[2023] JMCA Civ 30

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MR JUSTICE D FRASER JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2022CV00015

BETWEEN NORMAN WASHINGTON BURTON APPELLANT

AND THE DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

Lawrence Haynes and Ms Rochelle Haynes for the appellant

Mrs Tamara Francis Riley-Dunn and Ms Kaydian Davidson instructed by Nelson-Brown, Guy & Francis for Andrea Simpson, 2nd defendant in the court below

Mrs Andrea Martin-Swaby and Dwayne Green for the respondent

25, 27, 28 April and 19 May 2023

Civil Procedure – Relief from sanctions – Promptitude in application a condition precedent for relief to be granted – Determination of promptitude dependent on the circumstances of each case – Relationship between paragraphs (1), (2) and (3) of rule 26.8 of the CPR

BROOKS P

[1] I have read in draft the judgment of my learned brother D Fraser JA. The reasoning and conclusions set out by my learned brother accurately reflect my reasons for agreeing with the decision that was handed down and the costs order made herein.

D FRASER JA

Introduction

[2] This is an appeal from the decision of a judge of the Supreme Court ('the learned judge') made on 20 January 2022 in which she granted the respondent, Director of Public Prosecutions ('DPP'), relief from sanctions and extended time until 30 January 2022 for the fixed date claim form ('FDCF') in this matter, "with the 2015 number affixed along with supporting affidavit to be filed and served". The learned judge also granted leave to appeal and made no order as to cost.

The appeal

[3] By notice of appeal filed 2 February 2022 Norman Washington Burton, the appellant, sought orders a) setting aside i) the grant of relief from sanctions and ii) the extension of time to file the above- mentioned FDCF; b) refusing the application for relief from sanctions; c) declaring that the case of the respondent stands struck out; d) for costs here and below to the appellant; and e) such other order as the court deems fit. Ms Andrea Simpson, the 2nd defendant in the court below, did not file a separate notice of appeal, but offered submissions in support of those of the appellant.

[4] After hearing the submissions of counsel, the court, on 28 April 2023, made the following order:

> "1. The appeal is allowed.
>
> 2. The effect of the unless order of K Anderson J made on 19 February 2019 is restored with the result that as of 1 March 2019 the statement of case of the Director of Public Prosecutions is struck out.
>
> 3. The respondent shall file and serve submissions on costs on or before 5 May 2023 and the appellants shall file and serve submissions on costs on or before 12 May 2023."

[5] Inadvertently it omitted to record the setting aside of the relevant orders made by the judge of the Supreme Court. Under "the slip rule", the order may be amended to include that which was omitted. The order should now therefore read:

1 The appeal is allowed.

2. The following orders of Shelly-Williams J made on 20 January 2022 are set aside:

a) Claimant is granted relief from sanctions.

b) Time is extended until the 30th of January 2022 for the Fixed Date Claim Form with the 2015 number affixed along with supporting affidavit to be filed and served.

e) No order as to cost.

3. The effect of the unless order of K Anderson J made on 19 February 2019 is restored with the result that as of 1 March 2019 the statement of case of the Director of Public Prosecutions is struck out.

4. The respondent shall file and serve submissions on costs on or before 5 May 2023 and the appellants shall file and serve submissions on costs on or before 12 May 2023.

[6] The court promised to put its reasons in writing and this is a fulfilment of that promise. In addition, the aspect of costs has been considered and a decision thereon is set out below. It should however be noted, that, it was only after the hearing that the discovery was made that Ms Simpson was not an appellant. Consequently, she is not entitled to costs on the appeal. Therefore, the submissions on costs in that regard, filed by counsel on her behalf, were not considered.

The background

[7] It is important to outline, in some detail, the background to this matter to place in context the application for relief from sanctions, the grounds of appeal, and the submissions made on the appeal.

[8] The Mutual Assistance (Criminal Matters) Act ('MACMA') of Jamaica, passed in 1995, permits Jamaica and foreign states to assist each other, through mutual legal assistance, in the prosecution of criminal offences. The MACMA provides for a Designated Central Authority which handles requests for assistance. By Intrument of Designation of Central Authority, gazetted Friday 2 May 1997, the DPP is the Designated Central Authority for a number of matters under the MACMA, including requests for registration of foreign orders.

[9] On 27 July 2010 a restraint order was made in the Crown Court in the United Kingdom ('UK') restraining the appellant from dealing with a list of assets contained in the order, which included land and chattels located in Jamaica. On 4 August 2010 the Central Authority for the UK issued a letter of request to the DPP, requesting registration of this foreign restraint order.

