[2020] JMCA Civ 64

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2019CV00086

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA
THE HON MISS JUSTICE STRAW JA

BETWEEN	**ALICE McPHERSON**	**APPELLANT**
AND	**PORTLAND PARISH COUNCIL**	**1ST RESPONDENT**
AND	**THE NATIONAL WORKS AGENCY**	**2ND RESPONDENT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**3RD RESPONDENT**

Hugh Wildman and Miss Sasha-Lee Hutchinson instructed by H S Dale & Co for the appellant

Joseph Jarrett instructed by Joseph Jarrett & Co for the 1st respondent

Miss Faith Hall and Mrs Shorna-Kaye Edwards Henry instructed by the Director of State Proceedings for the 2nd and 3rd respondents

1 July and 18 December 2020

BROOKS JA

[1] I have read in draft the reasons for judgment of Straw JA and agree with her reasoning and conclusion, as they accord with my reasons for concurring with the order of the court. I have nothing further to add.

MCDONALD-BISHOP JA

[2] I too have read the draft judgment of Straw JA which accord with my reasons for concurring with the order made on 1 July 2020. There is nothing that I wish to add.

STRAW JA

Introduction

[3] On 1 July 2020, after hearing submissions from the parties, we made the following orders:

> "1. The appeal is allowed.
>
> 2. The judgment of K Anderson J made on 19 May 2017 is set aside.
>
> 3. The Registrar of the Supreme Court shall set the matter for case management conference and advise the parties of that date as expeditiously as possible.
>
> 4. Costs of the application below to the respondents to be agreed or taxed.
>
> 5. No order as to costs in the appeal."

We promised at that time to put our reasons in writing. This judgment is a fulfilment of that promise.

Background

[4] The appellant, Ms Alice McPherson, filed a claim form and particulars of claim on 4 February 2011, in the Supreme Court, against the Portland Parish Council ("PPC") (now renamed the Portland Municipal Corporation), the 1st respondent. The appellant sued for damages in relation to trespass to her property, situate at Lot 3 Red Hassell Road, Port Antonio in the parish of Portland, registered at volume 707 folio 140 of the Register Book of Titles. She claimed that the damages were as a result of incisions made on her land by the agents or representatives of the PPC, while carrying out road works in the community.

[5] On 27 June 2012, the Supreme Court granted permission to the PPC to file its defence out of time. In that defence, the PPC averred that any damage done was the responsibility of the National Works Agency ("NWA"). In an affidavit, filed on 10 July 2012, the appellant set out her attempts to obtain information from the PPC concerning this matter from July 2008 but to no avail, and that she subsequently obtained a valuation and appraisal report from Mr Keith Miller, Real Estate Dealer, dated 28 October 2010. In that report, reference was made to the NWA with information that it could have been doing the work for the PPC. She stated further that the PPC did not deny responsibility for the works being done at any time before the action was filed, neither did it file a defence within the prescribed time.

[6] However, as a result of the defence filed by the PPC, on that same day (27 June 2012), the appellant applied to the court for permission to add the NWA, as a defendant to the claim which was granted. The appellant filed an amended claim form and particulars of claim on 18 July 2012 in that regard. The Attorney General of Jamaica was also added as a defendant and was sued in a representative capacity by virtue of the Crown Proceedings Act. The Attorney General and the NWA are the 2nd and 3rd respondents, respectively, before this court.

[7] The Attorney General subsequently filed a defence on 10 October 2012, disputing the claim and asserting that the NWA had done no work on the appellant's property and had no knowledge of work of any kind being done. The appellant alleges that both the PPC and the NWA are jointly or severally responsible for the management

and maintenance of drainage in the parish and since both parties have denied responsibility for any damage to her property, this issue has to be determined at a trial.

[8] The first date for a case management conference ("CMC") was set for 29 June 2016 before Lindo J. On that date, both the appellant and her counsel, Mr Heron Dale, were absent. There being no evidence before Lindo J as to whether counsel for the appellant was served with notice of the hearing date, the matter was adjourned to 6 May 2016 for hearing, which took place before E Brown J. Notice of the adjourned date was served on counsel for the appellant, Mr Dale, by counsel for the PPC on 2 February 2016. On 6 May 2016, the claim was struck out by E Brown J, on the basis that the appellant and her counsel absent from the CMC. The formal order was filed on 9 May 2016, however, the appellant and her counsel only became aware of this order when the notice of taxation and bill of costs, filed on behalf of the PPC, were served on counsel for the appellant's office on 22 June 2016.

[9] The appellant, thereafter, filed an application on 6 July 2016 for the order of E Brown J to be set aside. In the supporting affidavit of Mr Dale filed on the same day, he indicated that he had been unaware of the date of 6 May 2016 as the secretary who had been dealing with the matter subsequently left the firm without recording the date for hearing in the office diary. Consequently, he was unaware of the date and unable to inform the appellant. This application was heard and refused by K Anderson J on 6 July 2016.

[10] On 29 July 2019, the appellant was granted an extension of time to file the application for leave to appeal and leave to appeal against the decision of K Anderson J. Subsequently, on 12 August 2019, she filed her notice and grounds of appeal.

