[2015] JMCA Civ 49

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 12/2015

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA (AG)

BETWEEN	**UNIVERSITY HOSPITAL BOARD OF MANAGEMENT**	**APPELLANT**
AND	**HYACINTH MATTHEWS**	**RESPONDENT**

Written submissions filed by Myers Fletcher & Gordon for the appellant

Written submissions filed by Richard Bonner & Associates for the respondent

2 October 2015

PROCEDURAL APPEAL

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

MORRISON JA

[1] I have had the opportunity of reading the draft judgment of my learned sister Phillips JA. I agree with her reasoning and conclusions and there is nothing that I can usefully add.

PHILLIPS JA

[2] This is an appeal, against the decision of Batts J, dated 27 January 2015, in which he granted the respondent relief from sanctions, from the order of F Williams J dated 17 March 2014, striking out the respondent's statement of case. Batts J made certain consequential case management orders, fixing dates for pre-trial review, the trial and the submission of an expert report. He granted leave to appeal.

Background

[3] The respondent filed a claim against the appellant in negligence pertaining to a surgical procedure resulting in a total abdominal hysterectomy and in respect of certain complications which followed. The claim was filed on 4 December 2003 while the amended particulars of claim was filed on 28 November 2006.

[4] A case management conference was held on 22 June 2005, where witness statements and medical reports were ordered to be filed by 29 September 2006 and the trial scheduled for 19 May 2008. On the day scheduled for trial, the court was informed that the respondent was unable to attend court as she was ill. A medical report was presented to the court. The trial was then adjourned to 14 to 16 January 2009. On 14 January 2009, the respondent was absent for reasons similar to that pertaining to the previous court date. The trial was adjourned to 8 to 11 February 2010.

[5] When the matter came up for hearing on 8 February 2010, the respondent and her then attorney-at-law were absent. The trial was on that day adjourned to 10 February 2010, however the respondent and her attorney were again absent. Anderson

J ordered that the matter be adjourned for a date to be fixed by the registrar and that the respondent, through her attorney-at-law, was to ensure that a trial date was set within 12 months of the date of that order. Another attorney-at-law was then approached to conduct the matter; however he subsequently left the island.

[6] On 6 May 2011, the appellant filed a notice of application seeking summary judgment against the respondent and that the respondent's statement of case be struck out. That application was made on the ground that the respondent had failed to comply with the court order dated 10 February 2010, namely to ensure that a trial date was fixed within 12 months of the date of that order. That application was heard on 6 March 2013 by Edwards J. The respondent was absent from the hearing but was represented by counsel.

[7] On that day, after hearing counsel Mr Krishna Desai for the appellant and Mr Lawrence Philpotts-Brown and Mr Richard Bonner, for the respondent, Edwards J made the following orders:

> "1. The time for the Claimant to file and serve the Notice of Application for Court Orders dated and filed on March 5, 2013 and the supporting affidavit of Richard Bonner dated and filed on March 5, 2013 is hereby abridged. The Notice of Application for Court Orders and Affidavit are allowed to stand as filed.
>
> 2. The Defendant's application to strike out the Claimant's claim is not granted.
>
> 3 The Defendant's application for summary judgment against the Claimant is not granted.

4. The Claimant is relieved from sanctions for failing to comply with the Order of the Hon. Mr. Justice Anderson made on February 10, 2010.

5. The trial of this matter is set for the 17th, 18th, and 19th of March 2014.

6. Unless the Claimant attends the trial to give evidence her statement of case stands struck out.

7. The Claimant is ordered to file and serve any expert medical opinion intended to be relied on at trial on or before December 20, 2013.

8. …

9. …"

[8] On 17 March 2014, the date fixed for the hearing of the matter, counsel for the respondent was present in court however the respondent was absent. Consequently, pursuant to order no 6, stated above, the respondent's statement of case was struck out.

[9] On 24 March 2014, the respondent filed a notice of application for court orders seeking relief from sanctions under rule 26.8 of the Civil Procedure Rules (CPR). The application was supported by two affidavits, deponed to by the respondent and Mr Richard Bonner. The respondent sought to have the order dated 17 March 2014 set aside, the statement of case restored, and an extension of time granted within which to file and serve a further expert medical report in order to prosecute her claim. The notice of application came up for hearing on two occasions, but was adjourned. The application was subsequently heard by Batts J on 27 January 2015, when he made the order granting relief from sanction as aforesaid.

[10] The relevant portion of the affidavits in support of the application for relief from sanction set out the respondent's position as outlined below.

Affidavit of Hyacinth Matthews sworn to on 24 March 2014, in part, as follows:

> "3. That I am informed by my said attorneys-at-Law and verily believe that on the 6th day of March, 2013, pursuant to an Order of this Honourable Court and in particular paragraph 6 of the said order made by Ms. Justice C. Edwards that should I fail to attend the trial fixed for hearing on the 17th day of March, 2014 the Claimant's statement of Case would stand struck out.
>
> 4. That on the said occasion I was not present and therefore would be unaware of the said Order.
>
> 5. That upon the coming on for hearing of this matter for trial on the 17th day of March, 2014 which was fixed by the aforesaid Order of this Honourable Court I was only informed that I should attend the hearing by my said attorney on the said 17th day of March, 2014 at about 10:30 a.m., and by the time I attended the Supreme Court at about 11:30 a.m. I was informed that my case had been struck out.
>
> 6. That my non attendance was intentional but occurred for the reasons outlined above."

The affidavit of Richard Bonner sworn to on 24 March 2014 …

> "15. That the delay and non-compliance with the order of the Court made on February 10, 2010 was not intentional but was due to a number of circumstances:-
>
> a) The Claimant's Attorney-at-law on the record was struck from the roll of Attorneys and was no longer entitled to practice law in Jamaica;
>
> b) That access to the relevant file of the Claimant was challenging given the situation mentioned at (a) above;

c) That Mr. Terrence Ballantyne who had been approached to have conduct of the matter subsequently left the island;

16. …

17. That on the said 6th day of March, 2013 this Honourable Court made certain Orders including firstly: That unless Claimant attends trial to give evidence, her statement of Claim shall stand struck out. Secondly: Trial dates were fixed for the 17, 18, and 19th day of March 2014, and Thirdly: That the Claimant is Ordered is ordered [sic] to file and serve any Expert Medical Opinion intended to be relied on, on or before December 20, 2013.

18. That I only informed the Claimant of the date fixed for trial on the said 17th day of March, 2014 including inadvertence on my part, due to my having checked the Supreme Court's Civil List and saw no listing of the matter for hearing, and generally due to the pressure of work.

19. That further had the Claimant attended the hearing the matter would still would [sic] not have proceeded, since the Defendant had failed and or neglected to provide the Claimant's attorneys-at-Law with the necessary information to prepare the expert witness report which had been ordered by this Honourable Court on the said 6th of March, 2014.

20. That my informing the Claimant to attend the trial on the said morning of the trial was not deliberate but due to inadvertence.

21. That I crave leave to refer to the Claimant's Claim Form and Particulars of Claim and say that it discloses that the Claimant has a real prospect for prosecuting the Claim., [sic] I do not believe that the Defendant will be prejudice in any way if the matter is restored to the List and she is allowed to prosecute her case.

22. …

23. That by letter dated 28th January, 2014 I wrote to the Defendant's Attorney-at-Law informing them that the Medical Expert instructed us that there were certain pages missing from the Doctor's Surgical Note, and that several requests had been made to the said Attorneys for a full report of the said Surgical Notes, which are still not forth-coming,. [sic] …

24. That I have also previously requested from the Defendant's Attorney-at-Law a full copy of the Post Operative Surgical Notes which we have been asking for form [sic] September 3, 2013, and that surgical notes were delivered to me which was handed to the medical expert for the preparation of his medical opinion, but the [sic] informed me on closer examination that there were certain pages still missing from the post operative surgical notes. And moreover it would not be possible for him to complete his medical opinion by the 20th of December, 2014 as ordered by this Honourable Court. Accordingly I hereby seek an extension of time to comply with the Order of the Court made on the 6th of March, 2013."

[11] After hearing Mrs Alexis Robinson for the appellant and Mr Lawrence Philpotts Brown and Mr Richard Bonner for the respondent, Batts J granted the application sought and as indicated he also granted the appellant leave to appeal. On 5 February 2015, the appellant filed notice of procedural appeal based on seven grounds of appeal as set out below:

"(1) The learned judge erred by exercising a discretion that did not arise.

(2) The learned judge erred in distinguishing and not following **H. B. Ramsay et al v Jamaica Re-development Foundation**, **Inc et al** [2013] JMCA Civ 1.

(3) The learned judge erred in finding that the Respondent had met the threshold test in Rule 26.8(2) of the CPR.

(4) The learned judge erred in taking into account the factors listed in Rule 26.8(3) of the CPR without first ensuring that the Respondent had met the threshold test in Rule 26.8(2) of the CPR.

(5) Alternatively, the learned judge erred in exercising his discretion in favour of the respondent in light of the factors listed in Rule 26.8(3) of the CPR.

(6) The learned judge erred by granting relief from sanctions in the light of his correct finding that the Respondent was still not ready for trial, 13 years after the alleged incident.

(7) The learned judge erred in making the order for relief from sanctions without the file as he was not sufficiently seized of the proceedings to date."

Counsel grouped the grounds of appeal in the following way and argued them accordingly: grounds 1 and 2, grounds 3 and 7, grounds 4 and 5 and ground 6. I have adopted a similar approach for ease of reference and convenience.

Submissions of the appellant

Grounds 1 & 2

[12] Counsel for the appellant submitted that rule 26.8(2) of the CPR sets out preconditions which must be satisfied before consideration can be given to rule 26.8(3). In making that submission counsel relied on **H B Ramsay & Associates Ltd et al v Jamaica Redevelopment Foundation Inc** [2013] JMCA Civ 1. Counsel further submitted that **International Hotels Jamaica Ltd v New Falmouth Resorts Ltd** SCCA Nos 56 & 95/2003 judgment delivered 18 November 2005, was in line with that

approach. On the other hand counsel submitted that **Villa Mora Cottages Limited & Anor v Adele Shtern** SCCA No 49/2006 judgment delivered 14 December 2007, went far beyond the principles enunciated in the two previous cases.

[13] Counsel submitted that **International Hotels Jamaica Ltd** and **Villa Mora Cottages Limited** were transitional cases (commenced before the 2002 CPR was enacted), as identified by Brooks JA at paragraph [13] in **H B Ramsay & Associates**. Counsel thus submitted that **H B Ramsay & Associates** ought to be followed as it had benefited from the CPR, from the outset. Additionally, counsel submitted that in **International Hotels Jamaica Ltd** and **Villa Mora Cottages Limited**, the primary test in rule 26.8(2) had been met, whereas in **H B Ramsay & Associates** the defaulting party had failed to meet the requirements of rule 26.8(2), which was similar to the case at bar, which was why counsel argued that **H B Ramsay & Associates** was applicable.

Grounds 3 & 7

[14] Counsel for the appellant submitted that the respondent's own affidavit evidence was that her failure to comply with the unless order was intentional. Thus the learned judge's finding that the failure to comply was unintentional was unsafe and ought to be overturned. Counsel also submitted that the respondent's explanation that she had not been informed of the court dates by her attorneys and the attorneys' claim of inadvertence was not a good explanation for the respondent's failure to attend court on the day the statement of case had been struck out. Counsel argued that if the court

were to hold that as a good explanation for delays based on the evidence that was before the court, then litigators would simply blame their overworked attorneys and the inefficiencies of the Supreme Court's registry for their failure to comply with the rules which resulted in the unless orders being imposed. It was also counsel's contention that "inadvertence" was a conclusion to be drawn and not an explanation in itself, referring to the dictum of Brooks JA in **H B Ramsay & Associates** and of Lord Dyson delivering the speech in the Privy Council case **The Attorney General v Universal Projects Limited** [2011] UKPC 37, in which he stated that it would be difficult to see how inexcusable oversight could amount to a good explanation.

[15] Further, counsel submitted, it could not be said that the respondent had generally complied with all relevant rules, practice directions and court orders and the learned judge's finding in that regard was therefore wrong and ought to be overturned. Counsel submitted that the respondent's failure to comply with rules and court orders was evident from the applications made to the court below and the orders granted, as set out in the affidavit of Richard Bonner in support of the application for relief from sanction, filed on behalf of the respondent in the court below. Counsel also submitted that the unless order had been made as a result of the respondent's general non compliance.

Grounds 4, 5 & 6

[16] Counsel maintained that the learned judge may have felt that the respondent had a good explanation because the failure to comply with the unless order was due to

the failure of the attorneys. However, that was a factor to be examined under rule 26.8(3) of the CPR which only arose for consideration when the threshold of rule 26.8(2) had been crossed. Thus, the learned judge was wrong to have considered the provisions of rule 26.8(3) when the respondent had failed to satisfy the requirements of rule 26.8(2) of the CPR.

[17] Counsel submitted that alternately, if the factors listed in rule 26.8(3) ought to have been considered the learned judge had erred in exercising his discretion in favour of the respondent. Counsel argued that that was due to the failure of the respondent to comply with the orders; not having been able to remedy the situation within a reasonable time; and the fact that the trial date was already missed. Further, counsel pointed out that the effect on the appellant was that it would have to defend the actions of its employees which had taken place over 14 years ago, and the respondent was still not ready for trial.

