[2018] JMCA Civ 4

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 98/2015

BEFORE:	**THE HON MRS JUSTICE MCDONALD-BISHOP JA** **THE HON MRS JUSTICE SINCLAIR-HAYNES JA** **THE HON MISS JUSTICE P WILLIAMS JA**	
BETWEEN	**JAMAICA INFRASTRUCTURE OPERATORS LIMITED**	**1ST APPELLANT**
AND	**UNITED MANAGEMENT SERVICES LIMITED**	**2ND APPELLANT**
AND	**DWAYNE MCGAW**	**RESPONDENT**

Written submissions filed by Henlin Gibson Henlin on behalf of the appellants

Written submissions filed by Townsend, Whyte & Porter on behalf of the respondent

2 February 2018

Procedural Appeal

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

MCDONALD-BISHOP JA

[1] The core issue for consideration in this appeal concerns the management of civil cases in the Supreme Court, particularly, the attendance of litigants and their attorneys-at-law at case management conference, which is governed by rule 27.8 of the Civil Procedure Rules, 2002 ("CPR"). The appeal specifically focuses on the power of a judge with conduct of a case management conference in circumstances where an attorney-at-law, representing a party to the claim, is present but the party he represents, whose attendance has not been dispensed with by the court, is absent and not represented by a person other than the attorney-at-law.

[2] This is an appeal from orders made by K Anderson J on 17 July 2015, by which he adjourned a case management conference and made consequential orders adverse to Jamaica Infrastructure Operators Limited (the 1st appellant) and United Management Services Limited (the 2nd appellant) in a claim brought against them by the respondent, Dwayne McGaw.

[3] It is the basic contention of the appellants that the learned judge ought to have conducted the case management conference in circumstances in which only their attorney-at-law was in attendance on their behalf. The gravamen of the appellants' complaint is that the learned judge erred in the exercise of his discretion when he adjourned the case management conference due to their absence (in the person of a representative other than their attorney-at-law) and made consequential unless and costs orders adverse to them. The respondent contends, on the other hand, that the

learned judge cannot be faulted for adjourning the case management conference and making the consequential orders in the terms he did and so the court ought not to interfere with the exercise of his discretion.

[4] Having considered the circumstances of the case, the relevant law and the submissions of counsel for the parties, I find that I cannot agree with the appellants' contention that the learned judge erred in the exercise of his discretion in such a manner that would justify the interference of this court. I have found favour with the respondent's position that the learned judge acted correctly. I find that there is no merit in the grounds of appeal and so the appeal should be dismissed. I have arrived at this conclusion for the reasons set out below.

The background

[5] By an amended claim form, filed on 13 March 2013, the respondent seeks damages for personal injury and consequential losses as a result of the alleged negligence and breach of statutory duty of the appellants and or breach of contract by the 2nd appellant, arising from an incident that occurred on 2 April 2010 at the Vineyards Toll Plaza in the parish of Saint Catherine.

[6] At all material times, the respondent was employed to the 2nd appellant as a tollbooth collector and the 1st appellant was the owner of premises where the Vineyards Toll Plaza is operated. On 2 April 2010, during the course of his employment, the respondent attended the Vineyards Toll Plaza to carry out duties on behalf of the 2nd respondent. He alleged that he was lawfully seated in a chair provided by the 1st

appellant and that in the course of the ordinary use of the chair, it overturned, causing him to fall to the floor and sustain injuries. The appellants have denied liability.

[7] Upon the close of pleadings, the matter was referred to mediation under the automatic meditation procedure of the Supreme Court. Mediation was held on 16 July 2014 but was unsuccessful. A case management conference was subsequently scheduled for 17 July 2015, being one year after the mediation was held.

[8] The matter came before K Anderson J for case management conference on the date as scheduled. The respondent and his attorney-at-law were present. The appellants' attorney-at-law was also present but there was no representative present on behalf of either appellant.

[9] The attorney-at-law appearing for the appellants apologized to the judge for the absence of a representative for the appellants and explained that they had informed the appellants of the scheduled case management conference on 16 July 2015, which was the day before the hearing. Counsel explained that given the short notice, the appellants were unable to find representatives in time for the hearing.

