[2010] JMCA Civ 11

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 72 OF 2007

BETWEEN	**NORMAN HARLEY**	**APPELLANT**
AND	**DOREEN HARLEY**	**RESPONDENT**

Nigel Jones instructed by Nigel Jones & Company for the appellant

Miss Carol Davis for the respondent

14 May 2009 and 23 March 2010

PROCEDURAL APPEAL

IN CHAMBERS

HARRIS, J.A.

[1] In this appeal the appellant challenges orders of Morrison, J. (Ag) (as he then was) in which he refused an application to strike out the respondent's statement of case and an application to grant the appellant leave to revoke an order or to grant him relief from sanction.

[2] The parties are husband and wife. On 24 December 2002, the respondent issued a writ of summons accompanied by a statement of claim in which she claimed an interest in several properties. The statement of claim was amended

on 11 April 2007. It is important to fully outline paragraphs 1- 22 thereof, which reads:

> "1. The Plaintiff is and was at all material times a businesswoman and wife of the Defendant the parties having been married on November 19, 1971.
>
> 2. That during the course of the said marriage the Plaintiff and the Defendant entered into various business transactions and formed certain companies for better dealing with the interest and property of the parties.
>
> 3. That amongst the companies registered by the parties as directors and shareholders are:–
>
> (i) Norman Harley Limited
>
> (ii) Seaburg Trading Limited
>
> (iii) Trophy Insurance Agents Limited
>
> (iv) Harley Corporation Guarantee Trust Co.
>
> (v) Hargal Limited
>
> 4. That the Plaintiff was integrally a part of the formation and operation of the various companies.
>
> 5. That over the intervening years the parties in their own names and through the companies purchased and retained the following properties:
>
> i) Lot # 17 part of # 19 Waterloo Road- registered at Volume 1163 Folio 699 in the name of Norman Harley
>
> ii) Lot # 16 part of # 19 Waterloo Road registered at Volume 1227 Folio 856 in the name of Norman Harley

iii) Land at Exchange St. Ann registered at Volume 1022 Folio 570 in the name of Harley Corp Guarantee Trust Co.

(iv) Lot 5 Oxford Estate Registered at Volume 1188 Folio 958 in the name of Norman and Doreen Harley.

v) Lot 3 Oxford Estate registered at Volume 1188 Folio 956

Lot 4 Oxford Estate registered at Volume 1188 Folio 957

Lot 9 Oxford Estate registered at Volume 1188 Folio 962

Lot 10 Oxford Estate registered at Volume 1188 Folio 963 all in the name of Harley Guarantee Trust Company Limited.

vi) Land of (sic) Retirement, Saint Mary registered at Volume 1134 Folio 511 in the name of Harley Guarantee Trust Co. Ltd.

(vii) Land part of Bundo, Saint Mary registered at Volume I098 Folio 144 in the name of Hargal Limited.

viii) Lot 124 Caribbean Park, Saint Mary registered in the name of the Defendant.

(ix) 21 Wellington Street, Saint Catherine registered at Volume 118 Folio 41.

6. That the parties went to Miami where they both purchased an Apartment at Bayside Condo 505 N.E. 30th Street, Unit 203, Miami Florida 33137 registered at Folio 01-3230-052-0130 and again the Plaintiff had said apartment renovated.

7. That all the above properties are jointly owned by the parties and were acquired by monies belonging to both parties obtained largely from the running of the

respective companies despite the fact that some of the properties were registered in the name of the Defendant only, some in the name of companies owned by the parties, and some in the parties in the parties (sic) joint names.

8. That in 1976 the Plaintiff gave up her employment at Mona Rehab and was initially the sole sales agent Agent (sic) for Hargal Limited acquiring listing and selling properties. Other agents were subsequently employed.

9. The plaintiff was responsible for the operation and running of Trophy Insurance Agents Limited almost from its inconception to 2002 when the business was sold and had undertaken both local and overseas exams to qualify as a registered agent.

10. That the Defendant had limited involvement in the operation of Trophy Insurance Agents Limited.

11. That during the relevant period while the Plaintiff was operating as Sales Agent of Hargal Limited sometime in or about 1979 the Plaintiff acquired a block listing from Royal Bank which included 5 town houses and 2 cottages.

12. That the Plaintiff sold the town houses and the commission received therefrom was used to deposit on 2 cottages at lot #16 and #17 part of #19 Waterloo Road and now registered at Volume 1227 Folio 856 and Volume 1163 Folio 699 of the Register Book of Titles. The said properties were registered in the name of the Defendant but it was agreed between the parties that #17 would belong to the Plaintiff and #16 be jointly owned by the Plaintiff and the Defendant.

13. That the Plaintiff personally oversaw the renovation of the said premises and the Plaintiff and the Defendant moved into #17 on the understanding that it would be the matrimonial home and would always be the property of the Plaintiff.

14. By agreement between the parties the cottage at #16 was rented and the Defendant has always collected rentals therefrom and retained same. The cottage at #16 was subsequently utilized by the son of the Plaintiff and the Claimant on the understanding that he pay the mortgage, and this continued until on or about 2006 when the Defendant without the consent of the Claimant evicted his son.

15. That in 1985 the Plaintiff located a house at Sundown Crescent, Kingston 10, purchased same, renovated it without the sight by the Defendant who later sold the said property and took the entire proceeds of same which he indicated he lodged to Harley Corp Guarantee Trust Company account.

