[2019] JMSC Civ. 11

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013 HCV 03599

BETWEEN	**CANUTE SADLER**	**1st CLAIMANT/1st RESPONDENT**
AND	**MICHELLE SADLER**	**2nd CLAIMANT/2nd RESPONDENT**
AND	**DERRICK MICHAEL THOMPSON**	**1st DEFENDANT/1st APPLICANT**
AND	**LORI-ANN THOMPSON**	**2nd DEFENDANT/2nd APPLICANT**

IN CHAMBERS

Mr. Adam Jones and Ms. Kathryn Williams instructed by Livingston, Alexander & Levy for the Claimants/Respondents

Ms. Jacqueline Cummings and Ms. Shantal Bailey instructed by Archer, Cummings & Company for the Defendants/Applicants

Heard: 2nd February, 2018, 5th April, 2018 & 25th January, 2019

Civil Practice and Procedure–Costs - Default Costs Certificate obtained against the Defendants - Defendants' Notice of Application to set aside Default Costs Certificate - Rule 65.22 of the Civil Procedure Rules - Factors the Court should consider in setting aside Default Costs Certificate.

Cor: Rattray, J.

[1] The issues for determination on the Application before this Court, are whether the Default Costs Certificate obtained by the Claimants on the 24th February, 2017, ought to be set aside, and should the Defendants' Points of Dispute filed on the 8th May,

2017, be allowed to stand. There is no challenge as to whether the Default Costs Certificate was properly issued by the Registrar. The real contention is that the Defendants, having failed to respond to the Claimants' Bill of Costs, now wish an opportunity to object to the sum awarded in the Default Costs Certificate. As such, they seek an Order that the said Default Costs Certificate be set aside and that their Points of Dispute be allowed to stand as filed and served in time.

[2] The grounds relied on by the Defendants to support their Application are as follows: -

a) Points of Dispute was filed out of time on the 8th May, 2017;

b) The Defendants' Attorneys-at-Law were served with the Default Costs Certificate on the 2nd June, 2017;

c) This Application was made as soon as reasonably practicable in the circumstances;

d) That the Defendants have a reasonable prospect of disputing the Claimants' Bill of Costs;

e) The Claimants would not be prejudiced by the granting of this Order;

f) The Court has the power to set aside a Default Costs Certificate under Rule 65.20 (4) of the **Civil Procedure Rules (CPR)**; *(sic)*

g) That the Court is empowered to grant the Orders sought under Rule 26.1 of the **CPR**.

[3] The chronology of events leading to the Default Costs Certificate being issued by the Registrar can be outlined as follows. The Claimants by way of Fixed Date Claim Form filed on the 17th June, 2013, sought the following reliefs from the Court: -

a) An injunction restraining the Defendants by themselves or their servants or agents or otherwise howsoever from constructing, altering, extending,

improving or upgrading the road or way or several roads delineated and coloured yellow shown in Transfer of Land dated 3rd June, 1974, touching and concerning land comprised in Certificate of Titles registered at Volume 1094 Folio 278;

b) An injunction restraining the Defendants by themselves or their servants or agents or otherwise howsoever from interfering with the reasonable enjoyment of the Claimants' property comprised in Certificate of Titles registered at Volume 1094 Folio 278;

c) A declaration that the Defendants by themselves or their servants or agents or their descendant in title or otherwise howsoever are not entitled to build or cause to be built any erections and/or other construction, or to alter, extend, improve or upgrade the road and/or way or several roads delineated and coloured yellow shown in Transfer of Land dated 3rd June, 1974, touching and concerning land comprised in Certificate of Titles registered at Volume 1094 Folio 278;

d) A declaration that the right and liberty derived from easement delineated and coloured yellow as shown in Transfer of Land dated 3rd June, 1974 touching and concerning land comprised in Certificate of Titles registered at Volume 1094 Folio 278 is limited to access to a single dwelling house;

e) Alternatively, a declaration that the right and liberty derived from easement delineated and coloured yellow as shown in Transfer of Land dated 3rd June, 1974 touching and concerning land comprised in Certificate of Titles registered at Volume 1094 Folio 278 is extinguished;

f) An Order that the Defendants pay the costs of these proceedings.

