[2017] JMCA Civ 2

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 126/2015

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA (AG)

BETWEEN	**JAMAICA PUBLIC SERVICE COMPANY LIMITED**	**APPELLANT**
AND	**CHARLES VERNON FRANCIS**	**1ST RESPONDENT**
AND	**COLUMBUS COMMUNICATIONS JAMAICA LIMITED (trading as FLOW)**	**2ND RESPONDENT**

Written submissions filed by Livingston Alexander & Levy for the appellant

Written submissions filed by Reitzin & Hernandez for the 1st respondent

10 February 2017

PROCEDURAL APPEAL

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

MORRISON P

[1] I agree with the reasoning and conclusions of Edwards JA (Ag) and have nothing further to add.

F WILLIAMS JA

[2] I too agree.

EDWARDS JA (AG)

Background

[3] This is an appeal against the decision of Rattray J made on 18 August 2015, where he refused the appellant's application for relief from sanctions. The history of the matter dates back to 28 August 2007, where the first respondent (the claimant in the court below) who was employed as an electrician to Columbus Communications Jamaica Limited, (the first defendant in the court below), received an electrical shock whilst replacing cables on a utility pole belonging to the appellant (the second defendant in the court below). The respondent suffered personal injuries and as a result, he filed a claim for negligence against the first defendant and the appellant.

[4] When the claim came on for case management, directions were given for the parties to file and serve witness statements on or before 9 May 2015. The appellant did not file its witness statement in the time allotted. As a result, on 26 May 2015 the appellant filed an application seeking relief from sanctions and for an extension of time to file its witness statement. One witness statement was in fact filed on 16 July 2015, the same day as the hearing of the application. The first respondent had also applied to strike out the appellant's statement of case for failing to comply with the case management orders. That application was adjourned.

[5] The appellant's application for relief from sanctions was supported by affidavit sworn to by David Fleming, an attorney-at-law and the appellant's legal officer. The application was based on the fact that the appellant's failure to file its witness statements was not intentional, it being due to the fact that the intended witnesses were "currently travelling outside of the parish as well as the island for an extended period of time due to work related commitments". It was also contended that the late filing of the statements would not affect the trial date, which had been set for 16 - 27 November 2015. However, the application was opposed by the first respondent on the basis that: (i) the affidavit in support of the application was defective in that it did not comply with rule 30.3 of the Civil Procedure Rules (CPR), as the source of the information and belief was not disclosed and (ii) that the explanation proffered for the delay was not a good explanation.

[6] After hearing oral and written submissions, the learned judge refused to grant relief from sanctions on the basis that the affidavit in support of the application was in breach of the CPR, rule 30.3 and, in any event, the appellant did not give a good explanation for failure to file its witness statement within the time limited in the case management orders.

Grounds of Appeal

[7] On 4 December 2015, this court granted leave to the appellant to appeal that decision. The grounds of appeal filed may be summarised as follows:

(a) The learned judge erred in law when he determined that the appellant's affidavit in support of the application for relief from sanction is in breach of rule 30.3 of the CPR in failing to identify the source of the information for the statement contained in paragraph 5 and was therefore inadmissible.

(b) The learned judge erred in concluding that there was no good explanation because the use of the word 'currently' could only address the situation present at the time when the affidavit was being sworn. The learned judge erred in concluding that the appellant's explanation was inadequate and that it was required to give an explanation for the entire period from the date of the case management order rather than for the period when the breach occurred.

(c) Further, the learned judge failed to apply the overriding objective, and the fundamental principle of access to justice whereby parties are to have a right to have their cases heard on the merits and should not be defeated by a purely procedural and technical breach which does not in any way impact the trial or justice of the case: **Watson v Fernandes** [2007] CCJ 1 (AJ).

(d) The learned judge erred in the exercise of his discretion in awarding costs of the application to be paid by the appellant, when there are special circumstances which warrant a departure from the general rule.

Ground (a) - Was the affidavit in breach of rule 30.3

[8] Counsel for the appellant argued that the learned judge fell into error when he failed to take into account the fact that the affidavit was made by the legal officer to the appellant who had conduct of the claim. She also argued that the learned judge erred when he drew the inference that the facts sworn to in the affidavit were not within the affiant's personal knowledge. Counsel noted that rule 30.3 only placed an obligation on an affiant to state the source of his information and belief when it is not within the affiant's personal knowledge. Counsel pointed out that, in the instant case, Mr Fleming did in fact have personal dealings with the intended witnesses as the appellant's employee and legal officer with conduct of the case.

[9] Counsel for the appellant submitted that the learned judge was plainly wrong in failing to draw the inference that Mr Fleming would naturally be working and liaising with the potential witnesses. She further submitted that the lack of detail as to whether the claim triggered an investigation, the extent to which he was involved in the process and the scope of his involvement were not material facts, which as a result of their omission, would disable the learned judge from being in a position to properly consider Mr Fleming's evidence; that evidence being that the witnesses had been unavailable to

prepare and finalise witness statements due to their work commitments which took them outside of the corporate area and the jurisdiction.

[10] Counsel pointed out also that Mr Fleming had sworn in the affidavit, at paragraph 3, that the facts stated were within his personal knowledge unless otherwise indicated and therefore the presumption of personal knowledge was in the affiant's favour. Counsel argued that, as the facts sworn to by the affiant were within his personal knowledge, the need to state the source of information did not arise. Moreover, counsel argued, there had been no challenge from the respondent that the information was not within the affiant's personal knowledge and in the absence of any evidence to the contrary, there was no valid basis for rejecting the evidence.