Grounds of appeal

[11] The appellant sought to rely on the following seven grounds:

> "i. That the Learned Judge erred in law when he found that the administrative inefficiency on the part of the Appellant's/Claimant's Attorneys-at-Law was not good reason for their failure to attend [the] Case Management Conference.
>
> ii. That the Learned Judge, K Anderson J's [sic] erred in law in his decision not to set aside the striking out was a wrong exercise of discretion.
>
> iii. That the Notice of Application to set aside the striking out of the Claim and to relist before the learned trial judge was made under CPR Part 26, rule 26(1)(d) [sic], which allows a judge at CMC to adjourn and make an unless order, which would have been more appropriate considering the history of the matter.
>
> iv. That the affidavit in support of the Applicant/Claimant's application contained enough to show that the applicant had a real prospect of success if the appeal was permitted to proceed.
>
> v. Had the applicant been present, it is likely a different order would have been made.
>
> vi. That there is a realistic prospect of the applicant establishing that there was a good reason for her default.
>
> vii. That the Appellant/Claimant has a good case on its merits and has a real chance of success if the substantive matter is heard."

[12] The grounds of appeal had given rise to a consideration of three main issues:

Issue 1 - Did the learned judge err in law when he found that administrative inefficiency on the part of the appellant's attorney at law was not a good reason for the failure to attend the CMC (grounds i and vi)?

Issue 2 - Would an alternative order, such as an unless order available under rules 26.4(1) and 26.2 of the CPR have been more appropriate (ground iii)?

Issue 3 - Had the appellant been present, is it likely a different order would have been made (ground v)?

[13] Grounds i, ii, iii and vi were relevant to whether the learned judge exercised his discretion properly in refusing the application, bearing in mind the evidence that would have been before him. Issues 1 and 2 (grounds i, iii and vi) were therefore considered together, as the issues were overlapping and all counsel made submissions in that regard. Ground ii did not have to be considered specifically, as it raised the ultimate question for determination by this court. Grounds iv and vii bore no relevance to the issues on this appeal but appeared to have been geared towards the previous application for extension of time to file the appeal and for leave to appeal. These grounds were, therefore, not considered.

[14] It is to be noted that there was no written judgment from K Anderson J available to this court, neither was there an agreed summary of the judgment presented by the parties pursuant to rule 2.5(2)(a) of the CAR. In fairness to the learned judge, it is not

clear whether a judgment was requested. However, there was consensus in the submissions of all counsel as to the reasoning of the learned judge in the matter.

Submissions on behalf of the appellant

Issues 1 and 2 (grounds i, iii and vi)

[15] Counsel, Mr Wildman, submitted that the essence of the appeal was whether K Anderson J exercised his discretion properly. He stated that the applicable rules guiding applications of this nature are set out in rule 39.6 of the CPR and that rule 27.8(6) makes this provision applicable where parties are absent from the CMC. He referred the court to **David Watson v Adolphus Sylvester Roper** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 42/2005, judgment delivered 18 November 2005, where the provisions of rule 39.6 were considered along with the guiding principles by K Harrison JA.

[16] Counsel submitted that, as required by rule 39.6(2), the appellant had made the application to set aside the order of E Brown J within the required time of 14 days of the date on which the appellant became aware of the said order. He stated that the actual order of E Brown J was never served on the appellant and that her awareness was triggered when service of the taxation proceedings relevant to the costs order of E Brown J was received on 22 June 2016, so the 14 days would begin to run as of that date.

[17] Counsel submitted that the major issue was whether the appellant had established that there was a good explanation for the absence of both the appellant

and her counsel from the CMC on 6 May 2016. In that regard, he referred the court to paragraphs 12 to 15 of the affidavit of the appellant filed on 30 April 2018 in which she deposed:

> "12. That I was told by my Attorney and do verily believe on February 2, 2016, my Attorneys-at-Law Messrs. H.S. Dale & Co was served with a Notice of Adjourned Hearing dated January 29, 2016 indicating that the matter came up for Case Management Conference on June 8, 2015 [sic] with a new date set for May 6, 2016 as neither the appellant nor her representatives attended.
>
> 13. That neither I nor my legal representative were in attendance at the hearing that was set for Case Management on June 8, 2015 [sic] as we were not notified by the Court of the said date, and I have been told by my Attorneys and do verily believe that to date we have not received a Notice of Appointment for Case Management Conference for the said date.
>
> 14. That on the 6th day of May 2016, when the matter came up for Case Management Conference, I was told by my Attorneys, and I do verily [sic] that they were not personally aware of the date as the secretary who was dealing with the matter was no longer with the firm and the information was not recorded in the Attorneys [sic] Court diary.
>
> 15. That because of this error, neither I nor my representatives was present resulting in the matter being struck out."

[18] Mr Wildman submitted that there was evidence of a good reason for failing to attend the CMC and relied on the dictum of Lord Dyson in **The Attorney General v Universal Projects Limited** [2011] UKPC 37 at paragraph 23. He submitted that the Privy Council recognised that there could be excusable oversight; that the facts in the above case were startling compared to the facts of this case; that the appellant in this case did not become aware of the notice of adjourned hearing and in these

circumstances, this court could conclude that there was a good reason which could form the basis for the order to be set aside.

[19] He also submitted that, although there is a shifting tide towards ultimate sanctions against the delinquency of counsel in the breach of rules or orders of the court, the court is still desirous of matters being contested. In that regard, he referred the court to **Salter Rex & Co v Ghosh** [1971] 2 All ER and contended that the discretion of K Anderson J could have been exercised differently, considering that E Brown J had the discretion to make an unless order at the time, pursuant to part 26 of the CPR, instead of applying the ultimate sanction of striking out the claim.

Issue 3 (ground v)

[20] In relation to the issue of whether it is likely a different order would have been made had the applicant been present, counsel submitted that this was without controversy, as there was no doubt that CMC orders would have been made if the appellant and/or her attorney were present before E Brown J on 6 May 2016.