[10] The learned judge informed the parties that he was not minded to proceed with the case management conference in the absence of representatives for the appellants and that he would adjourn the hearing. He also indicated that he would address the inconvenience to the respondent by making an order for costs in his favour. The learned judge was minded to award costs to the respondent against the firm of attorneys-at-law representing the appellants and he thereafter requested that the

appellants' attorney-at-law at the hearing make submissions as to why he should not make the costs order against the firm. Submissions were made by the appellants' attorney-at-law.

[11] During the course of the proceedings, the respondent's attorney-at-law informed the learned judge that the respondent had travelled from overseas and was in the process of migrating in September 2015. For that reason, counsel requested that the hearing be adjourned to a date prior to the respondent's departure. The learned judge informed the parties that he could not facilitate the request of the respondent for a date before his departure but that he would award costs for his airfare.The respondent gave the requisite information about his airfare. There was no issue raised before the learned judge by counsel for the appellants concerning the respondent's assertion that he had travelled from overseas and the learned judge's decision to compensate the respondent for the inconvenience caused by the adjournment by awarding him costs for his airfare.

[12] The learned judge, having heard counsel for both sides, proceeded to make the following orders:

> "1. The Case Management Conference is to be held before a judge in Chambers on February 12, 2016 at 12 noon for 1 (one) hour.
>
> 2. All parties shall be required to be present upon the adjourned Case Management Conference hearing, until said case has been concluded.
>
> 3. Unless the [appellants'] representatives are in full compliance with Order No. 2 above, the [appellants'] statement of case or the statement of case of any of the [appellants] in default of compliance shall stand

as struck out, without the need for further Court Order.

4. The costs of today are awarded as against the [appellants] in the sum of Thirty Three Thousand Seven Hundred and Seventy Dollars ($33,770.00) each and such sum shall be paid by each of the [appellants] to the [respondent] by or before September 30, 2015.

5. Unless each of the [appellants] shall be in full compliance with Order 4 above, then the statement of case of either or both of the [appellants] as would then be in default of compliance shall stand as struck out without the need for further Court Order.

6. The [respondent] shall file and serve this Order."

[13] The appellants, by notice of application for court orders filed on 24 July 2015, applied to K Anderson J to, among other things, set aside the order he made on 17 July 2015 or, in the alternative, to grant them permission to appeal those orders. On 18 September 2015, the learned judge refused the application, except for granting the appellants permission to appeal. He also granted a temporary stay of execution of his orders on condition that the appellants filed their appeal by 30 September 2015.

The appeal

[14] The appellants filed their appeal on 30 September 2015. There are four grounds of appeal set out in these terms:

"a. The learned judge erred as a matter of fact and/or law in the exercise of his discretion when he adjourned the case management conference even though counsel for the appellant was present and able to proceed with the case management conference.

b. The learned judge erred as a matter of law and/or fact when he imposed sanctions of his own initiative without giving the parties affected the right to be heard in accordance with r. 26.2 of the CPR and of ever being heard prior to their case being struck out in the event of future non-compliance.

c. The learned judge erred as a matter of fact and/or law in making the orders in accordance with r. 27.8(4) of the Civil Procedure Rules.

d. The learned judge erred as a matter of law and fact in awarding costs of the adjournment in favour of the respondent in all the circumstances."

[15] The appellants seek these orders from this court:

"a. The orders of the 17th day of July be set aside.

b. Costs here and of the proceedings below to the Appellants to be taxed if not agreed.

c. Such further and/or other relief as this Honourable Court deems just."

The issue

[16] As already indicated above, the deep issue arising for the consideration of this court is whether K Anderson J erred in the exercise of his discretion when he adjourned the case management conference and made the unless and costs orders in circumstances where the appellants' representatives were absent but their attorney-at-law was in attendance. This broad issue has given rise to three separate but distinct sub-issues, which each merits discrete examination by the court; those are:

i. whether the judge erred in the exercise of his discretion when he adjourned the case management conference;

ii. whether the judge erred when he made an unless order against the appellants on his own initiative and without hearing the appellants; and

iii. whether the judge erred when he awarded costs to the respondent in all the circumstances.

