[2018] JMCA Civ 25

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 20/2017

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE P WILLIAMS JA

BETWEEN	**RAY DAWKINS**	**APPELLANT**
AND	**DAMION SILVERA**	**RESPONDENT**

Written submissions filed by Burton-Campbell & Associates on behalf of the appellant.

Written submissions filed by Nelson-Brown, Guy & Francis on behalf of the respondent.

27 November 2017 and 26 October 2018

PROCEDURAL APPEAL

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

MORRISON P

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

SINCLAIR-HAYNES JA

[2] I concur.

P WILLIAMS JA

[3] Mr Ray Dawkins, the appellant, appeals the order of Thompson-James J made on 20 February 2017. By that order, the learned judge granted Mr Damion Silvera, the respondent, relief from the sanctions of an unless order which would have resulted in his statement of case against Mr Dawkins standing as struck out due to his failure to serve his witness statement within the court ordered time.

[4] On 13 November 2017, the appeal came on for consideration before this court. After considering the submissions, we gave our decision on 27 November 2017. We dismissed the appeal and ordered costs to be paid to the respondent, such costs to be taxed if not agreed. At that time, we promised to provide written reasons for our decision. These are my reasons for concurring in the decision of the court.

Background

[5] The respondent was injured as a result of a motor vehicle collision, which occurred on 12 December 2007. The appellant was the driver of one of the vehicles involved in the collision and Mr David James was the driver of the second vehicle, which was owned by Mr Ronald Wilson.

[6] In December 2010, the respondent commenced his claim against the three men for damages for negligence. The appellant was named as the first defendant with Mr Wilson and Mr James named as the second and third defendants respectively. The appellant filed his defence in January 2011 denying liability and asserting that the

accident was caused, and/or contributed to, by the negligence of the appellant and/or Mr Wilson and Mr James.

[7] The respondent filed further amended particulars of claim in January 2013. The defence of Mr Wilson was then filed on 4 February 2013 in which he asserted that any injury suffered by the respondent was because of his being hit by a motor bus that was being driven by the appellant.

Proceedings in the court below

[8] The matter first came before the court on 25 June 2013. At that time, it was referred for mediation. However, the appellant was granted leave to file and serve his amended defence. A case management conference date of 13 December 2013 was set with a date for pre-trial review set for 29 July 2014. The trial was set for three days commencing 29 September 2014.

[9] At the case management conference held on 13 December 2013, orders were made for the disclosure and inspection of documents, the filing and exchanging of witness statements and the filing of statements of facts and issues. Of particular relevance to this matter, witness statements were to be filed and exchanged on or before 9 May 2014.

[10] On 29 July 2014, the pre-trial review was held with the respondent and his attorney-at-law, as also an attorney-at-law for the appellant being present. King J made an order vacating the previously set trial dates and adjourned the pre-trial review to 22 April 2015. The trial was then set for 22 to 24 June 2015.

[11] King J also made the following order:

> "Unless all Case Management Conference Orders are compiled [sic] by the 27th February, 2015, the statements of case of the defaulting party or parties shall stand struck out."

[12] On 22 April 2015, the pre-trial review came on for hearing before Rattray J. At this time, the respondent and his attorney-at-law were present, along with an attorney-at-law representing the appellant and Mr Wilson, who was without legal counsel. The first order made by Rattray J was:

> "Time for the parties to comply with orders made at Case Management Conference on December 13, 2013 extended to May 29, 2015 by 4:00pm failing which the Statement of Case of the party or parties in default to stand struck out."

[13] The trial of the matter did not commence on 22 June 2015 but was adjourned to 6 June 2016. On 6 June 2016, Mr Wilson and Mr James filed a notice of application for relief from sanctions. On 7 June 2016, the respondent filed a similar application.

