EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

ANUHCVAP2012/0044

In the Matter of the Constitution of Antigua and Barbuda Cap. 23of the Revised Laws of Antigua and Barbuda alleging that the provisions of sections 3, 5 and 10 of the Antigua and Barbuda Constitution have been are being and are likely to be contravened by reason of the conduct of certain members of the ONDCP and for an Order to protect the contravention of said Constitutional Rights

BETWEEN:

SAVITA INDIRA SALISBURY

Appellant

and

THE DIRECTOR OF THE OFFICE OF NATIONAL DRUG AND MONEY LAUNDERING CONTROL POLICY (ONDCP)

Respondent

Before:
The Hon. Mde. Louise Esther Blenman — Justice of Appeal

On written submissions:
Ms. Leslie-Ann Brissett George for the Appellant
Ms. Bridget Nelson, Senior Crown Counsel, for the Respondent

_____
2014: March 21.
_____

Civil appeal – Interlocutory appeal – Appeal against case management decision – Rule 56 of the Civil Procedure Rules 2000 – Rule 26.9 of the Civil Procedure Rules 2000 – Whether trial judge erred in striking out claim on the basis of alleged breach of the rules – Whether learned trial judge exercised his discretion properly in not utilizing his case management powers to rectify matters where there was a procedural error

The appellant instituted a claim against the respondent in the form of a fixed date claim and, instead of filing with the fixed date claim form affidavit evidence in support as stipulated by rule 56.7(3) of the Civil Procedure Rules 2000 ("CPR"), filed a statement of case. The respondent filed a defence to the claim. At the hearing of the matter the respondent objected to the appellant's claim on the basis of non-compliance with rule 56.7(3) of the CPR and made an oral application to strike out the matter. The learned trial judge struck out the claim on the basis that the appellant had failed to file an affidavit in support of the claim or to apply for relief from sanctions.

The appellant appealed alleging that the learned trial judge erred in striking out the claim on the basis of the alleged breach of the rules since in the circumstances of the case rule 26.9 was applicable.

Held: allowing the appeal and awarding costs in the court below and on the appeal to the appellant, that:

1. In circumstances where the rule or order of court does not provide for sanctions where there is a default in procedure it is not open to the court to read any sanction into the rule. The CPR provides no sanction for non-compliance with rule 56.7(3). Therefore, the appellant's non-compliance with that rule did not require the appellant to file relief from sanctions.

   The Attorney General v Keron Matthews [2011] UKPC 38 applied; C.O. Williams Construction (St. Lucia) Limited v Inter-Island Dredging Co. Ltd. Saint Lucia, High Court Civil Appeal SLUHCVAP2011/0017 (delivered 19th March 2012, unreported) followed; Rule 56.7(3) of the Civil Procedure Rules 2000 applied.

2. Rule 26.9(3) of the CPR confers jurisdiction on a judge to make an order to put matters right if there has been an error of procedure or a failure to comply with a rule, practice direction, court order or direction. This the court may do on or without an application by a party. The failure of the appellant to file affidavit evidence in support with the fixed date claim was a procedural error. Hence, the learned trial judge would have been clothed with jurisdiction to give an appropriate direction to put matters right. Considering that the respondent would not have been prejudiced by an order to put matters right and that doing so would only further the overriding objective of the CPR, the learned trial judge did err in his refusal to do so.

   The Attorney General v Keron Matthews [2011] UKPC 38 applied; Rule 26.9(3) of the Civil Procedure Rules 2000 applied.

3. An appeal against a judgment given by a trial judge in the exercise of a judicial discretion will not be allowed unless an appellate court is satisfied that in exercising his or her judicial discretion the learned trial judge misdirected himself

in law, failed to take into account some material which he ought to have taken into account, or had taken into account a matter which ought to have excluded and as a result of this error the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be blatantly wrong. The learned trial judge's refusal to exercise his case management powers conferred on him by rule 26.7(3) of the CPR was an error. In the circumstances an appellate court would be in as good as a position as the learned trial judge to exercise the discretion conferred by the rules and make an order or give directions so as to bring the claim in conformity with the rules.

