[2022] JMCC Comm 23

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2020CD00050

BETWEEN	**YULANDE CHRISTOPHER T/A YULANDE CHRISTOPHER & ASSOCIATES AND THEN THOMAS AND CHRISTOPHER LAW PARTNERS**	**CLAIMANT**
AND	**GREGORY DUNCAN**	**1ST DEFENDANT**
	GLOBAL DESIGNS AND BUILDERS LIMITED	**2ND DEFENDANT**

IN CHAMBERS BY VIDEO-CONFERENCE

Ms. Yualande Christopher instructed by Yualande Christopher & Associates, Attorneys-at-Law for the Claimant.

Mr. Gregory Duncan in his personal capacity and on behalf of Global Design and Builders Limited.

Heard: May 17th and July 27th 2022

Civil Procedure - Application to set aside Default Cost Certificate - Rule 65.22 of the Civil Procedure Rules - Whether good reason exists for Application to be set aside

CRESENCIA BROWN BECKFORD, J

PRELIMINARY ISSUES

[1] The Defendants filed Notice of Application to set aside Default Judgment on February 25, 2022 **("the first application")** and Notice of Application to Set Aside Default Cost Certificate and Discharge of Final Charging Orders on March 1, 2022 **("the second application")**. The relevant underlying facts will be set out later. Despite the difference in nomenclature, both applications sought the same relief, that is, setting aside the Default Cost Certificate. Mr. Duncan indicated that he was relying on **Rule 65.18 (2) of the Civil Procedure Rules ("CPR") 2002 (as amended on the 3rd of August 2020)**. Ms. Yualande Christopher on behalf of the Claimant submitted that the Defendants should withdraw the first application or it be struck out. Mr. Gregory Duncan on behalf of the Defendants responded that he had made full and final payment of the agreed invoices and the Claimant was not out of pocket. Further, the Defendants were not served with the Claim Form. He indicated he was relying on the second application but refused to withdraw the first application. The Claimant further submitted that the Defendants in refusing to withdraw the first application for unspecified reasons, unsupported by cases or facts, the application should be struck out with costs to the Claimant.

[2] The Court advised the Defendants of **Rule 65.22 (4) of the CPR** whereupon Mr. Duncan requested an extension of time for the Defendants to file the Points of Dispute. He indicated that there was a Charging Order in respect of the property and an Order for Sale was being sought. This would require a Valuation Report in respect of the property. Ms. Christopher objected to this oral application on the basis that the Defendants have had time to do so. The matter was previously adjourned on their request and the Claimant has been waiting for a long time to have the matter heard. The prejudice to the Claimant does not justify giving the Defendants more time.

[3] Having considered the submissions, the Court ordered that the Application filed February 25th 2022 is struck out with costs to the Respondent on the basis that

the Applicant has elected to proceed on Application filed March 1st 2022, which is a duplication despite the misnomer. The oral Application to file Points of Dispute in relation to Application filed March 1st 2022 was refused on the basis that the Notice to file and serve Points of Dispute was served in February 2020, over two **(2)** years ago and the Defendants were not moved to act until Application for Sale of Land was filed. Further, the Application to set aside the Default Cost Certificate was filed some three months ago.

[4] The Court thereafter heard submissions on the second application. The refusal to extend the time to the Defendants to file the proposed Points of Dispute will be further expanded in the judgment.

[5] On July 25, 2022, late in the afternoon as I was engaged in a trial, and less than two **(2)** days before this court was set to deliver judgment, I received the Defendants Application for Court Order filed July 22, 2022 for this court to recuse itself in this (and all matters concerning the Defendants) because of conflict of interest. For reasons set out in a separate judgment, I refused the Application

BACKGROUND

[6] The Claimant served as Attorney-at-Law for the Defendants for the years spanning 2016-2018. The principal representatives of the parties were Ms. Yualande Christopher for the Claimant and Mr. Gregory Duncan for the Defendants. Mr. Duncan is the sole shareholder of Global Designs and Builders Limited. Following the termination of their relationship in 2018, the Claimant submitted its invoices for work carried out to Mr. Duncan and Global Designs and Builders on the 14th and 19th December 2019. Pursuant to the Defendants' instructions, the invoices were also sent to the Defendants' new Attorneys-at-Law, Chen Green and Company by letter on the 8th January 2019. On the 12th February 2020, the Claimant filed and served on the Defendants the Bill of Costs, submitted pursuant to **S. 21 and 22 of**

The Legal Profession Act, with Notice to serve Points of Dispute within 28 days after the date of service and Notice of Taxation.