Submissions on behalf of the 1st respondent

Issues 1 and 2 (grounds i, iii and vi)

[21] The thrust of counsel Mr Jarrett's submission was that the PPC has been wrongly added as a party to the claim, since the PPC was not responsible for the drainage system that passes through the appellant's land and for any incision on that land; and that responsibility for Red Hassell Road is the responsibility of the NWA. He stated that this fact was set out in an affidavit of the secretary-manager of the PPC, Ms Joan

Thomas, filed on 20 June 2012 and was confirmed in a letter dated 12 January 2012, from the NWA, which was exhibited in the said affidavit and served on the appellant's attorney on that same day.

[22] Counsel submitted further that the responsibility for ensuring the right parties were added to the claim was on the appellant and her attorneys at law. He contended that Red Hassell Road, with its associated drainage system, is a main road under the Main Roads Act and, therefore, the responsibility of the NWA which falls under the Ministry of Transport and Works. Further, that it is not a parochial road under the Parochial Roads Act under which the PPC has responsibility.

[23] He submitted that a valuation report obtained by the appellant from Mr Keith Miller, supports the contention of the PPC, as it reported that it was the NWA who had been constructing flood water drains from the main road through sections of the appellant's land. He stated that under these circumstances, the appellant was therefore aware that it was the NWA who was the proper party to be sued.

[24] Counsel also referred the court to the affidavit of Mr Raymond Grant, deputy superintendent of works for the PPC, filed 23 August 2017. He stated that the affidavit of Mr Grant refuted the statement made in the subsequent affidavit of Mr Keith Miller, filed on 9 August 2017, wherein he (Mr Miller) asserted at paragraph 8, that the responsibility for the maintenance of drains in the town is the responsibility of the PPC. Counsel reiterated that this assertion was highly disputed because the responsibility for main roads, as well as drainage systems for the main roads is exclusively the

responsibility of the NWA under the Main Roads Act. Counsel submitted that Mr Keith Miller's valuation report, which predated his affidavit, is confirmation that the subject road is a main road under the NWA's purview and the claim should not have included the PPC.

[25] Counsel contended therefore that this appeal, as it relates to the PPC, should be dismissed, as neither E Brown J nor K Anderson J exercised their discretion wrongly. In written submissions, he contended that, in any event, the appellant did not act promptly, but waited two months since E Brown J's order before making the application to set aside that order on 6 July 2016.

[26] In relation to whether the appellant had established a good reason for her failure to attend the CMC before E Brown J, counsel rehearsed the history of the matter and complained about the many missteps of the appellant, including the initial failure to join the NWA as a party to the claim. Based on the history of the matter, he stated also that the appellant would have failed to attend a CMC on two separate occasions. In relation to the second CMC held on 6 May 2016, while Mr Dale was served with the notice, the reason advanced by him (that his secretary failed to notify him) was without merit. Counsel also referred the court to rule 27.8(5) of the CPR, which allows for the statement of case of either party to be struck out for non-attendance at the CMC. In written submissions, he contended also that the appellant had not asserted that she was never served with the notification of the first CMC date on 29 January 2016. He

submitted, therefore, that there would have been no need for a third hearing before the appellant's statement of case could be struck out.

Issue 3 (ground v)

[27] Mr Jarrett submitted that the PPC had filed an application to strike out the claim against it, and that if the appellant had attended on 6 May 2016, this application would have been pursued. He submitted that the merits of the application would have been based on the factual scenario as set out by him in relation to the responsibility of the NWA for the main road. He stated, therefore, that it is likely that the PPC's application to strike out the claim would have been successful and this issue was subsumed in the application before E Brown J, but neither the appellant nor her counsel were present. He contended, therefore, that the appellant stood no reasonable chance of being successful against the PPC, even if the matter was allowed to go to trial.

Submissions on behalf of the 2nd and 3rd respondents

Issues 1 and 2 (grounds i, iii and vi)

[28] Counsel, Ms Hall, submitted that the appellate court will only interfere with the exercise of a judge's discretion if it was based on a misunderstanding of the law or evidence which can be shown to be demonstrably wrong. She referred the court to **The Attorney General of Jamaica v John Mckay** [2012] JMCA App 1. She stated that the appellant will therefore have to show that K Anderson J applied the wrong principle of law or took the wrong approach to the exercise of his discretion, in refusing to set aside E Brown's J decision.

[29] According to counsel, the learned judge did not err in his application of the law. The appellant's attorneys below applied for relief from sanctions in accordance with rules 26.8 and 27.8 of the CPR and the submissions and evidence below were grounded under those rules. These rules related to relief from sanctions. However, the applicable rule in relation to setting aside an order for striking out made in the absence of a party, was not rule 26.8 but rules 27.8 and 39.6.

[30] Counsel submitted that rule 39.6 of the CPR stipulates that the application must be made within 14 days of the service of the order on the absent party; that the application must be supported by affidavit evidence showing good reason for failing to attend the CMC; and the likelihood that some other order would have been made had the appellant attended. She referred the court also to **David Watson v Adolphus Sylvester Roper**, where K Harrison JA outlined the factors the court should consider in dealing with applications under rule 39.6 and stated also that the provisions of the rule must be applied cumulatively.

[31] Counsel conceded that the issue of promptness did not apply, as the appellant had filed the application to set aside the order of E Brown J within the required time as set out in rule 39.6(2). She agreed with the submissions of Mr Wildman on this point, that the application was filed within 14 days of the appellant being served with notice of the taxation proceedings on 22 June 2016, subsequent to the order of E Brown J.

