

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MISS JUSTICE STRAW JA  
THE HON MRS JUSTICE FOSTER-PUSEY JA  
THE HON MISS JUSTICE SIMMONS JA**

**SUPREME COURT CIVIL APPEAL NO COA2023CV00064**

**IN THE MATTER** of an application by DIANA THORBURN, RACHEL HERNOULD, BARBARA THORBURN-MCINTOSH to exercise jurisdiction over the financial affairs of ERNEST CARROLL THORBURN.

AND

**IN THE MATTER** of Section 29 of the Mental Health Act.

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| <b>BETWEEN</b> | <b>DIANA THORBURN<br/>RACHEL HERNOULD<br/>BARBARA THORBURN-MCINTOSH</b> | <b>APPELLANTS</b> |
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| <b>AND</b> | <b>PAULINE LINDO</b> | <b>RESPONDENT</b> |
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**Written submissions filed by Mrs Tana'ania Small Davis KC instructed by Livingston, Alexander & Levy for the appellants**

**Written submissions filed by M Maurice Manning KC and Miss Sherry Ann McGregor instructed by Nunes Scholefield DeLeon & Co for the respondent**

**31 July 2026**

**Civil Procedure – Costs - Notice of application for extension of time to file points of dispute – Whether rule 26.1(2)(c) applies to Part 65 of the Civil Procedure Rules, 2002**

**Civil Procedure – Costs - Application for relief from sanction - Civil Procedure Rules, 2002, Rules 65.20 and 26.8**

**PROCEDURAL APPEAL**

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

**STRAW JA**

[1] I have read, in draft, the judgment of my learned sister Simmons JA and agree with her reasoning and conclusion. There is nothing that I wish to add.

**FOSTER-PUSEY JA**

[2] I, too, have read the draft judgment of my learned sister Simmons JA. I agree with her reasoning and conclusion.

**SIMMONS JA**

[3] This is an appeal from the judgment of Master Henry-Anderson (‘the learned master’), made on 31 July 2023, refusing the appellants’ application for an extension of time to file points of dispute and for relief from sanction for failure to file points of dispute within the time specified in the Civil Procedure Rules, 2002 (‘the CPR’). The award of costs in favour of the respondent has also been appealed.

**The background**

[4] The facts giving rise to the proceedings are set out in the learned master’s judgment (**Re: Diana Thorburn, Rachel Hernould and Barbara Thorburn-McIntosh and Ernest Carroll Thorburn** [2023] JMSC Civ 233). They are not disputed, and I will focus on those aspects that are directly relevant to this appeal.

[5] In December 2017, Diana Thorburn, Rachel Hernould, and Barbara Thorburn-McIntosh (‘the appellants’), who are the daughters of Ernest Carroll Thorburn (‘Mr Thorburn’), filed an action under section 29 of the Mental Health Act, seeking a declaration that their father, Mr Thorburn, was incapable of managing and administering his financial

affairs due to a mental disorder. They also sought an order appointing them to oversee his affairs. Mr Thorburn's sister, Mrs Pauline Lindo ('the respondent'), was permitted to intervene in the proceedings as an interested party.

[6] On or about 29 January 2019, the matter was discontinued after the submission of medical reports, which showed that Mr Thorburn had full mental capacity and was capable of managing his affairs. Costs were awarded to the respondent.

[7] On 2 November 2021, a bill of costs amounting to \$13,895,891.85 and notice to serve points of dispute were filed and served by the respondent's attorneys-at-law on the appellants' attorneys-at-law.

[8] On 30 November 2021, the deadline for filing the appellants' points of dispute, they requested and obtained an extension of time from the respondent to do so by 7 December 2021. That deadline was not met.

[9] On 17 December 2021, the appellants' attorneys-at-law requested a further extension of time until 23 December 2021. Their request was not granted. However, the respondent's attorneys urged them to file their points of dispute as soon as possible but indicated that they reserved the right to oppose any application for relief.

[10] On 17 December 2021, the appellants filed an application seeking an order that:

1. The time for filing their points of dispute be extended to 21 days from the date of the order of the court; and
2. The appellants be granted relief from any sanction for failure to file their points of dispute within the time specified in the CPR.

[11] The grounds on which they relied are as follows:

- "(1) The [respondent] filed her Bill of Costs on 2 November 2021. The time for filing the Points of Dispute was 30 November 2021.

- (2) The failure to file the Points of Dispute was not intentional and the [appellants] have a good explanation for their failure to do so.
- (3) The Bill of Costs comprises 55 pages claiming costs of \$13,895,891.85. The papers relating to this matter are voluminous, and even though they don't all relate to the specific period in question, the Bill of Costs requires detailed response which necessitates going through many volumes of [papers and correspondence and to cross check against the items claimed.
- (4) Preparation of the Points of Dispute is an extremely time-consuming matter and came towards the end of the court term.
- (5) No Request for Default Costs certificate was filed up to 15 December 2021.
- (6) In all the circumstances, given the amount of costs that are being claimed, and that the [respondent] did not seek assessment of the costs for a period of two years, there is no prejudice caused by the delay in the [appellants'] Points of Dispute being filed out of time."

[12] The application was supported by the affidavit of Analiese Minott, attorney-at-law, who stated that the failure to file the points of dispute was not intentional and that there was a good explanation for the delay. The voluminous nature of the bill of costs, the large amount being claimed, the amount of work involved in responding and the court commitments of counsel were the factors relied on. The respondent relied on the affidavit of Michelle Campbell, who stated that after the appellants' request for additional time was refused on 17 December 2021, no further communication was received from their attorneys-at-law, and on 25 January 2022, a request for a default costs certificate was filed.

[13] It was further stated that the respondent's attorneys only became aware that an application for an extension of time had been filed when they received a requisition from the deputy registrar on 25 February 2022. A copy of the application was obtained from

the court on 13 April 2022. On 23 August 2022, the respondent's attorneys were served with the said notice of application and affidavit in support. It was indicated that one of the bases on which the application was being opposed was the prejudice to the respondent, who was stated to be in her 90s and "physically frail".

[14] In response, Ms Minott in her second affidavit, dated 18 November 2022, challenged Ms Campbell's assertion that the respondent would suffer any prejudice as the litigation was funded by Mr Thorburn's nephew and the bill of costs was not filed until two years after the costs order. The appellants filed their points of dispute on 15 February 2023.

### **The learned master's judgment**

[15] In considering the application for extension of time and relief from sanction, the learned master indicated that the first issue for her consideration was whether it was procedurally correct for a party who had not filed points of dispute to apply for an extension of time to do so or relief from sanctions. She concluded that rule 26.1(2)(c) of the CPR (power to extend time) does not apply to the costs regime in Part 65 of the CPR and that the registrar was duty-bound to issue a default costs certificate once a proper request had been made. The paying party could then apply to set it aside.

[16] The learned master also found that although the application for extension of time and relief from sanction had been made promptly, the points of dispute were not filed until one year and two months after it was due, and no explanation was given for the further delay. Additionally, the said points of dispute, having not been exhibited to an affidavit of merit, could not be considered by her.