16. That in 1986 the Plaintiff also acquired and renovated a house at Shakespeare Avenue, Kingston 20, Cardiff Crescent, Kingston 20. This property was sold by the Defendant who retained all the proceeds. The Plaintiff also sold houses at Blaise Close, Norbrook Kingston 8, and Cardiff Crescent Kingston 20 and other houses and the commission was always collected by the Defendant.

17. That the Plaintiff has never received any commission from the sale of any of the properties personally sold by on behalf of Hargal Limited or any of her or any profits garnered from the sale of other properties sold by agents of Hargal Limited.

18. That the Plaintiff did not make inquiries as to records to the use or allocations of the monies or properties as the Plaintiff was made to understand that all monies and properties was owned by and for the use of the parties and the family.

19. That during the marriage there was a common intention that the Plaintiff and the Defendant would own all the subject premises jointly.

20. That the plaintiff in pursuance to the common intention made direct and indirect contributions to the acquisition, maintenance and improvement to all the subject properties bought and retained by the parties and worked in the business of the companies jointly owned by the parties as aforesaid

21. That the Plaintiff acted to her detriment and incurred expenditures and expectations created and encourages (sic) by the Defendant that the Plaintiff would have an interest in some of the subject properties and a total interest in Lot #17 aforesaid.

22. The Plaintiff therefore claims: -

(1) One hundred percent (100%) interest in properly (sic) at Lot #17 part of #19 Waterloo Road registered at Volume 1163 Folio 699 and that the Defendant transfer the said property to the Plaintiff.

(2) Fifty percent (50%) interest or such other interest as this Honourable Court shall determine in all the following properties: -

i) Lot #16 part of #19 Waterloo Road registered at Volume 1227 Folio 856 in the name of Norman Harley.

ii) Land at Exchange St. Ann registered at Volume 1022 Folio 570 in the name of Harley Corp Guarantee Trust.

iii) Lot 5 Oxford Estate Registered at Volume 1188 Folio 958 in the name of Norman and Ooreen (sic) Harley.

iv) Lot 3 Oxford Estate registered at Volume 1188 Folio 956.

vi) Lot 4 Oxford Estate registered at Volume 1188 Folio 957.

vii) Lot 9 Oxford Estate registered at Volume 117S (sic) Folio 962.

viii) Lot 10 Oxford Estate registered at Volume 1188 Folio 963 all in the name of Harley Guarantee Trust Company Limited.

ix) Land of (sic) Retirement, Saint Mary registered at Volume 1134 Folio 511 in the name of Harley Guarantee Trust Co. Ltd.

x) Land part of Bamboo, Saint Mary registered at Volume 1098 Folio 144 in the name of Hargal Limited.

xi) Lot 124 Caribbean Park, Saint Mary.

xii) 21 Wellington Street, Saint Catherine registered at Volume 118 Folio 41 and that the subject properties be sold and the Plaintiff receive fifty percent (50%) of the proceeds of the sale.

(3) That the Defendant to be ordered to account to the Plaintiff for the disposal of any of the properties in which the Plaintiff is found to have an interest as declared by the Court and pay to her the amount found to be due.

(4) That the Registrar of the Supreme Court be empowered lo (sic) sign any and all documents necessary to effect a transfer and/or sale of any of these said properties if the Defendant refuses or is unable to do so.

(5) That all properties in which the Plaintiff is declared to have an interest be valued by CD Alexander Realty Limited or such other valuer appointed by this Honourable Court.

(6) Costs.

(7) Such further and other relief as the Court deems just."

[3] On 8 June 2004, by and with the consent of the respondent, a defence and counterclaim was filed by the appellant, in which he made the following averments:

> "1. Save and except that plaintiff and defendant got married on date alleged paragraph 1 of the Statement is denied. The defendant further says that the plaintiff was a Housewife only and did not carry on any business whatsoever.
>
> 2. Paragraph 2 of Statement of Claim is denied. The defendant further saith that the defendant was the sole creator of several businesses and on occasion to fulfil the requirement of the Companies Act, would when forming a Limited Company, entered a single share in plaintiff's name to hold same for and on the defendant's behalf as Trustee, the defendant being the beneficial owner. The plaintiff at all times, agreed to hold any share or shares put in her name in the defendant's companies, as a mere trustee for the defendant and to transfer them back to defendant when he so desires. The defendant further says that the plaintiff had no interest or property by herself; or jointly owned by herself and the defendant as alleged or at all.
>
> 3. With regard to paragraph 3, the defendant says that any share or shares in the plaintiff's name was held by her on trust for the defendant solely. Further the plaintiff had agreed to this before the shares or a share was put in her name. She agreed to hold the share or shares in the various company as trustee for the defendant who was and is the beneficiary. Further that in 1991 the plaintiff and her mother had signed an Agreement with defendant to purchase Lot 124 Caribbean Park registered at volume 885 folio 26; the said matter was not completed.
>
> 4. With regard to paragraph 4 of Statement of Claim the defendant repeats that plaintiff held all shares that appeared in her name only as trustee, defendant being the beneficiary as was agreed

between the plaintiff and the defendant at all times before the event of the share or shares being put in plaintiff's name.

