[2021] JMCA Civ 6

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2019CV00117

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE V HARRIS JA (AG)

BETWEEN	**DOUGLAS THOMPSON**	**APPELLANT**
AND	**PETER JENNINGS**	**RESPONDENT**

Written submissions filed by Douglas AB Thompson for the appellant

Written submissions filed by Henlin Gibson Henlin for the respondent

22 January 2021

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 sister, V Harris JA (Ag). I agree with her reasoning and conclusions. I also support her recommendation that the Rules Committee should address the lacuna that exists in respect of the procedure for invoking the relief provided by section 22(2) of the Legal Profession Act.

FOSTER-PUSEY JA

[2] I, too, have read, in draft, the judgment of my learned sister, V Harris JA (Ag). I agree with her reasoning and conclusions and have nothing to add.

V HARRIS JA (AG)

[3] On 22 November 2019, Henry-McKenzie J (Ag) (as she then was) ("the learned judge"), upon hearing a preliminary objection made by the appellant, Mr Douglas Thompson ("Mr Thompson"), in relation to a notice of application for court orders filed by the respondent, Mr Peter Jennings ("Mr Jennings"), made the following orders dismissing the objection:

> "(a) The preliminary objection taken by the 1st receiving party fails.
>
> (b) The applicant's attorney is to amend the Notice of Application for Court Orders [to reflect the true status of the matter and the parties herein] within 7 days of the date hereof.
>
> (c) Leave to appeal is granted.
>
> (d) The hearing of the Notice of Application filed January 16, 2019 is adjourned to July 2, 2020 at 2:00 pm for 2 hours.
>
> (e) Costs to the applicant to be taxed if not agreed.
>
> (f) The 1st receiving party's attorney-at-law is to prepare, file and serve orders herein."

[4] Mr Thompson now appeals those orders.

[5] It is to be noted that there is a variance with the order at paragraph (b) when this is compared with the minute of orders that has been provided to this court.[1] However, in my view, nothing material turns on this difference.

Background

[6] Mr Jennings, was for many years embroiled in a legal battle against his former employer, the National Commercial Bank Jamaica Limited ("NCB"), for the unfair termination of his employment in 2012. He first challenged his termination before the Industrial Disputes Tribunal ("IDT"), and was successful. NCB sought to challenge the award of the IDT by way of an application for leave to apply for judicial review in the Supreme Court. Mr Jennings again succeeded when that application was dismissed. NCB challenged that decision in this court but was once more unsuccessful. This court also dismissed NCB's application for permission to appeal to Her Majesty in Council. Mr Jennings was awarded costs in both the appeal and the latter application. These costs were subsequently agreed and paid by NCB in the amount of $11,300,000.00 by way of direct transfer into the account of Mr Thompson, who had acted as one of the attorneys on behalf of Mr Jennings in the judicial review matter in the Supreme Court, as well as, in the matters before this court.

[7] Notwithstanding this, Mr Jennings, thereafter, was forwarded a copy of an invoice dated 10 March 2017 from Mr Thompson, prepared by attorney-at-law Mr

---

[1]The difference is the absence of the words "(to reflect the true status of the matter and the parties herein)".

Douglas Leys QC, who was also a part of Mr Jennings' legal team. The total stated on that invoice, inclusive of general consumption tax ("GCT"), was $19,427,831.35. The names of both attorneys are recorded, along with others, in the heading of the decisions of the aforementioned matters, as counsel appearing for Mr Jennings, instructed by Douglas Thompson.

[8] Mr Jennings having settled previous invoices rendered by the attorneys-at-law was surprised and aggrieved by the invoice he received, and so, on 28 April 2017, he filed in the Supreme Court, a document entitled "Notice of Filing of Attorney/Client Bill of Costs". That notice bore claim number 2015HCV02511, the same claim number as NCB's application for leave to commence judicial review proceedings. Mr Jennings attached to that notice, a copy of the said invoice dated 10 March 2017. He then filed another document, with the heading "Points of Dispute", on 11 May 2017.

[9] In response, Mr Thompson, on 30 July 2018, filed a notice of objection raising, *inter-alia*, the preliminary issue that he had never been retained by Mr Jennings, and as such they had no attorney/client relationship. When the matter came up for hearing at taxation proceedings before the learned deputy registrar on 10 December 2018, the deputy registrar stayed the proceedings and directed that the preliminary issue as to whether an attorney/client relationship existed between Mr Thompson and Mr Jennings, be determined by a judge in chambers.

[10] Based on that direction, Mr Jennings filed a notice of application for court orders on 16 January 2019, seeking, *inter alia*, a declaration that an attorney/client

relationship existed between the attorneys-at-law (Mr Thompson and Mr Leys) and himself, between the period May 2015 and 6 April 2017. This application also bore the claim number of the judicial review matter, and identified NCB as the claimant, and the IDT as the 1st respondent. The application also identified Mr Jennings as the 2nd respondent/paying party, Mr Thompson as the 1st receiving party, and Mr Leys as the 2nd receiving party.

[11] When Mr Jennings' application came before the learned judge, on 10 October 2019, Mr Thompson raised two preliminary objections. The first was in regard to the procedure that Mr Jennings employed to initiate taxation proceedings under section 22(2) of the Legal Profession Act ("LPA"), and the second was that the determination of whether an attorney/client relationship existed between the parties, could not be determined by way of a notice of application for court orders (under Part 11 of the Civil Procedure Rules 2002 ("CPR"), using the same claim number as that of NCB's application for judicial review which had already been concluded.

