[2020] JMCA Civ 24

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 74/ 2018

BEFORE: THE HON MRS JUSTICE McDONALD-BISHOP JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

BETWEEN	**TINGLES DISTRIBUTORS LIMITED**	**APPELLANT**
AND	**LIQUID NITRO BEVERAGES INC**	**1st RESPONDENT**
AND	**TAMARIND SALES AND SERVICES LIMITED**	**2ND RESPONDENT**

Written submissions filed by Miss Karen O Russell for the appellant

Written submissions filed by Gordon/McGrath for the respondents

20 April and 15 June 2020

PROCEDURAL APPEAL

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

MCDONALD-BISHOP JA

[1] I have read in draft the judgment of my sister P Williams JA. I agree with her reasoning and conclusion and have nothing to add.

P WILLIAMS JA

[2] In this matter, Tingles Distributors Limited ('the appellant') appeals against the decision of Edwards J, as she then was ('the learned judge'), who on 27 June 2018 refused its application for relief from sanctions. She also granted an application for entry of judgment after striking out in favour of Liquid Nitro Beverages Ltd and Tamarind Sales and Services Limited ("the respondents") against the appellant. Additionally, she entered judgment for the respondents on the appellant's counter-claim.

Background

[3] On 14 March 2017, the respondents commenced a claim against the appellant seeking injunctive relief restraining the appellant and/or its servants and agents from passing off the name of the respondents' product, Liquid Herbal Nitro, or similar derivations. They also sought a declaration that the appellant had breached the Fair Competition Act and an inquiry as to damages suffered by them on account of the appellant's actions.

[4] At the time the respondents commenced their claim, they also sought an interim injunction restraining the appellant and/or its servants, agents or otherwise whatsoever from using, advertising, dealing with and/or passing off, or attempting to pass off, the name 'Liquid Herbal Nitro', or any derivations or colourful imitation of the respondents' trademark 'Liquid Herbal', until the determination of the matter.

[5] Between 29 March 2017 and 8 June 2017, hearings were held in relation to the application for the interim injunction. On 8 June 2017, the interim injunction was granted

and a case management conference in relation to the substantive claim was set to be held on 19 September 2017, but was subsequently set for 20 November 2017.

[6] On 20 November 2017, at the case management conference before Laing J, the following orders were made:

> "1. Standard Disclosure by the parties on or before 12th January 2018.
>
> 2. Inspection of documents on or before 19th January 2018.
>
> 3. Witnesses limited to four (4) for the Claimants and three (3) for the Defendant.
>
> 4. Witness Statements to be filed and exchanged on or before 2nd February, 2018.
>
> 5. Listing Questionnaire to be filed on or before 9th February, 2018.
>
> 6. The parties are to file a Pre-Trial Memorandum in accordance with the Civil Procedure Rule 38.5 on or before 14th February, 2018.
>
> 7. Pre-Trial Review is fixed for 26th February, 2018 at 2:30 p.m.
>
> 8. Trial by Judge alone is fixed for 4th, 5th, and 6th April, 2018.
>
> 9. Costs to be cost in the claim.
>
> 10. Claimants' Attorneys-at-Law to prepare file and serve a copy of this Order."

[7] On 26 February 2018, at the pre-trial review at which the attorney-at-law for the appellant participated by way of telephone, Laing J made the following orders:

> "1. All documents filed and served by the claimants up until 26th February 2018, are to stand as having been properly filed and served. The Claimants' witness statements filed out of time are also to stand as having been properly filed.
>
> 2. Time is extended to 12th March 2018 for the Defendant to comply with orders 1, 2, 4 and 5 of the case management order made on 20th November, 2017.
>
> 3. Unless the Defendant complies with the order in paragraph 2 herein, the Defendants' Statement of Case is to stand struck out and judgment entered for the Claimants.
>
> 4. Attorneys-at-Law for the Claimants are to file and serve a trial Bundle on or before 22nd March, 2018.
>
> 5. The parties are to file and exchange Skeleton Arguments and Authorities on or before 29th March, 2018."

[8] On 10 April 2018, the respondents filed an application for judgment to be entered after the striking out of the claim. This application came on for hearing on 25 April 2018. On that date, the appellant filed an affidavit in response to the request for entry of judgment after striking out. The hearing commenced but was, however, adjourned.

[9] On 7 June 2018, the appellant filed an application for relief from sanctions and affidavits of Deri-Ann Hinds and Karen Russell in support of the application.

[10] This application was heard by the learned judge on 27 June 2018, at which time the following orders were made:

> "1. The [appellants] Notice of Application for Relief from sanctions filed on June 7, 2018 is refused.

2. Judgment is hereby entered for the Claimants on their claim, in the following terms:

The Defendant and/or its servants, agents or otherwise are restrained from using, advertising dealing with and/or passing off or attempting to pass off:-

(i) the name '*Liquid Herbal Nitro*';

(ii) any derivations or colourful imitation of the Claimants' energy drink known in the market as "*Liquid Herbal Nitro*";

(iii) the Claimants' trademark '*Liquid Herbal Nitro*'; '*Nitro'; 'Liquid Herbal Nitro Can Series'* and '*Liquid Herbal Shot Series*'; and/or

(iv) all or any of the above with the word '*original*'.

3. It is hereby declared that the Defendant through its actions is in breach of section 37 of the Fair Competition Act.

4. Assessment of damages is set for January 9, 2019 for one day, beginning at 10:00 a.m.

…

6. Judgment is hereby entered for the Claimants on the Defendant's counterclaim."

At the time, the learned judge also granted leave to appeal.

The appeal

[11] There is no written record provided to this court of the reasons for the learned judge's decision. The appellant has, however, identified the following findings in law to challenge:

"a. The Learned Judge erred in the manner in which she exercised her discretion in not granting [sic]

Appellant's/Defendant's the application for relief from sanctions.

b. The Learned Judge failed to consider well established legal principles and or factors that would have aided her decision in favour of the Appellant or was aberrant and unreasonable in such considerations.

c. The Learned [Judge] on the urging of Counsel for the 1st and 2nd Respondents took into consideration factors that were neither applicable, relevant, in keeping with nor befitting to the legal principles and factors governing the application before her.

d. The Learned Judge has failed to perform an appropriate balance of the effect of her decisions on the parties and has failed to recognise or acknowledge that her draconian decision may very well result in irreparable harm to the Appellant.

e. The Learned Judge ignored the overriding objectives as stipulated by the CPR.

f. That the Learned Judge has failed to accept that the principle of opportunism by Counsel of the 1st and 2nd Respondents in this Application though glaring and was instead lured with irrelevant and irrational considerations.

g. The Learned Judge has failed to be influenced by Rules in particular CPR and the case law in arriving at her decision."