David Goldgar et al v Wycliffe H. Baird Saint Christopher and Nevis High Court Civil Appeal SKBHCVAP2007/0013 (delivered 23rd October 2007, unreported) followed; Dufour and Others v Helenair Corporation Ltd and Others (1996) 52 WIR 188 followed; Edy Gay Addari v Enzo Addari Territory of the British Virgin Islands High Court Civil Appeal BVIHCVAP2005/0002 (delivered 27th June 2005, unreported) followed.

JUDGMENT

[1] BLENMAN JA: This is an appeal by Ms. Savita Indira Salisbury ('Ms. Salisbury") against the decision of the judge at first instance to dismiss the claim for constitutional relief against the Director of the Office of National Drug and Money Laundering Control Policy ("ONDCP") on the basis that Ms. Salisbury has failed to comply with rule 56.7(3) of the Civil Procedure Rules 2000 ("CPR ").

Background

[2] On 7th February 2012, Ms. Salisbury commenced a claim in the High Court in which she alleged that her fundamental rights as provided by the Antigua and Barbuda Constitution Order 1981 were violated by officers of the ONDCP. In pursuance of her claim, she filed a fixed date claim and statement of case in which she alleged that officers from the ONDCP unlawfully entered her property having falsely represented to her that they had a valid search warrant when they did not and illegally seized and took away several records, materials and document which were in her property. The documents were stated to be relevant to offences alleged to have been committed by David Tom ("Mr. Tom") deceased, with whom Ms. Salisbury lived as man and wife. She was not implicated in the alleged

offences. Offences were also alleged to have been committed by Astra Holdings Limited. She says that she is not a director of Astra Holdings Limited. She also alleged that the officers arrested her and took her to ONDCP's headquarters where she was questioned for about two hours. Ms. Salisbury also alleged that the officers unlawfully took away documents from her home that related to Astra Holdings Limited and Mr. Tom. These documents, she says, are vital to her establishing the claim of the Estate of David Tom of which she is one of the executors. The offences that were stated on the search warrant did not implicate her in any way. On 2nd February 2012, the defendant indicated to her that she was not a suspect in the money laundering investigations but was needed to assist with investigations related to Astra Holdings Limited.

[3] She contended that in those circumstances her constitutional rights were breached and sought a number of reliefs including a declaration that the ONDCP and its officers entry onto her property was unlawful and violated her constitutional right as provided by section 10 of the Antigua and Barbuda Constitution Order 1981. She also sought a declaration that ONDCP unlawfully and illegally seized and removed articles from her premises. In addition, she sought a declaration that her arrest and detention were illegal and unconstitutional and in violation of her constitutional rights as protected by section 3 and 5 of the Antigua and Barbuda Constitution Order 1981. On 22nd February 2012, the fixed date claim and statement of claim were served on the Director of ONDCP. He filed a defence to the statement of claim on 5th March 2012 denying the allegations that were made by Ms. Salisbury. It is very important to note that she did not file an affidavit in support of her claim in breach of rule 56.7(3).

[4] The first hearing of the matter was set for 9th March 2012 and was adjourned to 14th June 2012. On 14th June 2012, at the adjourned hearing, ONDCP took a preliminary point that Ms. Salisbury had failed to comply with rule 56.7(3) of CPR and that her claim was fatally flawed. The alleged acts of non-compliance were that she had failed to present a claim that was headed 'Originating Motion' as

required by rule 56.7(2) and also that she had filed to file evidence on affidavit as required by rule 56.7(3). The Director of ONDCP argued that Ms. Salisbury's claim should be struck out due to her non-compliance.

[5] Ms. Salisbury strenuously opposed the application to strike out her claim on the basis that there was no requirement in the Antigua and Barbuda Constitution Order 1981 for the claim form to be headed "Originating Motion." Ms. Salisbury also implored the court not to strike out her claim even though the rule required her to file an affidavit. She said that the statement of claim pleaded all of the relevant ingredients upon which to ground her constitutional claim for redress and that the defendant was aware of the allegations that were being made against the officers of the ONDCP.

