seems to me that, for the High Court to revisit one of its earlier orders, the Applicant must either show some material change of circumstances or that the judge who made the earlier order was misled in some way, whether innocently or otherwise, as to the correct factual position before him. The latter type of case would include, for example, a case of material non-disclosure on an application for an injunction. **If all that is sought is a reconsideration of the order on the basis of the same material, then that can only be done, in my judgment, in the context of an appeal.**" (Emphasis supplied)

[135] The learned Master was entirely correct in adopting a stance consistent with this observation. The fact remains that the appellants are now effectively attempting to undo the order without any proper basis, amounting to an attempt at a second bite of the cherry. Accordingly, ground (c) fails.

[136] It was contended that the effect of the refusal of relief from sanction would bring the proceedings against the respondent to an end in circumstances where title to the property was procured by a fraudulent scheme. This was not a consideration which ought to have detained the learned Master. The established requirements for revocation were not satisfied: there was no change in circumstances, no misleading information requiring correction, and no exceptional circumstance arising from the further affidavit of Ms Clarke. The mere allegation of a fraudulent scheme in the underlying proceedings does not demonstrate any error on the part of the learned Master in refusing to revoke her order. Thus ground (d) also fails.

The award of costs

[137] In challenging the award of costs, the appellants contend that the learned Master erred in doing so in favour of the respondents, in circumstances where the application should not have been resisted. This is a submission which is utterly unmeritorious. The appellants had failed to comply with orders made by a court, were aware of challenges in complying with the orders from the time they were due, initially only sought an extension of time after the sanction had already taken effect, and applied for relief six months after the deadline for compliance had passed. The situation was compounded by the lack of due diligence in presenting a proper affidavit before the court for consideration, but this was alleviated because the flawed affidavit was still duly considered. In any event, all the evidence was correctly found to be woefully inadequate to address the issues raised in the application for relief from sanction. It is perplexing that a suggestion can seriously be made that efforts to avoid sanctions in circumstances of such disregard of orders and rules of the court should not be resisted.

[138] The general rule, under rule 64.6(1) of the CPR, is that the unsuccessful party should pay the costs of the successful party. The appellants were unsuccessful in their application, and no circumstances justified any deviation from this principle. The respondent properly opposed the application to revoke the order. The contention that it was unreasonable for the respondent to resist the application and should thus be denied

the costs for so doing is totally unsustainable. Costs should follow the event. Accordingly, ground (e) also fails.

The overriding objective

[139] As already discussed, the principle is that it is only in the absence of specific guidance in a particular rule, that the court is to have regard to the overriding objective. Rule 26.1(7) provides for the power for a court to revoke an order without stipulating the factors to be taken into consideration in the exercise of that power. This then was, therefore, an instance where regard could be had to the overriding objective. However, any regard to the overriding objective must be done within the context of relevant factors in the circumstances of the case. In this case, the overriding objective required the learned Master to determine whether there was any significant material change in circumstances to justify the revocation of the order. The fact that the material sought to be introduced had already been considered and properly found insufficient to address the relief from the sanction, cannot be viewed as a condition to be considered in furtherance of the overriding objective. The assertion that the decision of the learned Master demonstrates that she ought to have regard to the overriding objective is without merit. Therefore, ground (f) also fails.

Conclusion

[140] In the circumstances, it cannot be said that the orders made by the learned Master in the exercise of her discretion were plainly wrong to warrant this court's intervention. The appeal must therefore be dismissed, with costs to the respondent.

[141] In closing, it is recognised that the appellants, without more, may be unable to call their witnesses. This is a necessary consequence of the failure to comply with orders of the court followed by unexplained delay for applying for relief from sanction coupled with insufficient evidence to satisfy the requirements for the grant of relief. The fact that this was a possible consequence was not a basis for the learned Master to revoke her

order and to grant the relief from sanction. A reminder of the observations of Edwards JA (Ag) (as she then was) in **JPS v Francis** at para [70] seems appropriate. She stated:

> "…It is no use to say that the appellant will be prejudiced if is not able to call witnesses at the trial. Inherent in the existence of rule 29.11 of the CPR is an acceptance that there will be a prejudicial effect; nonetheless the rule still exists and attorneys and their clients must be mindful of it and the effect of non-compliance. As the Board stated in the case of The Attorney General v Universal Projects Limited [2011] UKPC 37], it serves the useful purpose on improving the efficiency of litigation." (Emphasis supplied)

[142] Ultimately, both appeals must be dismissed. The claim is to be fixed for further pre-trial review by the Registrar of the Supreme Court at the earliest possible date.

Order

Application No. COA2024APP0173

1. The application for an extension of time within which to serve submissions is granted.
2. No order as to costs of the application.

Application No COA2023APP00128

1. The application to adduce fresh evidence is refused.
2. Costs of the application to the respondent to be taxed if not agreed.

Supreme Court Civil Appeal Nos COA2023CV00039 and COA2023CV00097

1. The appeals are dismissed.
2. The decision and orders of Master Dickens (Ag) made on 6 June 2023 and 17 November 2023 are affirmed.
3. The claim is to be fixed for further pre-trial review by the Registrar of the Supreme Court at the earliest possible date.

4. Costs of the consolidated appeals to the respondent to be agreed or taxed.