[11] The following are the grounds of appeal:

"a. The Learned Judge by her decision has denied the parties to be heard on the merits of the case (s) and has in an unreasonable manner handed Judgment to the 1st and 2nd Respondent [sic] without more.

b. The Learned Judge did not consider the materiality and or triviality of the breach of the Court Order.

c. The Learned Judge in the exercise of her discretion was drawn into perhaps unprecedented and erroneous considerations of fraud and the aesthetics of the execution of the witness statement rather than the relevant factors.

d. The Learned Judge seemingly accepted that the document served on Counsel for the 1st and 2nd Respondents and on which Counsel relied during opposition of the Appellant's application were still not served as they were merely attached to an affidavit served on said Counsel.

e. The Learned Judge failed to appreciate that the aberrant and draconian disposal of [sic] Appellants' case was not the only or best sanction and/or penalty provided by the CPR.

h. That the Learned Judge has failed to accept that the Appellant should not be caused to suffer irreparable damage on the mistakes misunderstanding or even misgivings and failings of its Attorney-at-Law.

i. The Learned Judge did not consider, even cursory [sic], the merit of the Appellant's case.

j. The Learned Judge permitted and seemingly relied on the 1st and 2nd Respondent's counsel [sic] expertise in his own cause while who [sic] went on a frolic in exploitation of the Court with innuendoes on handwriting found on the Appellants' documents and arguments of fraud.

k. The Learned Judge pronounced that an administrative error in the Claim number of the documents filed required her to further extend time to regularize, this is far-fetched, unreasonable and mistaken or aberrant of the Learned Judge in [sic] she failed to recognise the powers and option of the Court and to exercise her discretion fairly.

l. The Learned Judge has been misled by opposing Counsel's failure to appreciate basic principles of jurisprudence."

The orders sought are as follows:

> "a) That the Decision of Her Ladyship Ms. Carol Edwards to refuse the Appellant's application for relief for [sic] sanctions be set aside.
>
> b) That Judgment entered by her Ladyship Ms Carol Edwards in favour of the 1st and 2nd Respondents on both the claim and counterclaim be set aside.
>
> c) That [the] matter be set for Pre-Trial review and or new trial dates be set for the trial of the claim and the counter-claim.
>
> d) Any other orders as this Honourable court finds reasonable and appropriate."

[12] Ultimately, it is the assertion of the appellant that the learned judge wrongly exercised her discretion in refusing its application. It is now well settled that this court will interfere with such an exercise only if it is satisfied that the judge had acted on some wrong principle or either on a misunderstanding of the applicable law or the evidence or arrived at a decision so aberrant that no judge regardful of his duty to act judicially could have reached (see **Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042).

[13] It will be understandably difficult in the absence of reasons to conduct a review of the exercise of the learned judge's discretion. The consideration now becomes whether from a review of the material that was before her, the decision demonstrates a proper exercise of her discretion.

The proceedings before the learned judge

[14] The application that first came before the learned judge was that of the respondents' which was to have judgment entered after striking out. Unfortunately, those

papers are not amongst those in the record of appeal. Most of the documents included in the record of appeal are those which were relied on by the appellant in its application for relief from sanctions. Other documents in the record relate to the application for interim injunction which had been pursued by the respondents. However, the respondents included in their submissions in response to the appeal, the submissions that were made in opposing the application for relief from sanctions.

[15] Miss Russell, the attorney-at-law for the appellant, filed an affidavit in response to the application to enter judgment, in which she asserted that the appellant's listing questionnaire, list of documents, pre-trial memorandum and witness statements were filed on 12 March 2018, albeit with "significant anomalies". The listing questionnaire and the pre-trial memorandum had incorrect headings. The heading on these two documents were headed as being of the 1st and 2nd claimants. The list of documents, the pre-trial memorandum and the witness statement of Horace Tingle, for and on behalf of the appellant, were filed with an incorrect claim number. Counsel explained that the claim number incorrectly used was for another matter involving the 1st respondent and the appellant. The documents were attached to the affidavit.

[16] Counsel also asserted "that through mere inadvertence these documents were not served" on the attorneys-at-law for the respondents".

[17] The hearing of this application was adjourned and, on 7 June 2018, the application for relief from sanctions and affidavits of Deri-Ann Hinds and Karen Russell in support of

the application was filed. In the notice of application for relief from sanctions, the following were among the grounds for the orders sought:

> "...
>
> iii. The [respondents] would not be prejudiced by this failure to comply with the orders of the Court.
>
> iv. The non-compliance was deem [sic] to mistaken or mere inadvertence.
>
> v. The nature of the claim and significant quantum of damages sought by the [respondents] do require for the [appellant] [sic] be heard on merits.
>
> vi. The [appellant] didn't intentionally fail with the Courts timeline.
>
> vii. The [appellant's] case has a real prospect of success.
>
> viii. The [appellant] should not be prejudiced or penalised for the failings and/or errors of his Attorney-at-law.
>
> ix. It would be fit and equitable to grant these orders."

[18] In her affidavit, Miss Russell sought to rely on the affidavit she had filed in response to the request for entry of judgment. She went on to explain that one of her employees, Mr Adrian Smith, had filed the documents but had failed to communicate with her administrative assistant, "with a view to determine [sic] if and when filed documents [were] to be served or whether they [were] to be returned to the office". The documents were returned to Miss Russell's administrative assistant at her office in Saint Ann without being served. Miss Russell said she was only made aware that the documents were returned when she was served with the respondents' affidavit.

[19] Miss Russell's administrative assistant, Miss Deri-Ann Hinds, in her affidavit, confirmed that she had not given the instructions for the filed documents to be served. She explained that this was due to her uncertainty as to how to proceed, given the fact that there was another matter which she said was "against this defendant". (It is assumed she was referring to the respondents who were, in fact, the claimants in this matter.) Miss Hinds asserted that Mr Smith was directed to return the filed documents to the office in Saint Ann.

[20] She acknowledged that she did not communicate with Miss Russell that the documents had been returned, despite her intention to do so. She asserted that it was a mere oversight and that she was only reminded of these documents when served with the request for judgment.