5. That with regard to paragraph 5 of the Statement of Claim save and except that the properties mention were acquired, the defendant denies that the plaintiff purchased any property or properties and deny that she took any part in the operation of the several companies. The plaintiff did not conduct or play any part in the companies affair in particular in the acquisition of any property real or personal. The defendant was the sole operator of the said companies and it was the defendant who solely decided and acquired the properties mentioned registered in the names of companies and in the joint names of plaintiff and defendant; and or in the defendant's name alone. The plaintiff was a mere trustee as agreed for (sic) defendant. The monies used to acquire these properties were earned solely by the defendant and advanced to the companies named in paragraph 3 of the Statement of Claim. Further that the plaintiff was paid a salary for any work she performed for the defendant and the companies for which she acted as a Director or Secretary up to 1989. Plaintiff was a mere employee.

6. That with regard to paragraphs 6, 7, 8, 9, 10, 11, 12 and 13 save and except that the plaintiff gave up her employment at Mona Rehab to become a Housewife only, the above described paragraphs are denied. The defendant further states that he employed qualified staffs to operate the companies in particular Trophy Insurance Ltd. The Plaintiff was financially rewarded for any work she did. Further one property listed is out of the Courts jurisdiction it being in a foreign country; to wit real property located in Florida U.S.A.

7. With regard to paragraph 15 of the Statement of Claim save and except that a house was acquired and renovated by Seaburg Trading Company with monies provided by defendant, which company later sold same; paragraph 15 is denied.

8. Paragraph 16 is denied. The defendant says Hargal Ltd acquired one premises, 20 Shakespeare Avenue, had it renovated and sold same, the net purchase price being credited to Hargal Limited Account.

9. With regard to paragraph 17 of Statement of Claim the plaintiff was a trustee only of any share or shares in her name from the several companies and was not entitled to any dividend or profit. Further up to 1989 the plaintiff was drawing a salary and other benefits.

10. With regard to paragraph 8, the defendant denies that at any time he or the companies had represented to the plaintiff or make the plaintiff to understand that all monies and properties was for the use of the parties to wit, the plaintiff and the defendant and the family. These monies belonged to the companies from which salaries were paid to plaintiff up to 1989 by the companies.

11. Paragraph 19 of the Statement of Claim is denied. Plaintiff was paid a salary.

12. Paragraphs 21 and 22 are denied.

13. With regard to paragraph 22 the defendant further saith that the plaintiff is not entitled to her claim as listed therein and as alleged or at all.

14. The defendant further states that the plaintiff had signed and transferred all shares that were held by her in trust for the defendant to the defendant's nominee the new trustee or trustees for the defendant's benefit.

15. Save that which is admitted the defendant denies each and every allegation as if the same were herein set forth and denied seriatim."

[4] On 30 July 2004, the respondent filed a defence to the counterclaim.

On 15 April 2004, the following order was granted by Daye, J. on the application of the respondent:

> "i) An interim injunction for 14 days of the date hereof restraining the Defendant from entering into any negotiation for the sale of or from selling premises at 505 NE 30 St. Unit 203 registered at Folio 10323 – 052-0130.
>
> ii) That paragraph 6 of the Statement of Claim filed herein be amended to read 505 NE 30 St. Unit registered at Folio 01323-052-0130.
>
> iii) That paragraph 22 be amended by inserting the following as subparagraph 2 xiii – "505 NE 30 St. Unit 203 registered at Folio 01323-052-0130 in the name Norman Harley."

[5] On 5 May 2004 Sykes, J (Ag.) as he then was, made the following order:

> "1. That the injunction granted by the Honourable Mr. Justice Daye on 15 April 2004 be discharged.
>
> 2. That a Statement of Account in respect of premises known as 505, North East 30th Street Unit 203, Miami, Florida in the U.S.A. be filed and served on or before 30th July, 2004.
>
> 3. That 50% of the net proceeds of the sale of this property to be paid into Court on or before 31st August, 2004."

[6] On 26 August 2004 the respondent made an application for an injunction to restrain the appellant from transferring or otherwise dealing with the properties and an order was granted.

[7] On 12 July 2005 the case management conference was held. At that time the trial was fixed for 4, 5 and 6 July 2007. However, it did not proceed due to the absence of the respondent.

[8] On 27 March 2007 the pretrial review was conducted by Daye, J. who ordered as follows:

> "1. Order granted to Defendant extending time to comply with paragraphs (2) & (3) of Court Order dated 5th May 2004 to 21st April, 2007.
>
> 2. Unless the Defendant complies with the order as extended in paragraph 1 above, he will not be permitted to proceed with his Defence.
>
> 3. Pre-trial Review adjourned to 28th May, 2007 at 12:00 noon before the Master.
>
> 4. Formal order to be prepared, filed and served by Claimant's Attorney-at-Law."

[9] On 16 May 2007 the respondent brought an application seeking the following order:

> "1. That the Defendant's Statement of Case be struck out unless the Defendant obeys paragraphs 2 and 3 of the order of the Honourable Mr. Justice Sykes made on 5th November, 2004 and of the Hon. Mr. Justice Daye made on 27th March 2007 on or before 28th May, 2007 or such other date as this Honourable Court shall determine."
>
> 2. ...
>
> 3. ..."

