[2020] JMCA Civ 62

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 65/2018

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE DUNBAR GREEN JA (AG)

BETWEEN	**THE NATIONAL WORKERS UNION**	**APPELLANT**
AND	**SHIRLEY COOPER**	**RESPONDENT**

Written submissions filed by Rachael S Dibbs for the appellant

Written submissions filed by Nigel Jones and Company for the respondent

11 December 2020

PROCEDURAL APPEAL

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

BROOKS JA

[1] I have had the privilege of reading, in draft, the meticulous judgment of my learned sister, Dunbar-Green JA (Ag). Whereas I was initially of the view that the appellant had a defence with a real prospect of success, I am convinced by the compelling analysis of Dunbar-Green JA (Ag) that it has not put itself in a position to advance that defence. I agree that the appeal should be dismissed. I trust that this result will be a further warning

to litigants that the orders of the court are to be obeyed and that failure to abide by that principle will be costly.

SIMMONS JA

[2] I agree with the reasoning of my learned sister Dunbar-Green JA (Ag) and I have nothing further to add.

DUNBAR-GREEN JA (AG)

[3] This is an appeal by the National Worker's Union (the appellant) against the decision of a master of the Supreme Court refusing the appellant's application for relief from sanctions. The 'unless order' which was made by Anderson J on 11 May 2016, required the appellant to file and serve witness statements by a specified date, failing which its defence would be struck out. The appellant having failed to comply, the respondent, Ms Shirley Cooper, made a successful application before the learned master for the sanction to be applied and judgment entered in her favour.

Background to the claim

[4] The appellant herein is the defendant in the court below while the respondent is the claimant. Proceedings were commenced with the filing of a claim form on 15 January 2013. In her claim, the respondent sought damages for breach of her employment contract. She averred that she had been an employee of the appellant for over 35 years and that she resigned her job in 2008, (in what appears to have been amicable circumstances). She stated that she had requested a severance package in a resignation letter which she withdrew for revision but had inadvertently omitted that request when

her letter was re-submitted. She claimed she was entitled to severance pay based on the practice in the organisation as per the appellant's staff manual.

[5] According to the appellant, in its defence filed on 30 January 2013, the respondent had voluntarily demitted office and received all legal entitlements and as such would not be entitled to severance pay. It averred that the respondent's claim is based on a misunderstanding of the staff manual, which provides for a discretionary severance payment.

Procedural history

[6] On 27 January 2015, the case came up for case management conference before C Brown J (Ag, as she then was). The parties were represented by their respective attorneys-at-law. The respondent and Mr Granville Valentine, then General Secretary of the appellant, were also in attendance. The judge made the usual case management orders, including that standard disclosure was to take place by 18 September 2015, and witness statements, pre-trial memorandum and listing questionnaire were to be filed and served by 30 October 2015, 22 January 2016 and 13 April 2016, respectively.

[7] On 27 January 2016, Christopher O Honeywell and Company, then attorneys-at-law for the appellant, filed a notice of application to remove their names from the record as counsel representing the appellant. In the affidavit in support of the application, sworn by Felisia Forrester, legal secretary, it was deposed that the appellant had failed to settle its payment obligations to counsel. She also indicated that the firm would discontinue legal representation of the appellant.

[8] When the pre-trial review came on for hearing on 29 January 2016, neither party nor its legal representative was in attendance. At the rescheduled pre-trial review on 27 April 2016, before Brown Beckford J, the respondent's attorney-at-law was present but the appellant was again absent and unrepresented. The pre-trial review was rescheduled to 11 May 2016, with an order from the judge that the appellant be served with the notice of adjourned hearing, personally. She also extended the time for the respondent to file witness statements and listing questionnaire.

[9] On 4 April 2016, an affidavit of service sworn by Conwell Baines was filed by Mr Honeywell. In it, Mr Baines averred that on 21 March 2016, he posted to the appellant, by registered mail, the amended notice of the adjourned hearing to remove the attorney's name from the record. He also exhibited the certificate of registered posting. That affidavit and the attestation page for the exhibit, however, are not dated and do not bear the name of the Justice of the Peace who purportedly attested his signature. Mr Baines' affidavit is, therefore, defective as it offends against rules 30.2(e)(v) and 30.4(1)(d) of the Civil Procedure Rules (CPR) which stipulate that an affidavit must contain the date on which it was sworn and the full name of the person before whom it was sworn. The effect is that Mr Baines' affidavit would have been inadmissible before the learned master. There is no indication that she had considered it.

[10] On 11 May 2016, the matter returned for pre-trial review before Anderson J. While counsel for the respondent was present, neither the appellant's representative nor its counsel was in attendance. Anderson J made the orders which are central to this appeal. They are, as far as relevant, reproduced below.

> "1. There shall be no pre trial review held with respect to this claim and any earlier order for the holding of a pre trial review is varied accordingly.
>
> 2…
>
> 3. All case management orders not yet complied with by the Defendant, necessitating the filing and service of documents shall be complied with and all such documents shall be filed and served by or before May 31st, 2016 failing which the Defendant's statement of case shall stand as struck out without the need for further order.
>
> 4. The parties shall respectively file and serve skeleton submissions and authorities and shall do so, by or before June 6, 2016..."

[11] On 25 May 2016, the matter came up in chambers, before Master Yvonne Brown (Ag, as she then was). Counsel for both parties were present. The appellant was not in attendance. The master granted the application removing the name of the firm of Christopher O Honeywell and Company from the record as attorneys-at-law for the appellant, and ordered that the firm serve the order on the appellant. The learned master also vacated the trial date and scheduled another pre-trial review for 30 January 2017, notice of which was to be filed and served by the respondent's attorney-at-law. Neither party appeared at the pre-trial review on 30 January 2017.

[12] Filed on 24 November 2017, was an affidavit of service sworn by Richard Taylor wherein he deposed that he had served the appellant with the formal order of Anderson J's orders. On even date, Jovell Barrett swore and filed an affidavit in which she exhibited the 'unperfected' order of Anderson J, along with the purported admit page evidencing service. Although she referenced an admit copy of the formal order of Master Yvonne

Brown in respect of the pre-trial review held on 25 May 2016, that document was not included in her affidavit.

[13] The appellant failed to comply with the 'unless order' by 31 May 2016. Consequently, on 27 November 2017, the respondent filed an application for the appellant's case to be struck out and judgment entered in her favour. In the alternative, she sought another 'unless order' for the appellant to comply with all pre-trial review orders within 14 days.

