[2025] JMCA Civ 36

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE EDWARDS JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MR JUSTICE BROWN JA

SUPREME COURT CIVIL APPEAL NO 98/2018

BETWEEN	**CAREIF LIMITED**	**1st APPELLANT**
AND	**ANTHONY THARPE**	**2nd APPELLANT**
AND	**JAMAICA OBSERVER LIMITED**	**RESPONDENT**

Anthony Tharpe in person and as representative for the 1st appellant

Charles Piper KC and Najeeb Spence instructed by Charles E Piper & Associates for the respondent

6 November 2023 and 5 December 2025

Civil practice and procedure – Specific disclosure and request for information – Unless order – Whether unless order complied with – Whether unless order took effect – Rules 1, 26, 28 and 34 of the Civil Procedure Rules, 2002

EDWARDS JA

Introduction and background

[1] This matter involves an appeal by the appellants, Careif Limited ('the 1st appellant'), and its principal officer, Mr Anthony Tharpe ('the 2nd appellant'), against the orders of V Harris J (as she then was) ('the learned judge'), made in the Supreme Court on 9 May 2017. By those orders, the learned judge declared that the appellants' statement of case in their libel and defamation claim against the Jamaica Observer Ltd ('the respondent'), stood struck out until relief from sanctions was obtained. The learned judge made further orders vacating the trial dates, awarding costs to the respondent, and granting leave to appeal. She also declared that there was no need to consider the

appellants' applications for discovery. Those orders and the learned judge's reasons for making them are contained in her written judgment bearing neutral citation [2017] JMSC Civ 66.

[2] The matter had come before the learned judge for a determination as to whether the appellants had complied with an unless order made on 13 May 2015, by Anderson J, which required the appellants to provide specific disclosure of certain documents and to comply with a request for information made by the respondent, failing which their claim would stand struck out without need for further orders. Having examined the appellants' list of documents, through which they claimed compliance with the unless order, the learned judge determined that the appellants had not complied and, therefore, that their claim stood struck out as at the date of Anderson J's order.

[3] By this appeal, the appellants have sought to challenge the learned judge's decision on various grounds, including that they did, in fact, comply with the unless order and that Anderson J was not entitled to make that order, in any event.

[4] Before the court is also a counter-notice of appeal by the respondent seeking to affirm the orders of the learned judge.

[5] I find it necessary to set out the procedural history of the matter in some detail.

Procedural history

[6] The 1st appellant, as asserted in the particulars of claim, is a limited liability company engaged in real estate investment and development in Jamaica and overseas, and the 2nd appellant, was at the material time, a businessman, and the managing director, chief executive officer and majority shareholder of the 1st appellant. The 2nd appellant was also the director, chief executive officer and majority shareholder in Phenion Investment Development Group Inc Limited and Phenion Real Estate Investment Fund Inc Limited. He was also, by his own account, "a specialist teacher in the field of economics, a real estate dealer, designer, developer and consultant in Jamaica as well as

a mortgage broker in the United States of America". The appellants owned, controlled and were involved in various real estate and investment projects across the country, for which they used the CAREIF brand to promote and market.

[7] The respondent is a limited liability company that prints and publishes a newspaper in Jamaica.

[8] On 7 May 2008, the respondent published an article entitled "CAREIF crashes" ('the article') in the Business Observer, in print as well as on its website, in which it described the 1st appellant as "one of several alternative investment clubs on the blacklist of the Financial Services Commission (FSC)". It was also stated in the article that CARIEF had "crashed", depriving investors of millions of dollars, that the company had failed to pay its employees their salaries, was closing several offices in Jamaica, and that it intended to move its operations to Miami. The article sought to substantiate those assertions by providing details and information from various sources, including a memorandum allegedly sent by the 2nd appellant to the 1st appellant's employees.

[9] On 6 September 2010, the appellants filed a claim and particulars of claim against the respondent in the court below for libel and defamation arising from the article, which it was said had caused them to suffer damage to their reputations and a general loss of business. It was also alleged that the 2nd appellant had suffered personal injury, distress, anxiety and embarrassment. The appellants sought damages, an injunction, interest and costs. Special damages were sought in the amount of $144,090,287,581.00, most of which was alleged to be loss of future earnings.

[10] The respondent filed a defence on 27 October 2010, denying that the words published were defamatory and capable of causing the damage, injury and loss alleged. The respondent put forward the defences of truth, fair comment on matters of public interest in good faith without malice, and qualified privilege without malice.

[11] On 5 September 2011, the respondent's attorney-at-law wrote to the appellants seeking specific disclosure of certain documents. The appellants' then attorney-at-law

responded by letter on 19 September 2011, and stated in general terms, that most of the documents requested were not "directly relevant to the issues in the proceedings and were not being relied on by the claimants". She offered up only one document and "relevant pages" of another.

[12] On 6 September 2011, the respondent filed a request for information asking the appellants to provide details of certain things alleged in their particulars of claim, including details of:

> (a) the development and investment projects the appellants were involved in at the time of the publication of the article and the various approvals from the relevant regulatory bodies;
>
> (b) the legal relations to acquire hotels and details of commercial and residential real estate and development projects acquired by the 2nd appellant;
>
> (c) the alleged investors and the investors' commitment to invest millions of dollars, and their withdrawal based on the article;
>
> (d) persons and or institutions that disassociated themselves or withdrew from involvement with the appellants based on the article; and
>
> (e) "firm prior arrangements" to acquire small hotels.

[13] On 19 September 2011, the appellants filed their own request for information asking the respondent to identify and provide details in relation to several allegations it had made in the impugned article, including (but not limited to):

> (a) the names of the investors the respondent alleged the appellants had deprived of millions of dollars;
>
> (b) the amount of money each investor was allegedly deprived of;
>
> (c) the details of the alleged investment projects involved;

(d) particulars to support the allegation that the 1st appellant was an alternative investment club;

(e) the nature and type of investments the respondent alleged that the appellants were engaged in contrary to the Securities Act;

(f) that the appellants could not pay its staff; and

(g) that the appellants had expressed an intention to relocate to Miami, Florida.

[14] That same day, the appellants filed a response to the respondent's request for information, through their then counsel, stating in response to each specific request, that the request was "irrelevant oppressive and improper", and that the details sought were not necessary to dispose fairly of the case. In addition, the appellants maintained that the details being sought were "not necessary to dispose fairly of the case or to save costs and should properly be made the subject of questions asked during cross-examination (if the defendant so chooses) of their Claimants and/or the witnesses".

[15] They also filed a notice of application for court orders, along with an affidavit in support, asking the court to strike out several paragraphs of the defence for failure to comply with various rules of the Civil Procedure Rules, 2002 ('CPR') and failure to disclose any reasonable ground of defence. The application was amended on 26 September 2011, further particularising the orders sought, seeking a determination by the court as to whether the words complained of could bear the defamatory meanings attributed to them, and seeking judgment on the admissions allegedly made by the respondent in the defence. The amended application asked the court to deal with certain matters as preliminary issues.

[16] On 12 October 2011, the respondent filed a notice of application for court orders, seeking specific disclosure of the documents "explicitly or implicitly" referred to in the particulars of claim, including:

a) audited financial statements for several companies listed;

b) the joint venture agreements;

c) the application to the Manchester Parish Council, the prospectus of all real estate development and investment projects lodged with the Financial Services Commission ('FSC');

d) documents relating to the planning and implementation of various mega real estate developments;

e) financial projections in relation to the Montego Bay Projects;

f) documents evidencing the legal relations regarding the acquisition of certain properties; and

g) documents evidencing the commitment of millions of dollars by investors to certain developments, and the cancellation/or withdrawal of those commitments.

[17] The respondent's application also sought, among other things, a determination by the court as to whether the information sought in its request for information was "irrelevant" as contended in the appellants' answers filed, as well as a determination as to which items in the appellants' request for information should be allowed, having regard to the pleadings.

[18] On 18 October 2011, the respondent filed an amended defence to include, in addition to minor changes, a reference to a letter it received from the FSC, subsequent to the publication of the article, purporting to confirm the FSC's investigation into the appellants, which spanned several years, as well as the fact that the 2nd appellant had not been registered as an investment club.