[32] Counsel submitted, however, that K Anderson J considered the applicability of rule 39.6(3), in any event, and concluded that he was not satisfied that a good reason

had been established for failure to attend the hearing. Further, that the learned judge, having considered (i) that the appellant had to prove that she complied cumulatively with the provisions of rule 39.6, and (ii) that her attorney accepted that the notice of adjourned hearing for CMC was served on his office, rightfully concluded that she had failed to prove that she had a good reason in failing to attend the hearing. It is on this basis that he ruled that her application failed.

[33] It was contended that the main consideration in deciding whether to set aside a judgment given in the absence of a party is the reason advanced for the said absence and the appellant must establish that she had a good reason for her absence; that in the circumstances, she had failed to so prove, as the explanation of administrative failings in her attorney's firm was not sufficient. In that regard, counsel referred the court to paragraph [15] of **Joscelyn Massop v Temar Morrison (by his mother and next friend Audrey White)** [2012] JMCA Civ 56, which quoted the dictum of Langrin JA in **Thelma Edwards v Robinson's Car Mart Ltd and Another** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 81/2000, judgment delivered 19 March 2001.

[34] She stated that, in reviewing this matter, the court ought to look at the entire conduct of the appellant and why she was not present at the CMC, as well as any prejudice that may be suffered by the respondents. Counsel contended, therefore, that the appellant has not shown good reason, as the administrative failing in her attorney's

firm is not sufficient. Counsel also referred the court to paragraph [23] of **The Attorney General v Universal Projects Limited** in support of this contention.

[35] In essence, it was counsel's contention that the reason advanced by the appellant did not amount to excusable oversight but administrative inefficiency and that this does not amount to a good explanation. She submitted that the court is now taking a stricter approach where rules of the court have been breached and that it is only in the rarest of cases that the fault of the attorney will be taken to be a good excuse. Counsel referred to the judgment of this court in **The Commissioner of Lands v Homeway Foods Limited and anor** [2016] JMCA Civ 21. She submitted that, while the reason advanced for the appellant's failure is a good explanation, it is certainly not a good reason.

[36] Like Mr Jarrett, counsel submitted that there must be a holistic consideration of all the circumstances of the case, including the missteps of the appellant. She, similarly, contended that the history of the matter was riddled with mishaps, missteps and delays on the part of the appellant; that the failings of the appellant's attorneys at law must be attributable to her because of the prejudice suffered from her inaction; and that it was her duty to advance her claim and she should have made the necessary checks on the progress of the matter. She submitted, therefore, that the appeal should be dismissed as K Anderson J's decision that rule 39.6 was not satisfied could not be faulted.

Issue 3 (ground v)

[37] Counsel conceded that if the appellant had been present, a different order would have been made as E Brown J would have been making orders relevant to a case management conference and that the merits of the actual claim itself would not have been relevant at that point.

Analysis and determination

[38] The ultimate issue for this court was whether K Anderson J properly exercised his discretion in refusing to set aside the orders of E Brown J made on 6 May 2016 (as set out in ground ii). Accordingly, the principles from **Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042 were applicable, insofar that this court, being one of appellate jurisdiction, must defer to the learned judge's exercise of his discretion and must not interfere with it merely on the basis that the members of this court would have exercised the discretion differently (see the dictum of Lord Diplock at page 1046). Further, this court will only interfere in the following well-recognised circumstances, namely, the discretion was exercised based on a misunderstanding of the law or facts which can be shown to be demonstrably wrong; or where the decision was so aberrant that no judge, regardful of his duty to act judicially could have reached it (see also the dictum of Morrison JA (as he then was) at paragraphs [19] and [20] of **the Attorney General of Jamaica v John Mackay**).

[39] The principles applicable to the appropriateness of interfering with the exercise of a judge's discretion were also well stated by Phillips JA in **Consetta Edwards et al v Joan May Black Valentine et al** [2012] JMCA Civ 61:

> "[39] The law with regard to the review by this court of the exercise of the discretion of the judge at first instance has been settled for some time. In **Re Jokai Tea Holdings Ltd** [1993] 1 All ER 630 at p. 635, the English Court of Appeal set out the law in this way:
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> > 'It is common ground that the judge was right in treating the matter as being within his discretion. As Mr Chadwick QC, for the bank, has rightly stressed, it follows that this court has no right to intervene and substitute its own decision unless in some way the judge misdirected himself with regard to the principles to be applied or, in exercising his discretion has taken into account matters which he ought not to have done or has failed to take into account matters which he ought to have done, or if the decision of the judge is plainly wrong. Therefore the first, and basic, question is whether the judge erred in one or other of those ways in exercising his discretion.'
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> Cooke JA stated specifically in **RBTT Bank Jamaica Limited v YP Seaton and Others** SCCA No 107/2007 delivered 19 December 2008, that he accepted that formulation as correct, and this court has repeatedly endorsed that approach.
>
> It is clear therefore that this court will only interfere with the exercise of the decision of the judge sitting in the court below, if he has not considered relevant material or has considered irrelevant material, or has failed to apply the correct principles, or his decision was just plainly wrong."

Issues 1 and 2 (grounds i, iii and vi)

General principles

[40] As Mr Wildman submitted, the applicable rules of the CPR were rules 27.8 and 39.6. Therefore, counsel who appeared for the appellant below, before K Anderson J, erred in relying on rule 26.8 (which pertains to relief from sanctions).