[14] On 7 December 2017 when the respondent's application was scheduled to be heard, counsel Rachel Dibbs, on behalf of the appellant, filed an application headed "Notice of Application for Court Orders For Relief from Sanctions by the Defendant". She also filed in support an "Affidavit of Urgency" by Granville Valentine sworn on even date as well as a "Notice of Change of Attorney".

[15] The orders sought on the appellant's application before the learned master were:

> "1. That orders 1, 3 and 4 made on 11 May 2016 be set aside and time extended for compliance by the Defendant.
>
> 2. That a date be set for pre-trial review.
>
> 3. That the Defendant be served with the application and affidavit(s) relied upon to secure the Orders made on 11th May 2016.
>
> 4. Costs to the Defendant.
>
> 5. An abridgment of time for filing and serving this application and supporting affidavit.

6. Such further and other relief as this Honourable Court deems just."

[16] In seeking to advance its application before the learned master, the appellant relied on 14 grounds. For succinctness, they are reproduced, in summary, below:

(i) pursuant to rule 11.18(1) of the CPR, a party who was absent when an order was made can apply to have it set aside. In that regard, the appellant has a good reason for its failure to attend as it had not been advised by its legal representative of the court date or the content of the order, and some other order would have been made had it been represented;

(ii) certain handwritten parts of the order of 11 May 2016 are illegible;

(iii) there was no service of the formal order made by Anderson J and the respondent had not satisfied proof of service;

(iv) no notice of the adjourned hearing on 27 April 2016 was served on the appellant;

(v) the overriding objective and justice of the case required that the application be granted;

(vi) the appellant's non-attendance on 11 May 2016 was unintentional, there was good reason for the failure to attend

court, it had been generally compliant with rules and practice directions, and it was therefore entitled to relief under rule 26.8; and

(vii) the respondent had not complied with the 'unless order' to serve witness statements on the appellant, and as such her statement of case had been struck out. There was therefore no need for the appellant to have done anything further.

[17] It is necessary to set out the relevant paragraphs of Mr Valentine's supporting affidavit, verbatim, below:

> "2. The matters contained herein are within my personal knowledge, those available to me from the records of the defendant and are true to the best of knowledge information and belief.
>
> …
>
> 4. This affidavit is filed in support of Notice of Application for Court Orders served on the Defendant on or about November 28 2017.
>
> 5. That the Defendant was previously represented by Christopher Honeywell and Company. I learnt yesterday December 6 2017 that [the] attorney may have removed his name from the record in this case. I am advised and believe that the Defendant was not served with that application nor Order.
>
> 6. That the Defendant has a good defence to this claim which was timely filed.
>
> 7. That the Defendant was not advised by its previous legal representative that a hearing was set for May 11 2016, at which unless Orders were made, had the

Defendant been aware it would have attended the hearing.

8. That the defendant was not aware that case management orders were not complied with by our previous legal representative. The Defendant will comply with all case management orders.

9. That I am informed that the previous legal representative for the Defendant recently returned the file to the offices of the Defendant. Upon being served with the Application set before the Court for December 7 2017 at 2:45 pm, I was informed that the file had been returned by the previous attorney.

10. That the returned file did not have the defence filed, nor any notices from which I could ascertain what had occurred on the file.

11. That the previous General Secretary who had knowledge of this matter is now deceased.

12 . That the defendant has obtained a new legal representative, who sought to get a copy of the file, and the file was not in place I am informed and believe.

…

14. I am informed and believe that the defendant has a good defence to this matter, that the Defendant has been compliant with the Rules and Orders save the Orders made after our previous legal representative applied to remove his name from the record, and we were not informed of Court dates.

15. That the defendant will comply with case management orders made and any other orders of this Court, the defendant will need some time to do so, non-attendance at court was not intentional.

16. The Defendant is a national trade union, our offices did not even receive a call that the hearing was taking place on May 11 2016. Additionally the Order exhibited does not show what date it was allegedly served on the Defendant.

17. The Order number 3 of the Formal Order dated May 11 2016 has handwriting which I have been unable to make out the words to see what the entire Order says. The Defendant wishes to comply but even now we are unable to understand the handwriting on the Order and seek clarity in this regard.

18. The defendant would like to have a pretrial review and to comply with orders of the Court as non-attendance was not intentional, there is a good explanation for the failure to attend when the unless orders were made, and there is a good explanation for case management orders not being followed as our previous legal representative appears to have stopped working on the matter, and the Defendant has generally complied with all other relevant rules, practice directions, orders and directions.

…

20. Failure to comply was not due to the Defendant, compliance can be achieved in a reasonable time, and there would be no effect on either party by the granting of such relief particularly where Orders were made in the absence of the Defendant."

[18] Both the respondent's application to strike out the defence and the appellant's application to set aside the orders of Anderson J were adjourned to 19 March 2018. In the interim, a number of documents were filed and served by both parties. On 8 March 2018, new counsel for the appellant, Rachel Dibbs, filed its list of documents, listing questionnaire and witness statement of Granville Valentine. The respondent, in turn, on 13 March 2018, filed an affidavit of service sworn by Richard Taylor, which spoke to service of the notice of the adjourned hearing of the pre-trial review on the appellant. Mr Taylor, likewise, stated that on 11 May 2016 and 13 May 2016, he served on the firm of Christopher O Honeywell and Company a listing questionnaire and the witness statement of Shirley Cooper, respectively. Exhibited in his affidavit were the admit pages of these

documents with what appears to be the company stamp for Christopher O Honeywell and Company.

Ruling of the learned master

[19] On 19 March 2018, the learned master heard, together, the respondent's application to strike out defence and enter judgment, and the appellant's application to set aside the orders of Anderson J. These are the orders she made, in part, as reflected in the 'unperfected' formal order filed on 31 July 2018:

> "**IT IS HEREBY ORDERED THAT**:
>
> (i) The Defendant's application to set aside orders 1, 3 and 4 made on the 11th day of May 2016 is refused;
>
> (ii) The Defendant's Statement of Case is struck out;
>
> (iii) Cost [sic] of both applications to the Claimant to be agreed or taxed;
>
> (iv) Claimant's Attorneys-at-Law to prepare, file and serve orders herein; and
>
> (v) Permission for leave to appeal by the Defendant is granted."

[20] The 'unperfected' order does not indicate that the learned master entered judgment for the respondent but it is so stated in paragraph [32] of her written judgment. I have extrapolated the issues, findings and reasons for her decision.

[21] After hearing submissions, the learned master considered, *inter alia*: (i) whether the appellant had been served with the formal order of 11 May 2016; (ii) whether the appellant's application was to have been made pursuant to rules 11.18 or 26.8 of the CPR; and (iii) whether the appellant had met the requirements under rule 26.8 of the

CPR. At paragraphs [19]-[21], she referred to the evidence of service contained in Mr Taylor's affidavits and observed that the 'unless order' was personally served before the attorney had his name removed from the record.