[19] The applications of both parties came on for hearing before McIntosh J on 12 June 2012, at which time he adjourned the applications and gave permission for the respondent to amend its defence. The appellants appealed that decision, and the appeal was allowed by this court on 19 November 2012.

[20] The appellants' application to strike out the defence then went before Straw J (as she then was), who heard the matter and, on 30 July 2013, ruled that the amended defence was permitted to stand as filed except for references in certain paragraphs which had been amended to include justification material that arose after the publication. Those pleadings, she ordered to be struck out. Otherwise, she found that there was no basis to strike out the whole defence for failure to comply with the rules.

[21] On 11 June 2014, when the respondent's application came on for hearing, Simmons J (as she then was) adjourned the matter and ordered that the appellants respond to the respondent's request for information on or before 24 June 2014.

[22] On 18 June 2014, the appellants filed a "Claimants Supplemental Response to [Respondent's] Request for Production". In that supplemental response, the 2nd appellant indicated that, "at the last case management conference held 11th of June 2014", he had committed to produce financials on the companies "which are relative to the matter in front of the Court". The supplemental response was purported to have been filed in fulfilment of that commitment. The 2nd appellant further indicated that he was prepared to "furnish for review", all information within his control to an independent third party, "upon appointment from the court", in order to keep all information confidential. The 2nd appellant also asserted that financial projections and summaries which would show the "substantial nature of the Damage" were attached to the supplemental response. The document also indicated that only publicly traded companies/corporations are required by law to have annual audited statements and that none of the claimant's businesses were public corporations.

[23] The appellants also filed an application for summary judgment on 18 June 2014, supported by an affidavit of urgency.

[24] The respondent's application for specific disclosure was eventually heard by Anderson J, who, on 13 May 2015, ordered, *inter alia*, that the appellants were to provide specific disclosure of all the documents listed in the respondent's notice of application

filed 12 October 2011, in a manner compliant with the CPR. Anderson J also found that the responses filed by the appellants to the respondent's request for information were invalid and ineffective, and that the appellants were to provide full responses to each aspect of the request. He further ordered that the appellants were to make both filings on or before 30 September 2015, failing which the appellants' statement of case would stand struck out, without further need for a court order. Those orders of Anderson J were not appealed.

[25] On 10 June 2015, the appellants filed a notice of application for court orders and a second request for production of documents. An affidavit of urgency in support of the application was filed on 17 June 2015.

[26] On 20 August 2015, the appellants filed a list of documents purportedly in fulfilment of Anderson J's unless order, which was served on counsel for the respondent.

[27] The parties subsequently came before the court for a case management conference ('CMC') on 29 October 2015. On that occasion, the CMC was adjourned to 7 June 2016, and the matter of the appellants' request for information was set for hearing on that date. By then, the appellants had filed a notice of application for court orders to compel the respondent to comply with their request for information, and that application was set for hearing at the CMC. However, at the CMC held on 7 June 2016, counsel for the respondent raised the issue of the appellants' compliance with Anderson J's unless order. At that time, the court's file could not be located. Batts J, therefore, adjourned the appellant's application and ordered that, on the next hearing date, the court would determine whether there had been compliance with the unless order before considering the appellants' application. To this end, Batts J also ordered that the appellants were to file an affidavit proving compliance with the unless order on or before 17 June 2016. The appellants did so by way of affidavit filed 14 June 2016, in which the 2nd appellant deponed that he had personally served the list of documents at the office of counsel for the respondent, in fulfilment of Anderson J's unless order.

[28] The matter came on for hearing before Harris J for a determination as to whether the appellants had complied. By that time, the respondent had conceded to having been served with the appellants' list of documents prior to the date of the unless order. This was contained in the affidavit of attorney-at-law Petal Brown filed 21 July 2016. In that affidavit, Ms Brown deponed that, after raising the issue of non-compliance with the unless order, the served copy of the appellants' list of documents was located at her firm's office. She, nonetheless, contended that the respondent was still of the view that what was filed did not comply with Anderson J's order. Having reviewed the matter, the learned judge agreed.

[29] For completeness, the appellants filed a notice of application for relief from sanctions in the Supreme Court on 3 July 2017. It is unknown to this court whether that application has yet been heard. In any event, it has no bearing on the matter before us.

Decision of the learned judge

[30] The learned judge accepted, based on what was before her, that the appellants did file a list of documents on 20 August 2015, in purported compliance with Anderson J's order. She, therefore, determined that the issues for her to decide were (1) whether the document filed was in full compliance with the applicable rules of court (Part 28 of CPR); and (2) whether the appellants had provided "full responses to each aspect" of the respondent's request for information, as ordered by Anderson J.

[31] The learned judge considered rules 28.6, 28.7, 28.8, 28.10 and 28.14, which she found to contain the applicable rules regarding the procedure, duties of the parties, and the powers of the court regarding specific disclosure. She also considered rule 34, which allows for either party to request certain information from the other, the requisite procedure, and the consequences of failure to comply. She then considered the applicable cases in relation to how a court should treat with the non-compliance of an unless order.

[32] Having examined the law, the procedural history of the matter, and the nature of the list of documents filed by the appellants in great detail, the learned judge took the

view that the appellants' list was "materially defective" and did not comply with Anderson J's order for specific disclosure, nor did it comply with his order to provide full responses to the respondent's request for information (see paras. [44] and [46] of her written judgment). She accepted the submission of counsel for the respondent that the document was "not consistent with the applicable rules of court" and that it was 'imprecise, argumentative, failed to identify the documents in a clear and cohesive manner, and had not been signed, dated and certified' (see para. [42] of the learned judge's decision).

[33] The learned judge came to that view based on the following reasons:

i. the statements made in the form 12 were confusing and did not identify the person(s) who provided the documents disclosed in accordance with rules 28.8(6). Nor did that person certify the list of documents disclosed as required by rule 28.10(2);

ii. the list contained "copious quotations" from rule 28, which contributed to the list being confusing and uncertain, as it was difficult to grasp the reason certain documents were not being disclosed, contrary to rule 28.8(3);

iii. it was stated in the list that audited financial statements requested did not exist or never existed with no explanation as to why, notwithstanding that most of the companies were limited liability companies;

iv. it was stated that certain documents were no longer in the appellants' control without stating what happened to them or where they were or could be as required by rule 28.8(4);

v. it was indicated that certain requests - in relation to the audited financial statements of the companies, the planning and implementation documents regarding several mega real estate

developments, and the prospectus regarding developments and investment projects lodged with the FSC were irrelevant;

vi. it was stated that the information requested regarding the details of the developments and investment projects of the appellants and their associated companies was irrelevant (this, the learned judge found to be argumentative and not in accordance with the rules and orders of Anderson J);

vii. the documents alleged by the appellants to have been previously disclosed to the respondent were not listed in the list of documents as required by rule 28.8(5);

viii. the appellants failed to disclose or address documents sought in relation to the legal relations that had allegedly been entered into to acquire certain properties identified;

ix. the list of documents was not dated and signed and was not certified in accordance with rules 28.10(1) and (2), which is mandatory (although the court copy could not be found, the learned judge relied on the fact that the copy served on the respondent's attorney was also unsigned and undated, like the copy the appellants had provided);

x. no schedule was provided in the list of documents with the documents or class of documents being disclosed, the reasons claiming a right not to disclose, or what happened to documents no longer in the appellants' possession or control and where they could be located;

xi. the list of documents included the appellants' response to the respondent's request for information, which was irregular; and

xii. the information given in answer to the respondent's request for information was not verified by a certificate of truth as mandated by rule 34.4.

[34] On those bases, the learned judge found that the appellants' statement of case stood struck out until it was relieved from sanctions on the appellants' application and, as such, there was no need to consider the appellants' application for discovery at that time. This she considered to be so notwithstanding the 2nd appellant's position as a self-represented litigant. She found him to be knowledgeable of the CPR and that he would have appreciated the risk of not complying with the unless order.