[12] The learned judge heard arguments from counsel and reserved her decision until 22 November 2019, when she made the orders set out at paragraph [3] above.

The decision in the court below

[13] In coming to her decision, the learned judge considered that, although section 22(2) of the LPA gave a client the right to refer his attorney's bill of fees for taxation, neither the LPA nor the CPR stipulate the procedure a client should follow when invoking that right. She also considered that none of the authorities that were relied on

took the case any further, in that, there was no authority before the court that required the client as the "party charged" to file a new claim to refer a matter to taxation as had been argued by Mr Thompson. The learned judge considered the case of **Adolphy DeCordova Samuels and others v Clough Long & Co** [2016] JMCA Civ 28, which she noted seemed to highlight that, under section 22 of the LPA, taxation was an alternative procedure to the filing of a new claim in respect of the attorney. She surmised that, since the only option available to a client under the LPA was a referral to taxation, and there was no mention of the initiation of a new claim, that option was not available to a client. In the circumstances, she came to the view that, in keeping with the overriding objective to deal with cases expeditiously and to save unnecessary expenses, a new claim need not be filed, and that the matter could be brought to taxation proceedings under the same claim in which the disputed fees arose.

[14] She did, however, agree with Mr Thompson that the drafting method used was "inappropriate and misleading", in that, a new heading that was not present in the original claim was used and adapted to include the receiving parties who were not parties to that particular claim. This was a procedural error, she found, that could be cured by way of the court's discretion under rule 26.9(3) of the CPR, as it went to form rather than substance.

The appeal

[15] On 6 December 2019, Mr Thompson filed a notice of appeal relying on the following grounds:

"(1) The Learned Judge erred as a matter of law when she concluded that the determination of whether an Attorney/Client relationship existed between the Appellant and Respondent could be determined in the already concluded Claim No. 2015HCV02511.

(2) The Learned judge was plainly wrong when she ruled that CPR 26.9 could cure the Respondent's failure to commence a claim under Part 8 of the CPR to determine if an Attorney/Client relationship existed between the Appellant and Respondent.

(3) The Learned Judge wrongly exercised her discretion in ordering costs of the preliminary objection to the Respondent."

[16] Mr Thompson is seeking orders that (a) the appeal be allowed and the preliminary objection taken in the court below be upheld, and (b) costs of the appeal and the preliminary objection in the court below. Grounds 1 and 2 will be treated with together.

The law and analysis

Ground 1 – The learned judge erred as a matter of law when she concluded that the determination of whether an attorney/client relationship existed between the appellant and respondent could be determined in the already concluded claim no 2015HCV02511

And

Ground 2 – The learned judge was plainly wrong when she ruled that CPR 26.9 could cure the respondent's failure to commence a claim under Part 8 of the CPR to determine if an attorney/client relationship existed between the appellant and the respondent.

A. *The appellant's submissions*

[17] Mr Thompson, under these grounds, has challenged the procedure adopted by the learned judge, on the basis that:

1. Mr Jennings was not the applicant, and Mr Thompson was not a party to claim no 2015HCV02511;

2. By the time the dispute arose between Mr Thompson and Mr Jennings, claim no 2015HCV02511 had already been disposed of in the court below and on appeal by this court; and

3. The issue involved is a substantive point that ought to be determined by declaratory proceedings commenced by fixed date claim form, or claim form and particulars of claim.

[18] As a result, Mr Thompson argued that the proceedings are a nullity and rule 26.9 of the CPR does not apply to such proceedings or proceedings in clear breach of a substantive procedural rule. The authorities of **Dorothy Vendryes v Dr Richard Keane and anor** [2011] JMCA Civ 15 and **Hon Gordon Stewart OJ v Senator Noel Sloley Sr and others** [2011] JMCA Civ 28 were cited in support of this point. The appellant has also relied on the decision in the appeals of **Anthony Hendricks v Commissioner of Customs** and **In the matter of an appeal by way of case stated and In the matter of an application by Pilmar Powell pursuant to section 79 of the Proceeds of Crime Act For forfeiture of seized cash from Patrick Anthony Spence, with interested parties Kurbitron Limited and Frederick Graham** [2018] JMCA Misc 1, which were heard together. In the latter decision, the court found that an application under section 79 of the Proceeds of Crime Act ("POCA") was to be commenced by way of plaint and particulars of claim pursuant

to section 143 of the Judicature (Resident Magistrates) Act ("JRMA") (now Judicature (Parish Courts) Act), and that to seek to commence the claim otherwise was a nullity which could not be cured by the discretion given to the judge in the Judicature Resident Magistrates Court Rules ("JRMCR") (now Judicature Parish Courts Rules) to amend defects and errors in proceedings.

[19] Mr Thompson has commended the approach taken in that case to this court. He has submitted that since the issue as to the existence of an attorney/client relationship is to be determined by claim form and particulars of claim, to proceed by way of a notice of application for court orders is a nullity which cannot be salvaged by rule 26.9 of the CPR. This is so, it is submitted, because that rule presupposes the existence of a validly commenced claim.

B. *The respondent's submissions*

[20] Counsel for Mr Jennings has argued that the learned judge was not palpably wrong in exercising her discretion in the way that she did based on the circumstances that led to the matter being placed before her.