[41] Rule 27.8, which appears under the heading "[a]ttendance at case management conference or pre-trial review", reads as follows:

> "27.8 (1) Where a party is represented by an attorney-at-law, that attorney-at-law or another attorney-at-law who is fully authorised to negotiate on behalf of the client and competent to deal with the case **must** attend the case management conference and any pre-trial review.
>
> (2) The general rule is that the party or a person who is in a position to represent the interests of the party (other than the attorney-at-law) **must** attend the case management conference.
>
> (3) However the court may dispense with the attendance of a party or representative.
>
> (4) Where the case management conference or pre-trial review is not attended by the attorney-at-law and the party or a representative the court may adjourn the case management conference or pre-trial review to a fixed date and may exercise any of its powers under Part 26 (Case management - the court's powers) or Part 64 (Costs).
>
> **(5) Provided that the court is satisfied that notice of the hearing has been served on the absent party or parties in accordance with these Rules, then**
>
> > **(a) if the claimant does not attend, the court may strike out the claim; and**
> >
> > (b) if any defendant does not attend, the court may enter judgment against that defendant in default of such attendance.
>
> **(6) The provisions of rule 39.6 (application to set aside judgment given in party's absence) apply to an order made under paragraph (5) as they do to failure to attend a trial.**" (Emphasis supplied)

[42] Rule 39.6, which is headed "[a]pplication to set aside judgment given in party's absence", provides:

> "39.6 (1) A party who was not present at a trial at which judgment was given or an order made in its absence may apply to set aside that judgment or order.
>
> (2) The application must be made within 14 days after the date on which the judgment or order was served on the applicant.
>
> (3) The application to set aside the judgment or order must be supported by evidence on affidavit showing -
>
> > (a) a good reason for failing to attend the hearing; and
> >
> > (b) that it is likely that had the applicant attended some other judgment or order might have been given or made."

[43] Rule 27.8(1) of the CPR requires that counsel should be present at a CMC. The general rule is also that the parties themselves or someone who can represent their interests should be present (rule 27.8(2)). The judge can, however, dispense with this requirement for the party to be present (rule 27.8(3)). In this case, both counsel and the appellant were absent at the CMC hearing on 6 May 2016. E Brown J had various options open to him, which were adjourning the CMC and exercising powers under parts 26 and 64 of the CPR, including the making of unless orders as well as costs orders (rule 27.8(4)), or striking out the statement of case as he actually did (rule 27.8(5)).

[44] The case of **David Watson v Adolphus Sylvester Roper** was relevant insofar that the applicable principles, when seeking to set aside a striking out order of a similar nature, were considered. It should be noted that rule 27.8(5) prescribes slightly different sanctions for claimants and defendants who fail to attend. In the case of a

claimant, the court may strike out their claim. This is precisely what obtained in the case at bar. In the case of a defendant, the court may enter judgment against that defendant, as was the case in **David Watson** (where a defendant failed to appear at the trial). What is clear is that rule 27.8(6) makes rule 39.6 applicable to "an order made under rule 27.8(5)" and as such, there can be no doubt the principles espoused in **David Watson** are equally applicable to a claimant who fails to attend a CMC.

[45] In **David Watson**, K Harrison JA held that the provisions of rule 39.6 are to be established cumulatively and that the predominant consideration for the court in setting aside a judgment given after a trial, in the absence of the applicant (defendant), is not whether there is a defence on the merits but the reason why the applicant (defendant) had absented himself from the trial. K Harrison JA stated (at page 8):

> "The predominant consideration therefore for the court in setting aside a judgment given after a trial in the absence of the applicant, is not whether there is a defence on the merits but the reason why the applicant had absented himself from the trial. If the absence was deliberate and not due to an accident or mistake, the court would be unlikely to allow a rehearing. Other relevant considerations include the prospects of success of the applicant in a retrial; the delay in applying to set aside; the conduct of the applicant; whether the successful party would be prejudiced by the judgment being set aside; and the public interest in there being an end to litigation. The court has approved these principles, and have applied them, from time to time – See **Thelma Edwards v Robinson's Car Mart and Lorenzo Archer** SCCA 81/00 (unreported) delivered 19th March 2001.
>
> Rule 39.6 therefore gives the absent party the opportunity of explaining why he did not attend and that he has a reasonable prospect of success. It also gives the party in whose favour the judgment was given, the chance of not having to prove his case all over again...if a court is satisfied

> that there is in truth no reasonable prospect that the judgment would be reversed.
>
> The conditions of rule 39.6 are similar to those enunciated in the case of **Shocked v Goldschmidt** [1998] 1 All ER 372 but under the CPR they are cumulative. There is no residual discretion therefore, in the trial judge, to set aside the judgment, if any of the conditions is not satisfied: **Barclays Bank plc v Ellis** (2000) The Times, 24 October 200."

[46] Ultimately, the decision of Mangatal J in **David Watson** dismissing the application to set aside a final judgment entered against the applicant (defendant) who failed to attend the trial was upheld. In concluding, K Harrison JA stated even more clearly (at page 14):

> "The appellant failed in my view, to satisfy the conditions set out in Rule 39.6 (3.) (a) and (b). I have said earlier in this judgment that the conditions in this rule are cumulative. The learned judge had no residual discretionary powers to come to the appellant's aid if he succeeds with respect to one of the conditions. The appellant is required to satisfy all of the conditions set out in Rule 39.6 (2) and (3). In my opinion, the learned judge correctly exercised her discretion in refusing to set aside the judgment. Not only did she consider the likelihood of a defence succeeding but she had also given proper consideration and due weight to the relevant principle why he had absented himself at the trial."

Was the application to set aside made promptly?