[17] Regarding the application for relief from sanction, the learned master concluded that in light of the one year and two months' delay in filing the points of dispute, she could not find that the appellants' actions were not intentional, where no good reason had been advanced for the continuing default. On those bases she refused the appellants' application for extension of time and relief from sanction.

## **The appeal**

[18] The appellants signalled their dissatisfaction with the learned master's decision by filing a notice of appeal on 11 August 2023, which was later amended on 28 December 2023, seeking the following orders:

- "a. The appeal is allowed.
- b. The Appellants are granted an extension of time and relief from sanction. The Points of Dispute filed on 15 February 2023 is permitted to stand.
- c. The Respondent shall pay the Appellants' costs here and in the court below."

[19] The grounds of appeal are as follows:

- "a. The learned [master] erred in that in the exercise of her discretion by taking into account matters that were not relevant and or by failing to take into account the relevant factors and or by failing to give due weight to relevant factors. In so doing the learned Master failed to balance the scales of justice.
- b. The learned Master erred in refusing to consider the Points of Dispute that had been filed in order to make an assessment of whether there was (a) a clearly articulated dispute about the costs sought and (b) a realistic prospect of successfully disputing the Bill of Costs. The learned Master erred in equating the Points of Dispute to a pleading, which would not constitute evidence and failed to appreciate the significant difference in assessing the merits of a defence by reference only to itself, it being a pleading and would in time have to be borne out by the evidence unlike points of dispute which would be assessed by the Registrar as taxing master without separate evidence. In doing so, the learned Master failed to apply her judicial function by reference to the criterion of justice.
- c. The learned Master erred in applying a rigid formula in refusing the application and did not give proper consideration that there was good reason why the extension and/or relief from sanction ought to be

granted and that there would be no undue prejudice to the Respondent. Even if the learned Master did not consider that there was a good reason for the delay, she ought to have given proper consideration as to the justice of the case including whether administration of justice would be harmed and whether the Respondent would be prejudiced. In rejecting the Applicants' reasons, the learned Master limited them to being 'understandable in the context of a 21-day request for extension' and erred in failing to consider them as ongoing reasons for the delay in filing the Points of Dispute. There was no proper basis for the reference to a 21-day request for extension since the application sought an extension of time until 21 days after the order is granted.

- e. The learned Master erred in concluding that the Appellants' failure to file the Points of Dispute was intentional on the basis that there was over a year of non compliance with no good reason being advanced."

[20] In the amendment to the grounds of appeal, ground of appeal d was deleted and was consequently not before the panel for its consideration.

[21] The following findings of law are also challenged:

- "a. The [appellants] failed to give a good explanation for the failure to file the Points of Dispute.
- b. The reasons given by the [appellants] for the delay in filing the Points of Dispute are understandable in the context of a 21 day request for extension but could not be seen as clear and cogent reasons for the further delay of over a year.
- c. The [appellants] have not given a good reason for the inordinate delay in filing the Points of Dispute when it did;
- d. The Court would not have any regard to the Points of Dispute that were filed on 15<sup>th</sup> February 2023; having not been properly exhibited to an Affidavit of Merit, the Points of Dispute cannot properly be considered as evidence of merit. The mere filing of a Points of Dispute

on its own is insufficient. Details needed to have been contained in an affidavit for the Court to properly taken them into consideration. The Court has no evidence upon which it can properly find that there is any merit to the challenge of the Bill of Costs and the Applicants have not provided any evidence of special or exceptional circumstances for the lack of evidence of merit to be excused.

- e. The [appellants'] failure to file the Points of Dispute was intentional after over a year of non-compliance with no good reason being advanced for continuing default."

[22] The respondent filed a counter notice of appeal seeking orders that:

- (a) The appeal be dismissed.
- (b) The counter notice of appeal is allowed, and the judgment entered on 31 July 2023 is affirmed.
- (c) Costs of the appeal to the respondent.

[23] The grounds are that the learned master's orders ought to be affirmed for the reasons set out in the judgment and for the following further reasons:

- "a. The Appellants' affidavits in support of the application were deficient and defective, in that they contained no evidence to satisfy the requirements to extend time to file Points of Dispute or to obtain relief from sanctions.
- b. It was proper for the Learned Master to exclude reference to the Appellants' Points of Dispute because it was filed on February 15, 2023, after (a) the Appellants had commenced submissions and the application was adjourned part-heard, and (b) their application for an adjournment and permission to file further evidence had been heard and refused, without there being any request for leave to appeal that ruling.
- c. Even if the Learned Master had regard to the Points of Dispute filed on February 15, 2023, it would not have

assisted the Appellants to overcome the deficiencies in the Affidavits in support of the application.

- d. Based on the unrefuted facts of this case, the Learned Master was correct to find that the sanctions imposed by CPR 65.20(4) took effect once the Appellants failed to file Points of Dispute in time. For that reason, only an application for relief from sanctions ought to have been considered by the Learned Master.
- e. If the proper administrative steps had been taken in a timely manner, the Default Costs Certificate would have been issued. In that case, the Appellants would have been entitled to apply to set aside the Default Costs Certificate in reliance on CPR 65.22. Even then, the Appellants would have fallen short on fulfilling the requirements for setting aside, as they would not have demonstrated as good reason, exhibited a proposed Points of Dispute to an affidavit, nor set out any of their complaints about the Bill of Costs in an Affidavit."

### **The issues for determination**

[24] The primary issue for the consideration of this court is whether the learned master erred in exercising her discretion when she refused the application for an extension of time and relief from sanction. This broad issue has given rise to the following sub-issues, which must be examined by the court:

1. Whether rule 26.1(2)(c) of the CPR, which governs applications for extension of time, is applicable to the costs regime in Part 65 (ground e (first limb) of the counter notice of appeal).
2. If yes, whether the learned master failed to properly apply the test for applications for extension of time (grounds of appeal a, c, e and b and grounds a and e (second limb) of the counter notice of appeal).

3. Whether the learned master erred in not considering the Points of Dispute that had been filed (ground of appeal b and grounds b, c and e of the counter notice of appeal).
4. Whether an application for relief from sanction was required in the circumstances (ground d of the counter notice of appeal).

### **The standard of review**

[25] As acknowledged by both counsel, the principles that should guide the approach of this court in treating with the appeal, which is concerned with the exercise of the learned master's discretion are contained in the oft-cited case from this court, **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, which endorsed the principles in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042. Consequently, this court can only interfere with the exercise of the learned master's discretion in limited and well-defined circumstances. To properly interfere with the learned master's decision, this court must be satisfied that the exercise of her discretion was based on a misunderstanding of the law and/or the evidence, or that the decision is so aberrant that it must be set aside on the ground that no judge, regardless of his duty to act judicially, could have reached it. This court must have due regard to the master's exercise of her discretion and must not interfere with it merely on the ground that we would have exercised our discretion differently.

### **Issue 1: Whether rule 26.1(2)(c) of the CPR, which governs applications for extension of time, is applicable to the costs regime in Part 65 (ground e (first limb) of the counter notice of appeal)**

#### Appellants' submissions

[26] Counsel on behalf of the appellants argued that Part 65 is silent on how late filings for points of dispute may be regularised and that is a matter that must be adjudicated upon by the court under its general powers of management. In referring to rule 26.1(2)(c) of the CPR, counsel submitted that where a rule does not particularise the factors that

the court should consider in exercising its discretion, the court is required to have regard to the overriding objective of dealing with cases justly.