[21] In their written submissions to the learned judge, the respondents set out the law applicable to applications for relief from sanctions as provided in rule 26.8 of the Civil Procedure Rules 2002 ('the CPR'). It was submitted that the application for relief was filed over two and a half months since the default. It was noted that the appellant had alleged that it only became aware of errors in filing and serving the relevant documents upon receipt of the application for judgment to be entered. This application had been served on 17 April 2018 and up to the time of that hearing, the appellant had not filed an application for relief from sanctions. Further, it was noted that, even after that hearing had commenced and been adjourned, there had been a delay of one and a half months before the application for relief was filed.

[22] Counsel submitted that the appellants had failed to advance an explanation that met the threshold of being a good explanation for the failure. Counsel contended that inadvertence or oversight cannot be sufficient explanation for the default which had transpired in the circumstances.

[23] Counsel went on to demonstrate that the appellant had committed several defaults since the inception of the matter. It had failed to serve the respondents with its defence within the time stipulated by the rules. It had failed to file its affidavit in response in respect to the respondents' application for an injunction within the time ordered by the court and it had yet to serve the respondents with its acknowledgment of service, notwithstanding, at least, two requests made. It had failed to comply with other orders made at the time the unless order was imposed.

[24] The submissions concluded with the assertion that the unless order took effect without the need for any further order. It was urged that the belated application for relief was not prompt and further that the appellant had not presented a good explanation for the default. The respondents submitted to the learned judge that the appellant had not met the prerequisites for obtaining relief and in the circumstances, the effect of the unless order ought to prevail.

The submissions for the appellant

[25] Counsel for the appellant set out what she described as the factual basis for the respondents' application for striking out and for judgment to be entered, as was contained

in an affidavit in support of the application, from Miss Kereene Smith, attorney-at-law for the respondent. It is as follows:

> "7. The deadline stipulated by the learned Judge for the Defendant to comply with said orders has since passed, yet to date the Claimants' Attorneys-at-Law of record, my Law Firm, has yet been served with any documents that the learned judge ordered that the Defendant file and serve, namely the Witness Statements, List of Documents in furtherance of disclosure and Listing Questionnaire.
>
> 8. I also visited the Commercial Registry of the Honourable Court on 14th March 2018, after the time for compliance elapsed and requested the Court's file for this suit in order to determine whether any of the relevant documents listed above had been filed by the Defendant as per the learned Judge's order, I carefully searched record of this suit and the Court's file kept in the Commercial registry for any Witness Statements, List of Documents in furtherance of disclosure and Listing Questionnaire filed by the Defendant. In my search I did not see any of the documents filed, being Witness Statements, List of Documents or Listing Questionnaire filed by the Defendant."

[26] Counsel also set out what she said were her submissions made to the learned judge as follows:

> "26. In my submissions to the Learned Justice Edwards she was asked to consider:
>
> 1. The Unless Order of the Learned Justice Laing juxtaposed to the 20th November 2017 Case Management Orders which are repeated at paragraph 13 herein and have those compared with the breaches complained of by Counsel Kereene Smith in her affidavit (refer to paragraph 16 herein) in that:
>
> 2. There were no orders made to which the Unless orders applied to the Listing Questionnaire, Pre-Trial Memorandum

> and or the List of Documents are [sic] to be served on or before the 12th of March 2018. Strictly speaking mere filing of those documents was all that was required and that was done. The allegations as they stood in the supporting affidavit that [sic] Counsel for the Respondent was in accurate, at least in part, and that Counsel had in fact misdirected herself and attempted to misdirect the Learned Judge in this regard.
>
> 3. The Appellant was in partial breach of the Unless order only as it relates to the exchange of the witness statement. As at the 12th day of March the witness statements were not exchanged in keeping with the Unless Order.
>
> 4. Other anomalies in the documents filed but these did not affect the terms of the Unless Order."

[27] Counsel said that in her submissions to the learned judge, she pointed out that all documents complained of were all filed together on the same day and time, as one bundle, and by one bearer. She conceded that there were errors in the heading of some of the documents; however, she urged "that all else to include the names of the parties were [sic] in order" and the errors therefore did not "nullify the filing of these documents".

[28] Counsel also noted that the learned judge was asked to find the following:

> "a) All documents were all filed and in keeping with [the] Unless Order.
>
> b) The administrative errors were of the nature that should not nullify the documents filed in compliance with the unless order.
>
> c) That Counsel had misled and continued to mislead the Learned Judge on the facts surrounding and the nature of the breach; in that the breach was exaggerated in and apparent from the affidavit supporting the Respondents' Application for entry of Judgment.
>
> d) That Counsel was opportunistic in his approach and in making this application even after shown the evidence that

would indicate that he was mistaken and the only breach was that the Witness Statement was not exchanged.

e) That the nature of the breach was not overwhelming and grievous.

f) That she will not be drawn in extraneous considerations that were not within the ambit of being just in the dispensation of justice. I further indicated that perusing court files to match signature of witness statement of Horace Tingle and allowing Counsel to proceed along the lines of fraud and false witness statement was wrong.

g) That at the date of the hearing the Respondents or their Attorney-at law had in fact served the Listing Questionnaire, List of Documents, The Pre-Trial Memorandum and the Witness statements in their original forms and all bearing the original stamps of the Supreme Court's registry on the Respondents' [sic] Attorney-at-law. Further it is these same Witness Statements which were brought to the scrutiny of the Learned Judge.

h) That the only breach was that of failing to exchange the Witness Statement."

[29] Counsel also set out in her submissions to this court a summary of the submissions made in opposition to the application for relief from sanctions as follows:

"a) The Appellant's breached Case management Unless orders by failing to file and or serve the Witness Statements, Listing Questionnaire, Pre-Trial Memorandum and List of Documents.

b) A[t] the time of the hearing the Respondent's or his Counsel were [sic] still not served Pursuant to the Civil Procedure Rules (CPR). (The Learned Judge repeated this fact stridently).

c) The unless order was issued given a series of previous breaches by the appellant.

d) The signature on the witness statement was fraudulent and was at the very least suspect and the Learned Judge was invited to and did peruse documents after a search among his and the Judges' documents, from purportedly from previous

filings filed by witness, Defendant, and or affiant 'Horace Tingle'.

e) Submissions and authority presented on fraud related to the 'falsified' signature and or the highly suspicious signature which read in the Judge's pronouncement 'Horace Tingle' without more.

f) Trial Dates were aborted owing to the failure of the Appellant to file and serve."

