



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

CLAIM NO. A179 OF 1987

**BETWEEN ARAWAK WOODWORKING
 ESTABLISHMENT LTD. PLAINTIFF**

A N D OSSIE LEE DEFENDANT

**Mrs. N. Foster-Pusey and Miss Anna Gracie
instructed by Rattray Patterson Rattray for the Claimant/Respondent**

**Mr. Courtney Bailey and Miss M. Burke
instructed by Dunn Cox for the Defendant/Applicant**

Hearing: 27th May, 2011 & July 27, 2011

In Chambers

MARSH, J.

1. By Amended Notice of Application for Court Orders dated and filed on the 25th day of May 2011, the Claimant/Applicant sought of this Court the following orders:-
 - i. The time of service of this Application be abridged
 - ii. That the order made by me on the 11th March, 2011, that the Claimant provide security in the sum of \$2,000,000.00 within seventy five (75) days be extended for a further seventy five (75) days.
 - iii. Alternatively, that the said order be varied to allow the Claimant to place the lands comprised in Certificate of Titles registered at Volume 821 Folio 84 in the Register Book of Titles as security and that the Claimant deliver up the Certificate of Title in respect of the same within Thirty (30) days of the date hereof.

- iv. Further or in the alternative that the Claimant be granted relief from the sanctions imposed pursuant to the order made by me on March 11, 2011.
- v. That costs of this application be costs in the Claim; and
- vi. Such further or other relief as this Court deems just.

2. The grounds on which these order are sought are as follows:-

1. The Applicant's delay was unintentional;
2. This application is filed within the time for complying with the said order.
3. The Applicant is unable to raise the security within the prescribed time and is anxious to proceed with the matter.
4. The Applicant will be unduly prejudiced if the order is not varied and/or extended.
5. The orders sought will not unduly prejudice the Respondent.

3. The Applicant Violet Taylor, Claimant's Managing Director Violet Taylor, in an affidavit to support this Amended Application sworn to on the 25th May, 2011 deponed among other things, that when this court was making the Order on the 27th day of May, 2011, Mrs. Foster-Pusey for the Applicant had intimated to the Court that Violet Taylor was offering as security six acres of land located at Mt. Lebanon in St. Andrew. The Court had declined to make the order as requested by Applicant's Counsel as there was no evidence (affidavit) before me, but the Court indicated that it would not be averse to making such an order if there was consent between the parties.

4. Mr. Bailey for the Respondent required instructions from his client. The order of the 27th May 2011 was then made.
5. The land is valued by D.C. Tavares Realty Co. at \$2,300,000.00 in a valuation dated 26th April, 2006, an amount in excess of the sum ordered by the Court. By letter dated 11th March, 2011 the Claimant's attorney-at-law wrote to the Defendant's Attorney-at-law proposing the use of this parcel of land as security. By letter dated 22nd March, 2011 the Defendant's attorney indicated that the Defendant was unable to agree to this arrangement.
6. The land has been listed for sale, subsequent to this but there has been no expression of interest to purchase the land at the price listed or "at any price at all." This has constrained the Applicant to apply to the Court as per the said Amended Application.
7. The matter is urgent as the Applicant is required to establish the security of \$2,000,000.00 by May 2011 or be barred from continuing its action against the Respondent. The balance of justice, it is advised, lies on the favour of this ground of the orders sought, as at worst, the Defendant has to wait another seventy five (75) days for the grant of security as opposed to Claimant's bar from continuing the Claimant's case. Further the Affiant is of the opinion that the application is filed within the time for complying with the Court's order.
8. The Respondent Ossie Lee responded to the affidavit of Violet Taylor dated the 25th May, 2011 and has deponed that he is not at all prepared to

undertake the risk of any further litigation which could be consequent on his having to be involved in the valuation and sale of any property owned by the said Claimant's Managing Director Violet Taylor. This is so, having regards to history of the previous interactions with the Claimant and the said Managing Director. The Claimant's Managing director's own affidavit has indicated that there seems to be little prospects of the land being sold and it cannot therefore be considered security for costs in this matter.