[47] In relation to the issue of the length of delay in the application to set aside, it is clear, although disputed by counsel for the PPC, that it was filed within the 14-day timeline required by rule 39.6(2). Counsel for the appellant received notification of the orders of E Brown J on 22 June 2016, when notice of the taxation proceedings was

served on him. He, thereafter, filed the application to set aside the orders of E Brown J on 6 July 2016. This issue had been properly conceded by counsel, Ms Hall.

Did the appellant provide a good reason?

[48] The major issue in controversy relates to whether the appellant provided a good reason for failing to attend the CMC. Although the full consideration of rule 39.6 of the CPR was not the basis of the emphasis before K Anderson J, in considering an application for relief from sanctions, in any event, he would have presumably considered whether there was "a good explanation for the failure" pursuant to rule 26.8(2)(b). In that regard, pertinent evidence would have been contained in the affidavit of Mr Dale, dated 6 July 2016, which was before the learned judge for his consideration in the overall exercise of his discretion.

[49] The evidence before K Anderson J, as contained in that affidavit, revealed that, despite being duly served, the appellant and her attorneys-at-law did not attend the CMC hearing before E Brown J on 6 May 2016, because of a breakdown in communication in Mr Dale's office. Such an explanation or reason may very well fall into the category of excusable oversight, inexcusable oversight or administrative inefficiency depending on a particular set of circumstances (see **Universal Projects Limited**). In the affidavits of the appellant filed before this court, presumably on 12 October 2018 (the stamp of this court was not clearly impressed) and 30 April 2018, she reiterated these reasons given by Mr Dale. The precise reason being that the secretary, who had been employed to Mr Dale's office, had received notice of this adjourned hearing, however, she failed to bring it to Mr Dale's attention and, subsequently, quit her

employment at the firm. What is readily apparent, is that the appellant's absence from the CMC hearing was as a direct result of the default of her counsel. According to both Mr Jarrett and Ms Hall, this cannot be considered to be a good reason.

[50] In relation to the first CMC hearing on 29 January 2016, Mr Dale (who incorrectly stated in his affidavit, filed 6 July 2016, that this took place on 8 June 2015) stated that he had not been notified by the court of that date. This cannot be disputed, as the notification made by Lindo J on the minute of order, dated 29 January 2016, indicated that there was "no proof of service" on the appellant. It is likely that what was meant was that Lindo J was not satisfied the appellant was properly notified of the CMC date by the Supreme Court Registry (per rule 27.3(6)). Mr Jarrett's submission, therefore, that the appellant failed to claim that she was not served in relation to the first CMC hearing, was without merit, as her abovementioned affidavits stated that she was not notified by the court in relation to that date (see also the relevant portions which were set out at paragraph [15] herein).

[51] Ms Hall referred the court to **Universal Projects Limited**, where the Board had to review the decision of the courts below in relation to whether there was no good explanation within the meaning of rule 26.7(3)(b) of the Civil Procedure Rules for Trinidad and Tobago (which deals with applications for relief from sanctions) for the failure to file and serve a defence. Lord Dyson, who delivered the judgment of the Board stated, at paragraph 23, that if the explanation for the breach connoted real or

substantial fault on the part of the defendant, then there was no good explanation for the breach:

> "…To describe a good explanation as one which 'properly' explains how the breach came about simply begs the question of what is a 'proper' explanation. Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly if the explanation for the breach is administrative inefficiency."

[52] Fraser JA (Ag) as he then was, who wrote the main judgment in the application by the appellant for extension of time to file this appeal (see **Alice McPherson v Portland Parish Council et al** [2019] JMCA App 20) approached the concept of a good reason, as required in rule 39.6(3)(a) of the CPR, at paragraph [47] of that judgment as follows:

> "The approach to the understanding of what is a 'good explanation' for the purposes of the rule that deals with relief from sanctions is clearly transferable to the concept of a "good reason", in the context of explaining absence from a hearing, which led to an adverse order being made against the absent party."

I have adopted his reasoning in that regard.

[53] I also agree with his assessment, at paragraph [48] of the same judgment, where it was stated:

> "…A 'proper' or 'good' explanation or reason must be one which not only adequately reveals why the default occurred, it must also show that the default is excusable in the circumstances. Put another way, an explanation or reason may comprehensively outline what caused a particular failing, but to be 'good', it also has to have the additional

> quality of justifying the relief, forbearance or favourable exercise of discretion sought."

[54] In **Joscelyn Massop** at paragraph [15], it was stated:

> "… If the absence was deliberate and not due to accident or mistake, the court would be unlikely to allow a rehearing."

[55] In assessing whether a reason could be deemed to be good, therefore, it is expected that proper consideration and due weight would be given as to why the appellant and her counsel were absent from the CMC.

[56] In relation to the issue of a stricter approach by the court to compliance with the rules, Ms Hall is correct. While acknowledging this principle of a stricter approach, McDonald-Bishop JA at paragraphs [49] and [50] of the judgment in **Homeway Foods Ltd**, stated, however, that the authorities made it clear that the draconian or extreme measure of striking out should be regarded as a sanction of last resort. This underlying or foundational principle should still form a part of the rubric of the court's assessment in applications, where the ultimate sanction of striking out is being considered or has been imposed.