[30] Rather than repeating the grounds of appeal, counsel advanced the challenge to the learned judge's decision:

"as being

a) Aberrant and unreasonable and failed to consider well established legal principles and further she leaned on the urging on Counsel for the respondent in her consideration of inapplicable or irrelevant factors. Per 2(b) and 2(c) of the Notice of Appeal summarised.

[Grounds d, e, f a and i are considered together]

b) Imbalanced and draconian in her decision, not in keeping with the overriding objectives and irreparable harm to the Appellant as a consequence and I hereby add as an overture given the nature of the breach, Summary of 2(d), 2(e) and 2(g) of the Notice of Appeal.

[Grounds a, b, e and j are considered together]

c) Failed to accept the principle of opportunism by Counsel of the Respondents though glaring. This being 2(f) of the Notice of appeal.

[Grounds c and h]"

[31] The first question that counsel posited for this court's consideration was whether the learned judge properly considered the surrounding facts and legal principles in the exercise of her discretion; or was she, indeed, aberrant.

[32] Counsel submitted that due to the coerciveness of the unless orders, they must be specific in what they state and require literal interpretation. She contended that the case management orders made by Laing J were specific and required no further interpretation. The orders, the submissions continued, called for the filing of the list of documents, listing questionnaire and pre-trial memorandum and not that they should be served. Counsel further submitted that the only breach was as it related to the appellant's failure to exchange the witness statement.

[33] In addressing the provisions of rule 26.8(1) of the CPR, counsel first considered the requirement that an application for relief from sanctions should be promptly made. She contended that the application had "commenced in some form" at the hearing for the entry of judgment on 25 April 2018. She stated that at the hearing of the application for relief from sanctions, the learned judge did not suggest that the application was not prompt and she opined that this was because the learned judge was aware of the attempts to ventilate the issues surrounding the sanctions on 25 April 2018.

[34] Counsel submitted that though, typically, the time ran from the date of the breach to the date of the formal application, in this case there was an intervening period when the matter was partially ventilated and the issues were known but for the formal application.

[35] Counsel referred to rule 26.2 of the CPR, which she noted empowered the learned judge to act on her own initiative. Counsel submitted that, when faced with any request not to enter judgment, and not to apply a sanction for a minor breach, and further when

proof is provided to the court in the form of affidavit evidence, the court, in the interests of justice, can treat with the matter whether or not a written application is done. Counsel noted that her perusal of the rule did not indicate "the stringent and exclusionary requirement of a written application for relief from sanctions". Counsel also submitted that case law has shown that an application for relief from sanction need not be in writing and referred to **Cutler v Barnet London Borough Council** [2014] EWHC 4445(QB).

[36] Counsel referred to a decision from this court, **Garbage Disposal and Sanitations Systems LTD v Green (Noel) et al** [2017] JMCA App 2, where she noted that a period of approximately two months was found to be not an inordinate delay. She recognised that that matter was not dealing with breach of an unless order but an infringement of case management orders.

[37] Counsel pointed out that the trial dates had already elapsed when the application was made and as such, when considering the application for relief from sanctions, there would have been no disturbance to a pending trial. Counsel referred to observations of Batts J in **Sherine Blake v LDCosta Loans and Financial Management Limited and Lincoln Brown** [2015] JMSC Civ 14. She contended that the respondents aided in the abortion or failure of the trial date in that they were aware of the breaches, yet awaited the passing of the trial date to make the application for entry of judgment.

[38] Counsel maintained that it was impossible to make the application prior to the breach coming to the knowledge of the appellant. She categorised the filing, without

serving the witness statement, as partial compliance only. She urged that in the circumstances, the application for relief from sanctions was promptly made.

[39] In turning to the question of whether or not the failure to comply was intentional, counsel began with the observation that it is hardly likely that most applicants would seek to intentionally commit breaches. She submitted that having taken steps to file all the documents on the prescribed date, as the appellant had done, was the "commencement of proof" that there was never an intention to disobey the breach. She contended that compiling these documents and getting them to the relevant arm of the court was more than 90% of what it would take to comply with the order.

[40] The submissions on this issue continued in terms which I think would be best reproduced as stated in the written submissions :

> "That further given the errors in claim numbers and other drafting errors as evident and admitted herein and whilst it embarrassed Counsel to admit being less than efficient in this regard it is clear through all the efforts made on behalf of the Appellant that non-compliant [sic] was never the intention but [a] 'forgivable trip'."

[41] Counsel pointed to the contents of the affidavits filed in support of the application for relief from sanctions. She also noted the affidavit filed in response to the request for entry of judgment, which she submitted provided clarity and "dissuade[d] somewhat the need for the formal application for relief from sanctions and to prove compliance".

[42] The submissions next considered the question of whether a good explanation was given. It was submitted that there is no codified standard as to what amounts to a good

explanation. Counsel referred to decisions from the Supreme Court where the matter of what can amount to a good explanation was considered, namely, **Corey Jackson v Ann Marie Phillips and Priscilla Fisher** [2017] JMSC Civ 30 and **Sherine Blake v LDCosta Loans and Financial Management Limited and Lincoln Brown**.

[43] The following was the manner in which the explanations relied on, based on the affidavit, were set out:

> "- Oversight
>
> - Confusion as there was another matter involving the same Defendant and Claimant and there was some uncertainty I add especially since they bore two sets of Claim numbers.
>
> - Mere in advertence
>
> - Administrative inefficiencies or error."

[44] Counsel invited this court to find that the explanations provided are good ones and to accept that there were excusable administrative inefficiencies, including the failure to exchange the witness statement.

[45] The submissions then addressed the issue of whether the party in default had generally complied with all relevant rules, practice directions, orders and directions. Counsel submitted that an unless order by its very nature is usually a last resort because there has been a history of non-compliance. Counsel contended that this requirement would create an almost impossible hurdle for applicants, as even "a couple slight past infringements could have applicants deemed generally non-compliant hence disqualify

them". Counsel submitted that it is the compliance with other rules and directions since the unless order that would be applicable.

[46] Counsel then reviewed the progress of the matter since the claim and application for an interim injunction had been filed. She concluded this exercise with the assertion that there was a great history of non-compliance by both parties. However, she contended that this should not be too heavily relied on as it is non-compliance that necessitated the unless order. Hence, she submitted, it is the general compliance with the unless order itself that should be considered and the question of the nature and significance of the breach and the portion or aspect of the order for which relief is sought that would be very important.