[10] By a re-issued application dated 24 May 2007 the appellant sought the following relief:

> "1. That the decision of the Honourable Mr. Justice Sykes and the Honourable Mr. Justice Daye for an Order for Payment into court be revoked;
>
> 2. That the decision of the Honourable Mr. Justice Daye to grant an unless order at the Pre Trial review be revoked;
>
> 3. That this Honourable Court grants the Defendant relief from sanctions for not having complied with the orders at (1) and (2) above.
>
> 4. The costs of this application be costs in the claim."

[11] On 24 May 2007 the appellant also made an application to strike out the respondent's claim on the ground that it disclosed no reasonable cause of action. The applications filed on 24 May 2007, were heard by Morrison, J (Ag.) on 28 June 2007 when he dismissed the applications with costs to the respondent. No reasons were submitted by Morrison, J (Ag). This however, does not preclude this court from reviewing the matter.

[12] It is also necessary to mention that on 4 July 2007, the claim was struck out for the reason that the respondent had failed to attend court on the date of hearing. However, on the application of the respondent, an order was made on 13 July 2007 setting aside the order striking out the claim and restoring it to the cause list.

[13] Six grounds of appeal were filed by the appellant. Grounds 1 and 2 will be considered simultaneously.

Ground 1 was amended to read:

> " The decision of the Learned Judge in Chambers that the Defendant's application to strike out the Claimant's claim was without merit was erroneous in law in that he failed to accept that the claimant had improperly claimed interest in properties owned by companies."

Ground 2 reads:

> "The learned Judge in Chambers failed to address his mind to several aspects of the Defendant's applications, including an application to strike out the claim against properties owned by the Defendant."

[14] Mr Jones for the appellant submitted that the respondent failed to set out the basis on which she claims an interest in the properties owned by the appellant and herself and the various companies and so her claim is vague, she, having not provided details of contribution made by her. He further argued that the learned judge, in deciding that the application to strike out the respondent's claim is unmeritorious, relied on **Chin v Chin** Privy Council Appeal No. 61 of 1999, delivered on 12 February 2001, but that case was inapplicable, in that Mrs Chin's claim was against the shares of the company and not against any of its assets. The issue, he argued, was whether the respondent's claim, for an entitlement to assets owned by the appellant and to such assets as are owned by the companies, is sustainable.

[15] Miss Davis submitted that the issues joined between the parties were whether the respondent was entitled to a percentage of the properties or a percentage of the companies listed in her claim. It is settled law that where a party claims an interest in property which is registered in the name of one party only, the common intention of the parties at the time of acquisition of the property must be established, she argued.

[16] A claim may only be struck out if it discloses no facts, and in the present case, facts have been pleaded, she contended. She further argued that once facts are pleaded in a claim, it is unnecessary to plead law and the question which the court would be required to determine is whether as a matter of law, either a resulting or a constructive trust arises. It was further submitted by her that, so far as the companies are concerned, the real issue to be decided is the extent of the respondent's shares in the company.

[17] A cause of action is one which contains facts which discloses a legitimate claim. A claim will only give rise to a cause of action where it alleges facts to be proven at trial. It will be struck out in circumstances where it discloses no legally recognizable claim. This proposition the learned author Stuart Sime at page 302, places in the following context:

> "A cause of action that is unknown to the law will be struck out ... A statement of case ought also to be struck out ... If the relief sought would not be ordered by the court."

A claim therefore, will only be struck out in plain and obvious cases. Accordingly, where a claim discloses no valid claim, the court will not permit it to stand. ***Price Meats Ltd v Barclays Bank, Plc*** The Times, January 19, 2000 at page 26.

[18] By her claim, the respondent seeks an entitlement to an interest in certain properties which are registered in the names of the parties, in the name of the appellant solely as well as in the names of companies in which the appellant and herself are shareholders. In her claim, she avers, among other things, that during the marriage she made direct contributions to the acquisition, maintenance and improvement of all properties. It was also her averment that all properties were acquired largely from funds from both parties as well as funds obtained in the process of operating the companies.

[19] The first issue to be addressed is whether the respondent could validly make a claim against the appellant in respect of those properties jointly held by both parties and those held by the appellant only. Where property is registered in the joint names of parties or in the name of one party only and another claims an interest therein, it is perfectly permissible for a court to adjudicate on the claim, in order to decide whether the claimant is entitled to an interest. Where facts are pleaded, the necessity would not arise to plead the law upon which the claim is founded, as rightly submitted by Miss Davis. At a trial, the question for determination would be whether a claimant had contributed to the purchase of

any property in which an interest is claimed, or whether there was a common intention of the parties for such claimant to acquire a beneficial interest therein.

[20] The respondent, with specificity and clarity outlines her claim against the appellant with respect to the properties registered in the names of herself and the appellant or in the name of the appellant only. As shown in the defence the appellant has expressly traversed all particulars pleaded in the statement of claim. Evidently, issue has been joined between the parties. It cannot be said that the facts contained in the statement of claim do not constitute an enforceable cause of action against the appellant.

[21] A further issue to be determined is whether the respondent's claim to an interest in the properties owned by the companies amounts to a cause of action against the appellant. A company is the beneficial owner of its property. It does not hold such property as a trustee for its members, nor does a shareholder hold any legal or beneficial interest therein. See ***Macaura v Northern Assurance Co. Ltd*** [1925] AC 619 at 626.