[22] Her principal findings in relation to issues ii and iii are found at paragraphs [27]-[30] of her reasons:

> "[27] The Defendants should have complied with the order by May 31, 2016. Having not been put in a position to comply, whether through his own inadvertence or that of his Attorney-at-Law, the option open to the Defendant was to seek relief from sanctions. The rule governing that relief from sanctions is encapsulated in Rule 28 of the Civil Procedure Rules.
>
> [28] Rule 26.8 sets out the procedure. Of note in the instant case is that though the heading of the Defendant's application said relief from sanctions, the order sought in the body of the application was that of rule 11.18, application to set aside order. One of the grounds advanced by the Defendant was that 'the applicant's non attendance on May 11, 2016 was not deliberate, not intentional as they had not been advised of the date by their legal representative who had applied to have his name removed according to the Court's file and the Defendant seeks relief in this regard pursuant to part 26 Rule 26.8,[sic] the Defendant was not at fault [sic] had generally complied with Rules and practice directions.'
>
> [29] It follows therefore that even if this court is incorrect in its assessment that the proper order was not applied for, consideration could be given to the application for relief from sanctions and whether all three elements crucial to the application have been met…
>
> [30] Where a party has failed to comply with an 'unless order', any sanction imposed by the default has that effect unless and until the defaulting party applies from [sic] relief from the sanction imposed by the order. (emphasis mine) [sic] An applicant who seeks relief from a sanction, imposed by his failure to obey an order of the court, must comply with the provisions of rule 26.8(1) in order to have his application

> considered. All three mandatory tenets prescribed by the Rules have not been met in this case. If he fails, for example, to make his application promptly the court need not consider the merits of the application. Additionally, the defendant's Affidavit in support does not make out a case for relief from sanctions. The application to set aside the unless order and extend time for compliance was made some eighteen months after the breach occurred. There is no Affidavit in support to ground the relief from sanctions."

Proceedings on appeal

[23] In its notice of appeal, filed on 15 June 2018, the appellant challenged several findings of fact and law in relation to the learned master's reasons and decisions. It is noted that several of the findings of fact attributed to the learned master are not contained in her written decision.

[24] The appellant filed a number of grounds which were framed as follows:

> "a) The learned Master erred as a matter of fact and law in coming to her decision to strike out the case of the defendant, by failing to utilise the criteria set out by CPR 26.8 to guide her decision making.
>
> b) The learned master failed to appreciate that paragraph 13 of the grounds for relief from sanctions filed by the defendant relied on Part 26.8 were properly pleaded and buttressed by the affidavit of Granville Valentine deponed and filed December 7, 2017, the ground reads thusly:
>
> > '13. the Applicant's non attendance on May 11, 2016 was not deliberate, not intentional as they had not been advised of the date by their legal representative who had applied to have his name removed according to the Court's file, and the Defendant seeks relief in this regard pursuant to Part 26, Rule 26.8, the defendant was not at fault and had generally complied with Rules and practice directions.'

c) The Learned Master failed to appreciate that the Claimant sought a lesser order in their Notice of Application for Court Orders filed on the 27th day of November, to have the defendant comply with Case Management Orders within 14 days as an alternative to strike out the defendants' statement of case, had a good explanation for a delay in compliance and had applied promptly for relief with evidence on affidavit of Granville Valentine General Secretary of the NWU. The order in question is order number 3 which reads as follows:

> '3. Alternatively, that the Defendant be ordered to comply with the pre-trial review orders within 14 days of this hearing failing which the Defendant's Statement of Case should be struck without the need for further court orders;'

d) The learned master erred as a matter of fact and /or law in failing to appreciate the criteria contained in the Rule 26.8, in light of the Order of May 25 2016

- In that no trial date had or has been set
- The trial calendar can still be met, therefore the granting of relief would not have any negative or prejudicial effect on either party
- The failure to comply was not generally the fault of the defendant
- A trial date was to be set by the Registrar (Order May 25 2016)
- Witness statements, Standard Disclosure and Pre trial memo had been filed prior to the hearing of the application by the Master and were therefore remedied within a reasonable time after being served with notice to strike out the claim.

e) The learned Master failed to apply the overriding objective in coming to her decision to strike out the case of the Defendant.

f) That compliance with case management orders albeit late, by the defendant, in the face of no trial date set was not

enough grounds to grant [sic] relief from sanctions and permit the defendant to defend its case on the merits.

g) The decision was not in the interest of administration of justice

h) The Learned Master failed to appreciate the defendant satisfied the criteria contained in Rule 26.8 in that the Order of May 11 2016 had been implicitly modified by the intervening Order of May 25 2016 in that the trial date had been vacated as the defendant would need to find new representation, and orders needed to be complied with.

   a. The Master erred as a matter of law in finding that the Defendants had no good reason for failing to comply with Case Management Orders and ought not to be relieved from sanctions.

   b. The Learned Master failed to appreciate that the failure to comply with the case management orders and the ensuing unless order was not intentional on the part of the part of the Defendant and that the Defendant had generally complied with all of the relevant Rules and Orders.

   c. The Learned Master failed to appreciate that the Defendant had timely filed its Acknowledgment of Service and Defence, attended and participated in Court Ordered mediation and attended case management conference.

I) The Learned Master failed to appreciate that the Defendant had a good defence to the claim, the claim for redundancy not having been made within the statutory period, and made after a resignation, and deserved to have the case tried on its merits.

j) The Learned Master failed to appreciate that there was a good explanation for the failure to comply by the Defendant due to the breakdown or the relationship with its legal representative.

k) The Learned Master failed to appreciate that the 'Unless Order' in the Court Order filed on May 25, 2016 did not follow the criteria contained in Rule 26.2 in that the Court made an Order on its own initiative without giving the

Defendant a reasonable opportunity to make such representations as required.

l)..."

Issues

[25] The primary issues derived from these grounds are:

1. Was the correct application made to obtain relief from sanctions? (ground b);

2. Did the appellant satisfy the conditions pursuant to rule 26.8 in order to obtain relief from sanctions? (Grounds a, d, f, g, and j); and

3. What was the effect of the order made on 25 May 2016, specifically did it modify or vary the 'unless order' of 11 May 2016? (Ground h).

[26] Grounds, c, e, i and k will be dealt with after considering the grounds mentioned above.