[4] The matter came up for trial in Chambers before Lindo J, who on the 4th May, 2016, delivered judgment in favour of the Claimants against the Defendants, with costs to the Claimants to be taxed if not agreed. On the 25th January, 2017, the Claimants

filed their Bill of Costs and Notice to serve Points of Dispute, which were then served on the Defendants' Attorneys-at-Law on the 26th January, 2017.

[5] The Defendants failed to file and serve their Points of Dispute within twenty-eight (28) days of being served with the Claimants' Bill of Costs, as mandated by Rule 65.20 (3) of the **CPR**. Consequently, the Claimants applied on the 24th February, 2017, for a Default Costs Certificate to be issued by the Registrar. On that same day, the Registrar issued the Default Costs Certificate to the Claimants in the sum of $2,928,933.55. Subsequently, on the 2nd June, 2017, the Defendants' Attorneys-at-Law were served with a copy of the Default Costs Certificate.

[6] It is to be noted that the Defendants on the 8th May, 2017, eventually filed their Points of Dispute and served it on the Claimants' Attorneys-at-Law on the 20th July, 2017, *twenty-one (21) weeks* after the time prescribed by the **CPR**. Thereafter, on the 25th July, 2017, the Defendants filed the instant Notice of Application seeking *inter alia*, that the Default Costs Certificate obtained by the Claimants be set aside and for their Points of Dispute filed on the 8th May, 2017, be allowed to stand as filed and served in time.

[7] The relevant provision of the **CPR** (as amended on the 15th November, 2011), which deals with the setting aside of a Default Costs Certificate is Rule 65.22, which provides: -

> *"(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."*

[8] Brooks JA, in the Court of Appeal decision of **Rodney Ramazan and Ocean Faith NV v Owners of Motor Vessel (CFS Pamplona)** [2012] JMCA App 37, was of the view that an Application to set aside a Default Costs Certificate was similar in nature

to an Application for Relief from Sanction. The learned Judge of Appeal at paragraph 14 expressed the position as follows: -

> *"I find also that rule 2.20(4) of the CAR which requires a consideration of the principles of relief from sanctions applies in these circumstances. The rule states:*
>
> *"(4) CPR rule 26.8 (relief from sanctions) applies to any application for relief."*
>
> ***It would seem that an application to set aside a default costs certificate easily qualifies as an application for relief. In assessing the instant case I shall use the benchmark set out in rule 26.8, albeit in a somewhat adjusted order**."*
>
> [Emphasis supplied]

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

> *"(1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be -*
>
> *(a) made promptly; and*
>
> *(b) supported by evidence on affidavit.*
>
> *(2) The court may grant relief only if it is satisfied that -*
>
> *(a) the failure to comply was not intentional;*
>
> *(b) there is a good explanation for the failure; and*
>
> *(c) the party in default has generally complied with all other relevant rules, practice directions orders and directions.*
>
> *(3) In considering whether to grant relief, the court must have regard*
>
> *to -*
>
> *(a) the interests of the administration of justice;*
>
> *(b) whether the failure to comply was due to the party or that party's attorney-at-law;*
>
> *(c) whether the failure to comply has been or can be remedied within a reasonable time;*
>
> *(d) whether the trial date or any likely trial date can still be met if relief is granted; and*
>
> *(e) the effect which the granting of relief or not would have on each party.*

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

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

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

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

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

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

Was the Application supported by Affidavit evidence?

[13] The Defendants relied solely on the Affidavit in Support of Notice of Application for Court Orders filed on the 25th July, 2017, and deponed to by their Attorney-at-Law, Mr. Clifton D. Campbell. The Claimants for their part relied on the Affidavit of Kathryn A. Williams in Opposition to Applicants' Notice of Application for Court Orders filed on the 23rd January, 2018, which was sworn to by one of their Attorneys-at-Law.

