[2020] JMCA Civ 38

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 23/2018

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MR JUSTICE L PUSEY JA (AG)

BETWEEN	**PROPRIETOR STRATA PLAN #788**	**APPELLANT**
AND	**MONICA DYSTANT**	**RESPONDENT**

Written submissions filed by Byfield Mellish & Rushton for the appellant

Written submissions filed by Nigel Jones & Co for the respondent

31 July 2020

PROCEDURAL APPEAL

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

PHILLIPS JA

[1] This is an appeal from the judgment of Wint-Blair J (Ag) (as she then was) made on 2 May 2017, refusing to grant orders for relief from sanctions. On 14 January 2015, Graham-Allen J (Ag) (as she then was) made orders striking out the statement of case of Proprietor Strata Plan #788 (the appellant) for its failure to file a statement of facts and issues by 12 December 2014. Graham-Allen J (Ag) also granted, in their entirety, orders sought by Miss Monica Dystant (the respondent) in her amended claim form

against the appellant, and vacated trial dates that had been set previously. The appellant is now seeking to have those orders set aside, and to have the matter remitted to the Supreme Court for trial, with costs.

Background

[2] This matter had a rather unusual history. I think for better comprehension of its journey through the courts, I will endeavour to briefly set out the background of the case as it unfolded.

[3] The respondent is the owner of Apartment #23, Sunbury Apartments, 10 Central Avenue, Kingston 10 in the parish of Saint Andrew. The appellant is registered under the Registration (Strata Titles) Act (the RSTA) as a body corporate. The respondent complained, *inter alia*, that she had suffered damage to her unit within the last eight years from hurricanes. She was unable to submit any claims as the appellant had not insured the building. She also stated that the appellant had failed to keep the property in good and serviceable repair. This, she said, forced her to obtain a loan, which attracted an interest rate of 18.5% per annum, to make repairs. These sums were not repaid to her by the appellant, nor had the appellant agreed to set off any sums due from her for maintenance against that amount. Being aggrieved, she filed a claim against the appellant, which was amended on 22 May 2012. She sought 20 orders (numbered (a)-(t)), as summarised below:

1. declaring that she ought not to pay maintenance for the period 2001-2011;

2. restraining the appellant from selling the unit in the scheme where she resided;

3. compelling the appellant to provide an account of all the maintenance fees she had paid and that were payable by her to the appellant;

4. requiring the appellant to insure the building against fire, earthquake and hurricane; to keep the common property in good and serviceable repair; to perform inspections of the common area; to provide adequate safety and security measures; to keep and maintain a good postal system; to immediately assign parking spaces for each apartment; to maintain audited financial statements; and account for irregularities in the appellant's 2008 statement;

5. requiring the appellant to pay $1,100,000.00 to her to repair the common area roof covering her apartment, plus interest at 23% per annum as at January 2009 and 18.5% per annum as at December 2010; along with $75,000.00 plus interest to reimburse her for monies she had expended to do modifications;

6. for the appellant to prohibit owners from hanging clothes on the balcony exposed to viewing from the main road;

7. requiring the appellant to comply with notices from the National Water Commission and the Jamaica Public Service, and give those entities access to service meteres on the property; and

8. for the appellant to pay to the respondent special damages exceeding $10,000.00 for courier services and a surveyor's report; and damages for breach of contract and/or the appellant's statutory duties.

[4] The appellant's defence, filed 21 March 2012, was that at the time of the filing of the claim, the respondent owed approximately $200,000.00 for maintenance. It stated that the property was uninsured due to the failure of owners, including the appellant, to pay the maintenance fee. In fact, the respondent and other owners had been unwilling to pay an increase in maintenance fees which had contributed to the appellant being starved for cash. Certain matters were therefore beyond the appellant's budget. It claimed that the property was well kept despite limited funds, and denied the particulars of failing to perform any contractual/statutory duties. The appellant further claimed that the expenses incurred by the respondent had been made by choice and without its consent. Moreover, no estimate of repairs or bills from the respondent had

ever been submitted to it. It was also pleaded that all financial reports had been made available to all owners.

[5] In the appellant's draft statement of facts and issues, the factual issues in dispute related to, *inter alia*, whether:

(i) maintenance was owed;

(ii) the appellant had failed to perform its duties as claimed; and

(iii) the respondent's roof was part of the common area.

The legal issues in dispute related to, *inter alia*, whether:

(i) the appellant was required to insure the premises at replacement value;

(ii) the appellant was obliged to pay the respondent $1,100,000.00 for the repairs allegedly done to the roof if found to be of the common area, thereby falling under the appellant's responsibilities;

(iii) the respondent had breached any strata law enabling the appellant to sell her unit; and

(iv) the appellant was obliged to correct the boundary wall and to comply with the orders of the Jamaica Fire Brigade.

Proceedings in the court below

[6] The first case management conference was held on 4 December 2013. The appellant and its counsel were absent, and so it was adjourned to 27 May 2014. On that day, the appellant's attorney-at-law was present but the appellant was not. Rattray J made certain orders for the management of the case, namely: standard disclosure by 16 July 2014; inspection of documents by 30 July 2014; witness statements to be filed and served by 29 September 2014; each party to file and serve their own statement of facts and issues by 27 October 2014; and listing questionnaires to be filed and served by 25 November 2014. The trial date was fixed for 26 January 2015, for three days. The case management order was to be filed by the respondent's attorney-at-law and served on the appellant or its attorney-at-law. Costs were to be costs in the claim.

[7] On 3 December 2014, the first pre-trial review was conducted by C McDonald J. The appellant was represented by counsel. By then, the respondent had filed and served all the required documentation in compliance with Rattray J's order. However, the appellant had not complied with any of the orders made by Rattray J. The orders made on that occasion are very relevant to this matter and are therefore set out below. C McDonald J ordered that:

> "1. The time for the [appellant] to comply with [the case management] order made on [27 May 2014] be extended to [12 December 2014].
>
> 2. In the event that the [appellant] fails to comply with order #1 above the [appellant's] statement of case stands struck out.

3. [Pre-trial review] adjourned to [14 January 2015] at 2:30 pm for 1 hour (After consulting with the Registrar).

4. Costs of the adjourned [pre-trial review] to [the respondent] to be agreed or taxed.

5. [The respondent's] attorney to prepare, file and serve this order.

[8] On 12 December 2014, the appellant filed and served a witness statement, list of documents, and listing questionnaire, but no statement of facts and issues. The respondent made an application for judgment to be entered in terms of the particulars of claim, together with interest, and for the appellant's case to stand struck out. On 14 January 2015, Graham Allen J (Ag) conducted a pre-trial review in which she made the orders which are the subject of this appeal as follows:

"1. The [appellant] having failed to comply with the order made by [C McDonald J] made on 3rd December, 2014 in particular paragraphs 1 and 2 of that order, the [appellant's] statement of case stands struck out.

2. Order in terms of paragraphs (a)-(t) of Amended Claim Form dated 21st May, 2012 and filed 22nd May, 2012.

3. Trial date of 26th January, 2015 for 3 days vacated

4. [The respondent's] attorney to prepare file and serve order made herein."

