

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL 120/07

BETWEEN	JAMES WYLLIE	1ST DEFENDANT/APPELLANT
	LORNA WYLLIE	2ND DEFENDANT/APPELLANT
	RICHARD WINT	3RD DEFENDANT/APPELLANT

A N D	DAVID WEST	1ST CLAIMANT/RESPONDENT
	CHRISTOPHER WEST	2ND CLAIMANT/RESPONDENT
	DOUGLAS WEST	3RD CLAIMANT/RESPONDENT
	MARSHALEEN FORSYTHE	4TH CLAIMANT/RESPONDENT
	JEROME SMITH	5TH CLAIMANT/RESPONDENT
	RICHARD SMITH	6TH CLAIMANT/RESPONDENT

PROCEDURAL APPEAL

Written submissions received from Owen S. Crosbie & Co. Attorney's-at-law for the appellants and Livingston, Alexander & Levy, attorneys-at-law for the respondents.

13 August 2008

MORRISON, J.A.:

1. This is an appeal from an order made by Sinclair-Haynes J on 19 October, 2007 dismissing a preliminary objection made on behalf of the appellants (the defendants in the court below). Although Notice of Appeal together with written submissions in support were filed on 1 November 2007 followed by written submissions on behalf of the respondents on 2 November 2007, the learned judge's written judgment

did not become available until 30 June 2008, hence the delay in this appeal receiving consideration.

2. On 11 July 2007, an application was made by Fixed Date Claim Form seeking injunctive relief and recovery of possession of property on behalf of the respondents who were the claimants in the court below) against the appellants.

3. An application for an interlocutory injunction came on for hearing before Sinclair Haynes, J on 27 September 2007, at which time the appellants through their counsel took a preliminary objection that the Fixed Date Claim Form was not signed by the respondents or their attorneys-at-law in breach of Rules 22.1 of the Civil Procedure Rules ("CPR") and section 149 of the Registration of Titles Act ("the RTA"). However, it does not appear that any formal written application to strike out was filed and the matter was adjourned for 12 October 2007.

4. On 3 October 2007, however, the respondents filed an amended Fixed Date Claim Form which was now only signed by their attorneys-at-law on their behalf. The hearing of the preliminary objection in due course commenced on 12 October 2007 and concluded on 19 October 2007, when the learned judge dismissed the objection, ruling that the Fixed Date Claim Form as originally filed was not a nullity, that the irregularity in the execution of the document by Mrs. Sheila Smith was an

irregularity which could be remedied within the court's discretion and that the Fixed Date Claim Form should stand as amended.

5. I hope, I do no injustice to the grounds of appeal filed on behalf of the appellants by summarizing them in my own words as follows:

- (i) the Fixed Date Claim Form not having been signed by the claimants in person or by their attorneys-at-law (Rule 3.6(3) (d), and 22.1), it could only properly have been signed on the claimant's behalf by an agent as duly authorized in pursuant to section 149 of the RTA.
- (ii) In the absence of any such signature, the Fixed Date Claim Form was void and ought accordingly to have been struck out.

6. In support of the grounds, the appellants filed a detailed written submission, referring to section 149 and the Sixteenth Schedule to the RTA and a number of authorities. With regard to Rule 26.9, which Sinclair-Haynes J had treated as applicable in the circumstances, the appellants maintained that that rule was irrelevant in that by its terms it only applied in cases of irregularity and not to a case of breach of a more fundamental character.

7. The respondents, on the other hand, support Sinclair-Haynes, J judgment, submitting that it is the CPR and not the RTA which governs proceedings in the Supreme Court and that it is well established that non-compliance with procedural rules will not be treated as nullifying

proceedings. They refer to and rely on Rule 26.9 and also cite in support **Halsbury Laws of England** and the decision of the Caribbean Court of Justice in **Watson v Fernandez** [2007] CCJ (AJ), to which specific reference was also made by Sinclair-Haynes J in her judgment. Finally, the respondents submitted, an amended Fixed Date Claim Form was filed on 3 October 2007 (in accordance with Rule 20.1) and it is clear that no prejudice has been caused to the appellants as a result of the original errors in the documentation.

8. Rule 26.9(2)–(4) provides as follows:

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

(3) Where there has been an error of procedure or failure to comply with a rule, practice directions, cannot order on direction, the court may make an order to put matters right.

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

9. This rule makes it plain, it seems to me, that ordinarily speaking non-compliance by a party with rules of court will not be treated by the court as fatal, and that the court has a wide discretion to remedy errors in procedure (significantly, even in respect of a failure to comply with a court order and also of its own motion). As the editors of **Halsbury's** observance of an earlier English version of the rule (RSC Order. 2.r.1 (i)):

"This is one of the most beneficent rule of the Rules of the Supreme Court. It is expressed in the widest terms possible to cover every kind of non-compliance with the rules, and in both the positive and negative forms, so as to ensure that every non-compliance must be treated as irregularity and must not be treated as a nullity" (4th edition, volume 37 paragraph 36).

10. On the face of it, therefore, I would have thought that Sinclair-Haynes, J was clearly within her powers under the rules in treating non-compliance with Rule 22.1 as an irregularity, which (no consequence having been specified by any rule, practice direction or court order – Rule 26.9 (i)) "does not render the proceedings a nullity." I would also agree with the learned judge that providing a remedy of the error is a matter within the court's discretion, in the exercise of which the court "must seek to give effect to the overriding objective of enabling the court to deal with the case justly," with regard to which an important consideration would be the question of possible prejudice (which was not alleged) to the other side from the exercise of the discretion.

11. But I cannot lose sight of the appellants' submission based on section 149 of the RTA, which provides as follows:

"The proprietor (including a married woman) of any land under the operation of this Act, or of any lease, mortgage or charge, may appoint any person to act for him in transferring the same, or otherwise dealing therewith, by signing a power of attorney in the Form or to the effect contained in the Sixteenth Schedule.

Every such power or a duplicate or attested copy thereof, shall be deposited with the Registrar, who shall note the effect thereof in a book to be kept for the purpose."

12. In my view, this section is by its terms applicable only to cases in which the proprietor of any land or other registrable interest under the RTA is desirous of appointing an agent for the purpose of "transferring same, or otherwise dealing therewith." It has absolutely no relevance as far as I have been able to discern to the commencement or continuation of proceedings in the Supreme Court under the CPR and accordingly was rightly not taken into account in any way by Sinclair-Haynes J in her decision in this matter.

13. Sinclair-Haynes J cited with approval the recent observation of the Caribbean Court of Justice in **Watson v Fernandez** that "Justice is not served by depriving parties of the ability to have their cases decided on the merits because of a purely technical procedural breach committed by their attorneys (paragraph 39). I entirely agree. It follows that I am also in agreement with the learned judge's conclusion that in the instant case "the ends of justice will not be served by striking out the [appellants'] case because of a procedural irregularity where it has not been shown that the defendants have or will suffer any prejudice".

14. In the result, the appeal is dismissed, with costs to respondents to be taxed if not agreed.