[11] Counsel also submitted that the learned judge fell into error in dismissing the affiant's statement that he reviewed the relevant documents and information, as there was nothing before the court to suggest that the evidence was not credible. Counsel noted that in the defence to the claim filed, Mr Fleming had personally certified the truth of the contents. Counsel further argued that, in holding that Mr Fleming should have identified each document which was reviewed, the learned judge acted unreasonably in requiring an onerous task within the context of an application for relief from sanctions.

[12] For his part, counsel for the first respondent submitted that the sole affidavit relied upon by the appellant contained hearsay statements on information and belief in paragraph 5 and failed to state the source of such information and belief as required by

rule 30.3(2)(b). It was submitted that such evidence was hearsay and thereby inadmissible. It was further submitted that, as a result, there was no evidence of any explanation for failing to comply with the case management order to file witness statement within the time limited by the order and therefore the judge was correct in his decision to refuse the appellant's application. Counsel also argued that, on a separate issue, the affidavit spoke to the unavailability of witnesses at a point in time, 12 days after the court ordered deadline. The evidence, it was argued, was therefore irrelevant and for that reason also inadmissible.

Decision on ground (a)

[13] I am indeed cognizant of the general rule that this court will not interfere with the decision of a learned judge at first instance unless it is demonstratively clear that, in arriving at that decision, he took the wrong approach, or that the decision arrived at was plainly the wrong one based on the circumstances before him or based on the applicable law relating to the issue. Before this court will interfere, it must be satisfied that the learned judge had fallen into error. I will therefore apply the principles set out in **Hadmor Productions Limited et al v Hamilton et al** [1982] 1 All ER 1042 and **Watt v Thomas** [1947] 1 All E R 582] in reviewing the learned judge's decision to determine whether he was plainly wrong to refuse the relief sought.

[14] The application for relief was made pursuant to rule 26.8 of the CPR. An application for relief from sanctions under rule 26.8(1) is operative where the court makes an order or gives directions and specifies the consequences for failure to comply or where the rules provide a sanction for non-compliance. In respect of the case

management orders made in this case, there were no consequences specified in the order itself for a failure to comply.

[15] However, under rule 29.11, the appellant's failure to file and exchange witness statements as ordered rendered it unable to call any witnesses unless it was granted relief from sanctions. Rule 29.11 of the CPR provides:

> "29.11(1) Where a witness statement or witness summary is not served in respect of an intended witness within the time specified by the court then the witness may not be called unless the court permits.
>
> (2) The court may not give permission at the trial unless the party asking for permission has a good reason for not previously seeking relief under rule 26.8."

[16] This in and of itself is a sanction and the appellant was therefore obliged to apply for relief from this sanction. Rule 29.11(2) refers expressly to rule 26.8 and applications for relief from sanctions are made pursuant to the provisions of rule 26.8 - see also **Chartwell Estate Agents Limited v Fergies Properties SA, Hyam Lehrer** [2014] EWCA Civ 506 per Davis LJ. In the result, the decision by the learned judge not to grant relief to the appellant and extend the time for compliance with the case management order to file and exchange witness statements was indeed fatal to the appellant by virtue of the operation of rule 29.11.

[17] A judge of the Supreme Court may exercise powers granted to him or her by the rules of court for the efficient, orderly and just management of cases. Rule 26.1(2)(c) provides that the powers given to the court includes the power to:

"(c) extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance had passed."

Except where the rules provide otherwise.

[18] Rule 26.3 (1)(a) provides that:

"In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court-

(a) That there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings."

[19] Where the application to extend time is made after the time for compliance has expired and there is a sanction imposed for a failure to comply, that sanction takes effect unless and until there is a successful application for relief. Rule 26.8 provides:

"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) thereis a good explanation for the failure; and

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

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

(a) the interests of the administration of justice;

(b) whether the failure to comply was due to the party or that party's attorney-at-law;

(c) whether the failure to comply has been or can be remedied within a reasonable time;

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

(e) the effect which the granting of relief or not would have on each party."

Rule 26.7 provides that sanctions imposed take effect unless relief is sought and obtained. Rule 26.9, which gives the court the power to rectify procedural defaults, does not apply to such cases.

[20] Rule 30.3 (1) and (2) of the CPR provides:

"(1) The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge.

(2) However an affidavit may contain statements of information and belief-

(a) where any of these Rules so allows; and

(b) where the affidavit is for use in an application for summary judgment under Part 15 or any

> procedural or interlocutory application, provided that the affidavit indicates-
>
> (i) which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief; and
>
> (ii) the source for any matters of information or belief."

[21] Hearsay evidence is generally inadmissible and can only be admitted based on the exceptions that exist at common law, by statute or by virtue of the CPR. Rule 30.3(2) of the CPR sets out the conditions that must be satisfied before a judge may admit hearsay evidence contained in an affidavit. If these conditions are not satisfied the court should not exercise its discretion to admit such evidence.

[22] In his judgment Rattray J stated at paragraph 21 that:

> "In the present case, I accept Mr Reitzin's submissions that the first sentence of Mr Fleming's [a]ffidavit is in breach of Rule 30.3 of the CPR. This rule provides for the admissibility of hearsay evidence in an [a]ffidavit only in certain specified instances..."