The application for relief from sanctions

[9] On 26 January 2015, the respondent filed a final judgment, and the appellant filed an application for relief from sanctions. On 1 October 2015, the respondent filed an amended final order and an amended final judgment. The appellant filed an

amended re-listed notice of application for relief from sanctions on 10 December 2015, in which it sought the following orders:

> "1. That the orders by the Honourable Mrs. Justice V. Graham-Allen made on the 14th day of January, 2015 be set aside.
>
> 2. That the Default Judgment entered on the 14th day of January, 2015 be set aside.
>
> 3. That the [appellant] be granted relief from sanction by restoring the [appellant's] claim and permitting the filing of the [appellant's] Statement of Facts and issues.
>
> 4. That in any event the 'amended final judgment' filed herein on October 1, 2015 is a nullity, the learned judge being *functus officio.*
>
> 5. That the amended final judgment be stayed until further order of the court.
>
> 6. That a new trial date be set."

[10] Essentially, the appellant relied on rule 26.8(1), (2) and (3) of the Civil Procedure Rules 2002 (CPR) in respect of the grounds of its application. The appellant indicated that it had complied with all the provisions of rule 26.8 of the CPR, and stated that the reliefs sought ought to be granted as prayed.

[11] The appellant filed two affidavits on 26 January 2015 in support of the application. They were sworn to by Andrea Wadsworth and Marvalyn Smith, respectively, both attorneys-at-law employed to the Kingston Legal Aid Clinic (KLAC), which was on record for the appellant.

[12] Miss Wadsworth deponed that the appellant's failure to comply with the orders of C McDonald J was not intentional, but that the delay was caused by the dissolution of the strata executive committee and the departure of the appellant's secretary, Miss Mary White. Additionally, she stated, attempts made to hold an annual general meeting to reconstitute a new strata executive committee had failed, and a standing committee of three was appointed by the strata corporation, "to see to the interim management of the strata".

[13] She further deponed that the KLAC had indicated to the appellant that it was intending to remove its name from the record as representing the appellant, as it was unable to obtain instructions to conduct that representation. That situation was avoided, however, as a result of consultation, and the KLAC continued to represent the appellant. Although the appellant met with representatives of the KLAC to give instructions, difficulties beset the clinic, namely, a staff shortage and several break-ins in the months of November and December 2014, in which computers and other valuable equipment were stolen. Ms Wadsworth further deponed that those disturbances caused the KLAC to experience "several challenges in monitoring and servicing clients' matters". So, in spite of their intention to file and serve the required documents in time that did not occur, due to the above challenges, and their failure to do so was an oversight on their part, and not intentional.

[14] Ms Wadsworth stated that it was in "the interest of the administration of justice that the matters between the parties be tried and for a court to adjudicate on whether

the [appellant] was liable to [the respondent] for breach of contract and statutory duties and several other claims arising out of her residence at Sunbury Apartments". Miss Wadsworth indicated that there was no prejudice to the respondent in permitting the orders prayed for, that could not be met by an order for costs. She also stated that the statement of facts and issues which was attached to her affidavit showed that both the appellant and the respondent had identified similar issues in the case. Additionally, she indicated that the failure to fully comply with the case management order could be easily remedied by filing and serving the statement of facts and issues forthwith. She also stated that, generally, the appellant had "complied with all other relevant rules, practice direction and orders".

[15] In the affidavit of Miss Marvalyn Smith, she deponed to the chronology of events that has been set out previously. She acknowledged that the appellant had not met the deadline for the filing of certain documents, and confirmed the difficulties experienced at the offices of the KLAC. She stated that when the matter was heard on 14 January 2015, she explained these difficulties to the learned judge and offered to cure the default as a matter of urgency, but her request was refused. Nevertheless, she said that by 14 January 2015, all documents had been filed, save and except the statement of facts and issues. The failure to file that document, she said, could not prejudice the respondent, as the appellant has agreed with the facts and issues identified by the respondent.

[16] She further indicated that there were serious issues to be tried, "the outcome of which is set to affect several households if an adverse decision is made against the [appellant]". She continued, "[t]he prejudice to the households to be affected is greater that any inconvenience [the respondent] may suffer from the matter being re-listed, permission being granted to file the document, and the matter proceed to trial". She stated that a costs order ought to be sufficient to satisfy the respondent. She indicated that the appellant had always been interested in its case, and was always ready to have its matter determined by the court. She suggested that a trial date could be set, and the status quo remain until the hearing of the matter, which would be a cost effective way to dispose of the matter in the interests of justice.

[17] In the respondent's affidavit in response, she complained about the "non-compliance" of the appellant in the proceedings. She referred to the fact that the first case management conference was adjourned as neither the appellant nor its counsel had been present. She pointed out that at the adjourned case management conference on 27 May 2014, although no representative of the appellant was present, their attorney was present, and so the dates fixed by Rattray J were known and ought to have been complied with. She also stated that at the pre-trial review (on 3 December 2014), there were three representatives of the appellant present, namely, Dr Maureen Reddish, Ms Andrea Wadsworth and Mrs Sophia Rambarran. So, having not fulfilled the obligations of the appellant by that date, the appellant's representatives ought to have done so by 12 December 2014, knowing that the statement of case would stand struck

out. It failed to comply with that order and so its pleading was struck out, and judgment entered in her favour.

[18] It was her contention that "it was not in the interest of justice that the matter between the parties be tried and for a court to adjudicate on whether the [appellant] is liable to [her], and [that she] would suffer irremediable prejudice if this application is granted". She stated that the matter had already been delayed by the appellant's non-compliance in the proceedings which had led to judgment being entered in her favour, and she should therefore have the right to enforce the same.

Reasons for judgment of Wint-Blair J (Ag)

[19] As indicated previously, on 2 May 2017, that application was heard by Wint-Blair J (Ag) who refused it, with costs to the respondent to be taxed if not agreed.

[20] Wint-Blair J (Ag) referred to the application before her and the reliefs prayed for. She noted the chronology of events which had brought the matter before her as previously set out, and addressed her mind to the orders made by Graham-Allen J (Ag) and the submissions challenging them. She reviewed the matter in relation to the orders sought by the appellant as outlined in paragraph [9] herein.

[21] With regard to the application to set aside the orders made by Graham-Allen J (Ag) (order 1), the learned judge dealt firstly with the issue of whether she had the jurisdiction to set aside those orders as Graham-Allen J (Ag) was a judge of co-ordinate jurisdiction. She queried whether the orders ought to have been made the subject of an appeal. The learned judge acknowledged that the failure to comply with the unless

order of C McDonald J had resulted in the appellant's statement of case being struck out. She referred to **The Attorney General v Universal Projects Limited** [2011] UKPC 37 and **Leymon Strachan v The Gleaner Company Limited and another** [2005] UKPC 33, with regard to the requirements in respect of an application to set aside a default judgment, as against one where the right to enter judgment has not arisen. Having heard submissions on the point, Wint-Blair J (Ag) indicated that both applications were different, and the applicant in the instant case must comply with the different applicable rules (rule 13.3 and rule 26.6(4) of the CPR) as the orders could not be granted by the invocation of the inherent jurisdiction of the court.

