[2020] JMCA Civ 7

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 25/2018

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA

BETWEEN	**JEFFREY WILLIAM MEEKS**	**APPELLANT**
AND	**VICTORIA MARIE MEEKS**	**RESPONDENT**

Written submissions filed by Chambers, Bunny and Steer for the appellant

Written submissions filed by Collielaw for the respondent

6 March 2020

PROCEDURAL APPEAL

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

BROOKS JA

[1] I have read, in draft, the judgment of my learned brother F Williams JA. I agree with his reasoning and conclusions and I have nothing further to add.

F WILLIAMS JA

[2] The appellant, by notice of appeal filed on 8 March 2018, (with amended notice filed on 15 May 2018) appeals against the orders of K Anderson J ("the judge"), dated 2 March 2018. By those orders, the judge had, *inter alia*, refused the appellant's application for relief from the sanction of the striking out of his statement of case. That sanction had been imposed consequent upon the appellant's failure to comply with an unless order made by Palmer-Hamilton J. The judge had also vacated the trial dates that had been set, granted the appellant leave to appeal and stayed the judgment.

Background

[3] The appellant and respondent to this appeal are husband and wife respectively. They will be referred to as "husband" and "wife" throughout the remainder of this judgment for ease of reference. On 13 June 2016, the wife filed a fixed date claim form ("FDCF", bearing claim number 2016 HCV 02428) seeking against the husband, orders for division of property, custody and maintenance pursuant to the Matrimonial Causes Act ("MCA") and the Property (Rights of Spouses) Act ("PROSA"). She also exhibited to her affidavit a copy of a petition, filed on 6 October 2011, in claim number 2011M02476, for the dissolution of her marriage to her husband. The husband filed an acknowledgment of service on 4 July 2016 and an affidavit in response on 5 October 2016.

[4] On 19 July 2016, at the first hearing of the FDCF, Laing J ordered that, on or before 26 August 2016, both parties were to make standard disclosure of properties that they owned. He also set trial dates in the matter of 26 and 27 April 2017 and gave permission for affidavits to be filed.

[5] On the said date, (that is, 19 July 2016) the wife filed a notice of application, in which she sought from the husband interim child and spousal maintenance. That application was heard on 16 November 2016 by Jackson-Haisley J (Ag) (as she then was). At that hearing, counsel for the husband raised a preliminary objection to the court's jurisdiction to hear the application. On 5 December 2016, Jackson-Haisley J (Ag) ruled that the wife was not precluded from making an application for interim maintenance pursuant to the MCA, where the claim was initiated by a FDCF and ordered the husband to pay certain sums for child maintenance. She thereafter adjourned the other issues in the application to be determined on 21 February 2017.

[6] From the record of appeal, it is observed that while the application referred to above (for interim maintenance) was filed on 19 July 2016, an identical application was also filed on 18 November 2016. However, the later application filed on 18 November 2016, bears the number assigned to the divorce petition (that is, 2011M02476). Additionally, while the court's minute of order and the written judgment addressing the application for interim maintenance note the relevant notice of application as being that filed on 19 July 2016, the corresponding formal order refers to the notice of application filed on 18 November 2016.

[7] On 5 December 2016, the wife filed an application to strike out the husband's statement of case on the basis that he had failed to disclose a particular piece of property in breach of Laing J's order for standard disclosure. As an alternative to striking out, the wife sought an order to have the husband provide specific disclosure of certain financial documents relating to Jeffrey Meeks Limited and Ozback Holdings Limited.

[8] On 21 February 2017, Palmer-Hamilton J (Ag) (as she then was) heard the application to strike out and on 2 March 2017, ordered, *inter alia,* as follows:

> "Specific Disclosure of the audited accounts for the last five (5) years to 2016, accounting books, records and financial statements for the same period of Jeffrey Meeks Limited is to be made. Unless the defendant specifically discloses these documents by **Monday, March 20, 2017**, his statement of case will be struck out and judgment will be entered for the Petitioner/Claimant." (Emphasis as in original formal order filed 6 March 2017)

[9] Palmer-Hamilton J (Ag) also ordered that certain references in the husband's affidavit filed on 5 October 2016 be deleted pursuant to rule 30.3(3) of the Civil Procedure Rules ("the CPR") and that the husband was to file and serve a supplemental affidavit reflecting those changes on or before 20 March 2017. Those were the orders imposing the sanction that is central to this appeal.

[10] The matter later came up for trial in chambers before Simmons J on 26 April 2017. At that time, the wife made an application (notice of which was filed on the said date), to strike out the husband's statement of case for his failure to comply with the unless order of Palmer-Hamilton J (Ag) to make specific disclosure and also for his failure to remove the afore-mentioned references from the affidavit. In the affidavit in support, filed on 26 April 2017, the wife deposed that, while the husband had filed a list of documents on 20 March 2017, he had failed to disclose the audited books and records or the accounts for 2016. Simmons J ordered, with the husband's consent and undertaking, that he should pay specified sums in child maintenance and also that:

> "6. Accounting records to be made available to the Claimant this afternoon on or before 3:30pm."

She also adjourned the matter for trial in chambers on 17 and 18 July 2018 and set the husband's application for relief from sanction (filed on 27 April 2017) with affidavit in support to be heard on 17 January 2018 by Anderson J.

[11] On 27 July 2017, the wife re-filed her application to strike out the husband's statement of case. However, the judge in his written judgment noted that it was unnecessary to consider that application.