[6] Despite the urging on behalf of Ms. Salisbury, the learned trial judge struck out the claim on the basis that Ms. Salisbury had failed to file an affidavit in support of the claim or to apply for relief from sanctions. However, the trial judge upheld Ms. Salisbury's submissions based on the first ground of the defendant's objection to the application to strike. The court held that her claim complied with rule 56.7(1) of the CPR. However, the learned trial judge held that Ms. Salisbury's failure to file an affidavit in support of her fixed date claim was fatal. The trial judge in his judgment said that Ms. Salisbury's filing of a statement of claim instead of an affidavit, as required by the rules, has deprived the court of evidence in support of the claim. The judge held that it was immaterial that the ONDCP had filed a defence to the statement of claim. The judge said:

> "[13] The fact that the statement of claim … contains most (or even all) of the information required to be stated in an affidavit does not result in the contents of the statement of claim being evidence on which a court may determine an application before it… The Defendant's awareness of the allegation on which constitutional redress is being sought is insufficient to validate the Claimant's non-compliance with the mandatory requirements of Rule 56.7, nor can the Claimant's application be rescued by the overriding objective, which was never intended to be used as a cure to the ills of non-compliance with the rules of civil procedure."

In those circumstances the trial judge struck out Ms. Salisbury's claim and awarded costs against her.

[7] She has obtained leave to appeal against the judge's ruling. In pursuance of the leave, Ms. Salisbury has appealed against the judge's decision and has filed several grounds of appeal.

[8] The grounds of appeal are:

(a) The learned judge erred in law in holding that a failure to file an affidavit as required by rule 56.7(3) of the CPR was fatal to a claim otherwise validly filed under rule 56.7(1) and (2) of the CPR.

(b) That the learned judge erred in law in finding that the respondent was prejudiced by the failure of the appellant to file an affidavit as required by rule 56.7(3) of the CPR.

(c) The learned judge misdirected himself as to the application of the powers given unto him by rule 26.9(3) of the CPR.

(d) The learned judge misdirected himself in law in finding that an application under rule 26.8 was relevant to the appellant in the application before the court.

(e) The learned judge misdirected himself in dismissing the claim before the court.

Issue

[9] In my opinion the grounds of appeal can be encapsulated in one issue namely whether the trial judge erred in striking out Ms. Salisbury's claim on the basis of her alleged breach of the rules.

Appellant's Submissions

[10] Learned counsel, Ms. Leslie-Ann Brissett George, submitted that the trial judge plainly got it wrong in striking out Ms. Salisbury's claim for constitutional relief based on breaches of her fundamental rights. Ms. Brissett George argued that Ms. Salisbury's fixed date claim has clearly identified the elements of her constitutional rights that were breached and therefore the Director of ONDCP knew the case he had to meet. She referred the Court to Olive Casey Jaundoo v Attorney-General of Guyana,[1] where Lord Diplock dealt with the issue of redress under the fundamental rights provisions of the Constitution, in support of her contention.

[11] Learned counsel, Ms. Brissett George, adverted the Court's attention to rule 26.9(1) – (4) of CPR which provides as follows:-

> "26.9 (1) This rule applies only where the consequence of failure to comply with a rule, practice direction, court order or direction 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, court order or direction does not invalidate any step taken in the proceedings, unless the court so orders.
> (3) If 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 right.
> (4) The court may make such an order on or without an application by a party."

[12] Ms. Brissett George also complained that the trial judge, in dismissing the fixed date claim, improperly accepted the submissions of the learned Senior Crown Counsel, Ms. Nelson. Ms. Brissett George argued that the circumstances in which Ms. Salisbury found herself, namely, having made a procedural error, was precisely of the type contemplated by the legislature in giving the judge the discretion to put matters right and to give directions so as to bring the claim in conformity with the rules. Ms. Brissett George argued that the judge did not have

[1] (1971) 16 WIR 141 at p. 146.

the benefit of the relevant legal principles when he opined in the judgment that Ms. Salisbury had failed to apply for relief of sanctions in order to correct the procedural misstep and this was fatal. She advocated that the correct approach to procedural missteps, such as in the case at bar, is that adopted by Deyalsingh J in A.N.R Robinson v Attorney General of Trinidad and Tobago and others[2] when he posited that:

> "It must be remembered that Rules are designed to affect the most practical course for ensuring that justice is done and are based on common sense and that strict adherence to them must give way sometimes to ensure that justice prevails."[3]

More critically, she reminded the Court that CPR provides no sanction for non-compliance with rule 56(3). Rather the conjoint effect of rule 26.9(1),(2) and (3) enables the court to make the necessary order to put matters right where there has been a procedural error such as occurred in the case at bar.