Submissions of the respondent

[18] Counsel for the respondent submitted that the appellant had not filed an affidavit to challenge the respondent's application for relief from sanction. Thus, when the matter was heard there was no evidence to contradict the affidavits in support of the application. Counsel for the respondent submitted that the affidavit(s) indicated that the failure to comply with the order was not intentional and that there was a good explanation for that failure and that the respondent had generally complied with all other relevant rules, practice directions and orders. Additionally, counsel for the

respondent contended that the application seeking relief from sanctions had been promptly made.

[19] Counsel submitted that it was well established that the court will not lightly interfere with the exercise of a discretion by a judge of the lower court on an interlocutory hearing, and referred to the dictum of Morrison JA on behalf of the court in **Attorney General of Jamaica v John McKay** [2012] JMCA App 2 and Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042.

[20] With regard to grounds 1 and 2, counsel for the respondent submitted that the learned judge had correctly exercised his discretion when he granted the application sought by the respondent, having correctly taken into account the factors prescribed in rule 26.8(3) when considering the elements outlined in rule 26.8(2). Thus, counsel submitted, it was an incorrect understanding of the law that a court should consider only the factors set out in rule 26.8(2) of the CPR on an application for relief from sanctions and that should any of those factors not be met, the discretion of the court in respect of rule 26.8(3) would not arise.

[21] Counsel based the above submission on what he said was the reasoning of the court in **International Hotels Jamaica Ltd**. He submitted that McCalla JA (Ag) (as she then was) had opined that despite one of the factors not being sufficient to grant relief from sanctions, where it had not been shown that the explanation given was not genuine, the court would proceed to consider all the factors in rule 26.8(2) and 26.8

(3). Counsel further submitted that the learned judge of appeal had stated that "...in considering whether to grant relief the learned judge [in the court below] was required to have regard to all matters stipulated in rule 26.8(3)" and also emphasized "the need for tribunals, at first instance to demonstrate compliance with rules 26.8(2) and 26.8(3) of the CPR." Counsel posited that the stance taken by Harris JA in **Villa Mora Cottages Limited** was entirely consistent with the statements made by McCalla JA (Ag) in **International Hotels Jamaica Ltd**. Counsel therefore argued that it was incumbent on the learned judge to examine all the circumstances of the case, bearing in mind the overriding principle with regard to dealing with cases justly, which would, he said, in any event, require the court to address systematically all the factors outlined in rule 26.8(3) of the CPR. He relied on **R C Residuals v Linton Fuel Oil** [2002] 1 WLR 2782 in support of this submission.

[22] Counsel sought to distinguish **H B Ramsay & Associates** from the case at bar. He submitted that in **H B Ramsay & Associates**, the court had found that the appellants had failed to make their application promptly and had given no explanation for their delay. On the other hand, counsel submitted that in the case at bar the respondent's application for relief from sanction had been made promptly and that the explanation given by counsel for the delay was never challenged by the appellant. Moreover, counsel also argued that **H B Ramsay & Associates** could be considered to have been decided *per incuriam* since the court did not have the opportunity of considering **Villa Mora Cottages Limited**, and counsel contended further that in **H B Ramsay & Associates**, the court was dealing with dilatory applications *simplicter* and

in those circumstances the court may have been more likely to have taken a more stringent approach. Counsel also submitted that the law lords in the Privy Council did not consider **Villa Mora Cottages Limited** or **International Hotels Jamaica Ltd** hence that case could also have been "decided *per incuriam* at least as it applies to Jamaica".

[23] With regard to grounds 3 and 7, counsel submitted that when the affidavit is read in its entirety, it is patently obvious that an omission had been made in paragraph 6 of the respondent's affidavit (set out in paragraph [10] herein) which was never raised at the hearing of the application for relief from sanctions. Counsel further argued that the explanation for the failure to comply was sufficient and at no time had it been suggested by affidavit evidence that the explanation was not genuine. It was therefore contended that it was reasonable for the court below, in accordance with **International Hotels Jamaica Ltd**, to have accepted the explanation offered as meeting the requirements of the rules. Further, counsel for the respondent submitted that there had been general compliance with the rules and practice directions, and pointed out that the extension of time needed by the respondent to file and serve a medical report was due to the appellant's failure to provide full disclosure in respect of the surgical notes, with the added difficulty of endeavoring to obtain a medical practitioner ready and willing to prepare the necessary report.

Issues

[24] In my view, the main issues to be decided on this appeal are:

(i) the proper interpretation to be accorded rule 26.8 of the CPR;

(ii) whether the provisions of rule 26.8(1) and (2) of the CPR represent threshold tests, that the respondent would have had to satisfy before the court could systematically examine the factors set out in rule 26.8(3) of the CPR; and

(iii) whether the learned judge ought to have exercised his discretion in the circumstances of this case to grant relief from sanctions.

Rule 26.8 of the CPR

[25] Rule 26.8 which sets out the conditions which must be satisfied in order for the court to grant relief from sanctions provides as follows:

> "26.8 (1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –
> (a) made promptly; and
> (b) supported by evidence on affidavit.
>
> (2) The court may grant relief only if it is satisfied that –
> (a) the failure to comply was not intentional;
> (b) there is a good explanation for the failure; and
> (c) the party in default has generally complied with all other relevant rules, practice directions [,] orders and directions.
>
> (3) In considering whether to grant relief, the court must have regard to-

(a) the interests of the administration of justice;
(b) whether the failure to comply was due to the party or that party's attorney-at-law;
(c) whether the failure to comply has been or can be remedied within a reasonable time;
(d) whether the trial date or any likely trial date can still be met if relief is granted; and
(e) the effect which the granting of relief or not would have on each party.

(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."

Analysis and discussion

[26] I must state at the outset that in keeping with the principles set out in several cases in this court, and recently by Morrison JA on behalf of the court in **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1, it is well settled that the Court of Appeal will not interfere to set aside the decision of the lower court, save in certain circumstances. Morrison JA (as he then was) referred to the oft cited dictum of Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 ALL ER 1042, 1046 where Lord Diplock stated that:

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

[27] Morrison JA then outlined the circumstances in the exercise of a trial judge's discretion which would warrant the interference of the appellate court.

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

On the basis of the foregoing, the court will not interfere with the decision of the learned judge unless it is demonstrated to be judicially incorrect, or "palpably wrong".

Issues (i) the proper interpretation to be accorded rule 26.8 of the CPR; and (ii) whether the provisions of rule 26.8(1) and (2) of the CPR represent threshold tests, that the respondent would have had to satisfy before the court could systematically examine the factors set out in rule 26.8(3) of the CPR.

[28] The arguments of counsel for the appellant and for the respondent in respect of the interpretation and application of rule 26.8 of the CPR focused mainly on three cases, namely; **International Hotels Jamaica Ltd**, **Villa Mora Cottages Limited** and **H B Ramsay & Associates**. I will examine all three cases, my emphasis being on the true and proper interpretation to be accorded to rule 26.8.

[29] In **International Hotels Jamaica Ltd**, the court was reviewing the order of Brooks J (as he then was) who had upheld an order at trial that the defence of the appellant which stood struck out by a previous order should remain struck out. The court examined rule 26.8(1) and (2) of the CPR and concluded that these conditions must be considered cumulatively in order to satisfy a primary test. In reviewing rule

26.8(3), Harrison JA (as he then was) said these are mitigatory factors which could influence favourably or otherwise the grant of relief from sanctions.

[30] In my view, contrary to submissions of counsel for the respondent, **International Hotels Jamaica Ltd** does not proffer principles different from those postulated in **H B Ramsay & Associates**. There is nothing stated in that case to support the respondent's submission that **International Hotels Jamaica Ltd** promulgates that the factors in rule 26.8(2) and (3) of the CPR should be considered together.

[31] **Villa Mora Cottages Limited** was heavily relied on by counsel for the respondent. This case was an appeal from the decision of McDonald Bishop J (Ag) (as she then was) who had refused the appellant leave to extend the time within which to file witness statements and had further refused to restore their defence which had been struck out. In that appeal, Harris JA at page 10, on behalf of the court had stated that:

> "It cannot be disputed that orders and rules of the Court must be obeyed. A party's non-compliance with a rule or an order of the Court may preclude him from continuing litigation. This, however, must be balanced against the principle that a litigant is entitled to have his case heard on the merits. As a consequence, a litigant ought not to be deprived of the right to pursue his case.
>
> The function of the Court is to do justice."

[32] The learned judge of appeal then quoted Wooding CJ in **Baptiste v Supersad** and **Montrose** (1967) 12 WIR 140 at 144, where he stated that:

> "The law is not a game, nor is the court an arena. It is… the function and duty of a judge to see that justice is done as far as may be according to the merits."

Harris JA concluded that paragraph by stating that:

> "In its dispensation of justice, the Court must engage in a balancing exercise and seek to do what is just and reasonable in the circumstances of each case, in accordance with Rule 1 of the C.P.R. A court, in the performance of such exercise, may rectify any mischief created by the non compliance with any of its rules or orders."

[33] These statements are simple, straightforward, unambiguous and cannot be doubted. Indeed, the above dicta of Harris JA clearly reflect the role and function of the court in the exercise of its discretion in the grant of orders and judgments, and set out the ambit within which the court ought to function.

[34] In **Villa Mora Cottages Limited**, the court considered **R C Residual Limited v Linton Fuel Oils Limited & Anor** [2002] 1 WLR 2782 which was interpreting rule 3.9 of the English CPR. In that case the appellant sought relief from sanctions where it had been precluded from relying on an expert's evidence following failure to comply with an order. That order provided that unless the appellant filed and served the expert report by 4:00 pm on 2 April 2002, it would be precluded from relying on that expert's evidence at the trial. Rule 3.9 of the English CPR, although similar in some respects to rule 26.8 of the Jamaican CPR, is significantly different in others.

[35] Rule 3.9 of the English CPR states as follows:

> "**3.9**—(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 including—

(a) the interests of the administration of justice;

(b) whether the application for relief has been made promptly;

(c) whether the failure to comply was intentional;

(d) whether there is a good explanation for the failure;

(e) the extent to which the party in default has complied with other rules, practice directions, and court orders and any relevant pre-action protocol;

(f) whether the failure to comply was caused by the party or his legal representative;

(g) whether the trial date or the likely date can still be met if relief is granted;

(h) the effect which the failure to comply had on each party; and

(i) the effect which the granting of relief would have on each party.

(2) An application for relief must be supported by evidence."

[36] Rule 3.9 therefore, clearly groups together all the factors which the court will consider in granting relief from sanctions into sub paragraphs (a) to (i) with paragraph (2) requiring that the application must be supported by evidence. On the other hand the Jamaican counterpart, rule 26.8 of the CPR, albeit similar in the wording, is divided into three separate paragraphs. Due to the umbrella words of each paragraph, they fall for consideration at different stages when considering whether to grant relief from sanctions. Paragraph 26.8(1) (which requires the application to be made promptly and to be supported by evidence) 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) states

three specific factors that must be in effect in order for the court to grant relief, and in circumstances 'only if it is satisfied…" As a consequence, the matters set out therein must be satisfied before the court can consider the factors set out in rule 26.8(3). Put another way, any failure to satisfy those factors precludes the consideration of the court under rule 26.8(3).

[37] Consequently, in my view, rule 3.9 of the English CPR sets out a different regime from that of rule 26.8 of the Jamaican CPR, in that under the English provision, once the court is considering the application for relief from sanctions it must consider all the factors stated therein cumulatively and simultaneously.

[38] The learned judge of appeal noted at page 14 of the judgment that:

> "The discretionary power conferred on the Court under Rule 26.8 renders it obligatory on the part of a judge, in giving consideration to Rule 26.8(2) to pay due regard to the provisions of Rule 26.8(3). In determining whether to grant or refuse an application for relief from sanctions, it is incumbent on the judge to examine all the circumstances of the case bearing in mind the overriding principles of dealing with cases justly. In so doing, he or she must systematically take into account the requisite factors specified in Rule 26.8(3)."

Having reviewed **R C Residual Limited v Linton Fuel Oils** in **Villa Mora Cottages Limited**, she concluded at page 16 that:

> "In the present case, it appears to me that the learned judge had misapplied Rule 26.8(2). It is manifest that in examining the factors outlined in Rule 26.8(2) due attention must be given to Rule 26.8(3). The learned judge had not systematically given consideration to the relevant factors as prescribed by Rule 26.8(3). This she was bound to do."

[39] With the greatest of respect to Harris JA in **Villa Mora Cottages Limited**, this approach appears to me to state the court's powers under rule 26.8 more widely than is justified by the clear language of the rule itself. Thus, in my view, in granting relief from sanctions, the court in this jurisdiction ought not to consider the elements set out in rule 26.8(2) together with the factors set out in rule 26.8(3), but must first satisfy itself with regard to the elements stated in rule 26.8(2), before considering the factors in rule 26.8(3).

[40] In **H B Ramsay & Associates**, Brooks JA, as reiterated by counsel for the appellant, recognized that **International Hotels Jamaica Ltd** and **Villa Mora Cottages Limited** were commenced prior to the enactment of the CPR, 2002. Brooks JA upon delivering the judgment of the court upheld the decision of Fraser J in the court below, which refused the appellants' application for relief. The appellants had disobeyed an unless order which had required them to pay costs to the respondents. The approach taken by Brooks JA, with which I entirely agree, was to firstly consider CPR 26.8(1) after which 26.8(2) was considered to decide whether the discretion of the court arose. At paragraph [31], Brooks JA, held that:

> "An applicant who seeks relief from a sanction, imposed by his failure to obey an order of the court, must comply with the provisions of rule 26.8(1) in order to have his application considered. If he fails, for example, to make his application promptly the court need not consider the merits of the application…if the court agrees to consider the application, the next hurdle that the applicant has to clear is that he must meet all the requirements set out in rule 26.8(2).