[7] The Defendants failed to file their Points of Dispute, and a Default Cost Certificate in the sum of Sixteen Million Seven Hundred and Seventy Thousand Dollars and Thirteen Dollars and Ninety-Three cents **($16,770,013.93)** was granted against both Defendants on the 7th December 2020. On February 3, 2022, the Claimant filed an Application for the Sale of Land belonging to the Second Defendant on the basis that no payment had been made by the Defendants in satisfaction of the judgment sum with interest and costs. On the 21st February 2022, the Defendants filed an objection to the Application. By an order of Batts J on the 24th February 2022, a Final Charging Order was granted to the Claimant. On 1st March 2022, the Defendants filed a Notice of Application to Set Aside Default Cost Certificate & Discharge of Final Charging Orders. At the time of hearing there was no proposed Points of Dispute exhibited by the Defendants.

SUBMISSIONS

[8] Mr. Duncan for himself and the Second Defendant firstly submitted that the Claimant was in breach of **Rule 65.18 (2) of the CPR,** as it served its Bill of Costs in excess of three months after the costs became due. The invoices attached showed a breach of this rule, therefore, what was before the court was improper and unjustly putting him (Mr. Duncan) up against every point on the ground that the invoices were settled. Mr. Duncan also submitted that the invoices in the Bill of Costs were not incurred. The invoices settled were not the ones presented in the Bill of Costs which were 'fictitious'. He relied on his Further Affidavit in Support of Application for Court Orders filed May 9, 2022 in which a chain of email correspondence was attached. These he said were invoices presented as final invoices with an overall outstanding balance of Two Million Two Hundred and Ninety-Three Thousand and Sixteen Dollars and Twenty-Five Cents **($2,293,016.25)**. He maintained sums in excess this amount had been paid and

the invoices to which he agreed had been signed by him. He submitted that the invoices in the Bill of Costs were not agreed and were not presented to him. He said these invoices were fabricated to show sums owed when none was owed. He further submitted that an hourly rate of Fifteen Thousand Dollars **($15,000.00)** was agreed upon. This was the rate on the settled and paid invoices. However, the 'fictitious' Bill of Costs had an hourly rate of Twenty-Five Thousand Dollars **($25,000.00)** and Fifty Thousand Dollars **($50,000.00)** in some instances.

[9] The Claimant referred to the Affidavit of Gregory Duncan filed May 9, 2022, in which he exhibited five invoices he said were presented to him. These invoices which he accepted, were not paid. The balance was therefore carried forward in subsequent invoices as the work carried out by the Claimant did not end at the date the invoices were sent. The subsequent invoices formed the basis of the Default Cost Certificate. The Claimant went on to explain each invoice pointing to the supporting documents.

[10] Ms. Yualande Christopher in her Affidavit filed May 10, 2022 sought to explain the six **(6)** cheques which the Defendants allege was payment in satisfaction of the Claimant's Bill of Costs. She states:

> *Cheque No. 000411-$4,050.000.00*
>
> *5. The Defendants" CIBC Cheque No. 000411 dated 26.05.2017 for **Four Million and Fifty Thousand Jamaican Dollars ($4,050,000.00)**, was paid to us to be allotted as follows:*
>
> *Deposit on the purchase of property at 71 Border Avenue. $3,050,000.00*
> *Legal Fees to be applied to Orville Palmer matter -$500 000.00*
>
> *Exhibited and marked **"YC-1"** is an email from the 2nd Defendant confirming his instructions on how to allow the payment.*
>
> *When the transaction fell through and was cancelled, the Claimant returned the sum*
>
> *of $3,050,000.00 by wire transfer to the 2nd Defendant. Exhibited and marked **"YC-2"** and **"YC-3"** are wire transfer instructions dated May 31,*

2017, and Statement of Account confirming payment of $3,550,000.00 to the 2nd Defendant. The 1st Defendant confirmed receipt of the reimbursement by phone on the 5th of June 2017.