[21] Learned counsel noted that the taxation proceedings were commenced pursuant to section 22(2) of the LPA, which the learned judge correctly found prescribes no procedure for "referring" a matter to the Supreme Court. The learned judge, learned counsel submitted, was also correct in finding that there is no law that prescribes a particular procedure to commence the proceedings, and Mr Thompson has not

demonstrated any legal basis to support his argument that a new claim is required to be filed.

[22] The authority of **Karin Murray v Clough Long and Company** [2018] JMSC Civ 30, it is argued, does not support Mr Thompson's assertion that a new claim is required, and can be distinguished on the basis that, in that case, the proceedings had been commenced outside of the prescribed time and therefore required an extension of time. It is also asserted that **Vendryes v Keane** and **Stewart v Sloley** are similarly distinguishable. Learned counsel submitted that in contrast to **Vendryes**, there is, in this case, no breach of any substantive rule, and in relation to the latter case, the application for a search order was struck out as the respondents had not been named.

[23] Counsel for Mr Jennings also seeks to distinguish the authority of **Hendricks v Commissioner of Customs**, on the basis that, in that case, a specific provision in the JRMCR was identified as the correct procedure for the relevant application. Whilst, in the instant case, Mr Thompson is unable to demonstrate that Mr Jennings breached any substantive rule, as there are no prescribed rules for matters of this nature.

[24] It is argued that Mr Jennings was never directed to file a new claim, but rather, the matter was referred to be determined by a judge in chambers. Counsel for Mr Jennings also made reference to the learned judge's finding that it was not unusual for the registrar to refer an issue of law arising from taxation to be determined by a judge in chambers. In those circumstances, it is argued, a new claim is not required.

Therefore, it is submitted, there is a real connection between claim no 2015HCV02511 and the taxation proceedings, in that:

i. the bill of fees related to the fees charged by the attorneys in the same claim;

ii. Mr Thompson's name appears on the record of the court as representing the respondent; and

iii. the bill of fees reflects that Mr Thompson billed Mr Jennings for work done in relation to the claim.

[25] In all the circumstances, therefore, it is submitted, the learned judge did not misdirect herself in law nor was she palpably wrong in dismissing Mr Thompson's objection.

[26] In respect of the learned judge's finding that even if there was a procedural error she could set matters right pursuant to her discretion under rule 26.9 of the CPR, counsel for Mr Jennings has submitted that the learned judge did not err. The Privy Council decision of **Honiball and Another v Alele** (1993) 43 WIR 314, it is said, supports the position that the court is empowered to set a procedural error right, without requiring new proceedings, where to do so would not substantially affect the rights of the parties. It is submitted, therefore, that the learned judge was correct to find that no prejudice would be caused by setting matters right and permitting the

matter to continue as if it were commenced by the correct procedure, since there was no evidence or assertion that Mr Thompson would have suffered any prejudice.

C. Discussion

[27] It is plain that the learned judge was correct to find that neither the LPA nor the CPR prescribe the particular form that a referral by a client of an attorney's fees for taxation, pursuant to section 22(2) of the LPA, should take.

[28] Section 22 of the LPA provides as follows:

> "22(1) An attorney shall not be entitled to commence any suit for the recovery of any fees for any legal business done by him until the expiration of one month after he has served on the party to be charged a bill of those fees...
>
> **(2) Subject to the provisions of this Part, any party chargeable with an attorney's bill of fees may refer it to the taxing officer for taxation within one month after the date on which the bill was served on him**.
>
> (3) If application is not made within the period of one month aforesaid a reference for taxation may be ordered by the Court either on the application of the attorney or on the application of the party chargeable with the fees, and may be ordered with such directions and subject to such conditions as the Court thinks fit.
>
> (4) An attorney may without making an application to the Court under subsection (3) have the bill of his fees taxed by the taxing master after notice to the party intended to be charged thereby and the provisions of this Part shall apply as if a reference for such taxation has been ordered by the Court." (Emphasis added)

[29] Further, section 23 of the LPA designates the "taxing officer" as "the Registrar or such other person as may be prescribed by rules of court". However, there is no

mention of the procedure that the referral should take. I wish to observe also that, although section 29 of the LPA allows for rules of court to repeal, vary or add to the provisions of Part V of the LPA, under which section 22 falls, it would appear that no such rules have been promulgated to date.

[30] Rule 65.1 of the CPR restricts the scope of Part 65 to the quantification of costs that are awarded by the Supreme Court.

[31] Although there are a few references in the CPR to taxation proceedings involving an attorney and his or her own client, these speak to the taxation of bills rendered by an attorney to his or her client. However, the "gateway" to initiate the taxation has not been specified in the rules (see rules 65.17(2) and 65.17(3)(i); rule 65.14(2)).

[32] The only mention of the LPA in the CPR is a reference to section 21 of the LPA in rule 65.17(3)(i) which does not concern the procedure for approaching the court to resolve disputes over costs between attorneys-at-law and their clients.

[33] Rule 65.18 provides only for the commencement of taxation proceedings by way of the filing and serving of a bill of costs by the receiving party (the attorney) on the paying party (which includes the attorney's own client). However, this rule does not conceive of the client initiating the proceedings.

[34] The only reference to form is in rule 65.18(3) which stipulates that a bill of costs need not be in any particular form once it indicates the total amount claimed, contains

sufficient detail and information to justify the amount claimed, and if there is a claim for GCT, the GCT reference number of the receiving party is to be indicated.