[47] Counsel contended that it appeared that it was the exaggerated nature and level of the breaches of the unless order that misled the learned judge rather than the history. Counsel maintained that the order did not call for the service of the majority of the documents and this failure to serve should not have been "used to exaggerate the non-compliance of the unless order for which the consequences are different from mere non-compliance".

[48] Counsel submitted that the issue of the triviality or seriousness of the breach must be considered. She relied on **Ian Wyche v Careforce Group Plc** [2013] EWHC 3282 in support of this submission. This case, she said, showed that even serious breaches may be entitled to relief from sanctions. Whilst conceding that failure to exchange witness statement is a relatively serious breach 'which could affect trial agenda', counsel

submitted that there was no evidence that this was the sole reason for the trial not to have proceeded.

[49] The submissions continued with a brief consideration of the factors outlined in rule 26.8(3) of the CPR, which were argued together. The thrust of these submissions was that an application for relief from sanctions requires that the judge perform a balancing act and in doing this, the nature of the breach is important. Counsel later submitted that, in the balancing act, the respondents' own behaviour would have assisted in the trial date not being met.

[50] Counsel pointed to the fact that the respondents were aware of the breach from 14 March 2018,s at a time when the trial dates were still intact. Counsel contended that 'opportunism' took over and the respondents awaited the passing of the trial dates. Reliance was placed on **Denton v T H White Ltd** [2014] EWCA 906. Counsel submitted that in that case, the court "warned against litigants opportunistically opposing relief from sanction applications, hoping to take advantage of minor mistakes by opposing parties".

[51] Counsel further complained that at the hearing, the learned judge was encouraged by the attorney-at-law for the respondents to engage in perusing the court records "in a bid to match signatures of one named Horace Tingle, based on purportedly previously signed affidavits and other documents versus a signature of Horace Tingle". It was submitted that the matter of any irregularity was a matter for a specific hearing or application or for trial.

[52] In conclusion, it was submitted that the learned judge took no issue with the promptness of the application since she neither said so nor sought to halt the application on that basis. Rather, the submissions continued, "it was the mistake, misleading and misinterpretation of the evidence and other factors as discussed herein [which] led the learned judge in the wrong direction".

The submissions on behalf of the respondents

[53] The submissions on behalf of the respondents largely mirrored the submissions which were made in the court below. They commenced with a review of the history of the proceedings, to include those in relation to the application for an interim injunction.

[54] It was acknowledged that there had been a failure on its part to comply with the timeline set out in the orders made at the case management conference but all the relevant documents had been filed and served by the time of the hearing on 26 February 2018. Laing J permitted the documents to stand as having been properly filed and served. It was pointed out that up to this time, the appellant had not filed any documents as ordered at the case management conference, hence the unless order was appropriately made.

[55] It was submitted that in considering whether to grant relief from sanctions, the learned judge adhered to the relevant principles and exercised her discretion in a just and equitable manner.

[56] Counsel submitted that the appellant, in arguing that there was no requirement to serve the relevant documents, save that of the witness statements, omitted to note that

the CPR specifically provide for service of these documents on all parties. It was noted that Laing J had ordered standard disclosure which, in and of itself, required that each party discloses to the other party documents that are relevant to the proceedings. The submission then was that it was untenable for counsel to argue that service of such a list of documents was not intended when an order for standard disclosure was made. Counsel referred to the provisions of rule 28.8(2) of the CPR.

[57] It was further submitted that, in any event, failure to comply with even one aspect of the orders constituted a breach and was capable of triggering the sanction imposed by the unless order.

[58] Counsel submitted that by filing the relevant documents in the wrong suit, coupled with the failure to serve all of the documents, the appellant also breached the unless order. Counsel referred to **Kandekore v COK Sodality Co-operative Credit Union Ltd et al** [2018] JMCA App 2, which it was urged is of particular note, as it regards oversight on the part of an attorney-at-law. It was submitted that this court had reasoned that an explanation offered for failure to file points of dispute, that the document had been filed inadvertently in the wrong court, whilst appearing to establish that the failure was unintentional, was not a good explanation.

[59] The submissions continued with a consideration of the provisions of rule 26.8 of the CPR. It was submitted that the appellant failed to satisfy the first requirement that its application was made promptly. It was noted that the oral application, which the appellant asserted had commenced at the hearing for judgment to be entered, lacked

the requisite affidavit in support and thus the timeline could not be at that time but rather would be at the time the formal application with the supporting affidavits was filed. It was pointed out that, in effect, the application was made over two and a half months after the time of the default. Counsel relied on **Pricewaterhouse (a Firm) v HDX 9000 INC** [2016] JMCA 18 in support of this submission.

[60] It was submitted that given the fact that the application was not prompt, the learned judge had no need to further examine the other aspects of the rule.

[61] The submissions continued with a consideration of whether the appellant's explanation was sufficient and whether the default was intentional. It was contended that the explanation was woefully inadequate and did not meet the threshold of being a good explanation for the failure. Counsel relied on **Corey Jackson v Ann Marie Phillips and Priscilla Fisher** in support of this submission.

[62] Finally, counsel conducted a review of the progress of the proceedings and asserted that, in relation to the claim, the appellant had yet to serve an acknowledgment of service and had failed to file its defence within the time stipulated in the rules.

[63] In conclusion, it was submitted that the appellant did not meet the prerequisites for obtaining relief and in the circumstances, the effect of the unless order ought to prevail.

The applicable provisions of the CPR

[64] The provisions of Part 26 of the CPR which deal with case management – the court's powers are relevant to the consideration of this matter.

Rule 26.3(1) provides, inter alia:

> "In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court-
>
> (a) That there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings."

Rule 26.5 provides, inter alia:

> "(1) This rule applies where the court makes an order which includes a term that the statement of case of a party be struck out if the party does not comply with the 'unless order' by the specified date.
>
> (2) Where the party against whom the order was made does not comply with the order, any other party may ask for judgment to be entered and for costs.
>
> (3) A party may obtain judgment under this rule by filing a request for judgment."
>
> ….."

Rule 26.7(1) provides:

> "(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 the sanction, and rule 26.9 shall not apply.

(3) Where a rule, practice direction or order-

(a) requires a party to do something by specified date, and

(b) specifies the consequences of failure to comply, the time for doing the act in question may not be extended by agreement between the parties."