[22] The learned judge concluded that she had no jurisdiction to set aside the orders of a judge of concurrent jurisdiction. She stated that when Graham-Allen J (Ag) made the orders, it must be taken, implicitly, that she had decided that she had jurisdiction to make them. If she had erred in law or on fact, it could be corrected by the Court of Appeal. She stated that Graham-Allen J (Ag) had not exceeded her jurisdiction, and even if the order was later said to be in error, she (the learned judge) had no power, being a judge of concurrent or co-ordinate jurisdiction, to correct it. The decision of Graham-Allen J (Ag) was binding on the parties unless and until it was reversed by the Court of Appeal. The orders as perfected were *res judicata*. As a consequence, the application to set Graham-Allen J's orders would be refused.

[23] With regard to the application to set aside the default judgment (order 2), the learned judge again referred to, and relied on **AG v Universal Projects Limited** for

the analysis of the difference between applications and orders for setting aside default judgments, and obtaining relief from sanctions imposed, within the context of the meaning of the word "sanction" in Part 26 of the CPR. It was clear that if one was making an application to set aside a default judgment, one had to satisfy the criteria in rule 13.3, and not those set out in rule 26.8 of the CPR. Additionally, although also relied on by counsel for the appellant, the learned judge stated that rule 26.6(1) of the CPR was inapplicable.

[24] In this case, the learned judge found that the right to enter judgment had arisen, and rule 42.8 of the CPR was applicable, as the order took effect from the date it was given or made (unless the court specifies a different date). The learned judge stated, therefore, that had the application before her been proceeding pursuant to rule 26.6, as it was required to be made within 14 days of the order, it would have been filed far outside the required limit. The learned judge concluded that this application was really one for relief from sanction and not one to set aside a default judgment. Accordingly, order 2 sought in the appellant's application was refused.

[25] The third order sought by the applicant was relief from sanctions (order 3). The learned judge referred to the case of **Marcan Shipping (London) Ltd v Kefalas and another** [2007] EWCA Civ 463, to make it clear that, once the condition on which the unless order depends had been satisfied, the sanction became effective without the need for any further order. As a consequence, the learned judge stated, incorrectly, that the appellant's statement of case was struck out as at 14 January 2015. The

learned judge pointed out that the application for relief from sanction was filed on the 26 January 2015, the application for the amended order in September 2015, and the perfected order in October 2015. The learned judge noted that the appellant's application was not dealt with when the matter was before the court in September 2015. The application for relief from sanction was, however, subsequently amended in December 2015.

[26] The learned judge canvassed the provisions of rule 26.8 of the CPR against the backdrop of the dicta of Lord Dyson on behalf of the Board in **AG v Universal Projects Limited**, and Brooks JA in **H B Ramsay & Associates Ltd and others v Jamaica Redevelopment Foundation Inc and Another** [2013] JMCA Civ 1. She concluded that given the rules and the authorities, rules 26.8(1) and (2) of the CPR were mandatory requirements and must be satisfied before the discretion of the court can be exercised to grant relief from sanctions. These provisions require that the application be made promptly, accompanied by an affidavit which stated that the failure to comply was not intentional, that there was a good reason for the failure, and generally, that the applicant had complied with all other relevant rules and directions. If these "conditions precedent", as she referred to them, were not satisfied, the application would be refused. The failure of an applicant to meet those conditions precedent will also result in the court not going on to the balancing exercise in rule 26.8(3), as the threshold for doing so would not have been met. The court therefore examined the evidence before it in order to assess if the conditions precedent had been satisfied.

[27] The first question was whether the application had been made promptly. The learned judge canvassed the principles emanating from the authorities and stated that whether something had been done promptly depended on the circumstances of the case. She indicated that a delay of 10 days and a delay of one month had been considered by courts as "not acting promptly", and so too would 35 days' delay, as occurred in the instant case. She indicated though, that even without an application to extend time for the application to have been filed, as had been suggested by Brooks JA in **H B Ramsay**, she would nonetheless consider the application further. The learned judge examined the chronology of events, the evidence in support of the application, the difficulties experienced by the appellant and their attorneys, and the evidence in response challenging the reasons for the delay and indicating prejudice, and concluded that there was no reason for the appellant not having filed the application for hearing before Graham-Allen J (Ag) on 14 January 2015. She therefore found that the application had not been made promptly.

[28] With regard to whether the failure to comply was intentional, the learned judge examined the evidence of the dissolution of the strata executive committee, and the administrative inefficiency at the attorneys' offices, and accepted that the appellant's failure to comply was not intentional.

[29] In addressing the issue of whether there was a good explanation for the failure to comply with all the orders, the learned judge referred to the said authorities mentioned above, and commented that, as no particular dates had been mentioned in

the affidavits by the attorneys in support of the application, it was difficult to make a determination as to the merit of their content. A further examination of the chronology of events was undertaken by the learned judge, and she indicated that she was impressed by the submissions of counsel for the respondent that there were no details and connection in the affidavit evidence in support of the application, as to how the break-ins and theft of computers and shortage of staff impacted the failure to comply with the case management orders. Wint-Blair J (Ag) noted that C McDonald J had generously granted a short extension of time for compliance which had not been met. In her opinion, the explanation for the delay was not a good one.

[30] Having examined the chronology of events yet again, the learned judge focused on the fact that there had been no compliance with the order of Rattray J on 27 May 2014, and the orders of C McDonald J on 3 December 2014 extended to 12 December 2014, and concluded that the appellant could not be said to have generally complied with all other orders in this matter. She thereafter refused to grant any relief from sanction (order 3), and consequently, did not go on to consider the balancing exercise relevant to the matters set out in rule 26.8(3) of the CPR.

[31] The appellant had also sought an order that the amended final judgment entered by Graham-Allen J (Ag) was a nullity as she was *functus officio* (order 4). The learned judge examined whether the court could amend its order before it was perfected and concluded that it could. Once the order had been perfected, however, the situation was different, as the amendment related to whether there had been an error, omission or

mistake in the judgment, as the principle was that the order of the court should reflect the intention of the court. She stated that rule 42.10 of the CPR embraced that common law position, somewhat, in that, it allowed the court (without an appeal) to "correct a clerical mistake in a judgment or order, or an error arising in a judgment or order from any accidental slip or omission". The learned judge referred to the amended order of the court in September 2015 which was perfected in October 2015, and said that this principle and rule was inapplicable to the matter, and so refused to grant order 4. The appellant did not pursue any challenge to this ruling on appeal.

[32] A request was also made for a stay of execution (order 5). The learned judge disposed of this summarily, indicating that there was no material before her in respect of which she could make such an order. The request for a stay was therefore refused.

The appeal

[33] As indicated, the appellant sought to challenge Wint-Blair's J (Ag) decision. This being an interlocutory appeal, permission was required to appeal that order (Judicature (Appellate Jurisdiction) Act, section 11(1)(f)(ii)). On 2 March 2018, Wint-Blair J (Ag) granted permission to appeal her order, and also granted a stay of execution of the orders made "in the Final Judgment" of Graham-Allen J (Ag) entered on 14 January 2015.

