[2020] JMSC Civ 181

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012HCV04860

BETWEEN	**DESMOND MUNDLE**	**CLAIMANT/ RESPONDENT**
AND	**IVAN SMALL**	**DEFENDANT/ APPLICANT**

IN CHAMBERS

Richard R. Reitzin instructed by Reitzin and Hernandez for the claimant/respondent.

Miguel Palmer for the defendant/applicant

December 20, 2017; January 25, 2018; February 15 and 28, 2018; July 23, 2020 and September 3, 2020

Judge has jurisdiction to set aside a default cost certificate for good reason - Inherent jurisdiction of court to control its process not impacted by amendments to CPR – Interpretation of definition of "clear days" in rule 3.2(3) of the CPR – Event refers to something that is scheduled to occur on a specified day and on that day only – Where the end of the period stipulated is defined by reference to an event the final day is excluded – Calculation of time period allowed for filing of points of dispute pursuant to rule 65.20(3) of the CPR – Filing of points of dispute not an event hence final day is included – Default costs certificate should not have been issued – General powers to address procedural errors unhelpful – Defects in application for and issuance of default costs certificate substantive and not merely procedural – Good reasons to set aside default costs certificate pursuant to rule 65.22(3) of the CPR – Bill of costs to be taxed

D. FRASER J

BACKGROUND

[1] On September 9, 2013, the claimant filed a claim against the defendant seeking damages for negligence arising out of a motor vehicle accident that took place on July 26, 2012. On May 29, 2015, the Honourable Mr Justice Evan Brown entered judgment on admission of liability in favour of the claimant, and ordered that costs be taxed if they could not be agreed. Costs apparently not having been agreed, on July 7, 2015 the claimant filed a Bill of Costs which was served on the defendant's attorney-at-law on the same day.

[2] The defendant filed his Points of Dispute on August 5, 2015 and served it on the claimant's attorneys-at-law on the same day. Also on August 5, 2015 the claimant filed a Default Costs Certificate (DCC), on the basis that the defendant had not filed the Points of Dispute in the time prescribed by the Civil Procedure Rules (CPR). The registrar signed the DCC on September 25, 2015.

THE APPLICATION

[3] On January 12, 2018, the defendant (applicant) filed an Amended Notice of Application for Court Orders, (the initial application having been filed September 29, 2016), seeking, amongst other things, the following orders:

i) That the DCC entered against the defendant on August 05, 2015 be set aside;

ii) The defendant's Points of Dispute filed August 05, 2015 stand as filed; and

iii) Costs of the application to be awarded to the defendant.

[4] The amended application, which was supported by the affidavit of Suzette Radlein, was made on the following grounds:

(i) The applicant makes the application pursuant rule 65.22(1) of the CPR;

(ii) Pursuant to rule 65.20(3) of the CPR, the applicant had 28 days in which to file his Points of Dispute which was filed on August 05, 2015 within the 28 days. Accordingly, the DCC was entered against the applicant in circumstances where he had filed his Points of Dispute within the prescribed time;

(iii) The applicant's Points of Dispute was filed and served before the registrar had issued the DCC;

(iv) In contravention of rule 65.21(1)(a)(ii) the claimant's (respondent's) affidavit of service filed August 05, 2015, failed to disclose whether or not the respondent had been served with Points of Dispute;

(v) The amount claimed by the Bill of Costs is excessive and it would be unreasonable to allow it to stand;

(vi) In the alternative the court has a discretion in allowing the applicant's Points of Dispute to stand as filed, thereby allowing the applicant to be heard in taxation proceedings herein;

(vii) The application was filed within a reasonable time and if granted the respondent will not suffer protracted delays;

(viii) The applicant has a real prospect of reducing the costs claimed by the respondent; and

(ix) The interests of the administration of justice calls for the DCC to be set aside.

[5] On July 23, 2020 the court made the following order:

i) The Default Costs Certificate issued on September 25, 2015 is set aside.

ii) The defendant/applicant's Points of Dispute filed on August 5, 2015 is permitted to stand.

iii) The claimant/respondent's Bill of Costs filed July 7, 2015 is to be taxed.

iv) Given the delay in the making of the application to set aside the Default Costs Certificate, 50% costs in this application are awarded to the defendant/applicant to be agreed or taxed. If costs are not earlier agreed, these costs should be taxed at the same taxation at which the respondent's Bill of Costs filed July 7, 2015 is taxed.

v) Given the age of this matter, the registrar is to accord priority to the taxation ordered.

vi) Attorney-at-Law for the defendant/applicant to file and serve order.