[23] At paragraphs 22 and 23 he continued:

> "Mr David Fleming in his [a]ffidavit stated that he is employed to the second Defendant as its legal officer. He has not stated nor has he provided any details of his job as legal officer which would lead him to be involved with the second Defendant's linesmen. Nor has he provided any evidence to indicate whether an investigative process was triggered as a result of this incident and if so, whether, at what time and to what extent he was involved in that process and the scope of this involvement. His mention in paragraph 2 of his [a]ffidavit as to reviewing relevant documents and information is of no assistance, without there being some specific reference as to when this review

> occurred and his identifying the documents, files, books and/or internal documentation allegedly reviewed by him. As drafted, [p]aragraph 2 of Mr Fleming's [a]ffidavit provided no foundation on which any conclusion can be arrived at as to Mr Fleming's knowledge of the intended whereabouts of witnesses as at the time he swore to his [a]ffidavit.
>
> I am of the view on the evidence before this Court that the first sentence of paragraph 5 of the [a]ffidavit of David Fleming being in breach of Rule 30.3 of the CPR is inadmissible. If I am wrong in that regard, and the [a]ffidavit of David Fleming is in fact admissible, it is imperative that the spotlight of scrutiny be shone on the [a]ffidavit filed on behalf of the Second Defendant to ascertain whether a good explanation emerges for the failure of the Second Defendant to file that Witness Statement by or before the 6th May 2015."

[24] It is clear, therefore, that the learned judge correctly treated this matter as involving two issues; firstly, whether the evidence was admissible and (ii) if it was admissible, whether it gave a good explanation for the failure to comply with the case management orders.

[25] The relevant portions of the affidavit filed by David Fleming were as follows:

> "1. That my address for the purposes of this Affidavit is care of 6 Knutsford Boulevard, New Kingston, Kingston 5 and I am an Attorney-at-Law and I am employed to the Applicant/2ndDefendant, Jamaica Public Service Company Limited as its Legal Officer.
>
> 2. I am duly authorized to depone to the facts set out herein based on my knowledge of this matter having reviewed all relevant documents and information relative to this matter derived from the Company's files, books and internal documentation.
>
> 3. At the hearing of the Case Management Conference set for the 30thJuly, 2014 it was ordered inter alia,

that the 2nd Defendant was to file and serve its Witness Statements on or before the 9th May, 2015.

4. The 2nd Defendant was unable to file its Witness Statements within the prescribed time however; it should be able to do so by the 8th June, 2015. The period of the delay is neither protracted nor inordinate in all the circumstances.

5. The 2nd Defendant's failure to file its Witness Statements is not intentional as its intended witnesses are currently travelling outside of the parish as well as the island for anextended period of time due to work related commitments. Accordingly, the 2nd Defendant's Attorneys-at-Law, Messrs. Livingston, Alexander & Levy have not been seized with the requisite instructions to draft and file the Witness Statements which contain the evidence to support its defence of the claim. As soon as the intended witnesses are available the 2nd Defendant's Attorneys-at-Law will be instructed so that the Witness Statements can be filed.

6. The claim is for damages for injuries allegedly sustained by the Claimant while carrying out works for and on behalf of the 1st Defendant's conductors which were located on the 2nd Defendant's utility pole. This will involve inter alia, a determination as to whether there was any negligence on the part of the 2nd Defendant in keeping its poles or itsconnections in good repair. The 2nd Defendant's Witnesses can effectively speak to these issues and therefore their statements are necessary as they contain the evidence to supportits defence of the claim.

7. I verily believe that the 2nd Defendant has generally been compliant with all other orders of this Honourable Court.

8. I verily believe that the Claimant will suffer no prejudice if the 2nd Defendant's Witness Statements filed on the 8th June, 2015 as the 2nd Defendant has remedied the failure within a reasonable time. If the court believes that the Claimant has been prejudiced an award of costs will sufficiently compensate him.

Further, the lack of filing of the Witness Statements will not affect the trial date set for 16-27 November, 2015. Accordingly, it is just that relief is granted to the 2nd Defendant.

9. If the Court does not grant the relief sought, I verily believe the 2nd Defendant will suffer severe prejudice as the Defendant would have no witnesses and will as a result not beable to adequately defend the case brought against it. The Defendant's Witnesses are therefore required to assist the Court in arriving at a just determination of the issues joined between the parties."

Whether paragraph 5 of the affidavit is hearsay

[26] I agree with counsel for the respondent that there is no reference in the affidavit of Mr Fleming that he had any personal dealing with the intended witnesses, or that he had conduct of the case; nor did Mr Fleming state in his affidavit that the matter was within his personal knowledge unless otherwise stated. However, there is equally no evidence that he did not have conduct of the claim. Whilst the affidavit may not have been the most elegantly drafted or the most detailed of affidavits, the fact is the affiant is an employee of the appellant and its legal officer and the statements in paragraph 5 must be viewed in that context.

[27] Evidence is hearsay where a witness gives evidence of facts they have not personally experienced for the purpose of proving the truth of those facts. Rule 30.3(1) provides that an affidavit "may contain only such facts as the deponent is able to prove from his or her own knowledge". There was no evidence before the learned judge that the truth of the statement in paragraph 5 that witnesses were not available was not

provable by the affiant from his or her own knowledge. There was also nothing contained in the affidavit from which the learned judge could have drawn the inference that it was not provable from the affiant's own knowledge. The affiant made no statement as to information and belief so as to trigger rule 30.3 2(b) (i) and (ii).

[28] The evidence which was before the learned judge was that the affiant is authorized to give the affidavit evidence based on his personal knowledge having reviewed the company documentation. Mr Fleming said at paragraph 2 of his affidavit that:

> "I am duly authorized to depone to the facts set outherein based on my knowledge of this matter having reviewed all relevant documents and information relative to this matter derived from the Company's files, books and internal documentation."

[29] I am of the view that this is sufficient for the judge to have admitted the evidence. The appellant is a company. The affiant was the legal officer employed to the appellant, his knowledge could therefore, be deemed to be the appellant's knowledge. It is the appellant who is required to give an explanation as to why it has not provided the witness statement in the time limited to do so. The appellant may provide an affidavit from a third party, such as its external attorneys, who may depone that the fault is theirs for whatever reason, but if the fault is the appellant's, then it must say so.

