[2023] JMSC Civ. 36

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2012HCV04550

BETWEEN	**PAUL GRIFFITH**	**CLAIMANT/RESPONDENT**
AND	**CLAUDE GRIFFITH**	**DEFENDANT/APPLICANT**

IN CHAMBERS

Glenroy Mellish, instructed by Byfield Mellish and Campbell for the Claimant/Respondent

Rykel Chong, instructed by Nigel Jones and Company for the Defendant/Applicant

Heard: November 24, 2022, and 2nd March 2023

Civil Procedure: Part 65 – Taxation Proceedings- Default Costs Certificate - Application to set aside - Rule 65.22 (2) – Whether default costs certificate was properly issued -Rule 65.22 (3) – Whether good reason exists to set aside.

M. JACKSON, J (AG)

INTRODUCTION

[1] This is an application brought pursuant to Part 65 of the Judicature Supreme Court Civil Procedure Rules, 2002, as amended ("the CPR"), by Claude Griffith ("the Applicant"), challenging the issuance of a default costs certificate against him.

[2] Before delving into the substantive application for which this court is asked to decide, it is necessary to provide a summary of the factual background and the timelines that gave rise to the application.

THE BACKGROUND

[3] On August 16, 2012, Paul Griffith ("the Respondent") instituted proceedings against the Applicant, challenging the authenticity of a Will purported to be that of their late father, Carlos Adrian Griffith. On October 5, 2017, after a trial which lasted two (2) days, Thompson-James J. gave judgment in favour of the Respondent and ordered the Applicant to pay his costs. The Learned Trial Judge also ordered that if the parties could not agree on the costs, the matter should proceed to a taxation hearing.

[4] The relevant timelines are as follows:

(i) October 5, 2017 – The Learned Trial judge ordered the Applicant to pay the Respondent's costs.

(ii) January 5, 2018 - The Respondent filed and served the Bill of Costs on the Applicant's Attorney-at-Law.

(iii) February 20, 2018 - The Respondent requested the default costs certificate after the Applicant failed to file a point of dispute within 28 days as required by the rule.

(iv) February 20, 2018 –Registrar K. Hill signed and dated the default costs certificate.

(v) February 21, 2018 – The Applicant filed his points of dispute.

(vi) February 26, 2018- The Applicant served the points of dispute on the Respondent.

(vii) January 17, 2019 -Registrar K. Hill stamped and certified a copy of the default costs certificate she previously signed as a true copy. The Respondent was given a copy.

(viii) March 29, 2019 – The certified copy of the default costs certificate was served on the Applicant (via the email to his Attorney at law, Mr Nigel Jones)

(ix) December 21, 2021 –The Respondent filed a without notice application for a provisional charging order.

(x) March 28, 2022 - The application for the provisional charging order was granted. June 8, 2022, was fixed as the date when the court will consider making the final charging order.

(xi) 17 April 2022 – The Applicant was served with the provisional charging order to make final in keeping with rule 48.7 of the CPR.

(xii) June 7, 2022 - The Applicant applied to set aside the default costs certificate and to discharge the provisional charging order.

(xiii) 8 June 2022 – The Court ordered that the Applicant's application filed on June 7, 2022, to set aside the default costs certificate to be heard on November 24, 2022, and that the application to consider making a final provisional charging order final should await the outcome of the application to set aside the default costs certificate.

THE APPLICATION

[5] By his application, the Applicant seeks the following orders:

1. The application to make the provisional charging order final, filed on March 29, 2022, is to be set aside.

2. Permission be granted for the default costs certificate entered on February 20, 2018, set aside.

3. Permission be granted for his points of dispute filed on February 21, 2018, to stand as if properly filed.

4. The Registrar is to Tax the bill of costs filed on January 5, 2018, as a matter of urgency.

[6] The principal grounds relied on in support of the application were extracted and formulated by this court as follows:

(a) The points of dispute, filed on February 21, 2018, out of time and in breach of rule 65.20 (3), was mainly due to administrative reasons on the part of the Applicant's Attorneys-at-Law.

(b) Notwithstanding that it was filed out of time, the points of dispute was filed before the Registrar signed and executed the default costs certificate filed by the Respondent on February 20, 2018.

(c) In those circumstances, the Registrar ought not to have issued the default costs certificate and, in keeping with rule 65.20 (5), ought not to have issued the default costs certificate where the Applicant's points of dispute would have been filed on February 21, 2018, and before the execution of the default costs certificate, which was filed on February 20, 2018.

(d) In those prevailing circumstances, the Applicant should not be ordered to pay the costs set out in the default costs certificate, which would prove exorbitant, unreasonable and manifestly excessive.

(e) In those circumstances and, in keeping with the overriding objective, taxation proceedings would be appropriate to be convened to unveil the issues and complaints set out of the points of dispute.

(f) That the provisional charging order should be set aside as it is connected to the sum prayed for in the default costs certificate, which is being contended by the Applicant as being manifestly excessive and unreasonable.

(g) The Applicant will be prejudiced if his application is not granted.

(h) The Respondent would not be prejudiced.

(i) The Orders sought are necessary for the just determination of the case.

[7] The substratum of the evidence in support of the application is set out in the Affidavit of Mr Nigel W. Jones, Managing Partner of the firm representing the Applicant.

The APPLICABLE LAW

[8] Part 65 of the CPR establishes the regime that deals with Cost and Quantification, including any procedure for taxation. Rules 65.18, 65.20, 65.21 and 65.22 are the relevant rules for these proceedings.

[9] Rule 65.18 (1) provides:

"**Commencement of Taxation Proceedings**

65.18 (1) 'Taxation proceedings are commenced by the receiving party –

(a) filing the bill of costs at the registry; and

(b) serving a copy of the bill on the paying party.

(2) 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 the costs.

…..