> There would, therefore, be no need for a court, which finds that the applicant has failed to cross the threshold created by rule 26.8 (2), to consider the provisions of rule 26.8(3) in relation to the applicant."

[41] Thus, the arguments submitted by counsel for the respondent that rule 26.8(2) ought to be considered with rule 26.8(3) when deciding whether the discretion of the court arises in order to grant relief, are based on an incorrect understanding of the law. Accordingly, that would dispose of issues (i) and (ii), and in the main grounds 1 and 2 which would therefore fail. However, that is not the end of the matter. The question would then arise: did the learned trial judge assess the application for relief from sanctions in accordance with the principles set out above? I will therefore now consider issue (iii) to assess whether he exercised his discretion properly in the circumstances.

Issue (iii) Whether the learned judge ought to have exercised his discretion to grant relief

[42] Batts J provided a well reasoned written judgment of his decision to grant the respondent relief from sanction which demonstrated that he was fully seised of the applicable procedure and the proceedings. The learned judge firstly addressed and readily accepted that the application for relief had been promptly made. The order to strike out the respondent's statement of case had been made on 17 March 2014 while the notice of application for relief from sanctions was filed on 24 March 2014. That amounted to a one week delay and there cannot, in my opinion, be any serious argument advanced that the application had not been made promptly. Additionally, the application was supported by evidence on affidavit, thus satisfying rule 26.8(1). That

would lead me now to review the learned judge's approach to what I consider to be at the heart of the appellant's contention; whether the threshold test in rule 26.8(2) of the CPR had been satisfied.

Whether failure to comply was intentional

[43] The order made by Edwards J was that unless the respondent attended the trial to give evidence the statement of case would stand struck out. Batts J found that the respondent's failure to attend the trial was not intentional. The learned judge found that it was common knowledge that the respondent's original counsel, Antoinette Haughton Cardenas, had been struck from the roll of attorneys entitled to practice in Jamaica. Mr Richard Bonner had clearly stated that that circumstance had led to the respondent not being present nor represented at court on two occasions. Further, with regard to the non attendance which was critical to the striking out of the statement of case on 17 March 2014, the respondent was not present at court the day the unless order was made having not been informed of the trial date until the very day of the trial at 10:30 am. The respondent did attend court that day, in fact at 11:30 am, but only after the order striking out the statement of case had already been made. On the basis of the foregoing there does not seem to have been any evidence to support the appellant's contention that the respondent was intentionally absent from court. The finding of Batts J on this aspect cannot be faulted.

Whether there was a good explanation for the failure to comply

[44] Counsel has a duty to act in the best interest of his client. In this case, he certainly failed to do so, having informed the respondent of the court date on the very day scheduled for the trial, in circumstances in which her attendance was the subject of an unless order. In my opinion, this was negligent to say the least. However, the real issue is whether the respondent should bear the draconian sanction of having her claim struck out for her failure to attend court when she was not even aware of the court date or the consequence of her non attendance, and in circumstances where the explanation for her non attendance appeared genuine. In my view, Batts J's decision that the explanation was a good one seems reasonable on the evidence before him. There was no evidence to suggest tardiness or lack of due diligence on the part of the respondent herself, with regard to her claim.

Whether there was general compliance with all other relevant rules, practice directions orders and directions.

[45] The appellant has argued that there has been non compliance by the respondent on the basis that:

(a) the respondent had sought an order extending the time within which to file and serve medical reports;

(b) on the day the unless order had been made the respondent had been granted an order abridging time for the filing and service of an application and relief from sanctions;

(c) the respondent had short served the appellant with the notice of application for relief from sanction, service having been effected on 1 May 2014 where the hearing was set for 6 May 2014;

(d) the medical reports which were ordered to be filed by 29 September 2006 still had not been filed; and

(e) the 8 February 2010 trial date had to be abandoned because the respondent was neither present nor represented.

[46] The learned judge found that the absences at trial were explained and accepted by the court, having been due to the respondent's illness and the personal circumstances of the respondent's then attorney. Where the outstanding expert reports were concerned, the learned judge found that the explanation from the respondent's attorney was that there was reluctance by medical practitioners to give evidence against the appellant. Further, there was the difficulty of obtaining full disclosure from the appellant, in that pages of certain post operative surgical notes in relation to the respondent, were missing, even after counsel for the respondent had requested the appellant to provide the same. Permission had been granted for the respondent to call an expert witness; however the witness statement filed on 16 October 2007 which had been provided by the expert witness supported the appellant's case. Thus the respondent had required an extension of time within which to file and serve a further expert medical report.

[47] The learned judge found that it was not a matter that the report had not been served but that it had not been prepared. However, the learned judge noted that an order had been made that two medical reports be admitted into evidence. On that basis he found that in the circumstances, the failure of the respondent to obtain and file the outstanding reports could not make the respondent guilty of general non compliance. In fact the learned judge found that based on the quality of legal service the respondent had had to endure, it was fair to say that she had been in general compliance with the rules and orders of the court.

[48] The learned judge commented that there was authority to support the position that unless orders should be used sparingly (see **Marcon Shipping Ltd v Kefalas and Another** [2007] 3 All ER 365 [2007] EWCA Civ 463), and that orders striking out a party's claim on the basis that the party had failed to attend court ought really to be rarely made. He referred to the general difficulties one can experience with communication and transportation in Jamaica. He also mentioned the fact that in the instant case the respondent had the added problem of absent representation and a 'history of ill - health' which had formed 'the genesis of her claim'. He expressed the hope that the court would be "less inclined" to make such orders in those circumstances in the future.

[49] Batts J referred to a powerful statement of Sykes J in **Gloria Findlay v Gladstone Francis** Suit No F 045/1994 delivered 28 January 2005, which I am of the

view warrants repetition here, being apt to the circumstances of the case at bar. He said:

> "I recognize that the good administration of justice requires that cases be dealt with expeditiously but this has to be measured against the risk of injustice to a litigant because of his lawyer's default, particularly where the defendant did not personally contribute to the state of affairs that has come about. The administration of justice while receiving a blow in this case will not be undermined..."

In the light of the foregoing and the efforts which had been made by the respondent to obtain an extension of time for the filing of the relevant documents rather than to blatantly disregard the orders of the court, I find that I am in agreement with the position taken by the learned judge that there had been general compliance by the respondent.

[50] That having been said, the threshold test would have been crossed and it would have been necessary for the learned judge to systematically consider the factors set out in rule 26.8(3) of the CPR (see **Kenneth Hyman v Audley Matthews and Derrick Matthews and The Administrator General for Jamaica v Audley Matthews and Derrick Matthews** SCCA Nos 64 and 73/2003 judgment delivered 8 November 2006). What was clear was that, in my opinion, Batts J approached his consideration of the matter in accordance with the proper interpretation of rule 26.8 of the CPR. The learned judge exercised his discretion in respect of rule 26.8(3) of the CPR in this way:

(a) He indicated that in his view the administration of justice would be undermined if the respondent was precluded from having her day in court.

(b) As the failure to comply was due to the attorney-at-law, he noted that the rule envisaged a difference in consequence in those circumstances as against when the fault was due to the litigant's personal conduct.

(c) He found that although the failure to attend court on 17 March 2014 could not be corrected, given another trial date the respondent would be able to attend so to that extent the failure would be corrected.

(d) There was no trial date set at the time of the making of the application but one could be set and he proceeded to do so.

(e) He endeavoured to demonstrate a balancing exercise in respect of the consequences of the delay experienced since the cause had arisen. Both sides he said, would have to face a trial. Fading memories would apply across the board, although there should be contemporaneous medical notes which would be helpful. There was no indication that any witnesses had died or were unavailable. In his view, there would be greater prejudice to the respondent if relief had not been granted, as she would "feel that she has been hard done by in a system which would have, through no fault of her own, permanently close the doors of justice in her face".

[51] In my opinion it would be very difficult to say that the learned judge had exercised his discretion wrongly and misdirected himself in any way, and in those circumstances, in keeping with the principles enunciated in **Hadmor Productions Ltd and others v Hamilton and others**, this court ought not to interfere with the learned

judge's decision to grant relief from sanctions. That would therefore dispose of issue (iii) and grounds 3, 4, 5 and 6 of the grounds of appeal would accordingly fail.

Ground of appeal 7 was not addressed by counsel in her submissions.

Conclusion

[52] In the light of the foregoing, I would dismiss the appeal, but in the circumstances of this case make no order as to costs. I would order that a case management conference be scheduled in the Michaelmas term (2015), so that early dates can be fixed for the filing and service of any further expert medical report and for a pretrial review and trial.

SINCLAIR-HAYNES JA (AG)

[53] I have had the opportunity of reading in draft the judgment of my learned sister Phillips JA and I agree with her reasoning and conclusion.

MORRISON JA

ORDER

1. Appeal dismissed.
2. Case Management Conference is to be scheduled in the Michaelmas Term 2015 for the fixing of early dates for:

    (i) The filing and serving of any further expert medical report;
    (ii) Pretrial review; and
    (iii) Trial.

3. No order as to costs.

[2015] JMCA Civ 49

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 12/2015

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA (AG)

BETWEEN	**UNIVERSITY HOSPITAL BOARD OF MANAGEMENT**	**APPELLANT**
AND	**HYACINTH MATTHEWS**	**RESPONDENT**

Written submissions filed by Myers Fletcher & Gordon for the appellant

Written submissions filed by Richard Bonner & Associates for the respondent

2 October 2015

PROCEDURAL APPEAL

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

MORRISON JA

[1] I have had the opportunity of reading the draft judgment of my learned sister Phillips JA. I agree with her reasoning and conclusions and there is nothing that I can usefully add.

PHILLIPS JA

[2] This is an appeal, against the decision of Batts J, dated 27 January 2015, in which he granted the respondent relief from sanctions, from the order of F Williams J dated 17 March 2014, striking out the respondent's statement of case. Batts J made certain consequential case management orders, fixing dates for pre-trial review, the trial and the submission of an expert report. He granted leave to appeal.

Background

[3] The respondent filed a claim against the appellant in negligence pertaining to a surgical procedure resulting in a total abdominal hysterectomy and in respect of certain complications which followed. The claim was filed on 4 December 2003 while the amended particulars of claim was filed on 28 November 2006.

[4] A case management conference was held on 22 June 2005, where witness statements and medical reports were ordered to be filed by 29 September 2006 and the trial scheduled for 19 May 2008. On the day scheduled for trial, the court was informed that the respondent was unable to attend court as she was ill. A medical report was presented to the court. The trial was then adjourned to 14 to 16 January 2009. On 14 January 2009, the respondent was absent for reasons similar to that pertaining to the previous court date. The trial was adjourned to 8 to 11 February 2010.

[5] When the matter came up for hearing on 8 February 2010, the respondent and her then attorney-at-law were absent. The trial was on that day adjourned to 10 February 2010, however the respondent and her attorney were again absent. Anderson

J ordered that the matter be adjourned for a date to be fixed by the registrar and that the respondent, through her attorney-at-law, was to ensure that a trial date was set within 12 months of the date of that order. Another attorney-at-law was then approached to conduct the matter; however he subsequently left the island.

[6] On 6 May 2011, the appellant filed a notice of application seeking summary judgment against the respondent and that the respondent's statement of case be struck out. That application was made on the ground that the respondent had failed to comply with the court order dated 10 February 2010, namely to ensure that a trial date was fixed within 12 months of the date of that order. That application was heard on 6 March 2013 by Edwards J. The respondent was absent from the hearing but was represented by counsel.

[7] On that day, after hearing counsel Mr Krishna Desai for the appellant and Mr Lawrence Philpotts-Brown and Mr Richard Bonner, for the respondent, Edwards J made the following orders:

> "1. The time for the Claimant to file and serve the Notice of Application for Court Orders dated and filed on March 5, 2013 and the supporting affidavit of Richard Bonner dated and filed on March 5, 2013 is hereby abridged. The Notice of Application for Court Orders and Affidavit are allowed to stand as filed.
>
> 2. The Defendant's application to strike out the Claimant's claim is not granted.
>
> 3 The Defendant's application for summary judgment against the Claimant is not granted.

4. The Claimant is relieved from sanctions for failing to comply with the Order of the Hon. Mr. Justice Anderson made on February 10, 2010.

5. The trial of this matter is set for the 17th, 18th, and 19th of March 2014.

6. Unless the Claimant attends the trial to give evidence her statement of case stands struck out.

7. The Claimant is ordered to file and serve any expert medical opinion intended to be relied on at trial on or before December 20, 2013.

8. …

9. …"

[8] On 17 March 2014, the date fixed for the hearing of the matter, counsel for the respondent was present in court however the respondent was absent. Consequently, pursuant to order no 6, stated above, the respondent's statement of case was struck out.

[9] On 24 March 2014, the respondent filed a notice of application for court orders seeking relief from sanctions under rule 26.8 of the Civil Procedure Rules (CPR). The application was supported by two affidavits, deponed to by the respondent and Mr Richard Bonner. The respondent sought to have the order dated 17 March 2014 set aside, the statement of case restored, and an extension of time granted within which to file and serve a further expert medical report in order to prosecute her claim. The notice of application came up for hearing on two occasions, but was adjourned. The application was subsequently heard by Batts J on 27 January 2015, when he made the order granting relief from sanction as aforesaid.

[10] The relevant portion of the affidavits in support of the application for relief from sanction set out the respondent's position as outlined below.