[10] On 15 December 2010 the DPP filed a FDCF and affidavit in support bearing claim number HCV016164 seeking registration of the foreign restraint order, in the Supreme Court of Jamaica. By order obtained without notice on 7 January 2011, the foreign restraint order was so registered and caveats placed on the registered titles of several properties, including Ms Andrea Simpson's residence. Ms Simpson was, however, not then named as a party to the claim.

[11] On 3 June 2014 a confiscation order was made in the UK against the appellant. On 5 November 2014 the foreign restraint order was varied in the UK which resulted in the discharge of that order in respect of a number of properties situated in Jamaica that it had referenced.

[12] The Central Authority of the UK issued another letter of request to the DPP seeking the simultaneous variation of the foreign restraint order as well as the registration of a foreign confiscation order in Jamaica.

[13] On 26 May 2015 a FDCF was filed by the DPP bearing the same claim number HCV06164 of 2010 and seeking registration of the foreign confiscation order. This FDCF now had Ms Andrea Simpson noted as the 2nd defendant and Barrington Mullings as the 3rd defendant. A notice of application for court orders ('NOACO'), also bearing claim number HCV06164 of 2010, was filed on 1 June 2015 seeking the variation of the foreign restrain order through the discharge of the order in relation to the properties in Jamaica which no longer formed part of the proceedings in the UK. Both applications were heard together without notice and granted on 2 June 2015.

[14] On 5 October 2015 the appellant filed a NOACA seeking declarations that the FDCF was invalid (as it had not been served within one year as required under the Civil Procedure Rules ('CPR')) and hence that all subsequent proceedings were null and void. On 2 November 2015, the DPP filed a NOACO seeking the assignment of a new number for the FDCF filed in 2015. Both applications were heard by Lawrence-Beswick J, senior puisne judge ('SPJ'), on 3 and 10 May 2016.

[15] On 24 May 2017, in respect of the application filed by the appellant, the SPJ granted declarations that the FDCF number HCV 06164 of 2010 was first issued 15 December 2018 and not 28 May 2015 and that no extension of time had been sought or granted within which it may be served. On the application filed by the DPP she ordered:

> "(4)…the HCV number 06164 of 2010 of the Fixed Date Claim Form dated 26th May 2015 be amended by the Registrar to a 2015 number. The [respondent] DPP must file the fixed date claim form with the amended number and any consequent amendments. The DPP must also refile any documents to which amendments must be made consequent on this order. The amended documents must be served on Mr Norman Burton by the DPP within 7 days of receipt of the amended fixed date claim form from the Supreme Court Registry.

> (5) Costs of application and costs thrown away to Norman Washington Burton and to Andrea Simpson to be agreed or taxed and to be paid by the DPP before any further action is taken in this matter…"

[16] Between 26 May 2017 and 25 November 2019 when the matter was determined, the respondent pursued an appeal against the costs orders.

[17] On 31 May 2017, the DPP refiled the FDCF and supporting affidavit to facilitate the insertion of the 2015 number by the Registrar; however, on that day they were assigned the number 2017HCV01713. The DPP served these documents within the period required pursuant to the order of the SPJ.

[18] On 2 June 2016, in the period between the hearing of the applications and the judgment of the SPJ, Ms Simpson filed a NOACO (subsequently amended on 26 August 2016), supported by an affidavit, seeking discharge of the confiscation order against properties owned by her.

[19] On 11 February 2019, the amended NOACO filed by Ms Simpson having come on for hearing, with the DPP not being present or represented, K Anderson J made an unless order in the following terms:

> "1. The [respondent] shall by or before February 28, 2019 comply with order number four (4) of the Orders made by Beswick J. on May 24, 2017, failing which, the [Respondent's] statement of case shall stand as struck out without the need for any further court order.
>
> …
>
> 6. The 2nd defendant shall file and serve this Order and shall do so, by or before February 14, 2019."

[20] This order was served on the DPP by Ms Simpson on 26 February 2019. Through several conversations with, and letters dated 19 March 2019 and 3 July 2020 to, the Registrar of the Supreme Court, the DPP sought to obtain a 2015 number for the FDCF. Included in the letter of 3 July 2020 was the indication that a) an appeal had been filed

against the costs order of the SPJ which included a prohibition on anything further being done in the matter until the costs were paid by the DPP; and b) "The Appeal having been determined in the Court of Appeal, we are now in a position where we wish to proceed to have this matter resolved within the Courts but our hands are tied as the learned judge Beswick indicated that the Registrar ought to insert a 2015 number in 2017". The entreaties finally bore fruit when, on 17 July 2020, the Registrar wrote to the DPP advising that claim number 2015HCV06215 had been assigned to the matter.