68.18 (6) The bill of costs served on the paying party or parties must contain or have attached to it a notice notifying the paying party of the need to serve points of dispute under rule 65.20 and the consequences of not doing so".

[10] Rule 65.20 speaks to the points of dispute, and the consequence of not serving it provides:

"**Points of dispute and consequence of not serving**

65.20 (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.

……

(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 paying 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."

[11] Rule 65.21 delineates the procedure to obtain a default costs certificate. It provides:

"How to obtain default costs certificate

65.21 (1) A receiving party who is permitted by rule 65.20 to obtain a default costs certificate does so by filing-

(a) an affidavit proving-

(i) service of the copy bill of costs; and

(ii) that no points of dispute have been received by the receiving party; and

(b) a draft default costs certificate in form 26 for signature by the registrar.

(2) The registrar must then sign the default costs certificate.

(3) A default costs certificate will include an order to pay the costs to which it relates."

[12] Both rules 65.22 (2) and 65.22 (3) deal with setting aside a default costs certificate. The relevant provisions provide the following:

"Setting aside default costs certificate:

65.22 (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".

[13] The difference between rules 65.22 (2) and 65.22 (3) was appropriately set out in **Advantage General Insurance Company Limited (Formally United General Insurance Limited Company) v Marilyn Hamilton** [2019] JMCA App 29 by Williams P, JA, at paragraph 55, as follows:

"It is pellucid that a party who failed to file the required points in dispute to challenge a bill of costs does not have an automatic right to have the

default costs certificate set aside. The difference between rule 65.22(2) and rule 65.22(3) is that in the former, a registrar is obliged to set aside the default costs certificate if the receiving party is not entitled to it, whereas in the latter, the court has the discretion to set aside the certificate where good reason is shown."

THE ISSUES FOR DETERMINATION

[14] The resolution of this application, in this court's view, falls to be determined under two broad headings:

(a) Whether the Registrar should have issue the default costs certificate when she did?

(b) If the default costs certificate was properly issued, is there a good reason for the court to set it aside?

ISSUE # 1: Whether the Registrar should have issued the default costs certificate.

[15] The crux of the Applicant's submission is that the Registrar should not have issued the default costs certificate on January 17, 2019, when she did.

[16] In advancing this point, Miss Chong has contended that notwithstanding that the Applicant was in breach of the 28-day requirement to file his points of dispute, it was nonetheless filed on February 21, 2018, a mere day after the Respondent requested the default costs certificate. She further stated that January 17, 2019, was the date the Registrar issued the default costs certificate; hence, the Applicant's point of dispute was filed before it was issued.

[17] Therefore, she further submitted that rule 65.20 (6) would avail the Applicant, and in those circumstances, the default costs certificate must be set aside as of right by this court. Accordingly, she rested the full force of her submission on Rule 65.20 (6), which she said would follow from 65.20 (5).

[18] In full disagreement with Miss Chong's submission, Mr Mellish submitted that using January 17, 2019, as the issue date is misleading and an inaccurate representation of the date when the default costs certificate was issued. He submitted that the issue date was February 20, 2018. He emphasised that the Respondent filed and applied for the default cost certificate on February 20, 2018, and the Registrar signed and dated it.

[19] In support of his arguments, Mr Mellish referred the court to three cases: **Auburn Court Limited et al. v National Commercial Bank Limited et al. SCCA No. 27** of 2004, Del. March 18, 2009, **Charela Ann Limited v United Church Corporation JMSC** Del. July 8, 2011**,** and **Gordon Stewart v Noel Sloley Ors** JMSC Civ 50.

[20] Concerning **Auburn Court Limited et al. v National Commercial Bank Limited**, Counsel first asked the court to have regard to the timelines of the costs' events in the case. This he helpfully sets out as follows:

The Timeline

(a) The Claimant's Bill of Costs was filed and served on April 18, 2008.
(b) The Claimant's request for a default costs certificate was filed on June 13, 2008.
(c) The Applicant filed his points of dispute on July 21, 2008 (out of time).
(d) The Registrar perfected the default costs certificate on January 7, 2009.

[21] Counsel then directed the court to paragraph 18 of the judgment, where Harris JA, as she then was sitting as a single judge, reasoned that:

> "The default costs certificate was filed on June 13, 2008. However, it was perfected on January 7, 2009. **The fact that it was perfected on that date would in no way affect its validity as it must be taken to have been filed on June 13, 2008.** In the case of **Workers Saving and Loan Bank v Winston McKenzie et al** (supra) it was held that once the document in support of the entry of a default judgment are in proper order,

the judgment, on filing, is to be taken as entered on the date of filing. **The principles are applicable to this case. The Default Certificate had been properly filed and accordingly, perfected on June 13, 2008. There is nothing to show that its integrity has been impugned. Its validity is intact".** (Emphasis)

[22] Counsel further asked the court to note that the date the court deemed the issue date was the date on which it was filed. On the notion that a default costs certificate is akin to a Default Judgment, he asked the court to have regard to the pronouncement of P Williams JA in **Advantage General v Marilyn Hamilton,** paragraph 62, where the Learned Judge of Appeal opined as follows:

> "[62] To my mind, the entering of the default costs 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".