Affidavit of Hyacinth Matthews sworn to on 24 March 2014, in part, as follows:

> "3. That I am informed by my said attorneys-at-Law and verily believe that on the 6th day of March, 2013, pursuant to an Order of this Honourable Court and in particular paragraph 6 of the said order made by Ms. Justice C. Edwards that should I fail to attend the trial fixed for hearing on the 17th day of March, 2014 the Claimant's statement of Case would stand struck out.
>
> 4. That on the said occasion I was not present and therefore would be unaware of the said Order.
>
> 5. That upon the coming on for hearing of this matter for trial on the 17th day of March, 2014 which was fixed by the aforesaid Order of this Honourable Court I was only informed that I should attend the hearing by my said attorney on the said 17th day of March, 2014 at about 10:30 a.m., and by the time I attended the Supreme Court at about 11:30 a.m. I was informed that my case had been struck out.
>
> 6. That my non attendance was intentional but occurred for the reasons outlined above."

The affidavit of Richard Bonner sworn to on 24 March 2014 …

> "15. That the delay and non-compliance with the order of the Court made on February 10, 2010 was not intentional but was due to a number of circumstances:-
>
> a) The Claimant's Attorney-at-law on the record was struck from the roll of Attorneys and was no longer entitled to practice law in Jamaica;
>
> b) That access to the relevant file of the Claimant was challenging given the situation mentioned at (a) above;

c) That Mr. Terrence Ballantyne who had been approached to have conduct of the matter subsequently left the island;

16. …

17. That on the said 6th day of March, 2013 this Honourable Court made certain Orders including firstly: That unless Claimant attends trial to give evidence, her statement of Claim shall stand struck out. Secondly: Trial dates were fixed for the 17, 18, and 19th day of March 2014, and Thirdly: That the Claimant is Ordered is ordered [sic] to file and serve any Expert Medical Opinion intended to be relied on, on or before December 20, 2013.

18. That I only informed the Claimant of the date fixed for trial on the said 17th day of March, 2014 including inadvertence on my part, due to my having checked the Supreme Court's Civil List and saw no listing of the matter for hearing, and generally due to the pressure of work.

19. That further had the Claimant attended the hearing the matter would still would [sic] not have proceeded, since the Defendant had failed and or neglected to provide the Claimant's attorneys-at-Law with the necessary information to prepare the expert witness report which had been ordered by this Honourable Court on the said 6th of March, 2014.

20. That my informing the Claimant to attend the trial on the said morning of the trial was not deliberate but due to inadvertence.

21. That I crave leave to refer to the Claimant's Claim Form and Particulars of Claim and say that it discloses that the Claimant has a real prospect for prosecuting the Claim., [sic] I do not believe that the Defendant will be prejudice in any way if the matter is restored to the List and she is allowed to prosecute her case.

22. …

23. That by letter dated 28th January, 2014 I wrote to the Defendant's Attorney-at-Law informing them that the Medical Expert instructed us that there were certain pages missing from the Doctor's Surgical Note, and that several requests had been made to the said Attorneys for a full report of the said Surgical Notes, which are still not forth-coming,. [sic] …

24. That I have also previously requested from the Defendant's Attorney-at-Law a full copy of the Post Operative Surgical Notes which we have been asking for form [sic] September 3, 2013, and that surgical notes were delivered to me which was handed to the medical expert for the preparation of his medical opinion, but the [sic] informed me on closer examination that there were certain pages still missing from the post operative surgical notes. And moreover it would not be possible for him to complete his medical opinion by the 20th of December, 2014 as ordered by this Honourable Court. Accordingly I hereby seek an extension of time to comply with the Order of the Court made on the 6th of March, 2013."

[11] After hearing Mrs Alexis Robinson for the appellant and Mr Lawrence Philpotts Brown and Mr Richard Bonner for the respondent, Batts J granted the application sought and as indicated he also granted the appellant leave to appeal. On 5 February 2015, the appellant filed notice of procedural appeal based on seven grounds of appeal as set out below:

"(1) The learned judge erred by exercising a discretion that did not arise.

(2) The learned judge erred in distinguishing and not following **H. B. Ramsay et al v Jamaica Re-development Foundation**, **Inc et al** [2013] JMCA Civ 1.

(3) The learned judge erred in finding that the Respondent had met the threshold test in Rule 26.8(2) of the CPR.

(4) The learned judge erred in taking into account the factors listed in Rule 26.8(3) of the CPR without first ensuring that the Respondent had met the threshold test in Rule 26.8(2) of the CPR.

(5) Alternatively, the learned judge erred in exercising his discretion in favour of the respondent in light of the factors listed in Rule 26.8(3) of the CPR.

(6) The learned judge erred by granting relief from sanctions in the light of his correct finding that the Respondent was still not ready for trial, 13 years after the alleged incident.

(7) The learned judge erred in making the order for relief from sanctions without the file as he was not sufficiently seized of the proceedings to date."

Counsel grouped the grounds of appeal in the following way and argued them accordingly: grounds 1 and 2, grounds 3 and 7, grounds 4 and 5 and ground 6. I have adopted a similar approach for ease of reference and convenience.

Submissions of the appellant

Grounds 1 & 2

[12] Counsel for the appellant submitted that rule 26.8(2) of the CPR sets out preconditions which must be satisfied before consideration can be given to rule 26.8(3). In making that submission counsel relied on **H B Ramsay & Associates Ltd et al v Jamaica Redevelopment Foundation Inc** [2013] JMCA Civ 1. Counsel further submitted that **International Hotels Jamaica Ltd v New Falmouth Resorts Ltd** SCCA Nos 56 & 95/2003 judgment delivered 18 November 2005, was in line with that

approach. On the other hand counsel submitted that **Villa Mora Cottages Limited & Anor v Adele Shtern** SCCA No 49/2006 judgment delivered 14 December 2007, went far beyond the principles enunciated in the two previous cases.

[13] Counsel submitted that **International Hotels Jamaica Ltd** and **Villa Mora Cottages Limited** were transitional cases (commenced before the 2002 CPR was enacted), as identified by Brooks JA at paragraph [13] in **H B Ramsay & Associates**. Counsel thus submitted that **H B Ramsay & Associates** ought to be followed as it had benefited from the CPR, from the outset. Additionally, counsel submitted that in **International Hotels Jamaica Ltd** and **Villa Mora Cottages Limited**, the primary test in rule 26.8(2) had been met, whereas in **H B Ramsay & Associates** the defaulting party had failed to meet the requirements of rule 26.8(2), which was similar to the case at bar, which was why counsel argued that **H B Ramsay & Associates** was applicable.

Grounds 3 & 7

[14] Counsel for the appellant submitted that the respondent's own affidavit evidence was that her failure to comply with the unless order was intentional. Thus the learned judge's finding that the failure to comply was unintentional was unsafe and ought to be overturned. Counsel also submitted that the respondent's explanation that she had not been informed of the court dates by her attorneys and the attorneys' claim of inadvertence was not a good explanation for the respondent's failure to attend court on the day the statement of case had been struck out. Counsel argued that if the court

were to hold that as a good explanation for delays based on the evidence that was before the court, then litigators would simply blame their overworked attorneys and the inefficiencies of the Supreme Court's registry for their failure to comply with the rules which resulted in the unless orders being imposed. It was also counsel's contention that "inadvertence" was a conclusion to be drawn and not an explanation in itself, referring to the dictum of Brooks JA in **H B Ramsay & Associates** and of Lord Dyson delivering the speech in the Privy Council case **The Attorney General v Universal Projects Limited** [2011] UKPC 37, in which he stated that it would be difficult to see how inexcusable oversight could amount to a good explanation.

[15] Further, counsel submitted, it could not be said that the respondent had generally complied with all relevant rules, practice directions and court orders and the learned judge's finding in that regard was therefore wrong and ought to be overturned. Counsel submitted that the respondent's failure to comply with rules and court orders was evident from the applications made to the court below and the orders granted, as set out in the affidavit of Richard Bonner in support of the application for relief from sanction, filed on behalf of the respondent in the court below. Counsel also submitted that the unless order had been made as a result of the respondent's general non compliance.

Grounds 4, 5 & 6

[16] Counsel maintained that the learned judge may have felt that the respondent had a good explanation because the failure to comply with the unless order was due to

the failure of the attorneys. However, that was a factor to be examined under rule 26.8(3) of the CPR which only arose for consideration when the threshold of rule 26.8(2) had been crossed. Thus, the learned judge was wrong to have considered the provisions of rule 26.8(3) when the respondent had failed to satisfy the requirements of rule 26.8(2) of the CPR.

[17] Counsel submitted that alternately, if the factors listed in rule 26.8(3) ought to have been considered the learned judge had erred in exercising his discretion in favour of the respondent. Counsel argued that that was due to the failure of the respondent to comply with the orders; not having been able to remedy the situation within a reasonable time; and the fact that the trial date was already missed. Further, counsel pointed out that the effect on the appellant was that it would have to defend the actions of its employees which had taken place over 14 years ago, and the respondent was still not ready for trial.

Submissions of the respondent

[18] Counsel for the respondent submitted that the appellant had not filed an affidavit to challenge the respondent's application for relief from sanction. Thus, when the matter was heard there was no evidence to contradict the affidavits in support of the application. Counsel for the respondent submitted that the affidavit(s) indicated that the failure to comply with the order was not intentional and that there was a good explanation for that failure and that the respondent had generally complied with all other relevant rules, practice directions and orders. Additionally, counsel for the

respondent contended that the application seeking relief from sanctions had been promptly made.

[19] Counsel submitted that it was well established that the court will not lightly interfere with the exercise of a discretion by a judge of the lower court on an interlocutory hearing, and referred to the dictum of Morrison JA on behalf of the court in **Attorney General of Jamaica v John McKay** [2012] JMCA App 2 and Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042.

[20] With regard to grounds 1 and 2, counsel for the respondent submitted that the learned judge had correctly exercised his discretion when he granted the application sought by the respondent, having correctly taken into account the factors prescribed in rule 26.8(3) when considering the elements outlined in rule 26.8(2). Thus, counsel submitted, it was an incorrect understanding of the law that a court should consider only the factors set out in rule 26.8(2) of the CPR on an application for relief from sanctions and that should any of those factors not be met, the discretion of the court in respect of rule 26.8(3) would not arise.

[21] Counsel based the above submission on what he said was the reasoning of the court in **International Hotels Jamaica Ltd**. He submitted that McCalla JA (Ag) (as she then was) had opined that despite one of the factors not being sufficient to grant relief from sanctions, where it had not been shown that the explanation given was not genuine, the court would proceed to consider all the factors in rule 26.8(2) and 26.8

(3). Counsel further submitted that the learned judge of appeal had stated that "...in considering whether to grant relief the learned judge [in the court below] was required to have regard to all matters stipulated in rule 26.8(3)" and also emphasized "the need for tribunals, at first instance to demonstrate compliance with rules 26.8(2) and 26.8(3) of the CPR." Counsel posited that the stance taken by Harris JA in **Villa Mora Cottages Limited** was entirely consistent with the statements made by McCalla JA (Ag) in **International Hotels Jamaica Ltd**. Counsel therefore argued that it was incumbent on the learned judge to examine all the circumstances of the case, bearing in mind the overriding principle with regard to dealing with cases justly, which would, he said, in any event, require the court to address systematically all the factors outlined in rule 26.8(3) of the CPR. He relied on **R C Residuals v Linton Fuel Oil** [2002] 1 WLR 2782 in support of this submission.

[22] Counsel sought to distinguish **H B Ramsay & Associates** from the case at bar. He submitted that in **H B Ramsay & Associates**, the court had found that the appellants had failed to make their application promptly and had given no explanation for their delay. On the other hand, counsel submitted that in the case at bar the respondent's application for relief from sanction had been made promptly and that the explanation given by counsel for the delay was never challenged by the appellant. Moreover, counsel also argued that **H B Ramsay & Associates** could be considered to have been decided *per incuriam* since the court did not have the opportunity of considering **Villa Mora Cottages Limited**, and counsel contended further that in **H B Ramsay & Associates**, the court was dealing with dilatory applications *simplicter* and

in those circumstances the court may have been more likely to have taken a more stringent approach. Counsel also submitted that the law lords in the Privy Council did not consider **Villa Mora Cottages Limited** or **International Hotels Jamaica Ltd** hence that case could also have been "decided *per incuriam* at least as it applies to Jamaica".

[23] With regard to grounds 3 and 7, counsel submitted that when the affidavit is read in its entirety, it is patently obvious that an omission had been made in paragraph 6 of the respondent's affidavit (set out in paragraph [10] herein) which was never raised at the hearing of the application for relief from sanctions. Counsel further argued that the explanation for the failure to comply was sufficient and at no time had it been suggested by affidavit evidence that the explanation was not genuine. It was therefore contended that it was reasonable for the court below, in accordance with **International Hotels Jamaica Ltd**, to have accepted the explanation offered as meeting the requirements of the rules. Further, counsel for the respondent submitted that there had been general compliance with the rules and practice directions, and pointed out that the extension of time needed by the respondent to file and serve a medical report was due to the appellant's failure to provide full disclosure in respect of the surgical notes, with the added difficulty of endeavoring to obtain a medical practitioner ready and willing to prepare the necessary report.

Issues

[24] In my view, the main issues to be decided on this appeal are:

(i) the proper interpretation to be accorded rule 26.8 of the CPR;

(ii) whether the provisions of rule 26.8(1) and (2) of the CPR represent threshold tests, that the respondent would have had to satisfy before the court could systematically examine the factors set out in rule 26.8(3) of the CPR; and

(iii) whether the learned judge ought to have exercised his discretion in the circumstances of this case to grant relief from sanctions.