The evidence before the judge

[12] The judge had before him the following evidence given in the husband's affidavit:

> "4. On the making of the order I dutifully attended on my accountants with a copy of the said order. I was provided with the audited accounts for the last five years. That I believed that the audited accounts were sufficient to provide the financial statements for Jeffrey Meeks Limited. Also I am not aware of the company keeping physical accounting books, records and financial statements. What the company uses is a software system on which data is stored.
>
> 5. That I misunderstood the order. I was not aware that the audited accounts for the last five years were insufficient. I dutifully caused a Further List of Document to be filed on the 20th of March 2017 containing the said audited financials. That had I known that my duty to disclose entailed the software system I would have dutifully complied in the same manner that I did with the audited financials.
>
> 6. That at no time did I intend to disobey the order. **When I was alerted on the <u>26th of March 2017</u> that I had not fully complied with the order**…I immediately contacted the accountants…I pointed out that the order

asked for Books, records and financial statements. I was advised that the information on the software was available. I ascertained the time that the information could have been made available to the Court and went to retrieve the data. The data was downloaded on three thumb drives…

7. I then quickly took the thumb drives to the office of my Attorney-at-Law who had been waiting to receive the thumb drives. I told my Attorney that I had checked each of the thumb drives twice. That I do verily believe that my Attorney quickly took the thumb drive to the office of Hussey and Collie before 3:30 p.m. when it was to be delivered by order of the Honourable Ms. Justice Simmons made on the 27th day of April 2017.

8. …that when one thumb drive was delivered to the chambers of Hussey and Collie the document did not open…

9. I then caused an email to be sent containing the ledgers extracted and in Excel. That this email was sent before the 3:30 pm timeline in compliance with the order of the Honourable Judge.

10. That I have generally complied with all other rules and directions save and except an oversight in refiling the affidavit of Jeffery Williams Meeks in Response to Affidavit of Victoria Marie Meeks on the 20th of March 2017, where in paragraph 42 the term 'open cohabitation with her common law spouse' was to be deleted and be replaced by 'with a committed partner'. While the term 'with a committed partner' was added by pure inadvertence the line to be deleted remained.

11. That based on the fact that the failure to comply was not intentional, that I have given a good explanation for the failure to comply and that I have generally complied with all relevant rules, practice directions, orders and directions and remedied the breach, I ask that this court grants the relief sought." (Emphasis supplied)

Findings of the judge

[13] The judge, in his deliberation on the matter, found that the husband was in breach of the unless order of Palmer-Hamilton J and that the sanction of striking out had taken automatic effect on 21 March 2017. The judge found that the actions of the husband had amounted to making the required information (that is, accounting books and records in digital form) accessible as distinct from providing specific disclosure in accordance with rule 28.8 of the CPR. The judge, in exercising his discretion, considered that rules 26.8(1) and (2) of the CPR stipulated pre-requisite conditions which had to be satisfied by a party seeking relief from sanction before the court could proceed to consider rule 26.8(3) of the CPR.

[14] The judge accepted that the husband had satisfied the requirement for his application to be supported by affidavit evidence, as required by rule 26.8(1). However, in relation to rule 26.8(2), the judge opined that the determination of whether an application had been filed promptly was not a purely arithmetical exercise, and found that, in the instant case, the husband had not explained the delay in making the application or explained why the application for relief had not been filed earlier. That finding led the judge to conclude that it would appear that the application was not filed promptly. While noting that the failure to meet that condition would sufficiently dispose of the application, he nonetheless proceeded to consider the other conditions stipulated by rule 26.8.

[15] The judge found that, in view of the husband's actions taken in an effort to comply, the failure to comply was not intentional. In relation to whether there was a good

explanation for the failure to comply with the court order, the judge found that the husband had not accepted the fact of his non-compliance but had instead asserted that he had sought to provide the information in a timely manner. The judge found that, from the evidence provided, he could glean no explanation for the husband's failure to comply.

[16] The judge found that, as the husband had failed to satisfy all the prerequisite conditions of rule 26.8(1) and (2) of the CPR, he need not consider rule 26.8(3). Consequently, he dismissed the application and made the orders stated at paragraph [2] herein.

The grounds of appeal

[17] The husband, being dissatisfied with this outcome, and having obtained permission to appeal, filed nine grounds of appeal. They were framed in the following manner:

> "(a) The Learned judge erred in Law when he ruled that Rule 26.8 had not been complied with.
>
> (b) The Learned judge did not take into consideration that the *Unless Order* had been varied the 24th day of April 2017 by the Honourable Miss Justice Nicole Simmonds [sic] in respect of the disclosure of accounting books, records of Jeffery Meeks Limited.
>
> (c) The Unless Order was made in respect of an application for interim orders for spousal and child maintenance in respect of Notice of Application for Court Orders filed on the 19th day of July 2016 in Claim No. 2016HCV02428 and 18th November 2016 in Claim No. 2011M02476.
>
> (d) No claim was made under the Property (Rights of Spouses) Act 2004 for an interest in Jeffery Meeks Limited. This disclosure order would be irrelevant

under an application under the Property (Rights of Spouses) Act 2004.

(e) The disclosure orders were made to establish the income of the Appellant to enable a Court to assess the Appellant's ability to pay maintenance for child and spousal maintenance.