[23] Mr. Mellish then invited the court also to have regard to the decision of **Charela Ann Limited v United Church Corporation,** in which Brooks J, as he then was, in which the learned judge, concerning the issue date, stated as follows:

> "Rule 65.20 sets out the procedure for serving points of dispute in respect of a bill of costs. Paragraph 3 of that rule requires that the paying party files and serves its points of dispute within 28 days of being served with the bill of costs. A sanction is stipulated to punish paying parties who fail to obey that rule. The sanction is that the paying party in default is precluded, unless permitted by the registrar, from participating in the taxation proceedings.
>
> Paragraph 5 of rule 65.20 states that a receiving party may file a request for the registrar to issue a default costs certificate if the 28-day period mentioned above has expired and no points of dispute have been served

on it. On the request for the default costs certificate having been filed, paragraph 6 of rule 65.20 becomes applicable. It states:

> "If any party (including the paying party) serves points of dispute **before the issue** of a default costs certificate, the registrar **may not issue** the default costs certificate." (Emphasis supplied)

I am prepared, for these purposes, to find that "issue", in the context of this rule, means "signed by the registrar". The term is not specifically defined in the CPR, and **it would unnecessarily complicate proceedings such as these, to find that "issue" means "delivered to the receiving party". (**Emphasis**)**

[24] In **Gordon Stewart v Noel Sloley Ors**, the court's attention was directed to paragraph 11 of the judgment where Sykes J, as he then was, made the following observation at paragraph 11:

> "11] **The rules contemplate that the paying party may be inactive.** It has provisions that prevent the paying party from delaying the process. In addition to the paying party not being heard if he is out of time, rule 65.20 (5) provides that the receiving party may request a default costs certificate if (a) the period for filing the points of dispute has passed and (b) no points of dispute have been served on the receiving party. Rule 65.20 (6) states that if 'any party (including the paying party) serves points of dispute before the issue of a default costs certificate, the registrar may not issue the default costs certificate.**' It has been decided by the Supreme Court that issue in this context means signed** (**Charela Inn Ltd v United Church Corporation** Claim No 2004HCV02594 (unreported) (delivered July 8, 2011) (Brooks J (as he was at the time, now Justice of Appeal)). The Court of Appeal has also decided that the date **of filing of the default costs certificate is the date from which it takes effect even if it is signed after the date of filing** (**Auburn Court Limited and another**

v National Commercial Bank SCCA No 27/2004 (unreported) (delivered March 18, 2009) (Harris JA))." (My Emphasis)

[25] On the strength of those authorities, Mr Mellish maintained that the default costs certificate was signed and properly issued on February 20, 2018, and not January 17, 2019. He further stressed that on February 20, 2018, when the Registrar signed and dated the default costs certificate, the Applicant did not file his points of dispute.

[26] Counsel asked the court to take a look at the default costs certificate. This, the court did. He submitted that it is clear that after the default costs certificate was signed and dated February 20, 2018, by Registrar K. Hill, she merely signed and stamped and certified it as a true copy of the original a year later, on January 17, 2019. Accordingly, he asked the court to find that January 17, 2019, bears no relevance to the date when the default costs certificate was issued and, therefore, would be of no effect.

[27] In his submission, he further underscored that when the points of dispute were filed, the default costs certificate would have already been properly issued, so rule 65.22 (2) could not avail the Applicant.

[28] Finally, on this point, he submitted that if the court accepted that January 17, 2019, as the date that the default costs certificate was issued, it would lead to an unfairness to the Respondent. He added that a paying party, such as the Respondent, could take as long as he wishes to file his points of dispute, wagering on delays in the Registry to dispatch the default costs certificate to the receiving party, as may have been the case. In conclusion, he argued that any arrangement other than February 20, 2018, would be an administrative nightmare and lead to unfairness to the receiving party.

ANALYSIS

[29] The facts in this case, for the most part, are without contradiction. The Applicant did file his points of dispute out of time. Rule 65.20 (4) makes it abundantly clear that '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'. It is also not in dispute that the Applicant made no application to the Registrar for permission to file out of time. The points of dispute was filed roughly three weeks after it was due, and there was a further delay of five days before it was served on the Respondent (Emphasis).

[30] As correctly observed by Sykes J, as he then was, and which I am entirely in agreement with, apart from rule 65.20 (4), a paying party can have the opportunity to file his points of dispute under rule 65.20 (6), where a request for a default costs certificate is made under rule 65. 20 (5), but before the Registrar issues it.

[31] In summary, the effect of the provision is that the Registrar is prevented from issuing a default costs certificate if the paying party serves a points of dispute in the interval between an application being made and a certificate being issued. From a clear reading of the rule, the provision is mandatory, and so there is no discretion on the part of the Registrar; once a points of dispute is filed before she issues the default costs certificate, it is, therefore, strictly prohibitive.

[32] Critical to resolving this matter, at the end of the day, this court must determine the issue date of the default costs certificate.

[33] As alluded to by Sykes J, as he then was, in **Sloley,** the cases had interpreted issue to mean signing by the registrar on the one hand or the date of filing – regardless of when it was signed. In this court's view, there is an inconsistency in relation to these two positions.

[34] However, in resolving this issue, this court finds that there is merit in going through the sequence of events that are intrinsic to his case, which must be carefully analysed in tandem with rule 65.20 (6) in relation to when the request was made for the default costs certificate and when his points of dispute was filed.

[35] The clear sequence of events showed that the Respondent used Form 26 and requested the default costs certificate on February 20, 2018, with the relevant affidavit in support attached. On that date, the unchallenged state of affairs was that a copy of the bill of costs was already served on the Applicant from January 5, 2018. The

unchallenged state of affairs was that up to February 20, 2018, the Respondent did not receive a copy of the Applicant's points of dispute.

[36] Rule 65.21 (2) provides that '**the registrar must then sign the default costs certificate**'. In keeping with that rule, the Registrar, K. Hill, signed the default costs certificate and dated it February 20, 2018.

[37] From the sequence of events, it is clear that when the Registrar acted as she did and signed the default costs certificate, rule 65.21 (1), conditions were met, and the Applicant was not in the arena to benefit from rule 65.20 (6). His points of dispute was filed a day later (February 21, 2018) and served the Respondent 5 days later. (My emphasis)

[38] In these circumstances, while the authorities have shown that issue means signed or the filing date, this court prefers the approach outlined in **Charella Inn** and would, therefore, take issue to mean sign. This court, therefore, finds that the default costs certificate was properly issued on February 20, 2018, in light of the pure and unadulterated facts of this case as presented.