Discussion and findings

[17] The starting point for dealing with the complaint of the appellants and the resultant issues that have arisen for consideration is to acknowledge the principles that should guide the approach of this court in treating with the appeal, which is one arising from the exercise of the judge's discretion.

[18] As counsel for the appellants themselves have accepted, this court can only interfere with the exercise of the judge's discretion and exercise its own in limited and well defined circumstances. Those circumstances are clearly set out in the oft-cited case from this court, **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 2, which endorsed the guiding principles enunciated by Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042. Based on those authorities, for this court to properly interfere with the learned

judge's decision, it must be satisfied that the exercise of his discretion was based on a misunderstanding of the law, the evidence, or an inference that a fact exists or does not exists, which can be shown to be demonstrably wrong; or where the 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. This court must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that members of this court would have exercised their discretion differently.

i. Did the judge err in adjourning the case management conference?

[19] In seeking to have this court interfere with the exercise of the judge's discretion in adjourning the case management conference on terms, counsel for the appellants have submitted that the judge "misunderstood and/or misinterpreted" rule 27.8 and, in particular, rule 27.8(4) and therefore erred as a matter of fact and/or law when he adjourned the case management conference, even though counsel for the appellant was present and able to proceed with the case management conference.

[20] Rule 27.8 deals with the issue of attendance at case management conference (as well as pre-trial review) and the powers of the case management conference judge. It seems necessary to set out the relevant provisions of this rule. It reads:

> **"Attendance at case management conference or pre-trial review**
>
> 27.8 (1) Where a party is represented by an attorney-at-law, that attorney-at-law or another attorney-at-law who is fully authorized to negotiate on behalf of the client and competent to deal with

the case must attend the case management conference and any pre-trial review.

(2) The general rule is that the party or a person who is in a position to represent the interests of the party (other than the attorney-at-law) must attend the case management conference.

(3) However the court may dispense with the attendance of a party or representative.

(4) Where the case management conference or pre-trial review is not attended by the attorney-at-law and the party or a representative the court may adjourn the case management conference or pre-trialreview to a fixed date and may exercise any of its powersunder Part 26 (Case management-the court's powers) or Part 64 (Costs).

(5) Provided that the court is satisfied that notice of the hearing has been served on the absent party or parties in accordance with these Rules, then

(a) if the claimant does not attend, the court may strike out the claim; and

(b) if any defendant does not attend, the court may enter judgment against that defendant in default of suchattendance.

(6) The provisions of rule 39.6 (application to set aside judgment given in party's absence) apply to an order made under paragraph (5) as they do to failure to attend a trial."

[21] According to counsel for the appellant, rule 27.8(1) makes the presence of a party's attorney-at-law mandatory at a case management conference, if the party is represented. However, rule 27.8, they say, does not make the party's attendance mandatory. This, it is contended, is seen from the combined effect of rules 27.8(2) and

27.8(3). They contend that there is no similar discretion to dispense with the attendance of an attorney-at-law where the party is represented, as evident from the terms and effect of rule 27.8(1) and given the role that the attorney-at-law is expected to perform at the case management conference. These provisions, counsel argue, are to be read in conjunction with the overriding objective of dealing with cases justly and the overall administration of justice. According to counsel, if the attorney-at-law is present, the overriding objective is not imperiled and the matter can proceed. However, where the attorney-at-law is absent or is present without instructions, the matter is unable to proceed and the court is unable to actively manage the case. It is within this context, the submission goes, that the exercise of the court's discretion within the ambit of rule 27.8(4) is to be understood.

[22] Counsel for the appellants further submit that rule 27.8(4) does not punish the absence of a party when a party's attorney-at-law is present or when the party is present and the attorney-at-law is absent, without more. The jurisdiction or discretion to adjourn the case management conference under rule 27.8(4) is only exercisable where both the attorney-at-law and the party are absent, they contend. According to counsel, for the court to order that a party should be present, notwithstanding the presence of his attorney-at-law, is, in effect, an order punishing that party.

[23] Counsel for the respondent submit in response, that as a general rule, the party must attend the case management conference, pursuant to rule 27.8(2) and accordingly, the failure of the party to attend must be addressed by an exercise of the judge's case management powers. There is no legal support, counsel submit, for the

appellants' contention that the judge conducting the case management conference is without discretion to adjourn the case management conference, once the attorney-at-law for the absent party is present.