[34] On 5 March 2018, notice and grounds of appeal were filed. The grounds of appeal are set out below:

"(i) That the learned judge failed to consider points of law raised by the [appellant] concerning the power of judges concerning orders made without a trial or generally not on the merits and fell into the error of declining jurisdiction to set aside the judgment.

(ii) That the learned judge in exercising her discretion to set aside the judgment failed to take the overriding objective into account. The learned judge as a consequence, failed to consider that the orders entered were unjust as they (i) would cause the Appellant to be in breach of the Registration (Strata Titles) Act, and (ii) made rulings on matters which are not properly within the jurisdiction of the court.

(iii) That the learned judge was wrong in concluding that there is no evidence that the hearing before the Honourable Mrs Justice V Graham-Allen [Ag] was not a hearing on the merits.

(iv) The learned judge erred by not giving any weight to evidence that at the hearing of the application to enter the order on January 14, 2015 the Appellant made an application for time to be extended for it to comply and gave reasons for the delay.

(v) The learned judge gave little or insufficient weight to the difficulties that the Appellant faced with its legal representation and failed to take into account that the failure to file the Statement of Facts and Issues was to be blamed on the attorneys and not the Appellant.

(vi) That a delay of 34-45 days was not inordinate in the circumstances.

(vii) That the learned judge relied on inferences which were unfavourable to the [appellant] but failed to draw inferences from proven facts which would have been favourable to the [appellant] namely, the consequences of staff shortages, break-ins and disruption at the offices of the attorneys-at-law."

Submissions

For the appellant

[35] Counsel for the appellant submitted that the learned judge had made errors of law in coming to her decision. He argued that she had failed to consider the overriding objective. She had also made awards on the particulars of claim which did not allow the appellant to perform its duties and powers under section 5 of its governing statute, the RSTA. For instance, he submitted, the RSTA empowers the strata corporation to establish a fund, to assess on each unit a levy to be paid, and in default of that, to sell the unit. Additionally, there is an order for the appellant to pay a sum, yet that sum has not been established as owing, and that was one of the orders prayed for on the claim. Counsel further argued that orders had been made by the court which, on consideration of the overriding objective, ought not to have made, for example, the assignment of parking lots, and the hanging of clothes over the balcony. He stated that the court itself could not enforce those orders as they were not susceptible to the court's supervision.

[36] Counsel submitted that the learned judge misunderstood the nature of the appellant's application. The application, he submitted, did not concern the jurisdiction of the judge who imposed the sanctions. The complaint about her being *functus officio* had been withdrawn as the order had not been perfected when the court had amended the earlier order. This, he said, had been clarified in submissions filed in the court. He said he also had not pursued the application to set aside the default judgment, and no arguments had been advanced on that position.

[37] He said that the application was being made pursuant to section 26.8 of the CPR, for relief from sanctions. He relied on **Leymon Strachan v The Gleaner Co Ltd**. He submitted that, in that case, Walker J had set aside a default judgment after an assessment of damages (which was similar to the case at bar), as "the second judge was being asked to set aside a judgment against [the appellant] for failure to obey an order, even though the order flowing from the judgment [had] been perfected". He submitted that the learned judge erred in concluding that she had no jurisdiction, even though it arose after a failure to obey an order of the court, and not after a trial on the merits. He relied on several paragraphs in the speech of Lord Millett and submitted that in the case at bar, as in **Leymon Strachan v The Gleaner Co Ltd**, there had been no determination of the merits on liability. The learned judge had focused, he stated, on the issue of jurisdiction as against the issue of merit, and so had fallen into error.

[38] Counsel submitted that the learned judge had also fallen into error as she seemed to require evidence that the application had not been heard on its merits. Counsel seriously challenged this finding and referred to the chronology of events and the fact that what was before Graham-Allen J (Ag) was a second pre-trial review and her first order made it clear that the statement of case was being struck out for failure to comply with an unless order made by C McDonald J. Counsel submitted that on an examination of all the affidavits before the learned judge, including that of the respondent, it was clear that the judgment was one made without evidence being adduced on the substantive matters before the court on the claim. As a consequence, the exercise of the discretion of the learned judge was done on a wrong basis.

[39] Counsel stated that the learned judge had also failed to consider properly the evidence that was before her, particularly with regard to the delay and the reasons for the same. He reminded the court that the appellant had made an oral request of Graham-Allen J (Ag) to grant an extension for the appellant to cure the default as a matter of urgency, but that request had been refused. Additionally, counsel submitted that the detailed procedure set out in rule 26.8 of the CPR, which ought to have been followed, had not been done in this case, which should have enured to the benefit of the appellant. Counsel submitted that the appellant had complied with the provisions of rule 26.8 of the CPR. He dealt with those provisions in detail.

[40] With regard to whether the application had been made promptly, he too examined the chronology of events and pointed out that there were only eight days between when the order was made by C McDonald J, and when the unless order would have been triggered. He submitted that the application for extension of time was made, though orally, on 14 January 2015, and the application for relief from sanctions was filed on 26 January 2015. He referred to a case out of this court, **Garbage Disposal & Sanitations Systems Ltd v Noel Green and others** [2017] JMCA App 2, where the court observed that striking out is a sanction which should be sparingly used in suitable cases, and that although the failure to comply should not be condoned (and in that case it was the failure to file the witness statement and the listing questionnaire), in the absence of other egregious failures, there ought to be other less draconian and more appropriate sanctions that could be imposed. The delay in that case was 62 days, and

the orders for relief from sanction were made. As indicated, he reiterated, in this case the delay was a period of 35 days.

[41] With regard to whether the delay was intentional or there was a good reason for the delay, counsel relied on the affidavits filed in support of the application which indicated knowledge of the operation of the KLAC; the difficulties involved in the representation of the appellant; and the challenges in the office. He submitted that there was clear evidence that there was no intention to delay the matter, and that there was good reason for the same. Counsel also submitted that even if the failure on behalf of the appellant's attorneys to file the statement of facts and issues may have been careless, it ought not to have resulted in the "unduly harsh" response from the court, in all the circumstances of this case, and "in the absence of contumacious behaviour".

[42] On the issue of whether there had been general compliance with other rules or orders of the court, counsel submitted that the appellant had filed its defence within the time required. The appellant had been absent from the case management conference before Rattray J and, although not present at the pre-trial review before C McDonald J on 3 December 2014, its counsel was present. So, apart from being absent from the case management conference before Rattray J and the failure to comply with those orders made by him, there had not been a consistent non-compliance by the appellant with orders of the court. He further stated that by the time of the hearing before Graham-Allen J (Ag), the appellant had complied with disclosure, the filing of the witness statement, and the listing questionnaire, which had been filed on 12 December

2014. It was only the filing of the statement of facts and issues that remained outstanding. That document, counsel submitted, was usually discretionary, and did not bind the court. Also, the issues appeared to be similar between the parties.