(f) The Appellant in fact disclosed the accounts as ordered by the Honourable Miss Justice Nicole Simmons by way of a thumb drive.

(g) The Fixed Date Claim Form did not disclose under what Section of the Property (Rights of Spouses) Act 2004 the application was being made. The parties having separated for more than (1) year prior to the filing of the Fixed Date Claim Form the Respondent would require an extension of time and no such application was made.

(h) That the Property (Rights of Spouses) Act 2004 is an Act to make provision for the division of property belonging to spouses and to provide for matters incidental thereto or connected therewith. It would therefore not extend to issues concerning the maintenance of children or issues relating to the custody care and control of children.

(i) The Learned trial judge was in any event wrong to have vacated the trial dates in July 2017 as the Statement of Case of the Husband relating to the application under the Property (Rights of Spouses) Act had not been struck out under the Unless Order."

[18] The husband's written submissions sought to address the grounds of appeal generally under the issues of: (i) the validity and effect of the unless order; and (ii) the learned judge's exercise of discretion pursuant to rule 26.8 of the CPR. In my view, having regard to the grounds listed and the arguments submitted in support thereof, these are the questions which arise for resolution:

(a) Did the judge err in finding that the pre-requisite conditions of rule 26.8 of the CPR had not been satisfied? (Ground (a))

(b) Did the judge err in finding that the husband had not complied with the unless order? (Ground (b))

(c) What was the effect, if any, of the order of Simmons J on the order of Palmer-Hamilton J (Ag)? (Ground (f)).

(d) Is the claim governed by section 13(2) of PROSA; and, if so, what is the effect of the wife's omission to obtain an extension of time to file the claim? (Ground (g))

(e) Did the sanction of the unless order strike out the husband's entire claim and did the judge, wrongly vacate the trial date? (Grounds (c), (d), (e), (h) and (i)).

I will now proceed to discuss each question seriatim.

Question (a): exercise of discretion pursuant to rule 26.8 of CPR

The written submissions

[19] The husband's written submissions on this issue were somewhat difficult to understand and could not be accepted in their entirety, as reference was made to information which was neither before the judge below for his consideration, nor properly before us as evidence to be considered. While that information, if accepted, perhaps might have shed new light on the issue of whether the application was promptly made

as it was, or, as things now stand, that information cannot be considered by us and ought properly to be disregarded.

[20] For the husband, counsel submitted that the application for relief had been made promptly and that the learned judge erred in not so finding. Counsel for the wife, on the other hand, submitted that the application was not filed promptly for the reasons that: (i) it was only made at the prompting of the court when the time originally scheduled for the trial to begin had passed; and (ii) after the wife had filed her application to strike out the husband's statement of case. Counsel also contended that the husband had not generally complied with the orders of the court, which was demonstrated by his: (a) non-compliance with the order to pay child maintenance as ordered by Jackson-Haisley J (Ag) dated 5 December 2016; (b) his failure to file a supplemental affidavit removing certain references pursuant to the order of Palmer-Hamilton J (Ag) dated 2 March 2017; and (c) his failure to disclose his interest in a property as per an order dated 19 July 2016.

<u>Discussion</u>

[21] The consideration of whether the judge properly exercised his discretion pursuant to rule 26.8 of the CPR must be viewed against the backdrop of the well-known admonition of Lord Diplock in **Hadmor Productions Ltd and another v Hamilton and others** [1982] 1 All ER 1042. That admonition is to the effect that the court will not lightly interfere with the exercise of the discretion of a judge below unless such exercise of discretion is shown to be demonstrably wrong or aberrant. Accordingly, for the husband to succeed on this issue, it must be shown that the judge had no proper basis for ruling as he did.

[22] The case of **Morris Astley v The Attorney General of Jamaica and The Board of Management of the Thompson Town High School** [2012] JMCA Civ 64, is among cases from this court that set out how the court below ought to treat with an application for relief from sanction pursuant to rule 26.8. It is therein stated that the court must first consider whether the preconditions of rule 26.8(1) have been met, and, if met, then the court must consider rule 26.8(2). The conditions under rule 26.8(3) thereafter function as general factors to which the court must have regard. Further, any failure to satisfy rule 26.8(2) precludes a consideration of 26.8(3) (see dicta of Phillips JA in **University Hospital Board of Management v Hyacinth Matthews** [2015] JMCA Civ 49, paragraph [36]).

[23] An affidavit having been filed in support of the application, the judge, as expected, found that the application was supported by affidavit evidence (as required by rule 26.8(1)). He then proceeded to consider the issue of promptness. What amounts to promptness is significantly dependent upon the circumstances of the particular case. In **Ray Dawkins v Damion Silvera** [2018] JMCA Civ 25 this court, in discussing some of the possibly relevant matters, opined as follows:

> "[66] If the assessment of whether the application was made promptly should be dependent solely upon the time at which the breach occurred, the respondent's application was made approximately a year after the deadline for compliance and that could be viewed as amounting to inordinate delay. However, the fact that there had been partial compliance and that there was in effect no negative delays to the matter proceeding to trial, were circumstances which ought to be taken into consideration.

> [67] Further, the circumstances under which the breach was brought to the attention of the court at the time of trial ought also to be considered. In the factual circumstances of this case, the reaction of the respondent in applying for relief from sanction can then be regarded as prompt. Thus, in the peculiar circumstances of this matter, the learned judge cannot be faulted for having concluded that the first hurdle to the making of the application had been sufficiently met."