The appeal and counter-notice of appeal

[35] By notice of appeal, filed on 18 October 2018, the appellants sought to challenge the orders of the learned judge based on the following grounds of appeal:

1. "The learned judge erred by exceeding her jurisdiction by reviewing orders of the lower Tribunal which are only reviewable under the jurisdiction of the Jamaica Appeals court only.

2. The learned judge erred in making orders that failed to have regard to the provisions of Part 1 and Rule 1.1; Rule 1.2 as well as Part 10; Part 11, and Part 26 of the Civil Procedure Rule.

3. The learned judge erred when she ignored the properly filed and set Applications of the Appellants to be heard at the CMC and instead allowed an oral application and argument by the Respondent that was not properly filed or adjourned by the Court to be heard, in keeping with CPR.

4. The Learned judge erred when she heard and ruled on an Application for enforcing an order that should not have been granted in the first place and was not enforced or enforceable because it had lost its prospective effect, lost its probative effect as well as because the

Respondent had in fact received full discovery responses to Respondents requests from the Appellants before any adverse Orders were granted.

5. The Learned Justice V. Harris struck a viable Claim and allowed an admitted incomplete Defense [sic] in violation of Rule 10.5.

6. The learned judge erred in that she failed to disclose any or any sufficient basis upon which she could rely to justify why she; as did Justice Batts, refused to first hear the Appellants Applications; to both Strike the Respondents incomplete Defense [sic] and Compel Respondent to comply to Part 28 as well as the Order of Justice Daye which compelled the Respondent/Respondent, to provide discovery requested made by the Appellants, which were properly adjourned to be heard, before Respondent made its without notice oral application for hearing, an already ruled on and abandoned Unless Order.

7. By not making orders applied for by the APPELLANTS the learned judge erred by not allowing Appellants an opportunity to protect their individual interest.

8. The Respondent's standing to make an Application to strike the Appellants statement of case; was already ruled on at multiple CMC's and was rejected by multiple justices.

9. The Learned Judge therefore failed to apply rules of res judicata.

10. In failing to hear or grant the APPELLANTs applied [sic] for Orders, the learned judge failed to have sufficient regard for the overriding objectives of the Civil Procedure Rules Part one; especially in light that the 1st APPELLANT and the 2nd Appellant have provided undisputed evidence that the Respondent had deliberately misrepresented the facts of the case, and in so

doing also filed fraudulent pleadings; including alleging it did not receive any discovery from the APPELLANTS.

11. The Learned Judge Erred [sic] when she based her Orders and rulings on a previous Order made by Mr. Justice Anderson; to an Application which at the time of Justice Andersons Ruling was in fact moot, because the Respondent had already received requested Discovery and in fact chose to refuse accepting and or alternatively examine or copy Discovery documents, provided by the Appellants. This is information which was not available to Justice Anderson because it was deliberately withheld by the Respondent.

12. The Unless order signed by Justice Anderson, was not acted on by the Honorable [sic] Judge himself, because Justice Anderson saw that the Appellants had complied with the timeline in the Unless Order as well as witnessed that the Appellants had served the Respondent in his [Justice Andersons] [sic] presence as well as made service before the time established by the orders issued by Him, Justice Anderson. In fact, Justice Anderson Upon receiving a Copy of the Discovery filed by the Appellant proceeded Examine the Discovery in front of the Respondent and then Justice Anderson proceeded to Adjourn as well as set the Appellants application to be heard at the next Case Management Conference. Justice Anderson did not enforce the Unless Order to strike the Appellant's Statement of Case after examining the Discovery [h]e had ordered the Appellants to comply.

13. The Over Riding Objective [sic] of the Civil Procedure Rule 2002; Rule 1.1 (2) and Rule 1.2, should have been considered before the said orders were made by Justice V. Harris.

14. The learned Judge, ordered that the APELLANTS could appeal against her ruling.

15. The Appellants have a very good prospect of succeeding in their appeal.

16. The justice of the case requires that all the Applications for orders made by the APPELLANTS should be heard and a Determination made by the Appeals Court before the matter is properly disposed of and a final order given.

17. The said Case Management Orders have unjustly deprived the APPELLANTS of the opportunity to have the matter settled expeditiously especially considering the Rulings of the Learned Justice V. Harris." (Emphasis as in original)

[36] The appellants sought orders reinstating their statement of case, as well as several other orders outside the scope of this appeal.

[37] On 30 October 2018, the respondent filed a counter-notice of appeal contending that the decision of the learned judge should be affirmed on the additional ground that the appellants failed to give "any good explanation for their failure to comply with the Order of Anderson J made on the 13th day of May 2015". For this ground, the respondent relied on the contention that the appellants have at all times maintained that they fully complied with the order of Anderson J, and that the appellants failed to put any material before the learned judge explaining their failure to respond to the request for information or to make disclosure as required by rule 28 of the CPR.

The issues

[38] The grounds of appeal filed were numerous, wordy, unclear, and largely in breach of the Court of Appeal Rules ('CAR'). I have, however, gleaned from grounds 1 to 13, the following issues for resolution by this court:

1. Whether the learned judge erred by making orders she had no jurisdiction to make (grounds 1, 4, 8, 9, 11 and 12);

2. Whether the learned judge was wrong to find that the list of documents filed by the appellants did not comply with the unless order (grounds 5, 11 and 12);

3. Whether the learned judge failed to consider Parts 1, 10, 11 and 26 of the CPR in arriving at her decision (grounds 2 and 13);

4. whether the learned judge erred in not hearing the applications filed by the appellants, and hearing instead the oral application of the respondent (grounds 3, 6, 7, 10); and

5. whether the learned judge allowed an incomplete defence in violation of rule 10.5 (ground 5).

[39] Grounds 14 to 17 were not in a form compliant with the rules of court regarding the formulation of grounds, and they raise no proper issues pertinent to the appeal against the learned judge's orders. The grounds in the respondent's counter-notice of appeal have also raised irrelevant matters and, consequently, there are no issues to deal with in the counter-appeal.

[40] Further, the appellants written submissions filed in the appeal on 24 March 2023, and oral submissions made at the hearing, in my view, have raised issues that are not properly before this court and are not relevant to this appeal. It is, therefore, important to note that this court is only concerned with an appeal from the decision of the learned judge regarding whether there was compliance with the unless order, and not with any question as to whether relief from sanctions should or should not be granted.

The approach of this court

[41] This being an appeal from the exercise of the discretion of the learned judge, this court will not lightly set it aside, and will only do so where it is clear that the decision was based on a misunderstanding of the law or evidence or on an inference that certain facts

did or did not exist, or where the decision was "so aberrant" that no judge regardful of his or her duty could have reached it (see **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1 and **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042 at page 1046).

[42] The appellants were not represented by counsel at the hearing of the appeal, as well as for much of the proceedings that took place in the court below. The 2nd appellant is a self-represented litigant, and the 1st appellant is represented by the 2nd appellant. This court being mindful of that, assisted and accommodated the appellants as much as possible, whilst not being overly concerned with minor technicalities.

Issue 1 - Whether the learned judge erred by making orders she had no jurisdiction to make (grounds 1, 4, 8, 9,11, and 12)

A. Submissions

[43] The appellants have challenged the jurisdiction of the learned judge to make the orders she did on the basis that (1) the learned judge "reviewed" orders made by other judges of the Supreme Court on matters that had already been decided, and were only reviewable by the Court of Appeal; (2) the learned judge ignored the rules of *res judicata*; (3) the learned judge ruled on an order that should not have been granted and that was unenforceable; and (4) Anderson J did not, himself, find that his unless order had not been complied with, and was, therefore, put into effect.

[44] The appellants submitted that *res judicata* prevented the learned judge from considering and ruling as she did, as the matter of discovery had been improperly repeatedly raised by the respondents even though the appellants had already provided "full discovery" of what was relevant to the claim. It was submitted that the respondent ought to have filed an appeal if it had been of the view that "Justice K Anderson should have effected the Unless [order] against the Appellants".

[45] The appellants argued that the bundle of discovery documents filed in satisfaction of the order were examined by Anderson J, and he made no ruling suggesting that the unless order had not been complied with.