[13] Learned counsel, Ms. Brissett George, said that had the decision in The Attorney General v Keron Matthews[4] been brought to the attention of the learned trial judge he would not have fallen into error. To the contrary, the judge would have exercised his discretion differently. In The Attorney General v Keron Matthews the Privy Council cautioned against the tendency of reading into the rules sanctions where the Rules Committee in its wisdom has imposed none. In circumstances where the rule or order of court did not provide for a sanction where there is a default in procedure it was not open to the court to read a sanction into the rule.

[14] Learned counsel, Ms. Brissett George, argued that the trial judge should not have ruled in favour of the Director of ONDCP in relation to the preliminary point that was taken. She referred the Court to A.N.R Robinson v Attorney General of Trinidad and Tobago and others in which Deyalsingh J at page 15 stated:

---

[2] HC No. 941 of 1976.
[3] As extracted from the appellant's submissions.
[4] [2011] UKPC 38.

> "In any event, the Rules [make] it quite clear that a failure in procedure is now an irregularity and the person wishing to take the point must do so within a reasonable time and before he has taken any fresh step after discovering the irregularity. This the Defendants have not done. In all the circumstances, I can see no injustice being done to the Defendants in allowing the proceeding to stand as they are. The Defendants, therefore, fail on this issue."[5]

Ms. Brissett George said that the above pronouncements are very instructive in the case at bar.

[15] Learned counsel, Ms. Brissett George, emphasised that the trial judge got it wrong when he failed to put matters right as he could have done under rule 26.9(3) of CPR since rule 26.9(3) was provided to address precisely these types of procedural error.

[16] Ms. Brissett George said that when it was asserted at first instance that ONDCP was aware of the nature of the claim this point was not advanced in support of any waiver but rather in support of Ms. Salisbury imploring the court to exercise its discretion in enabling Ms. Salisbury to remedy her default since there would have been no prejudice to the Director of ONDCP had the trial judge exercised his discretion in her favour. Ms. Brissett George was adamant that the trial judge was wrong to strike out the fixed date claim and to state that Ms. Salisbury did not seek leave to file an affidavit in support of the claim nor did she apply for relief from sanctions. She relied on the case of The Attorney General v Keron Matthews in which it was held that unless the rule imposes a sanction a party in default does not have to apply for relief from sanctions. In that case it was held that there was no sanction imposed for the failure to file a defence in time. The Privy Council further held that where there are procedural errors these can easily be corrected by the appropriate direction being given under the relevant case management rule. She also referred the Court to Antonio Webster v The Attorney General of

[5] As extracted from the appellant's submissions.

Trinidad and Tobago.[6] In that case the appellant had used the wrong claim form to institute the claim. Lord Dyson held that in so far as the appellant's error was procedural, rule 26.8 enabled the court to make an order to put things right.

[17] Ms. Brissett George urged the Court to allow Ms. Salisbury's appeal against the learned trial judge's dismissal order and exercise its discretion in Ms. Salisbury's favour. She also asked the Court to award costs in favour of Ms. Salisbury.

Respondent's Submissions

[18] Learned Senior Crown Counsel, Ms. Bridget Nelson, said that it is common ground that Ms. Salisbury committed a procedural error in filing a statement of claim in support of a fixed date claim instead of an affidavit as required by rule 56.7(3), (4) and (10). Ms. Nelson said that it is clear that the intention of the rule making body was that the court should be provided beforehand with the evidence the parties intended to rely on at the trial. Whereas, in the case at bar, Ms. Salisbury did not file an affidavit; therefore the court will be deprived of this important benefit. Ms. Nelson accepted that the rules provide for no sanction due to a breach of rule 56.7(3). She quite properly conceded that in view of the decision of The Attorney General v Keron Matthews the trial judge was wrong to state that Ms. Salisbury should have applied for relief from sanctions. She also accepted that in the absence of any sanction for breach of the specific rule, rule 26.9 becomes operative and the court has the power to make an order to put matters right.[7]