[24] Counsel rely on rules 26.1 and 26.3 of the CPR as the source of the judge's power to adjourn the case management conference, to award costs against the appellants, require the future attendance of the appellants and to attach sanctions for any non-compliance. They pointed out that the directives set out in rules 27.8(3) and 27.8(4) are not exhaustive and that rule 26.1(v) provides that the court may "take any other step, give any other direction and make any other order for the purpose of managing the case and furthering the overriding objective".

[25] Counsel for the respondent further submit that rule 27.8 makes provision for the steps a judge can take at a case management conference, which is not attended by a party, a party's attorney-at-law or a representative of the party. The learned judge, they argue, could have struck out the appellants' statement of case once he was satisfied that notice of the hearing had been served on the appellants, in accordance with the rules. Counsel also submit that the court did not apply the most severe penalty that was available to it. Instead, the court chose a more moderate action in its decision to make orders to manage the case, as the court is asked to do, pursuant to rule 26.1 (v). For these reasons, they contend, the learned judge did not err in law in adjourning the case management conference and so this court ought not to interfere with the exercise of his discretion in that regard.

[26] The contention of the appellants that the learned judge erred in adjourning the case management conference cannot be accepted. The interpretation they seek to have the court apply to rule 27.8 is inconsistent with the clear wording of the relevant rules and the obvious intention of the framers of the rules. I find favour with the respondent's arguments that the judge did not err in the exercise of his discretion when he adjourned the case management conference, although the appellants' attorney-at-law was present.

[27] It is clear from the literal reading of rule 27.8(1) that where a party is represented, as in the case of the appellants in this case, the attorney-at-law representing the party or another attorney-at-law fully authorised to negotiate on behalf of his client and competent to deal with the case, must attend the case management conference. The attendance of the attorney-at-law for a represented party is, unquestionably, mandatory and cannot be dispensed with.

[28] In relation to the attendance of the party, the general rule is that the party or a person who is in his position to represent its interest (other than its attorney-at-law) must attend the case management conference (rule 27.8(2)). This provision is mandatory, unless the party's attendance is dispensed with by the court under rule 27.8(3).

[29] The rule, therefore, stipulates quite clearly that where a party's attendance is not dispensed with by the court, the party is required to attend the case management conference, either in person or by some one else who can competently represent its

interest other than its attorney-at-law. It is clear that the attorney-at-law is not to be treated as the alter ego of the party for the purposes of the case management conference, hence the requirement for someone else other than the party's attorney-at-law to attend. The requirements for the attendance of the attorney-at-law and the party are therefore separate and distinct. The argument of counsel for the appellants that the attendance of the attorney-at-law alone is sufficient to satisfy the rule is rejected.

[30] Accordingly, both the party (or a representative other than its attorney-at-law) as well as its attorney-at-law must be present, unless the party's attendance is dispensed with by the court. In this case, the appellants' attendance was not dispensed with, and so they were each required by law to have been in attendance through a representative, other than their attorney-at-law.

[31] Rule 27.8(4) states equally clearly that where the attorney-at-law and the party (or a representative of the party) are not in attendance, the court may adjourn the case management conference to a fixed date. With the appellants' representatives not being present and their attendance not dispensed with in the instant case, then as it stood, the parties and their attorney-at-law were not present at the case management conference, as required by the rules of court. The power of the learned judge under rule 27.8(4) to adjourn the matter to a fixed date was unquestionably triggered.There was no fetter on the exercise of his discretion to do so. I therefore agree with the learned judge when he stated at paragraph [15] of his reasons:

> "The interpretation to be given to **rule 27.8(4**) **of the CPR** is that if a case management conference is not attended by

> a party or party's representative and that party's attorney, the court may adjourn the said conference to a fixed date and make case management orders and orders as to cost. The court does not only have that power if both the attorney and the party or party's representative, do not attend that conference. Indeed, if that were the correct interpretation, then this court would have to proceed with a case management conference, once the attorney for a party is present at that conference, even though that attorney's client (the litigant/party) is absent."