Submissions

9. Mrs. Nicole Foster Pusey for the Claimant/Applicant, after court had ruled that time for service was abridged, as sought at one (1) of the orders sought on the said amended application made submissions on the Applicant's behalf. She pointed out that the Court's power to vary order made by it is to be found at Part 26.1(7) of the Civil Procedure Rules 2002. This provision reads -

"A power of the Court under these Rules to make an order includes a power to vary or revoke that order."

She referred to Part 26.8.1

"Relief from Sanctions" and in particular to Part 26.8(2-4)

10. She indicated that the failure to comply was not intentional, was promptly made and supported by evidence – that there was good evidence for Applicant's failure to comply with the order in the stated time.
11. The orders sought should be granted in the interest of the administration of justice. If there is further time granted to the Applicant, this would not

inconvenience the Respondent. An extension of a further seventy five (75) days is not at all unreasonable.

12. If there be this extension of seventy five (75) days, granted to the Applicant, there would be no further legal costs to be incurred by the Respondent, as the order that the Claim be staged would still exist. There is no 'trial date' to be impacted since nothing is happening in the claim. This additional time would give the Respondent the protection that payment of the security by the Applicant would afford him.
13. If the orders sought were not granted then the claim would fall away entirely and the Applicant would be unable to proceed with its claim. The impact of a refusal to grant the orders would impact the Applicant much more than on the Respondent – all he will have to do is to wait on the provision of his security.
14. For support of these submissions, she referred Court to the Overriding Objectives paramount in the interpretation of the Rules and a case No. C.L. 197/F138 -

***R.E. Forrester & R.E. Forrester Electrical
Contractors Limited***
v.

Holiday Inn (Jamaica) Ltd.

More especially Mrs. Foster-Pusey pointed to paragraphs 4, 6, 7 and 8 of the said judgment of Sykes J. I will later refer to and comment on these paragraphs of the judgment. Paragraphs 11,13,16,29, 30 and 31 were also prayed in aid by Applicant's counsel and again I will return to these.

15. Mrs. Foster-Pusey, referred this Court also to Part 65.26 of Blackstone's Civil Practice 2010 – this sets out what may be paid into courts to represent security for costs when such orders are made and identify as alternatives, bonds and guarantee.

“Security for costs will not usually be allowed in the form of a charge on real property. If the property is valuable, there should be no difficulty in obtaining a bank guarantee or money to pay into Court....”

Counsel indicated that although it was not normal, this passage had ruled out “land” being a possible alternative to money, bonds and guarantees as “security for costs.” Application for relief from sanctions is in accordance with the Rules and exercise of the Court's discretion.

16. Mr. Bailey responded to Applicant's submission in robust tones.

He expressed that he had no difficulty with the position that the Court had power to vary order made by it. However, he contended that Part 26.8 of the Civil Procedure Rules has no relevance in the instant situation. In the instant case, sanction has not yet taken place. Relief for sanctions does not apply for an application to vary an “unless Order.” The authorities on which the Applicant relies are therefore irrelevant. The correct guidance may be found in the **Forrester** case (supra). The Court should disregard Part 26.8 of the Civil Procedure Rules as it does not apply.

17. He pointed out that the Application is being heard two (2) days after the 'Unless Order' that court had made. This Application ought to have been heard on the 25th of May, 2011 the 75th day of the Order being made.

There is no contest with the submission that the Court may extend time after "the time has passed." However, an 'unless order' is a particular species of order. It by its very nature, means that if it was not complied with by a date specified by the Court, the defaulting party's statement of case is automatically struck out without more. The defaulting party, once it fails to comply by the specified date, there is nothing to extend, to apply in respect of, nothing to vary, since the action no longer exists. See the Forrester case (earlier mentioned).

(17a) In Forrester's case, the disclosure order had expired – the "unless order" itself was heard on the very day the application would, but for the Application, been struck out. The scenario is different in the instant case – time had passed. The Applicant is the author of the circumstances in which it finds itself by applying on the eleventh hour. The matter has already been struck out.