[46] The respondent submitted, in brief, that the learned judge was entitled to make the orders that she did. The respondent relied on the cases of **Marcan Shipping (London) Ltd v Kefalas and another** [2007] EWCA Civ 463, **Eaglesham (Phillip John) v Ministry of Defence** (2016) [2016] EWHC 3011 (QB), and **Evanscourt Estate Company Limited v National Commercial Bank Jamaica Limited; National Commercial Bank Jamaica Limited v Evanscourt Estate Company Limited and Anor** (unreported), Supreme Court, Jamaica, Claim No E-013 of 2000, judgment delivered 1 November 2007.

B. Discussion

(1) *The learned judge's case management powers*

[47] The CPR gives judges of the Supreme Court a wide discretion to actively manage cases. Rule 25.1 of the CPR sets out the court's duty to actively manage cases. This includes the duty to: identify the issues in the case at an early stage (rule 25.1(b)); decide which issues need investigation and to dispose of others summarily (rule 25.1(c)); decide the order in which issues are to be resolved (rule 25.1(d)); fix timetables or otherwise control the progress of the case (rule 25.1(g)); give directions to ensure that the case is tried quickly and efficiently (rule 25.1(l)); and ensure that no party gains an unfair advantage by reason of that party's failure to give full disclosure of all relevant facts prior to the trial or the hearing of any application (rule 25.1(m)).

[48] Rule 26.1 sets out the court's general powers of case management, which include the power to take any step (other than what is specifically provided in the rules), give any direction or make any order for the purpose of managing the case and furthering the overriding objective of dealing with cases justly (rules 26.1(2)(v) and 1.1).

[49] The powers of the court, unless otherwise provided by any rule, enactment or practice direction, are to be exercised by a single judge of the court, a master, or a registrar (rule 2.5(1)).

[50] Rule 26.3 gives the court the general power to strike out a statement of case where a party has failed to comply with any rule, order or direction of the court. Rule 26.4(1) provides that where a party fails to comply with any rule or court order where no sanction is imposed, another party may apply to the court for an unless order.

[51] Rule 28.14(2) allows a party seeking to enforce an order for disclosure, to apply to the court for an order that a part of or all of the other non-compliant party's statement of case be struck out, and the court may order that, unless the party in default complies with the order for disclosure by a specific date, that party's statement of case or some part of it be struck out (rule 28.14(5)). The court may also make orders on its own initiative, unless otherwise provided (rule 26.2(1)).

(2) *Nature of an unless order*

[52] Any party may apply to the court for an unless order or the court may impose one on its own motion, in accordance with the rules and any existing practice direction. The unless order is a peremptory order and must be obeyed or else the consequences set out in the order itself will take effect. That consequence can only be alleviated by an application for and the grant of relief from sanctions (rules 26.4(7) and 26.7(2)). This principle, as set out in **Marcan Shipping (London) Ltd v Kefalas and another**, has long been well accepted and applied in many decisions of this court (see for example **Jeffrey William Meeks v Victoria Marie Meeks** [2020] JMCA Civ 7, at para. [37]).

[53] Usually, the party at fault has not complied with the unless order because that party has done nothing in compliance. This is the obvious case and thus there is no need for the matter to go back before a judge to make any further orders "to give effect" to the unless order.

(3) *The jurisdiction to determine whether there has been compliance with an unless order*

[54] Where it is unclear as to whether the unless order has been complied with, or where there is disagreement between the parties as to whether there has been compliance, an application may be made to a judge (not necessarily the judge who made the unless order) for a determination on the issue. That is precisely what occurred in this case, where the appellants filed a list of documents purporting to be compliant with the order. The respondent disputed this on the basis that what was provided was not in compliance with the order. It was necessary for a court to make the determination as to whether there was compliance or not and whether the consequences set out in the unless order had taken effect, as part of the judge's case management powers.

[55] The issue of non-compliance was raised before Batts J, on 7 June 2016, and he set the matter down for hearing to determine whether the appellants had in fact complied. This he had the power to do by virtue of his general powers of case management, since, had there been no compliance, the appellants' case would have been automatically struck out as of 30 September 2015. As a result, the appellants would have been prohibited from taking any further step in the matter until or unless they obtained relief from sanctions.

[56] At the time the matter came before the learned judge for determination, the issue whether the consequences flowing from the unless order had taken effect for non-compliance had not been considered and adjudicated on by any other judge. The issue having been raised before the learned judge, it was within her case management powers to examine the facts and determine whether Anderson J's unless order had been complied with, for if it had not been, then the appellants' statement of case would have stood struck out from the date indicated in the order.

[57] The unless order made by Anderson J was an order that he had the jurisdiction to make. In any event, whether he ought to have made that order based on the circumstances of the case was not a matter for the learned judge to assess, nor is it a

matter for this court, as that order is not the subject of this appeal. Given that Anderson J's order was not appealed and set aside by this court, the learned judge had the jurisdiction to assess whether there had been compliance with it or whether it had taken effect.

(4) *The meaning of disclosure and who determines whether it had already taken place*

[58] Disclosure is the procedure through which parties in an action disclose to each other documents relevant to their case and documents on which they may rely. Rule 28.1(3) indicates that a party discloses a document by revealing that it exists or had existed. The duty to disclose documents is limited to documents which are or were in the control of the party in that they are or were in that party's physical possession or the party had a right to possession or inspection of those documents (see rule 28.2).

[59] The procedure for disclosure begins with a list of documents concisely drawn up in a "convenient order or manner" which identifies the documents or categories of documents (see rule 28.8(2) and (3)). The list of documents should also contain a statement indicating which documents are no longer in that party's possession or control, what happened to those documents and where to the party's knowledge, information or belief those documents can now be found (see rule 28.8(4)).

[60] There are two types of disclosure under the law and the rules. They are standard disclosure and specific disclosure and may be done in stages by agreement of the parties or by order of the court. Even if standard disclosure has been made, it does not prevent the court from properly making an order for specific disclosure of documents if standard disclosure is inadequate or more is required (see **Digicel (St Lucia) Ltd v Cable & Wireless plc** [2008] EWHC 2522 at para. 36). There is no limit on the stage at which an application for specific disclosure can be made (see **Rigg v Associated Newspapers Ltd** [2003] EWHC 710 (QB)). A party to whom it is purported that standard or specific disclosure has been made may have grounds to believe that such disclosure is inadequate

or does not conform to the order for disclosure. In such a case, that party may make an application to the court for directions.

[61] If a party believes it is within that party's right to withhold the disclosure of any document, it should be so indicated in the list, stating the reason why that right is being claimed (rule 28.15(1)). A party may also apply to the court for an order permitting non-disclosure on the grounds that disclosure would "damage the public interest". Such an application must be accompanied by affidavit evidence in support of the claim of such a right.

[62] An order for specific disclosure may be made by the court pursuant to rule 28.6 of the CPR. It orders a party to make disclosure of specific documents or classes of documents or to make searches for such documents and disclose any which is located as a result of such a search. The order for specific disclosure requires only the disclosure of documents relevant to the proceedings. In making an order for specific disclosure, the court is mandated by rule 28.7 to consider whether specific disclosure is necessary and beneficial in disposing fairly of the claim or in saving costs. It must also consider whether the financial resources of the party against whom the order is to be made can likely enable it to comply with the order.

[63] The duty of the parties to give standard or specific disclosure, pursuant to any order of the court, is an ongoing one and subsists throughout the entirety of the proceedings (rule 28.13(1)). At any stage of the proceedings, therefore, any judge, before whom the parties in the case appear, is entitled to make the necessary orders in relation to disclosure and address any issues that arise regarding non-compliance, as part of the case management powers of the court.