[43] Counsel therefore submitted that on the matters raised in rule 26.8(3) of the CPR, the orders made were not consistent with the overriding objective and were not in the interests of the administration of justice. He submitted that when the order was made by Graham-Allen J (Ag) on 14 January 2015, it was still possible to comply with the one outstanding aspect of the unless order made on 3 December 2014 by C McDonald J (the filing and serving of a statement of facts and issues), and for the trial days set for three days commencing on 26 January 2015 to have been met. The failure to file the statement of facts and issues was clearly not that of the appellant, but of its counsel, and the statement of facts and issues filed on behalf of the respondent could have been adopted by the appellant. The respondent would not have been prejudiced by the non-filing of the statement of facts and issues, and the learned judge erred in her refusal to grant relief from sanctions.

[44] Counsel submitted that, in the circumstances, this court ought to substitute its own discretion and set aside the orders of the learned judge.

For the respondent

[45] Counsel for the respondent submitted that the learned judge was correct in acknowledging that she had no jurisdiction to deal with the matter, as she had applied the overall principle stemming from the Privy Council case of **Leymon Strachan v The**

Gleaner Co Ltd, that "[a]s a judge of co-ordinate jurisdiction, Wint-Blair J [Ag] had no power to set aside the order of Graham-Allen J [Ag)]". He relied on the decision of this court in **Sarah Brown v Alfred Chambers** [2011] JMCA App 16, for the principle that "once an order of a court had been passed and entered or otherwise perfected in a form which correctly expresses the intention with which it was made the court has no jurisdiction to alter it". He submitted further that once the order was passed and entered on a decision of the appellant's constant failure to comply with the court orders, and the consequences of that was known to both parties, then "the orders as perfected are res judicata". The order was amended before being perfected, but after that, it could only be set aside by an order from the Court of Appeal. Wint-Blair J (Ag), he maintained, had no power to correct it.

[46] Counsel submitted that the appellant had failed to satisfy the requirements of rule 26.8(1) and (2) which were mandatory, while the factors in rule 26.8(3) may be considered within the discretion of the court. Wint-Blair J (Ag), he said, had given all the material before her serious consideration. He also submitted that, in concluding that the decision of Graham-Allen J (Ag) was binding on the parties unless and until it was reversed by the Court of Appeal, the learned judge had decided correctly. He submitted further that, even if the learned judge had the jurisdiction to set aside the order, all the requirements of rule 26.8 of the CPR would have to have been met, and that had not occurred.

[47] Counsel also submitted that the learned judge had considered the overriding objective in her deliberations, as she had focused on the delay in the matter caused by the constant adjournments due to the fault of the appellant, and its failure to comply with the several orders of the court. Counsel said that that consideration did not need to involve the assessment of whether the court had made orders that it could not itself enforce. Also, he submitted that it was not the duty of the court to supervise its orders. The court, he stated, granted orders, and the claimant applied to the court, if necessary, to enforce orders that have not been complied with. In any event, he submitted that the case concerned the appellant's failure to execute its duties under the RSTA, and the learned judge had considered those allegations.

[48] Counsel submitted that the learned judge was correct to state that there was no evidence that the hearing before Graham-Allen J (Ag) had not been a hearing on the merits. Counsel said that the learned judge had taken into consideration all the evidence before her, and had viewed the merits of the case with regard to the evidence that was before her.

[49] Counsel submitted that the rejection by Graham-Allen J (Ag) of the appellant's oral application to extend the time to "cure the default" was correct as no affidavit had been filed in support; it was not made in writing; not made in time; nor was it made pursuant to rule 26.8 of the CPR; and it was made on the day that the application on behalf of the respondent was before the court to enter judgment.

[50] Counsel, in dealing with the application for relief from sanction, submitted that the court was correct to find that there was no good explanation having examined the content of the affidavits in support of the application. He relied on the dictum of Brooks JA in **H B Ramsay** in support of that contention. Counsel stated that the evidence amounted to administrative inefficiency which could not amount to a good explanation. The court had weighed all the evidence and the relevant factors which have to be satisfied in the rule, assessed the same, and refused the application.

[51] Counsel referred also the dicta of F Williams JA in **Garbage Disposal** and Sinclair-Haynes JA in **June Chung v Shanique Cunningham** [2016] JMCA App 5, and submitted that, in the instant case, the time delays were "definitely inordinate". If one was seeking relief from sanctions, he submitted, an application should be made "once the [order] has been given or a few days thereafter - or as soon as reasonably practicable". In the instant case, counsel submitted that the appellant has demonstrated "a consistent habit of not complying with [orders] within the requisite time period", including a further delay to apply for relief from sanction which ought not to be overlooked.

[52] Counsel submitted that the applicant had not met the criteria set out in the CPR and the application, therefore, was correctly refused. He also contended that the appellant had not provided sufficient grounds to succeed on the appeal, which ought therefore to be dismissed.

Issues

[53] In my view, on an examination of the grounds of appeal and the submissions, the main issues to be determined on this appeal are:

(i) Did the learned judge err in concluding that:

(a) there was no evidence that the hearing before Graham-Allen J (Ag) was not a hearing on the merits;

(b) the hearing was one on the merits; and

(c) as a judge of co-ordinate and concurrent jurisdiction, she could not hear the matter (grounds of appeal (i) (ii), (iii))?

(ii) Did the learned judge err in concluding that:

(a) the appellant had failed to satisfy the criteria required by rules 26.8(1) and (2) of the CPR which are mandatory (grounds of appeal (iv) and (vi)); and

(b) there was no need to exercise her discretion under rule 26.8(3)of the CPR as the threshold to do so had not been met?

(iii) Had the criteria set out in rule 26.8(3) been met (grounds of appeal (v) and (vii)?

Discussion and analysis

[54] In this matter and in the determination of this appeal, I think it is important to have in the forefront of our consideration the overriding objective of dealing with cases justly, which includes the following: (i) that parties are on an equal footing so far as is practicable; (ii) that there is a saving of expense; and (iii) that one ensures that the matter can be dealt with as expeditiously and fairly as possible.

[55] It is also important to recognise that this is yet another case which calls for the true and proper interpretation of certain rules of the CPR alongside the common law. Lord Woolf, the creative proponent of this dynamic regime, exhorts us to utilise the new (then) and acceptable approach to litigation through his powerful words in **Biguzzi v Rank Leisure plc** [1999] 4 All ER 934. He stated on page 940 that:

> "Under r 3.4(2)(c) [of the United Kingdom Civil Procedure Rules 1998] a judge has an unqualified discretion to strike out a case such as this where there has been a failure to comply with a rule. The fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of case. The advantage of the CPR over the previous rules is that the court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out."

[56] I am also mindful of the seminal speech of Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042, at page 1046, which set out cautions to be utilised by the appellate court when reviewing the exercise of discretion of a single judge of the lower court. He stated:

> "It [the Court of Appeal] may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own."

Issue (i): Was there a hearing on the merits and could a judge of co-ordinate jurisdiction consider the application (grounds (i)-(iii))

[57] In this case, the relevant case management orders were made by Rattray J on 27 May 2014, in the absence of the appellant but not its counsel. On 3 December 2014, at the pre-trial review, counsel for both the appellant and the respondent were present. It was on this day that the time was extended to 12 December 2014 for the appellant to comply with the case management orders made on 27 May 2014, and a further order made that failing to comply with that order, the appellant's statement of case would stand struck out. The appellant did not fully comply with that order, so as of 13 December 2014 the appellant's statement of case stood struck out. There was no need

for any further order of the court. Indeed, in **Marcan Shipping v Kefalas**, Moore-Bick LJ stated at paragraph [11] of the judgment:

> "'Unless' orders have a long history, dating back well into the nineteenth century and it was recognised at an early stage that once the condition on which it depended had been satisfied, the sanction became effective without the need for any further order."