[6] At the time of judgment it was indicated that reasons would follow. I now fulfil that promise, albeit later than initially scheduled, for which I apologise.

ISSUES

[7] The following were the issues identified by the court for resolution:

i) Whether the application to set aside the DCC is properly brought before a judge of the Supreme Court or should be referred to the registrar?

ii) If the answer to issue i) is yes, is there a basis for the DCC to be set aside and the Points of Dispute filed by the applicant being allowed to stand?

(1) Whether the applicant's Points of Dispute was filed and served within time as stipulated by rule 65.20(3) of the CPR, 28 days after he was served with the respondent's bill of costs?

(2) What is the effect of the applicant having filed his Points of Dispute before the registrar issued the DCC?

(3) What is the effect of the respondent's affidavit of service having failed to state whether he had been served with Points of Dispute?

iii) If the DCC is set aside and the Points of Dispute are allowed to stand should the court assess the reasonable costs or refer the matter to the registrar for taxation?

[8] The respondent raised some issues in relation to fraud regarding the affidavit evidence of Ms. Suzette Radlein. These were considered and disallowed during the hearing. They will not be repeated here, as they are unnecessary for the resolution of the matter.

SUBMISSIONS IN SUMMARY

[9] Counsel for the applicant submitted that:

i) The court has the authority as part of its inherent power to control its own process, to set aside a DCC**;**

ii) The applicant's Points of Dispute was filed on August 05, 2015, which is 28 clear days after the date of service and hence pursuant to rules 3.2(3) and 65.20(3) of the CPR, it was filed and served within time and the DCC should not have been issued by the registrar.

iii) Further, in breach of rule 65.21(a)(ii) of the CPR, the respondent's affidavit of service failed to disclose whether the respondent had been served with the Points of Dispute. Accordingly his request for the DCC was deficient and the granting of the certificate was irregular. For that reason it should be set aside;

iv) In the alternative, the Points of Dispute having been served before the registrar issued the DCC, the DCC ought not to have been issued;

v) If the court finds that the DCC was properly issued, there are a number of good reasons why the DCC should be set aside; and

vi) The applicant has a real prospect of reducing the sum claimed in the Bill of Costs.

[10] Counsel for the respondent submitted that:

i) The applicant's application is not properly before this Honourable Court at this time;

ii) The mere filing and serving of Points of Dispute is not an event by reference to which the end of the period in this particular case is defined and thus the Points of Dispute were filed and served out of time. The application should be dismissed with the usual accompanying orders as to costs;

iii) Furthermore, the applicant has no right to read any further affidavits and this submission is made notwithstanding this Honourable Court's directions permitting the filing of the same. However, the fact that the applicant's application is not brought bona fide; the manifestly excessive length of the delay in bringing the application; the fact that the delay is unexplained; the fact that there is no evidence of the applicant having a real prospect of success — all these facts, and others, are so compellingly against the applicant that this court is invited to find, that it is unnecessary to deal with this second preliminary point;

iv) The court will not countenance fraudulent applications. Ms. Radlein's assertion is duplicitous and her belief that the respondent's Bill of Costs is unreasonable and oppressive is false and without foundation. The rate asserted by Ms. Radlein and counsel for the applicant to be unreasonable is nothing short of an attempt to mislead and deceive the court;

v) A DCC may be set aside if the receiving party was not entitled to it: rule 65.22(2) of the CPR. The respondent was entitled to the DCC although he did not apply in exactly the correct way;

vi) An application to set aside a DCC is an application for relief from sanctions. See rule 2.20(4) of the CPR and ***Harold Brady v The General Legal Council***

[2012] JMCA App 40. Thus, for the applicant to succeed he must satisfy the conditions in rule 26.8 of the CPR;

vii) Rule 65.22(3) of the CPR provides that a DCC may be set aside for good reason. This requires the court to exercise a discretion;

viii) It is a well-established principle that judgments of the court are to be obeyed until they are set aside. The applicant refused to honour the judgment of the court and continues to act in contempt of the court; and

ix) The delay has dashed the respondent's legitimate expectation of early payment.

ISSUE 1: Whether the application to set aside the DCC is properly brought before a judge of the Supreme Court or should be referred to the registrar?

[11] Rule 65.22 provides that

(a) The paying party may apply to set aside the default costs certificate
(b) The registrar must set aside a default costs certificate if the receiving party was not entitled to it.
(c) The court may set aside a default costs certificate for good reason.
(d) 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.