*The payment of $500,000.00 was duly applied towards reducing the invoice no,00001118-0001 and is already accounted for. Exhibited and marked **"YC-4"** for ease of identity is a copy of the said invoice accounting for the $500,000.00.*

Cheque No. 0004688

*CIBC Cheque No. 000468 dated 29.06.2017 for **Five Hundred Thousand Jamaican Dollars ($500,000.00)**, was paid to us by the 2nd Defendant in anticipation of a settlement of claim with Tankweld Limited, with whom the Defendant was embroiled in litigation. Indeed, the Defendant's cheque is endorsed with the instructions "payment to Tankweld". The 2nd Defendant's offer was refused, so the sum was reimbursed in full to the 2nd Defendant. Exhibited and marked **"YC-5a"** for identification is our Sagicor Bank Ltd. cheque no. 6000530 in the amount of $500,000.00 endorsed in the 1s Defendant's name and **"YC-5b"** is statement of account with line item debited*

Cheque No. 000385

*CBC Cheque No. 000385 dated 16.05.2017 for **One Hundred and Forty-Seven Thousand Jamaican Dollars ($147,000.00)**, was paid to over to COK Sodality Co-Op on behalf of the Defendants with whom they were embroiled in a commercial arbitration. Exhibited and marked **"YC-6"** is a copy of our receipt, cheque, statement, letter enclosing cheque and encashed cheque dated 17.05.2017, in that amount*

Cheque No. 000354

*We were instructed by the 1s Defendant to allot CIBC Cheque No. 000354 dated 12.05.2017 for **Three Hundred and Fifty Thousand Jamaican Dollar ($350,000.00)**, in the following manner:*

*$300,000.00 to Counsel Leila Parker, who had carriage of sale of property at 125 Duke Street, Kingston, which the 2nd Defendant acquired and which is the subject of our final charging order. Exhibited and marked **"YC-7"**, and **"YC-8"** are copies of cheque no. 6000500 to Miss Leila Parker in the amount of $300,000.00, her receipt No. 231576, confirming receipt of same and our receipt to Mr. Duncan confirming the allotment of monies.*

*$50,000.00 to the Department of Cooperative & Friendly Societies for security of costs for Arbitration proceedings between the 1st Defendant and COK. Exhibited **"YC-9A" & "YC-9B"** are documents as follows:*

(i) Letter dated May 9, 2017, by Claimant to DCFS enclosing cheque of $50.000.00.

(ii) Receipt No. CCRR No. 989988 issued by DCFS for $50,000.00

Cheque No. 000348 and Cheque No. 000349 11

The Defendant's CIBC Cheques Nos. 0003484 and 000349 dated April 27, 2019 was paid in 2 cheques on the same day to cover a costs to a 3rd party. Of that amount ***$303,819.50 from cheque no. 000348 and $6,194.96 from cheque no. 000349*** *was allotted to legal fees and are already accounted for in our invoice no. 001118-0005 dated 150 November 2018.*

The Defendants had a great many matters including civil, commercial and criminal

matters, of which the Claimant either handled personally or outsourced on his behalf if the matters fell outside of her scope of expertise, to which legal fees were incurred and which are not the subject of the matter herein.

a. ***R v Gregory Duncan*** *(Information 4874/2013);*

b. ***Geeta Bagwandeen v Gregory Duncan anor*** *(Claim No. 2016 HCV04083)*

c. *Mediation of Consolidated Claim No. CD0029 of 2014 and CD 00059 of 2014-****Jade Hollis v Gregory Duncan & Global Designs & Builders Limited****;*

d. ***R v Gregory Duncan*** *(matter involving JPS)*

e. *Purchase of Property at 9 King Street, Spanish Town, Saint Catherine (aborted)*

f. *Purchase of property at 12 Glen Road in the parish of Saint Andrew (Grosvenor Heights)-* ***Douglas Halsall to Global Builders and Design*** *(aborted)*

g. *Negotiations in Commercial Loan Account* ***No. PDPD1521200118*** *and Current Account Number* ***5501867437*** *with Sagicor Bank for $40M offer.*

h. *Purchase of Property located at Town House #2, Johnson Hill Estate, Helshire, St. Catherine* ***Gregory Duncan to Donnette Lyn*** *(aborted)*

i. *Property at Unit 1, Rose Garden, 1 Hillside Drive, Belvedere, Saint Andrew-* ***Gregory Duncan to Luton Shelton-*** *Negotiations for settlement of contentious sale, which predated YCA's representation of Mr. Duncan.*

j. *Claim No. HCV 0004 of 2012-* ***Mark Walters v Gregory Duncan***

[11] With respect to the time of filing the Bill of Costs, the Claimant relied on the decision of Batts J in **Construction Developers Associate v Urban Development Corporation** [2018] JMCC Comm 26, where at paragraph 8, he stated:

> *The power under Rule 65.19 and its effect on Rule 65.18 was discussed in Auburn Court Limited and Delbert Perrier v National Commercial Bank Jamaica Ltd and RBTT Jamaica Limited SCCA No 27/2004, judgment delivered on 18th March, 2009. Justice of Appeal Harris, stated at paragraph 15:*
>
> > *"It appears to me that, the drafters of the Rules, in conferring discretionary powers on the registrar and the court to make certain orders on a receiving party"s failure to commence taxation within the prescribed time, must have intended that the word "must" is not mandatory. It would have been contemplated by them that the word ought to be construed as meaning "may". It follows that the word "must" within the context of Rule 65.18(2) is merely directory and therefore does not impose upon a receiving party any obligation to adhere strictly to the filing of a bill of costs within the requisite period."*

[12] Mr. Duncan responded. He referred to the email of June 19, 2018 exhibited to his Affidavit of May 9, 2022. He said the invoice presented to him was one in the chain of email which was settled. He also stated that in reference to cheque 354, the receipt was dated May 10 and the cheque was paid May 12. This he said showed the Claimant was lying and the money said to be paid to Ms. Parker could not be true. This he said was an example of the Claimant being fictitious. He further submitted that the **CPR** speaks to agreed invoices. The ones presented were not agreed.

[13] Ms. Christopher was given the opportunity to respond to Mr. Duncan's allegations. She declined to respond stating that she would not dignify the allegations of fictitious invoices with a response.

ISSUES

[14] The issues to be resolved are as follows:

(i) **Whether the Claimant in failing to comply with Rule 65.18(2) of the Civil Procedure Rules ("CPR") 2002 (as amended on the 3rd of August 2020) is barred from commencing taxation proceedings?**

(ii) **Whether the Default Costs Certificate obtained by The Claimant ought to be set aside pursuant to Rule 65.22 of the CPR?**

(1) **<u>The operation of Rule 65.18(2) of the CPR</u>**

[15] This issue can be quickly disposed of. Rule 65.18 (2) of the **CPR**, which provides that:

> *The bill of costs must be filed and served not more than three months after the date of the order or event entitling the receiving party to costs.*

has been judicially considered and interpreted that breach of this rule does not act as a bar to taxation proceedings.

[16] In **Canute Sadler and Anor v Dereick Michael Thompson and Anor ("Canute Sadler")** [2019] JMSC Civ. 11 Rattray J perfectly encapsulated the issues to be resolved in the case at bar and conducted a comprehensive review of the authorities, including from the Court of Appeal, to which I am agreed. I will therefore adopt his statements on the law and refer to his judgment on this and other issues.

[17] Rattray J in his application of **Rule 65.18 (2)**, followed the ruling of the Court of Appeal in **Henlin Gibson Henlin (A Firm) and Calvin Green v Lilieth Turnquest (**"**Henlin")** [2015] JMCA App 54 where F. Williams JA (Ag) (as he then was) said:

> *"There is no sanction that automatically applies to a breach of this rule. The possible consequence is specified in rule 65.19, which empowers the paying party to make an application seeking to compel the receiving party to commence taxation, which application, if granted, could result in the receiving party (if it continued in breach) being deprived of interest or part or all of the costs of taxation…"*

Rule 65.19 of the CPR states:

> *(1) Where the receiving party fails to commence taxation proceedings in accordance with rule 65.18 (2) the paying party may apply for an order requiring the receiving party to commence taxation proceedings within such time as the registrar may specify. (2) On an application under paragraph (1), the registrar may direct that, unless the receiving party commences taxation proceedings by a date specified by the registrar, all or part of the costs to which the receiving party would otherwise be entitled will be disallowed."*

Rattray J pointed out that the meaning and effect of **CPR Rule 65.18 and 65.19** had previously been decided in the Court of Appeal. He stated:

> *[40] Harris JA in the case of **Auburn Court Limited and Anor v National Commercial Bank Jamaica Ltd and Ano**r SCCA No. 27 of 2004, a judgment delivered on the 18th March, 2009, noted that: -*
>
> > *"13. Under Rule 65.18 (1) a party, commencing taxation proceedings must file a bill of costs in the court's registry, a copy of which must be served on the party who is required to pay. Rule 65.18 (2) specifies that a bill of costs must be filed and served within a three month period subsequent to the receiving party becoming eligible for the payment of costs. Does the use of the word "must" in the rule impose a mandatory obligation on a receiving party to file and serve a bill of costs within three months of an entitlement to the receipt of costs? The answer to this question lies in the true construction of the rule. In construing the rule regard must be had to Rule 65.19 (2) and 65.19 (3). This rule grants discretionary powers to the court as well as the registrar to bring into operation certain sanctions if a receiving party fails to commence taxation within three months.*
> >
> > *14. Under Rule 65.19 (2), the registrar, on an application from the paying party, is permitted to disallow all or part of the costs if the receiving party fails to commence taxation within the time specified by the registrar. Where there is a period of delay in the filing of the bill of costs, Rule 65.19 (3) confers on the court an inherent power to disallow all or a portion of the statutory interest accruing on the costs. The court may also disallow all or part of the costs of taxation.*
> >
> > *15. It appears to me that, the drafters of the Rules, in conferring discretionary powers on the registrar and the court to make certain orders on a receiving party's failure to commence taxation within the prescribed time, must have intended that the word "must" is not mandatory. It would have been contemplated by them that the word ought to be construed as meaning "may". **It follows that the word "must" within the context of Rule 65.18 (2) is merely directory and therefore does not impose upon a receiving party any obligation to adhere strictly to the filing of a bill of costs within the requisite period."** [Emphasis supplied] [as in original]*