[64] The appellants argued that they had already provided "full discovery" of what was "relevant" to the claim. However, it is not up to the appellants to make that determination. Standard disclosure had not yet been ordered or provided by the parties in the proceedings. But more importantly, an order for specific disclosure had been made by

the court and whilst it is open to a party to decide what is "directly relevant" for inclusion in a list of documents for standard disclosure, the ultimate decision of what is "directly relevant" in any claim, rests with the court. The court is entitled to order that documents which have not yet been disclosed are directly relevant and required for a fair disposal of the case, and therefore, must be disclosed by way of specific disclosure. The court is also entitled to determine that the answers provided to the request for information prior were not satisfactory, and that the information requested is necessary for a fair disposal of the case and must be provided. This is what Anderson J did when he made the order for specific disclosure, and it was not open to the appellants to unilaterally determine otherwise. The appellants ought to have appealed that decision if they disagreed with those findings.

(5) *Whether the principle of res judicata applied*

[65] The appellants complained that the learned judge "reviewed" matters already decided on by previous judges or that were only reviewable by the Court of Appeal, and that she ignored the rules of *res judicata*. These assertions have no basis in fact or in law, and *res judicata* does not apply in this case. The learned judge made no orders in relation to "discovery", or otherwise, that had already been made by another judge, as alleged (see **Suzette Curtello v The University of the West Indies (Board for Graduate Studies and Research** [2023] JMCA Civ 11, at paras. [50] to [52] for the accepted principles relating to *res judicata*).

C. Disposal of issue 1 - (grounds 1,4,8,9,11 and 12)

[66] Based on the foregoing, the learned judge had the jurisdiction to properly consider the matter before her and make the orders that she did. The appellants would, therefore, fail on this issue and the related grounds of appeal.

Issue 2 – Whether the learned judge was wrong to find that the list of documents filed by the appellants did not comply with the unless order (grounds 5, 11 and 12)

A. Submissions

[67] The appellants have submitted that the learned judge was wrong to come to the decision that she did, because a list of documents was filed by the appellants which fully complied with the orders made in the court below, and with Part 28 of the CPR. It was also submitted that all requests for information made by the respondent were answered. Although the 2nd appellant conceded that it was stated in the response to the request for information and specific disclosure that certain items requested were irrelevant, he submitted that this was because that information involved companies that had nothing to do with the case before the court. This was the appellants' position, notwithstanding that the 2nd appellant noted that the question of relevance of the request had been considered by Simmons J prior to the making of the unless order, when she ruled that the responses were to be provided.

[68] In relation to the learned judge's finding that the list of documents had been unsigned and uncertified, the 2nd appellant submitted that the learned judge was wrong to penalise the appellants in that regard, as the list contained in the court's file, as well as that served on counsel, had been signed and certified. It was not the appellants' fault, he said, that the court file was lost and the issue could not be verified. The 2nd appellant disagreed that the document filed was not in the correct format and argued that his case should not have been struck out based on such a technicality.

[69] On behalf of the respondent, King's Counsel Mr Piper submitted that the learned judge was correct in her assessment that the appellants had been non-compliant, and that she properly considered the facts and the relevant law.

[70] He submitted further that, from an examination of the list of documents the appellants had filed, it was clear that they were non-compliant. The list, King's Counsel said, was not credible and failed to adhere to the applicable rules. The certificate of truth

was incomplete and there was no schedule attached stating the different categories of documents being disclosed and otherwise. Overall, he submitted, the list was argumentative, confusing and inaccurate.

[71] In relation to the issue of non-certification and the lack of signature, Mr Piper asserted that he had not seen the file copy but regardless of whether the file copy was signed and certified, the copy of the document that was served on his firm was not. The rules, he contended, require that all copies filed and served must be duly signed and certified.

[72] King's Counsel submitted that the fact that the appellants were not represented by counsel is no excuse, as the 2nd appellant was given extensive accommodations because of his status as a litigant in person. Mr Piper stated that the 2nd appellant had been urged to get an attorney and was given time to do so but chose not to.

B. Discussion

[73] Anderson J's unless order, made on 13 May 2015, was in the following terms:

> 1. "The Claimants shall provide Specific Disclosure to the Defendant of all the documents referred to in paragraphs 1(a) to (i) of the Defendant's Notice of Application for Court Orders filed on October 12, 2011, and shall do so in a manner and form which is in full compliance with the applicable Rules of Court.
>
> 2. The Claimants shall provide full responses to each of the aspect [sic] of the Request for information filed and served by the Defendant on September 6, 2011 and further, this Court orders that the Claimants' Answers to the Defendant's Request for information filed on September 19, 2011 is invalid in law and is ineffective for the purposes of this Order to the extent that the same only constitutes a partial response to the Defendant's said Request for information.

3. The Claimants shall comply with the Orders number 1 and 2 above on or before September 30, 2015.

4. It is ordered that the Case Management Conference shall be before a Judge in Chambers on October 29, 2015 at 12:00 noon for one hour.

5. Unless the Claimants shall have fully complied in all respects with Orders number 1 to 3 above, then the Claimants' Statement of Case shall stand as struck out, without the need for further Court Order.

6. The costs of the Defendant's Application for Court Orders which was filed on October 12, 2011 shall be the Defendant's costs in any event.

7. The Defendant's Attorneys-at-Law are to prepare, file and serve this Order." (Emphasis added)

[74] The appellants were, therefore, required to give specific disclosure of the documents listed in the respondent's notice of application in accordance with the applicable rules, as well as full responses to each item set out in the respondent's request for information.

[75] There is no dispute that the appellants did in fact, as the learned judge accepted, file and serve a list of documents purporting to satisfy the unless order, prior to the deadline. It is a misconception by the appellants, however, that simply because they did so it, meant that there was compliance with the order. For there to have been compliance, what was filed by the appellants had to be compliant with the specifications of Anderson J's order and the relevant rules of court. The question here is whether the learned judge was entitled to find that it was not.

[76] Having examined what the appellants filed as their list of documents, their answers to the request for information and the applicable rules, I am of the view that the learned judge was entitled to find that the appellants were not compliant.

(1) *The applicable rules*

[77] The rules relating to disclosure and inspection of documents are set out in Part 28 of the CPR. These rules were referred to earlier but will be considered in greater detail here.

[78] Rule 28.1(3) provides that a party "discloses" a document by revealing it exists or has existed. The duty to disclose, whether by way of standard disclosure or specific disclosure, obligates parties to disclose only documents that are "directly relevant" to the case (rules 28.4(1) and 28.6(5)). Rule 28.6 (5) provides that specific disclosure may only require disclosure of "documents which are directly relevant to one or more matters in issue in the proceedings". For the purposes of Part 28 a document is "directly relevant" if:

> (a) "the party with control of the document intends to rely on it;
>
> (b) it tends to adversely affect that party's case; or
>
> (c) it tends to support another party's case." (Rule 28.1(4)).

[79] There is a duty to disclose only those documents that are or have been in a party's control. A party has or has had control of a document if:

> (a) the party is in or was in physical possession of it;
>
> (b) the party has or had a right to possession of it; or,
>
> (c) the party has or has had the right to inspect or take copies of it. (Rule 28.2(2))

[80] Rule 28.6(1) defines an order for specific disclosure as an order that requires a party to do one or more of the following:

> "(a) disclose documents or classes of documents specified in the order; or

(b)carry out a search for documents to the extent stated in the order and disclose any documents located as a result of that search."

[81] The procedure for disclosure is set out in rule 28.8 as follows:

"(1) Paragraphs (2) to (5) set out the procedure for disclosure.

2) Each party must make, and serve on every other party, a list of documents in form 12.

(3) The list must identify the documents or categories of documents in a convenient order and manner and as concisely as possible.

(4) The list **must state** –

(a) what documents are no longer in the party's control;

(b) what has happened to those documents; and

(c) where each such document then is to the best of the party's knowledge, information or belief.

(5) It must include the documents already disclosed.

(6) **A list of documents served by a company**, firm, association or other organisation **must** –

(a) state the name and position of the person responsible for identifying individuals who might be aware of any document which should be disclosed; and

(b) identify those individuals who have been asked whether they are aware of any such documents and state the position of those individuals." (Emphasis added)

[82] Rule 28.10 outlines the duty of the maker of the list to certify their understanding of the duty of disclosure. It provides:

"28.10 (1) The maker of the list must certify in the list of documents –

(a) that he or she understands the duty of disclosure; and

(b) that to the best of the maker's knowledge the duty has been carried out.