[39] This position is further fortified when this court considers the facts in **David Mundel v Ivan Small** [2020] JMSC Civ. 181. In that case, the request for a default costs certificate and the points of dispute were filed and entered on the same day, August 5, 2015. The Registrar, however, signed and dated the default costs certificate on September 25, 2015.

[40] Fraser J, as he then was, held that the default costs certificate was improperly issued. In delivering the judgment, he stated as follows:

> "[49] In the instant case, the evidence from the affidavit of Suzette Radlein filed September 29, 2016, reveals that the points of dispute were both filed and served on the respondent on August 5, 2015. **This act of service on the respondent ought to have restrained the registrar's hand pursuant to rule 65.20(6) of the CPR, as the** default costs certificate **was not issued until September 25, 2015...In this regard, unlike in the**

> **case of Charela Inn Ltd v United Church Corporation and Others, in the instant case, the requirements of service outlined in rule 65.20(6) of the CPR to restrain the registrar from issuing a default costs certificate had been met. Accordingly, the default costs certificate should not have been issued."** (Emphasis)

[41] I agree with the Learned Judge.

[42] Returning to the case before this court, the Registrar's signature on February 20, 2018, is indicative of the fact that she would have satisfied herself that the requirements of rule 65.21 (1) had been met and that there would be nothing to restrain her from signing the default costs certificate.

[43] There is no evidence in this court that the Applicant had sought permission to file his points of dispute out of time, nor did he check and ascertain whether the Respondent had requested the default costs certificate. As the defaulting party, he bears the burden of proof and must, therefore, provide the requisite evidence on a balance of probabilities. He is, therefore, required to do more than state mere bald assertions

[44] In light of the foregoing, I entirely agree with the Respondent's submission that January 19, 2019, could not be the issue date. Also, I agree with the submission that if that were so, all a paying party needs to do is rely on the administrative challenges of the registry, which often attends upon that office and waits until the ninth hour to file the points of dispute. In contrast, a receiving party, who slavishly follows the rule, is made worse for it and may have to wait more years to have his taxation dealt with. This, the court finds, would not be in keeping with the overriding objective of the CPR.

[45] In light of the observation made by Sykes J, in **Sloley**, it may be necessary to have an amendment to the rules to give greater precision as to when the issue date is operative.

[46] For the above reasons, I conclude that the Registrar should have issued the default costs certificate, and the default costs certificate was validly issued on February 20, 2018.

ISSUE # 2: Whether the court has good reason to set the default costs certificate aside.

[47] Having concluded that the default costs certificate was validly issued, this court must now consider rule 65.22 (3), which has also been prayed to aid this application. That is, whether there exists a good reason to set it aside.

[48] Rule 65.22 (3) provides that a default costs certificate can be set aside for good reason, it, however, does not provide the court with any qualified set of circumstances that it should and or may take into account in making that determination.

[49] In **Advantage General Insurance Company Limited (Formally United General Insurance Limited Company) v Hamilton**, McDonald–Bishop JA, too, made this observation and shared a similar sentiment concerning this important omission. At paragraph 14**,** she opined:

> "[14] Accordingly, there is only one criterion to be satisfied for the setting aside of default costs certificates under rule 65.22(3), and that is, that "good reason" exists for so doing. Neither the CPR nor the relevant authorities has provided an exhaustive list or closed category of factors that may constitute "good reason". It may very well be that some of the matters that are required in the consideration of an application for relief from sanctions may be relevant considerations in determining whether good reason exists for the setting aside of a default costs certificate. The requirement for the application to be made promptly may be one such consideration."

[50] At paragraph 15, in her usual guidance to these courts, she stated:

> "[15] …The question of what constitutes good reason for the purposes of the rule, falls to be determined **upon an objective consideration of the**

particular facts and circumstances of each case, with the application of sound judgment and the overriding objective to deal with the case justly" (my emphasis)

[51] In **Henlin Gibson Henlin and Calvin Green v Lilieth Turnquest** [2015] JMCA App 54, F Williams JA (ag) (as he then was), had earlier joined the conversation with regard to this omission. In that case, he followed the approach in **Kleinwort Benson Ltd v Barbrak Ltd and other appeals; The Myrto (No 3)** [1987] 2 All ER 289. At paragraphs [34] and [35] of the judgment, he stated:

> "[34] The words 'good reason', (which are used in rule 65.22(3) of the CPR), have been judicially considered in several cases. One such case is **Kleinwort Benson Ltd v Barbrak Ltd and other appeals; The Myrto (No 3)** [1987] 2 All ER 289. This is how the words were discussed at page 300 c, of the report:
>
> > 'The question then arises as to what kind of matters can properly be regarded as amounting to 'good reason'. The answer is, I think, that it is not possible to define or circumscribe the scope of that expression. Whether there is or is not good reason **in any particular case must depend on all the circumstances of that case, and must therefore be left to the judgment of the judge…'**
>
> [35] Many of the other cases that discuss the phrase 'good reason' cite the **Kleinwort Benson** case. What all these cases confirm is whether good reason exists or not is a matter left to the individual judge's discretion and is dependent on the particular facts and circumstances of each case."

[52] I deduced from the cases that in exercising the discretionary powers conferred by the CPR, including the power to set aside a default costs certificate, I must have regard to the overriding objective, which requires that cases are to be dealt with justly and at a

proportionate cost and which includes ensuring that cases are dealt with expeditiously and fairly, enforcing compliance with rules, practice directions and orders.

[53] Equally, in assessing whether there exists good reason to set aside a default costs certificate, I must pay particular attention to the merits of each case in keeping with its own intrinsic set of circumstances, both individually and cumulatively, as helpfully stated by P Williams JA in **Advantage General Insurance Company Limited (Formally United General Insurance Limited Company) v Marilyn Hamilton.** At paragraph 67, the learned judge of Appeal stated:

> "[67] The courts have always retained wide powers to set aside default judgments on such terms as it thinks just since it is recognised that there was no decision on the merits of the claim and the CPR set out the procedure for setting aside or varying a default judgment at Part 13. There must be a similar power to set aside a default costs certificate… the ultimate question is whether there is overall good reason for setting aside the default costs certificate."