Rule 26.8 of the CPR

[25] Rule 26.8 which sets out the conditions which must be satisfied in order for the court to grant relief from sanctions provides as follows:

> "26.8 (1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –
> (a) made promptly; and
> (b) supported by evidence on affidavit.
>
> (2) The court may grant relief only if it is satisfied that –
> (a) the failure to comply was not intentional;
> (b) there is a good explanation for the failure; and
> (c) the party in default has generally complied with all other relevant rules, practice directions [,] orders and directions.
>
> (3) In considering whether to grant relief, the court must have regard to-

(a) the interests of the administration of justice;
(b) whether the failure to comply was due to the party or that party's attorney-at-law;
(c) whether the failure to comply has been or can be remedied within a reasonable time;
(d) whether the trial date or any likely trial date can still be met if relief is granted; and
(e) the effect which the granting of relief or not would have on each party.

(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."

Analysis and discussion

[26] I must state at the outset that in keeping with the principles set out in several cases in this court, and recently by Morrison JA on behalf of the court in **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1, it is well settled that the Court of Appeal will not interfere to set aside the decision of the lower court, save in certain circumstances. Morrison JA (as he then was) referred to the oft cited dictum of Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 ALL ER 1042, 1046 where Lord Diplock stated that:

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

[27] Morrison JA then outlined the circumstances in the exercise of a trial judge's discretion which would warrant the interference of the appellate court.

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

On the basis of the foregoing, the court will not interfere with the decision of the learned judge unless it is demonstrated to be judicially incorrect, or "palpably wrong".

Issues (i) the proper interpretation to be accorded rule 26.8 of the CPR; and (ii) whether the provisions of rule 26.8(1) and (2) of the CPR represent threshold tests, that the respondent would have had to satisfy before the court could systematically examine the factors set out in rule 26.8(3) of the CPR.

[28] The arguments of counsel for the appellant and for the respondent in respect of the interpretation and application of rule 26.8 of the CPR focused mainly on three cases, namely; **International Hotels Jamaica Ltd**, **Villa Mora Cottages Limited** and **H B Ramsay & Associates**. I will examine all three cases, my emphasis being on the true and proper interpretation to be accorded to rule 26.8.

[29] In **International Hotels Jamaica Ltd**, the court was reviewing the order of Brooks J (as he then was) who had upheld an order at trial that the defence of the appellant which stood struck out by a previous order should remain struck out. The court examined rule 26.8(1) and (2) of the CPR and concluded that these conditions must be considered cumulatively in order to satisfy a primary test. In reviewing rule

26.8(3), Harrison JA (as he then was) said these are mitigatory factors which could influence favourably or otherwise the grant of relief from sanctions.

[30] In my view, contrary to submissions of counsel for the respondent, **International Hotels Jamaica Ltd** does not proffer principles different from those postulated in **H B Ramsay & Associates**. There is nothing stated in that case to support the respondent's submission that **International Hotels Jamaica Ltd** promulgates that the factors in rule 26.8(2) and (3) of the CPR should be considered together.

[31] **Villa Mora Cottages Limited** was heavily relied on by counsel for the respondent. This case was an appeal from the decision of McDonald Bishop J (Ag) (as she then was) who had refused the appellant leave to extend the time within which to file witness statements and had further refused to restore their defence which had been struck out. In that appeal, Harris JA at page 10, on behalf of the court had stated that:

> "It cannot be disputed that orders and rules of the Court must be obeyed. A party's non-compliance with a rule or an order of the Court may preclude him from continuing litigation. This, however, must be balanced against the principle that a litigant is entitled to have his case heard on the merits. As a consequence, a litigant ought not to be deprived of the right to pursue his case.
>
> The function of the Court is to do justice."

[32] The learned judge of appeal then quoted Wooding CJ in **Baptiste v Supersad** and **Montrose** (1967) 12 WIR 140 at 144, where he stated that:

> "The law is not a game, nor is the court an arena. It is… the function and duty of a judge to see that justice is done as far as may be according to the merits."

Harris JA concluded that paragraph by stating that:

> "In its dispensation of justice, the Court must engage in a balancing exercise and seek to do what is just and reasonable in the circumstances of each case, in accordance with Rule 1 of the C.P.R. A court, in the performance of such exercise, may rectify any mischief created by the non compliance with any of its rules or orders."

[33] These statements are simple, straightforward, unambiguous and cannot be doubted. Indeed, the above dicta of Harris JA clearly reflect the role and function of the court in the exercise of its discretion in the grant of orders and judgments, and set out the ambit within which the court ought to function.

[34] In **Villa Mora Cottages Limited**, the court considered **R C Residual Limited v Linton Fuel Oils Limited & Anor** [2002] 1 WLR 2782 which was interpreting rule 3.9 of the English CPR. In that case the appellant sought relief from sanctions where it had been precluded from relying on an expert's evidence following failure to comply with an order. That order provided that unless the appellant filed and served the expert report by 4:00 pm on 2 April 2002, it would be precluded from relying on that expert's evidence at the trial. Rule 3.9 of the English CPR, although similar in some respects to rule 26.8 of the Jamaican CPR, is significantly different in others.

[35] Rule 3.9 of the English CPR states as follows:

> "**3.9**—(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 including—

(a) the interests of the administration of justice;

(b) whether the application for relief has been made promptly;

(c) whether the failure to comply was intentional;

(d) whether there is a good explanation for the failure;

(e) the extent to which the party in default has complied with other rules, practice directions, and court orders and any relevant pre-action protocol;

(f) whether the failure to comply was caused by the party or his legal representative;

(g) whether the trial date or the likely date can still be met if relief is granted;

(h) the effect which the failure to comply had on each party; and

(i) the effect which the granting of relief would have on each party.

(2) An application for relief must be supported by evidence."

[36] Rule 3.9 therefore, clearly groups together all the factors which the court will consider in granting relief from sanctions into sub paragraphs (a) to (i) with paragraph (2) requiring that the application must be supported by evidence. On the other hand the Jamaican counterpart, rule 26.8 of the CPR, albeit similar in the wording, is divided into three separate paragraphs. Due to the umbrella words of each paragraph, they fall for consideration at different stages when considering whether to grant relief from sanctions. Paragraph 26.8(1) (which requires the application to be made promptly and to be supported by evidence) 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) states

three specific factors that must be in effect in order for the court to grant relief, and in circumstances 'only if it is satisfied…" As a consequence, the matters set out therein must be satisfied before the court can consider the factors set out in rule 26.8(3). Put another way, any failure to satisfy those factors precludes the consideration of the court under rule 26.8(3).

[37] Consequently, in my view, rule 3.9 of the English CPR sets out a different regime from that of rule 26.8 of the Jamaican CPR, in that under the English provision, once the court is considering the application for relief from sanctions it must consider all the factors stated therein cumulatively and simultaneously.

[38] The learned judge of appeal noted at page 14 of the judgment that:

> "The discretionary power conferred on the Court under Rule 26.8 renders it obligatory on the part of a judge, in giving consideration to Rule 26.8(2) to pay due regard to the provisions of Rule 26.8(3). In determining whether to grant or refuse an application for relief from sanctions, it is incumbent on the judge to examine all the circumstances of the case bearing in mind the overriding principles of dealing with cases justly. In so doing, he or she must systematically take into account the requisite factors specified in Rule 26.8(3)."

Having reviewed **R C Residual Limited v Linton Fuel Oils** in **Villa Mora Cottages Limited**, she concluded at page 16 that:

> "In the present case, it appears to me that the learned judge had misapplied Rule 26.8(2). It is manifest that in examining the factors outlined in Rule 26.8(2) due attention must be given to Rule 26.8(3). The learned judge had not systematically given consideration to the relevant factors as prescribed by Rule 26.8(3). This she was bound to do."

[39] With the greatest of respect to Harris JA in **Villa Mora Cottages Limited**, this approach appears to me to state the court's powers under rule 26.8 more widely than is justified by the clear language of the rule itself. Thus, in my view, in granting relief from sanctions, the court in this jurisdiction ought not to consider the elements set out in rule 26.8(2) together with the factors set out in rule 26.8(3), but must first satisfy itself with regard to the elements stated in rule 26.8(2), before considering the factors in rule 26.8(3).

[40] In **H B Ramsay & Associates**, Brooks JA, as reiterated by counsel for the appellant, recognized that **International Hotels Jamaica Ltd** and **Villa Mora Cottages Limited** were commenced prior to the enactment of the CPR, 2002. Brooks JA upon delivering the judgment of the court upheld the decision of Fraser J in the court below, which refused the appellants' application for relief. The appellants had disobeyed an unless order which had required them to pay costs to the respondents. The approach taken by Brooks JA, with which I entirely agree, was to firstly consider CPR 26.8(1) after which 26.8(2) was considered to decide whether the discretion of the court arose. At paragraph [31], Brooks JA, held that:

> "An applicant who seeks relief from a sanction, imposed by his failure to obey an order of the court, must comply with the provisions of rule 26.8(1) in order to have his application considered. If he fails, for example, to make his application promptly the court need not consider the merits of the application…if the court agrees to consider the application, the next hurdle that the applicant has to clear is that he must meet all the requirements set out in rule 26.8(2).

> There would, therefore, be no need for a court, which finds that the applicant has failed to cross the threshold created by rule 26.8 (2), to consider the provisions of rule 26.8(3) in relation to the applicant."

[41] Thus, the arguments submitted by counsel for the respondent that rule 26.8(2) ought to be considered with rule 26.8(3) when deciding whether the discretion of the court arises in order to grant relief, are based on an incorrect understanding of the law. Accordingly, that would dispose of issues (i) and (ii), and in the main grounds 1 and 2 which would therefore fail. However, that is not the end of the matter. The question would then arise: did the learned trial judge assess the application for relief from sanctions in accordance with the principles set out above? I will therefore now consider issue (iii) to assess whether he exercised his discretion properly in the circumstances.

Issue (iii) Whether the learned judge ought to have exercised his discretion to grant relief

[42] Batts J provided a well reasoned written judgment of his decision to grant the respondent relief from sanction which demonstrated that he was fully seised of the applicable procedure and the proceedings. The learned judge firstly addressed and readily accepted that the application for relief had been promptly made. The order to strike out the respondent's statement of case had been made on 17 March 2014 while the notice of application for relief from sanctions was filed on 24 March 2014. That amounted to a one week delay and there cannot, in my opinion, be any serious argument advanced that the application had not been made promptly. Additionally, the application was supported by evidence on affidavit, thus satisfying rule 26.8(1). That

would lead me now to review the learned judge's approach to what I consider to be at the heart of the appellant's contention; whether the threshold test in rule 26.8(2) of the CPR had been satisfied.

Whether failure to comply was intentional

[43] The order made by Edwards J was that unless the respondent attended the trial to give evidence the statement of case would stand struck out. Batts J found that the respondent's failure to attend the trial was not intentional. The learned judge found that it was common knowledge that the respondent's original counsel, Antoinette Haughton Cardenas, had been struck from the roll of attorneys entitled to practice in Jamaica. Mr Richard Bonner had clearly stated that that circumstance had led to the respondent not being present nor represented at court on two occasions. Further, with regard to the non attendance which was critical to the striking out of the statement of case on 17 March 2014, the respondent was not present at court the day the unless order was made having not been informed of the trial date until the very day of the trial at 10:30 am. The respondent did attend court that day, in fact at 11:30 am, but only after the order striking out the statement of case had already been made. On the basis of the foregoing there does not seem to have been any evidence to support the appellant's contention that the respondent was intentionally absent from court. The finding of Batts J on this aspect cannot be faulted.

Whether there was a good explanation for the failure to comply

[44] Counsel has a duty to act in the best interest of his client. In this case, he certainly failed to do so, having informed the respondent of the court date on the very day scheduled for the trial, in circumstances in which her attendance was the subject of an unless order. In my opinion, this was negligent to say the least. However, the real issue is whether the respondent should bear the draconian sanction of having her claim struck out for her failure to attend court when she was not even aware of the court date or the consequence of her non attendance, and in circumstances where the explanation for her non attendance appeared genuine. In my view, Batts J's decision that the explanation was a good one seems reasonable on the evidence before him. There was no evidence to suggest tardiness or lack of due diligence on the part of the respondent herself, with regard to her claim.

Whether there was general compliance with all other relevant rules, practice directions orders and directions.

[45] The appellant has argued that there has been non compliance by the respondent on the basis that:

(a) the respondent had sought an order extending the time within which to file and serve medical reports;

(b) on the day the unless order had been made the respondent had been granted an order abridging time for the filing and service of an application and relief from sanctions;

(c) the respondent had short served the appellant with the notice of application for relief from sanction, service having been effected on 1 May 2014 where the hearing was set for 6 May 2014;

(d) the medical reports which were ordered to be filed by 29 September 2006 still had not been filed; and

(e) the 8 February 2010 trial date had to be abandoned because the respondent was neither present nor represented.

[46] The learned judge found that the absences at trial were explained and accepted by the court, having been due to the respondent's illness and the personal circumstances of the respondent's then attorney. Where the outstanding expert reports were concerned, the learned judge found that the explanation from the respondent's attorney was that there was reluctance by medical practitioners to give evidence against the appellant. Further, there was the difficulty of obtaining full disclosure from the appellant, in that pages of certain post operative surgical notes in relation to the respondent, were missing, even after counsel for the respondent had requested the appellant to provide the same. Permission had been granted for the respondent to call an expert witness; however the witness statement filed on 16 October 2007 which had been provided by the expert witness supported the appellant's case. Thus the respondent had required an extension of time within which to file and serve a further expert medical report.