[14] In the notice of application, the grounds upon which the respondent relied for the relief from sanction were stated as being:

> "1. Pursuant to Part 26.8 this Honourable Court has jurisdiction to do so.
>
> 2. That by court order dated the 13th of December 2013 the [respondent] was required to file and exchange witness statement on or before May 9 2014 and those Orders were extended and made Unless Orders by Rattray J on the 22nd of April 2015 to expire on the 29th of May [sic] 2015.

3. That the Witness Statement was not served until the 5th day of June 2015.

4. That the failure to comply with the Order was not intentional.

5. That the [respondent] has generally complied with all other Orders.

6. That should relief be granted no prejudice will be suffered to the [appellants]."

[15] Miss Kimberlee S Dobson, attorney-at-law for the respondent, in a further affidavit filed in support of the application for relief from sanctions admitted that although the witness statement of the respondent had been filed from 13 June 2012, it was not served until the 5 June 2015. She explained that on 6 June 2016, the attorney-at-law appearing for the appellant announced that she had never been served with the witness statement of either Mr Wilson or Mr James. The matter was adjourned to 7 June 2016 to allow the attorney-at-law for those defendants an opportunity to make the requisite application for relief from sanctions.

[16] Miss Dobson further asserted that on 7 June, 2016 the attorney-at-law for the appellant "announced that in preparing for the application for relief from sanctions she became aware that though served with the [respondent's] witness statement from as far back as June 5, 2015 it was after the time limited in [Rattray J's] order and as such [the respondent's] statement of case should also stand as struck out".

[17] Miss Dobson asserted that within two hours on that said day, they had prepared, filed and served copies of the application on the attorneys-at-law. The application was adjourned and it is this application that was heard by Thompson-James J on 20

February 2017. The learned judge, having heard the submissions, granted the relief sought and gave leave to appeal.

The appeal

[18] On 7 March 2017, the appellant filed the notice and grounds of appeal. The following are the grounds of appeal:

> "(1) The learned judge failed to consider all the facts placed before the court and in particular that there was a breach of two (2) 'unless' orders.
>
> (2) The learned judge failed to appreciate that the court had no jurisdiction to restore the proceedings as there was no application for relief from sanctions by the Claimant/Respondent from the first 'unless' order.
>
> (3) That the learned judge did not consider or give due weight to the conditions to be satisfied pursuant to Rules 26.8 (1) & (2) of the CPR on an application for relief from sanctions.
>
> (4) That there was no satisfactory explanation for the delay of the Claimant/Respondent in complying with the case management and 'unless' orders for filing and service of the Claimant's/Respondent's witness statements.
>
> (5) That the learned judge erred in taking into account the factors listed in Rules 26.8(2) & (3) of the CPR without first ensuring that the Respondent had satisfied the requirement of promptness in Rule 26.8 (1) of the CPR.
>
> (6) That the learned judge failed to recognise that there would be significant prejudice to the 1st Defendant/Appellant in having the matter restored given that the claim was struck out for almost one year and the 1st Defendant/Appellant would have been of the view that litigation was at an end.

(7) That the learned judge erred in finding that the interest of administrative justice outweighed any prejudice to the 1st Defendant/Appellant."

[19] The appellant seeks the following orders from this court:

"(i) That the appeal be allowed.

(ii) That the order [Thompson-James J] granting relief from sanctions and restoring the Claimant/ Respondent's claim be set aside.

(iii) That the Claimant's/Respondent's statement of case remain struck out for failure to comply with the 'unless' orders granted in the court below.

(iv) Cost below and in the Court of Appeal to the Appellant.

(v) Any other relief this honourable court deems fit."

The submissions

For the appellant

[20] Counsel for the appellant identified four issues which she considered were to be determined by the court, namely:

"(a) Whether [Thompson-James J] could restore the proceedings by granting relief from the sanctions imposed on the 22nd April 2015 by [Rattray J]?

(b) Is the first 'unless' order made by [King J] still effective in light of the fact that no application was ever made for relief from sanctions in respect of that order?