The Defendants, the paying party, did not make an application compelling the Claimant, the receiving party, to commence the taxation proceedings. In the

absence of such an application, the Claimant was entitled to the Default Costs Certificate.

(2) **Whether the Default Costs Certificate ought to be set aside**

[18] The setting aside of a Default Costs Certificate is provided for in **Rule 65.22 of the CPR**, which states: -

> *(1) The paying party may apply to set aside the default costs certificate.*
>
> *(2) The registrar must set aside a default costs certificate if the receiving party was not entitled to it.*
>
> *(3) The court may set aside a default costs certificate for good reason.*
>
> *(4) An application to the court to set aside a default costs certificate must be supported by affidavit and must exhibit the proposed Points of Dispute.*

In the case at bar, the Default Cost Certificate could not be set aside by the Registrar as, the Defendants, not having filed Points of Dispute, the Claimant was entitled to it. This application could only therefore be heard by a court.

[19] In **Canute Sadler**, Rattray J conducted a review of the authorities setting the framework for an Application to Set Aside a Default Cost Certificate which I find useful to adopt. He wrote:

> *[8] Brooks JA, in the Court of Appeal decision **of Rodney Ramazan and Ocean Faith NV v Owners of Motor Vessel (CFS Pamplona)** [2012] JMCA App 37, was of the view that an Application to set aside a Default Costs Certificate was similar in nature - 5 - to an Application for Relief from Sanction. The learned Judge of Appeal at paragraph 14 expressed the position as follows: -*
>
> > *"I find also that rule 2.20(4) of the CAR which requires a consideration of the principles of relief from sanctions applies in these circumstances. The rule states:*
> >
> > *"(4) CPR rule 26.8 (relief from sanctions) applies to any application for relief."*
> >
> > ***It would seem that an application to set aside a default costs certificate easily qualifies as an application for relief. In assessing***

> ***the instant case I shall use the benchmark set out in rule 26.8, albeit in a somewhat adjusted order."*** *[Emphasis supplied]*

[9] The provisions of Rule 26.8 of the CPR reads: -

"(1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –

> *(a) made promptly; and*
> *(b) supported by evidence on affidavit.*

(2) The court may grant relief only if it is satisfied that –

> *(a) the failure to comply was not intentional;*
>
> *(b) there is a good explanation for the failure; and*
>
> *(c) the party in default has generally complied with all other relevant rules, practice directions orders and directions.*

(3) In considering whether to grant relief, the court must have regard to –

> *(a) the interests of the administration of justice;*
>
> *(b) whether the failure to comply was due to the party or that party's attorney-at-law;*
>
> *(c) whether the failure to comply has been or can be remedied within a reasonable time;*
>
> *(d) whether the trial date or any likely trial date can still be met if relief is granted; and*
>
> *(e) the effect which the granting of relief or not would have on each party.*

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

[10] In the case ***of H. B. Ramsay and Associates Ltd and Others v Jamaica Redevelopment Foundation Inc and Another*** *[2013] JMCA Civ. 1, Brooks JA, in considering the principles applicable to an Application for Relief from Sanctions opined that: -*

> *"[22] Where there is no good explanation for the default, the application for relief from sanctions must fail. Rule 26.8(2) stipulates that it is a precondition for granting relief, that the applicant must satisfy all three elements of the paragraph..."*

[11] Similarly, Edwards JA (Ag) (as she then was), in the case of Jamaica Public Service Company Limited v Charles Vernon Francis and Another [2017] JMCA Civ. 2, stated at paragraph 54: -