[47] The learned judge found that it was not a matter that the report had not been served but that it had not been prepared. However, the learned judge noted that an order had been made that two medical reports be admitted into evidence. On that basis he found that in the circumstances, the failure of the respondent to obtain and file the outstanding reports could not make the respondent guilty of general non compliance. In fact the learned judge found that based on the quality of legal service the respondent had had to endure, it was fair to say that she had been in general compliance with the rules and orders of the court.

[48] The learned judge commented that there was authority to support the position that unless orders should be used sparingly (see **Marcon Shipping Ltd v Kefalas and Another** [2007] 3 All ER 365 [2007] EWCA Civ 463), and that orders striking out a party's claim on the basis that the party had failed to attend court ought really to be rarely made. He referred to the general difficulties one can experience with communication and transportation in Jamaica. He also mentioned the fact that in the instant case the respondent had the added problem of absent representation and a 'history of ill - health' which had formed 'the genesis of her claim'. He expressed the hope that the court would be "less inclined" to make such orders in those circumstances in the future.

[49] Batts J referred to a powerful statement of Sykes J in **Gloria Findlay v Gladstone Francis** Suit No F 045/1994 delivered 28 January 2005, which I am of the

view warrants repetition here, being apt to the circumstances of the case at bar. He said:

> "I recognize that the good administration of justice requires that cases be dealt with expeditiously but this has to be measured against the risk of injustice to a litigant because of his lawyer's default, particularly where the defendant did not personally contribute to the state of affairs that has come about. The administration of justice while receiving a blow in this case will not be undermined..."

In the light of the foregoing and the efforts which had been made by the respondent to obtain an extension of time for the filing of the relevant documents rather than to blatantly disregard the orders of the court, I find that I am in agreement with the position taken by the learned judge that there had been general compliance by the respondent.

[50] That having been said, the threshold test would have been crossed and it would have been necessary for the learned judge to systematically consider the factors set out in rule 26.8(3) of the CPR (see **Kenneth Hyman v Audley Matthews and Derrick Matthews and The Administrator General for Jamaica v Audley Matthews and Derrick Matthews** SCCA Nos 64 and 73/2003 judgment delivered 8 November 2006). What was clear was that, in my opinion, Batts J approached his consideration of the matter in accordance with the proper interpretation of rule 26.8 of the CPR. The learned judge exercised his discretion in respect of rule 26.8(3) of the CPR in this way:

(a) He indicated that in his view the administration of justice would be undermined if the respondent was precluded from having her day in court.

(b) As the failure to comply was due to the attorney-at-law, he noted that the rule envisaged a difference in consequence in those circumstances as against when the fault was due to the litigant's personal conduct.

(c) He found that although the failure to attend court on 17 March 2014 could not be corrected, given another trial date the respondent would be able to attend so to that extent the failure would be corrected.

(d) There was no trial date set at the time of the making of the application but one could be set and he proceeded to do so.

(e) He endeavoured to demonstrate a balancing exercise in respect of the consequences of the delay experienced since the cause had arisen. Both sides he said, would have to face a trial. Fading memories would apply across the board, although there should be contemporaneous medical notes which would be helpful. There was no indication that any witnesses had died or were unavailable. In his view, there would be greater prejudice to the respondent if relief had not been granted, as she would "feel that she has been hard done by in a system which would have, through no fault of her own, permanently close the doors of justice in her face".

[51] In my opinion it would be very difficult to say that the learned judge had exercised his discretion wrongly and misdirected himself in any way, and in those circumstances, in keeping with the principles enunciated in **Hadmor Productions Ltd and others v Hamilton and others**, this court ought not to interfere with the learned

judge's decision to grant relief from sanctions. That would therefore dispose of issue (iii) and grounds 3, 4, 5 and 6 of the grounds of appeal would accordingly fail.

Ground of appeal 7 was not addressed by counsel in her submissions.

Conclusion

[52] In the light of the foregoing, I would dismiss the appeal, but in the circumstances of this case make no order as to costs. I would order that a case management conference be scheduled in the Michaelmas term (2015), so that early dates can be fixed for the filing and service of any further expert medical report and for a pretrial review and trial.

SINCLAIR-HAYNES JA (AG)

[53] I have had the opportunity of reading in draft the judgment of my learned sister Phillips JA and I agree with her reasoning and conclusion.

MORRISON JA

ORDER

1. Appeal dismissed.
2. Case Management Conference is to be scheduled in the Michaelmas Term 2015 for the fixing of early dates for:

    (i) The filing and serving of any further expert medical report;
    (ii) Pretrial review; and
    (iii) Trial.

3. No order as to costs.

[2015] JMCA Civ 49

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 12/2015

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA (AG)

BETWEEN	**UNIVERSITY HOSPITAL BOARD OF MANAGEMENT**	**APPELLANT**
AND	**HYACINTH MATTHEWS**	**RESPONDENT**

Written submissions filed by Myers Fletcher & Gordon for the appellant

Written submissions filed by Richard Bonner & Associates for the respondent

2 October 2015

PROCEDURAL APPEAL

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

MORRISON JA

[1] I have had the opportunity of reading the draft judgment of my learned sister Phillips JA. I agree with her reasoning and conclusions and there is nothing that I can usefully add.

PHILLIPS JA

[2] This is an appeal, against the decision of Batts J, dated 27 January 2015, in which he granted the respondent relief from sanctions, from the order of F Williams J dated 17 March 2014, striking out the respondent's statement of case. Batts J made certain consequential case management orders, fixing dates for pre-trial review, the trial and the submission of an expert report. He granted leave to appeal.

Background

[3] The respondent filed a claim against the appellant in negligence pertaining to a surgical procedure resulting in a total abdominal hysterectomy and in respect of certain complications which followed. The claim was filed on 4 December 2003 while the amended particulars of claim was filed on 28 November 2006.

[4] A case management conference was held on 22 June 2005, where witness statements and medical reports were ordered to be filed by 29 September 2006 and the trial scheduled for 19 May 2008. On the day scheduled for trial, the court was informed that the respondent was unable to attend court as she was ill. A medical report was presented to the court. The trial was then adjourned to 14 to 16 January 2009. On 14 January 2009, the respondent was absent for reasons similar to that pertaining to the previous court date. The trial was adjourned to 8 to 11 February 2010.

[5] When the matter came up for hearing on 8 February 2010, the respondent and her then attorney-at-law were absent. The trial was on that day adjourned to 10 February 2010, however the respondent and her attorney were again absent. Anderson

J ordered that the matter be adjourned for a date to be fixed by the registrar and that the respondent, through her attorney-at-law, was to ensure that a trial date was set within 12 months of the date of that order. Another attorney-at-law was then approached to conduct the matter; however he subsequently left the island.

[6] On 6 May 2011, the appellant filed a notice of application seeking summary judgment against the respondent and that the respondent's statement of case be struck out. That application was made on the ground that the respondent had failed to comply with the court order dated 10 February 2010, namely to ensure that a trial date was fixed within 12 months of the date of that order. That application was heard on 6 March 2013 by Edwards J. The respondent was absent from the hearing but was represented by counsel.

[7] On that day, after hearing counsel Mr Krishna Desai for the appellant and Mr Lawrence Philpotts-Brown and Mr Richard Bonner, for the respondent, Edwards J made the following orders:

> "1. The time for the Claimant to file and serve the Notice of Application for Court Orders dated and filed on March 5, 2013 and the supporting affidavit of Richard Bonner dated and filed on March 5, 2013 is hereby abridged. The Notice of Application for Court Orders and Affidavit are allowed to stand as filed.
>
> 2. The Defendant's application to strike out the Claimant's claim is not granted.
>
> 3 The Defendant's application for summary judgment against the Claimant is not granted.

4. The Claimant is relieved from sanctions for failing to comply with the Order of the Hon. Mr. Justice Anderson made on February 10, 2010.

5. The trial of this matter is set for the 17th, 18th, and 19th of March 2014.

6. Unless the Claimant attends the trial to give evidence her statement of case stands struck out.

7. The Claimant is ordered to file and serve any expert medical opinion intended to be relied on at trial on or before December 20, 2013.

8. …

9. …"

[8] On 17 March 2014, the date fixed for the hearing of the matter, counsel for the respondent was present in court however the respondent was absent. Consequently, pursuant to order no 6, stated above, the respondent's statement of case was struck out.

[9] On 24 March 2014, the respondent filed a notice of application for court orders seeking relief from sanctions under rule 26.8 of the Civil Procedure Rules (CPR). The application was supported by two affidavits, deponed to by the respondent and Mr Richard Bonner. The respondent sought to have the order dated 17 March 2014 set aside, the statement of case restored, and an extension of time granted within which to file and serve a further expert medical report in order to prosecute her claim. The notice of application came up for hearing on two occasions, but was adjourned. The application was subsequently heard by Batts J on 27 January 2015, when he made the order granting relief from sanction as aforesaid.

[10] The relevant portion of the affidavits in support of the application for relief from sanction set out the respondent's position as outlined below.

Affidavit of Hyacinth Matthews sworn to on 24 March 2014, in part, as follows:

> "3. That I am informed by my said attorneys-at-Law and verily believe that on the 6th day of March, 2013, pursuant to an Order of this Honourable Court and in particular paragraph 6 of the said order made by Ms. Justice C. Edwards that should I fail to attend the trial fixed for hearing on the 17th day of March, 2014 the Claimant's statement of Case would stand struck out.
>
> 4. That on the said occasion I was not present and therefore would be unaware of the said Order.
>
> 5. That upon the coming on for hearing of this matter for trial on the 17th day of March, 2014 which was fixed by the aforesaid Order of this Honourable Court I was only informed that I should attend the hearing by my said attorney on the said 17th day of March, 2014 at about 10:30 a.m., and by the time I attended the Supreme Court at about 11:30 a.m. I was informed that my case had been struck out.
>
> 6. That my non attendance was intentional but occurred for the reasons outlined above."

The affidavit of Richard Bonner sworn to on 24 March 2014 …

> "15. That the delay and non-compliance with the order of the Court made on February 10, 2010 was not intentional but was due to a number of circumstances:-
>
> a) The Claimant's Attorney-at-law on the record was struck from the roll of Attorneys and was no longer entitled to practice law in Jamaica;
>
> b) That access to the relevant file of the Claimant was challenging given the situation mentioned at (a) above;

c) That Mr. Terrence Ballantyne who had been approached to have conduct of the matter subsequently left the island;

16. …

17. That on the said 6th day of March, 2013 this Honourable Court made certain Orders including firstly: That unless Claimant attends trial to give evidence, her statement of Claim shall stand struck out. Secondly: Trial dates were fixed for the 17, 18, and 19th day of March 2014, and Thirdly: That the Claimant is Ordered is ordered [sic] to file and serve any Expert Medical Opinion intended to be relied on, on or before December 20, 2013.

18. That I only informed the Claimant of the date fixed for trial on the said 17th day of March, 2014 including inadvertence on my part, due to my having checked the Supreme Court's Civil List and saw no listing of the matter for hearing, and generally due to the pressure of work.

19. That further had the Claimant attended the hearing the matter would still would [sic] not have proceeded, since the Defendant had failed and or neglected to provide the Claimant's attorneys-at-Law with the necessary information to prepare the expert witness report which had been ordered by this Honourable Court on the said 6th of March, 2014.

20. That my informing the Claimant to attend the trial on the said morning of the trial was not deliberate but due to inadvertence.

21. That I crave leave to refer to the Claimant's Claim Form and Particulars of Claim and say that it discloses that the Claimant has a real prospect for prosecuting the Claim., [sic] I do not believe that the Defendant will be prejudice in any way if the matter is restored to the List and she is allowed to prosecute her case.

22. …

23. That by letter dated 28th January, 2014 I wrote to the Defendant's Attorney-at-Law informing them that the Medical Expert instructed us that there were certain pages missing from the Doctor's Surgical Note, and that several requests had been made to the said Attorneys for a full report of the said Surgical Notes, which are still not forth-coming,. [sic] …

24. That I have also previously requested from the Defendant's Attorney-at-Law a full copy of the Post Operative Surgical Notes which we have been asking for form [sic] September 3, 2013, and that surgical notes were delivered to me which was handed to the medical expert for the preparation of his medical opinion, but the [sic] informed me on closer examination that there were certain pages still missing from the post operative surgical notes. And moreover it would not be possible for him to complete his medical opinion by the 20th of December, 2014 as ordered by this Honourable Court. Accordingly I hereby seek an extension of time to comply with the Order of the Court made on the 6th of March, 2013."

[11] After hearing Mrs Alexis Robinson for the appellant and Mr Lawrence Philpotts Brown and Mr Richard Bonner for the respondent, Batts J granted the application sought and as indicated he also granted the appellant leave to appeal. On 5 February 2015, the appellant filed notice of procedural appeal based on seven grounds of appeal as set out below:

"(1) The learned judge erred by exercising a discretion that did not arise.

(2) The learned judge erred in distinguishing and not following **H. B. Ramsay et al v Jamaica Re-development Foundation**, **Inc et al** [2013] JMCA Civ 1.

(3) The learned judge erred in finding that the Respondent had met the threshold test in Rule 26.8(2) of the CPR.

(4) The learned judge erred in taking into account the factors listed in Rule 26.8(3) of the CPR without first ensuring that the Respondent had met the threshold test in Rule 26.8(2) of the CPR.

(5) Alternatively, the learned judge erred in exercising his discretion in favour of the respondent in light of the factors listed in Rule 26.8(3) of the CPR.

(6) The learned judge erred by granting relief from sanctions in the light of his correct finding that the Respondent was still not ready for trial, 13 years after the alleged incident.