(c) Whether or not the judge in exercising her discretion to grant relief from sanction applied the correct

principles of law as set out in the rules and decided cases.

(d) Whether the learned judge correctly applied the principles of law to the facts of the present case."

[21] She submitted that whereas the provisions of rule 26.8 of the Civil Procedure Rules (the CPR) give the judge jurisdiction to grant relief from sanctions, the factual circumstances of this case did not allow for such an exercise. It was submitted that the learned judge in exercising her discretion, failed to have regard to the fact that there was in existence a previous 'unless' order from which the respondent had not sought relief.

[22] It was also counsel's contention that this unless order created a barrier to the learned judge being able to restore the proceedings which had already been struck out. Further, she submitted that the order of Rattray J extending the time for compliance with the case management orders when a sanction was already in effect, rendered his order a nullity since there had been no relief from that earlier sanction. Counsel referred to **George Freckleton v Aston East** [2013] JMCA Civ 39 in support of these submissions.

[23] Counsel submitted that the result of the respondent's failure to comply with the case management orders, the effect of the sanctions imposed by virtue of the court order and the respondent's failure to seek relief from sanctions were not an irregularity which could be waived by the appellant’s action or inaction. She noted that there is a well-established principle of civil practice that whereas an irregularity can be waived, a

nullity cannot be so waived. She relied on **B & J Equipment Rental Limited v Joseph Nanco** [2013] JMCA Civ 2.

[24] She further observed that rule 26.7 of the CPR provides that the sanction imposed for a breach of an order has an automatic effect without the need for a subsequent court order. She referred to **George Freckleton v Aston East** which supported this interpretation of the rule.

[25] In relation to the first two issues identified for consideration, counsel contended the court was without jurisdiction to hear any application or proceedings in the matter except an application for relief from the first sanction that had remained in effect. She contended that the hearing of any other application or any proceedings in the court would amount to an abuse of the process of the court and would be barred, based on the doctrines of estoppel and res judicata.

[26] The court was invited to consider **Henderson v Henderson** [1843-60] All ER Rep 378, **Chuck v Cremer** (1846) 47 ER 884 and **Clarence Ricketts v Tropigas SA Ltd and Others** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 109/1999, judgment delivered on 31 July 2000, as instructive. She observed that the cases establish and apply the principle that:

> "Where a court of competent jurisdiction has considered a matter which is the subject of litigation and has formed an opinion or pronounced a judgment there can be no further adjudication of the same issue in the absence of special circumstances."

[27] In the submissions on whether the learned judge in exercising her discretion had applied the correct principles of law, counsel noted that the proper approach for the learned judge was outlined in rule 26.8(1) and (2) of the CPR.

[28] As such, she submitted, the first requirement had to be that the application must be made "promptly". The learned judge had to be satisfied that the applicant had shown on evidence that he acted with great alacrity in making the application. Counsel relied on the observations of this court in **National Irrigation Commission Ltd v Conrad Gray and Marcia Gray** [2010] JMCA Civ 18 and **HB Ramsay & Associates Ltd and others v Jamaica Redevelopment Foundation Inc and The Workers Bank** [2013] JMCA Civ 1 **(HB Ramsay)**.

[29] Counsel submitted that the issue of promptness has to be weighed in light of the facts of the claim. She contended that the respondent had been given three opportunities to comply with the order for service of his witness statement. She noted that the respondent had only realised his failure to do what was required when this was pointed out on the day of trial. Given these facts, counsel submitted that the learned judge failed to recognise that the application was not made promptly and the application should have failed on this very first ground.

[30] Counsel then submitted that the learned judge went further to consider the second limb of the requirements notwithstanding the fact that the application should have failed for want of being made promptly. It was counsel's contention that the inadvertence referred to by counsel for the respondent, in the form of "an

administrative oversight caused solely by our in house legal team", was an unsatisfactory explanation. This ought to have been fatal to the application for relief from sanctions. Counsel referred to **HB Ramsay** and **Jamaica Public Service Company Limited v Charles Francis and Columbus Communications Jamaica Limited** [2017] JMCA Civ 2 in support of this aspect of the submissions.