Was the Application made promptly?

[14] The word "promptly" is not defined by the **CPR**, but it does portray a sense of urgency. In order to ascertain whether a party has acted promptly, the Court must consider the particular circumstances of each case. This was expressed by Brooks JA in the above mentioned case of **H. B. Ramsay and Associates Ltd and Others v Jamaica Redevelopment Foundation Inc and Another**, wherein he stated that: -

> *"[10] …the word "promptly", does have some measure of flexibility in its application. Whether something has been promptly done or not, depends on the circumstances of the case."*

[15] In **Rodney Ramazan and Ocean Faith NV v Owners of Motor Vessel (CFS Pamplona)** (supra), the Default Costs Certificate was issued by the Court on the 28th June, 2012, and the Application to set aside the Default Costs Certificate was filed on the 15th August, 2012. Brooks JA, accepted that it appeared that the Applicants had sought to make a prompt Application, based on the Affidavit evidence of the Attorney-at-Law, Ms. Kashina Moore. She deponed that an Application that was intended to be filed in that Court, was in error, filed in the Admiralty Division of the Supreme Court on the 9th July, 2012.

[16] In the case of **Henlin Gibson Henlin (A Firm) and Calvin Green v Lilieth Turnquest** [2015] JMCA App 54, the Default Costs Certificate was issued by the Court on the 13th August, 2015, and was served on the Applicants on the 24th August, 2015. On that same day, the 24th August, 2015, the Applicants filed their Application to set aside the Default Costs Certificate.

[17] Similarly, in the case of **Lijyasu M Kandekore v COK Sodality Co-operative Credit Union Limited and Ors** [2018] JMCA App 2, the Court was of the view that the Application to set aside the Default Costs Certificate was made promptly, as the Default Costs Certificate was issued on the 21st October, 2016 and the Application to set it aside was filed on the 3rd November, 2016.

[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 was clearly of the view that no substantial delay had occurred in the filing of 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.

[20] I can do no more than to adopt wholeheartedly the words of McDonald-Bishop JA, in the case of **Flexnon Limited v Constantine Michell and Ors** [2015] JMCA App 55, where 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."*

[21] In the circumstances of the present case, I am satisfied that there was unexplainable delay on the part of the Defendants or their Attorneys-at-Law, in filing the

Application to set aside the Default Costs Certificate. Additionally, no reason for the delay has been put forward by the Defendants. The question is whether that delay, in and of itself, ought to preclude the Defendants from making their Application to set aside the Default Costs Certificate.

Was there a good reason for the delay in filing the Points of Dispute?

[22] F. Williams JA (Ag) (as he then was), in **Henlin Gibson Henlin (A Firm) and Calvin Green v Lilieth Turnquest** (supra), considered how the words 'good reason', were discussed in the case of **Kleinwort Benson Ltd v Barbrak Ltd and other appeals; The Myrto (No.3)** [1987] 2 All ER 289. At page 300 of that case those words were discussed by Lord Brandon as follows: -

> *"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…"*

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

[24] Harrison JA, in the decision of **CVM Television Ltd v Tewarie** SCCA No. 46/2003, a judgment delivered on the 11th May, 2005, in addressing the matter of delay in the filing and serving of Skeleton Arguments within the prescribed time, said at page 7: -

> *"In the instant case, although the reason given for the delay, namely: '…due to oversight and the heavy work schedule'… was good but not altogether adequate, it is not entirely nugatory."*

[25] The Court of Appeal has resiled from the position that oversight and heavy work schedule could be considered a good explanation. This is in keeping with the Privy Council decision of **The Attorney General v Universal Projects Limited** (supra),

wherein their Lordships expressed the view that administrative inefficiency was not a proper excuse for the failure to comply with the Rules or Orders of the Court. At paragraph 23 of the judgment Lord Dyson stated that: -