[30] How would a company explain its default? That explanation must come from an officer of the company. In this case the affiant Mr Fleming, having stated his position in

the appellant company, implicit in his unqualified assertions, garnered from the company's records, is the fact that he has ascertained the knowledge of those persons in the company, whose knowledge can be treated as the company's knowledge. There is no assertion that he obtained any information outside of the appellant company for which he needed to state any information or belief. The information he gleaned from the company's records is the appellant's own knowledge and no question of hearsay arises. See **Nationwide Building Society v Bateman** (1978) 1 All ER 999 which was applied in **National Commercial bank of Trinidad & Tobago v Bellamy et al**, TT 1997 HC 31, judgment of Sealy J. Although the subject matter is different from this case, I find the reasoning in both authorities highly persuasive and applicable to this case. In the latter decision Sealy J, in applying the reasoning in **Nationwide Building Society v Bateman**, said:

> "The case of Nationwide Building Society v. Bateman [1978] 1 ALL E.R. 999 dealt with a building society, as mortgagee seeking possession of mortgaged premises and the issue related to the swearing of an affidavit by the manager of one of its branches. The building society brought an originating summons under 0.88 of the Rules of the Supreme Court seeking the said possession. The manager swore that he was authorised to make the affidavit on behalf of the building society and in order to satisfy the requirement of Order 88, rule 6(4) that requires the affidavit to 'give particulars of every person who to the best of the plaintiffs [sic] knowledge is in possession of the mortgaged property', he said at paragraph 7 of the affidavit that: 'I am informed and verily believe that the defendant and his family are the only persons in occupation of the said premises.' The Master thought that the statement should have been completed in accordance with Ord.41, r. 5(2) and should have stated the sources of information and belief. He adjourned the summons for a decision on that and another

> question and another question which is not relevant to us.
>
> Goulding, J. did not think that Ord. 41, r 5(2) was applicable [to] this sort of matter and the head note reads as follows:
>
> 'Where a mortgagee brings an action in which he claims possession of the mortgaged property, the claim is one for a final and not an interlocutory order and, therefore, when the action is begun by originating summons, the affidavit in support must comply with RSC Ord. 41, r 5(1), by containing only such facts as the deponent is able of his own knowledge to prove. In order therefore to comply with the requirement of RSC Ord. 88 r. 6(4), that the affidavit give particulars of every person who to the best of the plaintiff's knowledge is in possession of the mortgaged property, the affidavit must be made by a deponent able of his own knowledge to prove the fact. If the plaintiff is a building society the affidavit must contain a statement by the deponent showing his own office in the plaintiff's organisation and an unqualified assertion giving the necessary particulars as to the persons in possession to the best of the plaintiff's, i.e. the society's knowledge; the deponent is not required to give the sources of information or belief since his unqualified assertion implies that he has ascertained the knowledge of those persons whose knowledge can be treated as the society's.'
>
> This application brought as it is under the provisions of the Act, must in essence be a final order. The affidavit therefore ought not to contain hearsay evidence, so that the question of information and belief does not arise. The deponent did not at any time say that he obtained information from a source outside of the plaintiff, so that I adopt the reasoning of Goulding, J. in the Nationwide case and say that the information which the deponent has gleaned from the records is knowledge that can be treated as the plaintiffs [sic]. There is therefore no need to compartmentalize the facts and matters which are deposed to in [sic] affidavit of Mr. Clement. This point fails."

[31] In the instant case the party in default is the appellant company. In its explanation for failing to comply, it seeks to blame no one but itself. It is its explanation

of its own default that it sought to lay before the learned judge. The appellant, being a company, could only do so through a deponent who is able to state his affiliation or office within the appellant company and who is also able make unqualified assertions based on his review of the company's documents, wherein the company's knowledge can then be treated as his own knowledge. In such a case no question of information and belief arises and there is no need for any further indication as to the source of such information. Of course this will not always be the case and I am not at all asserting that this approach is of general application. Ground (a) therefore succeeds.

Ground b - Was there an explanation for the failure

[32] The learned judge also considered the question of whether there was a good explanation for the failure to comply within the time limited and found that there was none. Counsel for the appellant submitted that the learned judge gave an unreasonably restricted view of the evidence which led him to err in finding that no good explanation was given for the failure to file witness statements within time. That the learned judge failed to take into consideration the correct principles and relevant factors in the exercise of his discretion. In particular, he should have taken into account the sufficiency of the explanation proffered instead of focusing on the use of the single word "currently". Counsel for the appellant relied on the cases of **H B Ramsay & Associates Ltd and ors v Jamaica Redevelopment Foundation Inc and another** [2013] JMCA Civ 1; **Hamilton v Flemmings & Flemmings** [2010] JMCA Civ 19; **Villa Mora Cottages v Monica Cummings and another** SCCA No 49/2006, delivered 14 December 2007.

[33] Counsel for the respondent connected the question of inadmissibility with the lack of explanation. Counsel argued that the explanation that the appellant purported to give amounted to no explanation at all because the statement at paragraph 5 was hearsay and therefore inadmissible. It was argued that it was inadmissible as the source of the information was not indicated and the reference to unspecified documents would not constitute a source for the statement of information and belief. Therefore, counsel submitted, since paragraph 5 was inadmissible, there was a complete absence of any explanation for failure to comply and the appellant had, therefore, not discharged its burden of proof. I have already indicated, for the reasons given, that this contention has no merit.