[21] On 28 January 2020, prior to the second letter of the DPP and the response of the Registrar, Ms Simpson, by claim number SU2020CV00268, applied to have the caveats removed from the titles to her properties. 21 July 2020 was set for a first hearing, on which date case management orders were granted and the hearing set for 21 April 2021. On 30 March 2021, less than a month before this hearing date, the DPP applied for relief from sanctions.

The grounds of appeal

[22] The grounds of appeal filed by the appellant are as follows:

> "(a) The Learned Judge erred in considering that the Application for Relief from Sanctions of the Respondent satisfied the threshold of applying promptly.
>
> (i) The Learned Judge although referring to the relevant authorities, failed to grasp or appreciate that the 'promptitude' required was not in relation to the bringing of the matter by the Director of Public Prosecution [sic] to the attention of the Registrar but in the Director of Public Prosecution's [sic] action in making an application for relief from sanction.
>
> (ii) That [sic] Learned Judge failed to grasp or appreciate that in this regard the Director of Public Prosecution [sic] had waited over two years (730 days) after the time for compliance with the Order of Justice Anderson to make the application. That in the circumstances the application could never be considered to have been prompt.

(iii) The Learned Judge also failed to appreciate that even although the Affidavit of Andrea Martin Swaby spoke of bringing the Order to the attention of the Registrar, there was no written correspondence BEFORE the 19 day of March, 2019 to that effect. Further by that time nearly three weeks had elapsed since the deadline for compliance with Justice Anderson's Order. No explanation was given as to why an application was not THEN made for relief from sanction.

iv) That is allowed to stand the Learned Judge's ruling would have the effect of degrading or watering down the efficacy of Rule 26.8(1) of the C.P.R. (2002).

(b) The Learned Judge erred in not awarding costs to the Appellants."

The submissions

Appellant

[23] Counsel for the appellant submitted that the learned judge fell into error by failing to recognize that rule 26.8(1) of the CPR requires promptitude not so much in compliance with the original order itself, but in efforts to come before the court on an application for relief from sanctions. Therefore, as the respondent waited over two years to file an application for relief from sanctions, the application could in no way be considered prompt. Counsel additionally highlighted that even after the Registrar had complied with the order the respondent waited another eight months before making the application for relief from sanctions.

[24] Further counsel advanced that while the efforts made by the respondent to get the Registrar to act were relevant to rule 26.8(2) of the CPR, under which the court had a discretion, that discretion could not be exercised unless it had first been established under rule 28.6(1) of the CPR that the application had been made promptly. Counsel also submitted that, in any event, there was no good explanation for the delay as the respondent could have applied to the court as soon as she realised that the order of the SPJ had not been obeyed and that time was elapsing.

[25] Counsel also invited the court to reject the contention of counsel for the respondent that, as the matter falls under the MACMA, it was somehow exempt from the CPR.

[26] Counsel relied on the authorities of **University Hospital Board of Management v Hyacinth Matthews** [2015] JMCA Civ 49; **H B Ramsay and Associates Ltd et al v Jamaica Redevlopment Foundation Inc et al** [2013] JMCA Civ 1; **Woodward v Finch** [1999] CPLR 699; **Joseph Nelson v David Robert Spencer et al** [2017] JMSC Civ 188; **Crichton Automotive v Zulfiqar Motors Co Ltd** [2019] JMSC Civ 197; **Rawti also called Rawti Roopnarine et al v Harripersad also Harripersad Kissoo** Civil Appeal No 52 of 2012 Court of Appeal of the Republic of Trinidad and Tobago, judgment delivered 22 June 2012; and **Robert Dale Brodber v E W Abrahams and Sons Limited and Maxwell Ormsby** [2020] JMSC Civ 145.

Ms Andrea Simpson

[27] In her submissions, counsel for Ms Simpson also highlighted the mandatory nature of the requirement in rule 26.8(1) in that an application for relief from sanctions must be made promptly. Counsel advanced that the learned judge erred in arriving at a conclusion that the application was made promptly by ostensibly relying on the positions that a) the application could not be done until the Registrar assigned the 2015 claim number; and b) after the number was assigned, the DPP's office had to await advice from the Attorney General's Chambers before proceeding with the application (despite saying that reason could not be relied on due to the absence of affidavit evidence in support).

[28] While maintaining that the lack of promptitude was dispositive of the appeal, counsel also advanced that additionally, the learned judge had erred in her assessment and application of the discretionary aspects of rule 26.8 of the CPR. Counsel challenged the finding that the failure to comply with the order of the SPJ, and by extension the order of K Anderson J, was not intentional. In that regard she argued that the evidence before the learned judge was that the actions of the DPP were dilatory, as the first time

the DPP requested in writing a 2015 number to be placed on the FDCF, was by letter dated 3 July 2020 and then 14 days later that request was satisfied.