[54] Brooks JA, as he then was, in **Rodney Ramazan and Ocean Faith NV v Owners of Motor Vessel (CFS) PAMPLONA** [2012] JMCA App 37**,** provided guidance in relation to some factors a court could use in determining whether good reason had been provided. These, he stated, would include:

(a) Whether the application to set aside was made promptly
(b) The Circumstances leading to the default.
(c) Consideration of whether there was a clearly articulated dispute about the orders sought.
(d) Consideration of whether there was a realistic prospect of successfully disputing the claim.

The Circumstances leading to the default.

[55] The Affidavit of Mr Jones set out the circumstances of the default being relied on. The relevant paragraphs, 3-8, state as follows:

"…..

3. The Respondent filed his bill of costs on January 5, 2018, and served it on our Kingston Branch located at Suite 11 Winchester Business Centre, 15 Hope Road, Kingston 10, in the circumstances where the Attorney who handled the matter was located at our Portmore Branch located at Unit 88, Portmore Pines Plaza, Saint Catherine…That there were administrative delays in having the bill of costs transferred to the appropriate Attorney and branch, including a delay in identifying to whom the matter belonged.

5. Upon the appropriate transfer to our Portmore Branch on or about February 12, 2018, the Attorney with conduct left the firm, and the secretary at the Portmore Branch assisted in handling the matter. My assessment of the points of dispute when it was finalized. A copy of the email thread dated February 19, 2018, is attached hereto Exhibited as "NWJ-2" for identification.

6. The Attorney, prior to her departure from the firm, spoke to the Defendant would have received instructions that the amount proposed by the Claimant was excessive and that there would be a difficulty paying the amount immediately. A copy of an email dated February 13, 2018, is attached hereto and exhibited as "NWJ-3".

7. It was the foregoing reasons the points of dispute were filed out of time on February 21, 2018, and served on the Claimant's Attorney on or about February 26, 2018. A copy of the points of dispute filed on February 21, 2108, and served on February 26, 2018, exhibited as NW J-4 for identification.

8. That the Claimant filed a default costs certificate on February 20, 2018, was executed by Registrar K. Hill on January 17, 2019.

……"

[56] Miss Chong asked the court to accept those circumstances as a good reason to set aside the default costs certificate. She also submitted that the Applicant's Attorneys-at-Law was never served with the default costs certificate until June 2022, when they were served with the Application for the provisional charging order to be made final.

[57] In the round, she further argued that if the court finds the reasons put forward are not good, she has asked that the court consider paragraph 69 of **Advantage General Insurance Company Limited (Formally United General Insurance Limited Company) v Marilyn Hamilton**, where P. William, JA opined that even if an explanation is not considered good, it is not fatal.

[58] Mr Mellish, on the other hand, submitted that the Applicant's Attorney-at-Law, Mr Jones, was served with a copy of the default costs certificate on March 29, 2019. In support of this point, Counsel directed the court's attention to the affidavit of the Respondent, which exhibited an email correspondence between his Attorney-at-Law and Mr Jones.

[59] Regarding the administrative delays, Mr Mellish submitted that the cases have held that administrative reasons do not amount to a good reason. He, accordingly, asked the court to have regard to the oft-cited case of **H.B Ramsay & Associates et al. v JRF** [2013] JMCA Civ. 1**,** which also adopted the reasoning of **AG v Universal Projects Limited**.

[60] He further asked to consider carefully the circumstances of the default in light of the evidence proffered by the Applicant. He submitted that the affidavit of Mr Jones revealed that up to February 13, 2018, the Applicant had not given instructions to his attorney and promised to do so by March 1.

[61] To further support his point on this submission, he asked the court to have regard to a letter dated February 13, 2018, addressed to Mr Jones, which was sent to him by a team member. The details of the letter were as follows:

> "Dear Mr. Jones,
>
> The client explained to me that he's having a difficulty making the immediate payment of the fees for taxation but says he will be able to do so by March 1. In the interim, please see attached the draft points of dispute."

[62] In this regard, Mr Mellish argued that there had to be other circumstances that contributed to the delay besides administrative reasons. Therefore, he submitted that the court should find that the Applicant has not advanced any good reason to set aside the default costs certificate.

ANALYSIS

[63] In coming to a determination whether the court has good reason to exercise its discretion on this factor, I am mindful of the dictum of Lord Denning MR in **Salter and Rex & Co v Gosh** [1971] 2 All ER 865, at page 866, where he opined that: "We never like a litigant to suffer by the mistake of his lawyer". I will, therefore, analyse the breach in the context of the explanation provided.

[64] There is no dispute that the bill of costs was served on the Applicant's Attorneys-at law on January 5, 2018, at their Kingston office. However, this court observed that it took more than a month to locate the attorney who had conduct of the matter, notwithstanding the parties are within the firm and separated by a few miles.

[65] The matter was eventually transferred to the Portmore Branch on February 12, 2018. No reason has been advanced to this court to explain this delay of over a month or the efforts made to locate the Counsel. What is clear was that by the time the matter was transferred to the Portmore Branch, the 28-day timeline required by the rules to respond to the Bill of Costs had long expired.

[66] In this court's view, sufficient explanation was necessary to place this court in a position to assess whether the administrative delay relied on effectively amounts to good reason. The burden of proof rests with the Applicant to show good reason. The onus was on the Respondent's Attorneys-at-Law to act promptly. It can hardly be underscored that taxation proceedings are visited with strict timelines entrenched in the rules.