[22] It was common ground that the learned judge placed reliance on the case of ***Chin v. Chin***. A distinction must be drawn between ***Chin v. Chin*** and the present case. Although Mrs Chin was a shareholder in the company, she did not seek to secure an entitlement to an interest in the property owned by that company. What she sought in her claim was a fifty percent interest in the shares of the company in which she held one share.

[23] In the instant case, the respondent's claim as pleaded clearly shows that she is seeking to secure an interest in properties owned by the companies. Her claim as framed, obviously, is not one in which she seeks an interest in shares in the companies as Miss Davis contends. Although she is a shareholder in the companies, this does not in itself assign to her a right to an entitlement to assets of the companies. To raise a claim for an interest in the property owned by the companies in this suit, she would have been required to have named the companies parties to the action. This she did not do. It follows therefore, that no cause of action could have accrued against the appellant with respect to the respondent's claim for an interest in the companies' properties. The respondent could only successfully maintain an action against the companies' properties if her claim was made against the companies. There being no cause of action arising with respect to the claims for an interest in the properties owned by Harley Corp Guarantee Trust and Hargal Limited, the claims for an interest in them should be struck from the statement of claim.

[24] Ground 3 is as follows:

> "The learned Judge in Chambers accepted the arguments of counsel for the claimant who was not properly on record."

Mr. Jones submitted that counsel for the respondent had failed to file a certificate of service subsequent to her filing a Notice of Change of Attorney, this notwithstanding the learned judge considered her submissions. Rule 63.2 of the Civil Procedure Rules (CPR) prescribes that upon the change of an attorney-at-

law, a notice of change of attorney as well as a certificate of service must be filed. It states:

> 63.2 "When a party changes its attorney-at-law, the new attorney-at-law must:
>
> (a) file a notice of change ...
> (b) ... and
> (c) file a certificate of service."

[25] The respondent had previously been represented by Mr H. S. Rose. A notice of change of attorney-at-law was filed by Miss Davis who subsequently represented the respondent's. However, a certificate of service was not filed by her. There can be no dispute that the effect of the certificate of service is to establish that the opposite party in an action has been advised of a change of representation.

[26] It is perfectly true that the submissions by Miss Davis were entertained by the learned judge. However, Miss Davis was served with the appellants' applications. In the circumstances, it is reasonable to infer that the learned judge would have been satisfied that the appellant had been aware that there was a change of attorney at law and had deemed it appropriate to waive the requirement of filing a certificate of service by Miss Davis. In my view, failure to file the certificate of service would in no way vitiate the proceedings nor would it operate as a bar to Miss Davis' submissions being considered by the learned judge.

[27] Ground 4 reads:

> "The learned Judge in Chambers failed to address his mind to the Defendant's application to revoke the orders of the Honourable Mr. Justice Courtney Daye and the Honourable Mr. Justice Sykes."

It was Mr. Jones' submission that the "unless order" had been improperly made in that the "unless order" had been granted on an oral application by the respondent's attorney-at-law and not in accordance with rule 26.4 and there was no application to dispense with an application under the rule. Therefore, the order ought to be revoked.

[28] By rule 26.4 a party may apply for an "unless order" where the other party has failed to comply with a rule or order of the court. The rule reads:

> "26.4 (1) Where a party has failed to comply with any of these Rules or any court order in respect of which no sanction for non-compliance has been imposed, any other party may apply to the court for an "unless order".
>
> (2) Such an application may be made without notice but must be accompanied by –
>
> (a) evidence on affidavit which –
>
> (i) identifies the rule or order which has not been complied with;
>
> (ii) states the nature of the breach; and
>
> (iii) certifies that the other party is in default; and
>
> (b) a draft order

(3) The registry must refer any such application immediately to a judge, master or registrar who may-

(a) grant the application;

(b) seek the views of the other party; or

(c) direct that an appointment be fixed to consider the application.

(4) Where an appointment is fixed under paragraph (3) (c) the court must give 7 days notice of the date, time and place of such appointment to all parties.

(5) An "unless order" must identify the breach and require the party in default to remedy the default by a specified date.

(6) The general rule is that the respondent should be ordered to pay the costs of such an application.

(7) Where the defaulting party fails to comply with the terms of any "unless order" made by the court that party's statement of case shall be struck out.

(8) ..."

[29] It is perfectly true that, as stipulated in rule 26.4 (2), a party, in making an application for an "unless order", is required to file an affidavit. The affidavit must contain such evidence as directed by (i), (ii) and (iii) of the rule as well as a draft order. The unless order was made at the pretrial review. In my opinion, the rule contemplates that an "unless order" may be granted by the court acting on its own initiative. In ***Marcan Shipping (London) Limited v George Kefalas***

[2007] EWCA Civ 436 Lord Justice Moore-Bick, in dealing with effect of non compliance with an unless order, stated that:

> "The scheme of the Rules relating to conditional orders in my view both clear and salutary in its effect, namely, that such orders mean what they say, that the consequences of non-compliance take effect in accordance with the terms of the order, but that the court has ample power to do justice under rule 3.8 on the application of the party in default, or, in an exceptional case, acting on its own initiative."