Rule 26.8 (1)

"An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be-

(a) made promptly; and

(b) supported by evidence on affidavit.

(2) The court may grant relief only if it is satisfied that:

(a) the failure to comply was not intentional;

(b) there is a good explanation for the failure; and

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

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

(a) the interests of the administration of justice;

(b) whether the failure to comply was due to the party or 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 of relief or not would have on each party."

[65] It is against the backdrop of these provisions that the appeal must be considered to determine if the learned judge exercised her discretion wrongly. In treating with an application for relief from sanctions pursuant to rule 26.8, the court must first consider whether the preconditions of rule 26.8(1) have been met. If the preconditions are met then the court must consider rule 26.8(2). Thereafter, the conditions under rule 26.8 (3) are general factors to which the court must have regard (see **Morris Astley v The Attorney General of Jamaica and The Board of Management of The Thompson Town High School** [2012] JMCA Civ 64 and **University Hospital Board of Management v Hyacinth Matthews** [2015] JMCA Civ 49).

[66] In **New Falmouth Resorts Limited v National Water Commission** [2018] JMCA Civ 13, Morrison P set out some considerations when dealing with an application for relief from sanctions as follows:

> "[47] ...on an application for relief from sanctions under rule 26.8(2), (i) the court must be satisfied that the particular sanction was properly imposed; (ii) the default position in relation to an 'unless' order, that is, the position that will obtain in the absence of a case for relief from sanctions being made out by the applicant, is that the sanction imposed for

> failure to comply with the order will follow; (iii) if the application is combined with an application to vary or revoke a previous order, that application should generally be considered first; (iv) an applicant for relief from sanctions must comply with all three requirements of rule 26.8(2) as a precondition to obtaining relief; (v) in considering whether that threshold has been crossed, the court must also consider the factors listed in rule 26.8(3), together with any other relevant considerations that will, taking into account the circumstances of the particular case, enable the court to deal with the matter justly; and (vi) the judge hearing the application should demonstrate that he or she has considered and balanced all the factors relevant to the particular case and in keeping with the overriding objective."

Was the sanction properly imposed?

[67] In the submissions made on behalf of the appellant, the issue was raised as to whether the appellant had, in fact, breached the order. I will consider that matter first.

[68] There is no dispute that the parties had failed to comply with the case management orders at the time of the pre-trial review. The appellants had failed to do anything in keeping with the orders and the respondents had failed to comply with the timelines imposed in the orders. In the submissions for the appellant, it was observed that the respondents had benefitted from an order by Laing J to "rectify their infringement".

[69] It is, perhaps, useful to recognise that in those circumstances Laing J, in exercise of his general powers of management, could make orders for the purpose of managing the case and furthering the overriding objective (see rule 26.1(v)). One of the powers Laing J had, was to make an order to put matters right, even without an application by the party (see rule 26.9). Hence the order that the documents filed and served by the

respondent as at that date were to be deemed as properly filed and served was entirely permissible.

[70] It was also fair for the appellant to have been afforded an opportunity to comply with the orders. The imposition of the unless order in these circumstances ought to have impressed upon the appellant the importance of observing the time line, especially with a trial date looming less than two months away.

[71] The appellant has argued that there was no requirement for service of anything other than the witness statements and pointed to the fact that a list of documents had been filed. This was, however, not enough to comply with the order which was for it to comply with standard disclosure, inspection of documents, and for the listing questionnaire to be filed and the witness statements to be filed and exchanged by 12 March 2018.

[72] Part 28 of the CPR, in dealing with disclosure and inspection of documents, provides the following:

> "28.4 (1) Where a party is required by any direction of the court to give standard disclosure that party must disclose all documents which are directly relevant to the matters in question in the proceedings.
>
> ...
>
> 28.8 (1) Paragraphs (2) to (5) set out the procedure for disclosure.
>
> (2) Each party must make, and serve on every party, a list of documents in form 12."

[73] Implicit in these rules is the requirement that the list of documents must be served. The fact that the order for standard disclosure did not specifically call on the appellant to serve the list of documents was not something on which the appellant could rely to assert compliance by only the filing of the list. To be compliant with the order for standard disclosure, the appellant had to make and serve on the respondents a list of documents.

[74] The inspection of documents flows from the serving of the list of documents. It is upon receipt of the list of documents that the other party has the right to inspect any document on the list which the rules allow. The other party would then be able to give written notice of the desire to inspect documents on the list and the inspection would only be facilitated not more than seven days after the notice is received (see rule 28.12 of the CPR).

[75] Having failed to serve the list of documents, the appellant had, in effect, substantially failed to comply with the orders for standard disclosure and inspection. The fact that the list of documents had been filed in the wrong matter compounded the default. The appellant is clearly wrong in maintaining that the filing of the list of documents meant that it was not in breach of the orders.

[76] The filing of the witness statement was, indeed, in partial compliance with the order. However, the fact that it was filed with an incorrect claim number and would not have been placed in the file for this matter somewhat diminishes this attempt to prove compliance. Further, in relation to the witness statement, the appellant complained that the learned judge engaged in an exercise of scrutinising the signature of the witness for

the appellant which appeared on his statement. On even a cursory look at that signature and the signature of the witness on his affidavit filed in opposing the application for interlocutory injunction, the difference is so striking that the learned judge cannot be faulted for finding it necessary to consider the authenticity of the witness statement that had been filed.

[77] The appellant pointed to the fact that a listing questionnaire was also filed on 12 March 2018 albeit with the wrong heading. It cannot escape comment that the listing questionnaire filed was identical to that which had been filed by the respondents, then the 1st and 2nd claimants, save for the changing of the name of the attorney-at-law who had conduct of the matter and who had filed it. This is especially noticeable where in the listing questionnaire, the appellant had responded that it intended to call four witnesses which was the number the respondents had been permitted to call. The appellant had been permitted to call three witnesses at trial and had filed the statement of only one.

[78] The sanction for the non-compliance with the orders made by Laing J properly took effect on 12 March 2018 and the appellant's case was struck out from that date. Counsel complained about the draconian nature of the order, which she said failed to take into consideration the merits of the appellant's case and which could cause it irreparable harm. It is well recognised that the court's coercive power of imposing sanctions is necessary for the court to ensure that its orders and directions are followed. The sanction of striking out is appropriate for the most serious breaches.