[29] Concerning the finding that there was a good explanation for the delay, counsel argued that no evidence was given of any efforts made by the DPP's Office to bring the order to the Registrar's attention before the unless order; there was only evidence after the unless order took effect. Further, counsel highlighted that after the 2015 claim number was assigned, absolutely no reason was given in the affidavit filed on behalf of the DPP, explaining why the application was not made until March of the following year.

[30] Counsel additionally complained that the DPP had not "generally complied with all other rules practice directions orders and directions". Counsel advanced that in breach of the SPJ's order a) the FDCF, amended to include the 2015 claim number, was not served within seven days of its receipt from the registry of the Supreme Court as it was not served until 28 January 2022; b) the FDCF has not been personally served on the appellant; and c) the FDCF and supporting affidavit remain unamended with the only defendant being named being the appellant.

[31] Finally counsel advanced that Ms Simpson has been "severely prejudiced by the continued laxity of the DPP's office in pursuing the matter correctly and abiding by the orders of this Court".

[32] Counsel relied on the authorities of **H B Ramsay & Associates Limited et al v Jamaica Redevelopment Foundation, Inc et al** [2012] JMSC Civ 64; **Re Jokai Tea Holdings Limited** [1992] 1 WLR 1196; **Kristin Sullivan v Rick's Café Holdings Inc T/A Rick's Café (No 2)** 2007 HCV 03502 (April 15, 2011); and **Elenard Reid and Others v Nancy Pinchas and Others** CL2002 R/031 (February 27, 2009).

Respondent

[33] Counsel for the respondent submitted that it was open to the learned judge to find as a fact, relying on the affidavit of Andrea Martin-Swaby, that the application for relief from sanctions was made promptly, based on the chronology of the matter from

the orders made by the SPJ to the point where the correct claim number was provided by the Registrar. Thus, the determination as to whether the application was made promptly, must be construed in conjunction with the reason for the failure to comply with the orders of the SPJ and K Anderson J; especially in light of the unusual nature of the non-compliance with the order of the SPJ, which was outside the control of the respondent. Further, counsel submitted that, on a true construction of rule 26.8(1) and the authorities which have interpreted it, not only must all the circumstances of a case be considered to determine the issue of promptitude, but even where it has been determined that an application for relief from sanctions has not been made promptly, the court still has a discretion to look at all the circumstances to ascertain whether it should grant relief.

[34] Counsel also submitted that the respondent took the view that in order to apply for relief from sanctions the orders for costs made by the SPJ had to be complied with. Therefore, as up to the filing of the application for relief from sanctions Ms Simpson had not served a default costs certificate, which was needed for the costs orders to be complied with, advice had to be sought regarding the inability to comply with the order for costs in relation to Ms Simpson. Counsel however acknowledged, that there was no affidavit evidence before the learned judge in support of this latter assertion.

[35] Counsel additionally advanced that there was a good explanation for the failure to comply with the relevant orders as the assignment of claim numbers is a process wholly controlled by the Supreme Court and the DPP could not act until the Registrar of the Supreme Court took action to issue the 2015 claim number. Further, counsel maintained that the numerous efforts made to have the Registrar issue a 2015 claim number clearly demonstrated that the failure of the respondent to comply with the orders the SPJ and K Anderson J was not intentional.

[36] Regarding the issue of whether the respondent had generally complied with all other relevant rules, practice directions, orders and directions, counsel submitted that the respondent had complied with the orders of the court as far as possible as the DPP had

served the refiled documents in which the 2017 number had been inserted on counsel for the appellant within the period required pursuant to the order of the SPJ, and had also sent copies to the UK to be served on the appellant.

[37] Counsel also again relied on the need to seek advice from the Chambers of the Attorney General, after receipt of the 2015 claim number, concerning the length of time that had elapsed since the respondent's statement of case had been struck out. The court reiterates that this submission is unsubstantiated by any affidavit evidence.

[38] Counsel additionally argued that as rule 26.8(3) required the court to consider the interest of the administration of justice when determining whether to grant relief, an important question was whether the enforcement of the foreign confiscation order should be prevented by the failure of the Registrar to insert a particular claim number.

[39] In her written submissions counsel advanced that the court was not bound by the CPR in this matter, as section 33 of MACMA provides that Rules of Court may be made dealing generally with all matters of practice and procedure under MACMA. The court could therefore create appropriate practice and procedure for matters of this "delicate nature". However, in oral submissions, while lamenting that the CPR is ill-suited to matters of this nature, counsel agreed that in the absence of any rules having been promulgated under section 33, the CPR applies.