[27] Counsel further submitted that the appellants had properly applied to the court for an extension of time to file their points of dispute pursuant to rule 26.1(2)(c) and the inherent jurisdiction of the court and that they had done so before the points of dispute were filed on 15 February 2023.

[28] Therefore, the learned master erred in holding that rule 26.1(2)(c) has no application to Part 65 and that the appellants' only recourse was to await the entry of a default costs certificate and then apply to set it aside.

#### Respondent's submissions

[29] Counsel submitted that the learned master was correctly guided by the case law in relation to the appellants' request for an extension of time. She stated that the learned master considered all the principles and the relevant factors in determining whether to grant the extension of time to file the points of dispute. Reference was made to **Attorney General of Jamaica v Roshane Dixon; Attorney General of Jamaica v Sheldon Dockery** [2013] JMCA Civ 23 ('**Roshane Dixon and Sheldon Dockery**'), **Barrington Green and anor v Christopher Williams and ors** [2023] JMCA Civ 5 ('**Barrington Green**'), **The Attorney General of Jamaica and anor v Rashaka Brooks Jnr (A minor) by Rashaka Brooks Snr (His father and next friend)** [2013] JMCA Civ 16 ('**Rashaka Brooks**') and **Phillip Hamilton v Frederick Flemmings & anor** [2010] JMCA Civ 19), in support of that submission.

[30] It was further submitted that in the court below "there [was] no dispute regarding the factors that the court should consider when exercising its discretion, as outlined in the case of **Roshane Dixon and Sheldon Dockery**". Having referred to paras. [19], [50], [52] to [57], [61] and [65] of the learned master's reasons, counsel submitted that there was no basis for this court to disturb the well-reasoned findings of the learned master.

## Discussion

[31] Rule 26.1(2)(c) of the CPR states:

**“Except where these rules provide otherwise, the court may-**

- (c) Extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed.” (Emphasis supplied)

[32] Part 65 of the CPR deals with the costs regime. Where costs are not agreed between the parties they may be taxed by the registrar, sitting as taxing master. The party entitled to be paid its costs is the receiving party; the party liable to pay them is the paying party. Taxation proceedings begin when the receiving party files and serves a bill of costs. Where the paying party intends to dispute items in the bill, points of dispute must be filed within 28 days of service. This is provided for by rule 65.20, which states:

- “(1) The paying party and any other party to the taxation proceedings may dispute any item in the bill of costs by filing points of dispute and serving a copy on –
  - (a) the receiving party; and
  - (b) every other party to the taxation proceedings.
- (2) Points of dispute must –
  - (a) identify each item in the bill of costs which is disputed;
  - (b) state the reasons for the objection; and
  - (c) state the amount (if any) which the party serving the points of dispute considers should be allowed on taxation in respect of that item.
- (3) The period for filing and serving points of dispute is 28 days after the date of service of the copy bill in accordance with paragraph (1).

- (4) If a party files and serves points of dispute after the period set out in paragraph (3) that party may not be heard further in the taxation proceedings unless the registrar gives permission.
- (5) The receiving party may file a request for a default costs certificate if -
  - (a) the period set out in paragraph (3) for serving points of dispute has expired; and
  - (b) no points of dispute have been served on the receiving party.
- (6) If any party (including the paying party) files points of dispute before the issue of a default costs certificate the registrar may not issue the default costs certificate."

[33] The learned master found that rule 26.1(2)(c), which deals with applications for extension of time, does not apply to the costs regime in Part 65, and consequently, an application to extend time was not permitted. In this regard, she indicated that the proper course, where the points of dispute have not been filed within the stipulated time, is for the registrar to issue a default costs certificate. In addition, she stated at para. [43] of her judgment:

"It is important to note that this scenario differs from the entry of default judgments under Part 12, primarily due to the introduction of Rule 12.5(e) in 2006,"

[34] Having referred to **Workers Savings and Loan Bank Limited v Winston McKenzie and ors** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal Nos 102 & 103/1996, judgment delivered 3 December 1996, the learned master stated that once a proper request had been made for a default costs certificate, it must be issued by the registrar. At that stage, the paying party may, if he or she so desires, apply to have it set aside. That is indeed correct; however, the sequence of events in this matter does not follow that script.

[35] In the instant case, the bill of costs was filed and served on 2 November 2021. The points of dispute were required to be filed within 28 days of that date. They were not, and the appellants filed their application for extension of time on 17 December 2021. The respondent filed an application for a default costs certificate on 25 January 2022. The hearing for application of extension of time and relief from sanction before the learned master commenced on 9 February 2023 and the points of dispute were filed by the appellants on 15 February 2023. Had there been no application for extension of time, the matter would have progressed as set out in Part 65. The application for extension of time effectively stayed the registrar's hand.

[36] The appellants have submitted that there is a lacuna in Part 65 of the CPR, as there is no provision dealing with the extension of time for filing points of dispute. I agree that Part 65 makes no reference to extending the time for filing points of dispute and only speaks to the setting aside of a default costs certificate. However, it is important to note that rule 26.1(2)(c) applies except where the rules otherwise provide and no provision in Part 65 specifically excludes its operation. If the respondent's submissions on this point are to be accepted, a paying party would be required to wait until a default costs certificate is issued, and then seek to set it aside, in circumstances where that party could properly file its points of dispute if afforded more time to do so. In **Auburn Court Limited and anor v National Commercial Bank Jamaica Ltd and anor** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 27/2004, Application No 7/2009, judgment delivered 18 March 2009, Harris JA stated at para. 17:

"On the issue of the bill of costs on the applicants on April 18, 2008, they would have been under a duty to file points of dispute within 28 days from that date. They did not do so until July 21, 2008. The document containing their points of dispute was accompanied by a letter addressed to the registrar seeking permission to file the points of dispute out of time. This letter to the registrar would in no way have availed them. In fact, the transmission of the letter requesting the registrar's permission to file the requisite document was misconceived. The rules do not empower the registrar to make an order for an extension of time to file points of dispute. **On the**

**expiration of the time for filing points of dispute, the applicants ought to have made an application to the court for an order for an extension of the time within which to comply with rule 65.20(3)."** (Emphasis supplied)

[37] In my view, to require a paying party to wait until a default costs certificate is issued and then apply to set it aside would incur unnecessary costs. That could not have been the intention of the framers of the rules and would not be in keeping with the overriding objective which requires the court to deal with cases justly. The court, in carrying out that mandate, is required to ensure, as far as practicable, that the court's resources are utilised efficiently and expense saved.

[38] Before any application for a default costs certificate has been made, a paying party may realise that it will be unable to file and serve its points of dispute within the stipulated time. It would be remiss of such a party to do nothing. In those circumstances, the filing of an application for extension of time would be the appropriate course. That is what the appellants did. Where a party's application to extend the time for the filing of points in dispute is successful and they file that document within the time allowed, rule 65.20(4) does not come into play. In the absence of any provision in the CPR which provides otherwise, it is my view that rule 26.1(2)(c) of the CPR applies to the costs regime in Part 65. Grounds d and e (first limb) of the counter-notice of appeal therefore fail.