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

[26] In the later decision of **H. B. Ramsay and Associates Ltd and Others v Jamaica Redevelopment Foundation Inc and Another** (supra), the Court of Appeal was of the view that administrative oversight was not a good explanation. Brooks JA, in delivering the judgment of the Court, stated at paragraph 21 that: -

> *"Mr Ramsay's affidavit does not give any explanation for the failure.* ***His evidence that his attorneys-at-law have told him that the default was by way of inadvertence, is inadequate****. Mrs Minott-Phillips QC, on behalf of the respondents, submitted that the term "inadvertence" was a conclusion to be drawn from an explanation and was not itself an explanation. I agree with the submission****. Without speculating what explanation, the attorneys-at-law would have given, it would seem, accepting Mr Ramsay's uncontroverted testimony about having paid over the monies, that at best, their explanation would have been "oversight". Based on the situation described above, and the expected action that it demanded,* ***I would describe such oversight as "inexcusable" and consequently, reject that explanation as being a good one****."*
>
> [Emphasis supplied]

[27] Similarly, in the case of **The Commissioner of Lands v Homeway Foods Limited and Stephanie Muir** [2016] JMCA Civ. 21, the Court of Appeal concluded that administrative inefficiency, reportedly resulting from inadequate staffing and voluminous workload, was not a good and acceptable explanation that can be accepted by the Court. McDonald-Bishop JA (Ag) (as she then was), in delivering the judgment of the Court, opined at paragraph 78: -

> *"The administrative inefficiency that flowed from the proclaimed lack of resources and heavy work load that reportedly affected the preparation of this appeal should be placed squarely at the feet of the State and should not be entertained or taken as constituting a good excuse for the appellant's failure to obey the orders and rules of the court.* ***This is not an excuse available to the ordinary***

> ***litigant or his legal representative and so it cannot be one that should avail the State**."*
>
> [Emphasis supplied]

[28] Counsel Mr. Campbell in his Affidavit further deponed: -

> *"4. That **due to a series of unfortunate administrative oversights**, the Applicants' Points of Dispute was not filed until the 8th May, 2017.*
>
> *…*
>
> *9. **The failure to file the said Points of Dispute is not through any fault of the Applicants**."*
>
> [Emphasis supplied]

[29] The explanation proffered on behalf of the Defendants, in my view, cannot avail them in the circumstances, and must respectfully be rejected by this Court. There is nothing in the evidence that identified or provided details of those *series of unfortunate administrative oversights*. As it is alleged that there were a series of them, the Defendants' Attorneys-at-Law should have had no difficulty in providing the precise nature of such administrative oversights or at least details of some of them that led to the delay.

[30] Further, as the Court is being asked to exercise its discretion pursuant to Rule 65.22 (3) of the **CPR**, then a good explanation for the default must be provided. In the absence of such explanation, the Court is reluctant to exercise its discretion in the circumstances. I can only adopt as appropriate the dicta of Smith JA, in **Peter Haddad v Donald Silvera** SCCA No. 31/2003, Motion 1/2007, a judgment delivered on the 31st July, 2007, wherein he noted at 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**."*
>
> [Emphasis supplied]

[31] Moreover, if the Court were to countenance the explanation put forward on the Defendants' behalf, this would send the wrong signal to Attorneys-at-Law, and the

litigants themselves, that the Rules and Orders of the Court can be lightly ignored. Furthermore, it would likely open the floodgates for other litigants and their respective Attorneys-at-Law, to tender and rely on the unacceptable explanation of *'administrative oversight'*, rather than specifying the actual cause leading to the breach of the Rules or Orders of the Court.