> *"Contrary to the view espoused by counsel for the respondent, there is no discord between the decision in the case of* ***Villa Mora Cottages and the case of H B Ramsay and Associates Ltd and another v Jamaica Redevelopment Foundation Inc and another. Both cases decided that the factors in rule 26.8(2) are cumulative and are threshold requirements, although using differing language in so stating. The result is that a litigant must pass the cumulative threshold requirements of rule 26.8(2) in order for the court to consider granting relief.*** *Having formed the view that the threshold requirements have been met, the court then determines whether to grant the relief, taking into account the factors in rule 26.8(3)." [Emphasis supplied] [as in original]*

[20] He concluded that:

> *[12] The issue of whether a good explanation or reason has been provided for the Defendants' failure to file their Points of Dispute within the time stipulated by the Rules, is one requirement that they must fulfil before this Court will set aside the Default Costs Certificate. I am of this view, as I accept the observation of Brooks JA in the case of Rodney Ramazan and Ocean Faith NV v Owners of Motor Vessel (CFS Pamplona) (supra), where he opined that "it would seem that an application to set aside a Default Costs Certificate easily qualifies as an application for relief." If no good explanation has been provided, then the Application to set aside the Default Costs Certificate must fail.*

I agree that in this application the court is called upon to exercise its discretion to determine whether good reason exists for the Defendants failure to file their Points of Dispute within the time required. As Rattray J put it:

> *The CPR does not indicate how a Court when faced with an Application of this nature is to determine whether an explanation is a good one or not.* ***It is my view, that the issue of whether a good reason or explanation for the delay has been provided by the Defendants, is a subjective one for the discretion of the particular Judge hearing the Application, based on the facts and circumstances of each case.*** *(Emphasis mine)*

[21] F Williams JA (Ag), in **Kandekore (Lijyasu) v COK Sodality Co-operative Credit Union Ltd & Anor ("Kandekore")** [2018] JMCA App 2, gave some indication of the matters to be considered by a court in the exercise of its discretion. He referred to the case of **Dr Adu Aezick Seray-Wurie v The Mayor and Burgess of the London Borough of Hackney** [2002] EWCA Civ 909, which he said identified specific issues which a court should consider when deciding whether good reason existed for setting aside a Default Cost Certificate. He stated:

> *Without attempting to stipulate mandatory requirements it would seem that those issues would include:*
>
> *(1) the circumstances leading to the default;*
> *(2) consideration of whether the application to set aside was made promptly;*
> *(3) consideration of whether there was a clearly articulated dispute about the costs sought;*
> *(4) consideration of whether there was a realistic prospect of successfully disputing the bill of costs;*
>
> *I find also that rule 2.20(4) of the CAR which requires a consideration of the principles of relief from sanctions applies in these circumstances.*
>
> *The rule states:*
>
> > *'(4) CPR rule 26.8 (relief from sanctions) applies to any application for relief.'*
>
> *It would seem that an application to set aside a default costs certificate easily qualifies as an application for relief. In assessing the instant case I shall use the benchmark set out in rule 26.8, albeit in a somewhat adjusted order."*

I shall consider this application in light of the specific issues identified by F Williams JA(Ag). Further, I will also consider whether the Defendants should be given an extension of time to remedy their default in filing the proposed Points of Dispute and the issue of prejudice generally.

Circumstances leading to the Default

[22] The authorities make it clear that the circumstances leading to default require that the Applicant provide a good explanation for the delay in serving the Points of Dispute. In **Canute Sadler**, Rattray J relied on the decision of **H. B. Ramsay and Associates Ltd and Others v Jamaica Redevelopment Foundation Inc and Another** [2013] JMCA Civ. 1 in which Brooks JA (as he then was) stated:

> *Mr. Ramsay's affidavit does not give any explanation for the failure. His evidence that his attorneys-at-law have told him that the default was by way of inadvertence, is inadequate. Mrs Minott-Phillips QC, on behalf of the respondents, submitted that the term "inadvertence" was a conclusion to be drawn from an explanation and was not itself an explanation. I agree with the submission.*

[23] In **Kandekore**, the Applicant erroneously filed the Points of Dispute in the Supreme Court instead of the Court of Appeal. The Respondents filed and served a Notice

of Withdrawal which specifically stated that the reason for the withdrawal of the Notice of Taxation was that the *'Appellant filed a Points of Dispute in the Supreme Court and did not file a Points of Dispute in the Court of Appeal.'* This explanation was not accepted. The court considered that the Applicant was not a layman but a practising Attorney-at-Law who should be conversant with the documentation and procedural rules relating to taxation. Further, he was notified of his error when the Respondent withdrew its Notice of Taxation, stating that the Points of Dispute had been filed in the Supreme Court instead of the Court of Appeal, and this was served on him some three months before the Default Cost Certificate was issued.