[35] The learned judge, in my view, was also correct in finding that the authorities of **Karin Murray** and **Turner & Co (a firm) v O Paloma SA** [1999] 4 All ER 353, relied on by the appellant before her, did not take the matter any further, as neither case dealt with the procedural issue of whether a referral of a bill to the taxing master by a client required that a new claim be filed. Both cases dealt with issues relating to whether the court could and ought to refer a bill to taxation, at the instance of the client, after the expiration of the 12-month period permissible by the relevant legislation. In **Karin Murray** a fixed date claim form was found to be necessary as the claimant had to seek the permission of the court to refer the matter to the taxing master, several years having elapsed since the bill had been issued.

[36] The case of **Adolphy DeCordova Samuels and Ors v Clough Long & Co**, considered by the learned judge, is also of little assistance, since, as noted by her, that case involved the referral of a bill of fees by an attorney and not a client. Further, it was found by this court in that case, that, since there was no attorney/client relationship between the appellants and the respondent, the respondent had not been entitled to file a bill of costs pursuant to section 22 of the LPA (see paragraphs [34] to [36] and [62]). Interestingly, in that case the "alternate procedure" of taxation was utilised and the bill of fees that was filed by the attorneys in the matter was assigned a new claim

number by the registrar of the Supreme Court. There, however, was no comment on the propriety of this by the court in its decision.

[37] There being no prescribed procedure as to how the taxation proceedings are to be commenced, there is also, *a fortiori*, no procedure prescribed as to how a preliminary issue arising in such taxation proceedings are to be dealt with or placed before a judge of the court.

[38] The issues that arise, therefore, are whether, in the absence of a prescribed procedure, the notice of application for court orders filed by the respondent in respect of the preliminary issue could be deemed a "procedural error", and if so, whether that error was one that could have been cured by rule 26.9 of the CPR or one that amounted to the proceedings being a nullity.

[39] Whilst, it is clear that Mr Jennings breached no particular rule in respect of how the preliminary objection in the taxation proceedings were to be referred to a judge in chambers, I do agree that there was some irregularity in the document commencing the proceedings. Although it is permissible, by virtue of rule 11.1 of the CPR, to make an application "after the course of proceedings", I agree with Mr Thompson that, in this case, such a course was not appropriate. I say so because the parties to the application were different from the original parties to the claim, and the subject matter was unrelated to that involved in the original claim, notwithstanding that the disputed fees were in relation to services rendered in those proceedings. The costs order that arose

from those proceedings had already been settled, and Mr Thompson and Mr Leys were not a party to the original proceedings.

[40] The CPR has specific rules relating to the addition of parties to proceedings, including that only a claimant can add a new defendant to the proceedings, and he or she may only do so without permission prior to the case management conference (rule 19.2(1)). Although the court may add or remove a party, either based on an application or on its own volition (rules 19.2(3) and 19.3(1)), it may do so only if such a course is desirable to resolve the matters in dispute in the proceedings (rule 19.2(3)(a)), or, if it is desirable to do so to resolve "an issue involving the new party connected to the matters in dispute in the proceedings" (rule 19.2(3)(b)). The original proceedings in this case would have been the judicial review proceedings, and those proceedings having already been completed, there would have been no issue left to be resolved that would require the addition of the parties that were added by Mr Jennings.

[41] Those proceedings having been completed, in my view, would have also meant that, any application using that claim number would relate to an issue consequent upon the decision of the court in that matter, and would involve the same parties. I am not of the view, therefore, that Mr Jennings could have properly commenced the proceedings before the learned judge in chambers, in respect of whether an attorney/client relationship existed, in the manner that it was brought. I agree with the appellant that, notwithstanding the referral of the matter by the deputy registrar to a judge in chambers, the issues should have been brought before the court by way of a fixed date

claim form, seeking a declaration from the court, which would have resulted in a new claim number affixed. A fixed date claim form is appropriate in the circumstances, since the issues to be determined were new and distinct, involved new parties and were unlikely to involve a substantial dispute as to fact. I say so on the premise that Mr Thompson averred in his affidavit, sworn to on 30 September 2019, that he provided legal advice and representation to Mr Jennings between November 2012 and June 2017, and that he had represented Mr Jennings in the Parish Court, the Supreme Court and the Court of Appeal (see paragraphs 20 and 22).

[42] I am, therefore, of the view that the learned judge erred when she concluded that the determination of whether an attorney/client relationship existed between Mr Thompson and Mr Jennings could be determined on a notice of application for court orders bearing the already concluded claim no 2015HCV02511 with the names of the parties added by Mr Jennings, and that an amendment of this notice of application "to reflect the true status of the matter and the parties herein" could cure the procedural defect she found had occurred.

Was Mr Jennings' error one that was capable of being cured? Did the learned judge err in applying rule 26.9 of the CPR to cure the irregularities in the application?

[43] Rule 26.9 of the CPR provides:

> "(1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order.
>
> (2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.

(3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.

(4) The court may make such an order on or without an application by a party."

[44] It is necessary to examine rule 26.9 in some detail. This rule gives the court "general power to rectify matters where there has been a procedural error". Rule 26.9(1) states that the rule "applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order". The use of rule 26.9, it would seem, is restricted where there is non-compliance with a rule, practice direction or court order and the consequence for the failure to comply has been specified by any rule, practice direction or court order. In other words, where there are no consequences provided for failing to conform to a rule, practice direction or court order, rule 26.9 may be used to remedy procedural errors.