[19] However, Ms. Nelson sought to defend the judge's decision on the basis that Ms. Salisbury's claim was not one in which the defendant had accepted the facts presented by Ms. Salisbury. On this basis, she urged the court to distinguish the case of The Attorney General of Trinidad and Tobago v Siewchand Ramanoop[8] upon which Ms. Salisbury relied on. She said that the facts in the

[6] [2011] UKPC 22.
[7] See rule 26.9(3) of the CPR.
[8] [2005] UKPC 15.

case at bar were unsuitable for redress by way of constitutional motion and it was overly dramatic to describe the actions of the officers of the ONDCP as an abuse of the coercive power of the State. She also sought to distinguish A.N.R Robinson v Attorney General and others from the case at bar. In that case the defendant was tardy in pointing out the breach of the rule. In fact the court pointed out the tardiness of the defendant in raising objection to the irregular procedure that was adopted by the claimant. The defendant had waited until the end of the trial at the stage of his closing address to raise the objection to the irregular procedure which the claimant had adopted. It was in those circumstances that the court held that the defendant having accepted the irregularity could not at that stage complain about any irregularity. Ms. Nelson said that in the case at bar the objection was taken at the first hearing and therefore the judge was correct to entertain the application and to strike out Ms. Salisbury's claim.

[20] Next, Ms. Nelson submitted that when, at paragraph 13 of his judgment, the trial judge stated that "the overriding objective… was never intended to be used as a cure to the ills of non-compliance with the rules of civil procedure", even if he had meant that there was implied sanction for non-compliance with part 56.7(3), it does not render incorrect the decision to strike out the claim for non-compliance because striking out is one of the options the court may exercise in addition to making an order to put matters right had the appellant made such application to file her affidavit out of time.

[21] Finally, one of the main planks of Ms. Nelson's rebuttal argument was that the learned trial judge was correct not to exercise his discretion under rule 26.9(3) since Ms. Salisbury had an alternative remedy at common law and should not have sought constitutional relief in any event. Ms. Nelson posited that before Ms. Salisbury's claim was struck out she had the option of making an application to the court for leave to file her affidavit out of time. She failed to do so and this was fatal to the survival of her claim.

[22] Interestingly, Ms. Nelson said that far from being driven from the seat of justice Ms. Salisbury always had open to her the option of filing another claim for relief under the Antigua and Barbuda Constitution Order 1981. Ms. Nelson implored the Court to uphold the ruling of the learned trial judge and dismiss Ms. Salisbury's appeal together with costs.

Court's Analysis

[23] This appeal has come before me for determination pursuant to rule 62.10 as an interlocutory appeal. By way of general observation, it bears noting that the Director of ONDCP did not file an application to strike out Ms. Salisbury's claim but rather the objection to the procedure that Ms. Salisbury had adopted in bringing her claim was made purely by way of oral submissions. This resulted in Ms. Salisbury not being provided with the opportunity to file any affidavit evidence in opposition to the application to strike. As a general rule, applications to strike, due to the errors of procedure, are made pursuant to rule 11.6(1) of CPR. However the need for an application to be in writing can be dispensed with by the Court or can be permitted by a rule or practice direction. In my view the present situation does not fall within the compass of either of these two situations and it does not appear that any of the parties adverted the judge's attention to rule 11.6.

[24] In my judgment, the better approach was for the Director of ONDCP to have filed an application to strike out Ms. Salisbury's claim rather than take the preliminary point that Ms. Salisbury had incorrectly filed a statement of claim instead of the affidavit in support of the fixed date claim as stipulated by the relevant rule. At first instance, Ms. Brissett George seemed not to have complained about the approach the learned trial judge took, namely, hearing the application to strike out the claim without the benefit of a written application but by way of a preliminary objection. The better approach was for Ms. Brissett George to have objected to the procedure there and then instead of participating in the process and then complaining about it on appeal.

[25] For the sake of completeness, it is noteworthy that rule 26.4(1) stipulates that if a party has failed to comply with any of these rules or any court order in respect of which no sanction for non-compliance has been imposed, any other party may apply to the court for an "unless order". No such application was made in the case at bar.

[26] Be that as it may, I have paid regard to the very helpful submissions of both learned counsel and to the ground of appeals as reflected in the sole issue. It is clear to me that Ms. Salisbury, in her appeal, wishes the Court to interfere with the exercise of the learned trial judge's discretion when he struck out her claim. The law in this regard is very clear, namely, an appellate court would be very slow to interfere with the exercise of a trial judge's discretion and will only do so if it is clear that the trial judge was blatantly wrong by, for example, taking into account irrelevant factors or failed to take into account relevant factors.