[30] Litigants no longer control the progress of proceedings. The management of cases is judge driven. The court has a duty to ensure that cases are properly managed. It may be that the respondent's attorney-at-law, in breach of rule 26. 4 (2), had made an oral application for the unless order without a supporting affidavit. However, even if she had not done so, the appellant was in breach of an order of the court and the learned judge in the exercise of his inherent jurisdiction would have been obliged either to have struck out his defence forthwith or to have made an unless order.

[31] Mr Jones further argued that the learned judge failed to give oral reasons for his refusal to revoke the order of Daye, J which imposed an unless order on the appellant for non compliance with the order of Sykes, J to pay 50% of the net proceeds of sale of the Miami property into court.

[32] It cannot be denied that, as a general rule, a judge is obliged to state reasons for his judgment. In ***McKenzie v. Campbell and Another*** (1992) 29

he cited the case of ***British South Africa Co. v. Companhia de Mocambique*** [1893] AC 602.

[34] At the outset, I must state that there is no evidence that Sykes, J. had been misled in making the order. It appears to me however that Mr Jones' contention is that Sykes, J. was not clothed with jurisdiction when he made his order with respect to the property in Miami and by extension that Daye, J. was also wrong in making the order. The question therefore is, could the order of Sykes, J. have been validly made? Could Daye, J. acting upon it, have made a further order?

[35] The issue therefore is whether the Jamaican court is seized of jurisdiction to adjudicate on the property in Miami. That property ranks as an immovable. It cannot be denied that it is a settled rule of private international law that the law of the lex situs governs the determination of title to and the right to possess immovables. Generally, a Jamaican court has no power to entertain an action to determine title, or a right to possession of immovable property located outside of the court's jurisdiction. However, there is an exception to this rule. A Jamaican court may exercise jurisdiction in personam in a case of foreign immovables against a party who is subject to its jurisdiction. Such jurisdiction may be exercised in circumstances where there is in place a personal obligation between the parties or some equity emanating from contract, trust or fraud. ***Deschamps v Miller*** [1908] 1 Ch 856; ***Razelos v Razelos*** [1969] 3 All ER 929.

J.L.R. 125, Gordon J.A., after making reference to the cases of ***Leonard v International Institute for Medical Studies*** Times April 29, 1985 CA and ***Eagil Trust Co. Ltd v. Pignott-Brown and Another*** [1985] 3 All E.R. 119, which dealt with the obligation of a judge to give reasons for his judgment, said at page 128:

> "The two cases referred to above firmly establish the duty of a judge to articulate the reasons which impel him to exercise his discretion in a certain way. In most cases the judge will have the benefit of reasoned arguments from counsel and these will enable him to identify the important issues for determination. The judge should then perform his clear duty to inform the persons why he came to his decision and thereby lay the foundation upon which the Court of Appeal may ultimately have to build. We endorse the need for reasons to be given for the exercise of the discretion whenever a judge sets aside a judgment whether regularly or irregularly obtained."

However, the failure of a judge to give reasons for his decision does not necessarily mean that this court ought to set aside his order. Where there are no reasons for judgment this court may exercise it discretion anew in the matter and as earlier stated, this court is empowered to embark on a rehearing of the matter.

[33] It was also Mr Jones' submission that Sykes, J. was misled in making his order based on the claim to the property in Miami. He contended that it is an inviolable rule of private international law that Caribbean Courts have no jurisdiction in actions directly involving determination of title to or the right to possess immoveable property in a foreign country. In support of this submission

[36] The court may therefore properly exercise jurisdiction over a party to an action who is duly served with process, or who submits to the court's jurisdiction. The evidence discloses that the writ of summons and statement of claim were duly served on the appellant. It is clear that he accepted service. Further, there is nothing to show that the appellant disputed the court's jurisdiction to try that aspect of the claim with respect to the Miami property. He entered an appearance and filed a defence and counterclaim, which is clear evidence of his submission to the court's jurisdiction.

[37] It follows that Sykes, J. could have lawfully given consideration to the application touching the property in Miami and made the requisite order. There being no jurisdictional defect in the proceedings, the order made by Daye, J. consequent upon Sykes, J's order remains valid.

[38] In the alternative, Mr Jones argued that the appellant has shown by his affidavit that the proceeds of sale from the property in Miami had to remain in the United States to abide clearance from the United States Revenue Department. This, he submitted, is a material change in circumstances which would warrant the revocation of the orders of Sykes and Daye JJ.

[39] By rule 26.1 (7) of the CPR the court is empowered to vary or revoke an order. The question which now emerges is under what conditions would a judge be entitled to revoke an order made by another judge exercising a parallel jurisdiction? The case of ***Mair v. Mitchell and Others*** SCCA 123/08 delivered

in February 2009, affords guidance as to the principles which the court ought to employ in dealing with an application under rule 26.1 (7). In that case Smith J.A., in considering the question as to the power of the court to vary an order under rule 26.1 (7), relied on the ratio decidendi as enunciated by Patten J, in Lloyd's **Investment (*Scandinavia) Limited v. Ager-Harrisen*** [2003] EWHC 1740. Patten J, in dealing with an application to vary an order under Part 3.1 (7) of the English CPR, at paragraph 11 said:

> "Although this is not to be an exhaustive definition of the circumstances in which the power under CPR Part 3.1 (7) is exercisable, it seems to me that, for the High Court to revisit one of its earlier orders, the Applicant must either show some material change of circumstances or that the judge who made the earlier order was misled in some way, whether, innocently or otherwise, as to the correct factual position before him."