Role of the appellate court

[27] It is settled practice that the court will not lightly interfere with the exercise of discretion by a judge and should only do so where it is shown that she exercised her discretion based on a misunderstanding of the law or evidence. A statement of that principle was expressed by Morrison P in **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1:

> "[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 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' ."

[28] Morrison P articulated this principle having referenced Lord Diplock's caution in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 ALL ER 1042, 1046:

> "[The appellate court] must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently."

[29] Consideration has also been given to the exhortation of Lord Hodge in the Privy Council decision of **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21 where at paragraph [12] he stated that:

> "…It has often been said that the appeal court must be satisfied that the judge at first instance has gone 'plainly wrong'…This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts…Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole…The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence…"

[30] This court will therefore not interfere to set aside the order of the learned master unless it is satisfied that her discretion was exercised on a wrong principle of law or a misunderstanding of the evidence.

Issue 1: was the correct application made to obtain relief from sanctions?

[31] Counsel for the appellant submitted that its application was made pursuant to rules 11.18 and 26.8 of the CPR. In addressing rule 26.8 specifically, she contended that ground 13 of the notice invoked that provision.

[32] For his part, counsel for the respondent argued that since the sanction would have taken effect on 31 May 2016, the only option which was available to the appellant was to apply for relief from sanctions under rule 26.8. To buttress his submission, he relied on **HB Ramsay and Associates Ltd and others v Jamaica Redevelopment Foundation Inc and another** [2013] JMCA Civ and **Marcan Shipping (London) Ltd v Kefalas and another** [2007] EWCA Civ 463. Counsel disagreed with the appellant that it had made an application for relief from sanctions under 26.8. He contended that the application made was to set aside the judge's orders under rule 11.18 and that rule was inapplicable in the circumstances. He suggested that the correct approach was outlined in the case of **Peter Crosswell v Financial Institutions Services Limited** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 45/2005, judgment delivered 28 September 2007.

Decision on issue 1

[33] It is necessary, at the outset, to resolve a contention between rules 11.18 and 26.8 of the CPR which arises from the appellant's application before the learned master.

[34] Rule 11.18 states:

> "**Application to set aside or vary order made in the absence of a party**
>
> 11.18 (1) A party who was not present when an order was made may apply to set aside that order.
>
> (2) The application must be made not more than 14 days after the date on which the order was served on the applicant.
>
> (3) The application to set aside the order must be supported by evidence on affidavit showing-
>
> (a) a good reason for failing to attend the hearing; and
>
> (b) that it is likely that had the applicant attended some other order might have been made."

[35] It is also important to set out rule 26.7, which, as far as is relevant, states:

> "**Sanctions have effect unless defaulting party obtains relief**
>
> 26.7 (1) Where the court makes an order or gives directions the court must whenever practicable also specify the consequences of failure to comply.
>
> (2) Where a party has failed to comply with any of these Rules, a direction or any order, any sanction for non-compliance imposed by the rule, direction or the order has effect unless the party in default applies for and obtains relief from sanction and rule 26.9 shall not apply."

[36] The relief from sanctions regime is found in rule 26.8 which provides, in part:

> "**Relief from sanctions**
>
> 26.8 (1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –
>
> (a) made promptly; and
>
> (b) supported by evidence on affidavit.
>
> (2) The court may grant relief only if it is satisfied that–
>
> (a) the failure to comply was not intentional;
>
> (b) there is a good explanation for the failure; and
>
> (c)the party in default has generally complied with all other relevant rules, practice directions, orders and directions.
>
> (3) In considering whether to grant relief, the court must have regard to –
>
> (a) the interests of the administration of justice;
>
> (b) whether the failure to comply was due to the party or that party's attorney at law;
>
> (c) whether the failure to comply has been or can be remedied within a reasonable time;
>
> (d) whether the trial date or any likely trial date can still be met if relief is granted; and
>
> (e) the effect which the granting of relief or not would have on each party."

[37] The first observation is that rule 11.18 makes no reference to an 'unless order' or relief from sanctions. Although it is applicable, generally, to instances where a party is absent when an order is made, it would not apply in a case where the sanction imposed

by the order would have taken effect. That situation is governed by the regime under rule 26.8.

[38] In making the distinction between rules 11.18 and 26.8, this court has observed in **Peter Crosswell v Financial Institutions Services Limited** that while both rules permit the setting aside of an order, the requirements and contexts are different. The court, in that case, considered what should be the proper procedural scheme to be adopted in setting aside an order to strike out a claim. The respondents had contended that rule 11.18 provided the relevant procedure but the court held that the applicable rule was 26.8 as the striking out was a sanction (see pages 10-11 per Cooke JA and page 22 per Harris JA).

[39] As it was not contested that the appellant was non-compliant, there was no need for the master to have considered whether to strike out the defence. That was not an option she could exercise as the sanction had already taken effect upon non-compliance with the 'unless order'. The plain meaning of rule 26.7 is that where the time limited for compliance has expired and a sanction is prescribed, there is no need for any further order from the court for the sanction to take effect (see also **Marcan Shipping (London) Ltd v Kefalas and another**). In the circumstances, what was required of the appellant was to seek relief from sanctions under rule 26.8 as rule 11.18 could be of no assistance. The learned master was therefore correct in her finding that the applicable rule was 26.8.

[40] It has been contended that the appellant had failed to file an application, with a supporting affidavit, seeking relief from sanctions, and as such, the learned master was correct to dismiss the application. This makes it necessary for this court to examine the nature and content of that application.

[41] The heading of the notice referred to "relief from sanctions" but the orders sought did not use those words. The question arises whether that meant relief from sanctions was not being sought. It seems not, because when the grounds of the notice are examined it is clear that both rules 26.8 and 11.18 are invoked.

[42] Ground 13 specifically invoked rule 26.8 by indicating that relief was being sought under that provision. It sought to satisfy the criteria established by the rule, viz:

> " 13. **The Applicant's non-attendance on May 11 2016 was not deliberate, not intentional** as they had not been advised of the date by their legal representative who had applied to have his named removed according to the Court's file, **and the Defendant seeks relief in this regard pursuant to Part 26, Rule 26.8, the defendant** was not at fault and **had generally complied with Rules and practice directions**." (Emphasis supplied)

[43] When the orders sought are examined, it is plain that there is no inconsistency between them and relief from sanctions. The substance of the relief sought was to set aside orders and extend time within which to comply. This is precisely the effect of a relief from sanctions in relation to an 'unless order'.

[44] All told, this was a strange application which is best described as an inelegant 'catch all' attempt at obtaining relief. Notwithstanding the inclusion of rule 11.18 and

otherwise extraneous or improper elements, there was clear intent to apply for relief from sanctions and the application ought to have been unequivocally treated as such.