[79] In **Barbados Rediffussion Service Limited v Asha Mirchandani and Others (No 2)** (2006) 69 WIR 52, the Caribbean Court of Justice considered the issue of striking out for failure to comply with an unless order. The President, writing on behalf of the court, had this to say:

> "[44] ...A judge dealing with an application to strike out, should start off by reminding himself that to strike out a party's case and so deny him a hearing on the merits, is an extreme step not to be lightly taken. In fact, this is a consideration which should be taken into account by the judge who is asked to make an unless order. He should not use the threat to strike out contained in such an order unless there is a real prospect that non-compliance with the order might warrant the imposition of such an extreme penalty.
>
> ...
>
> [46] With regard to the use of strike out orders as a response to disobedience of court orders, we respectfully disagree (as other courts have done) with the view of Millet J. expressed in the Logicrose case, that such disobedience can never justify the making of a strike out order. We prefer the view expressed by Arden L.J. in the Stolzenberg case that the fact that a fair trial is still possible, does not preclude a court from making a strike out order. We accept with some qualifications the principle expounded and applied in cases such as Trolley v Morris (supra), Hytec Information Systems Ltd v Coventry City Council (supra) and Re: Jokai Tea. Holdings Ltd. (supra), that defiant and persistent refusal to comply with an order of the Court, can justify the making of a strike out order. While the general purpose of the order in such circumstances may be described as punitive, it is to be seen not as retribution for some offence given to the court but as a necessary and to some extent symbolic response to a challenge to the court's authority, in circumstances in which failure to make a response might encourage others to disobey court orders and tend to undermine the rule of law. This is the type of disobedience that may properly be categorised as contumelious or contumacious.

> [47] ...What is required is a balancing act in which account is taken of all the relevant facts and circumstances of the case. For one thing it must be recognised that even within the range of conduct that may be described as contumelious, there are different degrees of defiance which cannot be assessed without examining the reason for non-compliance. No doubt the fact that what has been breached is an unless order has a special significance, as such an order is framed in peremptory terms which make it clear to the party to whom it is directed, that he is being given a last chance. The previous conduct of the defaulting party will obviously be relevant, especially if it discloses a pattern of defiance. It is also relevant whether the non-compliance with the order was total or partial. Normally it will not assist the party in default to show that the non-compliance was due to the fault of his lawyer since as already stated the consequences of the lawyer's acts or omissions are as a rule visited on his client. There may be an exception made, however, when the other party has suffered no prejudice as a result of the non-compliance."

[80] The appellant was well aware that the unless order afforded it an opportunity to comply with the case management orders in time to meet the trial date and was well aware of the consequence for failing to do so. The sanction, to my mind, was properly imposed.

Whether the application was made promptly

[81] In **H B Ramsay & Associates Ltd et al v Jamaica Redevelopment Foundation Inc et al** [2013] JMCA Civ 1, Brooks JA, writing on behalf of the court, stated the following:

> "[10] ….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.
>
> ...

> [14] In addressing the matter of promptitude in the instant case [counsel] on behalf of the appellants, submitted that "[p]romptitude cannot be assessed without taking into account the state of mind of the applicant". That submission was a part of a wider submission that the assessment of whether the application was made promptly, should take into account the time at which the applicant became aware of the default, and not at which the default occurred. I find that the submission does not have much force in the context of a sanction that is applied pursuant to an "unless order". **Where such orders are made, the party affected is given notice of the requirement and the penalty for non-compliance. The deadline for compliance should therefore, be uppermost in his mind**." (Emphasis mine)

[82] The attorney-at-law for the appellant was present when the unless order was made. The trial date had previously been set for 4, 5 and 6 April 2018 and counsel was present when that was done. This is an instance where the deadline for compliance should have been uppermost in its mind. It seems to me that if counsel was preparing to meet the trial date, she would, at least, have realised that the statement of the witness for the appellant had not been served. It is, therefore, curious that counsel should be content to assert that what she describes as the infringements were brought to her attention a few days prior to 25 April 2018, when there was to be a hearing of the application for judgment to be entered.

[83] Having been served with the application for judgment to be entered, the appellant ought to have made an application for relief from sanction, pursuant to rule 26.7(2) of the CPR to avoid the consequence of the breach. Counsel submitted that there was no need for a formal application and that the submissions commenced in opposition to the application for judgment to be entered was an attempt to ventilate the issues surrounding the sanction. Counsel found support for the submission in **Cutler Barnet** v

London Borough Council, where the court considered whether an application for relief from sanctions could be considered in the absence of a formal application. It was held that the absence of a formal application was not conclusive and that neither CPR 3.9 nor 3.8 of the English rule requires the application to be made in writing.

[84] Rule 3.9 of the English CPR, which deals with relief from sanctions, states:

> "(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need-
>
> (a) for litigation to be conducted efficiently and at proportionate cost; and
>
> (b) to enforce compliance with rules, practice directions and orders.
>
> (2) An application for relief must be supported by evidence."

The court, in holding that the absence of a formal application did not conclude the matter, went on to observe that the oral application for relief was supported by a statement of the appellant's counsel.

[85] Our rules expressly provide that the application for relief from sanctions must be supported by evidence on affidavit. To be supportive of the application, the affidavit ought to address the issues which the court would be obliged to consider in determining whether to grant relief. The contents of the affidavit, filed by counsel in response to the application for entry of judgment, were deficient in that regard. At that time, counsel was content

with establishing that there had been compliance with the order by the filing of the documents "albeit with significant anomalies".

[86] The appellant, having failed to fully comply with any of the orders in anticipation of the trial date on 4 April 2018, when served with the respondents' application for judgment to be entered, did not appreciate the need for an application for relief from sanctions. There was already a delay in making the application of over one month when the application for entry of judgment came on for hearing. After the hearing had commenced and counsel for the appellant came to appreciate the need for an application for relief from sanctions, there was a further delay of over a month before the application was filed on 7 June 2018. The application was not made promptly in the circumstances.

[87] It would have been open to the learned judge, therefore, to find that the application had not been made promptly. On that basis, the applicant would not have been entitled to relief from sanctions. Although this finding would be sufficient to dispose of this appeal I will, nevertheless, go on to consider the other requirements of rule 26.8(2).

Whether the failure to comply was not intentional

[88] It is clear from the submissions that the appellant was satisfied that the filing of the list of documents was sufficient to comply with one aspect of the order. It could be presumed from this that the appellant intentionally did not serve the list of documents due to the erroneous belief that it was not necessary to do so.