[12] In the cases of ***Charela Inn Ltd v United Church Corporation and Others*** 2004 HCV 02594, del. July 8, 2011) and ***Rodney Ramzan and Another v Owners of Motor Vessel (CFS Pamplona)*** [2012] JMCA Civ App 37, decided at different levels (Supreme Court and Court of Appeal), it was held that a judge in the respective courts had jurisdiction to set aside a DCC for good reason. In ***Charela Inn Ltd v United Church Corporation and Others*** Brooks J, (as he then was), also found that by virtue of the court's inherent power to control its process, it could set aside a DCC.

[13] In ***Michael Johnson v Frederica Crooks, Michelle Crooks and Harold Crooks*** [2016] JMSC Civ 201 in 2016**,** after a consideration of the authorities and the

relevant rules of the CPR, Wint-Blair J (Ag) (as she then was), held that in the circumstances of that case a judge of the Supreme Court did not have jurisdiction to set aside a DCC but the registrar did. The learned judge reasoned that if the judge had jurisdiction it would lead to an anomalous result, particularly having regard to the appellate process provided for in rule 65.27 of the CPR. It should be noted that counsel for the respondent initially relied on this judgment in support of his submissions. However after the decision was reversed by the Court of Appeal, as shall be subsequently reviewed, he indicated to the court he could no longer do so.

[14] In the year after the decision in ***Michael Johnson v Frederica Crooks, Michelle Crooks and Harold Crooks,*** in the case of ***Lijyasu M Kandekore v COK Sodality Co-operative Credit Union Ltd & Ors*** [2017] JMCA App 20**,** an application in chambers**,** Brooks JA reaffirmed the findings in ***Charela Inn Ltd v United Church Corporation and Others*** and ***Rodney Ramzan and Another v Owners of Motor Vessel (CFS Pamplona),*** that the jurisdiction conferred in rule 65.22 of the CPR was not limited to the registrar. In fact, the learned judge noted that since the amendment of the CPR in 2011, the registrar's power to hear the application was limited, being curtailed to instances where it was demonstrated that the receiving party was not entitled to the DCC. Brooks JA however found that in the Court of Appeal it was a panel of three judges, that is, 'the court', as indicated by the Court of Appeal Rules (CAR), that could hear the application and not a single judge.

[15] In the renewed application before the court with citation ***Lijyasu M Kandekore v COK Sodality Co-operative Credit Union Ltd & Ors*** [2018] JMCA App 2, the court agreed with the careful and detailed judgment given by Brooks JA concerning who had the power to set aside a DCC depending on the circumstances.

[16] In the appeal against the decision of Wint-Blair J (Ag) (as she then was) cited as ***Frederica Crooks, Michelle Crooks and Harold Crooks v Michael Johnson (by his Attorney Roland Fitzgerald Barrett)*** [2020] JMCA Civ 20, the appellants

challenged the learned judge's conclusion that she had no jurisdiction to set aside the DCC and her remission of the matter to the registrar for hearing.

[17] P. Williams JA writing on behalf of the court stated as follows:

> [37] The position, therefore, is that with the amendment to rule 65 of the CPR, it is clear that for the purposes of the setting aside of a default costs certificate, the functions of the registrar is to be distinguished from that of the court. The registrar is obliged to set aside the default costs certificate if the receiving party is not entitled to it and a single judge of the Supreme Court has discretion to set aside the certificate where good reason is shown.
>
> [38] The learned judge recognised the amendment but was content to say that it "has not specified whether the application may be brought before a judge". She did not seemingly recognise that by its very definition 'court', as used in rule 65.22(3), must include a judge of the Supreme Court.
>
> [39] It is perhaps useful at this point to note that the grounds for the application to set aside the default costs certificate that referred specifically to rule 65.22 were set out in the following manner:
>
> > 1. …
> >
> > 4. In the alternative, pursuant to rule 65.22 of the Civil Procedure Rules which has interpreted and applied by the Court of Appeal to permit the setting aside of default costs certificates for good reason.
> >
> > 5. In the circumstances there is good reason to set aside the Default Costs Certificate dated the 27th day of June 2016, in particular, the Defendants/Applicants have a good explanation for the failure to file a Points of Dispute in time, they also have a real prospect of successfully reducing the claimed costs and they will be seriously prejudiced if the said Default Costs Certificate is allowed to stand."
>
> [40] From her reasoning, it seems the learned judge was focused on establishing that it was wrong to assert that a judge could exercise the function expressly given to the registrar in rule 65.22(1). This may well have been as a result of the submissions that were made to her which seemed to have relied on the decisions of **Rodney Ramazan and another v Owners of Motor Vessel (CFS Pamplona)**, **Harold Brady v the General Legal Council** and **Charela Inn Ltd v United Church Corporation & Ors**. Hence, her conclusion was limited to her finding that an application to set aside a default costs certificate pursuant to rule 65.22(1) is to be made to