[40] Counsel relied on the cases of **H B Ramsay and Associates Ltd et al v Jamaica Redevlopment Foundation Inc et al**; **Meeks v Meeks** [2020] JMCA Civ 20; **Re Jokai Tea Holdings Limited**; **National Workers Union v Shirley Cooper** [2020] JMCA Civ 62; and **Ray Dawkins v Damion Silvera** [2018] JMCA Civ 25.

Analysis

[41] Two main issues arise on this appeal. Firstly, does the court have a discretion to grant an application for relief from sanctions if it was not made promptly and, secondly, was the application in this case made promptly?

[42] Rule 26.8 of the CPR, which deals with relief from sanctions, reads as follows:

> "(1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction **must** be –
>
> (a) made promptly; and
>
> (b) supported by evidence on affidavit.
>
> (2) The court **may** grant relief only if it is satisfied that –
>
> (a) the failure to comply was not intentional;
>
> (b) there is a good explanation for the failure; and
>
> (c) the party in default has generally complied with all other relevant rules, practice directions orders and directions.
>
> (3) In considering whether to grant relief, the court **must** have regard to –
>
> (a) The interests of the administration of justice;
>
> (b) Whether the failure to comply was due to the party or the party's attorney-at-law;
>
> (c) whether the failure to comply has been or can be remedied within a reasonable time;
>
> (d) whether the trial date or any likely trial date can still be met if relief is granted; and
>
> (e) the effect which the granting of relief or not would have on each party.
>
> (4) The court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown." (Emphasis supplied)

[43] In **H B Ramsay and Associates Ltd et al v Jamaica Redevlopment Foundation Inc et al** Brooks JA (as he then was), in analysing the requirement that

applications for relief from sanctions must be made promptly, had this to say at paras. [9] to [10].

> "[9] …It is without doubt that the current thinking is that if an application for relief from sanctions is not made promptly, the court is unlikely to grant relief. Rule 26.8 states that the application 'must' be made promptly. This formulation demands compliance. Although the word 'must' has been variously interpreted as mandatory in some contexts (see **Norma McNaughty v Clifton Wright and others** SCCA No 20/2005 (delivered 25 May 2005)) and directory in others (see **Auburn Court Ltd and Another v National Commercial Bank Jamaica Ltd and Another** SCCA No 27/2004 (delivered 18 March 2009)), the context of rule 26.8(1) does suggest a mandatory element.
>
> [10] In my view, if the application has not been made promptly the court may well, in the absence of an application for extension of time, decide that it will not hear the application for relief. I do accept, however, that the word 'promptly', does have some measure of flexibility in its application. Whether something has been promptly done or not, depends on the circumstances of the case."

[44] At para. [18] Brooks JA determined that, as the application had not been made promptly, it should fail. He, however, decided to also address the other aspects of the application.

[45] At para. [31], in his concluding comments, Brooks JA said:

> "[31] An applicant who seeks relief from a sanction, imposed by his failure to obey an order of the court, must comply with the provisions of rule 26.8(1) in order to have his application considered. If he fails, for example, to make his application promptly the court need not consider the merits of the application. Promptitude does, however, allow some degree of flexibility and thus, if the court agrees to consider the application, the next hurdle that the applicant has to clear is that he must meet all the requirements set out in rule 26.8(2). Should he fail to meet those requirements then the court is precluded from granting him relief. There would, therefore, be no need for a court, which finds that the applicant has

> failed to cross the threshold created by rule 26.8(2), to consider the provisions of rule 26.8(3) in relation to that applicant."

[46] Counsel for the respondent found solace in advancing an interpretation of the quoted paragraphs that they support the position that, not only should all the circumstances of the case be taken into account to determine if the applicant had acted promptly, but that the court may still exercise its discretion to consider the application and grant relief in appropriate circumstances, even when promptitude has not been established.

[47] Counsel for the respondent also relied on dicta in **Ray Dawkins v Damion Silvera**. At paras. [66] to [67] P Williams JA, writing on behalf of the court, stated:

> "[66] If the assessment of whether the application was made promptly should be dependent solely upon the time at which the breach occurred, the respondent's application was made approximately a year after the deadline for compliance and that could be viewed as amounting to inordinate delay. However, the fact that there had been partial compliance and that there was in effect no negative delays to the matter proceeding to trial, were circumstances which ought to be taken into consideration.
>
> [67] Further, the circumstances under which the breach was brought to the attention of the court at the time of trial ought also to be considered. In the factual circumstances of this case, the reaction of the respondent in applying for relief from sanction can then be regarded as prompt. Thus, in the peculiar circumstances of this matter, the learned judge cannot be faulted for having concluded that the first hurdle to the making of the application had been sufficiently met."

Thus, in the peculiar circumstances of that case, the court regarded the application as prompt.