For the respondent

[31] The approach taken by counsel for the respondent in her submissions was to deal with grounds 1 and 2 together since both related to the consideration of the relevance of the first 'unless' order. Grounds 3, 4 and 5 were dealt with together since these grounds were in relation to the application of rule 26.8 of the CPR. Finally, grounds 6 and 7, which raised the issue of prejudice to the appellant, were addressed together.

[32] It was counsel's contention that the decision in **Samuels v Linzi Dresses Ltd** [1981] QB 115 emphasised that the court does have the power to extend time where an 'unless' order has not been complied with once it is done in a cautious manner, while still reinforcing the need for full compliance with any court order. Counsel noted that **Pereira v Beanlands** [1996] 3 All ER 528 supported that position.

[33] Counsel found further support for the submission that the time for compliance with an 'unless' order can be extended even after the time had expired in **Keen Phillips (A Firm) v Field** [2007] 1 WLR 686. She noted that this court in **Dale Austin v The Public Service Commission and The Attorney General of Jamaica**

[2016] JMCA Civ 46 had considered and endorsed the decision in **Keen Phillips (A Firm) v Field**. Thus, counsel concluded that the order of Rattray J had the effect of extending the time for compliance.

[34] Further, counsel contended, the issue as to whether Rattray J erred in making the order to extend the time for compliance with the case management orders cannot be the subject of review by a court of concurrent jurisdiction, but can only be challenged by way of appeal. Counsel relied on **Leymon Strachan v The Gleaner Company Limited and Another** [2005] UKPC 33 in support of this contention.

[35] Counsel submitted that since there was no appeal of the order of Rattray J, the parties were bound by the order unless reversed by this court. Counsel further submitted that Thompson-James J being a judge of concurrent jurisdiction, could not look behind the order of Rattray J.

[36] In the submissions made in relation to rule 26.8 of the CPR, counsel commenced by reminding this court of the fact that this court could not interfere with the exercise of the discretion of Thompson-James J, merely upon the grounds that this court might have exercised its discretion differently. Counsel referred to **Hadmor Productions Limited and Others v Hamilton and Another** [1983] 1 AC 191; **HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd. and Another** [2015] 2 All ER 206 and **Dayne Smith v William Hylton and Another** [2014] JMCA App 35.

[37] Counsel submitted that the appellant had failed to show that the decision of Thompson-James J was plainly wrong and an incorrect exercise of the learned judge's discretion.

[38] The decision of **HB Ramsay** was also relied upon for a determination of what constitutes "promptness" in making an application for relief from sanction. Counsel urged that each case ultimately turn on its own facts since there is a degree of flexibility in the assessment of the promptitude of an application.

[39] In the circumstances of this case where the application had been made on the same day the error had been discovered, counsel submitted the respondent had acted with reasonable celerity and alacrity.

[40] On the issue of whether there had been a good explanation for the failure, counsel noted that there had been no affidavit evidence by the appellant challenging the averments made on behalf of the respondent. Counsel submitted that it could not be said that the reason advanced for the delay was inadequate. The failure to comply was attributable to the counsel for the respondent and counsel contended that this in itself would not be sufficient to bar the respondent from proceeding. Counsel submitted 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-at-law. Reliance for this submission is **Gladston Watson v Rosedale Fernandes** [2007] CCJ 1 (AJ).

[41] Counsel observed that the respondent had generally complied with all the other relevant rules, practice directions, orders and directions. She noted that the witness statement had been filed from 12 June 2012. Counsel contended that the respondent had been in a position to exchange his witness statement from then, whereas the appellant only filed and served his witness statement on 27 February 2015 at 3:30 pm.