[24] P Williams JA in **Ray Dawkins v Damion Silvera** cited the case of **National Irrigation Commission Ltd v Conrad Gray and Marcia Gray** [2010] JMCA Civ 18 in which K Harrison JA commented on the meaning of the word "promptly":

> "[14] …Promptly is an ordinary English word which we would have thought had a plain and obvious meaning, but if we need to be told a bit more about what it means, we do have the authority of **Regency Rolls Limited v Carnall** [2000] EWCA Civ 379 where Arden L.J. pointed out that the dictionary meaning of 'promptly' was 'with alacrity'. Simon Brown, L.J. said:
>
> > 'I would accordingly construe 'promptly' here to require, not that an applicant has been guilty of no needless delay whatever, but rather that he has acted with all reasonable celerity in the circumstances'."

[25] Similarly, Brooks JA, at paragraph [10] of **HB Ramsay and Associates Limited and others v Jamaica Redevelopment Foundation Inc and another** [2013] JMCA Civ 1, opined that:

> "[10] In my view, if the application has not been made promptly the court may well, in the absence of an application for extension of time, decide that it will not hear the application for relief. I do accept, however, that <u>the word 'promptly', does have some measure of flexibility in its application. Whether something has been promptly done or not, depends on the circumstances of the case'</u>." (Emphasis added)

Brooks JA also made the following comments at paragraph [31] of the said judgment:

> "An applicant who seeks relief from a sanction, imposed by his failure to obey an order of the court, must comply with the provisions of rule 26.8(1) in order to have his application considered. If he fails, for example, to make his application promptly the court need not consider the merits of the application. Promptitude does, however, allow some degree of flexibility and thus, if the court agrees to consider the application, the next hurdle that the applicant has to clear is that he must meet all the requirements set out in rule 26.8 (2). Should he fail to meet those requirements then the court is precluded from granting him relief. There would, therefore, be no need for a court, which finds that the applicant has failed to cross the threshold created by rule 26.8(2), to consider the provisions of rule 26.8(3) in relation to that applicant."

[26] In the court below, the judge in this matter based his consideration of the issues on the husband's affidavit evidence. Having perused that evidence, it is noted that paragraphs 6 through 9 identify the date when the husband became aware of the breach, that is 26 March 2017, and his actions flowing therefrom, in an attempt to rectify the breach up to the point that the application for relief was filed on 27 April 2017. While the husband describes himself as acting with utmost alacrity and expedition to remedy the breach when he became aware of it (that is, trying to comply with the order of Simmons J) no specific time line is given for how long it took for the various activities to be completed. Since there was approximately one month elapsing between the date that the husband stated that he became aware of the breach and the filing of the application, it would appear that there is no sufficient basis to fault the learned judge for finding that there was no explanation for the delay in filing the application or why it was not filed beforehand. Accordingly, the application having failed to pass the requirements of rule

26.8(1), there was no further obligation on the learned judge to have given consideration to rule 26.8(2) and (3) of the CPR.

[27] This question must therefore be resolved in the wife's favour. That would be sufficient to dispose of the appeal; however, consideration will still be given to the other questions that have arisen.

Question (b): compliance with the unless order

The written submissions

[28] For the husband, counsel argued that, although the required information from the accounting "software" had not been specifically disclosed, that factor would not have resulted in a breach of the unless order, as the audited financial statements for the years ending 2011 to 2015 that were disclosed, included data from the accounting software. In that regard, counsel submitted, there would have been no breach of the unless order.

[29] For the wife, it was submitted that there was a breach of the unless order which had resulted in the imposition of the sanction that took automatic effect upon the occurrence of the breach.

Discussion

[30] The order made by Palmer-Hamilton J (Ag) required the husband to specifically disclose "audited accounts, accounting books, records and financial statements" for the last five years up to 2016. In examining whether a breach of the unless order had in fact occurred, the learned judge analysed the conduct of the husband as disclosed in his

affidavit, against the stipulated procedure for specific disclosure contained in rules 28.6(1), 28.8(1) to (5) and 28.12 of the CPR. This is how those rules read:

[31] Rule 28.6(1) of the CPR provides that:

> "An order for specific disclosure is an order that a party must do one or more of the following things-
>
> (a) disclose documents or classes of documents specified in the order; or
>
> (b) carry out a search for documents to the extent stated in the order and disclose any documents located as a result of that search."

Rule 28.8 contains the following provisions:

> "(1) Paragraphs (2) to (5) set out the procedure for disclosure.
>
> (2) Each party must make, and serve on every other party, a list of documents in form 12.
>
> (3) The list must identify the documents or categories of documents in a convenient order and manner and as concisely as possible.
>
> (4) The list must state –
>
> (a) what documents are no longer in the party's control;
>
> (b) what has happened to those documents; and
>
> (c) where each such document then is to the best of the party's knowledge, information or belief.
>
> (5) It must include documents already disclosed.
>
> (6) A list of documents served by a company, firm, association or other organisation must –

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

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

Rule 28.12 states:

"(1) When a party has served a list of documents on any other party, that party has a right to inspect any document on the list, except documents –

(a) which are no longer in the physical possession of the party who served the list; or

(b) for which a right to withhold from disclosure is claimed.

(2) The party wishing to inspect the documents must give the party who served the list written notice of the wish to inspect documents in the list.