**Issue 2: Whether the learned master failed to properly apply the tests for applications for extension of time [grounds a, c, e and b (in part) and grounds a and e (second limb) of the counter-notice of appeal]**

Discussion

[39] Applications for extension of time are governed by rule 26.1(2)(c) of the CPR which has already been set out in para. [30] above. The rule does not, however, specify the factors that are to be taken into account by the court in its consideration of such applications. In **Roshane Dixon and Sheldon Dockery**, Harris JA, who delivered the decision of the court, stated at paras. [17] to [19]:

"[17] The court is endowed with discretionary powers to grant an extension of time but will only do so where it is satisfied that there is sufficient material before it which would justify it in so doing. In **Strachan v The Gleaner Company** Motion No 12/1999 delivered 6 December 1999, Panton JA (as he then was) outlined the following factors which a court takes into consideration in the exercise of its discretion on an application for an extension of time:

- '(i) the length of the delay;
- (ii) the reasons for the delay;
- (iii) whether there is an arguable case for an appeal and;
- (iv) the degree of prejudice to the other parties if time is extended.'

He further said that:

'Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for a [sic] extension of time, as the overriding principle is that justice has to be done.'

[18] It cannot be denied that rule 1.1 of the CPR under which the appellant seeks assistance, imposes an obligation on the court to deal with cases justly. In order to give effect to the overriding objective, under the rule, the court, in its application and interpretation of the rules, must ensure as far as is practicable that cases are dealt with fairly and expeditiously. The court, in considering what is just and fair looks at the circumstances of the particular case. In an application for an extension of time, the delay and the reasons therefor are the distinctive characteristics to which the court's attention is initially drawn. It cannot be too frequently emphasized that judicial authorities have shown that delay is inimical to the good administration of justice, in that it fosters and procreates injustice. It follows therefore, that in applying the overriding objective, the court must be mindful that the order which it makes is one which is least likely to engender injustice to any of the parties.

[19] The first issue to be addressed relates to the **length of the delay in making the application...**". (Emphasis supplied)

(See also **Barrington Green, Rashaka Brooks and Phillip Hamilton v Frederick Flemmings & anor**)

(a) *The length of the delay*

[40] The learned master, at para. [50], found that there was no inordinate delay in the filing of the application. In addressing this issue, the learned master stated:

"Addressing the issue of delay, this Court agrees with Counsel for the Applicant, that the time for filing of the Application was not inordinately long as it was just some 17 days after the points of dispute was due."

[41] In the same paragraph, the learned master also addressed the delay in filing the points of dispute. She stated:

"What was clearly inordinate however, was the length of time for the filing of the Points of Dispute itself, that is, some 1 year and 2 months after it was due. The reasons that have been provided as to why the initial delay occurred, are duly noted by this court, that is (i) the fact that counsel in the litigation department were very busy at the time the points of dispute was due, (ii) that the bill of costs was some 55 pages in length and given its complexity, warranted an experienced costs paralegal to review the files and papers in order to properly prepare it, and lastly, (iii) that it was not easy to locate such a person within the available time allotted. **However, though these could be seen as understandable reasons in the context of a 21-day request for extension, they could not be seen as clear and cogent reasons for the further delay of over a year.** In fact, though a further Affidavit was provided by Analiese Minott in November 2022, which the Court anticipated would have dealt with the delay from the time of the filing of the Application to when this later Affidavit was filed, that is, just some two months before the date fixed for the hearing of the Application, it did not do so. **As such, this Court finds that there was no good reason provided by the Applicants for the inordinate delay in**

**filing the Points of Dispute when it did.”** (Emphasis supplied)

[42] In assessing whether the learned master erred in taking into account the period between the time when the points of dispute were due and the date of filing, I have borne in mind that the application for an extension of time was made in circumstances where the points of dispute had not been prepared up to the time of the filing of the said application. In fact, the affidavit of Ms Minott sets out the reasons why that had not been done. Based on that affidavit, this is not a case where the document had already been filed, and an application was being made to regularise the situation. Ms Minott deposed that the appellants’ inability to file the points of dispute within the time allowed was due to counsel’s work pressure and the magnitude of the bill of costs. She further stated that as a result, they were unable to handle the preparation of the points of dispute. The application for extension of time having been made on that premise ought not to have been evaluated against the late filing of the points of dispute.

[43] In my view, the appellants, having filed the application, cannot be faulted for awaiting the court’s decision and were, therefore, not obliged to file the points of dispute prior to obtaining an extension of time to do so. The learned master, therefore, erred in using the date on which the points of dispute were filed to determine the length of the delay.

[44] In any event, even if the period between the time when the points of dispute was due and the date of the filing of the points of dispute is found to be inordinate, that is not the end of the matter. As stated in **Leymon Strachan v The Gleaner Company** (unreported), Court of Appeal, Jamaica, Motion No 12/1999, judgment delivered 6 December 1999 (**‘Leymon Strachan’**), even where there is no good reason for the delay, the court is not bound to reject the application. The circumstances of the case are to be examined with a view to determining the justice of the case. In that assessment, the merits of the case would be highly relevant. In the circumstances, I will proceed to consider the explanation given for the delay.

(b) *The explanation for the delay*

[45] The explanation for the delay given by Ms Minott is that the appellants' attorneys-at-law faced certain challenges that prevented them from addressing the bill of costs, which was quite formidable. At paras. 8 and 9 of her affidavit she stated:

"8....Even though initially an attorney in our office attempted to draft the Points of Dispute, it is an extremely time consuming matter and came towards the end of the court term in which every single lawyer in our litigation department in particular is under extreme pressures with various back-to-back trials and contested hearings right down to the last day of term. Indeed, five of our lawyers are involved in a matter that is scheduled to continue beyond the end of the term on 20 December 2021.

9. The [appellants'] lead counsel Mrs. Tana'ania Small Davis eventually realised that it would be more efficient if a specialist costs paralegal should be retained to prepare the Points of Dispute. An extension of time of one week was sought and agreed by the [respondent's] Attorneys-at-law however that time has proved insufficient."

[46] As set out above, in dealing with this issue the learned master found that whilst there was no inordinate delay in the filing of the application that could not be said of the time the appellants took to file the points of dispute. She then proceeded to assess whether "clear and cogent" reasons were given for the latter period of delay and found them wanting. The relevant paragraphs of the judgment are set out above at para. [41].

[47] The respondent has prayed for the learned master's decision to be affirmed on the basis that the appellants' affidavits in support of the application were insufficient to satisfy the requirements for the grant of an extension of time. In this regard, I have found the decision of this court in **Alice McPherson v Portland Parish Council and ors** [2020] JMCA Civ 64 (**'the McPherson appeal'**) to be instructive. At paras. [52] and [53] Straw JA, who delivered the judgment of the court, stated:

"[52] Fraser JA (Ag) as he then was, who wrote the main judgment in the application by the appellant for extension of

time to file this appeal (see **Alice McPherson v Portland Parish Council et al** [2019] JMCA App 20) approached the concept of a good reason, as required in rule 39.6(3)(a) of the CPR, at paragraph [47] of that judgment as follows:

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

I have adopted his reasoning in that regard.