[32] The learned judge was correct in his interpretation and application of the relevant rules and so it cannot be said that he misunderstood the law. He acted within the ambit of the rule and he did not run afoul of Part 1 of the CPR, which provides that he must give effect to the overriding objective in applying and interpreting the rules. The appellants' complaint in ground of appeal (a) that the learned judge erred in adjourning the case management conference is, in my view, devoid of merit.

ii. Was the judge wrong to impose the unless order on his own initiative and to do so without hearing the appellants?

[33] The judge had made an order that a representative of the appellants should attend the next case management conference and he specified the consequences of the failure to do so, which was the striking out of the defaulting appellants' statement of case. Counsel, on the appellants' behalf, submit that the orders imposed by the learned judge are usually made where the default is habitual. However, in the instant case, the appellants' failure to attend the case management conference was their first non-compliance and therefore the orders imposed by the learned judge are disproportionate and do not serve the interests of justice. According to counsel, the order is more stringent than the general rule in the CPR, in that the order seeks to compel the

appellants' attendance at all times, even if there may be good reason for their absence. The unless order made by the learned judge, they contend, places the appellants on a different footing from all other defendants to whom the CPR apply.

[34] Having taken into consideration the detailed submissions of counsel for the appellants and counsel for the respondents on this issue, and having examined all the circumstances of the case, I can discern no basis on which it could properly be found that the learned judge erred in making the unless order in the circumstances he did.

[35] Rule 27.8(4), in addition to conferring the power on the judge to adjourn the case management conference, also empowers him to exercise any of his case management powers under Part 26 of the CPR. Rule 26.1(2)(m) of the CPR gives the judge the power to require any party (or party's attorney-at-law) to attend court and rule 26.1(2)(v) empowers the judge to take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective.

[36] In addition to the foregoing powers, rule 26.7 of the CPR specifically provides:

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

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

(a) requires a party to do something by 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 agreement between the parties."

[37] By imposing a sanction by way of an unless order, the consequence for failure to comply with the order made for the appellants' attendance at the next case management conference, the learned judge was acting within the ambit of rule 26.7(1). He evidently adopted that course to secure compliance with the order of the court in his effort to effectively manage the case at that stage of the proceedings. He had the power and legitimate right to do so.

[38] This court has noted that the order of the learned judge has not been perfected and from the wording of the unless order, it seems that the learned judge did not intend to compel the appellants' attendance at all times and for all events during the course of the proceedings before the Supreme Court. The order stated that they are required to be "present upon the adjourned [c]ase [m]anagement [c]onference hearing until said case has been concluded". This court takes this to mean that the learned judge made an order to cover the appellants' presence at all case management conferences that may be scheduled until the case is concluded. In any event, even if the order was that they are to be present until the conclusion of the case, the order has not stipulated any term that would prejudice the appellants' right to approach the court for an order dispensing with their attendance at the case management conference, as

provided for by rule 27.8(3) or to generally seek relief from sanction, which is provided for in rule 26.7 (2) as indicated at paragraph [36] above. The argument that the order has prejudiced the appellants and has placed them on different footing from other defendants is baseless and cannot be accepted as a ground on which to assail the exercise of the learned judge's discretion.

[39] The other aspect of the appellants' disgruntlement, which relates to the making of the unless order, is the contention that the learned judge erred in making the unless order without giving them the right to be heard in accordance with rule 26.2 of the CPR. They also contend that he failed to give them the opportunity to be heard, prior to their case being liable to be struck out in the event of future non-compliance. Counsel on the appellants' behalf submitted that the failure of the learned judge to give the appellants an opportunity to be heard is a miscarriage of justice. According to them, had the appellants been given the opportunity to explain, they would have demonstrated that they had a good explanation and it is unlikely that the unless and costs orders would have been made against them. Compliance with rule 26.2(2) is mandatory, they argued. They have relied on **Grace Kennedy Remittance Services Limited v Paymaster (Jamaica) Limited and Paul Lowe** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 5/2009, judgment delivered 2 July 2009.