[34] The respondent argued further that even if the affidavit complied with rule 30.3(2)(b)(ii), there would still be no evidence of good explanation. This, as the affidavit spoke only to the current state of affairs. Counsel for the respondent argued that the relevant period could only be before the deadline expired. To that end, he concluded that the explanation was irrelevant and therefore inadmissible. Counsel cited **Brownlie v Four Seasons Holdings Incorporated** (2014) EWHC 273 for that proposition.

[35] Counsel argued further that based on the authorities the absence of a good explanation was fatal to the application. Counsel also relied on the reasoning in **H B Ramsay and Associates Ltd and others v Jamaica Redevelopment Foundation and another.** According to counsel, the decision represents a significant departure and a reversal of the approach by this court in **Villa Mora Cottages**. Counsel pointed

out that Brooks JA held in **H B Ramsay and Associates Ltd and others v Jamaica Redevelopment Foundation and another** that in the absence of a good explanation the application must fail. Counsel also noted that that decision is supported by the Privy Council judgment in **The Attorney General v Universal Projects Ltd** [2011] UK PC 37. Counsel also argued that, based on the wording of rule 26.8(2), **H B Ramsay and Associates Ltd and others v Jamaica Redevelopment Foundation and another** and the case of **Villa Mora Cottages** were irreconcilable.

Decision on ground b

[36] The issue is whether the learned judge was correct to find that the explanation given was not a good one.

[37] I will begin this discussion with the decision in **Brownlie v Four Seasons Holdings Incorporated**, which was relied on by the first respondent. In that case it was said in a witness statement that the defendant "do not own" various entities in Egypt. The learned judge held that the statement was irrelevant as it was expressed in the present tense. Counsel for the first respondent argued that this case is applicable to the one before this court because of the use of the word "currently" in the affidavit of Mr Fleming. However, in my view, the authority is unhelpful because it was a case where the claimant's husband was killed in a traffic accident in Egypt, whilst on tour. The claim was filed in England. The witness statement was intended to be a denial that the defendant had any presence in Egypt; so that when the witness stated that the defendant "do not own" entities in Egypt it did not answer the question of whether they had in fact owned entities in Egypt at the time of the accident.

[38] In this case the order was made on 30 July 2014. Time for compliance was 9 May 2015. The application was made on 26 May 2015 and witness statement filed on 16 July 2015. Counsel for the first respondent submitted that "currently" as used in the affidavit could not cover the entire period between 30 July 2014 and 9 May 2015. He argued therefore that there was no explanation for the "vast bulk" of the relevant period.

[39] Counsel for the appellant however, submitted that the word "currently" had some measure of flexibility in the same way the word "promptly" does. He relied on the statement made by Brooks JA in **H B Ramsay and Associates Ltd and another v Jamaica Redevelopment Foundation Inc and another** at paragraph [10] where he stated that:

> "...I do accept, however, that the word 'promptly' does have some measure of flexibility in its application. Whether something had been promptly done or not, depends on the circumstances of the case."

[40] Be that as it may, I am unable to agree with counsel that the word "currently" does carry the same degree of flexibility in interpretation as the word "promptly" but happily, it is not necessary for this decision to make that determination one way or the other. However, I also cannot agree with the learned judge that "currently" could only be interpreted to mean the date the affidavit was sworn.

[41] In the instant case, the learned judge in coming to his decision considered that:

> "It is important to examine the words utilised in that explanation. I am of the view that the word 'currently' can

> only be interpreted to mean, at the time this Affidavit [sic] was sworn, that is, on or about the 21st May, 2015. Of necessity, the question must arise as to what had happened to those witnesses between the time the Order was made and the date the Affidavit [sic] was filed in May, 2015. No explanation has been provided in that regard. Surely, if a party has failed to take a step between the time the Order of the Court was made and the time for compliance with that Order, the explanation for such default over that period, for it to be considered a good explanation, ought to outline the circumstances which triggered or caused the default over the said period.
>
> I am of the view that the use of the word 'currently' by the affiant addresses the present situation at the time the affidavit was sworn to. I am therefore satisfied that no good explanation has been put before this Court for the failure to comply with the Order for filing and exchanging witness statements in the time prescribed by the Court."

[42] The learned judge was of the view that the affiant's statement in paragraph 5 that the witnesses were "currently" travelling outside of the parish spoke to a period after the time for compliance had already passed and limited to when the affidavit was sworn to. In this regard, the learned judge was partially correct. It is true, that in general, one would expect the explanation for failing to comply with a time-table to refer to happenings during the period limited for the compliance. However, in dismissing the explanation for that reason alone I believe the learned judge took too restrictive an approach to the application. In my view, the paramount issue was not whether the explanation covered all the period limited for compliance. Certainly, it would have been better for the appellant if it did, but the fact that it did not, by itself, should not have prevented the learned trial judge from considering it. What mattered was whether he considered it to be a good explanation for failing to comply in the time limited. Rule 26.8(2) of the CPR requires the learned judge to be satisfied that there is

a good explanation for the failure to comply in order to exercise his discretion to grant relief from sanctions. Being currently off the island or travelling out of the parish simply means they are not available. That they will be away "for extended period on work commitments" also means it will be that way for some time, whether or not it was that way from July 2014.

[43] Counsel for the appellant also sought to rely on the dictum in **Phillip Hamilton v Frederick Flemmings & Another**. In that case there was an application for extension of time to file defence which was refused in the court below. The application was made 4½ months after the time for filing a defence had expired. The application had been opposed on the basis that there was no credible explanation for the failure to file a defence in the time specified to do so by the rules. In refusing the extension of time the learned judge at first instance agreed that there was no credible explanation for the failure on the basis that, although the explanation was that the defendant had been ill, there were no dates given for the illness or for the recovery thereof. The learned judge also found that the delay in applying for the extension was inexcusable and there was no realistic prospect of success in defending the claim.