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

**'...A 'proper' or 'good' explanation or reason must be one which not only adequately reveals why the default occurred, it must also show that the default is excusable in the circumstances.** Put another way, an explanation or reason may comprehensively outline what caused a particular failing, but to be 'good', it also has to have the additional quality of justifying the relief, forbearance or favourable exercise of discretion sought.'" (Emphasis supplied)

[48] In **Attorney General v Universal Projects Limited** [2011] UKPC 37, Lord Dyson, who delivered the opinion of the Board, stated at para. 23:

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

[49] In this matter, the learned master accepted the appellants' explanation for the delay, in part. However, it appears that she lost sight of their reasons for making the application for extension of time. The learned master noted when the points of dispute were filed and found that no good reason had been provided for the entire period of the

delay. As stated above, that was the wrong approach. The appellants were awaiting the outcome of their application for extension of time. The fact that they chose to be proactive by filing the points of dispute before the learned master's decision should not have been used against them.

[50] Based on Ms Minott's affidavit, the appellants were not personally at fault in this matter. In such circumstances, the court has demonstrated a general unwillingness to punish a client where his attorney-at-law was responsible for ensuring compliance with the rules. In **Merlene Murray-Brown v Dunstan Harper and anor** [2010] JMCA App 1, the principle was stated by Phillips JA in the following terms:

"[30]...The fact is that there are many cases in which the litigants are left exposed and their rights infringed due to attorneys [sic] errors made inadvertently, which the court must review. In the interests of justice, and based on the overriding objective, the peculiar facts of a particular case, and depending on the question of possible prejudice or not as the case may be to any party, the court must step in to protect the litigant when those whom he has paid to do so have failed him, although it was not intended..."

(See also **the McPherson appeal** and **Salter Rex & Co v Ghosh** [1971] 2 All ER 865)

[51] I have also noted that in **Alice McPherson v Portland Parish Council and ors** [2019] JMCA App 20 (the application decision), where the delay was caused by the failure of the applicant's attorney's secretary to diarise the date and her departure without sharing the information with the applicant's counsel, the court stated at para. [50]:

"...a court could be minded to view the failings of counsel as excusable oversight, rather than mere administrative inefficiency. The court is also well aware of the oft cited words of Lord Denning MR in **Salter Rex & Co v Ghosh** [1971] 2 All ER 865 at page 866 where he said, 'We never like a litigant to suffer by the mistake of his lawyers'. Accordingly, we conclude that there is a realistic prospect that a court may find that the applicant's reason for her non-attendance at the CMC was a good one." (Bold as in original)

[52] In this matter, the reason proffered for the appellants' inability to file the points of dispute within the required time was accepted by the learned master as a good one. I agree. However, she fell into error by considering the additional period after the application was made in assessing that issue.

[53] Where the explanation for the delay is found to be wanting, the failure of the application is not inevitable. In **Carlton Williams v Veda Miller** [2012] JMCA App 39, ('**Carlton Williams**'), Harris JA stated at paras. [32] and [33]:

"[32] The reason for the failure of the applicant to comply within the requisite time is highly material. **Some reason for the delay must be advanced. Even in the absence of a good reason, the court may nonetheless grant an extension, if the interests of justice so requires** [sic]. In **CVM Television v Tewarie** the appellant advanced a reason for the delay which was not considered 'altogether adequate', but was treated as not 'entirely nugatory'. In **Williams v The Attorney-General**, a notice of appeal was filed in relation to an interlocutory order made in the court below, without the requisite leave being granted for appealing. Although the time for appealing lapsed, leave to appeal was granted. The reason proffered for the tardiness was a mistake on the part of the attorney-at-law for the appellant and the misplacement of the file in the Registry of the Supreme Court. In **Arawak Woodworking Establishment Limited v Jamaica Development Bank Limited**, an application for enlargement of time to appeal was refused because the applicant, having been granted leave to appeal by the Master, failed to do so within the prescribed time and delayed for a period of 54 days before seeking an extension of time, despite reminders by the registrar of the court of appeal. No reason was advanced for the delay. In addition, the proposed appeal was considered unmeritorious.

[33] It is true, as Mr Haisley submitted, that the applicant's attorney-at-law was seized of the matter 15 days prior to the expiration of the time for appealing and could have acted then. However, he did not. **There being a delay, a reason or reasons must be put forward for it. It cannot be said that some reason had not been given for the delay. The fact that the heavy workload of the attorney-at-law**

**prevented him from pursuing an appeal in a timely manner and the matter of the misplaced file due to the attorney's relocation are acceptable as plausible explanations for the applicant's tardiness in the pursuit of an appeal."** (Emphasis supplied)

[54] It is evident from the court's reasoning in **Leymon Strachan** and **Carlton Williams** that the interests of justice must be considered (see also **Fiesta Jamaica Limited v National Water Commission** [2010] JMCA Civ 4).

[55] In order to determine whether it is in the interests of justice to grant the application for extension of time, the merits of the case must be assessed.

**Issue 3: Whether the learned master erred in not considering the points of dispute [ground of appeal b and grounds b, c and e of the counter notice of appeal]**

Appellants' submissions

[56] On the appellants' behalf, it was submitted that the points of dispute, having been filed, ought to have been considered by the learned master. Reliance was placed on **Henlin Gibson Henlin (A Firm) and anor v Lilieth Turnquest** [2015] JMCA App 54 (**'Henlin Gibson Henlin'**) in support of that submission. It was further submitted that the points of dispute show that the costs claimed are "disproportionate, unreasonable and excessive" and that there was "considerable duplication". In addition, costs were claimed for as many as five counsel, even though certification had been granted for only two. Specific reference was also made to the sum of \$8,422,263.50 that was claimed for psychiatric nursing care for Mr Thorburn, which counsel argued was not costs incurred by reason of the litigation. This material, it was submitted, ought to have been considered by the master in determining whether there was a clearly articulated and *bona fide* dispute.

Respondent's submissions

[57] The respondent submitted that the learned master's ruling on this issue is correct as Ms Minott's affidavits did not provide any material on which the learned master could

have exercised her discretion. Regarding the sum claimed for psychiatric expenses, it was pointed out that this was dealt with before Henry-McKenzie J, who at para. [42] of her judgment dated 9 November 2019, made an order for the recovery of those costs and that order has not been appealed.

[58] The situation in the present case, it was submitted, is different from that which obtained in **Henlin Gibson Henlin**, in which F Williams JA (Ag), as he then was, had regard to the points of dispute although they were not exhibited to an affidavit. Firstly, unlike in **Henlin Gibson Henlin**, the points of dispute in the instant case were filed out of time. Secondly, there was no affidavit raising any concerns that would have allowed the learned master to conclude that there was a *bona fide* dispute. Thirdly, the points of dispute were not filed before the request for a default costs certificate.