[27] This is also an appeal against a case management decision of the learned judge. I do not need to repeat the order that is being appealed from nor the reasons that the learned trial judge gave for striking out Ms. Salisbury's claim; it suffices to state that in the present case I am dealing with a complaint that the judge made an error in law in the exercise of his discretion. An appellate court could only interfere with the learned trial judge's exercise of discretion in the circumstances that have been clearly adumbrated above. In fact, this Court has consistently stated that it will not interfere with the trial judge's case management order unless he is clearly wrong, has misdirected himself in law, failed to take into account some material which he ought to have taken into account, or had taken into account a matter which ought to have excluded thereby exceeding the generous ambit within which reasonable disagreement is possible.[9]

---

[9] See David Goldgar et al v Wycliffe H. Baird, Saint Christopher and Nevis High Court Civil Appeal SKBHCVAP2007/0013 (delivered 23rd October 2007, unreported); Dufour and Others v Helenair Corporation Ltd and Others (1996) 52 WIR 188 per Sir Vincent Floissac CJ and Edy Gay Addari v Enzo Addari, Territory

[28] There is common ground that Ms. Salisbury did not file an affidavit in support of her claim in clear violation of rule 56.7(3). The only real question for me to determine is whether this was fatal to the survival of her claim as the learned trial judge seemed to have thought. Much of the learned trial judge's decision to strike seemed to turn on the fact that Ms. Salisbury had failed to file an application for extension of time to put in an affidavit in support of the claim which should have been accompanied by an application for relief from sanctions. It is unfortunate that the judge was not referred to the several decisions of our Court which have clearly held that, in the absence of a sanction that is imposed by a provision of the rules or order, an applicant who breaches the provision of a rule in relation to a procedure does not have to apply for relief from sanctions.

[29] In C.O. Williams Construction (St. Lucia) Limited v Inter-Island Dredging Co. Ltd.[10] it was held that rule 27.8 stipulates the circumstances that must exist for a party to apply for an extension of time and relief from sanctions. That party would have to be seeking to vary a date which the court has fixed for a case management conference; or for a party to do something where the order specifies a sanction for non-compliance; or for trial review; or for variation of a date set by the Court or the rules for doing any act which will affect any of the previously mentioned dates. It is only where those circumstances exist and the party seeks to vary a date set in the timetable after the deadline date has passed that rule 27.8(4) requires that the party apply for an extension to which the party has become subject under the rules or a court order.

[30] In view of the above pronouncement, which I adopt and apply to the case at bar, there was no need for Ms. Salisbury to have applied for relief from sanctions since there was no sanction imposed on her for failure to comply with rule 56.7(3) of

---

of the British Virgin Islands High Court Civil Appeal BVIHCVAP2005/0002 (delivered 27th June 2005, unreported).

[10] Saint Lucia, High Court Civil Appeal SLUHCVAP2011/0017 (delivered 19th March 2012, unreported).

CPR.[11] Even though the above view that was expressed by the learned trial judge was important, it does not seem that that was determinative of his decision. However, it is important that I state that there is much force in Ms. Brissett George's argument on this point and I agree fully with her that learned trial judge was wrong to opine that Ms. Salisbury ought to have applied for relief from sanctions under rule 26.8 of the CPR. I therefore reject the submissions of learned counsel, Ms. Nelson, on this point which seeks to gloss over the point.

[31] I turn now to address the more fundamental aspect of Ms. Salisbury's complaint, namely, the trial judge erred in failing to properly apply the relevant legal principles to the situation at bar where there was a clear procedural error as provided for by rule 26.9. I have already indicated that rule 56.7 does not stipulate that failure to comply with its dictate renders the claim automatically susceptible to dismissal or a striking out order. I agree with Ms. Brissett George that the failure to file an affidavit in support of the fixed date claim was not recognised by the drafters of the rule to warrant their imposition of a sanction.