[67] It, therefore, would have been important to identify and state the reasons behind the "administrative reason". For example, what were the efforts made to locate the Counsel, who received the bill of costs on behalf of the firm, when did the Counsel with conduct of the matter leave the Firm, and when did that Counsel speak to the Applicant?

[68] In the court's view, the reasons set out in the affidavit lacked substance and were too general. The Applicant must place sufficient facts before this court so that it can make a proper assessment. It is not for the Court to attempt to read into the reasons. The phrase 'administrative reason' without more tells this court nothing.

[69] In relation to whether the Applicant was served with the default costs certificate, Miss Chong strongly objected for three reasons. Firstly, she argued that the Respondent did not file an affidavit opposing the application. Secondly, because he had not done so, the Applicant's account remained unchallenged. Thirdly, the affidavit of the Respondent concerning the application for a provisional charging order cannot be relied on to oppose the application to set aside the default costs certificate.

[70] In support of her position, she relied on the cases of **Shernett Manning v Twin Acres Development et al**. [2017] JMSC Civ. 54 and **Melrose Finance v Miguel Sutherland et al.** [2022] JMSC Civ. 111.

[71] Counsel Mr Mellish, in response, argued that the affidavit can be relied on as it forms part of the court's core bundle, and the evidence contained in it is relevant to the applications before this court. He further submitted that the affidavit formed part of material that was already in the possession of the Applicant's Attorneys-at-Law. He

further submitted that the affidavit is concerned with the application to set aside the default costs certificate and the application for the provisional charging order to be made final.

[72] After carefully assessing the submissions, this court does not find merit in the submissions made by Miss Chong on this point. At the beginning of this hearing, Mr Mellish indicated that he intends to rely on the affidavit as part of the material he filed in a judge's bundle in opposition to the application. The Applicant took no objection at that time. I, therefore, find that notice of the evidence was made available and known to counsel.

[73] I also find the authorities relied on by Miss Chong to be distinguishable and bear no relevance to the circumstances of this case before me.

[74] I also find that the evidence is relevant in determining the orders sought by the Applicant in his Notice of Application for Court Orders and what he has asked this court to determine. Accordingly, excluding the evidence would not be in keeping with the overriding objective.

[75] A further important observation by this court is that nowhere in the affidavit of Mr Jones was it ever stated or challenged that he or the firm was never served with the default costs certificate. Accordingly, asserting by way of a submission that service was not effected will not be sufficient. Such assertion must be incorporated in the affidavit for the court to consider it.

[76] The court also observed that the email address by which the service was effected matched the email address of the other correspondences that the Applicant has asked this court to have regard to. I, therefore, accept that Applicant, through his Counsel, Mr. Jones, was served with the default costs certificate from March 29, 2019.

[77] Even if I am wrong, when this court assessed the Applicant's conduct up to and after the points of dispute was filed, it was populated with a series of non-compliance. In those circumstances, the clear evidence is that the Attorneys-at-Law for the Applicant were not only late in filing the points of dispute, but they had sought no permission from

the Registrar to file out of time. This can be contrasted with the **Auburn Court Limited et al v. National Commercial Bank Limited**; case**,** where the applicant had a letter accompanying the points of dispute for permission to file it out of time.

[78] The conduct of the Attorneys-at-Law for the Applicant can be contrasted with the **Advantage General Insurance Company Limited (Formally United General Insurance Limited Company) v Marilyn Hamilton,** where the application to set aside the default costs certificate was made a day later.

[79] As expected, the Respondent correctly proceeded to have his costs subject to taxation, in keeping with the rules. This court finds that it is not enough for a defaulting party to file his points of dispute in circumstances where there was already a breach of the rule and do nothing and be expected to place himself back into the ring at the penultimate time when the Respondent did everything in keeping with the rules to satisfy his costs judgment.

[80] The inaction on the Applicant's part is seriously wanting, at best. As a paying party, he is required to act with celerity. The rules clearly indicate that taxation will only occur where points of dispute have been filed in keeping with a particular timeline. Additionally, where no points of dispute have been filed, a default costs certificate may be issued, as was the situation in this case.

[81] I find the words of Judge Grenfell in **Nolan v Devonport and Anor** [2006] EWHC 2025 useful and do provide caution to Applicants, such as the Respondent. The Learned Judge said:

> "[20] …It is not enough for a party to sit back and to await further directions of the court, albeit that the court is under a duty to manage the application. If there is a delay, Pt. 1.3 makes it clear that the parties do have a duty to prompt the court."

[82] Equally, this is not a case where the parties acting on behalf of the Applicant are laypersons; it is a law firm, and there is no good reason for a professional firm heavily engaged in civil litigation to disregard the court's rules and remain dormant for so long.

[83] I found the sage words of Williams F, JA in **Lijyasu M Kandekore v COK Sodality Co-operative Respondent Credit Union Limited** [2017] JMCA App 20, very relevant. He held:

> "[17] The circumstances of the default, although perhaps being attributable in part to errors made by the respondents, should also have been apparent to the applicant, he being, not a layman, but a practising attorney-at-law who ought to be aware of the documents and procedures relating to taxation proceedings."

[84] For these reasons and in exercising the discretion afforded by rule 65.22 (3), I find that no good reason was placed before me, enabling me to exercise my discretion favourably.

Was the application made promptly to set aside the default costs certificate?

[85] The default costs certificate was obtained on February 20, 2018, and served on the Applicant on March 29, 2019. The application to set aside the default costs certificate was filed on June 7, 2022. On these facts, there can be no dispute that the application to set aside the default costs certificate was not made promptly. It was over three years. The delay is substantial.

[86] Miss Chong, in refusing to accept any notion of dilatory conduct, submitted that the Applicant was never served with the default costs certificate. She further submitted that the provisional charging order and the default costs certificate only came to the Defendant's Attorney's attention in June 2022.