[45] Rule 26.9(2), however, provides that an error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any steps taken in the proceedings, unless the court so orders. Additionally, rule 26.9(3) allows for the court to make an order to put matters right, where there has been an error of procedure or a failure to comply with a rule practice direction, court order or direction. It follows, therefore, that, while rule 26.9(1) refers to instances in which the general powers of the court to rectify procedural errors cannot be exercised, rules 26.9(2) and (3), reflect the broad instances in which these powers can in fact be utilised.

[46] In the circumstances of this case, Mr Jennings did not fail to adhere to a rule, practice direction, court order or direction, where the consequence of his non-compliance was explicitly stated. Therefore, the learned judge was not precluded from utilising rule 26.9 to rectify the procedural error which she identified had taken place.

[47] It has been well established that the discretion of the court to correct a procedural error does not extend to cases where that error amounts to a nullity (see **Vendryes v Keane and Keane, Stewart v Sloley and others**, and **B & J Equipment Rental v Nanco (Joseph)** JMCA Civ 2). Moreover, it is to be noted that not every procedural irregularity or error is to be taken as invalidating the proceedings or to be deemed a nullity. It would appear that, what is to amount to a nullity will depend on the circumstances of each case. The case law indicates that the circumstances in which the court has found that a procedural error amounted to a nullity, were cases in which that procedural error arose from non-compliance with a prescribed statutory provision or a rule which is couched in mandatory terms. This is not the case in this matter. Otherwise, the authorities show that the court does not readily find that a matter is a nullity.

[48] Mr Thompson has sought to rely on **Hendricks v Commissioner of Customs**. However, in my view, that case can be distinguished from the present one, on the basis that the issue there related to statutory provisions that required the court actions to be commenced in a particular way. The attempt to initiate the action any other way was, therefore, deemed to be a nullity. The issues before the court in **Hendricks v**

Commissioner of Customs, which arose from two appeals and a case stated submitted by the Resident Magistrate (now Parish Court Judge), included whether an application to the Resident Magistrates Court for forfeiture of cash under section 79 of the POCA could be properly commenced by a notice of application for court orders supported by an affidavit, and if not, whether the Resident Magistrate could cure the proceedings by way of the discretion given to it by the JRMA and JRMCR. Sinclair-Haynes JA found, which had been accepted by the parties, that since the POCA did not prescribe a procedure, the requisite procedure ought to have been by plaint and particulars of claim as set out in section 143 of the JRMA. She further reasoned that, since the Resident Magistrates Court was a creature of statute, the Resident Magistrate, could only act within the confines of the JRMA and JRMCR. The matters not having been commenced in accordance with the substantive legislation (given that a notice of application for court orders (form 7) is unknown to the Resident Magistrates Court and is a concept of the CPR), they would, therefore, have amounted to nullities, and could not be remedied by virtue of the discretion provided by section 190 of the JRMA. That power only applied to existing proceedings.

[49] Similarly, in **Stewart v Sloley and others**, Morrison JA (as he then was) agreed with the judge in the court below, that, in circumstances where an application made under rule 53.10 of the CPR was to be commenced by way of fixed date claim form, but was instead commenced by a notice of application for court orders, the judge had no discretion to cure the defect by reference to the overriding objective, as "the court cannot sanction something that the rule plainly does not permit" (see paragraph

[55]). In coming to this decision, Morrison JA considered that the rule was couched in mandatory terms with the use of the word "must", and spoke to the issue of the court's jurisdiction.

[50] On the other hand, from the case of **Georgia Pinnock (as Executrix of the Estate of Dorothy McIntosh Deceased) v Lloyd's Property Development Ltd & Ors** [2011] JMCA Civ 9, it can be gleaned that where the wrong claim number has been assigned to a document filed into court, this does not automatically lead to a nullity. Once that error can be remedied, the court ought to make orders to facilitate the correction of the error, particularly where it is to be attributed to the registrar of the court who has the statutory mandate to assign claim numbers to matters that are filed in the registry of the court. This was found to be so, even where the claimant himself had typed in the incorrect claim number. In such a case, it was found, the registrar ought to have checked that the number was correct.

[51] In **Georgia Pinnock**, the appellant was the executrix of the estate of the original claimant, Mrs McIntosh, who had in 1993, filed an action for specific performance of a sale agreement she had entered into with the 2nd respondent. The 2nd respondent had also entered into a sale agreement of the same property with the 3rd respondent. Although Mrs McIntosh had paid a deposit, the sale was not completed and she lodged a caveat to protect her interest in the property. In 1999, the court granted her specific performance, but for several reasons, years passed and the sale was still not completed. In 2009, the 3rd respondent instructed his attorneys to register an

instrument of transfer of the property, and the Registrar of Titles duly "warned" the caveat lodged by Mrs McIntosh. The caveat lapsed on 16 January 2009, and four days later the appellant filed a notice of application seeking an order directing the Registrar of Titles not to register the transfer, as well as an order restraining the 2nd respondent from dealing with the property. The orders were granted and extended several times. In October 2009 another order was made extending the restriction on the Registrar of Titles, but also directing the claimant to "institute proceedings for the court to determine the legal and equitable ownership of the property". The appellant subsequently filed a fixed date claim form using the same claim number as in the 1993 action. In response, the 3rd respondent filed an application to strike out the claim. The application was heard and the judge struck out the matter on the basis that the procedure utilized was invalid, as it was not possible to bring a fixed date claim form within an existing claim, particularly one that had already been adjudicated upon. The judge also directed that the claimant file a claim form in the matter, being of the view that a claim form was more suited than a fixed date claim form.