[44] On appeal to this court, Phillips JA in dealing with the issue of delay said at paragraph [41]:

> "However, in my view, in examining the conduct of a litigant in respect of delay, for the purpose of deciding whether to exercise a discretion in his/her favour, the relevant starting point for consideration, is when the litigant is in breach of the rules, in that, the time has expired, and the matter cannot proceed without reference to the courts. In this case

> it would have been 4 ½ months and the matters outlined in paragraph 39 above, could readily have consumed that period, and provided the good reason for the delay."

In this case Phillips JA was referencing the conduct of the defendant with respect to the delay in making the application for extension of time to file his defence and not to the adequacy of the explanation for failing to file the defence in the time limited to do so, so that the dictum would not be applicable to this case as to whether there was a good explanation for the failure to comply with the orders. Any reliance by the appellant on this authority is therefore, misconceived.

[45] In my view, the essence of the explanation, in the instant case, was that the appellant's witnesses were not available to give witness statements before the period expired. The learned judge ought to have understood and accepted it to mean just that. His restrictive approach sought to punish the appellant for not complying at the earlier stageof the period limited for doing so. This approach fails to take into account the fact that the appellant could have complied on the last day of the period specified and there would be no need for an explanation as to why there was no earlier compliance. Certainly, a litigant who acts in this way does so at his own peril, if for some reason he misses that deadline. There may be a good explanation for missing the deadline but there may be an even better explanation for not being able to meet it earlier in the period. However, in my view, the fact that the explanation for missing the deadline did not cover the earlier period, important though it may be, by itself should not automatically result in the explanation which was in fact proffered, being dismissed out of hand.

[46] In **H B Ramsay and Associates Limited and another v Jamaica Redevelopment Foundation Inc and another**, the appellants had failed to comply with the unless order made by the court. They applied for relief from sanctions which was refused by the judge below. When the matter came before this court, it considered the issues turned on whether, (a) the application had been made promptly; (b) there was a good explanation for the failure; and (c) whether the appellants had generally complied with other rules, order and directions. In that case there was no explanation for the failure to comply in the time specified and the application for relief from sanctions was not made promptly. This court took the view that where there was no explanation the application must fail. It was held that the three factors in rule 26.8(2) were cumulative and all must be satisfied before the applicant can succeed. This was confirmation of that view long taken by Brooks J, as he then was, in **Paul White v Homel Grant and another** Suit No CL 1993/W 127, delivered 7 April 2006, where he relied on the decision of McCalla JA (Ag) (as she then was), in **International Hotels Jamaica Ltd v New Falmouth Resorts Ltd** SCCA Nos 56 and 95/2003, delivered 18 November 2005.

[47] In this case it was the duty of the learned judge to determine whether the appellant's claim that the witnesses were currently unavailable because they were travelling or working out of town for an extended period was an acceptable explanation for failing to comply with the case management orders without regard to whether the explanation was for the current period when the affidavit was being sworn to or for the

entire period of the delay. There may be cases where that will be a decisive point but this was not one such case.

[48] This is a case involving the appellant's pole lines. The learned judge recognized that the witnesses for the appellant would likely come from amongst its linesmen. It was not, therefore, implausible to state and to accept that linesmen were not likely to be found sitting around in the appellant's offices. However, if the appellant chooses to leave getting statements from such persons down to just before the period for compliance expires, it does so at its own peril, unless it can furnish the court with a good explanation for so doing.

[49] In **Villa Mora Cottages** Harris JA considered the effect of rules 26.8(1) and 26.8(2). At page 10 of the judgment Harris JA observed:

> "It cannot be disputed that orders and rules of the Court must be obeyed. A party's non-compliance with a rule or an order of the Court may preclude him from continuing litigation. This, however, must be balanced against the principle that a litigant is entitled to have his case heard on the merits. As a consequence, a litigant ought not to be deprived of the right to pursue his case.
>
> The function of the Court is to do justice. 'The law is not a game, nor is the Court an arena. It is ... the function and duty of a judge to see that justice is done as far as may be according to the merits' per Wooding, C.J. in **Baptiste v. Supersad** [1967] 12 W.I.R. 140 at 144. In its dispensation of justice, the Court must engage in a balancing exercise and seek to do what is just and reasonable in the circumstances of each case, in accordance with Rule 1 of the C.P.R. A court in the performance of such exercise, may rectify any mischief created by the non-compliance with any of its rules or order."

[50] Harris JA determined that the conditions in rule 26.8(2) were "fundamentally interwoven" and that they are "inherently and intrinsically bound together as a determinative factor as to whether relief from sanction ought to be granted" before concluding that the conditions were to be considered cumulatively.