#### Discussion

[59] The decision whether to grant an extension of time is a matter within the discretion of the court. In **Roshane Dixon and Sheldon Dockery**, Harris JA stated at para. [17]:

“The court is endowed with discretionary powers to grant an extension of time but will only do so where it is satisfied that there is sufficient material before it which would justify it in so doing.”

The learned judge of appeal, having referred to the judgment of Panton JA (as he then was), stated at para. [18]:

“It cannot be denied that rule 1.1 of the CPR under which the appellant seeks assistance, imposes an obligation on the court to deal with cases justly. In order to give effect to the overriding objective, under the rule, the court, in its application and interpretation of the rules, must ensure as far as is practicable that cases are dealt with fairly and expeditiously. The court, in considering what is just and fair looks at the circumstances of the particular case. In an application for an extension of time, the delay and the reasons therefor are the distinctive characteristics to which the court’s attention is initially drawn. It cannot be too frequently emphasized that judicial authorities have shown that delay is

inimical to the good administration of justice, in that it fosters and procreates injustice. It follows therefore, that in applying the overriding objective, the court must be mindful that the order which it makes is one which is least likely to engender injustice to any of the parties.”

[60] In order to determine where the interest of justice lay, the merits of the points of dispute and the issue of prejudice were matters for the learned master’s consideration. The issue of prejudice was not addressed by the learned master.

[61] Where an application for an extension of time to file points of dispute is being made, it is expected that an affidavit of merit exhibiting the draft points of dispute would be filed in support of the application. That was not done in this case. The affidavit in support only addressed the reasons for the delay. The appellants did, however, file points of dispute during the course of the proceedings.

[62] The issue of the appellants’ failure to file an affidavit of merit was addressed by the learned master in paras. [54] to [57] of the judgment as follows:

“[53] In the instant case, as highlighted by the Respondents, the Applicant failed to submit any Affidavit of Merit. That is, neither of the two affidavits of Analiese Minott addresses the merits of the proposed Points of Dispute, (as it would have been at the time the affidavits were filed) nor was a draft of the points of dispute exhibited to either of the 2 Affidavits.

[54] This Court is of the view that the reasoning that is applied to the importance of the filing of an Affidavit of Merit to an Application for an Extension of Time in Filing a Defence, should similarly be applied to an Application for an Extension of Time for the Filing of a Points of Dispute, as in both instances, the court has to consider whether the applicant has a legitimate case to put before the tribunal for determination. **In the same way, that the Court of Appeal determined that the Defence that was filed out of time was a mere pleading and not evidence before the court for its consideration, this court also finds that the Points of Dispute filed out of**

**time, having not been properly exhibited to an Affidavit of Merit, cannot properly be considered as evidence of merit. The mere filing of a Points of Dispute on its own is insufficient.**

[55] It should be noted that during oral submissions, Counsel for the Applicant attempted to address this issue, by highlighting some of the merits of the proposed points of dispute, but this was rightfully objected to by Counsel for the Respondent, as such details needed to have been contained in an affidavit for the Court to properly take them into consideration.

[56] In the circumstances, the Court has no evidence upon which it can properly find that there is any merit to the challenge of the Bill of Costs and the Applicants have not provided any evidence of special or exceptional circumstances for the lack of evidence of merit to be excused, as was done by the Court of Appeal in the **Rashaka Brooks** case.

[57] The failure to place an Affidavit of Merit in support of its application before this Court for its consideration without more could have been viewed as fatal to the Applicant's success as it relates to its Application for Extension of Time. This failure however was compounded by the inordinate delay in filing the points of dispute and the absence of a good reason for the delay, and as such, this Court finds that, in the interests of justice, it cannot grant the request for an extension of time for filing the Points of Dispute." (Emphasis supplied)

[63] The learned master, at para. [54] of the judgment, stated that the points of dispute not having been "properly exhibited" to an affidavit of merit, could not be considered as evidence of merit and "the mere filing of a Points of Dispute on its own is insufficient". She stated that neither of the affidavits of Analiese Minott addressed the merits of the "proposed Points of Dispute, (as it would have been at the time the affidavits were filed) nor was a draft of the points of dispute exhibited to either of the two Affidavits". The learned master found that, based on **Barrington Green**, an affidavit of merit was required in the absence of exceptional circumstances. She concluded that in the absence

of an affidavit of merit, there was no evidence on which she could properly find that there was any merit to the appellants' challenge of the bill of costs. There were, also, no exceptional circumstances that could excuse that deficiency. On that basis, the learned master found that it would not be in the interests of justice to grant the application and refused it.

[64] There can be no dispute that the appellants did not file an affidavit of merit setting out the bases on which it is being asserted that there is "a clearly articulated dispute" regarding the costs being claimed.

[65] The respondent has argued that the situation is akin to that which applies to applications to set aside a default judgment where a proposed defence is required to be exhibited to the affidavit in support. However, where, as in this case, it is asserted that the appellants were unable to file the points of dispute within the stipulated time and in circumstances which suggest that the difficulties are ongoing, it would, in my view, be unrealistic to expect a draft of the points of dispute to be exhibited to Ms Minott's affidavit. However, it would have been prudent to exhibit the points of dispute to an affidavit when they became available.

[66] I have found the decision of this court in **Rashaka Brooks** to be particularly helpful in considering this issue. That case was concerned with an appeal from the refusal of an application for an extension of time in which to file a defence. No draft defence was annexed to the affidavit in support of the application due to counsel's inability to obtain instructions. The reasons advanced for the late filing were that, due to an administrative oversight, the file was not assigned in the Attorney General's Chambers and, having been assigned, their instructions were incomplete. Brooks JA, who underscored the importance of filing an affidavit of merit to which a draft defence would, in the usual course, be exhibited, stated at paras. [13] and [14]:

"...it is important to note that rule 10.3(9) of the CPR, which deals with applications for extension of time to file a defence,

does not provide any guidance as to the manner of assessing such applications...

As is well known by now, the principle that operates is that, in the absence of specific guidance in a particular rule, the court is to have regard to the overriding objective in applying that rule."

[67] The overriding objective as contained in rule 1.1(1) of the CPR requires courts to deal with cases justly. Rule 1.2 states that in the interpretation of the rules or the exercise of any power conferred by the rules, courts are to seek to give effect to the overriding objective. When the above principle is applied to matters that fall within the discretion of a court, "an inflexible stance" should not be adopted as the facts of each case must be considered.

[68] In para. [15] of **Rashaka Brooks**, Brooks JA stated:

"[15] The result of applying that principle is that there should not be an inflexible stance where the court is given a discretion. Generally, each case is to be decided on its own facts. This court has recognised this principle in previous decisions dealing with applications for extension of time within which to file a defence. In **Fiesta Jamaica Limited v National Water Commission**, the court approved an approach to assessing such applications. Harris JA, with whom the rest of the court agreed, said at paragraph [15] of her judgment:

'The first issue to be addressed is whether the appellant ought to have been granted an extension of time to file the proposed defence. The principle governing the court's approach in determining whether leave ought to be granted on an application for extension of time was summarized by Lightman J., in a[n] application for extension of time to appeal in the case of **Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd and Ors.** [All England Official Transcripts (1997-2008) (delivered 18 January 2000)].'