[40] Smith J.A. in adopting the ratio pronounced by Patten J, said:

> "Although Patten J. was dealing with an application to vary the conditions attached to an order setting aside a default judgment and not one to vary a procedural regime, as in the instant case, I am of the view, that the reason for his decision represents a correct statement of the principle of law applicable to the exercise of the judge's discretion, under Rule 26. (7) of the CPR. Indeed this principle was approved by the English Court of Appeal in **Collier v Williams** (supra)."

[41] It is patently clear that rule 26.1 (7) restricts the conditions under which a court may vary or revoke an order. The rule does not provide an open door permitting a court to reverse its decision merely because a party

wishes the court so to do. A court therefore, will only revisit an order previously made if an applicant, seeking to revoke that order, shows some change of circumstances or demonstrates that a judge who made an earlier order had been misled. Has the appellant shown that either of these two factors would enure to his benefit?

[42] The appellant sought to rely on averments in paragraph 6 of his affidavit sworn on the 15 December 2004 to show a change of circumstances which prevented him from complying with the order to pay one half of the proceeds of sale of the Miami property into court. He stated as follows:

> "6. That the clearance of the funds in compliance with the said court order is subject to legal rights of the USA Revenue Department , defendant's United States Attorneys at Law are in negotiation with USA Revenue Department re their rights to a portion of the gross sale price see copy letter attached addressed to the defendant marked "NH1" for identification."

[43] It is of significance that at paragraphs 4 and 5 of his affidavit filed on 4 May 2004 he stated:

> "4. That I further state that I am the sole legal and beneficiary (sic) owner of the said property which was bought the 11th January, 1998, attached is copy title marked "B" for identity. The deposit was paid solely on my behalf only by Maritime Commodities Express Inc. a company registered in the United States of America of which the only other shareholder beside the defendant is Lloyd Galloway and of which the Claimant had no share or benefit or interest in. Attached is copy Annual Returns marked "C" for identity.

> 5. That the said property was bought with the help of a mortgage being granted to me solely by a United States of America registered company which is now held by the Bank of America."

[44] Yet, paragraph 3 of his affidavit sworn on 19 April 2007 in support of his application before Morrison J (Ag) paints a different picture from that which had been previously placed before the court. The paragraph reads:

> "3. That I have been informed by Manley & Associates, a member of Florida and American Institutes of Certified Public Accountant, with regards to account re the sale price of said condo as follows: That there is no net funds payable to Norman Harley from the sale price to enable the obedience to No. 3 of the court order re payment into court of 50% of net proceeds. That in fact Maritime Commodities Express Incorporated, a company incorporated and located in America, a lending agency which provided the monies to purchase the said condo that, is Unit 203, 505 NE 30th Street, Miami, Florida is the equitable and beneficial owner of the funds from the sale of the said condo. Attach (sic) marked "A" for identity is Statement of Account and "B" copy of a letter sent in the matter from Manley & Associates as to the proceeds of the sale."

[45] On examination of the averments in the affidavit no statement was made therein indicating that there was a restriction as to the clearance of the funds, which as stated in the appellant's earlier affidavit, prevented him from paying the money into court. Clearly, there would have been nothing before the learned judge to show any change of circumstances which would have prevented him from obeying the orders. The learned judge therefore, could not have regarded the averments put forward in the affidavit of 19 April 2009

as amounting to a change in circumstances and rightly refused to revoke the orders of Sykes, J. or Daye, J.

[46] In passing, I must add that there is no evidence that Daye J had been misled in making his order and as already indicated, nor was Sykes J misled in so doing.

[47] Ground 5 reads:

> "The learned Judge in Chamber (sic) erred in law in failing to exercise his decision in favour of the Appellant/Defendant's application for relief from sanction."

Ground 6 is as follows:

> "The exercise of the decision was unreasonable in light of the Affidavit evidence before the Learned Judge in Chambers."

Mr Jones submitted that the appellant had generally complied with the orders. He further submitted that an enforceable undertaking had been given by the appellant not to dispose of the proceeds of sale of the Miami property or any other property and that the application for relief from sanction was made promptly and a statement of account had been filed. Although the accuracy of the statement of account had been challenged, he argued, a request for further and better particulars had been made. He argued that the appellant had given good reason for his failure to pay the money from the proceeds of sale of the property in Miami in that the clearance of the funds was subject to the rights of the United States Revenue Department.

[48] Miss Davis argued that the appellant had generally disobeyed the orders of the court. So far as the order of Daye J is concerned, although that order had been made from as far back as 2004, no good explanation had been given for the non compliance with the order. The appellant's failure to provide a proper account with respect to the sale of the property in Miami, and his failure to pay one half of the proceeds of sale into court are intentional, she argued.

[49] The CPR heralds a new procedural regime. It demands that litigants must adhere to timetables. It, however, permits the court, in exercising its powers under the rules, to exercise some flexibility in its approach in dealing with delays occasioned by litigants disregarding time limits. By rule 1.1, the court, in its application of the overriding objective, is directed to deal justly with cases. In many cases, the court, in applying the overriding objective will treat the question of delay or the failure to comply with a rule or order with greater clemency than that which obtained prior to the advent of the CPR. See ***Biguzzi v Rank Leisure plc*** [1999] 4 All ER 934; ***Walsh v Misseldine*** [2000] EWCA Civ 61; ***Flax-Binns v Lincolnshire County Council*** [2004] EWCA Civ. 424.