[48] It will be instructive to also consider the guidance on this point from this court in other cases, some of which were cited in arguments. In **University Hospital Board of Management v Hyacinth Matthews** Phillips JA, at para. [40], endorsed the approach

taken by Brooks JA in **H B Ramsay and Associates Ltd et al v Jamaica Redevelopment Foundation Inc et al** that the provisions of rule 26.8(1) must be complied with before the court needs to consider the provisions of rule 26.8(2), which themselves must be satisfied before the provisions of 26.8(3) need be considered.

[49] However, even before **H B Ramsay and Associates Ltd et al v Jamaica Redevelopment Foundation Inc et al** was decided, the mandatory requirement of promptness was recognised. In **National Irrigation Commission Ltd v Conrad Gray and Marcia Gray** [2010] JMCA Civ 18, Harrison JA at para. 16 opined:

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

[50] In **Morris Astley v The Attorney General of Jamaica & Another** [2012] JMCA Civ 64, Morrison JA (as he then was) interpreted rule 26.8, at para. [39], as follows:

> "[R]ule 26.8(1) provides that such an application must be made (a) promptly and (b) supported by affidavit. Once these preconditions are met, rule 26.8(2) permits the court to grant relief from sanctions imposed for failure to comply with any rule, order or direction (only) if it is satisfied that (a) the failure to comply was not intentional, (b) there is a good explanation for the failure and (c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions. And rule 26.8(3) sets out the general factors to which the court asked to grant relief from sanctions must have regard, viz, (a) the interests of the administration of justice; (b) whether the failure to comply was that of the party or his/her attorney-at-law; (c) whether the failure to comply can be remedied within a reasonable time; (d) the impact of granting relief on the actual or likely trial date; and (e) the effect on either party of granting or not granting the application for relief."

[51] Then, after the case of **H B Ramsay and Associates Ltd et al v Jamaica Redevelopment Foundation Inc et al**, in **Price Waterhouse (A Firm) v HDX 9000 Inc** [2016] JMCA Civ 18, a case in which the learned judge at first instance granted relief from sanctions even though he found that the application had not been made promptly, Brooks JA (as he then was) had this to say at paras. [36] to [37]:

> "[36] It was stated in **H B Ramsay**, that there was a degree of flexibility in the assessment of the promptitude of an application. It may well be that the explanation for what may at first blush seem a delay, demonstrates that the application was indeed made promptly. Each case would turn on its own facts. If however, the court is of the view that the application was not made promptly, and there is no application for extension of time, the application for relief from sanction should fail.
>
> [37] The learned judge in this case, having found that the application had not been made promptly, was, therefore, in error to have continued to consider the other aspects of rule 26.8. He compounded that error when he went on to consider the provisions of rule 26.8(3), despite his finding HDX had not complied with all the provisions of rule 26.8(2). The learned judge found that certain failures by HDX were intentional. Rule 26.8(2) is definitive in its terms. It clearly states that the court may only grant relief if it were satisfied that all three aspects of paragraph (2) have been satisfied…"

[52] Subsequently in **Meeks v Meeks** F Williams JA, writing for the court, having examined whether the application had been made promptly, stated at para. [26] that:

> "…the application having failed to pass the requirements of rule 26.8(1), there was no further obligation on the learned judge to have given consideration to rule 26.8(2) and (3) of the CPR."

[53] Further, in **National Workers Union v Shirley Cooper** Dunbar-Green JA (Ag) (as she then was) at para. [69] outlined that:

> "…The appellant having not dispelled the evidence that it had been served and therefore had or ought to have had knowledge of the unless order it did not satisfy the

> requirement of promptitude. Consequently, the learned master ought to have rejected the application…."

[54] It is thus accepted and beyond doubt that under rule 26.8(1) the establishment of promptitude is a *sine qua non,* a condition precedent to the court being able to grant relief. That is the clear meaning of paras. [9], [10] and [31] earlier quoted from **H B Ramsay and Associates Ltd et al v Jamaica Redevelopment Foundation Inc et al**. The broader interpretation of that decision urged by counsel for the respondent is erroneous. The fact that in several cases courts have gone on to consider the factors listed in rule 26.8(2) and sometimes those in rule 26.8(3), despite concluding that the requirements of rule 26.8(1) have not been satisfied, does not diminish the fact that non-compliance with 26.8(1) is an absolute bar to relief being granted. Whatever the reason a court decides to assess the merit of an application against the requirements of rule 26.8(2) and (3), after determining that rule 26.8(1) has not been complied with, either (and usually) to show that the application was generally hopeless or, that, but for non-compliance with rule 26.8(1) the application may have been granted, it does not change the fact that rule 26.8(1) must be complied with, for the application to proceed.