(2) In the case of a list served on behalf of a company, firm, association or other organisation the certificate referred to in paragraph (1) **must be made by the person identified in rule 28.8(6)(a)**.

(3) Where it is impracticable for the maker of the list to sign the certificate required by paragraph (1) it may be given by that party's attorney-at-law.

(4) A certificate given by the attorney-at-law must also certify –

(a) the reasons why it is impractical for the maker of the list to give the certificate; and

(b) that the certificate is given on the instructions of the maker of the list."

[83] As it relates to a request for information, Part 34 of the CPR permits a party to seek information from another party about the matter in dispute by serving a request for information. If that party does not provide the requested information within a reasonable time, the court may make an order compelling the party to provide the information requested. Like with an order for specific disclosure, the court may only make that order if it is satisfied that it is necessary to dispose of the claim fairly or to save costs (rule 34.2(1) and (2)). Information provided in response to the request must be verified with a certificate of truth in accordance with rule 3.12 (rule 34.4).

(2) *The nature of the disclosure made by the appellants*

[84] The list of documents filed by the appellants, in essence, cited the name of the documents, quoted from the relevant rules of the CPR, and indicated, under each document listed, that the document did not exist, standard disclosure had been previously made, and that the specific document requested was not directly nor indirectly relevant. This was followed up by a citation of the rules and a statement that the rules do not apply to this case nor this request. That was followed up by another citation of the rules and a

statement that the claimant does not fall within the scope or definition of the rules as it related to the specific request.

[85] This pattern was repeated throughout the document as it relates to each specific request. To understand the nature of the disclosure made to the respondent, and what was examined by the learned judge, it is necessary to give a few examples.

[86] In relation to the specific disclosure ordered for the audited financial statements of the 13 companies listed at item (a) (from the date of their incorporation to present), the appellants identified no documents. In relation to each of the companies listed (including the 1st appellant company), it was stated that the documents did not exist and had never existed, that standard disclosure had previously been made of their non-existence, and that the specific documents requested were not directly or indirectly relevant to the matter before the court. This was an ambiguous response that was copied and pasted 12 times throughout the document in relation to each of the companies listed, along with certain portions of rules 28.1, 28.2 and 28.4. It is important to note that the words "no documents related to audited financial statements belonging to Phenion Development Group Inc, exist or has ever existed", were copied and pasted in relation to the other companies, albeit in all probability, it was inadvertently done. Nonetheless, the true status of the audited financial statements relating to those companies, therefore, was not properly disclosed.

[87] For documents listed at item (b) (planning and implementation documents, including land titles related to certain mega real estate development mentioned in the particulars of claim), the appellants, citing the rules, claimed that standard disclosure had been made, the document was not directly or indirectly relevant, the rules did not apply to the document requested, and that the duty of disclosure only applied to documents that are in or had been in its control.

[88] For documents listed at item (c) (documents evidencing legal relations), the appellants stated that standard disclosure had already been made and that the

documents were not relevant, and referring to the rules, stated that the rules did not apply to the documents requested. As an alternative, the appellants also stated that the specified documents were no longer in their control, but a diligent search would be made and if the requested documents were found they would be supplied. It was not stated what happened to those documents, and where such documents were to the best of their knowledge, information and belief.

[89] For the document listed at item (d) (the prospectuses for the appellant's investments lodged with the FSC), the appellant referred to previous standard disclosure and stated that the specific document requested was not directly or indirectly relevant and were not subject to disclosure. Nevertheless, the appellant declared it had made full disclosure and referred to an attachment and to the rules. There were no such attachment and the names of those "specific documents" were not identified.

[90] In relation to the disclosure requested at item (e) for the joint venture agreements referred to in the particulars of claim, the appellant claimed to have already made standard disclosure and that the specific documents requested were not directly or indirectly relevant to the claim. They also stated that the specific request was "inappropriate" as the document was "privileged proprietary holding private confidential information not subject to disclosure and not relevant." After quoting the rules, the appellants stated that none of the conditions in the rules apply to this case, as it related to the request for specific disclosure. The appellants also stated that the duty to disclose was limited to documents in a party's control and referenced a "DISCLOSURE ATTACHED". There was no such disclosure attached.

[91] For documents listed at item (f), the appellants claimed standard disclosure had already been made of their nonexistence. Regarding item (g), the appellants maintained that the document had been provided on multiple occasions, and that the appellants were required to disclose only once. Nevertheless, the appellants purported to provide specific disclosure of financial projections of the Montego Bay Project. For documents at item (h),

(commitments to Phenion Preserve and Phenion on the Ridge), the appellant claimed that specific disclosure had been provided.

[92] At documents listed at item (i) (documents evidencing the cancellation and/or withdrawal of commitments referred to in the particulars of claim), the appellant claimed that the cancellation of commitments were mostly verbal and other withdrawal documents were lost or missing. This was followed by a citation of the rules. No details were provided of the persons who allegedly withdrew their commitments because of the defamatory statements allegedly made by the respondent, as the appellants claimed they were oral and those in writing could not be located or were no longer in their possession or control. This too was followed by citations of the rules. Investors' commitments were said to have been disclosed whilst others in writing could not be found. Some investors, it was stated, cancelled orally or by default and, alternatively, documents could not be found after diligent search. No documents could be found after diligent search for any of the request made of documents mentioned in para. 21.8 of the appellants 'particulars of claim'.

[93] The rest of the document was in similar format, with a regurgitation of the rules, a failure to identify specific documents, and a general statement that either the documents requested did not exist or were not directly relevant.

[94] Under the heading "SPECIFIC REQUEST FOR DISCLOSURE FILED Sept 6th 2011", the appellants repeated their citations of the rules on disclosure, claimed the various documents were not relevant or had already been disclosed under standard disclosure, or, stated that the documents were no longer in their possession and or physical control. They also claimed to have made searches for the requested documents, but that the documents could not be located. These included applications and approvals regarding National Environment and Planning Agency ('NEPA'), the Real Estate Board, and Parish Councils. Specific disclosure was claimed to have been made of: the dates of Parish Council approvals; dates of the acquisition of lands; the subject of developments which are still in the appellants' possession; documents detailing the real estate developments;

investments placed on the international markets; and details of commercial and residential real estate and development projects acquired by the 2nd appellant, as alleged.

[95] Although there was one document entitled "Building Permit" from the Manchester Parish Council, dated 2 June 2008, approving a town house development, it was not marked as an exhibit. There was also an approval for a septic tank from the environmental Health Unit of NEPA, in respect of Phenon Lincoln/Carief, but the document was not properly marked as an exhibit. There was also an unmarked, hard to read title in the name of an individual not connected to this case. There was a Parish Council approval from Saint Mary Parish Council, as well as several documents stamped for the Judicial Circuit in and for Palm Beach County. It was unclear what item in the request for specific disclosure those documents referred to.

(3) *Was there compliance?*

[96] From a thorough examination of the list of documents filed by the appellants, it is clear to me, that the document failed to comply with the applicable rules of court and the orders of Anderson J. Not only did the list fail to comply with the strictures of the applicable rules in Part 28 and 34 as to form, but it failed to comply, as a matter of substance, in meeting the purpose of disclosure and requests for information.

[97] Whilst the list purported to be in the format of form 12, it sought to include the appellants' response to both the application for specific disclosure and the request for information in the one document. The list failed to identify the documents or categories of documents in a convenient order and manner or as concisely as possible, as required by rule 28.8(3). In fact, apart from few named documents, it failed to identify the documents or categories of documents with specificity or sufficient particularity to enable the respondent and the court to know exactly what documents existed at the time or had previously existed. Although, in the first section of the list, on page 2, it states that part 1 of schedule 1 contains a list of "all the documents that are/were in the physical possession of the claimant, that the claimant has or had the right to possession or to inspect or take copies, and which the claimant relies or intends to rely", there was no

such schedule attached with such listings. There was no categorisation at all of documents being disclosed or documents for which a right was claimed to withhold disclosure, and no explanation as to what happened to documents disclosed that were no longer in the appellants' possession, to the best of the appellants' knowledge, information and belief (as required by rule 28.8(4)).