[50] Under Rule 26.8 a party may apply for relief from sanction. The rule reads:

> "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) support 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 interest of the administration of justice;

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

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

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

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

4. The court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown."

[51] The unless order was made on 27 March 2007. The time within which the appellant was required to comply with the order was extended until 21 April 2007. The application for relief from sanction was made on 16 May 2007, 25 days after the expiry date for the compliance with the order. The appellant was present at the pretrial review. It cannot be said that he acted with promptitude having delayed for a period of 21 days before making the application.

[52] Notwithstanding the appellant's failure to act with dispatch in making the application, his delay cannot be regarded inordinate. The questions therefore which now fall for consideration are: whether the failure to comply with the unless order is intentional, whether the appellant has proffered a plausible explanation for the failure to comply with the order and whether generally there has been compliance with all other rules, orders and directions.

[53] I must now look to see whether the appellant has surmounted the first hurdle. Was his non compliance with the order intentional? He was mandated to file a statement of account and pay one half of the proceeds of sale of the property into court. He filed a document purporting to be a statement of account. It merely states:

" Sale price	-	US$139,900.00
Proceeds of sale total paid to Maritime the equitable/beneficial owner of the proceeds of sale-	-	$101,866.81
Paid to Norman Harley	-	Nil

Sgd. Norman Harley"

[54] This document is woefully inadequate and cannot be regarded as a proper statement of account. The appellant had the service of Manley and Associates, certified accountants, yet elected not to obtain a proper statement of account from them. This leads me to conclude that the appellant may have intended to deceive the court as to the true amount realized from the proceeds of sale of the property. He therefore could not be regarded as having satisfied the first criterion laid down by the rules.

[55] I now move to the issue as to whether a plausible explanation had been proffered for the appellant's failure to comply with the unless order. He asserted that his inability to pay the money into court had been occasioned by Maritime holding an equitable interest in the property. This cannot be regarded as a good reason. He stated that he holds the legal interest in the property. The property was sold. His purported statement of account shows that Maritime was paid $101,866.81. Even if it were to be accepted that Maritime was paid this sum, there would still be a balance from which he could have made the payment into court. Clearly, it cannot be said that a good reason had been advanced by him for his non compliance with the order, as contended by Mr Jones.

[56] I will now consider whether the appellant has complied with all other relevant rules, orders and directions. He had in fact adhered to all relevant rules, the court management orders and all other relevant orders of the court save and

except that which required him to file the statement of account and to make the payment. The matter had even advanced to trial. However, the trial did not proceed due to the absence of the respondent.

[57] The appellant has not satisfied the first two limbs of rule 28.2 (a) and (b). However, the respondent does not seem to be averse to his being afforded a further period of five days to make good that which he had omitted to do. This notwithstanding, I will consider whether the circumstances of this case would warrant the relief sought. Rule 28.3 directs the court to consider all the circumstances inclusive of the factors laid down in 3 () to (e). How then should the court approach this directive? Mance L. J. in ***Hansomand Others v Makin and Another*** [2003] EWCA Civ 1801, offers guidance as to the manner in which the court ought to approach its duty in the application of the rules. At paragraph 20 he said:

> "...at the end of the day the right approach is to stand back and assess the significance and weight of the relevant circumstances overall, rather than to engage in some form of "head counting" of circumstances."

[58] Each case must be dealt with on its own facts. The delay in producing a proper statement of account and the failure of the payment of the money into court must be laid exclusively at the appellant's feet. The question however is whether a fair trial can be achieved. The case raises the issue of the beneficial entitlement of the respondent to property owned by the appellant and by the parties. There is available evidence upon which the court can properly

adjudicate on the material issues raised in the pleadings. The delay would not prevent the court from assessing the evidence.

[59] A further question however, is whether the delay would in any way operate prejudicially to the respondent. Although the delay is as a result of slothfulness on the part of the appellant, there is nothing to show that the respondent would suffer any undue prejudice if the matter proceeds to trial. The appellant's failure to comply with the order can still be remedied and a trial date can be met. The decisive issue however, is whether in light of the overriding objective of dealing with cases justly and the interest of the administration of justice, the court should permit the appellant to defend the action or bar him from doing so.

[60] Although Mr. Jones has informed the court that the appellant has given an undertaking not to dispose of the proceeds of sale of the Miami property, there is no evidence before this court in support thereof. However, even if the relief sought were to be refused, the respondent would still have to prove her claim. The appellant therefore, should be given a chance to defend the action. In all the circumstances, I am of the view that the appellant should be afforded one last opportunity to furnish a proper statement of account and pay into court one half of the proceeds of sale of the Miami property, within seven days of the date hereof, failing which, his defence shall stand struck out.

ORDER

Appeal allowed in part. The claims for an interest in the properties owed by Harley Corp Guarantee Trust and Hargal Limited are struck from the statement of claim. The order of Morrison, J. refusing to grant the appellant relief from sanction is set aside. Appellant to file a statement of account prepared by a certified accountant and pay into court one half of the net balance of the proceeds of sale of the Miami property within seven days of the date hereof, failing which the defence shall stand struck out. Costs to the respondent to be agreed or taxed.