[40] Rule 26.2, on which the appellants rely, in advancing this ground of appeal, cannot avail them. The rule reads:

> "(1) Except where a rule or other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative.
>
> (2) Where the court proposes to make an order of its own initiative it must give any party likely to be affected a reasonable opportunity to make representations.
>
> (3) Such opportunity may be to make representations orally, in writing, telephonically or by such other means as the court considers reasonable.
>
> (4) Where the court proposes –
>
> (a) to make an order of its own initiative; and
>
> (b) to hold a hearing to decide whether to do so,
>
> the registry must give each party likely to be affected by the order at least 7 days notice of the date, time and place of the hearing."

[41] In this case, the learned judge was tasked with conducting the case management conference. The rule requires parties who are represented to be in attendance with their attorneys-at-law. Counsel in attendance for the appellants explained to the court the reason for their client's absence. Essentially, the appellants' failure to have a representative attend the case management conference was due to counsel's failure to advise them in a timely manner. Counsel made representations that the learned judge could proceed to conduct the case management conference notwithstanding the absence of the appellants. The judge also heard representations on behalf of the respondent that he had travelled from overseas for the hearing and about his plans to migrate after a particular date.

[42] It was for the learned judge to treat with the explanation given by counsel for the appellants and to treat with the matter before him as the rules of court and the general law allow. He had all the circumstances before him for a decision to be made concerning the progress of the matter. The learned judge did not see it fit to conduct the case management in the absence of the appellants. That was a matter solely within his discretion.

[43] In the circumstances of this case and given the rules that were engaged, the failure of the learned judge to give notice to the appellants to make representation before making the unless order is not fatal to the exercise of his discretion. Such approach was not necessary in these circumstances. I would adopt the dictum of Morrison JA (as he then was) in **Duke St John-Paul Foote v University of Technology Jamaica(UTECH) and anor** [2015] JMCA App 27A, paragraph [35], and say that:

> "The element of surprise, and hence potential unfairness, to the other side, which rule 26.2(2) of the CPR was obviously designed to obviate would, it seems to me, have been completely absent in the particular circumstances of this case."

[44] It ought to be noted also, that apart from making the unless order, the learned judge had the power to enter judgment against the appellants in default of the attendance of a representative, in accordance with rule 27.8(5), once he was satisfied that notice of the hearing was brought to their attention. From all indications, notice of the hearing was given to their attorneys-at-law, which was, in effect, notice to the appellants. Once notice of the hearing was served on the appellants and they failed to

attend, the learned judge could have proceeded to judgment in default of attendance. This is a more draconian measure provided for by the rules and which could have been applied by the learned judge, without notice to the appellants. In all the circumstances, there was nothing to bar him from imposing an unless order, a sanction of less severity, in order to give the appellants a chance to comply with the rules of court.

[45] The learned judge undeniably pursued a course of action in treating with the appellants' non-attendance, which was less detrimental to their interests. It was within his power to do so. He cannot be faulted for taking the necessary and decisive steps in seeking to manage the case as he did by the imposition of an unless order to secure future compliance on the part of the appellants.

[46] It should be noted too that the learned judge, in saying that the appellants' statement of case should be struck out, without need for further order, was merely saying that the respondent need not apply for the striking out order to be made in the event of non-compliance by the appellants. It means that the order would automatically take effect upon non-compliance. However, with the statement of case struck out, the respondent would have had to then request that judgment be entered against the appellants in order to secure judgment on his claim. With that necessary procedure to be followed by the respondent, the appellants would be afforded an opportunity to make an application for relief from sanction as provided for by rule 26.8.

[47] Furthermore, even without the respondent applying for judgment to be entered in his favour, upon the failure of the appellants to comply with the unless order, the

appellants would also have the right to apply to the court for relief from sanction andor for extension of time within which to comply, if they were to realise that they are unable to comply in time with the order of the court. Also, as indicated before, they still possess the right to approach the court to have their attendance dispensed with or indeed, to seek to vary the unless order. In **Prime Sports Jamaica Limited (Coral Cliff Entertainment) v Lori Morgan** [2017] JMCA Civ 32 at paragraph [31], P Williams JA, made it absolutely clear that "...the court may indeed vary the terms of an unless order if in the interests of justice it is appropriate to do so". In **Dale Austin v The Public Service Commission and The Atorney General of Jamaica** [2016] JMCA Civ 46 at paragraph [101], Edwards JA (Ag) set out some helpful propositions which have been endorsed by the court in **Prime Sports JamaicaLimited (Coral Cliff Entertainment)** that could be utilised by a party against whom an unless order has been made.