[24] **In Henlin**, the Applicants' Points of Dispute was filed within the twenty-eight **(28)** days as prescribed by **Rule 65.20 (3) of the CPR**. However, it was served on the wrong law firm. F. Williams JA (Ag), found that this was a genuine error and considering that the Points of Dispute was filed in time, and there was general compliance with the rules, he accepted this explanation. He stated:

> *I give special consideration to the fact that the points of dispute in this matter were filed on 8 July 2015 - that is, within the 28 days permitted by the CPR. I am quite aware as well that the firm on which the points of dispute was served was not the firm on the record. Whilst not condoning administrative inefficiency or even, possibly, carelessness, I have considered the explanation given and all the circumstances and am minded to accept the explanation given that a genuine error was made in serving the wrong firm.*

[25] In the instant case, the Defendants have proffered no reason for the failure to file and serve the Points of Dispute. The Notice served on them clearly indicated the effect of a failure to do so, that is, that they may not be heard further in the taxation proceedings. In the Notice of Application and accompanying affidavit filed on March 1, 2022, the Defendants do not provide the Court with an explanation or the circumstances which led to the Defendants' failure to comply with the time prescribed for filing and serving the Points of Dispute. The focus of the affidavit and indeed the submissions of Mr. Duncan was whether the Bill of Costs was correct. That focus was misplaced. Even in **Kandekore,** a reason, albeit not accepted, was given. The Defendants, and Mr. Duncan in particular, cannot rely on ignorance as a layman. Mr. Duncan is self-represented on his own behalf and

on behalf of the Second Defendant in a number of matters before the Court. He has demonstrated that he is well versed and familiar with the **Civil Procedure Rules**. The Default Cost Certificate was granted on the 7th December 2020, some nine months after the Notice to file and serve the Points of Dispute was served on the Defendants. The Defendants' failure to give a reason for failing to file their Points of Dispute means they have not passed the threshold for the Court to consider whether the Application should be granted. As said by Brooks JA (as he then was), *'Where there is no good explanation for the default, the application for relief from sanctions must fail. Rule 26.8(2) stipulates that it is a precondition for granting relief'*. This therefore ought to be the end of the matter. I will nonetheless examine the other criteria.

Whether the Application was made promptly?

[26] In **Canute Sadler**, Rattray J, after review of several authorities, stated:

> *The word "promptly" is not defined by the CPR, but it does portray a sense of urgency. In order to ascertain whether a party has acted promptly, the Court must consider the particular circumstances of each case.*

In **Canute Sadler**, the Defendant was served with the Default Costs Certificate on the 2nd June 2017 and the Application to set aside the Default Costs Certificate was then filed on the July 25, 2017. The Court found that the defendant did not proffer any reason for filing the Application to set aside more than six **(6)** weeks after his firm was served with the Default Costs Certificate. Rattray J stated:

> *Such an explanation is important and ought to have been provided in the circumstances, bearing in mind that it was delay in filing the Points of Dispute, which eventually led to the Claimants obtaining the Default Costs Certificate.*

[27] In **Advantage General Insurance Co Ltd v Marilyn Hamilton ("Advantage General Insurance")** [2019] JMCA App 29, the Default Costs Certificate was obtained on the 12th March 2018 and served on the applicant on the same day. The Application to set aside Default Costs Certificate and the accompanying

affidavit exhibiting the proposed Points of Dispute was filed on the March 13, 2018. McDonald-Bishop JA found that the application was promptly made.

[28] In **Kandekore**, the Default Costs Certificate was obtained on the 21st October 2016 and the Application to set aside was filed on November 3, 2016. It was found that the application was made promptly.

[29] In the case at bar, there is no affidavit indicating the date of which the Default Cost Certificate was served. The Defendants contend they first learnt of the Default Cost Certificate when they were served by email on February 18, 2022 **(Defendants Submission in support to its affidavit in Objection to the Claimant's Application for Sale of Land)**. The first application was filed February 25, 2022 and the second application March 1, 2022. The Application to set aside the Default Cost Certificate could therefore be said to have been made promptly.

Whether there was a clearly articulated dispute about the costs sought? and Whether there was a realistic prospect of successfully disputing the bill of costs?

[30] In **Kandekore**, these issues were considered together by F Williams JA(Ag). He stated:

> *They should be considered against the background of: (a) what is stated in the applicant's points of dispute; and (b) what the rules require points of dispute to state.*

[31] F Williams JA (Ag) found in that instance that the proposed Points of Dispute filed contained only a general statement of contest, when the rules required that particulars should be provided, therefore no clearly articulated dispute was presented. In those circumstances, there was no basis on which to consider whether there was a realistic prospect of successfully disputing the Bill of Costs.