[42] On the final issue as to the possible prejudice to the appellant, counsel noted that the unchallenged evidence before Thompson-James J was that the parties had attended for trial to commence on 6 June 2016. It was not until the following day that counsel for the appellant had announced her discovery that the witness statement had been served outside of the time stipulated by the order of Rattray J. Thus, counsel contended, there was no evidence that the appellant had formed the view that the litigation against him was at an end. Further, counsel observed that there was no evidence of the effect that the granting of relief from sanctions would have had on the appellant and as to any prejudice that would be caused to him should the relief be granted.

[43] Counsel submitted that having failed to provide the learned judge with such evidence, the appellant could not seek to challenge the findings of the learned judge in that regard.

[44] Finally, counsel submitted that where a party has narrowly missed a deadline imposed by an order but has otherwise fully complied with its terms, it is appropriate for an order for relief from sanctions to be made. Counsel referred to **Mitchell v**

News Group Newspapers Ltd [2013] EWCA Civ 1537 cited in **Denton and others v TH White Ltd and another** [2014] EWCA Civ 906 in support of this submission.

[45] Counsel conceded that the witness statement had in fact been served approximately seven days after the date specified in the order of Rattray J. Thus, the failure had been remedied at the time of the hearing of the application for relief. The default of the respondent had therefore not prevented the progression of the matter and the parties were prepared for trial on 6 June 2016.

Discussion

[46] This is yet another of those matters where a judge has failed to provide reasons for the way a judicial discretion was exercised. The circumstances that can lead to this court interfering with such an exercise are now well settled, flowing largely from the observations of Lord Diplock in **Hadmor Productions Limited and Others v Hamilton and Another**. In **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1. Morrison JA (as he then was) succinctly set out these circumstances at paragraph [20]:

> "This court will therefore 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."

[47] The consideration therefore must be whether this decision, without reasons, demonstrates a proper exercise of the learned judge's discretion. Regrettably, it is also a consideration to be made without a full awareness of all the material the learned judge had before her. This is because in the material presented to this court, the appellant provided the application, affidavits and submissions that were relied on by the respondent only. There is nothing to indicate what the appellant presented in opposition to this application.

[48] The system of case management that was introduced through the CPR seeks to ensure that matters progress through the courts in a timely manner. It is now well established that the timetable set by the court for the progression of litigation must be obeyed. Failure to do so can attract consequences, the most severe of which will be to have one's case struck out.

[49] Rule 26.7 of the CPR provides that:

> (1) Where the court makes an order or gives directions the court must whenever practicable also specify the consequences of failure to comply.
>
> (2) Where a party has failed to comply with any of these Rules, a direction or any order, any sanction for non-compliance imposed by the rule, direction or the order has effect unless the party in default applies for and obtains relief from sanction, and rule 26.9 shall not apply.
>
> (3) Where a rule, practice direction or order-
>
> > (a) requires a party to do something by a specified date; and

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

[50] The rule under which the learned judge was asked to act and which therefore is most relevant to this appeal is rule 26.8 of the CPR. This rule provides that:

"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's 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."

[51] There have been several decisions from this court, which have stressed the importance of complying with the rules and the orders of the court. In **The Commissioner of Lands v Homeway Foods Limited and Stephanie Muir** [2016] JMCA Civ 21, McDonald-Bishop JA (Ag) (as she then was), conducted a comprehensive consideration of this issue and had this to say at paragraphs [49]-[50]:

"[49] In **Bigguzzi v Rank Leisureplc** [1999] 1 WLR 1926, Lord Woolf MR made the important point that under the CPR, the keeping of time limits laid down by the rules or by the court, itself, is, in fact more important than it was under the old procedural regime. The clearest reflection of this, he noted, is to be found in the overriding objective and in the power of the court to strike out a party's statement of case for, *inter alia*, failure to comply with a rule, practice direction or court order. Lord Woolf MR explained in that case, that judges, in exercising their discretion within the scope of the CPR, should be trusted to exercise their discretion fairly and justly in the given case, while recognising their responsibility to litigants in general not to allow the same defaults to occur as had occurred in the past. The overriding purpose of the rules, he said, is to impress upon litigants the importance of observing time limits in order to reduce the incidence of delay in proceedings.