[58] Later on in the judgment at paragraphs [34]-[36], he set out three consequences of the unless order which he thought were worthy of mention. He said:

> "[34] ... The first is that it is unnecessary, and indeed inappropriate, for a party who seeks to rely on non-compliance with an order of that kind to make an application to the court for the sanction to be imposed or, as the judge put it, 'activated'. The sanction prescribed by the order takes effect automatically as a result of the failure to comply with its terms. If an application to enter judgment is made under r 3.5(5), the court's function is limited to deciding what order should properly be made to reflect the sanction which has already taken effect. Unless the party in default has applied for relief, or the court itself decides for some exceptional reason that it should act of its own initiative, the question whether the sanction ought to apply does not arise. It must be assumed that at the time of making the order the court considered all the relevant factors and reached the decision that the sanction should take effect in the event of default. If it is thought that the court should not have made an order in those terms in the first place, the right course is to challenge it on appeal, but it may often be better to make all reasonable efforts to comply and to seek relief in the event of default.
>
> [35] The second consequence, which follows from the first, is that the party in default must apply for relief from the sanction under r 3.8 if he wishes to escape its consequences. Although the court can act of its own motion, it is under no duty to do so and the party in default cannot

> complain if he fails to take appropriate steps to protect his own interests. Any application of this kind must deal with the matters which the court is required by r 3.9 to consider.
>
> [36] The third consequence is that before making conditional orders, particularly orders for the striking out of statements of case or the dismissal of claims or counterclaims, the judge should consider carefully whether the sanction being imposed is appropriate in all the circumstances of the case. Of course, it is impossible to foresee the nature and effect of every possible breach and the party in default can always apply for relief, but a conditional order striking out a statement of case or dismissing the claim or counterclaim is one of the most powerful weapons in the court's case management armoury and should not be deployed unless its consequences can be justified. I find it difficult to imagine circumstances in which such an order could properly be made for what were described in *Keen Phillips v Field* as 'good housekeeping purposes'."

[59] Orders 1 and 2 made by C McDonald J (see paragraph [7] herein) were made on the basis of the failure of the appellant to file certain documents (witness statements, listing questionnaire and a statement of facts and issues) between the months of July and November 2014. An order was made on 3 December 2014, extending the time to comply, with the unless order (order 2) being triggered in eight days (12 December 2014). As a comment, as no serious submission has been put forward on the point, it must be noted that as far as I am aware from the documents placed before us, no application had been made by the respondent before C McDonald J for an unless order. It therefore appeared that that order was made on the initiative of the court. The procedures set out in the rules in those circumstances do not appear to have been followed, in that, the appellant did not receive any notice before the hearing of the pre-

trial review of the potential *unless* order to be made at the pre-trial review, and then it was made to take effect in a fairly short time thereafter.

[60] It was clearly unnecessary for Graham-Allen J (Ag) to make any further order to "activate" the unless order. Also, as far as I am aware there was no application from the respondent for the court to do that, but even so, order 1 of Graham-Allen's J (Ag) order, therefore, merely endorsed and acknowledged the previous order made by C McDonald J (namely, that as the orders of the case management conference on 27 May 2014 had not been complied with, the statement of case stood struck out). There was no further consideration or determination by her of the matters stated therein.

[61] There seemed to be some misunderstanding or perhaps confusion in this matter with regard to what exactly were the reliefs being prayed for. There does not seem to be any question as to whether order 2 made by C McDonald J, and order 1 made by Graham-Allen J (Ag), were orders which had not been made on the merits, meaning that, they had not decided any of the substantive matters in controversy between the parties. I cannot accept the statement made by the learned judge that there was no evidence that the matter had not been heard on its merits. The evidence was all before her to that effect. Certainly, order 1 made by Graham-Allen J (Ag) was effected merely by a recognition of the appellant's failure to comply with the orders made by C McDonald J.

[62] The real issue, it seems to me, is what was the effect of this unless order? Pursuant to rule 26.5 of the CPR, once the order has been made a party can ask for

judgment to be entered. In certain circumstances, judgment can be entered in terms of the particulars of claim, in other circumstances, the judgment can be entered based on what the court considers the claimant entitled to. If judgment had been entered pursuant to rule 26.5 of the CPR, in circumstances where the right to judgment had not arisen, then the party against whom the judgment had been entered could apply to have it set aside within 14 days of service of the judgment. If the right to enter judgment had not arisen the court must set it aside. In this case (other than the procedural missteps mentioned above), the right to enter judgment would have arisen on 13 December 2014, the statement of facts and issues not having been filed, resulting in the application and order made to enter the judgment on 14 January 2015. The learned judge was correct when she stated that the provision to set aside the order within 14 days of service of the judgment would have been inapplicable, as the right to enter judgment had arisen. The order was effective once made, which was on 14 January 2015. The application, to set it aside was filed on 26 January 2015.

[63] Rule 26.6(4) of the CPR states that if the application is made for any other reason, rule 26.8 (relief from sanction) applies. Once an order made has not been complied with, the sanction takes effect and remains in place unless the party in default obtains relief (rule 26.7(2)). The orders made under Part 26 would have been orders made without a trial, and essentially, by default. In fact, the (a)-(t) orders granted by Graham-Allen J (Ag) on the amended claim form, were based on the failure to comply with the said *unless* order, which resulted in the respondent's right to enter judgment having arisen. In my view, that order did not appear to have been granted on the proof

of the matters stated therein, as although the witness statement had been filed there was no reference to it, and the trial days fixed for the matter had been vacated. So, that too remained a judgment entered by a failure and/or default of the appellant.

[64] It is clear from the provisions contained in rule 26.2 to 26.7 of the CPR that in the instant case, there would have been no determination on the merits, and an application could therefore be made to obtain relief from sanction, and if successful, ultimately setting aside the orders made. That is so at law, even in respect of final judgments relating to liquidated judgments, that is, after default judgments for damages to be assessed. Once there has not been an adjudication on liability on the merits, a judgment for damages to be assessed remains a default judgment and could be set aside. Indeed, as said by Lord Millett in **Leymon Strachan v The Gleaner Co**, on behalf of the Board, at paragraph 21 "[a] default judgment is one which has not been decided on the merits". He indicated that "[t]he courts have jealously guarded their power to set aside judgments where there has been no determination on the merits, even to the extent of refusing to lay down any rigid rules to govern the exercise of their discretion". Indeed, Lord Millett referred to the oft cited passage of Lord Atkin, in **Evans v Bartlam** [1937] AC 473 where he states:

> "The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."

[65] Lord Millett made it clear, however, that even though "damages have been assessed and a final judgment entered does not deprive the court of jurisdiction to set aside a default judgment, it is highly relevant to the exercise of discretion".