> the registrar and not to a single judge of the Supreme Court. She cannot be said to have erred with that conclusion.
>
> [41] Where she fell into error was in making an order that, as constituted, she had no jurisdiction to set aside the default costs certificate. The provisions of 65.22(3) gave her the jurisdiction to do so. The manner in which the grounds for the application were set out was an invitation for her to exercise her discretion to set aside the default costs certificate for good cause. Having been led to embark on a discussion on the functions of the registrar as against that of a single judge pursuant to rule 65.22(1), she failed to consider and go on to exercise the discretion given her in rule 65.22(3).
>
> [42] Since the learned judge did not purport to exercise her discretion at all, this court was therefore free to exercise an original jurisdiction in seeking to have a just resolution in this matter. Accordingly, the further consideration for this court was whether the default costs certificate should be set aside for good cause.

[18] Having given the matter due consideration the appeal was allowed and the DCC set aside.

[19] It is clear then, that, pursuant to rule 65.22(3) of the CPR, a judge of the Supreme Court has jurisdiction to set aside a DCC for good reason. It should also be highlighted that as noted by Brooks J, (as he then was), in ***Charela Inn Ltd v United Church Corporation and Others*** the amendments to the CPR in no way affected the inherent jurisdiction of the court to control its processes and set aside a DCC. I will therefore go on to consider issue number two.

ISSUE 2: Is there a basis for the DCC to be set aside and the Points of Dispute filed by the applicant being allowed to stand?

[20] The application is based on the premise that the respondent was not entitled to the issue of the DCC because: 1) the applicant's Points of Dispute was filed and served within time as stipulated by rule 65.20(3) of the CPR, 28 days after he was served with the respondent's Bill of Costs, 2) the applicant filed the Points of Dispute before the registrar issued the certificate; and 3) the respondent's affidavit of service failed to state whether he had been served with points of dispute.

Issue 2 (1): Whether the applicant's Points of Dispute was filed and served within time as stipulated by rule 65.20 (3) of the CPR, 28 days after he was served with the respondent's bill of costs

[21] Counsel for the applicant submitted that the DCC was not properly issued because the applicant's Points of Dispute were filed on August 5, 2015, which he argued was 28 clear days after the applicant was served with the respondent's Bill of Costs on July 7, 2015, in compliance with rule 65.20 (3) of the CPR. Counsel submitted that as the time for doing the actions of filing and serving points of dispute is indicated as 28 days "after" the date of service of the DCC, the end of the relevant period is defined by reference to an event. Hence the 28th day should not be included in the calculation of "clear days" under rule 3.2(3)(b) of the CPR, in which case, the filing of the points of dispute was within time.

[22] Counsel for the respondent countered that submission by contending that the mere filing and serving of Points of Dispute, is not an event by reference to which, the end of the period in this particular case is defined. Consequently, pursuant to rule 3.2(3)(b) of the CPR the 28th day should be counted, resulting in the Points of Dispute having been filed and served out of time.

[23] The relevant rules of the CPR govern the computation of time, the filing and service of Points of Dispute and how to obtain a DCC. They are set out below.

> **CPR Rules**
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> Rule 3.2- **Time – Computation**
>
> (1) This rule shows how to calculate any period of time for doing any act which is fixed -
> (a) by these Rules;
> (b) by any practice direction; or
> (c) by any judgment or order of the court.
>
> (2) All periods of time expressed as a number of days are to be computed as clear days.
>
> (3) In this rule "**clear days"** means that in computing the number of days -

(a) the day on which the period begins; and
(b) if the end of the period is defined by reference to an event, the day on which that event occurs or should occur, are not included.

Examples

(a) Document served by post deemed to be served 14 days after posting: document posted on 1st September, deemed served on 16th September.

(b) Document must be filed at least 3 days before the hearing: application is to be heard on Friday 20 October, the last date for filing the document is Monday 16 October.

Rule 65.20 – Points of dispute and the consequence of not serving

(1) The paying party and any other party to the taxation proceedings may dispute any item in the bill of costs by filing points of dispute and serving a copy on -

(a) the receiving party; and

(b) every other party to the taxation proceedings.

(2) …

(3) The period for filing and serving points of dispute is 28 days after the date of service of the copy bill in accordance with paragraph (1).

(4) If a party files and serves points of dispute after the period set out in paragraph (3), that party may not be heard further in the taxation proceedings unless the registrar gives permission.

(5) The receiving party may file a request for a default costs certificate if -

(a) the period set out in paragraph (3) for serving points of dispute has expired; and

(b) no points of dispute have been served on the receiving party.