[52] On appeal, Phillips JA, writing on behalf of the court, agreed that it was wrong to file a fixed date claim within an already adjudicated claim, and that a new claim was required. She, however, found, relying on **Christopher Olubode Ogunsalu v Dental Council of Jamaica** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 53/2008, judgment delivered 3 April 2009, that it was the responsibility of the registrar to enter numbers on documents submitted by litigants for filing, and that the registrar ought not to have accepted the fixed date claim form and assigned it the

same number. The obligation remained with the registrar, although the appellant had affixed the number prior to it being filed. Phillips JA found that, although the error was not one that could be easily corrected, since it was doubtful that the relevant fees had been paid and the documents stamped, the court could still have ordered that the fixed date claim form be "amended or re-filed as long as the required stamps and/or fees had been settled, the seal of the court impressed, and the new number assigned thereto". She further found that to strike out the claim was a "draconian approach" and was "not necessary in all the circumstances, as it has only spawned further litigation, and increased costs as a result thereof" (see paragraph [38]).

[53] In coming to that decision Phillips JA relied on the Privy Council authority of **Eldemire v Eldemire** (1990) 38 WIR 234, in which the Board dealt with the issue of whether an action to recover property from trustees registered as the proprietors was wrongly commenced by originating summons, and whether this invalidated the proceedings. The Board stated, at page 239, as follows:

> "As a general rule, an originating summons is not an appropriate machinery for the resolution of disputed facts. The modern practice varies. Sometimes when disputed facts appear in an originating summons proceedings, the court will direct the deponents who have given conflicting evidence by affidavit to be examined and cross-examined orally and will then decide the disputed facts. Sometimes the court will direct that the originating summons proceedings be treated as if they were begun by writ and may direct that an affidavit by the applicant be treated as a statement of claim. Sometimes, in order to ensure that the issues are properly deployed, the court will dismiss the originating summons proceedings and leave the applicant to bring a fresh proceeding by writ.

> **In general, the modern practice is to save expense without taking technical objection, unless it is necessary to do so in order to produce fairness and clarification**. In the present case, as Gordon JA himself observed, the facts are not in dispute. The admissions of Arthur are just as effective in the originating summons proceedings as they were in the writ action." (Emphasis added)

[54] The more recent decision of this court in **Apple Inc v Swatch AG (Swatch SA) Swatch Ltd** [2019] JMCA Civ 29, is another case in which an error in commencing proceedings was found by the court to be curable rather than a nullity. The respondent, intending to initiate an appeal against a decision of the Registrar of Industrial Property under the Trade Marks Act, filed a document in the Supreme Court entitled 'Notice of Appeal' under rule 62 of the CPR, when the action ought to have been commenced by fixed date claim form pursuant to rule 60 of the CPR. The appellant filed a notice of a point *in limine* seeking to impugn the validity of the document on the basis that the error in procedure amounted to a nullity and was incapable of being cured. The respondent also filed a notice of application seeking orders to allow the appeal to stand as if properly filed, or that it be allowed time to file the requisite fixed date claim form. The learned judge ruled in favour of the respondent, allowing the document to stand. On appeal, F Williams JA on behalf of the court, in dealing with that issue, found that the learned judge had a "wide discretion to put matters right" pursuant to rule 26.9 of the CPR, there being no sanction prescribed by the relevant rules, and the words "shall" or "must" were not used in respect of the requirements in the relevant rules. F Williams JA also found that there would have been no prejudice caused to the appellant for the matter to be dealt with in substance, as, the "notice of appeal" contained all the

information required by rule 60.2. The "only real discernible difference" between the contents of both documents, he noted, was the title of both documents (see paragraph [50]). The learned judge of appeal also commended the use of the approach taken in **Eldemire** as the preferable one in circumstances of this nature (see paragraph [54]).

[55] In **Honiball and Another v Alele**, an appeal emanating from this court, where a matter raising an issue of fraud had been improperly commenced by way of a motion in an action in which the judgment had already been delivered, the Privy Council held, at page 319, that, although unusual in the circumstances:

> "The motion was, in truth, more in the nature of an originating motion. Nevertheless, the issue to be determined was fairly and squarely raised and the method of bringing it before the court was, in the final analysis, **no more than a procedural irregularity. It did not invalidate the proceedings and in their lordships' judgment the Court of Appeal of Jamaica was right not to attach critical importance to a purely procedural objection.** As it was expressed by Carey JA in the course of his judgment:
>
> > 'The practical effect of the [respondent's] procedure of a motion...amounts to the same as if he had proceeded directly. This circuitous route which the [respondent] chose pales into insignificance and merges into the real issue which fell to be determined, namely whether the [respondent] could prove fraud.' "(Emphasis added)

[56] The approach in that case accords with that taken in **Georgia Pinnock v Lloyd's Property Development Ltd, Apple v Swatch** and **Eldemire v Eldemire**.

Disposal

[57] Based on those authorities, I am not of the view that the proceedings in this case should be deemed a nullity, and I agree with the learned judge that the error was a matter of form rather than substance, and that it was capable of being rectified by the use of rule 26.9. I say so for the following reasons.

A. *The referral of the appellant's bill of fees to the registrar by Mr Jennings*

[58] In the instant case, Mr Jennings, as required by section 22(2) of the LPA, placed before the registrar the bill of costs that was prepared by Mr Leys QC and sent to him by Mr Thompson. Interestingly, it is noted that the bill of fees that was sent to him by Mr Thompson bore the same claim number as NCB's application for leave to commence judicial review proceedings. This was understandable, because Mr Jennings was being billed for legal fees in that matter.