18. If the Court did not agree with the submission that there is nothing left to vary, the matter having been struck out, then the Defendant relies on his submissions as to why there should be no variation or extension of the Court's order.

19. Further, the Defendant contends that the Claimant has not, in the affidavit of Violet Taylor fulfilled the requirement of explaining why it had failed to

comply with the Court's order. The land offered by the Applicant is not security. Its 2006 valuation is not up to date. There is no evidence of what efforts have been made subsequent to the Court's order to obey the order regarding payment of Security for costs. The conduct of the Applicant through its Managing Director, suggests a disregard for and an ignoring of the Unless Order.

20. The Claimant's argument that there is no prejudice to the Defendant is absurd. The prejudice, the Defendant contends, is in the 'delay' – witnesses may die or move away. It is therefore not true that the Defendant is not prejudiced by delay.
21. Should the Court be minded to exercise its discretion to grant, the orders sought in the Claimant's application, the Court should limit to a shorter extension of time than that sought and upon such stringent terms as would include the Claimant paying forthwith to the Defendant costs of the application summarily assessed by the Court.
22. The incontrovertible fact in this application is that it was made on May 25, 2011, the order which it seeks to affect was made on March 11, 2011, the order which it seeks to affect was made on March 11, 2011. This is a classic example of an application made on the eleventh hour. The Applicant relied on the provisions of Part 26.8.1 of the Civil Procedure Rules 2002, but this reliance is misplaced as this Part relates to "relief from any sanctions imposed." There is as yet no imposition of Sanctions in the instant case.

23. The question to be assessed is whether or not the Applicant has provided this Court with explanation for failure to comply with the order which it now seeks to have the Court extend or alter. It must satisfy the Court on credible evidence before it that the non-compliance with the unless order was not the result of any refusal to ignore or to disobey the order. It should indicate in its request for an extension of time, that it has made efforts to comply with the order, and more particularly it should indicate what these efforts are, why these efforts were unsuccessful and if it is to be in a position to do so, when it is that compliance will take place.
24. Browne-Wilkinson VC (as he then was) expressed it succinctly and well when in *Re Jokal Holdings Limited*, he said-

The Court should not be astute to find excused for such failure since obedience to orders of the Court is the foundation on which its authority is founded. But if a party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, such failure to obey is not to be treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have enjoyed.

25. This position of the Courts as to how any flouting of any of its orders is treated indicates that the Court turns its face against such conduct. The non-compliant party has to establish clearly and unambiguously that his failure to obey the Court's order was not because of an intention to ignore the order or to flout that order.
26. The bases of the Applicant's application are stated in the affidavit of Violet Taylor, its Managing Director. The evidence stated in the said affidavit

will have to be examined with a view to seeing whether this Court can be minded to exercise in Applicant's favour that power which Part 26.1(7) confers on it, under the Civil Procedure Rules 2002, to make an order to vary or revoke an order it has made.

27. This rule is governed in its effect by the overriding objective i.e. Court should be enabled to deal justly with the case. No party should be prejudiced by his financial position. The overriding objective, besides being a statement of the components which the court "must take into account when exercising its extensive discretion "when applying and interpreting the Civil Procedure Rules.
28. The Court should look at the possible impact on the other party in the case; how will it affect the case management, pretrial review and trial dates; has the delay caused undue hardship to the other party? What difficulty will an extension of time cause to the Defendant; the conduct to date of the Applicant?
29. Relief to extend time where an "unless" order has been made and not complied with is not automatic, although the jurisdiction to extend time exists. Roskill L.J. (as he then was) in a judgment preceding the Civil Procedure Rules has in **Samuels v Linzi Dresses Ltd [1981] Q.B. 11, 126**, stated –

To say that there is no jurisdiction to extend the time where an "unless" order has been made and not complied with, is not to suggest –let this be absolutely plain – that relief should be automatically granted to parties who have failed to comply with the orders of the Court or otherwise upon stringent