(7) The learned judge erred in making the order for relief from sanctions without the file as he was not sufficiently seized of the proceedings to date."

Counsel grouped the grounds of appeal in the following way and argued them accordingly: grounds 1 and 2, grounds 3 and 7, grounds 4 and 5 and ground 6. I have adopted a similar approach for ease of reference and convenience.

Submissions of the appellant

Grounds 1 & 2

[12] Counsel for the appellant submitted that rule 26.8(2) of the CPR sets out preconditions which must be satisfied before consideration can be given to rule 26.8(3). In making that submission counsel relied on **H B Ramsay & Associates Ltd et al v Jamaica Redevelopment Foundation Inc** [2013] JMCA Civ 1. Counsel further submitted that **International Hotels Jamaica Ltd v New Falmouth Resorts Ltd** SCCA Nos 56 & 95/2003 judgment delivered 18 November 2005, was in line with that

approach. On the other hand counsel submitted that **Villa Mora Cottages Limited & Anor v Adele Shtern** SCCA No 49/2006 judgment delivered 14 December 2007, went far beyond the principles enunciated in the two previous cases.

[13] Counsel submitted that **International Hotels Jamaica Ltd** and **Villa Mora Cottages Limited** were transitional cases (commenced before the 2002 CPR was enacted), as identified by Brooks JA at paragraph [13] in **H B Ramsay & Associates**. Counsel thus submitted that **H B Ramsay & Associates** ought to be followed as it had benefited from the CPR, from the outset. Additionally, counsel submitted that in **International Hotels Jamaica Ltd** and **Villa Mora Cottages Limited**, the primary test in rule 26.8(2) had been met, whereas in **H B Ramsay & Associates** the defaulting party had failed to meet the requirements of rule 26.8(2), which was similar to the case at bar, which was why counsel argued that **H B Ramsay & Associates** was applicable.

Grounds 3 & 7

[14] Counsel for the appellant submitted that the respondent's own affidavit evidence was that her failure to comply with the unless order was intentional. Thus the learned judge's finding that the failure to comply was unintentional was unsafe and ought to be overturned. Counsel also submitted that the respondent's explanation that she had not been informed of the court dates by her attorneys and the attorneys' claim of inadvertence was not a good explanation for the respondent's failure to attend court on the day the statement of case had been struck out. Counsel argued that if the court

were to hold that as a good explanation for delays based on the evidence that was before the court, then litigators would simply blame their overworked attorneys and the inefficiencies of the Supreme Court's registry for their failure to comply with the rules which resulted in the unless orders being imposed. It was also counsel's contention that "inadvertence" was a conclusion to be drawn and not an explanation in itself, referring to the dictum of Brooks JA in **H B Ramsay & Associates** and of Lord Dyson delivering the speech in the Privy Council case **The Attorney General v Universal Projects Limited** [2011] UKPC 37, in which he stated that it would be difficult to see how inexcusable oversight could amount to a good explanation.

[15] Further, counsel submitted, it could not be said that the respondent had generally complied with all relevant rules, practice directions and court orders and the learned judge's finding in that regard was therefore wrong and ought to be overturned. Counsel submitted that the respondent's failure to comply with rules and court orders was evident from the applications made to the court below and the orders granted, as set out in the affidavit of Richard Bonner in support of the application for relief from sanction, filed on behalf of the respondent in the court below. Counsel also submitted that the unless order had been made as a result of the respondent's general non compliance.

Grounds 4, 5 & 6

[16] Counsel maintained that the learned judge may have felt that the respondent had a good explanation because the failure to comply with the unless order was due to

the failure of the attorneys. However, that was a factor to be examined under rule 26.8(3) of the CPR which only arose for consideration when the threshold of rule 26.8(2) had been crossed. Thus, the learned judge was wrong to have considered the provisions of rule 26.8(3) when the respondent had failed to satisfy the requirements of rule 26.8(2) of the CPR.

[17] Counsel submitted that alternately, if the factors listed in rule 26.8(3) ought to have been considered the learned judge had erred in exercising his discretion in favour of the respondent. Counsel argued that that was due to the failure of the respondent to comply with the orders; not having been able to remedy the situation within a reasonable time; and the fact that the trial date was already missed. Further, counsel pointed out that the effect on the appellant was that it would have to defend the actions of its employees which had taken place over 14 years ago, and the respondent was still not ready for trial.

Submissions of the respondent

[18] Counsel for the respondent submitted that the appellant had not filed an affidavit to challenge the respondent's application for relief from sanction. Thus, when the matter was heard there was no evidence to contradict the affidavits in support of the application. Counsel for the respondent submitted that the affidavit(s) indicated that the failure to comply with the order was not intentional and that there was a good explanation for that failure and that the respondent had generally complied with all other relevant rules, practice directions and orders. Additionally, counsel for the

respondent contended that the application seeking relief from sanctions had been promptly made.

[19] Counsel submitted that it was well established that the court will not lightly interfere with the exercise of a discretion by a judge of the lower court on an interlocutory hearing, and referred to the dictum of Morrison JA on behalf of the court in **Attorney General of Jamaica v John McKay** [2012] JMCA App 2 and Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042.

[20] With regard to grounds 1 and 2, counsel for the respondent submitted that the learned judge had correctly exercised his discretion when he granted the application sought by the respondent, having correctly taken into account the factors prescribed in rule 26.8(3) when considering the elements outlined in rule 26.8(2). Thus, counsel submitted, it was an incorrect understanding of the law that a court should consider only the factors set out in rule 26.8(2) of the CPR on an application for relief from sanctions and that should any of those factors not be met, the discretion of the court in respect of rule 26.8(3) would not arise.

[21] Counsel based the above submission on what he said was the reasoning of the court in **International Hotels Jamaica Ltd**. He submitted that McCalla JA (Ag) (as she then was) had opined that despite one of the factors not being sufficient to grant relief from sanctions, where it had not been shown that the explanation given was not genuine, the court would proceed to consider all the factors in rule 26.8(2) and 26.8

(3). Counsel further submitted that the learned judge of appeal had stated that "...in considering whether to grant relief the learned judge [in the court below] was required to have regard to all matters stipulated in rule 26.8(3)" and also emphasized "the need for tribunals, at first instance to demonstrate compliance with rules 26.8(2) and 26.8(3) of the CPR." Counsel posited that the stance taken by Harris JA in **Villa Mora Cottages Limited** was entirely consistent with the statements made by McCalla JA (Ag) in **International Hotels Jamaica Ltd**. Counsel therefore argued that it was incumbent on the learned judge to examine all the circumstances of the case, bearing in mind the overriding principle with regard to dealing with cases justly, which would, he said, in any event, require the court to address systematically all the factors outlined in rule 26.8(3) of the CPR. He relied on **R C Residuals v Linton Fuel Oil** [2002] 1 WLR 2782 in support of this submission.

[22] Counsel sought to distinguish **H B Ramsay & Associates** from the case at bar. He submitted that in **H B Ramsay & Associates**, the court had found that the appellants had failed to make their application promptly and had given no explanation for their delay. On the other hand, counsel submitted that in the case at bar the respondent's application for relief from sanction had been made promptly and that the explanation given by counsel for the delay was never challenged by the appellant. Moreover, counsel also argued that **H B Ramsay & Associates** could be considered to have been decided *per incuriam* since the court did not have the opportunity of considering **Villa Mora Cottages Limited**, and counsel contended further that in **H B Ramsay & Associates**, the court was dealing with dilatory applications *simplicter* and

in those circumstances the court may have been more likely to have taken a more stringent approach. Counsel also submitted that the law lords in the Privy Council did not consider **Villa Mora Cottages Limited** or **International Hotels Jamaica Ltd** hence that case could also have been "decided *per incuriam* at least as it applies to Jamaica".

[23] With regard to grounds 3 and 7, counsel submitted that when the affidavit is read in its entirety, it is patently obvious that an omission had been made in paragraph 6 of the respondent's affidavit (set out in paragraph [10] herein) which was never raised at the hearing of the application for relief from sanctions. Counsel further argued that the explanation for the failure to comply was sufficient and at no time had it been suggested by affidavit evidence that the explanation was not genuine. It was therefore contended that it was reasonable for the court below, in accordance with **International Hotels Jamaica Ltd**, to have accepted the explanation offered as meeting the requirements of the rules. Further, counsel for the respondent submitted that there had been general compliance with the rules and practice directions, and pointed out that the extension of time needed by the respondent to file and serve a medical report was due to the appellant's failure to provide full disclosure in respect of the surgical notes, with the added difficulty of endeavoring to obtain a medical practitioner ready and willing to prepare the necessary report.

Issues

[24] In my view, the main issues to be decided on this appeal are:

(i) the proper interpretation to be accorded rule 26.8 of the CPR;

(ii) whether the provisions of rule 26.8(1) and (2) of the CPR represent threshold tests, that the respondent would have had to satisfy before the court could systematically examine the factors set out in rule 26.8(3) of the CPR; and

(iii) whether the learned judge ought to have exercised his discretion in the circumstances of this case to grant relief from sanctions.

Rule 26.8 of the CPR

[25] Rule 26.8 which sets out the conditions which must be satisfied in order for the court to grant relief from sanctions provides as follows:

> "26.8 (1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –
> (a) made promptly; and
> (b) supported by evidence on affidavit.
>
> (2) The court may grant relief only if it is satisfied that –
> (a) the failure to comply was not intentional;
> (b) there is a good explanation for the failure; and
> (c) the party in default has generally complied with all other relevant rules, practice directions [,] orders and directions.
>
> (3) In considering whether to grant relief, the court must have regard to-

(a) the interests of the administration of justice;
(b) whether the failure to comply was due to the party or that party's attorney-at-law;
(c) whether the failure to comply has been or can be remedied within a reasonable time;
(d) whether the trial date or any likely trial date can still be met if relief is granted; and
(e) the effect which the granting of relief or not would have on each party.

(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."

Analysis and discussion

[26] I must state at the outset that in keeping with the principles set out in several cases in this court, and recently by Morrison JA on behalf of the court in **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1, it is well settled that the Court of Appeal will not interfere to set aside the decision of the lower court, save in certain circumstances. Morrison JA (as he then was) referred to the oft cited dictum of Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 ALL ER 1042, 1046 where Lord Diplock stated that:

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

[27] Morrison JA then outlined the circumstances in the exercise of a trial judge's discretion which would warrant the interference of the appellate court.

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

On the basis of the foregoing, the court will not interfere with the decision of the learned judge unless it is demonstrated to be judicially incorrect, or "palpably wrong".

Issues (i) the proper interpretation to be accorded rule 26.8 of the CPR; and (ii) whether the provisions of rule 26.8(1) and (2) of the CPR represent threshold tests, that the respondent would have had to satisfy before the court could systematically examine the factors set out in rule 26.8(3) of the CPR.

[28] The arguments of counsel for the appellant and for the respondent in respect of the interpretation and application of rule 26.8 of the CPR focused mainly on three cases, namely; **International Hotels Jamaica Ltd**, **Villa Mora Cottages Limited** and **H B Ramsay & Associates**. I will examine all three cases, my emphasis being on the true and proper interpretation to be accorded to rule 26.8.

[29] In **International Hotels Jamaica Ltd**, the court was reviewing the order of Brooks J (as he then was) who had upheld an order at trial that the defence of the appellant which stood struck out by a previous order should remain struck out. The court examined rule 26.8(1) and (2) of the CPR and concluded that these conditions must be considered cumulatively in order to satisfy a primary test. In reviewing rule

26.8(3), Harrison JA (as he then was) said these are mitigatory factors which could influence favourably or otherwise the grant of relief from sanctions.

[30] In my view, contrary to submissions of counsel for the respondent, **International Hotels Jamaica Ltd** does not proffer principles different from those postulated in **H B Ramsay & Associates**. There is nothing stated in that case to support the respondent's submission that **International Hotels Jamaica Ltd** promulgates that the factors in rule 26.8(2) and (3) of the CPR should be considered together.

[31] **Villa Mora Cottages Limited** was heavily relied on by counsel for the respondent. This case was an appeal from the decision of McDonald Bishop J (Ag) (as she then was) who had refused the appellant leave to extend the time within which to file witness statements and had further refused to restore their defence which had been struck out. In that appeal, Harris JA at page 10, on behalf of the court had stated that:

> "It cannot be disputed that orders and rules of the Court must be obeyed. A party's non-compliance with a rule or an order of the Court may preclude him from continuing litigation. This, however, must be balanced against the principle that a litigant is entitled to have his case heard on the merits. As a consequence, a litigant ought not to be deprived of the right to pursue his case.
>
> The function of the Court is to do justice."

[32] The learned judge of appeal then quoted Wooding CJ in **Baptiste v Supersad** and **Montrose** (1967) 12 WIR 140 at 144, where he stated that:

> "The law is not a game, nor is the court an arena. It is… the function and duty of a judge to see that justice is done as far as may be according to the merits."

Harris JA concluded that paragraph by stating that:

> "In its dispensation of justice, the Court must engage in a balancing exercise and seek to do what is just and reasonable in the circumstances of each case, in accordance with Rule 1 of the C.P.R. A court, in the performance of such exercise, may rectify any mischief created by the non compliance with any of its rules or orders."

[33] These statements are simple, straightforward, unambiguous and cannot be doubted. Indeed, the above dicta of Harris JA clearly reflect the role and function of the court in the exercise of its discretion in the grant of orders and judgments, and set out the ambit within which the court ought to function.