(6) If any party (including the paying party) serves points of dispute before the issue of a default costs certificate the registrar may not issue the default costs certificate.

Rule 65.21 – How to obtain a default costs certificate

(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.

[24] Counsel for both parties agreed that in calculating the "clear days" to determine whether the Points of Dispute were filed within time, the day of the filing of the Bill of Costs should be excluded. The difference in approach was in relation to the 28th day. Counsel for the applicant maintained that it should be excluded, whereas counsel for the respondent contended that it should be included.

[25] Both parties relied on the authority of ***Royal Caribbean Cruises Limited & Anor. v Access to Information Appeal Tribunal & Ors***. [2016] JMCA App 19. The main issue in that case was whether a claim for judicial review had been made within 14 days of the order granting leave to apply for judicial review. The rule which had to be construed was rule 56.4(12) of the CPR which provides that, *"Leave is conditional on the applicant making a claim for judicial review within 14 days of receipt of the order granting leave"*.

[26] Brooks and P. Williams JJA writing for the majority both agreed that the time period should be determined by excluding the date from which the 14 day period was to be calculated, but including the 14th day. They however got to the latter position by different routes. P. Williams JA agreed with the view that the end of the period was not defined by reference to an event, but that the party granted leave was required by the relevant rule 56.4(12) of the CPR to do something within a period

of days. She however went on to hold that the computation of clear days as set out in rule 3.2 of the CPR did not apply in the circumstances of the case.

[27] Though it is not stated explicitly, it appears that the learned judge took that view because the examples used to explain the effect of the rule, did not include any that considered actions to be taken **within** a period. Williams JA therefore grounded her finding based on the general rules of interpretation set out in the **Interpretation Act**. At paragraph 63 of the judgment the learned judge found that, applying those principles to the rule, *"would lead to the understanding … that leave is conditional on the applicant making a claim not exceeding or not beyond, or out of a period of 14 days."*

[28] Brooks JA on the other hand was of the view that there was no need to have recourse to the **Interpretation Act**, as the matter was addressed by the CPR. He however indicated that the examples given in the CPR did not apply, presumable because they did not address an action to be taken "within" a period. Sinclair Haynes JA dissented on the outcome. The learned judge shared Brooks JA's view that the CPR did apply and that there was no need to rely on the **Interpretation Act**. However she did not find it necessary to have recourse to any examples outside of the CPR and, contrary to that which was held by Brooks JA, found that the filing of a claim was an "event", hence the 14th day should also have been excluded. I agree with the views of Brooks and Sinclair-Haynes JJA that the CPR applied to the exclusion of the **Interpretation Act,** because the situation addressed in ***Royal Caribbean Cruises Limited & Anor. v Access to Information Appeal Tribunal & Ors***. fell within the CPR, thus obviating the need to go outside the CPR to the **Interpretation Act** to resolve the matter.

[29] To understand the basis on which Brooks JA came to his finding, it is important to extract two passages from his judgment. Interpreting rule 3.2(3) of the CPR, which outlines the definition of "clear days" Brooks JA observed at paragraph 5 that:

> It is important to note that "the day on which that event occurs", is not an unqualified statement, it depends on the words which precede it. In

> ascertaining what constitutes "clear days" in any particular situation, a point to be ascertained is whether "the end of the period is defined by reference to an event.

[30] Then at paragraph 8 he continued that:

> Using the terminology of rule 3.2(3), it is my view that the end of the period set by rule 56.4(12) of the CPR is not defined by reference to an event. The period is, instead, defined by the day on which the period begins. It is rule 3.2(3)(a) alone which is applicable to rule 56.4(12). Rule 3.2(3)(b) is excluded.

[31] Brooks JA having found that the examples given in the CPR were unhelpful in the circumstances of that case gave 2 other examples. In the first example taken from rule 11.11(1) of the CPR he indicated that the rule requiring service of a notice of application, *"at least 7 days before the court is to deal with the application"* was one wherein both paragraphs (a) and (b) of rule 3.2(3) of the CPR would apply, as the end of the period is defined by an event, namely the hearing. However, relying on the example given at rule 2.8(3)(iii) of the English Civil Procedure Rules where particulars of claim are required to be served *"within 14 days"* of the service of the claim form, and the claim form is served on the 2nd of October, the last day for service of the particulars of claim is the 16th of October. In that event the learned judge stated that utilising the standard of "clear days" the 2nd of October would not be counted and the 14th day is the day by which compliance was required. Therefore Brooks JA found that, in that second example which informed his ruling, only rule 3.2(3)(a) of the Jamaican CPR would apply.