[57] It is acknowledged that the circumstances in **Homeway Foods Limited** were different from the instant case. In that case, the appellant was seeking an extension of time to file documents under rule 1.7(2)(b) of the CAR, and the respondents were seeking to have the appeal struck out. McDonald-Bishop JA considered some guiding principles relevant to the appropriateness of striking out cases. It is expedient to set out paragraphs [51] and [52] of her judgment in that regard:

"[51] In **Barbados Rediffusion Service Ltd v Asha Mirchandani and Others (No 2)** (2006) 69 WIR 52, the question of the appropriateness of the sanction of striking out was also thoroughly and usefully examined by the Caribbean Court of Justice (the CCJ) within the context of an unless order and by reference to some relevant authorities. Some salient principles arising from that decision have been distilled as providing useful guidance on the subject. It is duly accepted, as their Lordships have postulated, at paragraph [40], that the approach of the court, in determining whether to strike out a party's case, must be holistic and so a balancing exercise is necessary to ensure that proportionality is maintained and that the punishment fits the crime. According to their Lordships, at paragraph [44], the discretion of the court is wide and flexible to be exercised as 'justice requires' and so it is impossible to anticipate in advance, and it would be impractical to list, all the facts and circumstances which point the way to what justice requires in a particular case.

[52] Some of the pertinent considerations that have been enunciated by the CCJ, at paragraphs [45] to [47], have been distilled and set out in point form below, simply for ease of reference rather than on account of any rejection of their Lordships' formulation.

(i) Strike out orders should be made either when that is necessary in order to achieve fairness or when it is necessary in order to maintain respect for the authority of the court's orders. In this context, fairness means fairness not only to the non-offending party but also to other litigants who are competing for the finite resources of the court.

(ii) If there is a real risk that a fair trial may not be possible as a result of one party's failure to comply with an order of the court, that is a situation which calls for an order striking out that party's case and giving judgment against him.

(iii) The fact that a fair trial is still possible does not preclude a court from making a strike out order. Defiant and persistent refusal to comply with an order of the court can justify the making of a strike out order. While the general purpose of the order in such

circumstances may be described as punitive, it is to be seen not as retribution for some offence given to the court but as a necessary and, to some extent, a symbolic response to a challenge to the court's authority, in circumstances in which failure to make such a response might encourage others to disobey court orders and tend to undermine the rule of law. This is any type of disobedience that may properly be categorized as contumelious or contumacious.

(iv) It must be recognised that even within the range of conduct that may be described as contumelious, there are different degrees of defiance, which cannot be assessed without examining the reason for the noncompliance.

(v) The previous conduct of the defaulting party will obviously be relevant, especially if it discloses a pattern of defiance.

(vi) It is also relevant whether the non-compliance with the order was partial or total.

(vii) Normally, it will not assist the party in default to show that non-compliance was due to the fault of the lawyer since the consequences of the lawyer's acts or omissions are, as a rule, visited on his client. There may be an exception made, however, when the other party has suffered no prejudice as a result of the noncompliance.

(viii) Other factors, which have been held to be relevant, include such matters as (a) whether the party at fault is suing or being sued in a representative capacity; and (b) whether having regard to the nature of the relief sought or to the issues raised on the pleadings, a default judgment can be regarded as a satisfactory and final resolution of the matters in dispute.

(ix) Regard may be had to the impact of the judgment not only on the party in default, but on other persons who may be affected by it."

[58] Also at paragraph [53], McDonald-Bishop JA observed that there would necessarily be a stricter approach as to timelines, where the breaches occur at the appellate level. She stated, "…the approach to the question whether an appeal should be dismissed or struck out for non-compliance with the rules and orders of the court or whether an extension of time should be granted for compliance is **a bit different from that which applies to cases at first instance**" (emphasis supplied).

[59] Having referred to the guidelines distilled by McDonald-Bishop JA relevant to striking out, it is perhaps important to observe that the order that was reviewed by this court was not E Brown J's order to strike out the appellant's claim, rather the order of K Anderson J, refusing to set aside that order and have the ultimate sanction remain.

[60] Turning now to the relevant issues that would have been before K Anderson J for his consideration, it was acknowledged that the explanation given by Mr Dale for his absence on 6 May 2016 could reasonably be described as administrative inefficiency. This is typically not regarded as a good reason for failing to be present. However, the quality of the reason, whether it can be deemed in the final analysis to be good or not, fell to be weighed in the context of all the circumstances that would have been before the learned judge. The challenge which was faced, was that, in the absence of written reasons for judgment, it was difficult to appreciate how the learned judge assessed the particular set of circumstances before exercising his discretion. This was further compounded by the fact that the application made before him was wrongly premised by the appellant's counsel below, as an application for relief from sanctions.

[61] It appeared that the learned judge made the bald finding that the reason given was one of administrative inefficiency and as such rejected it as not being a good reason. Unfortunately, there is nothing to suggest that a holistic approach was utilized by the learned judge in the actual exercise of his discretion. The circumstances surrounding the particular infraction or breach ought to have been given due weight during the assessment exercise in order that proportionality be maintained.

[62] The case at bar bore some unique features which have to be considered. The appellant found herself in a most unfortunate position where her reason for failing to attend the CMC was clearly not due to her own actions or omissions but rather the default of her counsel. This, of course, does not necessarily produce a favourable outcome in these types of applications.

[63] I would adopt the words of Foster-Pusey JA in **Norda Williams v CMK Bakery Limted** [2020] JMCA Civ 26:

> "[67] … Each matter in which there is reliance of the default of counsel, in proof that a litigant had a good explanation for the breach of a court order, must be viewed in its own particular circumstances. This is a matter in which I would adopt the statement of Phillips JA in **Jamaica International Insurance Company Limited v The Administrator General for Jamaica** [2013] JMCA App 2, where she said in part at paragraph [36], dealing with the delay of proceedings due to an attorney-at-law's default: 'this was not a matter of mistake of the law or a misunderstanding of the rules but a careless approach to one's professional obligation.' Likewise, in this case, the appellant's attorney-at-law had a duty to deal with the matter in a vigilant and diligent manner."