[34] In **Villa Mora Cottages Limited**, the court considered **R C Residual Limited v Linton Fuel Oils Limited & Anor** [2002] 1 WLR 2782 which was interpreting rule 3.9 of the English CPR. In that case the appellant sought relief from sanctions where it had been precluded from relying on an expert's evidence following failure to comply with an order. That order provided that unless the appellant filed and served the expert report by 4:00 pm on 2 April 2002, it would be precluded from relying on that expert's evidence at the trial. Rule 3.9 of the English CPR, although similar in some respects to rule 26.8 of the Jamaican CPR, is significantly different in others.

[35] Rule 3.9 of the English CPR states as follows:

> "**3.9**—(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 including—

(a) the interests of the administration of justice;

(b) whether the application for relief has been made promptly;

(c) whether the failure to comply was intentional;

(d) whether there is a good explanation for the failure;

(e) the extent to which the party in default has complied with other rules, practice directions, and court orders and any relevant pre-action protocol;

(f) whether the failure to comply was caused by the party or his legal representative;

(g) whether the trial date or the likely date can still be met if relief is granted;

(h) the effect which the failure to comply had on each party; and

(i) the effect which the granting of relief would have on each party.

(2) An application for relief must be supported by evidence."

[36] Rule 3.9 therefore, clearly groups together all the factors which the court will consider in granting relief from sanctions into sub paragraphs (a) to (i) with paragraph (2) requiring that the application must be supported by evidence. On the other hand the Jamaican counterpart, rule 26.8 of the CPR, albeit similar in the wording, is divided into three separate paragraphs. Due to the umbrella words of each paragraph, they fall for consideration at different stages when considering whether to grant relief from sanctions. Paragraph 26.8(1) (which requires the application to be made promptly and to be supported by evidence) 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) states

three specific factors that must be in effect in order for the court to grant relief, and in circumstances 'only if it is satisfied…" As a consequence, the matters set out therein must be satisfied before the court can consider the factors set out in rule 26.8(3). Put another way, any failure to satisfy those factors precludes the consideration of the court under rule 26.8(3).

[37] Consequently, in my view, rule 3.9 of the English CPR sets out a different regime from that of rule 26.8 of the Jamaican CPR, in that under the English provision, once the court is considering the application for relief from sanctions it must consider all the factors stated therein cumulatively and simultaneously.

[38] The learned judge of appeal noted at page 14 of the judgment that:

> "The discretionary power conferred on the Court under Rule 26.8 renders it obligatory on the part of a judge, in giving consideration to Rule 26.8(2) to pay due regard to the provisions of Rule 26.8(3). In determining whether to grant or refuse an application for relief from sanctions, it is incumbent on the judge to examine all the circumstances of the case bearing in mind the overriding principles of dealing with cases justly. In so doing, he or she must systematically take into account the requisite factors specified in Rule 26.8(3)."

Having reviewed **R C Residual Limited v Linton Fuel Oils** in **Villa Mora Cottages Limited**, she concluded at page 16 that:

> "In the present case, it appears to me that the learned judge had misapplied Rule 26.8(2). It is manifest that in examining the factors outlined in Rule 26.8(2) due attention must be given to Rule 26.8(3). The learned judge had not systematically given consideration to the relevant factors as prescribed by Rule 26.8(3). This she was bound to do."

[39] With the greatest of respect to Harris JA in **Villa Mora Cottages Limited**, this approach appears to me to state the court's powers under rule 26.8 more widely than is justified by the clear language of the rule itself. Thus, in my view, in granting relief from sanctions, the court in this jurisdiction ought not to consider the elements set out in rule 26.8(2) together with the factors set out in rule 26.8(3), but must first satisfy itself with regard to the elements stated in rule 26.8(2), before considering the factors in rule 26.8(3).

[40] In **H B Ramsay & Associates**, Brooks JA, as reiterated by counsel for the appellant, recognized that **International Hotels Jamaica Ltd** and **Villa Mora Cottages Limited** were commenced prior to the enactment of the CPR, 2002. Brooks JA upon delivering the judgment of the court upheld the decision of Fraser J in the court below, which refused the appellants' application for relief. The appellants had disobeyed an unless order which had required them to pay costs to the respondents. The approach taken by Brooks JA, with which I entirely agree, was to firstly consider CPR 26.8(1) after which 26.8(2) was considered to decide whether the discretion of the court arose. At paragraph [31], Brooks JA, held that:

> "An applicant who seeks relief from a sanction, imposed by his failure to obey an order of the court, must comply with the provisions of rule 26.8(1) in order to have his application considered. If he fails, for example, to make his application promptly the court need not consider the merits of the application…if the court agrees to consider the application, the next hurdle that the applicant has to clear is that he must meet all the requirements set out in rule 26.8(2).

> There would, therefore, be no need for a court, which finds that the applicant has failed to cross the threshold created by rule 26.8 (2), to consider the provisions of rule 26.8(3) in relation to the applicant."

[41] Thus, the arguments submitted by counsel for the respondent that rule 26.8(2) ought to be considered with rule 26.8(3) when deciding whether the discretion of the court arises in order to grant relief, are based on an incorrect understanding of the law. Accordingly, that would dispose of issues (i) and (ii), and in the main grounds 1 and 2 which would therefore fail. However, that is not the end of the matter. The question would then arise: did the learned trial judge assess the application for relief from sanctions in accordance with the principles set out above? I will therefore now consider issue (iii) to assess whether he exercised his discretion properly in the circumstances.

Issue (iii) Whether the learned judge ought to have exercised his discretion to grant relief

[42] Batts J provided a well reasoned written judgment of his decision to grant the respondent relief from sanction which demonstrated that he was fully seised of the applicable procedure and the proceedings. The learned judge firstly addressed and readily accepted that the application for relief had been promptly made. The order to strike out the respondent's statement of case had been made on 17 March 2014 while the notice of application for relief from sanctions was filed on 24 March 2014. That amounted to a one week delay and there cannot, in my opinion, be any serious argument advanced that the application had not been made promptly. Additionally, the application was supported by evidence on affidavit, thus satisfying rule 26.8(1). That

would lead me now to review the learned judge's approach to what I consider to be at the heart of the appellant's contention; whether the threshold test in rule 26.8(2) of the CPR had been satisfied.

Whether failure to comply was intentional

[43] The order made by Edwards J was that unless the respondent attended the trial to give evidence the statement of case would stand struck out. Batts J found that the respondent's failure to attend the trial was not intentional. The learned judge found that it was common knowledge that the respondent's original counsel, Antoinette Haughton Cardenas, had been struck from the roll of attorneys entitled to practice in Jamaica. Mr Richard Bonner had clearly stated that that circumstance had led to the respondent not being present nor represented at court on two occasions. Further, with regard to the non attendance which was critical to the striking out of the statement of case on 17 March 2014, the respondent was not present at court the day the unless order was made having not been informed of the trial date until the very day of the trial at 10:30 am. The respondent did attend court that day, in fact at 11:30 am, but only after the order striking out the statement of case had already been made. On the basis of the foregoing there does not seem to have been any evidence to support the appellant's contention that the respondent was intentionally absent from court. The finding of Batts J on this aspect cannot be faulted.

Whether there was a good explanation for the failure to comply

[44] Counsel has a duty to act in the best interest of his client. In this case, he certainly failed to do so, having informed the respondent of the court date on the very day scheduled for the trial, in circumstances in which her attendance was the subject of an unless order. In my opinion, this was negligent to say the least. However, the real issue is whether the respondent should bear the draconian sanction of having her claim struck out for her failure to attend court when she was not even aware of the court date or the consequence of her non attendance, and in circumstances where the explanation for her non attendance appeared genuine. In my view, Batts J's decision that the explanation was a good one seems reasonable on the evidence before him. There was no evidence to suggest tardiness or lack of due diligence on the part of the respondent herself, with regard to her claim.

Whether there was general compliance with all other relevant rules, practice directions orders and directions.

[45] The appellant has argued that there has been non compliance by the respondent on the basis that:

(a) the respondent had sought an order extending the time within which to file and serve medical reports;

(b) on the day the unless order had been made the respondent had been granted an order abridging time for the filing and service of an application and relief from sanctions;

(c) the respondent had short served the appellant with the notice of application for relief from sanction, service having been effected on 1 May 2014 where the hearing was set for 6 May 2014;

(d) the medical reports which were ordered to be filed by 29 September 2006 still had not been filed; and

(e) the 8 February 2010 trial date had to be abandoned because the respondent was neither present nor represented.

[46] The learned judge found that the absences at trial were explained and accepted by the court, having been due to the respondent's illness and the personal circumstances of the respondent's then attorney. Where the outstanding expert reports were concerned, the learned judge found that the explanation from the respondent's attorney was that there was reluctance by medical practitioners to give evidence against the appellant. Further, there was the difficulty of obtaining full disclosure from the appellant, in that pages of certain post operative surgical notes in relation to the respondent, were missing, even after counsel for the respondent had requested the appellant to provide the same. Permission had been granted for the respondent to call an expert witness; however the witness statement filed on 16 October 2007 which had been provided by the expert witness supported the appellant's case. Thus the respondent had required an extension of time within which to file and serve a further expert medical report.

[47] The learned judge found that it was not a matter that the report had not been served but that it had not been prepared. However, the learned judge noted that an order had been made that two medical reports be admitted into evidence. On that basis he found that in the circumstances, the failure of the respondent to obtain and file the outstanding reports could not make the respondent guilty of general non compliance. In fact the learned judge found that based on the quality of legal service the respondent had had to endure, it was fair to say that she had been in general compliance with the rules and orders of the court.

[48] The learned judge commented that there was authority to support the position that unless orders should be used sparingly (see **Marcon Shipping Ltd v Kefalas and Another** [2007] 3 All ER 365 [2007] EWCA Civ 463), and that orders striking out a party's claim on the basis that the party had failed to attend court ought really to be rarely made. He referred to the general difficulties one can experience with communication and transportation in Jamaica. He also mentioned the fact that in the instant case the respondent had the added problem of absent representation and a 'history of ill - health' which had formed 'the genesis of her claim'. He expressed the hope that the court would be "less inclined" to make such orders in those circumstances in the future.

[49] Batts J referred to a powerful statement of Sykes J in **Gloria Findlay v Gladstone Francis** Suit No F 045/1994 delivered 28 January 2005, which I am of the

view warrants repetition here, being apt to the circumstances of the case at bar. He said:

> "I recognize that the good administration of justice requires that cases be dealt with expeditiously but this has to be measured against the risk of injustice to a litigant because of his lawyer's default, particularly where the defendant did not personally contribute to the state of affairs that has come about. The administration of justice while receiving a blow in this case will not be undermined..."

In the light of the foregoing and the efforts which had been made by the respondent to obtain an extension of time for the filing of the relevant documents rather than to blatantly disregard the orders of the court, I find that I am in agreement with the position taken by the learned judge that there had been general compliance by the respondent.

[50] That having been said, the threshold test would have been crossed and it would have been necessary for the learned judge to systematically consider the factors set out in rule 26.8(3) of the CPR (see **Kenneth Hyman v Audley Matthews and Derrick Matthews and The Administrator General for Jamaica v Audley Matthews and Derrick Matthews** SCCA Nos 64 and 73/2003 judgment delivered 8 November 2006). What was clear was that, in my opinion, Batts J approached his consideration of the matter in accordance with the proper interpretation of rule 26.8 of the CPR. The learned judge exercised his discretion in respect of rule 26.8(3) of the CPR in this way:

(a) He indicated that in his view the administration of justice would be undermined if the respondent was precluded from having her day in court.

(b) As the failure to comply was due to the attorney-at-law, he noted that the rule envisaged a difference in consequence in those circumstances as against when the fault was due to the litigant's personal conduct.

(c) He found that although the failure to attend court on 17 March 2014 could not be corrected, given another trial date the respondent would be able to attend so to that extent the failure would be corrected.

(d) There was no trial date set at the time of the making of the application but one could be set and he proceeded to do so.

(e) He endeavoured to demonstrate a balancing exercise in respect of the consequences of the delay experienced since the cause had arisen. Both sides he said, would have to face a trial. Fading memories would apply across the board, although there should be contemporaneous medical notes which would be helpful. There was no indication that any witnesses had died or were unavailable. In his view, there would be greater prejudice to the respondent if relief had not been granted, as she would "feel that she has been hard done by in a system which would have, through no fault of her own, permanently close the doors of justice in her face".

[51] In my opinion it would be very difficult to say that the learned judge had exercised his discretion wrongly and misdirected himself in any way, and in those circumstances, in keeping with the principles enunciated in **Hadmor Productions Ltd and others v Hamilton and others**, this court ought not to interfere with the learned

judge's decision to grant relief from sanctions. That would therefore dispose of issue (iii) and grounds 3, 4, 5 and 6 of the grounds of appeal would accordingly fail.

Ground of appeal 7 was not addressed by counsel in her submissions.

Conclusion

[52] In the light of the foregoing, I would dismiss the appeal, but in the circumstances of this case make no order as to costs. I would order that a case management conference be scheduled in the Michaelmas term (2015), so that early dates can be fixed for the filing and service of any further expert medical report and for a pretrial review and trial.

SINCLAIR-HAYNES JA (AG)

[53] I have had the opportunity of reading in draft the judgment of my learned sister Phillips JA and I agree with her reasoning and conclusion.

MORRISON JA

ORDER

1. Appeal dismissed.
2. Case Management Conference is to be scheduled in the Michaelmas Term 2015 for the fixing of early dates for:

    (i) The filing and serving of any further expert medical report;
    (ii) Pretrial review; and
    (iii) Trial.

3. No order as to costs.