[45] Turning to the affidavit, it is observed that although it was headed "Affidavit of Urgency…" there were averments which pertain to the criteria set out under rule 26.8, in particular, paragraphs 14, 15 and 18.

[46] Regardless of form, the learned master was required to expressly and carefully consider the application and supporting affidavit to reach a conclusion as to whether they met the basic requirements to satisfy the criteria under rule 26.8 of the CPR. Since it was apparent that rule 26.8 was also invoked, the relevant paragraphs in the notice and affidavit ought to have been addressed. Although compliance with rules of procedure is important, the court should not be formulaic in treating with applications. The rules are undergirded by the imperative to do justice in each case, based on the particular circumstances.

[47] This position finds support in the Court of Appeal decision in **Morris Astley v The Attorney General of Jamaica and The Board of Management of the Thompson Town High School** [2012] JMCA Civ 64 which dealt with an application under the wrong rule. At paragraphs [31] and [34], Morrison JA, as he then was, resolved the matter in these terms:

> "[31] Although it would undoubtedly have been helpful to see the learned judge's reasons for refusing the application for relief from sanctions, it may well be that rule 39.6 is what McIntosh J had in mind when he made the remark attributed to him by both parties that the appellant had made the 'wrong

> application' in the instant case. But that was not, in my view, an end to the matter. The core principle of the CPR is that the court 'must seek to give effect to the overriding objective when interpreting these rules or exercising any powers under these rules' (rule 1.2). As Mr Stuart Sime observes in his work, 'A Practical Approach to Civil Procedure' (10th edn, para. 3.28), '[s]hutting a litigant out through a technical breach of the rules will not often be consistent with...[this objective], because the primary purpose of the civil courts is to decide cases on their merits'. As an example of the overriding objective in action, Mr Sime cites **Re Holcrest Ltd** [2000] 1 WLR 414, in which the Court of Appeal allowed a claim commenced by the wrong form of originating process to continue as though it had been commenced in appropriate form, rather than forcing the claimant to start again by issuing fresh proceedings.
>
> ….
>
> [34] It accordingly seems to me that, in furtherance of the overriding objective, it was clearly open to McIntosh J to have treated with the appellant's application, albeit made under rule 26.8, as if it had been made under rule 39.6…."

[48] Had the learned master dealt with the merits of the affidavit, it would have been open to her to conclude that it met the requirements for consideration under rule 26.8. She fell in error when she found that "there was no affidavit in support to ground a relief from sanctions application".

[49] Having said that, it cannot be overlooked that the application which was before the master and similarly the one before us are woefully deficient in content, structure and grammar. The grounds of appeal, affidavit and skeleton arguments made for tortuous reading and I feel constrained to say that, in addition to the existing Court of Appeal Rule and Practice Direction in relation to the contents of skeleton submissions, we may have arrived at a point where it is necessary to issue practice directions about the acceptable

standard of language for the courts. Beyond this, the contents of the affidavit do not comply with the standard set out in rule 30.3 of the CPR, in so far as the source for matters of information and belief has not been stated.

Issue 2: did the appellant satisfy rule 26.8 in order to obtain relief from sanctions?

[50] Counsel for the appellant acknowledged that an application for relief from sanctions must be made promptly. She submitted that the appellant only became aware of the orders when it was served with the respondent's notice of application to strike out its case. This was on or about 28 November 2017. She contended that as soon as it became aware of the orders an application was filed, on 7 December 2017, to set them aside. Accordingly, this action was prompt within the meaning of "promptitude" expressed in **HB Ramsay and Associates Limited and others v Jamaica Redevelopment Foundation Inc and another**, at paragraph [10].

[51] It was submitted further that the non-compliance was not intentional and resulted, in part, from an absence of notice, including the removal of its attorneys-at-law from the record. The appellant relied on **Re Jokai Tea Holdings Ltd** [1992] 1 WLR 1196 (per Lord Nicholas Brown-Wilkinson at page 1203) for the proposition that "if a party can clearly demonstrate that there was no intention to ignore or flout the order and that failure to obey was due to extraneous circumstances such failure to obey is not to be treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have". The absence of legal representation, she said, also explained the failure to comply with the orders. In addressing the last of the requirements under rule

26.8(2), counsel submitted that the appellant had generally complied with all other rules and orders. She relied on **International Hotels Jamaica Limited v New Falmouth Resorts Limited** (unreported), Court of Appeal, Jamaica, Civil Appeal Nos 56 and 95/2003, judgment delivered 18 November 2005.

[52] Turning to rule 26.8(3), counsel posited that the interests of the administration of justice required that parties to litigation should have their cases heard on the merits and not be defeated by purely technical breaches, particularly when the other party had not suffered any prejudice. She referred to **Watson v Fernandes** [2007] CCJ 1 (AJ). Counsel also submitted that the failure to comply was not due to the litigant's conduct and that the case management orders having now been complied with, there would be no prejudice to the respondent were the registrar to set a new trial date.

[53] In response, counsel for the respondent argued that since the appellant failed to file an application for relief from sanctions, the learned master could not have exercised her discretion to grant relief. However, in the unlikely event it was determined that the appellant's application was one for relief from sanctions, the evidence before the master would not have been sufficient to satisfy the mandatory criteria outlined in rule 26.8. He asserted that those requirements were cumulative and failure to satisfy any one of them would be fatal. The case of **Ray Electra Jobson-Walsh (Administrator ad litem for deceased Gilbert Baron Jobson, deceased) and another v Administrator General of Jamaica (Administrator of the estate of Gilbert Baron Jobson, deceased) and others** [2013] JMSC Civ 132 was cited in support.

[54] The reason given by Mr Valentine for non-compliance, including that there had been hand-written and illegible insertions on the notice, did not constitute 'good reason', counsel posited. He contended further that since the appellant had been represented by its General Secretary, as well as its attorney-at-law, at the case management conference on 27 January 2015, it should have been fully aware of the case management timetable set by the court. Yet, the appellant had failed to file and serve witness statements by 30 October 2015, did not comply with the order to provide standard disclosure on or before 18 September 2015, and failed to attend pre-trial review set for 29 January 2016. It had also failed to attend the adjourned hearings on 27 April 2016 and on 11 May 2016. Counsel referred to these as instances of general non-compliance with the court's orders and the basis on which the 'unless order' had been made. In that regard, it could not be said that the appellant had generally complied with all other relevant rules, practice directions, orders and directions.