[64] Although Foster-Pusey JA specifically referred to instances of breaches of court orders, I am of the view that the reasoning is equally apt to situations where the rules of court have been breached. I, too, found the words of Phillips JA to be applicable to the conduct of the appellant's counsel.

[65] One would expect that counsel, who is retained in litigation matters, would have made inquiries with the registry, as well as checked with the court lists from time to time, concerning the date for CMC hearing. However, it was indisputable, that the absence from the second CMC hearing would have been the first culpable breach committed by the appellant and her counsel. There was no disclosed pattern of defiance or composite breaches.

[66] It should have been given some weight also that the breach occurred at an early stage, namely, the CMC and not at the time of a trial as in **David Watson**. Further, there was no evidence of prejudice visited upon the respondents, which could not have been cured by an order for costs, including, where appropriate, an order for wasted costs. There was, also, no suggestion that a real risk existed that a fair trial would not have been possible.

[67] These are circumstances where the observation of Lord Denning MR in **Salter Rex & Co**, that the court never likes a litigant to suffer by the mistake of his lawyers, could bring balance to the outcome of such an application. If the entirety of the circumstances were properly considered, the reason given especially by the appellant, while not overwhelming, did cry out for the forbearance or the favourable discretion of

the learned judge. No justifiable purpose could be served by putting the "axe to the root" of the claim in light of all the circumstances (see also the dictum of Phillips JA at paragraph [16] of **Sandra Durrant v Jacqueline Kemp** [2018] JMCA Civ 36).

[68] In **Homeway Foods Limited**, the appellant had committed two sets of breaches relative to the appeal, although they had been given time to rectify the first breach. In considering the explanation given for the delay, McDonald-Bishop JA stated that the explanation of inadequate staffing and a voluminous workload really amounted to administrative inefficiency as expressed by Lord Dyson in **Universal Projects Limited**. The issue in **Homeway Foods Limited**, however, was compounded by the continuing or composite breach of the rules and orders of the court at the appellate level. At paragraph [76], McDonald-Bishop JA concluded, therefore, that the administrative inefficiency was not a good excuse **when all the circumstances were considered**. The explanation was, therefore, rejected as constituting a good and acceptable reason.

[69] In the round, in the case at bar, there was no visible demonstration that all these circumstances, as set out above, were properly weighed by K Anderson J, in order to arrive at the conclusion that he did.

[70] While the reason provided by the appellant may appear to be attributable to administrative inefficiency on the part of her attorney at law, the circumstances were such that the appellant herself was not advised of the CMC date by her attorney-at-law to whom notice was sent (albeit that he said it was not brought to his attention by his

secretary). She would have had no knowledge of the court fixture and of the particular requirement for her to attend the case management conference with her legal representative. When that was coupled with the absence of prejudice to the respondents, it was necessary to have regard to the principles enunciated in **Salter Rex & Co** together with the overriding objective. This was one of those rare cases that the fault of the attorney could be taken to be a good excuse in respect of the appellant's failure to attend the CMC. With this in mind, it was determined that the circumstances were such that a good reason had been established by the appellant for her failure to attend the CMC. It was for these reasons that I, therefore, concluded that the submissions of Mr Wildman had merit in relation to grounds i, ii, iii and vi.

Issue 3 (ground v)

[71] While the prospect of success may be relevant to a consideration of rule 39.6(3)(b), its significance as a determining factor depends on the nature and stage of the proceedings at which the order is made. As far as this case is concerned, the issue is whether at the CMC, if the appellant and counsel were present, a different order would have been made.

[72] Ms Hall conceded that there is no issue that the appellant would succeed on this point, as the CMC order would have been made and the claim would not have been struck out. The issue for consideration before K Anderson J would not have been on the merits of the claim.

[73] Mr Jarrett, on the other hand, submitted that he was making no concessions on this issue, as the PPC had proposed to make an application for the case to be struck out against it. It was his view that there was no prospect of success in relation to the PPC. However, it is apparent that no such application had been made and even if there had been such an application, no hindsight can be applied to determine whether it would have been heard on the date of the CMC hearing before E Brown J, neither was there any evidence that it was raised as an issue before K Anderson J for his consideration.

[74] In any event, the issue as to whether the PPC could ultimately be held liable at all would have to be determined subsequent to any case management conference, after orders for disclosure and, possibly, witness statements had been filed. At paragraph 2 of the defence of the Attorney-General, filed on 10 October 2012, the Attorney-General denied that any representatives of the NWA "illegally entered the appellant's land and made several incisions". By contrast, the defence of the PPC was to the effect that the NWA is responsible for the drains that were made on the appellant's property.

[75] So on this basis, it was easily established that a different order would have been made if, the appellant and/or her attorney-at-law were present at the CMC before E Brown J on 6 May 2016. I found therefore that ground v also had merit.

Conclusion

[76] It seemed to me, therefore, that a proper and holistic consideration of the particular circumstances of the case at bar, together with the general requirement to

give effect to the overriding objective when exercising powers under the CPR (rule 1.2), should have resulted in the setting aside of the order of E Brown J.

[77] This determination is not to be taken as trivialising the importance of adherence to the CPR, and in particular the requirement for attendance at CMC, which has been described as "the single most important event in the court's active management of each case" (per Lord Briggs in **Super Industrial Services Ltd and another v National Gas Company of Trinidad and Tobago Ltd** [2018] UKPC 17, in the context of the Trinidadian CPR). It bears repeating, that the case at bar fell to be determined on its own particular factual circumstances. It is for these reasons that I agreed that the orders set out at paragraph [3] should be made.