In his judgment, Lightman J said at paragraphs 8 and 9:

'8. The position, however, it seems to me, has been fundamentally changed, in this regard, as it has in so many areas, by the new rules laid down in the CPR which are a new procedural code. The overriding objective of the new rules is now set out in Pt 1, namely to enable the court to deal with cases justly, and there are set out thereafter a series of factors which are to be borne in mind in construing the rules, and exercising any power given by the rules. **It seems to me that it is no longer sufficient to apply some rigid formula in deciding whether an extension is to be granted. The position today is that each application must be viewed by reference to the criterion of justice and in applying that criterion there are a number of other factors (some specified in the rules and some not) which must be taken into account.** In particular, regard must be given, firstly, to the length of the delay; secondly, the explanation for the delay; thirdly, the prejudice occasioned by the delay to the other party; fourthly, the merits of the appeal; fifthly, the effect of the delay on public administration; sixthly, the importance of compliance with time limits, bearing in mind that they are there to be observed; seventhly, (in particular when prejudice is alleged) the resources of the parties.

9. I am in no ways setting out all the relevant factors, but all the factors I have set out appear to me to be relevant and require to be taken into account in deciding what justice requires in respect of the particular application. I should add that the existence of this broad approach, which decides the case by reference to justice, is not to be treated as a passport to the parties to ignore time limits because, as I say, one of the important features in deciding what justice requires is to bear in mind that time limits are there to be observed and that justice may be seriously defeated if there is any laxity in that regard.' (Emphasis as in original)

Although Lightman J did mention the matter of merit, the point to be noted for these purposes, is that it "is no longer sufficient to apply some rigid formula in deciding whether an extension [of time] is to be granted."

[69] Brooks JA then proceeded to consider the scenario where there was no draft defence available due to the defendant's attorney's lack of instructions. He posed the question of whether in those circumstances such a defendant would have no hope of pursuing a successful application for an extension of time. The learned judge of appeal concluded that in special circumstances where the defendant is able to satisfy the court that the application was made within a reasonable time, there are good reasons for the delay, there is a good reason why the extension should be granted and there would be no undue prejudice to the claimant, the application ought to be granted. The learned judge of appeal stated at paras. [19] to [21]:

"...it is only just that a defendant who expects to be able to file a defence, but anticipates that he will not be able to file it within the time prescribed, or realises that the time prescribed has passed, should not be shut out, as of course, from being able to apply successfully for an extension of time.

[20] It may reasonably be argued that, if his application is to be considered, he is then placed in a better position than a defendant who has been able to produce a draft defence and, therefore, has that defence subjected to the scrutiny of the court. **We certainly would not wish to open the floodgates for applications without evidence of merit to be made in an attempt to cure the sloth of attorneys-at-law or the parties whom they represent.**

[21] For that reason, it is our view that it is only in special circumstances that such an application should succeed. **A defendant who has not produced evidence of merit should only be successful if he were able to convince the court that it would be just to extend the time.** The decision should lie within the discretion of the judicial officer hearing the application. Without laying down any mandatory criteria, such an application should address the issues identified by Lightman J and explain to the satisfaction of the court the efforts made to secure the evidence concerning the element of merit and the reason for its absence." (Emphasis supplied)

[70] Whilst it may be argued that the appellants at the outset ought to have been able to raise sufficient issues in an affidavit to assist the court in determining whether a clearly

articulated dispute exists, the reasons given for the failure to file the points of dispute in my view qualify as special circumstances. The bill of costs was quite voluminous and, as can be gleaned from the affidavit of Analise Minott, the task of preparing the points of dispute was formidable. The appellants' attorneys-at-law were not in a position to devote the necessary time and attention to that task at the particular time. They even indicated that the services of an experienced paralegal were required. As in **Rashaka Brooks**, this court does not wish "to open the floodgates for applications without evidence of merit to be made" in circumstances where either the parties or their attorneys-at-law have wilfully disregarded or not paid sufficient attention to the timelines set out in the rules. This does not appear to be the case in this matter. The learned master was, therefore, required to consider whether it would be just to extend the time. In conducting that assessment, the learned master was not, in my view, precluded from examining the points of dispute that had been filed. Points of dispute differ from a defence in that they are required to supply a lot more detail. The items being disputed are to be identified and the reasons for the objection stated. The paying party should also state the sum, if any, that is deemed appropriate (rule 65.20(2) of the CPR). The points of dispute filed by the appellants satisfied those requirements. Therefore, a perusal of the points of dispute would have assisted the learned master to determine whether the application should be granted in the interests of justice.

[71] My view is also buttressed by the fact that even where points of dispute are filed out of time, the registrar is not allowed to ignore them, as rule 65.20(6) of the CPR prevents the issuing of a default costs certificate where the points of dispute are filed and served before that takes place. This applies even where the application for the default costs certificate was made before the filing of the points of dispute. The only issue in those circumstances is whether the paying party is to be heard in the taxation proceedings. That decision is a matter within the registrar's discretion (see rule 65.20(4) of the CPR).

[72] Based on the particular circumstances of this case, the absence of an affidavit of merit is not, in my view, fatal. The issues raised in the points of dispute ought to have

been considered by the learned master in the interests of justice. The learned master, therefore, erred in failing to properly consider the specific circumstances of this case before concluding that the absence of an affidavit of merit exhibiting the points of dispute was fatal to the application. Ground b of the notice of appeal, therefore, succeeds. Grounds b, c, d, and e of the counter-notice of appeal are without merit and therefore fail.

[73] As to the issue of prejudice, the appellants' assertion that the litigation was funded by the respondent's nephew has not been disputed. That aside, their assertion that the bill of costs was not laid until approximately two years after the conclusion of the matter has not been denied. The bill of costs is quite extensive, and the learned master accepted the appellants' assertions regarding the time and attention required to prepare the points of dispute by the due date. The application for extension of time was made in a timely manner. Even if the points of dispute were filed earlier, that would not affect the progress of the application which was already in train. The parties would still have had to await the court's decision. By filing the application, the appellants, if successful, would not have been faced with the possibility of an adverse ruling by the registrar. In those circumstances, the force of the argument that the respondent would be prejudiced if the appellants' appeal is allowed is not compelling.

**Issue 4: Whether an application for relief from sanction was required in the circumstances [ground d of the counter notice of appeal]**

Appellants' submissions

[74] Counsel relied on the judgment of P Williams JA in **Advantage General Insurance Company Limited (formerly United General Insurance Company Limited) v Marilyn Hamilton** [2019] JMCA App 29, ('**Marilyn Hamilton**'), which counsel submitted was impeccable in its reasoning and ought to be adopted. Drawing on paras. [64] and [65] of that decision, counsel advanced two propositions. First, rule 65.20 does not bar a paying party who has missed the time for filing points of dispute from filing them; it provides only that such a party may not be heard in the taxation

proceedings without the registrar's permission. Secondly, the failure to file points of dispute attracts no sanction from which relief is required. The consequence of the failure is that the receiving party may request the entry of a default costs certificate, and an application to set aside such a certificate is not to be approached in the same way as an application for relief from sanctions.