[51] Harris JA also determined that the issue was whether the learned judge, having found that the applicant had generally complied with all the conditions of rule 26.8(1) and 26.8(2), was wrong to hold that the applicant had not proffered a good explanation. Counsel for the appellant in that case, had argued that the judge wrongly exercised her discretion by reason of her failure to take account of the factors in rule 26.8(3) of CPR when considering rule 26.8(2). In agreeing with this contention, Harris JA found that the judge was obliged to also give consideration to rule 26.8(3). At page 16 Harris JA stated:

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

[52] The judge at first instance, although finding that the application was made promptly and that the applicant had generally complied with rule 26.8(2)(a) and (c), determined that the applicant had not proffered a good explanation for the failure to file the requisite documents and refused the application. That explanation was contained in the affidavit of Mr Eric Frater, the attorney-at-law for the defendant in that case. The relevant portions of the affidavit were set out in the judgment of Harris JA as follows:

> "That the delay and non-compliance with the Orders, was not intentional and was due to a number of circumstances as set out below:
>
> (i) The orders fell in a period when I was in the process of transferring my practice to another Attorney-at-Law, with a certain amount of dislocation attendant.
>
> (ii) The 3rd Defendant who is the person from whom I received instructions and is in possession of relevant documents was ill for some time and died on the [sic]. The 2nd defendant is based overseas.
>
> (iii) I have had some difficulty in getting the witness statements signed, as some of the witnesses have changed addresses.
>
> (iv) Upon receipt of an expert witness statement, I sought to find an expert to counter it, and although I made contact with one, it was not possible in the time frame to get him to visit the locus, taking his equipment with him, and to prepare an expert report for use in the case."

[53] In that case the judge, at first instance, found that the appellant did not proffer a good explanation for the failure to file the requisite documents. Harris JA found however, that the explanation was a perfectly good one. Harris JA put it this way:

> "It cannot be said, however, that none of the reasons advanced by the appellants for non-compliance can be rendered nugatory nor can they be perceived to be inadequate. Two of the reasons advanced by Mr Frater for the delay are of manifest significance, namely; the fact that he was engaged in transferring his practice and the difficulty in locating some of the witnesses. These, in my view, offer a plausible explanation for the delay and ought to have been accepted by the learned judge.
>
> ...
>
> There is also the matter of locating witnesses. The learned judge failed to consider the fact that there were difficulties in locating witnesses. Clearly witness statements could not

> have been produced until all or some of the witnesses were found.
>
> In the case under review the application was refused on June 9, 2006. The trial had been fixed for hearing on February 26, 27 and 28, 2007. Had the appellants been granted leave to file and serve the relevant documents, the trial date could have been met."

[54] Contrary to the view espoused by counsel for the respondent, there is no discord between the decision in the case of **Villa Mora Cottages** and the case of **H B Ramsay and Associates Ltd and another v Jamaica Redevelopment Foundation Inc and another**. Both cases decided that the factors in rule 26.8(2) are cumulative and are threshold requirements, although using differing language in so stating. The result is that a litigant must pass the cumulative threshold requirements of rule 26.8(2) in order for the court to consider granting relief. Having formed the view that the threshold requirements have been met, the court then determines whether to grant the relief, taking into account the factors in rule 26.8(3).

[55] Harris JA in **Villa Mora Cottages** took the view that the judge, in considering the requirements under rule 26.8(2), fell into error in finding that the explanation given was not a good one and as a result of that error failed to go on to consider rule 26.8(3). The rule requires that the court may consider granting relief if it is satisfied that the conditions set out are met. If the conditions set out are met, then the court is to have regard to the factors set out in 26.8(3) in deciding whether to grant the relief.

[56] Factors (a) and (b) of 26.8 are subjective and the rules does not indicate how a court is to determine whether an explanation is a good one or not. Certainly rule

28.8(3)(b) seems to suggest that an acceptable explanation maybe that the fault in not complying is that of the applicant's attorney-at-law for some reason. Certainly there will be many other acceptable excuses for non-compliance.

[57] Reliance on English authorities to interpret the proper application of rule 26.8(2) should best be avoided or approached with caution because the English rule is not only laid out differently but has also been interpreted differently from ours by the English courts. In this jurisdiction, a first instance judge faced with an application for relief from sanctions must begin from a point of principle that (a) the orders of the court must be obeyed; (b) all the requirements of rule 26.8 (1) and 26.8(2) must be met; (c) once those requirements have been met, it is the duty of the judge to have regard to the interest of the administration of justice and ensure that justice is done in accordance with the overriding objective, without resort to needless technicalities, in keeping with the factors set out in rule 26.8(3); (d) a litigant is entitled to have his case heard on the merits and should not lightly be denied that right; and (e) the court must balance the right of the litigant against the need for timely compliance. Taking all that into consideration, the approach to the application of the rule should be that taken in **H B Ramsay and Associates Ltd and another v Jamaica Redevelopment Foundation Inc and another**.

[58] All that being said, although the appellant's explanation for non-compliance was the unavailability of its witnesses, that explanation is not squarely in line with the one given in **Villa Mora Cottages**. Bearing in mind that the potential witnesses are employees of the appellant, I find that I have to agree with the learned judge that this

was not a good explanation. Unlike the situation in **Villa Mora Cottages** where the appellant in that case had no control over the movements of the potential witnesses, the appellant in this case, has control over the movements of the potential witnesses in its employ. To say that the witness statements could not be prepared and exchanged because they were off the island or travelling outside of the parish for an extended period may really be viewed as an admission of administrative inefficiency. No excuse has in fact been proffered for that fact. These employees are under the control and direction of the appellant. They were out on work commitments. There was no explanation why they were not directed to make themselves available to give statements as required or why they were not rostered in such a way that they would become available for statements to be taken from them.

[59] In coming to this conclusion I am mindful of the decision of the Privy Council in **The Attorney General v Universal Projects Limited**, on appeal from the Court of Appeal of Trinidad and Tobago. In that case there was an unless order made by the court extending time for service of the defence in default of which leave was granted to the claimant to enter judgment against the defendant. The defendant failed to comply in the time permitted to do so and the claimant entered judgment. The defendant subsequently filed, inter alia, an application to set aside the judgment. The learned judge at first instance took the view that the defendant ought properly to have filed an application for relief from sanction. He treated the application as such and dismissed it. The defendant appealed to the Court of Appeal of Trinidad and Tobago, which dismissed the appeal. An appeal was then made to the Privy Council.