[66] It is interesting to note also that Harrison P (Ag) in **Trevor McMillan and others v Richard Khouri** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 111/2002, judgment delivered 29 July 2003, referring to applications to set aside default judgments, said on behalf of this court:

> "A second and subsequent application may be made to the same or another judge of the Supreme Court to set aside such a judgment as long as the applicant can put forward new relevant material for consideration (**Gordon et al v Vickers** (1990) 27 JLR 60). Facts may be regarded as new material, although through inadvertence or lack of knowledge such facts were not placed before the court on the first occasion provided they are relevant (See also **Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies et al** [1971] 1 WLR 550)." (See pages 7-8)

[67] Of course, I readily recognise that there is a different regime when the application to set aside the default judgment would have arisen on the failure of a party to file an acknowledgment of service or a defence, as required by the rules. There is a different approach when there has been a sanction imposed by the court or a rule for failure to do an act. As Lord Dyson said in **AG v Universal Projects Limited**, the word "sanction" is an ordinary word the definition of which includes "the specific penalty enacted in order to enforce obedience in law". As a consequence, rule 13.3 of the CPR (dealing with setting aside default judgments) is different from rule 26.8

(dealing with relief from sanctions). They are both dealing with contrasting situations. There are also varying criteria required in the disparate applications, and one is not required to have to demonstrate both criteria when making an application under the specific applicable rule (see **The Attorney General v Keron Matthews** [2011] UKPC 38).

[68] What is clear though is that they are all orders made in default and not on the merits (that is orders for default judgment requiring applications to set aside, and orders imposing sanctions and requiring applications for relief from sanctions). The application made subsequent to an unless order is of this genre. It is an order in default of action and the court has stated a sanction as a consequence. The applications for relief from the sanctions are all made to judges of coordinate/concurrent jurisdiction. As said in **Marcan Shipping**, the order remains in effect *until* the application for relief is made. Similarly, a default judgment remains in place until an order is granted setting it aside. The unless order and the default judgment are therefore not initially subject to appeal. There has been no determination on the merits. In this case, once the application for relief from sanction succeeded, orders 1 and 2 made by Graham-Allen J (Ag) would fall away. So the learned judge would have been empowered to deal with the orders made by Graham-Allen J (Ag), although a judge of coordinate /concurrent jurisdiction. Her indication that she was not able to do so was an error on her part.

[69] This was not a situation as occurred in **Sarah Brown v Alfred Chambers** (relied on by counsel for the respondent) as in that case, the appeal had been heard

and determined and the court was *functus*. No application for extension of time could therefore have been entertained. But it is of significance and one must bear in mind, that section 6(1) of the Judicature (Supreme Court) Act provides as follows: "Judges of the Supreme Court shall have in all respects, save as in this Act otherwise provided equal power, authority and jurisdiction". As a consequence, Wint-Blair J (Ag) could hear the application for relief from sanctions with the resulting consequence, once successful, that judgment entered on the particulars of claim, without trial, and in default of compliance of the court orders would be set aside. In the circumstances of this case, grounds (i), (ii) and (iii) must therefore succeed.

Issues (ii) and (iii): Relief from sanction (grounds (iv)-(vii))

[70] Issues (ii) and (iii) require a detailed examination of rule 26.8 and the evidence adduced by the parties. The rule states as follows:

> "(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.

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

[71] It is now well settled, and was captured correctly by the learned judge (summarised at paragraph [26] above), that rule 26.8(1) of the CPR acts as a preliminary test which must be satisfied before the application can be considered by the court under rule 26.8(2). Rule 26.8(2) contains three specific factors which must be in effect in order for the court to grant relief. Those factors must be satisfied before the court can consider the factors set out in rule 26.8(3). So, any failure to satisfy those factors precludes the court's consideration of section 26.8(3) (see **University Hospital Board of Management v Hyacinth Matthews** [2015] JMCA Civ 49). These factors are considered below.

Was the application for relief from sanction made promptly and supported by affidavit?

[72] With regard to rules 26.8(1)(a) and (b) of the CPR, it is not in dispute that the application was supported by evidence on affidavit. The learned judge, however, found that the application had not been made promptly. She noted that 10 days and a period

of one month had been found to be "not acting promptly". However, as stated by Brooks JA in **H B Ramsay**, "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". I agree with this statement.

[73] In this case, C McDonald J gave an extension of time to 12 December 2014, permitting only eight days for the appellant to comply with the case management orders before the statement of case stood struck out. As indicated, that was an order made on the court's initiative without any notice to the appellant. That short period occurred during the month of December when unusual circumstances were occurring in the offices of the appellant's counsel. The appellant's counsel indicated that they were not only short staffed, but were suffering from break-ins at their offices with the loss of equipment. Yet, three of the documents were filed, with one remaining outstanding. The application for relief was filed on 26 January 2015, in the month following.

[74] The facts of **Garbage Disposal** were that the period of the applicant's non-compliance with case management orders, before the filing of the application for relief from sanctions, was between 55-62 days (a little less and more than two months). F Williams JA stated that "I do not think that that period can reasonably be said to have amounted to inordinate delay". In the instant case, the period of the appellant's non-compliance with regard to filing the statement of facts and issues, which was to be filed on 12 December 2014 (the date to which time was extended by C McDonald J), to the filing of the application for relief from sanctions (on 26 January 2015), was 42 days (a

little over one month). I am of the view that, in all the circumstances of this case, 42 days' delay is not inordinate, and so, the appellant should have been considered to have acted promptly. The learned judge failed to take all the relevant matters into consideration and therefore erred in this regard.

Was non-compliance intentional?

[75] The learned judge held that the failure to comply was not intentional. I agree with her. The evidence showed that the appellant, in spite of the difficulties experienced, nonetheless pursued participation in the proceedings.

Was there a good explanation for the failure?

[76] As indicated, the original delay in this matter occurred between the months of September and December 2014, when the case management orders made were to have been effected. In that period, there was a dissolution of the executive committee of the appellant. The secretary of the appellant left its employ. It was difficult to hold annual general meetings to reconstitute a new strata executive committee, and eventually, an interim standing committee of three was appointed to manage the strata. As a consequence, their attorneys initially were unable to get instructions to proceed with the matter and were planning to remove their name from the record, although that was aborted. Then there were the difficulties, as previously mentioned, with the break-ins at their offices and the resulting loss of equipment. I cannot see how the absence of specific dates with reference to those activities, within that particular period, negates the appellant's contention that there was a good explanation for failure to comply. As the authorities say, it does not have to be an absolute explanation, but an explanation

must be provided. What occurred, in my view, certainly could not be described as inexcusable oversight.

[77] After the order granted by C McDonald J on 3 December 2014, the delay in filing the documents were as a result of difficulties being experienced by the appellant's attorneys. It is also important to mention, yet again, that by 12 December 2014, in keeping with her order, the witness statement and listing questionnaire had been filed. It was only the statement of facts and issues that remained outstanding. In **Salter Rex & Co v Ghosh** [1971] 2 All ER 865, Lord Denning MR referring to the fact that due to counsel's admitted mistake the applicant was out of time, said, that if the applicant's case had merit, the time would certainly have been extended, as "we never like the litigant to suffer by the mistake of his lawyers". In **Colin Austin v Newcastle Chronicle & Journal Limited** [2001] EWCA Civ 834, Aldous LJ said that it would be wrong, in circumstances where the delay in filing particulars of claim was due to the mistake of the claimants' solicitors, to "heap their mistake on the back of the claimant".