[98] Although the appellants responded specifically to each item ordered to be disclosed, as pointed out by the learned judge, the information in the list was set out in a confusing manner, due in large part to the inclusion of quotations of certain rules from Part 28 of the CPR, particularly rules 28.1, 28.2(1) and 28.4(1). These rules were repeated for each item. Otherwise, the language used was set out in a disorganised and confusing way which made it difficult to understand what documents existed or had previously existed, and the actual reason why the documents were not being disclosed.

[99] Although a party is entitled to state that documents do not exist and have never existed, the fact that the appellants also stated other reasons would have created uncertainty as to the true status of the documents and would have raised the question whether there was a deliberate attempt to obfuscate the disclosure process.

[100] Apart from the failures in the list and answers to request for information already identified, the list failed to specifically identify all the documents already disclosed (rule 28.8(5)), and the requirements of rule 28.8(6) were only partially satisfied. Although the 2nd appellant stated his position and named himself as the person responsible for identifying individuals who might be aware of any document which should be disclosed (rule 28.8(6)(a)), he did not identify the names and positions of the individuals who had been asked whether they were aware of any such documents, as required by rule 28.8(6)(b). What was indicated was that "no individuals have been named". Whilst this might have been acceptable had he stated he had asked no individuals, or that no such individuals were identified, he instead stated, "I have asked any individuals identified; if identified and where identified, whether they are aware of any documents which should be disclosed". This response could have given the impression that he had asked those

individuals but was choosing not to name them. This would not have been permissible as the requirement is a mandatory one. It could have also been interpreted to mean that since no individuals had been named none were asked and/or identified. Whichever it was, the true state of affairs remained unclear.

[101] With specific reference to the respondent's request for information of 6 September 2011, for most of the information and documents requested, it was stated generally that either the documents requested were privileged, no longer in the physical possession of the person serving the list or could not be found. No details were provided as to which documents were privileged, no longer within the appellants' possession or could no longer be found. Much of the requests sought the provision of certain details relating to assertions made in the particulars of claim, including important dates, names of persons, institutions, and projects. None of this information was provided by the appellants and certainly could not in any way satisfy the order of Anderson J to give "full responses". The learned judge was correct to find as she did in this regard.

[102] Further, I am of the view that the appellants' refusal to disclose documents on the basis that they were not "directly relevant" was not a position that they were entitled to take and was a flagrant breach of the orders of the court. So too was the refusal to provide information in response to the request for information on this basis.

[103] In this case, Anderson J made the material orders having heard the respondent's application, which sought specific disclosure having regard to the inadequacy of the appellants' response to the request for information and the respondent's letter to the appellants' attorney of 5 September 2011 requesting specified documents. The application also specifically sought a determination as to whether the information requested was irrelevant as asserted in the appellants' initial response and noted the respondent's view that the documents requested were, indeed, relevant.

[104] Rule 28.7 requires that, in deciding whether to grant an order for specific disclosure, the court must consider whether such disclosure is necessary for a fair disposal

of the claim or to save costs. Rule 34.2(2) requires the same in respect of an order to compel a party to respond to a request for information. Those were the matters that were before Anderson J for consideration.

[105] Whilst he gave no written decision for the orders he made, Anderson J would have been aware of the pleadings, the history of the matter, and the rules, and it can only be presupposed that, having granted the orders, he was of the view that what he ordered to be disclosed was directly relevant and necessary for the fair disposal of the case. The same could be said in respect of the information he required the appellants to provide in response to the respondent's request for information. This is evident from the wording of number 2 of his orders, where he ordered that the document previously filed by the appellants, purporting to satisfy the respondent's request for information, was insufficient to satisfy that request and was "invalid" and "ineffective" due to the partial nature of the response. It is to be recalled that the appellants' purported answer provided none of the information requested, but rather, stated that each item requested was "irrelevant, oppressive and improper", and were not necessary for a fair disposal of the claim or to save costs. Anderson J was not of this view and ordered otherwise. If the appellants had wished to challenge these findings, particularly the question of whether the documentation sought were directly relevant to the proceedings, they should have filed an appeal against that decision. Not having done so, it was not permissible for them to decide, on their own accord, that the documents requested were not directly relevant and that they were not required to disclose them. In doing so, the appellants were in direct contravention of Anderson J's orders.

(4) *The failure to certify*

[106] Equally important was the fact that the list of documents was not signed and certified as required. Rule 3.6(3)(c) and (d) require that every document to be filed in court must contain its date and be signed by the person filing it (except in the case of an affidavit). The copy of the list before the learned judge stated the date (on page 1) but was not signed. Even if it is accepted that the copy of the list on the lost court file was

signed and certified as asserted by the appellants, the fact that the copy of the list served on the respondent was not signed meant that the requirement had not been satisfied. I agree with Mr Piper that all copies of documents filed should have been signed.

[107] In relation to certification of the list, the learned judge found that the list was not certified in accordance with rule 28.10(1) and (2). In the list, it was set out that the 2nd appellant certified that the duty of disclosure, the terms of the order for specific disclosure, and the duty to disclose in accordance with the order of the court were explained to him, and that he had complied with his duty. However, he did not specifically state, as required by rule 28.10(1)(a), that he understood the duty of disclosure, nor did he state that "to the best of his knowledge" the duty had been carried out as required by rule 28.10(1)(b). To be fair to the appellants, the 2nd appellant followed the wording set out in the sample form 12 of the CPR. The wording in the form does not state the certification as it is worded in those rules. In any event, since the document must be signed for the certification to be valid, and since I have already found that it was not, the learned judge was entitled to find that the certification requirement had not been met. The learned judge did not err in this regard.

[108] The response to the request for information was also required to be "verified by a certificate of truth" in accordance with rule 34.4. It was not. Therefore, that requirement was also not satisfied.

(C) Disposal of issue 2 (grounds 5, 11 and 12)

[109] For those reasons I agree with the learned judge that the appellants' list of documents was "materially defective" and failed to comply with the orders of Anderson J. The grounds of appeal associated with this issue, in my view, have no merit.

Issue 3 - Whether the learned judge failed to consider Parts 1, 10, 11 and 26 of the CPR in arriving at her decision (grounds 2 and 13)

A. Discussion

(i) *Part 10*

[110] The assertion that the learned judge failed to sufficiently consider Part 10 has no merit, as the rules in that Part have to do with the procedure for disputing the whole or part of a claim, and were not relevant to the issues the learned judge had to decide.

(ii) *Part 11*

[111] Whilst Part 11 deals with applications for court orders in proceedings, no particular rule in Part 11 was pointed to, and I identified none, that was pertinent to the resolution of the issues before the learned judge.

(iii) *Part 26*

[112] With regards to Part 26, the learned judge rightly considered that Part and more specifically rule 26.7, which is one of the applicable rules that sets out the automatic effect of the sanction given in an unless order (see also rule 26.4(7) which deals specifically with the automatic effect of the sanction for failing to comply with an unless order.) The learned judge also cited the correct principles from the relevant authorities that are to guide the court in the application of the rule. There is, therefore, no merit in this complaint.

(iv) *Part 1*

[113] Rule 1.1 of the CPR sets out the rule regarding the overriding objective. It reads, as follows:

> "(1) These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
>
> (2) Dealing justly with a case includes-

(a) ensuring, so far as is practicable, that the parties are on an equal footing and are not prejudiced by their financial position;

(b) saving expense;

(c) dealing with it in ways which take into consideration-

(i) the amount of money involved;

(ii) the importance of the case;

(iii) the complexity of the issues; and

(iv) the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

[114] Rule 1.2 mandates that the court must seek to "give effect to the overriding objective when interpreting these rules or exercising any powers under these rules". Rule 1.3 indicates that it is the duty of the parties "to help the court to further the overriding objective".

[115] The overriding objective is not a device to ignore the rules. It is merely a "compass to guide courts, litigants and legal advisors as to their general course" (see Lord Woolf's final report of the English Civil Procedure Rule Committee, Access to Justice, 1996). The overriding objective was seen as necessary due in major part to the fact that the CPR was not designed to answer every question or solve every problem that may crop up. In that regard, in a case where a unique situation arises where there is no definitive rule or practice direction to cover it, resort may be had to the overriding objective.