[32] I am also guided by and accept the dicta of Harris P (Ag) (as she then was), in the case of **Watersports Enterprises Limited v Jamaica Grande Limited and Others** [2012] JMCA App 35, where she stated at paragraph 35 that: -

> *"It has often been declared by this Court that where time limits are prescribed by the rules a litigant is duty bound to adhere to them."*

[33] In like manner Panton JA (as he then was), in **Port Services Ltd v Mobay Undersea Tours Ltd and Fireman's Fund Insurance Company** SCCA No. 18/2001, a judgment delivered on the 11th March, 2002 also opined at page 10 that: -

> *"For there to be respect for the law, and for there to be the prospect of smooth and speedy dispensation of justice in our country, this Court has to set its face firmly against inordinate and inexcusable delays in complying with rules of procedure. Once there is a situation such as exists in this case, the Court should be very reluctant to be seen to be offering a helpful hand to the recalcitrant litigant with a view to giving relief from the consequences of the litigant's own deliberate action or inaction."*

[34] In the earlier cited case of **Henlin Gibson Henlin (A Firm) and Calvin Green v Lilieth Turnquest**, which was relied on by Counsel Ms. Cummings, the Points of Dispute was filed within the twenty-eight (28) days permitted by the **CPR**. However, it was served on the wrong law firm. F. Williams JA (Ag), considered and accepted the explanation in all the circumstances, given that a genuine error was made in serving the wrong firm, and also bearing in mind that the Points of Dispute was filed in time.

[35] Similarly, Counsel relied on the case of **Rodney Ramazan and Ocean Faith NV v Owners of Motor Vessel (CFS Pamplona)** (supra), in which the excuse proffered was *"clerical error resulting in the [Bill of Costs] being misplaced after it was served on [the Attorneys-at-Law], it was not brought to the attention of the responsible Attorney*

until found." Brooks JA, did not consider the explanation a good one, but did not consider it fatal to the Application.

[36] Those two cases relied on by Ms. Cummings are distinguishable based on the circumstances of the present case. In this case, no proper explanation or reason whatsoever was provided to the Court for the default. *'A series of unfortunate administrative oversights'* is not an explanation, as it does not tell the Court why the Points of Dispute was not filed within the prescribed time. To accept such an explanation would require the Court to speculate as to what is meant by that description. The Court ought not to be put in such a position. A satisfactory explanation that would assist the Court ought properly to give details of the particular circumstances which led to the Points of Dispute not being filed and served within the time stipulated by Rule 65.20 (3) of the **CPR**. The Court is of the view that no good reason has been proffered by the Defendants for the delay.

[37] Sykes J (as he then was), in **Elenard Reid and Anor v Nancy Pinchas and Others**, Claim C.L 2002/R 031, a judgment delivered on the 27th February, 2009, in considering the Affidavit evidence in support of an Application for Relief from Sanction, noted at paragraph 54 that: -

> *"The affidavit does not explain the reason for the failure and so no good reason has been advanced for the failure. Is it that the attorneys removed from one location to the next? Is it that the attorney who had conduct of the matter left the chambers? Was there a flood or fire at chambers which caused the matter to be mislaid? Is it that there was difficulty in contacting the claimant to secure the signature?* ***The affidavit does not attempt an explanation other than ask the court to accept that the omission was due to inadvertence****."*
>
> [Emphasis supplied]

I am in complete agreement with the aforementioned dicta of the learned Judge.

Have the parties generally complied with the Orders/Rules of the Court?

[38] The Claimants obtained judgment on the 4th May, 2016, and as such their Bill of Costs ought properly to have been filed and served on or before the 4th August, 2016, pursuant to Rule 65.18 (2) of the **CPR**, which provides that: -

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

[39] The Bill of Costs was in fact filed on the 25th January, 2017, more than five months after it should have been filed and served. There is no automatic sanction that applies to that Rule. This was indicated by F. Williams JA (Ag) in the previously cited case of **Henlin Gibson Henlin (A Firm) and Calvin Green v Lilieth Turnquest**, where he stated: -

> *"[45] There is no sanction that automatically applies to a breach of this rule. The possible consequence is specified in rule 65.19, which empowers the paying party to make an application seeking to compel the receiving party to commence taxation, which application, if granted, could result in the receiving party (if it continued in breach) being deprived of interest or part or all of the costs of taxation…"*