> [50] The authorities have equally made it clear that striking out or dismissing a party's case is a draconian or extreme measure and so it should be regarded as a sanction of last resort. As Lord Woolf explained in **Bigguzzi**, there may be alternatives to striking out, which may be more appropriate to make it clear that the court will not tolerate delay but which, at the same time, would enable the case to be dealt with justly, in accordance with the overriding objective. The court in considering what is just, he said, is not confined to considering the effects on the parties but is also required to consider the effect on the court's resources, other litigants and the administration of justice."

[52] McDonald-Bishop JA (Ag) also referred to and endorsed the principles arising from the decision of the Caribbean Court of Justice (the CCJ) in **Barbados Rediffusion Service Ltd v Asha Mirchandi and Others (No 2)** (2006) 69 WIR 52 where the question of the appropriateness of the sanction of striking out was also thoroughly and usefully examined within the context of an unless order. At paragraph [51], McDonald-Bishop JA (Ag) stated inter alia:

> "...It is duly accepted, as their Lordships have postulated... that the approach of the court, in determining whether to strike out a party's case, must be holistic and so a balancing exercise is necessary to ensure that proportionality is maintained and that the punishment fits the crime. According to their Lordships ... the discretion of the court is wide and flexible to be exercised as 'justice requires' and so it is impossible to anticipate in advance, and it would be impractical to list, all the facts and circumstances which point the way to what justice requires in a particular case."

[53] The need to ensure that each case is dealt with justly according to its particular circumstances means that, where appropriate, relief from sanctions may be granted

even after the sanction has taken effect (see **Keen Phillips (a Firm) v Field, Marcan Shipping (London) Ltd v Kefalas and another** [2007] EWCA Civ 463 and **Dale Austin v The Public Service Commission**). One of the reliefs which may be granted is an extension of time within which to comply with an unless order.

Was the judge wrong to grant relief from the sanction imposed by the 'unless order' of Rattray J, given the 'unless order' previously imposed by King J?

[54] It is necessary to note that the application before the learned judge was for relief from the sanction imposed by the unless order of Rattray J. It is also noted that in the material exhibited, which was before the learned judge, the respondent had not made mention of the previous unless order imposed by King J. There is no indication of whether the issue of that first order had been raised before the learned judge.

[55] The appellant in his submissions before this court, in raising the issue of whether Rattray J could have extended the time for compliance, urged that he was without jurisdiction to do so. Further, it was contended that the hearing of any such application would amount to an abuse of process and would be barred on the doctrine of estoppel and res judicata.

[56] Rattray J would have been at liberty to consider granting relief from the sanctions imposed by King J and to extend the time for compliance, if the justice of the case so required. The problem that confronts a further consideration of this issue is that there is no indication of what material Rattray J had before him or what submissions were made to him that led to his extending the time for compliance.

[57] A need for an appreciation of what material was before Rattray J is even more necessary when one recognises that the provisions of rule 26.2 of the CPR gives the court power to make orders of its own initiative. There needs to be no formal application. The minute of orders made at the pre-trial review indicates that attorneys-at-law for both the respondent and the appellant attended before King J when the first unless order was made, and likewise before Rattray J when the time for compliance was extended. This court cannot speculate as to what happened at either of those hearings and without more it cannot be determined that Rattray J was clearly in error when he made the order extending the time for compliance.

[58] Further, the decision by Rattray J to extend the time for compliance with the orders of King J was an exercise of his discretion. Any complaint about that exercise should have been launched through an appeal to this court. In the circumstances, the learned judge cannot be said to have erred in considering the application that was before her relating to the relief from the sanctions imposed in the orders of Rattray J.