(3) The party who is to give inspection must permit inspection not more than 7 days after the date on which the notice is received.

(4) Where the party giving the notice undertakes to pay the reasonable cost of copying, the party who served the list must supply the other with a copy of each document requested not more than 7 days after the date on which the notice was received."

[32] In relation to the husband's compliance with the unless order, two pertinent observations may be gleaned from his affidavit evidence. First, the company used an accounting software to store accounting information. That would have fallen within the category of 'records' ordered to be disclosed. Second, it is undisputed that the accounting books and records were not specifically disclosed in form 12. Those factors, in view of these rules, lead me to conclude that the judge did not err in finding that the husband

had failed to comply with the unless order and that his acts culminated in an attempt to make the accounting books and records in digital form accessible as distinct from providing specific disclosure, in the manner stipulated by the relevant rule. Thus, the 20 March 2017 deadline expired without the husband making specific disclosure of the books and records in digital form.

[33] Further, the judge would have had no need to consider the question of relief from a sanction that came about as a natural consequence of the failure to comply with the unless order. This is so, especially in the circumstances of this case, where the application had proceeded on the basis of the husband's acceptance that his failure to specifically disclose the accounting software had resulted in the imposition of a sanction. There is no merit in the husband's contentions on this issue.

Question (c): effect of the order of Simmons J

<u>The written submissions</u>

[34] For the husband, it was submitted that the order of Simmons J had varied the order of Palmer-Hamilton J (Ag), by: (i) extending the time for compliance; and (ii) changing the type and method of service. On the other hand, counsel for the wife proffered the argument that the order made by Simmons J could not have varied the order of Palmer-Hamilton J (Ag) as there was no application for a variation and the sanction had already taken effect at the time of Simmons J's order. In that regard, counsel submitted, the husband's only remedy was to have made and succeeded on an application for relief from sanction.

Discussion

[35] An appropriate starting point to this discussion, is a review of rule 26.7(2) of the CPR which stipulates how a party may seek to regularise a breach of an unless order, where a sanction has been imposed (as was the case in these circumstances), for a party's failure to comply with its terms. Rule 26.7(2) provides that:

> "Where a party has failed to comply with any of these Rules, a direction or any order, any sanction for non-compliance imposed by the rule, direction or the order has effect unless the party in default applies for and obtains relief from the sanction, and rule 26.9 shall not apply."

[36] It is clear that, emerging from this rule are two indisputable principles: (i) the sanction imposed by the order for failure to comply has effect, unless the defaulting party obtains relief from sanction; and (ii) rule 26.9, which gives the court general power to rectify procedural errors cannot be applied in such circumstances to grant recourse to a defaulting party.

[37] Also without doubt is the principle set out in the case of **Marcan Shipping (London) Ltd v Kefalas and Anothe**r [2007] EWCA Civ 463: the sanction of an unless order takes effect automatically upon the occurrence of the breach.

[38] It therefore follows that, when the husband failed to specifically disclose the required information by 20 March 2017, his statement of case stood struck out. Thus, at the time the parties appeared before Simmons J, the sanction would already have been in effect. At that time, there was no formal application for relief from sanction being considered by Simmons J. Accordingly, it is necessary to explore how the court ought to

treat with the exercise of discretion to grant relief from a sanction imposed pursuant to rule 26.7, in the absence of a formal application for relief from sanction, pursuant to rule 26.8.

[39] In the case of **Keen Phillips (a firm) v Field** [2007] 1 WLR 686, an order was made that, unless the party filed a certified transcript by a particular date, permission to appeal would be refused. Due to no fault of the party or his counsel, the transcript was filed outside the stipulated period. The Court of Appeal of England and Wales had to consider whether a judge below had jurisdiction to extend time for compliance (which the judge had done) and grant permission to appeal, subsequent to the party's failure to comply with the unless order, notwithstanding that a formal application was not made for relief from sanction.

[40] The headnote of that judgment reads:

> "The court's general case management powers to extend time pursuant to CPR r 3.1(2)(a) [similar to our 26.1(2)(c)] and to act on its own initiative pursuant to CPR r 3.3(1) [similar to our 26.2(1)] are not cut down by CPR r 3.8(1) [similar to our 26.7(2)]. The court therefore has jurisdiction to extend time for compliance with a case management order even where no application has been made under rule 3.8 by the party in default for relief from the sanction for non-compliance with the order…. the judge had jurisdiction to extend time and grant permission to appeal notwithstanding that the claimant had not applied formally for relief from the sanction for non-compliance."

[41] J Parker LJ, in that case, was content to accept that, in the circumstances, by granting an extension of time, the learned judge was granting relief from sanction within

the meaning of rule 3.8 and that the general case management powers of the court were not limited by rule 3.8. He opined that:

> "The words 'has effect' in CPR r 3.8 mean, in my judgment, no more than that, absent any exercise by the court of its general case management powers in extending time or otherwise granting relief from sanction, the sanction will remain in effect until relief from it is granted by the court on an application made under CPR r 3.8 by the party in default."

[42] It is very important to observe, however, that the relevant English provisions differ from our own in that the English court's general case-management powers are unfettered by rule 3.8. Additionally, the considerations stipulated for granting relief from sanction under the English CPR differ in material respects from ours.