Unfortunately, up to the time of this appeal, counsel still points to the filing of the pre-trial memorandum as done in an effort to be compliant, when it was not a part of the order. However, the submission that the appellant's action in filing all the documents on the prescribed date is proof that there never was an intention to disobey the order, will be accepted. On this basis, I will hold, in the appellant's favour, that the breach was not intentional.

Whether there is a good explanation for the failure

[89] The explanations offered for the failure to comply with the order were set out as being oversight, mere inadvertence, administrative inefficiencies or error and confusion due to existence of another matter involving the parties.

[90] In **Attorney General v Universal Projects Ltd** [2011] UKPC 37, Lord Dyson, who delivered the decision of the Board, had this to say :

> "[23]...To describe a good explanation as one which 'properly' explains how the breach came about simply begs the question of what is a 'proper' explanation. Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly if the explanation for the breach is administrative inefficiency."

[91] In the circumstances, where the appellant had failed to comply with the case management orders that were eventually made subject to an unless order, it is hard to accept that any explanation that showed the absence of attention or care in following up on the order can be accepted as being a good one. This, to my mind, is a case of

inexcusable oversight and the administrative inefficiency in these circumstances is equally inexcusable.

[92] Even if it is accepted that the failure to comply may not have been intentional, there has been no good explanation offered for the breaches.

Whether the appellant has generally complied with all other orders, rules and directions

[93] The appellant has accepted that in the progress of this matter through the courts it had not been fully compliant with all the orders, rules and directions. It has also been accepted that the fact of this failure is what led to the imposition of the unless order.

[94] It was urged that it is the general compliance with the unless order that should be considered along with the nature and significance of the breaches. In that regard, it has been demonstrated that the appellant was wrong in assuming that the filing of the list of documents was sufficient to comply with the orders for standard disclosure and inspection. There is no doubt that the disclosure and inspection of documents important parts of the process for the proper preparation for trial. Failure to comply with those orders, therefore, represents a serious breach. The appellant has accepted that the failure to serve the witness statement was important for the smooth and efficient progression of the matter. This was another breach that was of a serious nature.

[95] I accept the respondents' submission that there has been a general history of non-compliance during the course of proceedings prior to the imposition of the unless order. The appellant has properly conceded that there had been a history of non-compliance,

which was what had caused the imposition of the unless order. Ultimately, the learned judge would not have been incorrect for finding that there had not been general compliance prior to the application of the sanction.

Whether the respondents were opportunistic

[96] Before final disposition of the matter, I feel compelled to address this issue given what counsel for the appellant had identified as a challenge to a finding in law that "the learned judge had failed to accept the principle of opportunism by counsel for the respondents though glaring". In making the submissions relative to this issue, counsel relied on the observations of the English Court of Appeal in **Denton v T H White Ltd.**

[97] Counsel contended that Dyson MR and Vos LJ chided opportunism and warned against litigants opportunistically opposing relief from sanctions applications, hoping to take advantage of minor mistakes by opposing parties. Counsel pointed to the following as stated at paprgraphs 41 and 43 :-

> "41. We think we should make it plain that it is wholly inappropriate for litigants or their lawyers to take advantage of mistakes made by opposing parties in the hope that relief from sanctions will be denied and that they will obtain a windfall strike out or litigation advantage. In a case where (a) the failure can be seen to be neither serious nor significant, (b) where a good reason demonstrated, or (c) where it is otherwise obvious that relief from sanctions is appropriate, parties should agree that relief from sanctions be granted without the need for further costs to be expended in satellite litigation. The parties should in any event be ready to agree limited but reasonable extensions of time up to 28 days as envisaged by the new rule 3.8(4).
>
> ...

> 43. The court will be more ready in the future to penalise opportunism. The duty of care owed by a legal representative to his client takes account of the fact that litigants are required to help the court to further the overriding objective. Representatives should bear this important obligation to the court in mind when considering whether to advise their clients to adopt an uncooperative attitude in unreasonably opposing applications for relief from sanctions. It is unacceptable for a party to try to take advantage of a minor inadvertent error, as it is for rules, orders and practice directions to be breached in the first place. Heavy costs sanctions should, therefore, be imposed on parties who behave unreasonably in refusing to agree extensions of time or unreasonably oppose applications for relief from sanctions."

[98] It is to be recognised that the court in that case was tasked with giving clarification and amplification of the correct approach to the rule which deals with relief from sanctions. The rule as set out in paragraph [84] above differs significantly from our rule.

[99] In any event, an obvious flaw in the reliance that the appellant has placed on **Denton v T H White** is the fact that this is not a matter where the breaches of the appellant can be regarded as being neither serious or significant. The failure to comply with the unless order meant that the appellants case had been struck off. This was not a matter in which the respondent could co-operate and agree to any extension for the appellant to comply with the orders.

[100] At paragraph [42] of **Denton v T H White**, the following comment was made:-

> "42. It should be very much the exceptional case where a contested application for relief from sanctions is necessary. This is for two reasons: first because compliance should become the norm, rather than the exception as it was in the past, and secondly, because the parties should work together

> to make sure, that in all but the most serious cases, satellite litigation is avoided even where a breach has occurred."

[101] There was no way to avoid a contested application for relief from sanctions in this case. The claim was struck out by virtue of the unless order and the respondents' application for judgment after the striking out had predated the appellant's application for relief from sanctions. The appellant had failed to comply and clearly did not even appreciate what was required to be done to be in compliance. It therefore did not appreciate the significance and seriousness of the breach. Once the date for compliance had passed and the appellant's case was struck off and the trial date had passed with no step being taken to rectify the situation, the respondents cannot be regarded as taking advantage of the appellant's mistake when they applied for judgment to be entered in their favour. The appellant's contention that the respondents were opportunistic is without merit.

Conclusion

[102] The appellant had failed to promptly make its application for relief from the sanction imposed for its non-compliance with the court orders. It had also failed to satisfy the requirements set out in rule 26.8(2) of the CPR. The learned judge therefore properly exercised her discretion when she refused the application for relief from sanctions. There is no legal basis for this court to disturb her decision.

[103] In conclusion, I am of the view that the appeal ought to be dismissed, with costs to the respondents to be agreed or taxed.

FOSTER-PUSEY JA

[104] I too have read the draft judgment of my sister P Williams JA and agree with her reasoning and conclusion.

MCDONALD-BISHOP JA

ORDER

Appeal dismissed. Costs to the respondents to be agreed or taxed.