[78] In **University Hospital Board v Hyacinth Matthews**, the court commented in paragraph [44] of the judgment that "counsel had a duty to act in the best interest of his client". In that case, he had failed to do so, and in the court's opinion he had acted negligently. But the court posited the question as to whether the client should bear the draconian sanction of having their case struck out in those circumstances, and held that it the client should not, although the court did acknowledge that there was no evidence

to suggest tardiness or lack of due diligence on the part of the client with regard to the claim.

[79] In my view, in this case, the learned judge failed to properly take all the relevant matters into consideration, and erred in not finding that the appellant had provided a good explanation for failing to comply.

Has there been general compliance?

[80] There was no doubt that the appellant had failed to comply with the case management orders made on 27 May 2014. Those orders ought to have been complied with in September, October and November 2014. When the matter went before C McDonald J on 3 December 2014, there was no compliance. However, at the time of the further pre-trial review before Graham-Allen J (Ag) on 14 January 2014, the appellant had complied with all orders, save the filing of the statement of facts and issues, which had been due on 27 October 2014, and in respect of which time had been extended to 12 December 2014, and so was then one month overdue. The draft statement of facts and issues was exhibited to the affidavit of counsel. It was, counsel said, indicating similar facts and issues to those identified by counsel for the respondent. Counsel requested an extension of time from the court within which to obtain full compliance, but that was refused.

[81] It is true that at that time, there was no application for relief from sanction yet before the court, and so that application was ineffectual. The application for relief from sanctions was filed 12 days later. However, it is also of some significance that only one

document remained outstanding – a document that is prepared by counsel and which the court could have proceeded without. Additionally, as all the cases refer to striking out as draconian and a sanction which should be used sparingly in suitable cases, where it would appear justifiable and appropriate to do so, in this case, striking out the statement of case appeared to be completely disproportionate to the infraction which existed. Moreover, as counsel for the appellant correctly pointed out under rule 27.9(2) of the CPR, the statement of facts and issues does not bind the trial judge. In those circumstances, the learned judge could have utilised a different approach with less harsh consequences.

[82] That being the case, in my opinion, the threshold with regard to rule 26.8(2) would have been crossed and the learned judge should have gone on to examine the factors in rue 26.8(3), which she failed to do because of her decision on the "condition precedent" factors in 26.8(2). In my view, she erred. I will deal with them succinctly.

[83] This claim relates to one unit within a registered strata plan. It would be in the interests of justice for the court to determine whether sums are payable by the appellant to the respondent particularly in circumstances where the object of the repair may not be a part of the common area. The overriding objective would, in the administration of justice and fairness, require a determination by way of competing evidence adduced on both sides of the several issues the subject of the claim. There are also some claims which may not be justiciable in the court, for instance, the restraint on hanging the clothes on the balcony, and the assignment of parking spaces

to apartments. There was some delay on the part of the appellant prior to the issuance of the unless order, but subsequent thereto, the delay was occasioned by the attorneys.

[84] The statement of facts and issues was one prepared by the attorneys based on the information received from the appellant, which information was represented in the filed pleadings and witness statement and therefore already to hand. The delay could have been remedied within a reasonable time as the appellant had complied with the court order, save in respect of that one document, which was already in draft form. At the time the documents were filed on 12 December 2014, and the application for relief from sanction filed on 26 January 2015, it seemed eminently possible that the scheduled trial date could have been met, as the matter was then ready for trial, and could have proceeded then.

[85] The appellant's statement of facts and issues was not crucial for the conduct of the case. The court could have proceeded without it, and relied on the statement of facts and issues filed by the respondent, particularly since it appeared on the appellant's case, based on the draft document attached to Ms Wandsworth's affidavit, the parties were *ad idem* on the extent of the disputes which existed between them. Striking out a statement of case usually means depriving the litigant of access to the court (see **Woodhouse v Consignia plc; Steliou v Compton** [2002] 1 WLR 2558). It has also been stated that striking out for delay should only be granted if there is considerable risk that it would not be possible to have a fair trial, but if a fair trial is still possible the court should consider some lesser sanction (see **Taylor v Anderson and another**

[2002] EWCA Civ 1680). Failing that, the order would appear to be disproportionate (see Stuart Sime, A Practical Approach to Civil procedure, 15th edition).

[86] What is clear is that in the circumstances of this case, the respondent would have suffered no prejudice from a short adjournment for the filing and service of the appellant's statement of facts and issues, if thought necessary. Although the respondent claimed that she had suffered prejudice, it had not been demonstrated in what way that would have occurred, save for her claim, simpliciter, to that effect. Indeed, as previously indicated, she had averred "that it is not in the interest of justice that this matter between the parties be tried and for a court to adjudicate on whether the [appellant] is liable to me". I must say I find that contention unacceptable. Also, in the absence of prejudice, it is usual to permit the litigant to rectify the matter. And, as indicated in this case, by the time the application for relief from sanctions was heard, the case management orders, resulting in the unless order, had been complied with save for the filing of the statement of facts and issues which could have been filed with dispatch. Additionally, lesser sanctions could have been imposed in relation to perhaps punitive costs, or an increased payment of interest on any sums which may have been found to be due to the respondent.

[87] In my opinion, this was a case in which the learned judge failed to take all the matters before her into consideration, and was misguided in relation to certain facts that were before her. She ought to have exercised her discretion in favour of granting relief from sanction and allowing the matter to proceed to trial. There was no indication

that a fair trial could not still have occurred. Grounds (iv) to (vii) would also therefore succeed.

Conclusion

[88] In all these circumstances, I would therefore allow the appeal with costs to the respondent to be agreed or taxed. The orders of Graham-Allen J (Ag) and Wint-Blair J (Ag) should be set aside. The matter should be remitted to the Supreme Court for trial before a different judge. A case management conference should be scheduled at the earliest convenient time to the parties and the court. I would also award costs to the respondent in keeping with rule 26.8(4) of the CPR.

[89] I, on behalf of the court, apologise profusely for the delay in the delivery of this judgment. This was an unfortunate situation of administrative oversight, which once discovered, was corrected immediately. It is the hope that such a situation will not recur, but that it has happened at all is deeply regretted.

F WILLIAMS JA

[90] I have read in draft the judgment of my sister Phillips JA. I agree with her reasoning and conclusion. There is nothing that I wish to add.

PUSEY JA (AG)

[91] I too have read the draft judgment of Phillips JA and agree with her reasoning and conclusion.

PHILLIPS JA

ORDER

1. The appeal is allowed.
2. The orders made by Graham-Allen J (Ag) and Wint-Blair J (Ag) are set aside.
3. The matter is remitted to the Supreme Court for trial before a different judge. A case management conference should be scheduled at the earliest convenient time to the parties and the court.
4. Costs to the respondent to be taxed if not agreed.