[32] In summary therefore I note the following. The effect of Brooks JA's analysis is that in calculating "clear days", where the end of the period is not defined by reference to an event, only the first day at the beginning of the period is excluded. Where however the end of the period is defined by reference to an event, both the first day at the beginning of the period and the last day of the period are excluded.

[33] Sinclair Haynes JA in her analysis agreed with Brooks JA that the CPR applied but disagreed with him that the examples of how to calculate "clear days" provided in

the CPR were unhelpful. The learned judge embraced these examples as relevant to the case. Further disagreeing with Brooks JA, Sinclair Haynes JA found that the filing of a claim is an event requiring the last day of the period to be excluded, whereas Brooks JA implicitly found that the filing of a claim was not an event, therefore the last day should be included.

[34] P. Williams JA in assessing the examples given in the CPR to explain the calculation of "clear days" opined that in each example, the end of the period was defined by reference to an event; therefore in addition to the first day of the period the last day of the period should also be excluded. However the learned judge then went on the indicate that in the circumstances of the case the CPR did not apply, and as indicated above, decided the matter based on an interpretation of the meaning of the word "within" in accordance with general principles of interpretation pursuant to the **Interpretation Act.**

[35] On the basis of that combined analysis, in the interpretation of rule 56.4(12) of the CPR, the majority view was that, leave having been granted on July 7, 2015, the dates to be included in the computation were July 8 – July 21 both inclusive. The claim having been filed on July 22, 2015, the majority accordingly held it was filed out of time.

[36] Turning to the instant case, the relevant rule 65.20(3) states that, *"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)."* Emphasis added. The evidence is that the Bill of Costs was served on July 7, 2015 and the Points of Dispute were served on August 5, 2015. It is agreed that July 7, 2015 should not be included in the calculation and that reckoning of the period should commence from July 8, 2015. The question is whether rule 3.2(3)(b) of the CPR applies. If it does, the last day of the period August 4, 2015 should also be excluded, in which event the Points of Dispute were filed within time. If rule 3.2(3)(b) does not apply, then the last day of the period should be included and the Points of Dispute were filed one day out of time.

[37] For ease of reference, it is helpful to once again outline rule 3.2(3) of the CPR. It provides:

> (3) In this rule "**clear days"** means that in computing the number of days -
> (a) the day on which the period begins; and
> (b) if the end of the period is defined by reference to an event, the day on which that event occurs or should occur, are not included.

[38] In ***Royal Caribbean Cruises Limited & Anor. v Access to Information Appeal Tribunal & Ors***. Brooks JA was the only judge who expounded on how rule 3.2(3) should be interpreted. At paragraph 8 he indicated that, *"In ascertaining what constitutes "clear days", a point to be ascertained is whether the end of the period is defined by reference to an event."* If the period is not defined by reference to an event, the effect of Brooks JA's reasoning is that there would therefore be no "day on which that event occurs or should occur" that should be excluded.

[39] The examples included at rule 3.2(3) of the CPR have to be considered carefully in the context of this case. They are:

> Examples
>
> (a) Document served by post deemed to be served 14 days after posting: document posted on 1st September, deemed served on 16th September.
>
> (b) Document must be filed at least 3 days before the hearing: application is to be heard on Friday 20 October, the last date for filing the document is Monday 16 October.

[40] Counsel for the applicant relied on example 3 ii on page 47 of **Civil Procedure Volume 1 Autumn 2002** (The White Book). However that example is differently worded from rule 65.20(3) of the CPR that will ultimately need to be interpreted and is therefore unhelpful. Also, there is no basis to have recourse to the White Book, when our rules apply.

[41] Two things should be stated at this point. Firstly, the drafting of rule 3.2(3) of the CPR is conjunctive. The rule speaks to what happens when both a) and b) apply. This is indicated by the fact that a) and b) are joined by the conjunction "and"

reinforced by the fact that in b) the verb used to refer to the two days excluded, one from a) and one from b) is appropriately “are” and not “is”. The fact that alternative situations may exist where only a) applies and not b), is however presupposed by the use of the word “if” at the start of b). Clearly the existence of alternative solutions was an interpretation embraced by Brooks JA in ***Royal Caribbean Cruises Limited & Anor. v Access to Information Appeal Tribunal & Ors***., as he held that only rule 3.2(3)(a) and not rule 3.2(3) (b) applied.

[42] Secondly, in both examples provided in the rule, both 3.2(3)(a) and rule 3.2(3) (b) apply. That means that in both examples the end of the period is defined by reference to an event. In example a) a document served by post is deemed to be served 14 days ***after*** posting (Emphasis added). Thus a document posted 1st October would be deemed served on 16th October, as both the 1st and the 15th days would have to be excluded.