Whether the learned judge erred in granting relief from sanction in circumstances, where the conditions of rule 26.8 (1) and (2) of the CPR were not met?

[59] In **HB Ramsay and Associates Ltd** Brooks JA stated at paragraph [31] 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. Promptitude does, however, allow some degree of flexibility and thus, 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). Should he fail to meet those requirements then the court is precluded from granting him relief. 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 that applicant."

[60] It is to be noted that the rule does not give any definition of the word "promptly", neither is this requirement of promptness referable to any other event. There are other rules where a party is required to make an application to avoid the consequence of its matter being determined due to a failure to comply with a rule or a direction. For example, in an application to set aside or vary a judgment made in default, "the court must consider whether the defendant has applied to the court as soon as is reasonably practicable after finding out the that judgment has been entered" (see rule 13.3(2) of the CPR).

[61] In **National Irrigation Commission Ltd v Conrad Gray and Marcia Gray** Harrison JA stated that:

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

And at paragraph [16] he had this to say:

> "...Promptness, in our view, is the controlling factor under 26.8. It is plainly a very important factor, as is evident from the fact that it is singled out in the rule as a matter to which the court must have regard. In our judgment, it is a very important factor, because there is a strong public interest in the finality of litigation. Put simply, people are entitled to know where they stand."

[62] The unless order has been described as an order of last resort and it has been urged that such an order should best be made where there is a history of failure to comply with other orders. See **Hytec Information Systems Ltd v Coventry City Council** [1997] 1 WLR 1666.

[63] The order in this case was made at the first pre-trial review. There was no indication which of the orders made at the case management conference the parties had failed to comply with or which party was in default. The second order extending the time for compliance also did not identify the default and the party defaulting. The respondent had in fact complied partially with the order regarding his witness statement within the time ordered by C Brown J at the case management conference on 13 December 2013. It had then been ordered that witness statements were to be filed and exchanged on or before 9 May 2014. The witness statement had been filed from 13 June 2012.

[64] The witness statement was eventually served on 5 June 2015. This was some three months after the date for compliance of the first unless order of King J and more significantly seven days after the time for compliance of the second unless order of

Rattray J. The statement was served in advance of the trial date of 22 June 2015. The trial date was adjourned to 6 June 2016. The fact that the appellant had received the respondent's witness statement late was only made known on 7 June 2016 and the respondent's attorney-at-law filed the application for relief from sanction on the same day.

[65] In these circumstances, it cannot be said that there was any egregious history of failure to comply with the orders of the court. It is perhaps useful to recall what has been described as the seeds from which the test to be applied for striking out a case is regarded to have been sown. In **Allen v Sir Alfred McAlpine & Sons Ltd** [1968] 2 QB 229, Diplock LJ in dealing with dismissing claims for want of prosecution said at page 259:

> "It is then a Draconian order and will not be lightly made. It should not in any event be exercised without giving the plaintiff an opportunity to remedy his default, unless the court is satisfied either that the default has been intentional and contumelious, or that the inexcusable delay for which the plaintiff or his lawyers have been responsible has been such as to give rise to a substantial risk that a fair trial of the issues in the litigation will not be possible at the earliest date at which, as a result of the delay, the action would come to trial if it were allowed to continue."

[66] If the assessment of whether the application was made promptly should be dependent solely upon the time at which the breach occurred, the respondent's application was made approximately a year after the deadline for compliance and that could be viewed as amounting to inordinate delay. However, the fact that there had

been partial compliance and that there was in effect no negative delays to the matter proceeding to trial, were circumstances which ought to be taken into consideration.

[67] Further, the circumstances under which the breach was brought to the attention of the court at the time of trial ought also to be considered. In the factual circumstances of this case, the reaction of the respondent in applying for relief from sanction can then be regarded as prompt. Thus, in the peculiar circumstances of this matter, the learned judge cannot be faulted for having concluded that the first hurdle to the making of the application had been sufficiently met.