[55] Therefore, from my examination of rule 26.8 of the CPR and consideration of cases interpreting its application, it appears the effect of paragraphs (1) to (3) of that rule is as follows:

a) an application for relief from sanctions cannot be granted unless it has been made promptly and supported by affidavit. What may be considered prompt will depend on the circumstances of each case, but the natural meaning of the word prompt should not be unreasonably strained or elasticised to bring circumstances within its compass. If the court decides that the application was not made promptly, the application must be refused and there is no discretion to exercise – paragraph 1: **National Irrigation Commission Ltd v Conrad Gray and Marcia Gray** para. [16]; **Morris Astley v The Attorney General of Jamaica and Another** para. [39]; **H B Ramsay and Associates Ltd et al v Jamaica**

Redevelopment Foundation Inc et al paras. [9], [10] and [31]; **Universal Hospital Board of Management v Hyacinth Matthews** para. [40]; **Price Waterhouse (A Firm) v HDX 9000 Inc.** para [36]; **Meeks v Meeks** para. [26]; and **National Workers Union v Shirley Cooper** para. [69];

b) if paragraph 1 has been satisfied it is only then that the discretion of the court to grant relief is potentially activated. It will only be activated if all three conditions precedent in paragraph 2 are satisfied, namely the failure to comply was not intentional, there is a good explanation for the failure and the party in default has generally been compliant with all other relevant rules, practice directions orders and directions. The factors are cumulative – paragraph 2: **Morris Astley v The Attorney General of Jamaica and Another** para. [39]; **H B Ramsay and Associates Ltd et al v Jamaica Redevelopment Foundation Inc et al** para. [31]; **Universal Hospital Board of Management v Hyacinth Matthews** paras. [39] – [41]; and **Price Waterhouse (A Firm) v HDX 9000 Inc** para. [37];

c) if paragraphs 1 and 2 have been complied with, in deciding whether to exercise the discretion activated under paragraph 2, the court is mandated to have regard to the factors listed in paragraph 3 as may be relevant to the circumstances of the particular case – paragraph 3: **Morris Astley v The Attorney General of Jamaica and Another** para [39]; and **Universal Hospital Board of Management v Hyacinth Matthews** para. [50].

[56] Issue one having been settled, I now move to consider whether the application in this case was prompt. The learned judge, while acknowledging that the delay of two years was long, accepted the reason proffered by the respondent, supported by affidavit evidence, that compliance with the order was in the hands of the Registrar of the Supreme Court and outside of the respondent's purview. The learned judge also adverted to the

other reason advanced by the respondent, that of awaiting advice from the Attorney General's Chambers office, but correctly indicated it could not be considered, as it was only advanced in submissions and not supported by affidavit evidence. Thus, relying on **Meeks v Meeks**, the learned judge took "into consideration the circumstances of the delay" and also "in keeping with the overriding objectives of the Rules" found that the [respondent] had "satisfied Rule 26.8(1)".

[57] It should first be pointed out that the reliance of the learned judge on the overriding objective was an error. Brooks JA (as he then was) in **Price Waterhouse (A Firm) v HDX 9000 Inc**, at para. [37], indicated that "[j]udges must be reminded that resort to the overriding objective may only be had in the absence of specific provisions which are clear in their meaning". Rule 26.8, being clear in its meaning, the overriding objective should not have been considered in aid of the application.

[58] Regarding the "circumstances of the delay", the submission of counsel for the appellant that the learned judge fell into error by failing to recognise that rule 26.8(1) of the CPR requires promptitude not so much in compliance with the original order itself, but in efforts to come before the court on an application for relief from sanctions, is apt. It is apparent from the affidavit evidence relied on by the respondent that:

a) the understanding of the Office of the DPP was that the effect of the costs order of the SPJ was that no further steps could be taken in the matter until the costs of the appellants had been paid, which aspect of the learned judge's order had been appealed; and

b) there was uncertainty whether the Registrar of the Supreme Court was empowered to insert a claim number in a claim for a year that had passed and whether the DPP could take further steps in the matter in light of the costs order.

[59] Those positions were communicated to the Registrar by the respondent in a letter dated 19 March 2019, three weeks after the unless order of K Anderson J took effect.

Interestingly, despite the uncertainty as to the Registrar's powers to comply with the order of the SPJ to insert a 2015 number in a claim after the year 2015 had passed, that does not appear to have been an issue raised in the appeal of her order.