[43] This analysis accords with the views expressed by both Sinclair Haynes JA and P. Williams JA in ***Royal Caribbean Cruises Limited & Anor. v Access to Information Appeal Tribunal & Ors***. Sinclair Haynes JA was also of the view, not supported by Brooks JA, that the filing of a claim was an event that trigged the application of rule 3.2(3)(b). Example b) is not helpful for the determination of the instant matter, as it has to do with the determination of clear days before a hearing, not the filing service of a document after a specified time period.

[44] The question now is, can example a) be applied to rule 65.20(3)? If so, that would mean that the end of the period “*28 days **after** the date of service of the copy bill”* is defined by reference to an event, and hence the final day would not be included in the count. Consequently the Points of Dispute would have been filed within time on August 5, 2015.

[45] Having carefully considered the matter I am of the view that the situation in rule 65.20(3) is distinguishable from that in example a), even though the word “after” is used in both. Example a) stipulates that *“Document served by post deemed to be*

served 14 days after posting:" I understand the event to be when service is deemed. That is because, even if actual service is achieved before 14 days after posting, or is achieved beyond 14 days after posting, or is in fact never achieved, the deeming of service "14 days after posting" is an event that occurs on only one identifiable day, which defines the end of the period. Looking at the examples provided in the CPR, (deeming of service by post and filing of documents before a hearing), it seems to me that an "event" refers to something that occurs or should occur on a specified day and on that day only. If something can occur on any one of a number of succeeding days from a start date up to the end of a period, I find that that occurrence is not an event by reference to which the end of the period is determined.

[46] Therefore, considering rule 65.20(3) of the CPR which provides that, *"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).",* I find that, unlike in example a), the relevant period in this rule is not defined by reference to an event, but rather by reference to the day on which the period begins. That is so, as filing points of dispute can take place at any time during the period stipulated. Accordingly it is difficult to see how filing the points of dispute could be an "event" which defines the period and determines when the allotted time expires. This approach accords with the reasoning of Brooks JA in ***Royal Caribbean Cruises Limited & Anor. v Access to Information Appeal Tribunal & Ors***.

[47] Therefore the period for the filing of the Points of Dispute began with the service of the Bill of Costs on July 7, 2015. The 28 days after July 7, 2015 allowed for filing those Points of Dispute would be counted excluding July 7 and commencing on July 8. As it is the day on which the period begins that defines the period the final day is not excluded. Hence the period ended on August 4, 2015. The Points of Dispute were therefore filed and served one day late.

Issue 2 (2): The effect of the applicant having filed his Points of Dispute before the registrar issued the DCC

[48] In ***Charela Inn Ltd v United Church Corporation and Others***, Brooks J, (as he then was), on a consideration of rule 65.20(6) stated at pp. 4 **–** 6, that:

> 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".
>
> There is, however, a more curious issue to be resolved. Paragraph 5 speaks to the paying party **serving** the points of dispute before the issue of the default costs certificate. That, in my view, is a cumbersome requirement. It seems to me that it would be the **filing** of the document which would alert the registrar to the existence of the points of dispute. Service is effected on the paying party, while filing, as defined in rule 3.7(1), is delivery, by one means or other, to the registry.
>
> The service of the points of dispute is not an action which could be relied upon to guide the registrar; there is no requirement in the rules for the receiving party, upon being served with the points of dispute, to then notify the registrar of the service. Even if there were such a requirement, it would be a most cumbersome and inconvenient procedure. It is my view, that it is the filing of the points of dispute which should restrain the registrar. It would then be for the registrar to decide whether permission would be granted to the paying party to participate in the taxation hearing which would follow in accordance with rule 65.23.
>
> Despite that reasoning, however, I find that the rule is clear; it requires **service** of the points of dispute in order to restrain the registrar from issuing the default costs certificate. It is not permissible, in my view, to find that

> "serves", as used in rule 65.20(6), means "files". The rule should be reviewed by the rules committee to determine whether its effect is reasonable.
>
> In the instant case, although it is accepted that the points of dispute were filed almost a month before the default costs certificate was signed by the registrar, there is no indication that it was served before that signing. Consequently, the Junors were entitled to the certificate and there was no indication that the registrar ought not to have signed it.

[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 DCC was not issued until September 25, 2015. Though there was no evidence proffered that indicated whether the service of the Points of Dispute was brought to the attention of the registrar, and if so by what means, the fact is that the service of the Points of Dispute on the respondent was not challenged. 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 DCC had been met. Accordingly, the DCC should not have been issued.