[48] In the light of all the options or avenues for redress that are available to the appellants to avoid the unwanted consequences of the unless order, they are not deprived of an opportunity to be heard or without an avenue to pursue relief from sanction, if they are not in a position to comply with the order of the court. Therefore it cannot seriously be argued that the unless order is inconsistent with the overriding objective to deal with the case justly or is otherwise inherently or manifestly unjust.

[49] Having taken into consideration the submissions of counsel on both sides on this issue, I find it difficult to accept that the unless order, in the terms stated, would or

could lead to a miscarriage of justice so as to justify this court interfering with the exercise of the learned judge's discretion. This ground of appeal has no merit.

iii. Did the learned judge err as a matter of law and fact in awarding costs of the adjournment in favour of the respondent in all the circumstances?

[50] Counsel for the appellants argue that "the appellants have been wrongly mulct in costs even though their attorney-at-law was present with full instructions", in accordance with rule 27.8(1). Furthermore, they contend, there was no evidence supporting the order for the costs disbursement to the respondent. I cannot accept the appellants' contention concerning costs.

[51] The learned judge is empowered under rule 27.8(4) to exercise his powers under rule 64 as to costs in deciding to adjourn the case management conference due to failure of a party to attend. Rule 27.3(8) also provides that the general rule is that costs incurred in attending a case management conference are costs in the claim. However, rule 27.3(9) states that the court may make some other order as to costs where the case management conference has to be adjourned due to the failure of one or more parties to attend the hearing or co-operate fully in achieving the objective of the case management conference.

[52] Furthermore, and as already indicated in treating with the learned judge's power to make the unless order, the learned judge could have entered judgment against the appellants in default of their attendance and so an award of costs is also a less draconian penalty for their non-attendance than entering such a judgment. Therefore,

generally speaking, the award of costs to the respondent, as a result of the adjournment, was well within the discretion of the learned judge and in keeping with the provisions of the CPR. It cannot be said that he exercised his discretion on a wrong premise of fact or law in awarding costs against the appellants.

[53] The more crucial issue for consideration is whether the learned judge erred in awarding costs in the sum he did without supporting evidence. The affidavit of Cavelle Johnson, counsel appearing for the respondent in the proceedings below (filed on 17 August 2015 in response to the appellants' application for relief from sanction and permission to appeal) indicated that on the day of the case management conference, the respondent had travelled from overseas and that that fact was brought to the attention of the leaned judge. The learned judge was also advised that the respondent was preparing to migrate by September 2015.

[54] Counsel deponed that upon the learned judge indicating that he was minded to reimburse the respondent his airfare, the respondent stated, through his counsel, that the cost of airfare was US$530.00. The learned judge then calculated the Jamaican equivalent of that sum, which amounted to JMD$62,540.00. He awarded that sum plus the sum of JMD$5,000.00, which represented the costs for the day. He also ordered that the costs are to be apportioned equally between the appellants. Counsel deponed that there was no objection from the appellants in relation to the respondent's information to the court or the learned judge's decision to reimburse his airfare. This has not been rebutted.

[55] The contention of counsel for the respondent is that given that there was no challenge from counsel for the appellant, no dispute had arisen before the learned judge concerning the issue of costs and so there there was no need for the respondent to have provided supporting evidence in the circumstances.

[56] Part 64, to which rule 27.8(4) refers, contains rules about costs and the entitlement to costs, while part 65 deals with the quantification of costs. In this case, the learned judge had seen it fit to quantify the costs. Although the learned judge has given no written reasons treating with the award of costs, it is clear on the face of his decision and on the record that the basis of his assessment was the expenses incurred by the respondent to attend the adjourned hearing and which he would have had to incur to return. He had to measure the inconvenience in monetary terms. The expenses incurred to travel to court cannot be said to be an improper basis on which to compute costs to be awarded in the circumstances. It is accepted, however, that although compensating the respondent for the inconvenience caused to him by an award of costs was within the learned judge's discretion, he was nevertheless obliged to act judicially in making his decision.