[40] Harris JA in the case of **Auburn Court Limited and Anor v National Commercial Bank Jamaica Ltd and Anor** SCCA No. 27 of 2004, a judgment delivered on the 18th March, 2009, noted that: -

> *"13. Under Rule 65.18 (1) a party, commencing taxation proceedings must file a bill of costs in the court's registry, a copy of which must be served on the party who is required to pay. Rule 65.18 (2) specifies that a bill of costs must be filed and served within a three month period subsequent to the receiving party becoming eligible for the payment of costs. Does the use of the word "must" in the rule impose a mandatory obligation on a receiving party to file and serve a bill of costs within three months of an entitlement to the receipt of costs? The answer to this question lies in the true construction of the rule. In construing the rule regard must be had to Rule 65.19 (2) and 65.19 (3). This rule grants discretionary powers to the court as well as the registrar to bring into operation certain sanctions if a receiving party fails to commence taxation within three months.*
>
> *14. Under Rule 65.19 (2), the registrar, on an application from the paying party, is permitted to disallow all or part of the costs if the receiving party fails to commence taxation within the time specified by the registrar. Where there is a period of delay in the filing of the bill of costs, Rule 65.19 (3) confers on the court an inherent power to disallow all or a portion of the statutory interest accruing on the costs. The court may also disallow all or part of the costs of taxation.*
>
> *15. It appears to me that, the drafters of the Rules, in conferring discretionary powers on the registrar and the court to make certain orders on a receiving party's failure to commence taxation within the prescribed time, must have intended that the word "must" is not mandatory. It would have been contemplated by them that the word ought to be construed as meaning "may". **It follows that the word "must" within the context of Rule 65.18 (2) is merely directory and therefore does not impose upon a receiving party any obligation to adhere strictly to the filing of a bill of costs within the requisite period**."*

[Emphasis supplied]

[41] Rule 65.19 of the **CPR** reads as follows: -

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

[42] The Defendants being the paying parties, through their Attorneys-at-Law, did not make an Application pursuant to Rule 65.19 of the **CPR**, compelling the Claimants, the receiving party, to commence the taxation process. Without such an Application, the Claimants were fully entitled to the Default Costs Certificate granted by the Registrar. As such, the Court is not prepared on that basis to Order that the Default Costs Certificate herein be set aside due to the Claimants' delay in filing their Bill of Costs.

[43] From a perusal of the Affidavit of Counsel Mr. Campbell, the Defendants are in breach of Rule 65.22 (4) of the **CPR**, as the proposed Points of Dispute was not exhibited to the said Affidavit.

Can the default be remedied within a reasonable time?

[44] The default has already been remedied by the Defendants, as they have filed their Points of Dispute on the 8th May, 2017, and served it on the Claimants' Attorneys-at-Law on the 20th July, 2017. The Defendants now seek the Court's permission to have their Points of Dispute stand, and for the matter to proceed to taxation.

Is there a real prospect of success in having the costs reduced at taxation?

[45] At paragraph 7 of his Affidavit Counsel Mr. Campbell averred: -

> *"That the Applicants have indicated that based on legal advice they believe that they have a real prospect of successfully disputing the Respondents' Bill of Costs as, among other things, the hourly rate for the legal fees are excessive and unreasonable in the circumstances, the Bearer and Photocopy fees are*

> *unreasonable, for most of the items in the bill, there are unreasonably- two or more fee earners and generally there is an exaggeration of the time spent on most of the items stated in the bill."*

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

Was the default attributed to the Defendants' or that of their Attorneys-at-Law

[47] From the evidence it appeared that the failure to file the Points of Dispute was through no fault of the Defendants, as highlighted at paragraph 9 of the Affidavit of Counsel Mr. Campbell, but was due to their Attorneys-at-Law. In this regard, I am guided by the dictum of Lord Denning MR in **Salter Rex & Co v Ghosh** [1971] 2 All ER 865, who stated at page 866 that *"We never like a litigant to suffer by the mistake of his lawyers."*