[59] However, applying the principles in **Christopher Olubode Ogunsalu** and **Georgia Pinnock**, it would seem to me that when Mr Jennings referred Mr. Thompson's bill of fees to the learned registrar under section 22(2) of the LPA, the registrar could have assigned a new claim number to the matter, as was done in **Adolphy DeCordova Samuels and Ors v Clough Long & Co**. She could also have instructed that the notice be amended to reflect the correct names of the parties to the proceedings. This, it is opined, was within her statutory remit. However, it could well be that this was not done because of the quagmire that has been created by the procedural gaps in the LPA and the CPR.

[60] In passing, I wish to recommend that this lacuna be urgently addressed by rules of court as provided by section 29 of the LPA. The proper procedure ought to be made pellucid so that any client or person chargeable with an attorney's bill of fees may refer that bill to the registrar for taxation, if he or she so desires, without being met with the hurdles Mr Jennings has been confronted with in this matter. The uncertain situation, as it exists, in my view, has the potential to perpetuate injustice.

[61] By way of an example, in the United Kingdom ('UK'), a client is empowered to challenge his or her attorney's bill of costs by virtue of section 70 of the Solicitors Act 1974. This section falls under Part III of the legislation. Section 70(1) allows a party chargeable with a solicitor's bill to apply to the high court for the bill to be assessed within one month of being served. This provision is similar to section 22 of the LPA. Likewise, there is no provision in the Solicitors Act that sets out the procedure that is to be engaged to have a solicitor's bill assessed in these circumstances.

[62] However, various parts of the UK's Civil Procedure Rules ('CPR UK') provide that practice directions may be used to supplement the rules. The relevant rules in the CPR UK which address costs (special cases) and proceedings relating to solicitors can be found at Parts 46 and 67 respectively.[2] These rules are supplemented by practice directions 46 and 67 ('PD 46, PD 67').

---

[2] Rule 46.9 of the CPR UK makes provision for the basis of detailed assessment of solicitor and client costs. Rule 46.10 sets out the assessment procedure. Proceedings under Part III of the Solicitors Act 1974 are addressed by Rule 67.3 while PD 67 focusses on proceedings in the costs office, jurisdiction and

[63] The provisions in Parts 46 and 67 of the CPR UK, PD 46 and PD 67 set out the procedure that is to be followed to have an attorney's bill of costs taxed or assessed. In particular direction 6.4 of PD 46, which was updated on 30 January 2017, states that the procedure for obtaining an order under Part III of the Solicitors Act is done by instituting a Part 8 claim (similar to a fixed date claim form in our jurisdiction) in the High Court. If a similar course were to be adopted in our jurisdiction, any preliminary issues arising therefrom could easily and properly be dealt with by way of a notice of application for court orders under Part 11 of our rules.

B. *The procedure used to refer the preliminary objection to the judge in chambers*

[64] Having considered the authorities of **Eldemire**, **Christopher Olubode Ogunsalu**, **Apple v Swatch** and **Honiball**, I again find myself in agreement with the learned judge that what has occurred in this case amounts to no more than a procedural irregularity which does not invalidate the proceedings, and that she was correct, in my view, in not attaching significant importance to the "purely procedural objections" in this matter.

[65] Additionally, adopting the approaches stated in **Eldemire** and **Apple v Swatch**, "to save expense without taking technical objection, unless it is necessary to do so in order to produce fairness and clarification", the procedural defects that have been

---

allocation of these claims between the judiciary, how evidence is to presented and the drafting and service of orders.

identified are "curable" since they do not invalidate the proceedings, by applying rule 26.9 of the CPR.

[66] However, in the circumstances, applying these authorities, as well as, rule 26.9(3), I am convinced that the proper approach, was for an order to be made, by the learned judge, allowing the matter to proceed as if commenced by fixed date claim form and thereafter making any consequential orders that would be required to allow the matter to progress to trial.

[67] It is observed that the notice of application and supporting affidavits have set out in detail the real issue which falls to be determined, namely whether an attorney/client relationship existed between the parties, and in practical terms, they contained all the information that would have been required to be included in the fixed date claim form and any supporting affidavit(s). Therefore, the substance of the matter can be heard without exposing Mr Thompson to any risk of prejudice or substantial impairment of his rights.

[68] Consequently, while the learned judge erred in concluding that the determination of whether an attorney/client relationship existed between the parties could be determined on a notice of application bearing the same claim number of a matter that had been concluded, she was correct that the proceedings were not invalidated by the irregular procedure, because there had not been a breach of a prescribed statutory provision or rule couched in mandatory terms in initiating the proceedings. She also did not err when she found that rule 26.9(3) could be used to cure the procedural error. In

any event, as demonstrated by the authorities, the procedural defect is capable of being rectified without prejudice to Mr Thompson. Therefore, the learned judge cannot be faulted, for finding as she did, that the preliminary objections raised by Mr Thompson should fail.

Ground 3 - The learned judge wrongfully exercised her discretion in ordering costs of the preliminary objection to the respondent

A. *The appellant's submissions*

[69] Mr Thompson has submitted that, even though his preliminary objection was not upheld, since the learned judge ruled that there had been a procedural error in Mr Jennings' application that needed to be amended, he should have been awarded costs. It was submitted that, the learned judge ought to have adopted the approach in the first instance decision of **Cartade and others v Pan Caribbean Financial Services Limited and others** (unreported), Supreme Court, Jamaica, claim no 2006HCV02956, judgment delivered on 15 October 2008, in which Brooks J (as he then was) awarded costs to the defendants, even though he dismissed their application to strike out the claim, based on the fact that the application needed to be amended. The costs order was subsequently upheld on appeal (see **Pan Caribbean Financial Services Limited and others v Cartade and others** [2011] JMCA Civ 2). The learned judge's failure to adopt this approach, it was contended, amounted to an improper exercise of her discretion.