[60] No application for relief from sanctions was made at this time although the respondent knew that the unless order had by then taken effect. In light of the contents of the letter of 19 March 2019, that application could have been made then on the basis that compliance with the unless order had been frustrated by inaction by or inability of the Registrar regarding execution of the order of the SPJ. As indicated by counsel for the appellant, the reasons for the respondent's non-compliance are relevant to the discretionary factors under rule 28.6(2), but do not assist in establishing promptitude on the part of the respondent under rule 28.6(1).

[61] Over one year later, after a second letter to the Registrar from the respondent, a 2015 claim number was issued to the respondent on 17 July 2020. Although there are submissions which proffer a reason, there is no affidavit evidence providing an explanation why the application for relief from sanctions was not filed until 3 March 2021. In light of the already long delay up to 17 July 2020, a further unexplained delay of almost eight months, makes it impossible for the finding of promptitude by the respondent under rule 28.6(1) to be sustained. While the cases show that varying periods of time have been held to be prompt, depending on the circumstances, long inaction in the face of knowledge of the breach requiring an application for relief, vitiates a finding of promptitude. In this regard the case of **Ray Dawkins v Damion Silvera**, where the application was made approximately a year after the deadline for compliance, but was filed the same day the breach was discovered, is clearly distinguishable from the instant case. Accordingly, the learned judge fell into error in determining that the application had been made promptly and that she was therefore permitted to further consider and grant the application for relief from sanctions.

[62] The conclusion on the issue of promptitude is dispositive of the appeal. There is therefore no need for the court to go on to consider the factors under paragraphs (2) and (3) of rule 26.8.

[63] It is for the foregoing reasons that this court allowed the appeal and restored the effect of the unless order of K Anderson J, striking out the statement of case of the respondent.

[64] The appellant also appealed against the learned judge making no order as to costs. It is usual that applicants for relief from sanctions pay costs regardless of the outcome of the application, given that it is from their default that the need for the application arose. It may be that the costs order was made because the learned judge ascribed the "fault" in this matter to the Registrar of the Supreme Court.

[65] The respondent was not armed with the reasons for the court's decision to inform its submissions on costs. In light of those reasons, the attempt to support the order of the learned judge on the primary bases that the respondent was not at fault and that the default originated from the inaction of the Registrar of the Supreme Court, rests on shaky ground.

[66] Assistance was sought from the case of **Paul Baxendale-Walker v Law Society** [2008] 1 WLR 426 in which the Court of Appeal of England upheld the Divisional Court's ruling that the solicitor should pay 60% of the Law Society's costs. However, that case is unhelpful. In that matter it was recognised that the Law Society when performing the important public function of seeking to maintain high professional standards was in a wholly different position from a party to ordinary civil litigation. Thus the ordinary rule that properly incurred costs generally followed the event, did not apply to disciplinary proceedings against a solicitor.

[67] By contrast, as pointed out by counsel for the appellant in his submissions on costs, the respondent in this matter (operating as the Central Authority) was engaged in ordinary civil litigation seeking an enforcement order and was not a regulator as in **Paul**

Baxendale-Walker v Law Society. Further, in **Paul Baxendale-Walker v Law Society**, the Law Society was partially successful in that one of the two allegations of conduct unbefitting a solicitor was admitted, with the result that the solicitor was suspended from practice for three years. In the instant case the respondent was wholly unsuccessful. I might also add that the nature of the proceedings is also wholly different. In the cited case the matter concerned disciplinary proceedings, while the instant case concerns an ultimately unsuccessful application for relief from sanctions. The fact that the respondent was acting in pursuance of international cooperation in criminal proceedings throughout this matter, is insufficient to displace the general rule, considering all the circumstances of this case.

[68] Accordingly, as submitted by counsel for the appellant, the discretion regarding the award of costs must be exercised judicially and, given the circumstances of this case, requires that the general rule that costs should follow the event be applied: **Winston Brown and Annette Maud-Marie Brown v Carlton Daye** [2021] JMCA Civ 22A at paras. [8] and [10]. I would, therefore, propose that costs here and in the court below be awarded to the appellant, and costs in the court below be awarded to Ms Simpson, such costs to be agreed or taxed.

[69] Just before parting with this matter, a feature of the hearing was that the respondent relied on an affidavit filed by counsel appearing. Counsel are reminded of the undesirability of this practice in light of rule 30.1(1)(3) of the CPR and canon V(p) of the Legal Profession (Canons of Professional Ethics) Rules.

LAING JA (AG)

[70] I have read in draft the judgment of my learned brother D Fraser JA and I have nothing to add. It reproduces the analysis of the court in arriving at the decision which was handed down and the costs order made herein, with which I agreed.

BROOKS P

ORDER

1 The order made on 28 April 2023 is amended in accordance with the order outlined at para. [5].

2. Costs to the appellant, here and in the court below, and to Ms Andrea Simpson in the court below, to be agreed or taxed.