[55] On the issue of service, the respondent submitted that the burden of proof was on the appellant to satisfy the court that it had not been served with notice of the hearing or the formal order that contained the 'unless order'. In support of this submission, counsel relied on **Lyn's Funeral Home v Paul Feron** [2018] JMSC 133. Referring to **Jamaica Public Service Company Limited v Charles Vernon Francis and Columbus Communications Jamaica Limited (trading as Flow)** [2017] JMCA Civ 2, paragraph [67], the respondent posited that where the appellant failed to meet the requirements for relief from sanctions under rule 26.8(2), the master had no obligation to consider the overriding objective or any other factors under rule 26.8(3).

Decision on issue 2

a) Rule 26.8(1)

[56] Rule 26.8(1) of the CPR stipulates that an application for relief from sanctions 'must' be made promptly and supported by evidence on affidavit. That preliminary test must be satisfied before the court can proceed to a consideration of the additional criteria under rule 26.8(2), (see Phillips JA, in **University Hospital Board Management v Hyacinth Matthews** [2015] JMCA Civ 49, paragraph [36]).

[57] According to Mr Valentine, there was no knowledge of the pre-trial review hearing at which the 'unless order' was made. He attributed this to lack of communication with the attorney-at-law. Apparently, the appellant existed in an interregnum for at least two years, since the notice to remove the attorney's name was filed in January 2016 and Mr Valentine supposedly did not learn about this until 6 December 2017. This position wanes in the face of compelling evidence from Mr Taylor that there had been personal service of both the notice of the pre-trial review and the 'unless order' in May of 2016.

[58] In the first of his two affidavits, Mr Taylor deposed that he had served a copy of Anderson J's formal order on the appellant, at its office, on 12 May 2016 and it had been received and signed for at the front desk. The admit page of the formal order purportedly served by Mr Taylor was referred to as an exhibit at paragraph 8 in the affidavit of Jovell Barrett filed 24 November 2017. In his second affidavit of 13 March 2018, he averred that on 4 May 2016, he personally served the appellant, at its office, with a notice of the adjourned hearing filed on 3 May 2016 (pertaining to the pre-trial review of 11 May 2016 when Anderson J made his orders). Mr Taylor also averred that this document was

collected at the front desk and signed for and he referenced the exhibited admit page at paragraph 4. Additionally, he deposed that he served a listing questionnaire and the witness statement of the respondent at the offices of the attorneys-at-law for the appellants. The admit pages for that service are referenced at paragraphs 6 and 8 as being exhibited to the affidavit.

[59] Mr Valentine raised a technical point at paragraph 16 of the affidavit where he deposed, "[a]dditionally [sic] the Order exhibited does not show what date it was allegedly served on the Defendant". The evidence does not support this challenge. The relevant documents are inscribed with signature, date and time. In any event, Mr Valentine's rejoinder did not amount to a denial of service and no convincing evidence was proffered as to why the appellant was unaware that those documents had been served. Mr Valentine's statement at paragraph 11 that the death of a previous General Secretary would have had a bearing on the question of knowledge, is bereft of essential details and discloses internal administrative inefficiency, which is not an acceptable explanation for delay (**The Attorney General v Universal Projects Limited** [2011] UKPC 37, paragraph 23).

[60] It would be useful at this juncture to denote instances in which this court has dealt with the issue of promptness.

[61] In **HB Ramsay and Associates Limited and others v Jamaica Redevelopment Foundation Inc and another**, the court held that the appellants' delay of almost one month, in seeking relief from sanctions, failed to satisfy the

requirement for the application to have been brought promptly. The court below had ordered the appellants to pay the respondents' costs within a stipulated time, failing which their statement of case would stand struck out. The appellants had paid over the funds to their attorneys prior to the deadline, however, the attorneys inadvertently failed to pay over the funds to the respondents' counsel within the stipulated time.

[62] This court found that the delay was fatal because the nature of the act stipulated in the order warranted that counsel would have been eagerly expecting the funds and anxiously waiting to turn it over. The court considered that no explanation had been provided for the default in complying with the order or the delay in seeking relief from sanctions. Brooks JA opined that it would have been untenable to determine the period of delay in assessing the issue of promptness, based on the 'state of mind' of the appellant, that is, when the appellant became aware of the default rather than when the breach actually occurred. The learned appellate judge stated that such a submission by the appellants' counsel was untenable in the context of an "unless order", as where such orders are made, the party is given notice of the requirement and the penalty for non-compliance. Thus, the deadline for compliance should be foremost in the mind.

[63] In **National Irrigation Commission v Conrad Gray and another** [2010] JMCA Civ 18, the appellate court was concerned with a judge's grant of relief from sanctions, where there was a six-month delay in making the application. In that case, the breach arose from the failure of the respondent to comply with an order of the court stipulating that unless security for costs, in a specified sum, was provided within 42 days, the claim would be struck out. That deadline expired about 21 July 2008.

[64] In support of the application for relief, the respondents deposed that from 7 July 2008 arrangements had been made to facilitate the transfer of the funds but that on 23 July 2008, they were informed that the order was not complied with. They averred that while the funds had been re-sent it was not credited to the relevant account until 12 August 2008. In allowing the appeal, the court found that the application could not be considered prompt in the absence of an explanation why the application was not brought earlier than 11 December 2008.

[65] In **Meeks v Meeks** [2020] JMCA Civ 20 F Williams JA provides an exegesis on how this court has treated with the issue of promptness. Set out below is an extract from that very helpful judgment:

> "[23]…What amounts to promptness is significantly dependent upon the circumstances of the particular case. In **Ray Dawkins v Damion Silvera** [2018] JMCA Civ 25 this court, in discussing some of the possibly relevant matters, opined as follows:
>
> > '[66] If the assessment of whether the application was made promptly should be dependent solely upon the time at which the breach occurred, the respondent's application was made approximately a year after the deadline for compliance and that could be viewed as amounting to inordinate delay. However, the fact that there had been partial compliance and that there was in effect no negative delays to the matter proceeding to trial, were circumstances which ought to be taken into consideration.
> >
> > [67] Further, the circumstances under which the breach was brought to the attention of the court at the time of trial ought also to be considered…'

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

> '[14] …Promptly is an ordinary English word which we would have thought had a plain and obvious meaning, but if we need to be told a bit more about what it means, we do have the authority of **Regency Rolls Limited v Carnall** [2000] EWCA Civ 379 where Arden L.J. pointed out that the dictionary meaning of 'promptly' was 'with alacrity'. Simon Brown, L.J. said: 'I would accordingly construe 'promptly' here to require, not that an applicant has been guilty of no needless delay whatever, but rather that he has acted with all reasonable celerity in the circumstances.'