[43] Also helpful in guiding us towards a solution, although reflecting a different approach, is the case of **George Freckleton v Aston East** [2013] JMCA Civ 39. In that case, this court upheld the decision of a judge below, who had ruled that the court had no discretion to extend time for compliance where the husband had failed to comply with an unless order; and had not applied for relief from sanction. Morrison JA (as he then was), writing on behalf of the court, opined that the correct recourse would be an application for relief from sanction pursuant to rule 26.8 of the CPR, the court having been powerless to grant relief of its own motion, pursuant to rule 26.9 of the CPR. Morrison JA also concluded that neither rule 26.1(2)(c) nor 26.9 could avail the husband in that case where a sanction was stipulated and imposed by the order.

[44] The following observations were made at paragraph [23] of the judgment:

> "While I cannot doubt that both **Samuels v Linzi Dresses Ltd** and **Pereira v Beanlands** were correct applications of the law as it stood under the pre 1998 Rules of the Supreme Court in relation to the effect of unless orders, I would prefer and adopt the reasoning of the Court of Appeal in the post-CPR decision of **Marcan Shipping (London) Ltd v Kefalas and Another** in which Moore-Bick LJ said this (at para 24):
>
>> 'In my view it should now be clearly recognised that the sanction embodied in an 'unless' order in traditional form takes effect without the need for any further order if the party to whom it is addressed fails to comply with it in any material respect'."

[45] There is also the decision of this court in the case of **Dale Austin v The Public Service Commission and The Attorney General of Jamaica** [2016] JMCA Civ 46, which held that a judge below had power to act on her own motion or initiative pursuant to rule 26.2(1) to vary an unless order, which stipulated the time within which costs were to be paid, after the time for compliance had passed. This court (per Edwards JA) found that that discretion was exercisable pursuant to rule 26.1(2)(c) and (v) or 26.1(7).

[46] That decision, however, was made without the court being referred to and considering the previous decision of **George Freckleton v Aston East**, which has not been overruled.

[47] In line with the reasoning from **George Freckleton v Aston East**, it seems to me that the court below has no general power to grant relief from sanctions imposed for instances of default in the face of unless orders or to make orders to put things right of its own motion: such action ought to be taken pursuant to an application for relief from sanction. Thus, where a breach of an unless order has already occurred, the unless order could not then be varied to effect compliance.

[48] The order made by Simmons J to have the accounting records available that afternoon on or before 3:30 pm, would have, in effect, allowed the wife to obtain access to that information. It is clear that Simmons J was aware of the pending application for relief, having herself scheduled it for hearing. Thus, it would appear that she did not purport to exercise a discretion to grant relief from sanction. Further, when the terms of her order are considered, they do not seem capable of varying the unless order which required specific disclosure of "accounting books, records and financial statements" or capable of lifting the sanction imposed. Accordingly, the order of Simmons J would not have directly affected the sanction imposed as a consequence of the breach of the unless order.

Question (d): is the claim governed by section 13(2) of PROSA, and, if so, what is the effect on the unless order of the omission to obtain an extension of time to file the claim

The written submissions

[49] Counsel, on behalf of the husband, submitted that the wife's claim fell within section 13 of PROSA, and that, by virtue of section 13(2), the claim ought to have been filed within 12 months of the commencement of separation and that the filing of the divorce petition would also have triggered the application of that section of PROSA to the case. He further submitted that the FDCF was filed more than 12 months after the commencement of the parties' separation and that, since no extension of time was sought or obtained to bring the claim, the claim was irregular and the unless order made by Palmer-Hamilton J (Ag) thereby invalid. Counsel relied on **Saddler v Saddler** [2013]

JMCA Civ 11 to support those arguments. Counsel further submitted that the wife could not obtain relief under section 11 of PROSA as it had not been pleaded.

[50] Counsel for the wife also relied on the case of **Saddler v Saddler** to support the submission that the court has power to regularize any irregular procedure and as such the unless order was not invalid. Moreover, the submission continued, both parties had treated the claim as valid; and, in the absence of an application for an extension of time, the claim could proceed pursuant to section 11 of PROSA. Counsel contended that there was no need to state in the FDCF the specific provision under which a party is claiming: it would suffice if the evidence relied on is placed before the court and the other party has adequate opportunity to respond to it.

Discussion

[51] It is true that the FDCF does not state the specific provisions of PROSA that are being relied on to bring the claim. However, each of the provisions (sections 11 and 13) involves a consideration of different factors. The relevant parts of section 13 of PROSA read as follows:

> "13.-(1) A spouse shall be entitled to apply to the Court for a division of property-
>
> (a) on the grant of a decree of dissolution of a marriage or termination of cohabitation; or
>
> (b) on the grant of a decree of nullity of marriage; or
>
> (c) where a husband and wife have separated and there is no reasonable likelihood of reconciliation; or
>
> (d) where one spouse is endangering the property or seriously diminishing its value, by gross

> mismanagement or by wilful or reckless dissipation of property or earnings.
>
> (2) An application under subsection (1) (a), (b) or (c) shall be made within twelve months of the dissolution of a marriage, termination of cohabitation, annulment of marriage, or separation or such longer period as the Court may allow after hearing the applicant."

[52] In the instant circumstances, the claim for division of property could proceed pursuant to section 13 of PROSA, if the parties had separated and there was no reasonable likelihood of reconciliation. However, pursuant to section 13(2), the application to the court would need to be brought within 12 months of the occurrence of the circumstances giving rise to the right to apply, with the court having a discretion to allow the application to be brought outside of that 12-month period.