[87] She further argued that the firm filing the Applicant's points of dispute, when it did, would not have known that the Registrar would have executed the default costs certificate in circumstances where the rules provide that it ought not to be. She, therefore, contended that there was no delay on the Applicant's part, as the application was filed a day before the hearing of the Claimant's Final Charging Order, which was fixed for June 8, 2022.

[88] As is expected, Mr Mellish vehemently challenged those submissions. He submitted that taken from any perspective, the delay was enormous and should not be condoned by this court.

[89] He further submitted that the Applicant was only jolted into action after he was served with the application for the provisional charging order to be made final on April 17, 2022.

[90] Counsel further submitted that even though the application for the provisional charging order to be made final was served on the Applicant on April 17, 2022, the Applicant's application to set aside the default costs certificate was not made until almost two months later. Counsel argued that in all the various instances, the Applicant failed to act promptly.

ANALYSIS

[91] As I have found that service was effected, there is no doubt that the Applicant failed to act promptly. By way of illustration, some recent authorities showed this point clearly. In **Advantage General Insurance Company Limited (Formally United General Insurance Limited Company) v Marilyn Hamilton,** the default costs certificate was served on March 12, 2018, and the application to set it aside was filed on March 13, 2018, one day later. In **Lijyasu M Kandekore v COK Sodality Co-operative Respondent Credit Union Limited,** the default costs certificate was issued on 21 October 2016, and the application to set it aside was filed on 3 November 2016. In both cases, the court held that applications to set aside the default costs certificate were made promptly.

[92] In **Canute Sadler and Anor v Derrick Thompson and Anor** [2019] JMSC CIV.11, the application was made some six weeks later. Rattray J, had this to say:

> "[18] In the instant case, the Defendants' Attorneys-at-Law were served with the default costs certificate on the 2nd June, 2017, although it was issued by the Registrar on the 24th February, 2017. The Application to set

aside the default costs certificate was then filed on the 25th July, 2017. At paragraph 6 of his Affidavit Counsel Mr. Campbell deponed: -

> "*That in the circumstances there is no substantial delay in the filing of this Application which was made as soon as reasonably practicable in the circumstances.*"

[19] Counsel Mr Campbell clearly believed that no substantial delay had occurred in filing the Application to set aside the default costs certificate. **I do not agree.** Additionally, Counsel did not provide any reason as to the delay in filing the Application more than six (6) weeks after his firm was served with the default costs certificate by the Claimants' Attorneys-at-Law. 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." (Emphasis)

[93] I do not accept that the application was made promptly and find that no good reason was provided for the failure to act promptly.

Whether there was a clearly articulated dispute about the bill of costs:

[94] In his affidavit, Nigel Jones at, paragraph 9, deposed that:

> From a thorough assessment or a taxation exercise, it is clear that the costs put forward by the Claimant in his Bill of Costs is manifestly excessive and unreasonable, and in those circumstances, an opportunity should be given to the Applicant for taxation proceedings to be convened."

[95] In the points of dispute filed, Mr. Jones is contending that the sum of $ 722,613.75 for the Attorney's fees and other costs, as well as the US$8,854.00 for the handwriting expert fees, are excessive. Mr. Jones has further stated that $181,934.14 would be more appropriate for the Attorney's fee. He did not provide a suggested cost for the expert witness but only maintained that it was excessive.

[96] Counsel also contended that the rates outlined by the attorney and the rates of certain tasks were excessive and billed multiple times. She submitted that the charges were made for two attorneys reviewing the same documents. She also contends that the task of drafting, as distinct from perfecting certain documents, was carried by both attorneys-at-law.

[97] Counsel further submitted that points of dispute filed on February 21, 2018, identified several areas in which it challenged the amount sought by the Respondent and contended that the costs are excessive given the nature of the application made and the time spent in court.

[98] She further submitted that the points of dispute include challenges to the rates for the attorneys-at-law, the hours stated for a certain task and having a single task billed multiple times.

[99] Finally, she submitted that there is an articulated dispute about the costs and placed reliance on the cases of **Advantage and Harold Brady v The General Legal Counsel** [2021] JMCA App 27**.**

[100] Mr. Mellish, in complete opposition, challenged the submission on several planks. He contended that the costs set out in the default costs certificate were awarded to the Respondent after a two-day trial. He further contended that the proceedings was not just an application, as the Applicant would want the court to believe, but rather a trial.

[101] Counsel further contended that contrary to the submissions, no task was described multiple times, which was not clearly stated in the points of dispute. He further submitted that the rate of $15,000.00 per hour for an attorney who was at ten (10) years at the Bar at the time was reasonable and compared favourably with the rates billed in the profession, including the Attorney-at- Law for the Defendant.

[102] Mr. Mellish further objected to the treatment of the expert by the Applicant, whose points of dispute has not provided a reasonable cost, even though he has asked

this court to find that it was unreasonable**.** He further contended that the court duly appointed the expert, and the bill of costs supports her overall costs, including travelling.

ANALYSIS

[103] Rule 65.20(2) requires specificity on the part of an Applicant seeking to challenge the bill of costs. I have looked at the points of dispute filed by the Applicant, and I noted that the primary focus was a general complaint in relation to the duration of the time spent dealing with the matter. There was no proper articulation of the issues in dispute. Counsel has failed to identify tasks that were billed multiple times.

[104] The Counsel for the Applicant did not factor or provide any recommended fees for the expert costs or make a recommendation of the amount of fee to be charged. Rather, his main challenge advanced was only that the expert fees were excessive.

[105] Having assessed the Applicant's points of dispute, I find that his objection was a more general approach that objected to the fees charged by the Respondent; no plausible or justifiable explanation was given for the preferred reasons for reducing the Respondent's fees and hours. In keeping with the rules, the Applicant must provide a more detailed reason. A bald response that the fees are excessive is not enough.

[106] Therefore, in the final analysis, this court finds that there is not a clearly articulated dispute about the costs sought.