[68] The circumstances identified are also germane to the question of whether the failure to comply was intentional. There is nothing from these circumstances to suggest that the failure to comply was deliberate and hence this question can easily be resolved in favour of the respondent. The learned judge again cannot be faulted for coming to such a conclusion.

[69] Counsel for the respondent has accepted responsibility for the failure to serve the witness statement. In her further affidavit in support of the application for relief from sanction, Miss Kimberlee S Dobson, one of the attorneys-at-law having conduct of the matter, stated the reason for failure:

> "This was an administrative oversight caused solely by our in house legal team, for which we are extremely embarrassed for. This delay was in no way contributed to or caused by the [Respondent] in any way."

[70] In **The Attorney General v Universal Projects Ltd** [2011] UKPC 37, Lord Dyson who delivered the decision on the Board stated at paragraph [23] that:

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

[71] The fact that the witness statement for the respondent was filed even before the case management conference, to my mind, supports the contention of the attorney-at-law that this failure to serve was due to oversight and not so much inefficiency. This then is one circumstance where oversight is excusable. In these circumstances, it cannot reasonably be said that the learned judge can be faulted for finding that the respondent provided a good explanation.

[72] On the question of whether there was general compliance, there is no assertion of any other instance of non-compliance on the part of the respondent. Indeed, in the submissions on behalf of the respondent made to the learned judge, his attorneys-at-law had set out very clearly that there had been timely compliance with all the other orders made.

[73] In conclusion, the appellant's contention that the learned judge did not exercise her discretion in keeping with the provisions of rule 26.8(1) and (2) is not borne out after a consideration of the circumstances of this matter. The decision of the learned

judge to grant relief from sanctions was well within the proper exercise of her discretion.

Whether the judge erred by failing to consider the issue of prejudice as it affected the appellant?

[74] In the submissions made on behalf of the appellant, there are no real arguments made in support of the grounds relating to the question of prejudice. There is therefore no material presented to demonstrate what prejudice the appellant would have suffered. This would especially be relevant since the appellant seemed to have not formed the view that the litigation was at an end in light of the fact that he turned up for the trial. Further, it is noted that the fact that the respondent's statement had not been received within the court ordered time was not raised until the second day of trial.

[75] in any event, the fact that the claim may have been struck out due to the non-compliance of the respondent did not entitle the appellant to view the matter as coming to an end. The appellant would have been better able to rely on the assumption that there was finality to the litigation if he had obtained judgment.

[76] Rule 26.5 of the CPR states:

> "26.5(1) This rule applies where the court makes an order which includes a term that the statement of case of a party be struck out if the party does not comply with the 'unless order' by the specified date.
>
> (2) Where the party against whom the order was made does not comply with the order, any other party may ask for judgment to be entered and for costs.

(3) A party may obtain judgment under this rule by filing a request for judgment.

(4) The request must:-

(i) prove service of the 'unless order'

(ii) certify that the right to enter judgment has arisen because the court's order was not complied with;

(ii) state the facts which entitle the party to judgment."

[77] Any party who wished to have the matter brought to finality needed to have complied with rule 26.5 of the CPR given the nature of the unless order that had been made. The matter had come on for trial and all the parties were ready to proceed before the late discovery of the non-service of the witness statements from one party to the appellant. It was on the next day that the appellant sought to take issue with the late service of the witness statement from the respondent. What prejudice the appellant would have suffered is not apparent from these circumstances.

[78] In determining whether to grant relief from sanctions, the court is required to seek to do justice between the parties in light of the overriding objective. In these circumstances, the trial date had been met and it has not been demonstrated that there was any effect on the appellant because of the breach. These grounds therefore are without merit and must accordingly fail.

[78] It is for these reasons that I concurred with the orders referred to in paragraph [4].