Issue 2 (3): The effect of the respondent's affidavit of service having failed to state whether he had been served with points of dispute.

[50] Counsel for the respondent accepted that he failed to comply with the requirements of rule 65.21(1)(a)(ii) of the CPR. Although an affidavit proving service of the bill of costs on the applicant was filed, that affidavit failed to indicate that no points of dispute were received by the respondent. The respondent in his 2nd Skeleton Submissions submitted that rule 26.9 of the CPR aids his case. That rule provides:

> **Rule 26.9**- **General power of the court to rectify matters where there has been a procedural error**, provides that:

> (1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order.
> (2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in these proceedings, unless the court so orders.
> (3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters rights.
> (4) The court may make such an order on or without an application by a party.

[51] On a reading of rule 65.21(1)(a) and (b) of the CPR, it does appear to operate in the conjunctive. Therefore, all the requirements must be fulfilled before a receiving party becomes entitled to a DCC. Though the court is empowered under rule 26.9 of the CPR to 'put matters right', that discretion should not be exercised where the receiving party has failed to indicate whether Points of Dispute were filed. This especially in a context where they having been filed pursuant to rule 65.20(6) the receiving party was not entitled to the issuance of the DCC. The general power under rule 26.9 of the CPR to address procedural errors cannot assist the respondent in these circumstances. The matter sought to be rectified is a substantive pre-condition that was not met and not merely procedural.

Should the DCC be set aside?

[52] It is important to emphasize at this point that there is only one criterion governing the power of a judge to set aside a DCC. In ***Fredrica Crooks and Ors v Michael Johnson (by his Attorney Roland Fitzgerald Barrett)*** P. Williams JA while addressing this issue stated at paragraph 43 that:

> [43] At the time this matter was before the learned judge and at the time this procedural appeal was considered, the procedure for determining whether a default costs certificate should be set aside pursuant to rule 65.22(3) involved a consideration of the principles of relief from sanctions. However, in a recent decision from this court it was determined that that approach was inappropriate. In **Advantage General Insurance Company Limited** (**Formerly United General Insurance Company Limited**) **v Marilyn Hamilton** [2019] JMCA App 29, McDonald-Bishop JA stated:

> "[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 consideration.
>
> [15] There cannot be, however, any hard and fast rule that the requirements under rule 26.8 of the CPR, must be applied, be it strictly or modified, to applications brought under rule 65.22(3). 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."

[53] Has the applicant demonstrated that there is a good reason or reasons to have the DCC set aside? Firstly as points of dispute had been filed and served prior to the issuance of the DCC it should not have been issued. Secondly another reason why it should not have been issued is that the respondent's affidavit failed to indicate if points of dispute had been served on him. As those issues relate to pre-conditions for the issuance of the DCC that were not satisfied, it is manifest that they constitute good reasons for the setting aside of the DCC. Given that those are the good reasons put forward by the applicant the fact that there was some considerable delay in the application to set aside the DCC should not disentitle the applicant from obtaining the relief sought, especially as the law now is that there is no *"hard and fast rule that the requirements under rule 26.8 of the CPR, must be applied, be it strictly or modified, to applications brought under rule 65.22(3)."* The late application should however have implications for costs.

[54] While the good reasons so far identified amount to factors that should cause the DCC to be set aside "as of right", an additional question that is useful to consider, is whether the applicant has a realistic prospect of successfully disputing the bill of costs. If so, that would ensure that the court would not be acting in vain in setting

aside a DCC, in circumstances where there was no basis to challenge the contents of the Bill of Costs.

[55] Having examined the bill of costs and the points of dispute, I am of the view that there is a clearly articulated dispute concerning some of the costs sought. The question whether the costs claimed are reasonable can benefit from closer assessment. I am therefore satisfied that there is a realistic prospect of the applicant successfully disputing the bill of costs. Accordingly this is another good reason to set aside the DCC. If the DCC should be set aside, naturally the points of dispute filed should be allowed to stand.

ISSUE 3: If the DCC should be set aside and points of dispute allowed to stand, should the court assess/tax the costs or refer the matter to the registrar for taxation?

[56] The Bill of Costs and the Points of Dispute are very detailed. Some of the costs claimed and the reasons why they are disputed could benefit from justification by the respective parties in the process of taxation. It is also likely that given the opportunity to attend taxation the parties may in some instances accept that both of their costs, (i.e. those claimed by the respondent and offered by the applicant), are unreasonable and taxation would be helpful in determining what reasonable sum should be paid by the applicant as costs. The matter should therefore be referred to taxation.

CONCLUSION

[57] It is for the above reasons why the court made the order earlier outlined at paragraph 5.