[60] The Privy Council agreed that, in those circumstances, the proper application was one for relief from sanctions. It considered the provisions of rules 26.6 and 26.7 which were essentially in *pari materia* to rule 26.8(1) and 26.8(2) of our CPR. The Board took the view that the order made by the judge at first instance was an unless order which imposed a sanction which was the consequence of the failure to comply with the court order, in keeping with the language of rule 26.6 of the CPR of Trinidad and Tobago. The Board found that the sanction was the judgment entered as a result of the failure tocomply with the order and it was, therefore, necessary to apply for relief from such a sanction. The Board found that there was an important distinction in setting aside judgments entered in default under part 12 of the CPR and applications for relief from sanctions under rule 26.7, necessitated by a failure to comply with a court order, rule or direction.

[61] In determining whether the defendant had satisfied the requirements for relief from sanctions to be granted to it, the Board considered the learned judge's reason for not granting relief. Both the judge at first instance and the Court of Appeal had found that the defendant had not acted promptly and had failed to satisfy the preconditions in rule 26.7(3) (our CPR 26.8(2)). The Board based its decision on the fact that the defendant had failed to provide a good explanation for its failure to comply with the court order which was fatal to the defendant's case and as a result, did not consider it necessary to consider the challenge to the other basis on which the defendant's appeal was dismissed by the Court of Appeal.

[62] The explanation by the defendant in that case inter alia, was the absence of a Solicitor General and the delay in retaining outside counsel. Both the judge at first instance and the Court of Appeal found that this was not a good explanation for failing to file a defence in the time permitted. The Board in considering the issue and the submission of counsel that the defendant's explanation was a good one, said:

> "The Board cannot accept these submissions. First, if the explanation for the breachie the failure to serve a defence by 13 March connotes real or substantial fault on the part of the Defendant, then it does not have a 'good' explanation for the breach. 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."

[63] In **H B Ramsay and Associates Ltd and another v Jamaica Redevelopment Foundation Inc and another**, this court held that where there was no good explanation for the failure to comply the application must fail. That case as well as the case of **Villa Mora Cottages** has held that rule 26.8(2) is cumulative and the applicant must satisfy all three preconditions set out in rule 26.8(2)(a), (b) and (c) before relief may be granted. The failure to give a good explanation is therefore fatal.

[64] In these circumstances there is no need to consider rule 26.8(3) or the fact that at the time the court had heard the application the appellant had filed a witness statement, or that the trial date was four months away, or whether there was prejudice to the 1st respondent.

[65] The appellant is the author of its misfortune. Rule 29.11 is quite clear. The case management order gave the appellant a period of almost a year to file and exchange witness statements. It failed to do so in circumstances where the witnesses were its own employees. It sent these needed employees off the island and travelling out into other parishes without securing their statements and with no mechanism in place to get them back into office in time to give the statements, even up to the last day of the time limited. This amounted to administrative inefficiency which, in my view, does not amount to a good explanation. The learned judge would have been entitled to find that there was no good explanation for the failure to comply.

[66] Faced with what would be the result of its failure as per the language of rule 29.11, it was incumbent on the appellant to comply with the orders or apply for an extension of time before the time expired when it found it had difficulties in complying or furnish the court with a good explanation for failing to comply. As stated by Jamadar JA in his judgment in the Court of Appeal of Trinidad and Tobago in **Attorney General v Universal Projects Limited** which was approved by the Board:

> "A party cannot in the face of a court order pursue a course that it knows or reasonably anticipates will lead it foul of that order and then pray in aid relief from the sanctions of the order the circumstances that it was aware could lead to default. In such circumstances a party must act promptly to either comply with the court order or to secure further directions so as to avoid default. Thus the explanation given for failing to file a defence by the 13th March 2009 is not, in my opinion, a good explanation for the breach."

Ground (c)

[67] In view of the failure to give a good explanation, the learned judge did not need to give any further consideration to the application or to the context of the proceedings or to apply the overriding objective of dealing with cases justly. Unless the appellant passed the threshold requirements, there is no basis for considering the overriding objective or indeed any of the factors in rule 26.8(3).

Ground (d)

[68] The appellant argued that the learned judge erred in the exercise of his discretion in failing to consider that there were special circumstances that warranted his making no order as to costs on the application. No special circumstances were highlighted to this court which would cause me to think it necessary to propose that this court disturb the learned judge's cost order.

Conclusion

[69] It was wrong for the learned judge to have found that the affidavit was inadmissible for the reason he gave. However, having gone on to consider whether the explanation given in the affidavit was a good one and having found that it was not a good explanation, I agree, if for slightly different reasons, with this finding. That is fatal to the appellant's application. There was, indeed, no good explanation for the failure to file witness statement in the time specified to do so. This is a threshold requirement. The appellant having failed to pass that hurdle, the learned judge was precluded from granting the relief sought.

[70] The result is that the appellant will not be able to call a witness at the trial. Though this result may appear to be draconian, it is the rule and litigants will best give regard to it or suffer the consequences. It is no use to say that the appellant will be prejudiced if it is not able to call witnesses at the trial. Inherent in the existence of rule 29.11 of the CPR is an acceptance that there will be that prejudicial effect; nonetheless the rule still exists and attorneys and their clients must be mindful of it and the effect of non-compliance. As the Board stated in the case of **The Attorney General v Universal Projects Limited**, it serves the useful purpose of improving the efficiency of litigation.

[71] I would therefore propose that the appeal be dismissed with costs to the first respondent to be agreed or taxed.

MORRISON P

ORDER

Appeal dismissed. Costs to the first respondent to be agreed or taxed.