[57] Rule 65.17reads:

> "(1) Where the court has a discretion as to the amount of costs to be allowed to a party, the sum to be allowed is the amount-
>
> (a) that the court deems to be reasonable; and

(b) which appears to the court to be fair both to the person paying and the person receiving such costs.

(c) ..."

[58] The rule then enumerates some factors that the court should consider in deciding what would be reasonable. The list of factors is not exhaustive. The fact that the learned judge chose the airfare as a basis of assessing the loss to the respondent cannot be challenged as being unreasonable or unfair.

[59] It seems evident from the record of appeal and the submissions of counsel on both sides, that no dispute arose in the court below as to whether, in fact, the respondent had travelled from overseas to attend the case management conference that had to be adjourned. The learned judge accepted the respondent that he travelled from overseas. I am not prepared to interfere with his acceptance of that fact, which was never challenged before him.

[60] The learned judge then allowed the respondent to provide information concerning the cost of his airfare, which was given. Apparently, no issue was raised by the appellants' counsel that the respondent was being challenged in his assertionas to the costs of his airfare and that specific proof was required by them. The appellants had the opportunity to request that his assertions be strictly proved but no effort was made to exploit that opportunity before the learned judge. The issue of insufficiency of proof now being raised on appeal was never an issue raised before the learned judge at the time he was dealing with the issue of costs. I see no basis to interfere with his decision to rely on the respondent's say-so. In fact, the appellants have pointed to no

requirement in law (and I know of none) which stipulates that expenses incurred must be strictly proved before they can be allowed by the court in terms of costs.

[61] The pivotal question for determination by the learned judge in executing his function judicially was what award of costs would have been fair and reasonable to both the respondent (the receiving party) and the appellants (the paying parties), having regard to the circumstances before him and the overriding objective. It is observed within this context, that there is no complaint that the sum ordered to be paid as reimbursement of the respondent's airfare is exorbitant, unfair or unreasonable. In my view, it does not appear to be an exorbitant or unreasonable sum for the appellants to pay to be in breach of the rules of court which resulted in inconvenience to the respondent. There is no complaint that the appellants do not have the ability to pay the sum.

[62] It cannot be said that the learned judge misapplied the law or misinterpreted any fact and he did nothing aberrant. I would therefore refuse to interfere with the exercise of the learned judge's discretion in ordering that as part of the respondent's costs, the respondent should be reimbursed his airfare.

[63] There can be no dispute, and there was none in the court below, that the $5,000.00 awarded as the costs of the day is reasonable and fair.

[64] In my view, the sum ordered by the learned judge to be paid by the appellants in equal share should stand because the award is not at all unreasonable or unfair in all the circumstances. I would rule accordingly. Ground of appeal (d) therefore fails.

Conclusion

[65] There is no basis on which this court could properly interfere with the orders of K Anderson J even if we would have exercised our discretion differently. He acted within the ambit of the law governing his functions as a judge who had conduct of a case management conference. He had the power to adjourn the case management conference, to impose an unless order and to award costs against the appellants as a result of the non-attendance of a representative on their behalf, albeit that their attorney-at-law was present. The learned judge cannot be faulted in making the order that the respondent be compensated in costs for his travel from overseas in the sum ordered.

[66] I would dismiss the appeal with costs to the respondents.

[67] The delay in the disposal of this appeal is deeply regretted and I sincerely apologise to the parties and to counsel.

SINCLAIR-HAYNES JA

[68] I have read in draft the judgment of McDonald Bishop JA. I agree with her reasoning and conclusion and I have nothing further to add.

P WILLIAMS JA

[69] I too have read in draft the judgment of McDonald-Bishop JA. I agree with her reasoning and conclusion and I have nothing further to add.

MCDONALD-BISHOP JA

ORDER

(1) The appeal is dismissed.

(2) The orders made by K Anderson J on 17 July 2015 are affirmed except for order number 4 which is varied only to the extent that the costs ordered to be paid by the appellants to the respondent must be paid within 60 days of the order of this court.

(3) The stay of execution of the orders of K Anderson J is discharged.

(4) The matter is to be set for case management conference by the Registrar of the Supreme Court at the earliest possible opportunity.

(5) Costs of the appeal to the respondent to be taxed, if not agreed.