[32] The case at bar is even more egregious. As in **Canute Sadler**, the Defendants have not attached any proposed Points of Dispute to the Affidavit of Mr. Duncan.

This is in fact a condition precedent. **CPR Rule 65.22 (4)** requires that the Application to Set Aside the Default Cost Certificate must be supported by affidavit and must exhibit the proposed Points of Dispute. I can do no better than the words of Rattray J:

> *The requirement of Rule 65.22 (4) of the CPR, in having the proposed Points of Dispute, attached as an exhibit to the Affidavit in Support of the Application to set aside the Default Costs Certificate, is for the Court to consider the Points of Dispute and to notify the receiving party of the contested items. That Rule indicates that the Points of Dispute "must" be exhibited, which in my view, reflects the mandatory nature of the provision. The Points of Dispute was not exhibited to the Affidavit of Counsel Mr. Campbell, and as such, is not properly before the Court for its consideration.*

This failure on the part of the Defendants is fatal to the application.

Should time be extended to file the Points of Dispute

[33] The Defendant sought, at the hearing of this application, an extension of time to file the Points of Dispute after it was made clear to him that the Application to Set Aside the Default Cost Certificate was bound to fail, as the Defendants had not complied with what was a mandatory requirement in **CPR Rule 65.22 (4)**. The Claimant's contention was that this oral application should not be considered in view of the overall delay of over two years since the Points of Dispute should have been filed and served.

[34] The Court considered its responsibility to manage cases and the overriding objective of the **Civil Procedure Rules** to allot to cases an appropriate share of the court's resources. The Application was first filed February 25, 2022. The Defendants had had about three months to exhibit the proposed Points of Dispute and about two years to file their Points of Dispute. In all the circumstances, the court considered that if it would not be in the interests of the administration of justice to grant the application for an adjournment, then it ought not exercise its discretion to grant the oral application for an extension of time to the Defendants to file the Points of Dispute.

Prejudice

[35] In **Canute Saddler,** Rattray J weighed the prejudice to be suffered by each party. He considered that the Claimant would be prejudiced by the delay in the payment of their costs, and further costs to be incurred by the taxation proceedings, and the Defendants would be prejudiced if the Application to Set Aside the Default Costs Certificate was not granted, as they would be required to pay the sum claimed. Mr Duncan, in his Affidavit of Urgency in Support of Notice of Application to Set Aside Default Cost Certificate and Discharge of Final Charging Orders filed March 1, 2022, states:

> *That the Claimant seeks to inflect, prejudicial and unfair injure to the Defendants unjustifiable.*
>
> *The Claimants applications are without merit and are an abuse of the Courts Process.*

[36] In the present case the Claimant has obtained a final Charging Order and has applied for the sale of the property. Setting aside the Default Cost Certificate would mean the fruits of the judgment would be snatched from the Claimant. On the other hand, the Claimant seeks the sale of the Defendants property to settle the debt. The submissions of Counsel Ms. Christopher in which she set out how each payment received from the Defendants was applied, has not been successfully challenged. The Defendants' assertion that the Claimant's Bill of Cost was based on 'fictitious' invoices did not persuade the Court. The Claimant's explanation of the invoices and allocation of monies received from and on behalf of the Defendants are more persuasive than the Defendants averments. The one particular challenge by Mr. Duncan as to the date of paying the cheque and the date of receipt is clearly erroneous as an examination of the receipt shows the date could only be construed as the 15th or the 16th May. It my view that the Claimant would suffer the greater prejudice if the Default Costs Certificate were set aside by the delay in realizing the fruits of the judgment.

[37] The Defendants in failing to provide a good explanation for the delay in filing their Points of Dispute and also failing to exhibit a proposed Points of Dispute as required by **Rule 65.22 of the CPR**, the Application to set aside the Default Cost Certificate must fail.

[38] The Application to Discharge the Final Charging Order is predicated on the Default Cost Certificate being set aside. Accordingly, the Application to Discharge the Final Charging Orders is also refused.

ORDERS

On May 17, 2022

1. Application filed February 25th 2022 is struck out. Cost of the Application to the Respondent.
2. Application for Extension of Time to file Points of Dispute in relation to Application filed March 1, 2022 is refused.

On July 27, 2022

3. The Defendants' Notice of Application to set aside the Default Costs Certificate and Discharge of Final Charging Orders filed March 1, 2022 is refused.
4. Costs of the Application to the Claimant to be taxed if not agreed.
5. Permission to Appeal Refused.