[25] Similarly, Brooks JA, at paragraph [10] of **HB Ramsay and Associates Limited and others v Jamaica Redevelopment Foundation Inc and another** [2013] JMCA Civ 1, opined that:

> '[10] In my view, if the application has not been made promptly the court may well, in the absence of an application for extension of time, decide that it will not hear the application for relief. I do accept, however, that the word 'promptly', does have some measure of flexibility in its application. Whether something has been promptly done or not, depends on the circumstances of the case'. (Emphasis added)

Brooks JA also made the following comments at paragraph [31] of the said judgment:

> 'An applicant who seeks relief from a sanction, imposed by his failure to obey an order of the court, must comply with the provisions of rule 26.8(1) in order to have his application considered. If he fails, for example, to make his application promptly the court need not consider the merits of the application...'."

[66] What should be distilled from these cases is that the meaning of prompt is a contextual matter and not purely a quantitative measure. Its quality may vary according to circumstances, such as that which explains dilatory conduct.

[67] In the case before us, the period of delay amounted to approximately one year and six months (the time of the breach to filing of the application for relief from sanctions). That is the crucial period which goes to the determination of promptness and not the nine days or so between the service of the respondent's notice to strike out and the filing of the application for relief.

[68] Even if the court were to accept that the previous attorney's conduct contributed to the 18-month delay for reason of being 'inactive', so to speak, the appellant had a duty to keep the channel of communication open with its attorney-at-law. It is inexcusable for a recalcitrant litigant to offer a near two-year hiatus between itself and its attorney-at-law as a reason for not complying with the 'unless order'. As Smith JA opined in **Norma McNaughty v Clifton Wright and Others** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 20/2005, judgment delivered 25 May 2005, at page 12:

> "I am constrained to repeat what the Court of Appeal has said ad nauseam, namely that orders or requirements as to time are made to be complied with and are not to be likely ignored. No Court should be astute to find excuses for such failure since obedience to the orders of the Court and compliance with the rules of the Court are the foundation for achieving the overriding objective of enabling the Court to deal with cases justly."

[69] The appellant having not dispelled the evidence that it had been served and therefore had or ought to have had knowledge of the 'unless order', it did not satisfy the

requirement of promptitude. Consequently, the learned master ought to have rejected the application. As she went on to find that all three tenets under rule 26.8(2) had not been met, I will consider those criteria.

b) Rule 26.8(2)

[70] In order for the court to grant relief it has to be satisfied that the failure to comply was not intentional, there was good explanation for it and the appellant had generally complied with all other relevant rules, practice directions, orders and directions. These requirements are cumulative. The learned master ought to have dealt with them systematically. There is no indication that she did so, rather there was a bald statement that they were not met.

Failure to comply unintentional

[71] The first consideration should have been whether the failure to comply was unintentional. At paragraphs 15 and 18 of Mr Valentine's affidavit, he averred, without more, that non-attendance at court was not intentional. However, at paragraph 8 he deposed, "…the defendant was not aware that the case management orders were not complied with by our previous legal representative". It was also indicated at paragraph 9 that the case file had been returned by the attorney-at-law to the appellant but it did not carry any notices from which it could be gleaned as to what had transpired. The blame is being placed at the feet of its legal representative. However, there is nothing in the evidence to support a conclusion that the non-compliance was deliberate as, for example, in **Hytec Information Systems Ltd v Coventry City Council** [1997] 1 WLR 1666 where the impugned inaction was deemed 'intentional and contumelious' due to the

arrogant and contemptuous attitude which was displayed by counsel. Undoubtedly, the appellant's failure to comply was inexcusable but there is no evidence that it was intentional.

Good explanation for failure

[72] The next requirement to have been satisfied was whether there was good explanation for the failure to comply. The Privy Council, in the **Attorney General v Universal Projects Limited**, in considering a similarly worded rule in the Civil Procedure Rules of Trinidad and Tobago, held at paragraph 18 that the absence of a good explanation within the meaning of the rule, was fatal to the application.

[73] Reference has already been made to the reasons set out in the affidavit, primarily that there was no knowledge that counsel had sought and received an order to remove his name from the record. The issue of counsel's conduct and attribution for it was commented on by Lord Denning MR, in **Salter Rex v Ghosh** [1971] 2 All ER 865, where he said at page 866 that a litigant should not be made to "suffer by the mistake of his lawyer". This was also the point of contention in **Hytec Information Systems Ltd v Coventry City Council**, where counsel's refusal to take further part in the proceedings led to the defendant's pleadings being struck out for failure to comply with an 'unless order' and refusal of an application for relief from sanctions.

[74] The English Court of Appeal considered that the justice of a case could exonerate a party for the conduct of its counsel but opined that this would invariably be in circumstances where the default was outside the party's control. The court considered

the dictum of Sir Nicolas Browne-Wilkinson VC in the **Re Jokai Tea Holdings Ltd** at page 1203, where he said that in deciding the consequences of non-compliance with an unless order, it should be asked whether the failure was 'intentional and contumelious'. The Court of Appeal described counsel's behaviour as "an arrogant disdain to the court's authority" and "contumaciously disrespectful", thereby leading to a determination that the defendant could not escape "[paying] the penalty for that failure" (page 1676).

[75] As sympathetic as this court might be to the argument that clients should have some cover from the consequences of inappropriate conduct by counsel, **Hytec Systems Ltd v Coventry City Council** has made it plain that there will be no blanket absolution. The starting point for the dilemma in which the appellant found itself was the crucial date when the 'unless order' was made at pre-trial review. Generally speaking, there is no requirement for a litigant to attend a pre-trial review where it attended the case management conference (rule 27.8(2)). However, the vector of default pivots to the absence of the appellant from the pre-trial review on 11 May 2016 because the court had directed personal service and there is evidence that this was done. As to the attorney-at-law, it is already indicated that his conduct is not determinative of this issue because the appellant had not successfully rebutted the evidence of service in relation to the pre-trial review and the 'unless order'. In other words, the appellant has not shown that the default was out of its control. It has therefore not provided a good explanation for its failure to comply with the "unless order".

<u>General compliance</u>

[76] The third criterion is that the appellant must show that there was general compliance with all other relevant rules, practice directions, orders and directions. This does not mean there must have been compliance in every instance because being generally compliant is a matter of degree. The spirit of this rule is that there must be a demonstrable proclivity to comply. The learned master found and would have been entitled to consider under this head that the appellant had filed and served its acknowledgment of service and defence in a timely manner and that the matter had proceeded to mediation in a reasonable time. There was also evidence before her that the appellant's representative had attended the case management conference on 27 January 2015, along with its attorney-at-law.