B. *The respondent's submissions*

[70] Counsel for Mr Jennings, on the other hand, has argued that the learned judge did nothing wrong in ordering costs in favour of Mr Jennings, as the general rule is that costs follow the event, and no special circumstances were submitted to the court to justify a deviation from this rule. Further, the learned judge's order to amend the application, it was asserted, was not consequent on Mr Thompson's objection, but was based on an observation by her that it was necessary for it to be plain in the heading of the application that the matter concerned an attorney/client bill of cost under section 22 (2) of the LPA.

[71] Counsel for Mr Jennings sought to distinguish the case of **Cartade and others v Pan Caribbean Financial Services Limited and others** from the instant case, on the basis that, in that case, the court was also considering the claimants' application to amend, the result of which would have affected the outcome of the defendants' application to strike out. Further, in that case, the amendments allowed were substantial and would have had consequential effects on the defendant. In this case, it was argued, the amendment of the heading had no effect on Mr Thompson.

C. *Discussion*

[72] A judge of the Supreme Court has a wide discretion to award costs in civil proceedings (see section 28E(1) of the Judicature (Supreme Court) Act), subject to any other enactment and the court rules). Pursuant to rule 64.6 of the CPR, if the court chooses to make an order as to costs in any proceedings, the general rule is that the court "**must** order the unsuccessful party to pay the costs of the successful party"

(emphasis added). The court, however, "**may"** order a successful party to pay all or part of the unsuccessful party's costs (rule 64.6(2)), based on a consideration of the factors set out in rule 64.6(4), which include the conduct of the parties, whether the unsuccessful party succeeded on certain issues, whether it was reasonable for any party to pursue a particular allegation, and the manner in which a party has pursued any aspect of the case. The language of the provisions makes it clear that, whether there should be a departure from the general rule, is ultimately within the discretion of the judge.

[73] It is well settled that this court will not interfere with the exercise of the learned judge's discretion unless it is of the view that the learned judge came to her decision based on a misunderstanding of the law or evidence before her, that would render her decision demonstrably wrong or so "aberrant that it must be set aside" (see **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1).

[74] In the circumstances, I can see no basis on which to interfere with the learned judge's discretion to order costs as she so did.

[75] Mr Thompson raised preliminary objections which were, for the most part, unsuccessful. The costs order made by the learned judge was in keeping with the general rule that the unsuccessful party **must** pay the costs of the successful party. Whilst the learned judge gave no reasons as to her ruling on costs, it is clear that she saw no reason to depart from the general rule in the circumstances. In my estimation, she cannot be faulted for this.

[76] The authority of **Cartade and others v Pan Caribbean Financial Services Limited and others** does not assist Mr Thompson. I agree with counsel for Mr Jennings that that case can be distinguished on its facts. The court was there considering both the defendant's application to strike out the claim, and the claimant's application to amend the claim to correct the errors which formed the basis of the defendant's application. The court was of the view that the interests of justice were better served by allowing the amendments to the statement of case rather than striking out the claim, but awarded costs to the defendants. This was understandable, considering the extensive submissions required for both applications noted by the judge, and that, as submitted by the respondent, the amendments would occasion substantial consequences, including amendments to the defence by the defendant.

[77] The same cannot be said in the instant case. I can see no prejudice or hardship caused to Mr Thompson consequent on the amendment ordered by the learned judge. All things considered, the question as to whether the partial success of Mr Thompson's argument that there had been a procedural error was a circumstance sufficient to take costs outside of the general rule was a matter for the learned judge, and I see no basis upon which to say she was palpably wrong for not finding that this was so.

[78] Accordingly, ground 3 fails.

Conclusion

[79] While I agree with the learned judge that the preliminary points should fail, I nonetheless would allow the appeal in part on ground 1, for the reasons stated above, and propose to make the following orders:

(1) The appeal is allowed in part.

(2) The order at paragraph (b) made by Henry-McKenzie J (Ag) on 22 November 2019 is set aside, but all other orders, including the order for costs, are affirmed.

(3) The matter is to proceed as if commenced by way of fixed date claim form.

(4) The respondent is to amend the heading of the fixed date claim form to reflect the true parties to the claim, being Peter Jennings as the claimant, and Douglas Thompson as the defendant.

(5) The registrar is to affix a new claim number to the document as amended.

(6) Thereafter, the matter is to be set down for first hearing.

(7) Each party is to bear their own costs of the appeal.

BROOKS JA

ORDER

1. The appeal is allowed in part.

2. The order at paragraph (b) made by Henry-McKenzie J (Ag) on 22 November 2019 is set aside, but all other orders, including the order for costs, are affirmed.

3. The notice of application for court orders is to proceed as if commenced by way of fixed date claim form.

4. The respondent is to amend the heading of the fixed date claim form to reflect the true parties to the claim, being Peter Jennings as the claimant, and Douglas Thompson as defendant.

5. The registrar is to affix a new claim number to the document as amended.

6. Thereafter, the matter is to be set down for first hearing.

7. Each party is to bear their own costs of the appeal.