[48] In the case of **Jamaica Public Service Company Limited v Rose Marie Samuels** [2010] JMCA App 23, the Applicant sought permission to have its Notice of Appeal filed out of time on the 4th March, 2010 stand. Counsel for the Applicant advised the Court that she was at fault for the failure to file the Appeal within the requisite time. Counsel's explanation for the delay was that she thought that her client had six (6) weeks within which to file its Notice of Appeal, and not fourteen (14) days from the date of the judgment, as she was of the view that the judgment being appealed was a final one. The Court in the circumstances accepted the explanation put forward for the delay and granted the extension of time. Morrison JA (as he then was), in delivering the judgment of the Court noted that: -

> *"[30] …I find it difficult to see why, notwithstanding Mr. Kinghorn's stinging criticism of the reasons set out in Miss Dunn's affidavit, Lord Denning's comment*

> *in **Salter Rex & Co v Ghosh** ("We never like a litigant to suffer by the mistake of his lawyers") should not be applied in this case…"*

[49] The circumstances of the instant case differ however, from the scenario outlined in the above mentioned case of **Jamaica Public Service Company Limited v Rose Marie Samuels**. In that case, Counsel frankly accepted responsibility for the failure to file the Notice of Appeal within the prescribed time frame. She further provided an explanation for the delay, which was accepted by the Court. It is in those circumstances that the Court of Appeal in that case, was of the view, with which this Court agrees, that the litigant ought not to suffer due to the admitted mistake of its Attorneys-at-Law.

[50] In the present case, the Defendants' Attorneys-at-Law have not *expressly* accepted responsibility for the delay in filing the Points of Dispute. They have however, pointed 'the finger of blame' on "*a series of unfortunate administrative oversights",* a phrase which tells this Court nothing. It is not for the Court to attempt to read into that "explanation", something with which it will find favour. That burden rests solely on the Defendants, which they have failed to discharge.

What do the interests of the administration of justice require, and which of the parties would be greatly prejudiced by the setting aside of the Default Costs Certificate?

[51] In his Affidavit Counsel Mr. Campbell deponed as follows: -

> *"10. That the Respondents will suffer little or no prejudice by the grant of the orders sought and in any case any prejudice may be cured by awarding them costs in the application.*
>
> *11. That on the other hand, the Applicants would suffer severe prejudice if they are not given an opportunity to have the matter of costs decided on its merits, that is, an opportunity to have the Bill of Costs taxed."*

[52] The setting aside of the Default Costs Certificate would mean a delay in the payment of costs to the Claimants, and also result in further costs being incurred as a result of the taxation hearing. On the other hand, the Defendants would be prejudiced if the setting aside of the Default Costs Certificate is not granted, as they would be required to pay the sum of $2,928,933.55, which they allege is exorbitant.

[53] The award of costs to the Claimants, as suggested by the Defendants' Attorneys-at-Law, in my view, cannot satisfactorily ameliorate the prejudice caused by the Defendants delay in this matter. This position was highlighted by Harris JA, in the decision of **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 would be encountered by a party 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 realize the fruits of their judgments. In such circumstances, compensation by way of costs would not be an option."*

[54] In the final analysis, the Court must bear in mind that no proper nor acceptable explanation has been provided by the Defendants' Attorneys-at-Law for the failure to file the Points of Dispute within the stipulated time. This is a precondition that must be fulfilled before the Court can set aside the Default Costs Certificate. It would therefore be unacceptable to set aside the Default Costs Certificate, in the circumstances of the present case, where no good reason nor explanation has been provided for the default. The Court is therefore of the view that the Defendants' Application must be refused.

[55] In the premises, the Court makes the following Orders: -

a) The Defendants' Application to set aside the Default Costs Certificate dated the 24th February, 2017 is refused;

b) Costs of the Application to the Claimants, such costs to be taxed if not agreed;

c) Leave to appeal refused.