[53] From the affidavit evidence of the wife in support of the FDCF, it is seen that the parties were married on 14 September 1991 but that "the marriage broke down in 2006". Such evidence, if accepted by a court, in the absence of evidence of any reasonable likelihood of reconciliation by the parties, would have entitled the wife to bring the claim pursuant to section 13. If that was done, it would have activated the requirement for the claim to be brought within 12 months after separation or necessitated an extension of time to bring the application outside that period.

[54] The case of **Saddler v Saddler** was two consolidated appeals, arising from two different actions, in which the court considered whether a claim form which was filed outside the 12-month limitation period stated in section 13(2) of PROSA was valid, where no extension of time to bring the claim had been sought; and whether that claim could

be cured by a subsequent application for an extension of time to file the claim. Phillips JA, writing on behalf of the court, after a careful consideration of the authorities, enounced several principles of law. The following observations were made in relation to the exercise of the court's discretion to extend time pursuant to section 13(2) of PROSA in circumstances where a claim form has been filed outside the 12-month limitation period:

> "[41] It is clear that section 13(2) is a provision which sets out a time line for the application for division of property under PROSA. There are certain events which trigger the right to apply. They are set out in section 13(1) (a), (b), (c) and (d) above. But the application if being made under subsections (a), (b) or (c) shall be made within 12 months of the dissolution of the marriage, termination of cohabitation, annulment of marriage, separation **or such longer period as the Court may allow after hearing the applicant**. So it is clear that the time to apply under PROSA can be extended, and that would be effected by the exercise of the court's discretion.
>
> ….
>
> [44] …Their claim to apply under PROSA could only be defeated by their failure to comply with section 13(2). That section is a limiting section, and thus provides a limitation defence. A fixed date claim form filed under section 13 claiming relief permitted under PROSA could not therefore be struck out as an abuse of process simpliciter. If filed outside the time limited in the section, the action certainly could not proceed without the court allowing the time period to be extended, for to do otherwise would be in breach of the specific words in the section. The fact that the legislation specifically provides a time within which a claim shall be made, but also refers to a longer period being allowed by the court, indicates that although the time is limited, the time period is flexible, and can be extended, once the court exercises its discretion in favour of the applicant after hearing him/her. If the time is not extended by the court, as the matter could proceed no further, the limitation defence would

succeed, as although a procedural defence, it is a complete defence, and the claim would be time barred. **Before that application is made, however, the claim, in my view, is not invalid**. The words in the statute, in my opinion, give the court a wide discretion to permit persons to access the benefits provided in PROSA, particularly since the statute is dealing with the protection of the rights of persons within families.

[45]…[referring to the dicta of Edwards J (as she then was) in **Brown v Brown**)] Indeed the learned judge made the further point, which I find compelling, that although a fixed date claim form may be time barred from proceeding under section 13(1) (c) of PROSA, it could yet validly proceed under section 11 where there is no limitation period as long as the marriage subsists, or section 13(1) (d) if the facts existed. So a claim may not be able to proceed in respect of a division of matrimonial property if the time period had passed and there had been no extension of the period allowed, but may yet proceed under section 11 or section 13(1)(d) using the same claim form. Additionally, also posited by Edwards J, with which I agree, is that a claim which is filed out of time is not invalid, but cannot proceed, as an application for extension of time must be made and if granted, the time must be extended from the time allotted in PROSA to the date of the filing of the claim, for the claim originally filed to stand, or if the claim is not yet filed, to a determined date for the filing of the same.

….

[54] As indicated above, section 13(2) states the time within which the application for benefits under PROSA shall be made. However, the words, 'or such longer period as the court may allow' make it clear that the court has a discretion to extend the time set out in the statute. That does not seem to be in dispute. The issue is: when can that discretion be exercised, in the light of the words of the statute? If an applicant is desirous of filing an application outside the 12 month period allotted in the section within such longer period as the court may allow," (Emphasis added in part)

At paragraph [86] the following statements of law were proffered:

"(iii) Section 13 of PROSA does not go to jurisdiction, but is a procedural section setting out the process to access the court and the remedies available. Jurisdiction of the court is conferred in the main by sections 6, 7 and 14.

(iv) As the provision is procedural, and not a condition precedent to the jurisdiction of the court, any irregularity can be remedied by a subsequent order, that is *nunc pro tunc*, in the interests of justice, particularly as the grant of the order is under the court's control through the exercise of its discretion.

(v) The claims could be considered to be irregular or at worst, in a state of suspended validity until the application for extension of time was granted.

(vi) ...

(vii) …

(viii) …

(ix) On any study of the language of section 13 of PROSA the focus was on extension, that is, on such longer period as the court may allow, and not on leave.

(x) Section 13 of PROSA was not promulgated to create a limitation bar.

(xi) If the claim is filed outside the 12 month time period set out in the statute, extension of time must be obtained from the court for the matter to proceed, but no leave is required, and so no application for leave and extension is required.