[77] It was open to the learned master to weigh the competing arguments in relation to those matters as well as the conduct of the appellant after the sanction had taken effect. In that regard, it would matter that there was evidence before her that the appellant had been served with notice of the pre-trial review, the 'unless order' and other documents personally or through its attorney-at-law on record. Other than Miss Dibbs' activity when she came into the matter and the learned master's finding that the appellant had been compliant in the pre-case management period, there is nothing else about the conduct of the appellant that would have guaranteed a favourable assessment of general compliance.

[78] Notwithstanding the appellant's failure to meet the threshold requirements, I will go on to consider, briefly, the other issues raised in this appeal.

Issue 3: what was the effect of order of 25 May 2016, specifically whether it had modified or varied the 'unless order' of 11 May 2016?

[79] The appellant submitted that the learned master did not appreciate that the orders of 25 May 2016 (which set a new pre-trial review date and vacated the trial date) impliedly permitted it time to obtain new legal representation. It also argued that the orders effectively varied those of 11 May 2016.

[80] The respondent's stance was that she was entitled to judgment under rule 26.5 as the appellant had failed to comply with an 'unless order', the consequence being the automatic result of its case being struck out. Counsel contended that the remaining criterion had been satisfied as there was satisfactory proof that the said order had been served upon the appellant. Reliance was placed on the dictum of Fraser J, as he then was, in **HB Ramsey and Associates Ltd and others v Jamaica Redevelopment Foundation Inc and another**.

Decision on issue 3

[81] There is no merit in the appellant's submission that the pre-trial review orders of 25 May 2016 had varied or modified the orders of 11 May 2016. Having granted the order to have the appellant's attorneys-at-law removed from the record and considering that the trial dates were less than a month away, the master did what was prudent in the circumstances and vacated those dates. She also set another date for pre-trial review. The master was specific about the orders she was changing. There is no indication that she was varying the orders made on 11 May 2016 which, in the main, had to do with filing and serving documents.

Other issues (grounds c, e, i and k)

[82] Ground (c) makes out that the learned master failed to appreciate that the respondent had sought, in the alternative, a less draconian order than the striking out of the appellant's statement of case. The first point to consider is that the sanction to strike out the appellant's case would have taken effect at breach, the result of which was an automatic striking out of the defence. So, the learned master could not have done anything in relation to the striking out of the appellant's case. She could have granted relief from sanctions consistent with the alternative orders which had been suggested by the respondent, but she did not have to exercise her discretion in favour of it and the order she made was within her powers.

[83] Ground (i) would have required the master to consider the merits of the defence. However, rule 26.8(3) limits the factors to be considered when the court is exercising its general discretion to grant relief from sanctions. The English provision is wider as it provides a non-exhaustive list, qualified by the words, 'consider all the circumstances including…". Thus the English court would be entitled to consider the merits of a defence (**Chapple v Williams** [1999] CPLR 73, referenced in White Book 2011, page 91). It would seem to me that the merits of the defence would not be a relevant consideration under rule 26.8. Moreover, the learned master, having found that the application had not satisfied the threshold requirements under rule 26.8(2), had no reason to consider whether the defence was a relevant consideration under rule 26.8(3).

[84] Ground (e) raises the overriding objective, on the basis that the learned master failed to apply it in coming to her decision to strike out the defendant's case. The learned

master did no such thing and giving effect to the rules is very much consistent with the overriding objective which is to decide cases justly with economy in judicial time and use of other resources.

[85] As it pertains to ground (k) in which the appellant complains that Anderson J had not followed rule 26.2 when he made the orders, I would say, firstly, that this is not an appeal from the orders made by Anderson J. There is also no indication in the order that the judge was acting under rule 26.2. Secondly, Anderson J was permitted to make the 'unless order' in exercise of his case management powers under parts 25 and 26 of the CPR, in particular rule 26.7 which states that where the court makes an order or gives directions it must, whenever practicable, also specify the consequences of failure to comply.

[86] The case of **Jamaica Infrastructure Operators Ltd and another v Dwayne McGaw** bears out the point that the judge could have made the 'unless order' pursuant to rule 26.7. Reference is made to the dicta of McDonald Bishop JA at paragraphs [37] and [44]:

> "[37] By imposing a sanction by way of an unless order, the consequence for failure to comply with the order made for the appellants' attendance at the next case management conference, the learned judge was acting within the ambit of rule 26.7 (1). He evidently adopted that course to secure compliance with the order of the court in his efforts to effectively manage the case at that stage of proceedings. He had the power and legitimate right to do so."

And at paragraph [44]:

> "It ought to be noted also, that apart from making the unless order, the learned judge had power to enter judgement against the appellants in default of the attendance of a representative, in accordance with rule 27.8 (5) once he was satisfied that notice of the hearing had been brought to their attention. From all indications, notice of the hearing was given to their attorneys-at-law, which was, in effect, notice to the appellants. Once notice of the hearing was served on the appellants and they failed to attend, the learned judge could have proceeded to judgment in default of attendance. This is a more draconian measure provided for by the rules and which could have been applied by the learned judge, without notice to the appellants. In all the circumstances, there was nothing to bar him from imposing an unless order, the sanction of less severity, in order to give the appellants a chance to comply with the rules of court."

[87] At the time the orders were made, previous case management orders had not been complied with and the pre-trial review had been adjourned on at least two occasions due to non-attendance by one or both parties. The judge, in those circumstances, had every right to make the orders, given the history of this matter. In fact, he had also made an 'unless order' in relation to the respondent who also had been dilatory.

Conclusion

[88] The applicable rule is CPR 26.8, pursuant to which relief from sanctions could properly be sought and obtained. The learned master fell in error when she failed to treat the application as being made pursuant to that rule and the affidavit of urgency as not being supportive of such an application. However, the appellant failed to establish that it had acted promptly and it provided no good reason for its non-compliance. The learned master was correct in her refusal of the application for relief from sanctions.

[89] In the circumstances, I propose the following orders:

i. The appeal is dismissed.

ii. The order of Master Harris (Ag) made on 8 June 2018 refusing the application to set aside orders 1, 3 and 4 of the orders made by Anderson J on 11 May 2016, is affirmed.

iii. Costs of the appeal to the respondent to be agreed or taxed.

BROOKS JA

ORDER

i. The appeal is dismissed.

ii. The order of Master Harris (Ag) made on 8 June 2018 refusing the application to set aside orders 1, 3 and 4 of the orders made by Anderson J on 11 May 2016, is affirmed.

iii. Costs of the appeal to the respondent to be agreed or taxed.