[116] Part 1 has been interpreted to cover issues dealing with mere technical breaches of the rules. Therefore, the principle of "dealing with cases justly" has been applied by the courts to prevent a litigant being shut out of pursuing his claim or his defence merely on a technical breach of a procedural rule. "Doing justice between the parties" has been applied by the courts to ensure that meritorious cases are heard and not struck out for minor procedural defaults. However, the overriding objective cannot be used to override statutory provisions, rules of evidence, substantive law or principles firmly established by earlier authorities (see the statements of learned authors Gilbert Kodilinye and Vanessa Kodilinye in Commonwealth Caribbean Civil Procedure, 3rd Edition, at pages 5 to 7).

[117] In **Powell and others v Pallisers of Hereford Ltd** [2002] EWCA Civ 959, the English Court of Appeal emphasised that the overriding objective imposed an obligation on that court not to unnecessarily interfere in case management decisions made by lower court judges in cases which they were to try. Part of the obligation of the parties in furthering the overriding objective is for them to cooperate in providing the necessary information to move the case along and to actively seek ways to settle the dispute.

[118] The assertion by the appellants that, in making her orders, the learned judge failed to have regard to the overriding objective, set out in Part 1 of the rules, is without merit. Although the court has a duty to seek to give effect to the overriding objective in its interpretation and application of the rules in court proceedings, the overriding objective does not give a judge the power or the discretion to interpret the provisions of the CPR contrary to its clear and unambiguous language. This principle has been well accepted by this court (see **Hon Gordon Stewart OJ & Ors v Independent Radio Company Limited & Anor** [2012] JMCA Civ 2, **Millicent Forbes v The Attorney General of Jamaica** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 29/2005, judgment delivered 20 December 2006, and **Vinos v Marks & Spencer** plc [2001] 3 All ER 784). Although the overriding objective appears to give a judge a wide discretion in the exercise of case management powers, in this instance, the language in rules 26.4(7) as to the effect of non-compliance with an unless order is clear and

unambiguous. Once the learned judge determined that there had been non-compliance with the unless order and it took effect, the overriding objective could not properly be resorted to, so as to achieve a different outcome. This is especially so, since there was no application before her for relief from sanctions. As provided by rule 26.7(2), the sanction remains in effect unless and until relief from sanctions is applied for and obtained.

[119] Further, in assessing whether the appellants had complied with the unless order, the learned judge was duty bound to assess whether the appellants had complied with the clear requirements of rules 28 and 34 regarding disclosure and requests for information. The question as to whether there was compliance was as much one of of fact as it was of law that could not be resolved or overridden merely by the application of the overriding objective, especially in the light of the appellants' insistence that there was compliance, when clearly this was not so.

[120] I have considered that the appellants were not represented by counsel at the material time, and that the learned judge found that, notwithstanding this fact, she was of the view that the 2nd appellant understood the rules and the consequences of failing to comply. I would agree with that to some extent, based on how the 2nd appellant had conducted himself in the matter, filing various applications and even appealing a decision of that court that he had been dissatisfied with. In relation to the unless order in this matter, he did file his documents within time and attempt to follow the format and wording of the form 12. It seems to me that much of the disorganisation and irregular formatting in the list filed had little to do with his lack of understanding of what was required by the rules. In any event, I am of the view that a lack of understanding as a layperson could not avail him before the learned judge and cannot avail him here. An unrepresented litigant has the same obligation to comply with the rules, court orders, and directions of the court, as does any other litigant. In the case of a self-represented litigant the court may excuse issues of delay and other technical defaults such as those

involving the proper filing of documents, but rules must be followed by all parties in dealing with cases justly, even where the court provides guidance to the unrepresented.

B. Disposal of issue 3 (grounds 2 and 13)

[121] With respect to the appellants' list of documents, there were mandatory rules in Part 28 that were breached, and which affected the very validity of the list of documents. The learned judge could not have ignored the consequence of non-compliance attached to the unless order. In any event, even if the irregularities with formatting were of the kind that the learned judge had the discretion to ignore, the list did not substantially disclose what the appellants were ordered to disclose and did not give the information they were ordered to give in response to the request for information. Moreover, the appellants' refusal to make disclosure and provide information on the basis that what had been requested was not directly relevant, and that standard disclosure had already been made, in my view, was an intentional breach of the order, and was not "technical" as the appellants argued.

[122] Additionally, although the learned judge did not specifically mention Part 1 of the CPR and the overriding objective in her reasons, it can be seen in her assessment of the case that she considered the various factors impacting on the justice of the case. The learned judge, at para. [34], quoted an excerpt from paras. [39] and [46] of the case of **Eaglesham v Ministry of Defence**, which referred to the necessity and importance of the court seeking to: deal with cases expeditiously and fairly; balance the relevant factors; and enforce compliance with rules, practice directions and court orders. Her consideration of this shows that the learned judge was cognizant of her duty in that regard, and in seeking to enforce compliance with the rules, the learned judge was indeed giving effect to the overriding objective. As stated by Dunbar-Green JA (Ag) (as she then was) in **The National Workers Union v Shirley Cooper** [2020] JMCA Civ 62, at para. [84], "giving effect to the rules is very much consistent with the overriding objective which is to decide cases justly with economy in judicial time and use of other resources".

[123] I, therefore, find no merit in grounds of appeal associated with this issue.

Issue 4 - Whether the learned judge erred in not hearing the applications filed by the appellants, and hearing instead the oral application of the respondent (grounds 3, 6, 7 and 10)

Discussion and disposal of issue 4 (grounds 3,4,7 and 10)

[124] As stated before, the issue of compliance came before the learned judge for determination, having been set for hearing by virtue of the order of Batts J. The learned judge proceeded accordingly. Not only was she entitled to do so by virtue of the court's general case management powers, but she was also duty bound to do so based on what had occurred in the case. If the appellants had not complied with the unless order, they would have had no case before the court and, therefore, no basis on which to ground their applications. They would have been prohibited from taking any further step in the matter until and unless they obtained relief from sanctions. Therefore, to assess compliance would have been the only logical step for the learned judge to take.

[125] This would have been so regardless of when the applications were filed. Although, the fact that an application is filed first in time may be a good reason for it to be heard first, where there are multiple applications before the court, the nature of the applications and how they might affect the case will ultimately determine the order in which they will be heard. A judge managing a case has the power to determine in what order and in which manner the applications before him or her should be heard, considering the overriding objective of dealing with cases justly, and the court's general powers of case management. These grounds have no merit.

Issue 5 - Whether the learned judge allowed an incomplete defence in violation of rule 10.5 (ground 5)

Disposal of issue 5 (ground 5)

[126] This ground has no merit. The learned judge did not consider any issue or make any orders regarding the defence. The appellants' notice of application challenging the defence was heard and adjudicated upon by Straw J, prior to the matter going before the learned judge. The appellants did not appeal that decision.

Conclusion

[127] Orders of the court ought to be obeyed. Where there has been non-compliance with an unless order to which a sanction is attached, that sanction automatically takes effect. In this case, the appellants were ordered to give specific disclosure and provide full responses to the respondent's request for information. This they failed to do in form and in substance, in accordance with the applicable rules of court. The sanction that the appellants' statement of case was to stand struck out if there was non-compliance would have automatically taken effect as at the time of the non-compliance. The learned judge correctly found that there had been no substantial compliance with the unless order in this case, and that the sanction, therefore, took effect. I would, therefore, dismiss the appeal and affirm the orders of the learned judge, made on 9 May 2017. I would also award costs to the respondent, to be taxed if not agreed.

SIMMONS JA

[128] I have read in draft the judgment of Edwards JA and I agree with nothing further to add.

BROWN JA

[129] I too agree and have nothing further I wish to add.

EDWARDS JA

ORDER

1. The appeal is dismissed.

2. The orders of V Harris J, made on 9 May 2017, are affirmed.

3. Costs of the appeal to the respondents to be agreed or taxed.