[32] This brings me to address the sub-issue of whether the learned trial judge exercised his discretion properly in not utilising his case management powers to rectify matters where there clearly was a procedural error. I agree with the very persuasive argument of Ms. Brissett George that rule 26.9 gives the court the discretion to rectify such errors. This much has been conceded by learned counsel, Ms. Nelson. In my view if there has been an error in the procedure adopted by a party, rule 26.9(3) stipulates that the judge has jurisdiction to put matters right. Contrary to what the trial judge has stated it is precisely if there has been error of the kind at bar that the legislature has made provisions to enable the trial judge to exercise his discretion in order to put matters right. What is more

[11] See the very instructive Privy Council decision of The Attorney General v Keron Matthews.

significant is that the trial judge is clothed with the jurisdiction/discretion to put things right whether or not a party had made an application to that effect.[12]

[33] No prejudice would have been caused to the Director of ONDCP if the trial judge had exercised his discretion to put things right. He had available to him the ability to award costs to the Director of ONDCP and give appropriate directions.

[34] In view of the totality of the circumstances, I have no doubt that the learned trial judge exercised his discretion wrongly because he did not have the benefit of being referred to the relevant principles of law which ought to have guided him in the exercise of his discretion. In these circumstances, the appeal court will intervene. Indeed, learned counsel should have adverted the court's attention to C.O. Williams Construction (St. Lucia) Limted v Inter-Island Dredging Co. Ltd. together with The Attorney General v Keron Matthews and rule 26.9(4). In the case at bar, I have no doubt that, had the parties brought to his attention the relevant principles of law, the learned judge, in the exercise of his case management powers, would have made an order to put matters right under CPR 26.9(3) in the absence of any stated consequences of failure stipulated by a rule, practice direction or order. The judge would have done so bearing in mind the overriding objective and the justice of the case together with his powers under rule 26.9(4).

[35] It is the law that the court must seek to do justice between the parties. Towards this end, the court has a very broad discretionary power under rule 26.9 which must be exercised judicially in accordance with well-established principles. Overall and in the exercise of this discretion, the court must seek to give effect to the overriding objective which is to ensure that justice is done between the parties. Indeed, rule 1.2 states that:

> "The court must seek to give effect to the overriding objective when it –
> (a) exercises any discretion given to it by the Rules; or

[12] See rule 26.9(4) of the CPR.

(b) interprets any rule."

[36] It is unfortunate that, instead of utilising the case management powers provided by rule 26.9 to put things right, the judge incorrectly posited that the rule could not avail an applicant who had made a procedural misstep. There seems to be some merit in Ms. Brissett George's argument that the judge having taken this position would in effect be imposing sanction in circumstances where no rule or order had imposed such a sanction. The judge also appeared to have factored into his decision to strike out Ms. Salisbury's claim the fact that no attempt was made by her to file affidavit evidence in pursuance of her claim. There is great force in the argument of Ms. Brissett George that the Rules Making Committee did not provide a sanction for non-compliance with rule 56.7(3). There is good reason for this, namely, such a misstep is not regarded as being automatically fatal and could be put right by the trial judge by giving appropriate directions in accordance with rule 26.9(1), (2) and (3). I reiterate the fact that the trial judge could have made the order to put things right with or without an application being made by a party.[13] This aspect of the rule did not attract the attention of learned counsel but in my judgment it goes to the crux of the appeal. The learned trial judge was not directed to this sub-rule by either counsel. This is unfortunate.

[37] Learned counsel, Ms. Nelson, quite properly conceded that CPR 56 does not impose a sanction for failure to comply with it and therefore it was for the judge to exercise his case management powers under CPR 26.9(3). The further argument of Ms. Nelson that when the judge stated that the overriding objective was never intended to be used as a cure to the ills of non-compliance with the rules of Civil Procedure he was not there implying that there were implied sanctions applicable to non-compliance with rule 56.7(3) only bears stating so as to be rejected. The clear intendment of the learned trial judge was stated in the judgment. It is incredulous that Ms. Nelson went on to say that even if the trial judge had meant

[13] See CPR 26.9(4).

that there was an implied sanction from non-compliance with rule 56.7(3) it does not render incorrect the decision to strike out since it is one of the options the court may exercise in addition to making an order to put matters right had Ms. Salisbury made such an application to file her affidavit out of time. This submission is hopelessly flawed and untenable for the reasons I have stated earlier.