Whether there was a realistic prospect of successfully disputing the bill of costs

[107] In keeping with the above and bearing in mind the phrase realistic prospect of success as defined by Lord MR in **Swain v Hallman** [2001] 1 All ER 91, which has been accepted and relied upon in this jurisdiction, I do not find that there is a reasonable prospect of successfully disputing the bill of costs.

The Prejudice

[108] In her submissions and also relying on the affidavit of Mr Jones, Miss Chong asked this court to find that the Applicant would suffer significant prejudice if the Application is refused, whereas the Respondent would suffer none.

[109] She further submitted that there is a real issue to be challenged regarding whether the default costs certificate should have been issued, and it would not be in keeping with the overriding objective if this court were not to set it aside.

[110] It is noteworthy that Counsel has not explicitly indicated what prejudice the Applicant would suffer if the application were not to be aside. This type of evidence would have been most instructive since the Respondent has had a judgment in his hand since 2019. Not only has the Respondent been waiting for the fruits of his judgment since at least 2019, but the substantive claim was filed in 2012, the trial ended in 2015, and the order for costs was made in 2017. As evident from the chronology of events, the Respondent did not sit by idly but made every attempt to progress his matter. The evidence showed that he acted with far more promptitude than the Applicant.

[111] Meanwhile, the Applicant has made no effort to comply with the rules, having been served in 2019 with the default costs certificate. This delay is now roughly four years, which this court finds to be not in keeping with the spirit in which the rules were formulated. Equally, even if the Applicant contended that he was not served with the default costs certificate, he took no further part in the matter after he filed his points of dispute.

[112] It is a requirement that he should have filed the points of dispute within 28 days after January 5, 2018, but he chose to file it approximately three weeks late on February 21, 2018. Having done so, he did not follow up or contact the registrar to ascertain whether any default costs certificate had been requested before his almost three-week delay from the time required to file his points of dispute. The Applicant also failed to seek the Registrar's permission to file his points of dispute out of time, which could have

prompted a search that would uncover that a default costs certificate was already issued to the Respondent the day before, on February 20, 2018.

[113] The court must undertake a balancing exercise to ensure justice is served. The Respondent has been waiting for the fruits of his judgment for some time. In these circumstances, I am compelled to pay strong regard to the dicta of Smith JA, in **Peter Haddad v Donald Silvera** SCCA No. 31/2003, Motion 1/2007, a judgment delivered on the 31st of July 2007, wherein he noted on page 13: -

> "As the successful party is entitled to the fruits of his judgment, the party aggrieved must act promptly. The Court, in my view, should be slow to exercise its discretion to extend time where no good reason is proffered for a tardy application."

[114] I do not accept that any prejudice will likely be attended upon the Applicant, and even if there were to be, the prejudice to the Respondent far outweighs that of the Applicant.

[115] I accept that this court can award costs to ameliorate any hardship to the Respondent. I, however, do not find that an award of cost would be a panacea in this case. I am also guided by the position adopted by Harris JA, in **Attorney General of Jamaica v Roshane Dixon and Attorney General of Jamaica v Sheldon Dockery** [2013] JMCA Civ. 23, where she opined that: -

> "[31] As pronounced in **Haddad v Silvera**, the payment of costs does not ameliorate any hardship which a party would encounter in circumstances of delay. The respondents have filed their claims against the appellant and are desirous of having the matter concluded by the court. In each case, leave has been granted for a judgment in default of defence to be entered against the appellant. Any attempt to deprive the respondents of their right to proceed with their claim, in these circumstances, would be unduly prejudicial to them. An order for an extension of time would preclude them from proceeding to take steps to realise the fruits of their judgments. In

such circumstances, compensation by way of costs would not be an option."

[116] This is not one of those cases with special circumstances and, as such, would be deserving. Moreover, if the Court were to countenance the level of delay, it would send the wrong signal to Attorneys-at-Law and the litigants that the Rules and orders of the Court can be taken lightly or ignored. The importance of a defaulting party acting promptly and in compliance with the rules cannot be underscored.

[117] In the case of **Orrett Bruce Golding and The Attorney General of Jamaica v Portia Simpson Miller** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 3/2008, judgment delivered 11 April 2008, Panton P, as he was then, writing in 2008, made the following observation on the question of delay and the failure to comply with the requirements of the CPR:

> "[15] Before leaving this matter, I have to remind litigants and their attorneys-at-law that they ignore the Civil Procedure Rules at their peril. The days of paying scant regard to the Rules are over. Those days went out with the 1990s... There can be no return to such times as it is not in the interests of justice for the Courts to permit such laxity."

[118] I agree with Panton, J and also endorse the words of McDonald-Bishop JA, in the case of **Flexnon Limited v Constantine Michell and Ors** [2015] JMCA App 55, in which she stated that:

> "[32] In our jurisdiction, where there is an embedded and crippling culture of delay, significant weight must be accorded to the issue of delay, whenever it arises as a material consideration on any application."

DISPOSITION

[119] In all the circumstances, if I am to place appropriate weight on the importance of dealing with cases expeditiously, complying with the rules, practice directions and

orders, and of the inevitable prejudice to the Respondent on setting aside the default costs certificate, this application must be refused.

[120] The Orders by this Court in the final disposition of the matter are as follows:

(i) Permission for the default costs certificate entered on the 20th of February 2018 to be set aside is refused.

(ii) Permission for the points of dispute filed on February 21, 2018, to stand as properly filed is refused.

(iii) The provisional charging order in respect of the properties registered at Volume 1095 and Folio 193 and Volume 1020 and Folio 624 on March 29, 2022, to be set aside is refused.

(iv) The Application for the provisional charging order to be made final is to proceed for a hearing on June 26, 2023, at 3.00 p.m. for 1 hour.

(v) Leave to appeal is denied.

(vi) The costs of the Application is to the Respondent to be taxed if not agreed.

(vii) The Applicant's attorney to prepare, file and serve this order.