#### Respondent's submissions

[75] Counsel on behalf of the respondent submitted that the learned master's findings in relation to the application for relief from sanctions are unassailable. Counsel advanced that the appellants are plainly wrong in their assertion as there is no legal requirement for the word "sanction" to be used for a sanction to result from failure to comply with a rule. Counsel submitted that being barred from participating in taxation due to failure to file points of dispute is a sanction in the very same way that a party who fails to file a witness statement in time is prevented from calling that witness. Rule 65.20(4), except for the fact that it is subject to the time stipulation in rule 65.20(3) is also self-contained, so the learned master was correct to find that the sanctions imposed by rule 65.20(4) took effect once the appellants failed to file points of dispute in time. That inaction then triggered the need to apply for relief from sanctions.

#### Discussion

[76] The learned master at para. [47] of the judgment stated that the filing of the points of dispute out of time triggered the sanction in rule 65.20(4), which barred the appellants from being heard in the taxation proceedings unless permitted by the registrar.

[77] I agree that would be so had there been no application for extension of time. Whilst there is no similar provision in Part 65 as rule 12.5(e), which prevents the entry of a default judgment when there is a pending application for an extension of time to file a defence, the considerations that informed the amendment to the latter rule apply in the circumstances of the case. How could the registrar issue a default costs certificate in the face of a pending application for extension of time?

[78] The appellants, it seems, out of an abundance of caution, applied for relief from sanction in the event that the court was of the view that the sanction had already taken effect. An application for relief from sanction is only necessary where the time for compliance has passed. In **Robert v Momentum Services Ltd** [2003] 1 WLR 1577, Dyson LJ with whom the other members of the court agreed, stated at para. [33]:

“There is a difference in principle between on the one hand seeking relief from a sanction imposed for failure to comply with a rule, practice direction or court order, where such failure has already occurred, and on the other hand seeking an extension of time for doing something required by a rule, practice direction or court order before the time for doing it has arrived. The latter cannot sensibly be regarded as, or even closely analogous to, a relief from sanctions case.”

[79] The above principle was applied by this court in **Dale Austin v The Public Service Commission and anor** [2016] JMCA Civ 46 and **Prime Sports Jamaica Limited (Coral Cliff Entertainment) v Lori Morgan** [2017] JMCA Civ 32.

[80] In the instant case, the application for an extension of time was made on the day the additional time granted by consent would have expired. Where the paying party fails to file and serve his points of dispute within the prescribed time, he runs the risk of being denied the opportunity to be heard in the taxation proceedings unless permitted by the registrar (rule 65.20(4)).

[81] In **Marilyn Hamilton**, to which the appellant referred, the court considered whether the entry of a default costs certificate was a sanction for which relief was required. The court found that that was not so. The reasoning of the court is set out in paras. [62] to [66] which state:

“[62] To my mind, the entering of the default cost certificate is more akin to the entering of a default judgment for failure to acknowledge service or to file a defence. It is an administrative function of the registrar without a hearing or any consideration of the merits of the matter. As such, I find the observations of the Privy Council in **The Attorney General v Keron Matthews** useful. The Board, in

interpreting a provision in the CPR of Trinidad and Tobago, which is similar to our rule 26.8, dealing with relief from sanctions, pointed out that the rule “provides for relief from any sanction imposed for a failure to comply inter alia with any rule”. It was subsequently stated at paragraph 15:

‘In the view of the Board, this is aiming at rules which themselves impose or specify the consequences of a failure to comply.’

[63] At paragraph 16 Lord Dyson, writing on behalf of the Board, had this to say:

‘It is striking that there is no similar provision in relation to a failure to file a defence within the time prescribed by the rules. **There is no rule which states that, if the defendant fails to file a defence within the period specified by the CPR, no defence may be filed unless the court permits. The rules do, however, make provision for what the parties may do if the defendant fails to file a defence within the prescribed period...It is straining language to say that a sanction is imposed by the rules in such circumstances.** At most, it can be said that, if the defendant fails to file a defence within the prescribed period and does not apply for an extension of time, he is at risk of a request by the claimant that judgment in default should be entered in his favour. That is not a sanction imposed by the rules. Sanctions imposed by the rules are consequences which the rules themselves explicitly specify and impose.’

[64] **It is possible to apply a similar consideration to rule 65.20. The rule does not state that if the paying party does not file points of dispute within the time specified no points of dispute may be filed unless the court permits. Indeed, the rule provides that if a party files points of dispute after the time specified, that party may not be heard unless the registrar gives permission (rule 65.20(4)).**

[65] However, a paying party who fails to file points of dispute is at risk of a request by the receiving party that a default costs certificate be entered in his favour (rule 65.20 (5)). That

is not a sanction imposed by the rule for which relief is required, hence an application for setting aside of the default costs certificate ought not to be subjected to the same considerations as an application for relief from a sanction.

[66] The respondent's reliance on those authorities that deal with applications for relief from sanctions is therefore misplaced." (Emphasis supplied)

[82] Based on the reasoning of the court in **Marilyn Hamilton**, the risk of not being heard in the taxation proceedings does not fall within the definition of a sanction as contemplated by the rules. The appellants were not barred from filing their points of dispute outside of the 28-day period. They could have done so and thereby expose themselves to the risk of not being allowed to participate in the taxation proceedings or being issued with a default costs certificate. Those were possible consequences as they depend on the actions of other persons. The registrar has the discretion to allow them to participate in the taxation proceedings and the respondent may decide not to apply for a default costs certificate. There being no sanction imposed by the rules, the making of the application for relief from sanction was procedurally incorrect and ought not to have been considered by the learned master. Ground d of the counter notice of appeal therefore fails.

## **Conclusion**

[83] It is my considered view that the learned master fell into error when she found that rule 26.1(2)(c) of the CPR does not apply to Part 65. She also erred when, in considering the issue of delay, she took into account the period between the due date for filing the points of dispute and the date they were filed, when the appellants were under no obligation to file them before their application had been determined. Whilst the learned master correctly identified the principles regarding the need for an affidavit of merit, she erred in applying them, as, based on the reasons given, the circumstances were special as in **Rashaka Brooks**.

[84] For the reasons stated above, I would allow the appeal, set aside the judgment of the learned master and grant the order for an extension of time to file the points of dispute. The counter appeal should also be dismissed.

[85] Rule 65.8(3)(b) states that where an application is made for extension of time, the applicant is to pay the costs of the respondent. The respondent is therefore entitled to her costs in the court below. Although the appellants have succeeded in the appeal and the counter notice of appeal, they are the parties in default. In the circumstances, I propose that no order be made for the costs of the appeal and the counter notice of appeal (see **Rashaka Brooks**).

## **STRAW JA**

### **ORDER**

1. The appeal is allowed.
2. The judgment of the learned master, made on 31 July 2023, is set aside.
3. The counter notice of appeal is dismissed.
4. The time within which the appellants were permitted to file and serve points of dispute is extended to 16 February 2023. The points of dispute filed on 15 February 2023 is permitted to stand.
5. Costs of the application in the court below to the respondent.
6. No order as to costs on the appeal and the counter notice of appeal.