[38] Next, Ms. Nelson's argument that that the trial judge was correct in striking out the claim since Ms. Salisbury had an alternative remedy at common law and there were not unsubstantial issues of fact for determination by the court which rendered the case more suited for ordinary trial, is unsustainable and unmeritorious. I can see no good reason to take these matters into account when the trial judge clearly did not determine whether the constitutional claim was appropriate in the circumstances.

[39] Finally, I am of the view that Ms. Nelson's submissions that Ms. Salisbury was not driven from the seat of justice by the court but always had open to her the option of filing another claim under the Antigua and Barbuda Constitution Order 1981 if she was so advised and filing an affidavit in support, is wholly incongruous with the posture that she has adopted earlier. It is also unmeritorious and in my view supports the position that Ms. Salisbury should be granted leave to file an affidavit in support of her claim instead of being forced to incur unnecessary costs to file a new claim.

[40] It is noteworthy that the trial judge did not come to a definitive position in relation to whether or not Ms. Salisbury ought to have utilised another process/method to challenge the alleged acts of the ONDCP. In fact the judge stated at paragraph 14 of his judgment that:

> "…the Defendant may well be right that the Claimant's application could have been proceeded with (and I could add could still be proceeded with) as an action in tort and not by way of an application for constitutional redress. If that be the case, then the Claimant may not need to be rescued from the consequences of her flawed application, but needs only

to file an application for relief in tort in order to get the redress which she seeks."

I emphasise that the learned trial judge did not come down one way or the other on the issue of whether it was appropriate for Ms. Salisbury to file a claim for constitutional relief in the circumstances.

[41] In my judgment, it is clear that the learned trial judge acted on wrong principles of law when firstly he stated that Ms. Salisbury ought to have filed an application for leave to file an affidavit in support out of time or for relief from sanctions. He thereby fell into error and this impacted on the manner in which he exercised his discretion; his decision exceeded the generous ambit within reasonable disagreement is possible and was therefore wrong. In so concluding, I also accept Ms. Brissett George's arguments in relation to the purpose of the overriding objective and the ability of the judge to put matters right in accordance with the rules that enable him to do so.[14].

[42] For all of the above reasons, I am ineluctably driven to properly exercise the discretion that the trial judge ought to have done, while reminding myself of the applicable legal principles that were adumbrated in the cases above and CPR 26.9(3) which gives the Court the jurisdiction to put matters right. Also, I am mindful of rule 26.9(4). Exercising the discretion afresh against the above background, I have no doubt that the justice of the matter requires that leave should be granted to Ms. Salisbury to file and serve an affidavit in support of her claim within 28 days of the judgment. Thereafter the Director of ONDCP is to file an affidavit in answer within 28 days of receipt of the affidavit in support. I am of the opinion that to do so would cause no prejudice to the Director of ONDCP. The matter will thereafter proceed in accordance with the relevant rules.

[43] Ms. Salisbury had succeeded on the appeal. The general rule is costs should follow the event. In so far as the learned trial judge had ordered Ms. Salisbury to

[14] See rule 26.9 of the CPR.

pay the Director of ONDCP costs in the sum of $2,000.00 and in light of Ms. Salisbury's success, this order is set aside. Ms. Salisbury, in addition to seeking an order to set aside the costs order that was made by the trial judge, seeks costs in this appeal and in the court below. I have no doubt that Ms. Salisbury is entitled to receive costs in the lower court which is fixed at $2,000.00. She is also entitled to have costs of this appeal which is two thirds of the costs in the court below.

Conclusion

[44] In the premises, I would order that the appeal be allowed and set aside the order of the court below. I would hold that Ms. Salisbury is entitled to the following reliefs:

(a) Costs in the sum of $2,000.00 in the court below.

(b) Costs of this appeal in the sum of two thirds of the cost in the court below.

[45] For the above reasons, I direct that Ms. Salisbury is granted leave to file and serve an affidavit in support of the claim within 28 days of the order. Leave is granted to the Director of ONDCP to file and serve an affidavit in answer within 28 days of receipt of the affidavit in support. Thereafter, the matter would proceed in accordance with the relevant rules.

[46] The Court gratefully acknowledges the assistance of learned counsel.

Louise Esther Blenman
Justice of Appeal