(xii) There are no words indicating that the application for extension of time must be filed before the claim form is filed, if the claim form is filed outside the time limited in PROSA. There is no indication that the application for extension cannot be filed after the claim is filed, and the order granted *nunc pro tunc."* (Emphasis as in original)

[55] The case of **Pameleta Marie Lambie v Estate of Leroy Evon Lambie (Deceased)** [2014] JMCA Civ 45, may also be helpful. In that case, the judge below had made several declarations of interest in relation to property which he deemed to be the

family home, in circumstances in which the FDCF was filed in breach of section 13(2) of PROSA and without the requisite extension of time. One of the grounds advanced by the appellant in that case was that the learned judge had failed to consider that section 13(2) of PROSA prohibits application for division of property under PROSA without the permission of the court. This court (per McDonald-Bishop JA) considered whether the application was irregular, it having been filed outside the limitation period without the permission of the court. This court in that case differentiated between sections 11 and 13 on the basis that section 11 applies to spouses in subsisting marriages but there was no express provision for spouses who had separated without any likelihood of reconciliation.

[56] This court concluded that the facts of the case suggested that the case had proceeded on the basis of section 13 of PROSA. In that event, this court found that the judge below would have had to address the jurisdictional hurdle as a preliminary issue in order to treat with an application under section 13. It was found that the judge below had erred in not first determining the issue of jurisdiction. Because this disposed of the matter, it was decided that it was not necessary to explore the applicability of section 11 but that, if the application had proceeded by virtue of section 13, then the application would have been irregular and would have remained irregular in the absence of an extension.

[57] In relation to the instant case, the conclusion to be drawn from those authorities is that, if and where the claim was to proceed pursuant to section 13, the omission to seek an extension of time does not by itself invalidate the claim as an abuse of process.

While the jurisdiction of the court is unaffected, the claim exists in a state of "suspended validity". There is no doubt that such an irregularity could be cured by a party subsequently obtaining an extension of time pursuant to the court's power to exercise such a discretion under section 13(2). However, the exercise of such a discretion is not before this court for consideration. The fact is that the court has the discretion to remedy any defect which could arise pursuant to section 13, and as such the unless order would, if and where section 13 comes into play, without the necessary extension having been obtained, occupy a state of "suspended validity". Further, an option to proceed pursuant to section 11 would be available where the claim meets the requirements set out thereunder. For these reasons, the husband could not successfully impeach the validity of the unless order on the basis of the omission to seek an extension of time. It is important to observe as well that there is no appeal from the imposition of the unless order. Neither was an objection taken below that the matter ought not to proceed due to the omission to seek an extension of time to bring the claim.

Question (e): whether unless order strikes out both claims

The written submission

[58] The husband's counsel submitted that the FDCF contained two different claims: one for custody and maintenance and the other for division of property. Further (it was contended), since the unless order had its genesis in an application for interim maintenance, filed pursuant to the Maintenance Act and the MCA, it could not have the effect of striking out the statement of case relating to the division of property sought pursuant to PROSA.

[59] The wife's counsel, on the other hand, submitted that there was one claim before the court, albeit that a different relief was sought under different pieces of legislation. Accordingly, the entire claim would have been struck out. It was also argued that the issue of whether Jackson-Haisley J (Ag) could properly have granted the interim orders for maintenance were not before this court as those orders were not appealed. Further, the orders of Jackson-Haisley J (Ag) have no bearing on the unless order.

Discussion

[60] In order to determine the extent of the striking out sanction, regard must be had to the terms and stipulations of the unless order. It will be recalled that the unless order stipulated that "[U]nless the defendant specifically discloses these documents by Monday March 20, 2017 his statement of case will be struck out and judgment will be entered for the Petitioner/Claimant." Rule 2.4 of the CPR defines the term "statement of case". It provides that "statement of case" means:

> "(a) a claim form, particulars of claim, defence, counterclaim, ancillary claim form or defence and a reply; and
>
> (b) any further information given in relation to any statement of case under Part 34 either voluntarily or by order of the court."

[61] The implications of the definition of "statement of case" is that any reply or defence filed by the husband, in response to the claim, would be struck out by the imposition of the sanction. This would include the striking out of the husband's affidavit in response to the wife's affidavit. When those documents are perused it is noted that they address claims for both maintenance and division of property. This treatment of the various issues

in the FDCF and the statement of case is clearly supported by rule 8.3 of the CPR which provides that:

> "A claimant may use a single claim form to include all, or any other claims which can be conveniently disposed of in the same proceedings."

[62] Accordingly, the wife, being the claimant below, would be permitted to include (as she had done) all the associated family issues which may conveniently be disposed of in the same proceedings.

[63] In conclusion, since the order of Palmer–Hamilton J (Ag) stated that the husband's "statement of case", would be struck out, that would be the resulting effect: there was no qualification of the order to distinctly identify which claims would be struck out. The fact that the FDCF sought claims for custody and maintenance in addition to orders for division of property would not affect the impact of the sanction. Accordingly, the judge correctly vacated the trial dates.

[64] The husband's complaint that the judge's order that judgment would be entered for the "Petitioner/Claimant" created doubt as to which aspects of the statement of case was struck out, is rejected as having no merit, since the use of both terms, in my opinion, removes any obscurity as to the party in whose favour judgment would be entered.

[65] Further, the husband's complaint that Jackson-Haisley J (Ag) had no basis on which to make the interim order for maintenance, cannot be explored here, as there has been no appeal from that decision.

[66] In the result, I propose that the appeal be dismissed, with costs to the respondent to be agreed or taxed.

P WILLIAMS JA

[67] I have read in draft the judgment of my brother F Williams JA and agree with his reasoning and conclusion.

BROOKS JA

ORDER

(i) The appeal is dismissed.

(ii) The costs of the appeal to the respondent to be agreed or taxed.