**terms..... orders as to time are not to be ignored
but to be complied with."**

30. It is therefore abundantly evident that this stringent approach to "unless" orders in particular, preexisted the C.P.R. and still exists during the current regime of the Civil Procedure Rules. There is the expectation that Court orders should not be flouted or disobeyed with impunity. However, in the same consideration must be balanced the litigant's right not lightly to be denied his day in Court.
31. In the instant application, the Court is mindful of the reminder to a court by Browne-Wilkinson VC (as he then was) in **Jokal Holding Ltd. (supra)**, that a Court "should not be astute to find excuses for such failure, since obedience to orders of the court is the foundation on which its authority is founded."
32. Has the Applicant made out a clear and unequivocal case that its non-compliance with the "unless" order was not a result of a decision not to obey the order in the time stipulated? In the Affidavit of the Applicant's Managing Director Violet Taylor, deponed that she had made an offer of transferring real estate to the Respondent during the hearing of the application and prior to the order, the Claimant now seeks to extend; that Respondent's attorney-at-law, was unable to agree to that request, he not having any instructions for his client, the Respondent. The Claimant's attorney-at-law had subsequently pursued the initial offer that land be transferred as security, but despite the valuation of the land, the

Respondent was not minded to accept that offer. The land was listed unsuccessfully on the books of Century 21, Heave Ho and C.D. Alexander for sale at a listed price of \$3,800,000.00.

33. The offer having fallen through, the Applicant has not "been able to as yet put together the necessary fund to satisfy the cash security on behalf of the Claimant."
34. The Applicant has submitted that there is no hardship on the Respondent were the order sought to be granted. However, the Respondent has countered that the hardship he will suffer, if the application succeeds is that memory will fade and witnesses may move or die or become otherwise unavailable.
35. Mr. Bailey for the Respondent has also submitted that if the court is minded to grant the order sought in this application, the Court should summarily quantify the amount for costs in this application and order that the costs be paid to the Respondent forthwith. This is a tempting quasi-concession, but in the light of the history of this matter and the part that to now, the financial position of the Applicant has played, it would almost certainly reduce the ability to find the amount for security of costs and quite surely prevent the Applicant from being able to have its day in court.
36. I am in total agreement with the submission of Mr. Bailey for the Respondent, and the evidence Respondent himself that the land offered as security, would if accepted, possibly cause the Respondent to risk

being involved in valuation and sale of land owned by the said Violet-Taylor.

37. Mr. Bailey submitted and supported his contention that the Applicant had not provided evidence which was sufficiently strong to cause the Judge to lift the sanction of dismissal, by reference to the case

AP (U.K.) Ltd. v. West Midland Fire and Civil Defence Authority (2001)
EWCA Civ. 1917.

Here the judge had found that the highest the Applicant's evidence could be put is that money "will probably be available."

38. In the instant application, the Applicant relying on a successful offer and acceptance by the Respondent her offer of land in lieu of security, had hoped that the Respondent would have issued instructions to his attorney to accept the offer of the land as security. "Albeit that the authorities seem to suggest that "security for costs will not usually be allowed in the form of a charge on real property." The Applicant had therefore, having hoped to place land in substitution for the sum of money ordered as security for costs, been unsuccessful in its offer. It has been unable to put together the sum ordered in the time stipulated.

39. I have concluded on the evidence before me that the Applicant has not been contumelious nor has it flouted the order on purpose. I am therefore minded to make an order extending the time within which to pay the sum ordered into Court. I am not however making an order for cost to be paid forthwith, despite the fact that this order I make with the stringent condition

that Applicant will have an extension of sixty (60) days from the hereof and I so order.

40. The order I make therefore is as follows:

- (i). The order made by me on the 11th March, 2011 that the Claimant provide security in the sum of \$2,000,000.00 within seventy five (75) days, be extended as of today by sixty (60) days.
- (ii). If the amount ordered remains unpaid into Court after the said sixty days have elapsed the Claimant's Statement of Case stands struck out.
- (iii). Costs of this application be costs in the Claim.