[**2016**] JMSC Civ 218

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011HCV04442

BETWEEN	**CHARLES VERNON FRANCIS**	**Claimant**
AND	**COLUMBUS COMMUNICATIONS JAMAICA LIMITED (trading as FLOW)**	**First Defendant**
AND	**JAMAICA PUBLIC SERVICE COMPANY LIMITED**	**Second Defendant**

Richard R Reitzin instructed by Messers Reitzin & Hernandez for the Claimant/Respondent

Tavia Dunn, Arlene Williams and Monroe Wisdom instructed by Nunes, Scholefield, DeLeon & Co for the First Defendant/Applicant

Tana'ania Small Davis and Joshua Sherman instructed by Livingston, Alexander & Levy for the Second Defendant

Heard: 18th August, 2015, 22nd & 23rd September, 2015 & 6th December, 2016

Application for extension of time and Relief from sanction - Failure to comply with Case Management Conference Order to file and exchange witness statements - Judicial Notice considered

COR : RATTRAY, J.

[1] Charles Vernon Francis, an employee of the First Defendant, Columbus Communications Jamaica Limited (trading as FLOW), sustained severe personal injuries from a massive electrical shock. He suffered these injuries while he

attempted to run a steel wire and cable between utility poles owned by the Second Defendant, Jamaica Public Service Company Limited (JPS). He instituted legal action against both Defendants alleging that he was injured by their negligence.

[2] At the Case Management Conference held on the 30th July, 2014, Orders were made for the parties, inter alia, to file and exchange Witness Statements on or before the 9th May, 2015. A trial date was set for the 16th November, 2015, for ten (10) days, and a Pre-Trial Review hearing fixed for the 16th July, 2015. The trial date was subsequently vacated and a new trial date commencing 27th March, 2017, for ten (10) days was set. A further Pre-Trial Review was fixed for 20th June, 2016 for five (5) days.

[3] On the 15th July, 2015, the First Defendant filed a Notice of Application for Court Orders seeking a variation and extension of time for it to comply with the Case Management Conference Orders. The First Defendant had failed to comply with the Case Management Conference Order which directed that Witness Statements were to be filed and exchanged on or before 9th May, 2015. The First Defendant also sought permission to make further amendments to its Amended Defence filed on 7th May, 2012 and that the Further Amended Defence of the First Defendant filed and served on 15th July, 2015 be permitted to stand.

[4] The First Defendant's application was supported by the Affidavit of Arlene Willliams, an Attorney at law at the firm of Nunes, Scholefield, DeLeon & Co appearing on behalf of the First Defendant. In her Affidavit, sworn on the 15th July, 2015 and filed on the same day, Ms. Williams advised that the Company's failure to comply with the Order was neither intentional nor wilful.

[5] She was informed that "one of the intended witnesses is no longer working with the 1st Defendant Company and no longer resides at the last address on the 1st

Defendant's record". She later explained in her Supplemental Affidavit sworn on 24th July, 2015 and filed on the same day, that the First Defendant underwent a period of control transition. This control transition was pursuant to an agreement made in or about November, 2014, to transfer FLOW and its parent company to Cable and Wireless Communications Plc.

[6] Further, Ms. Williams explained that this transition period, which began about November 2014, included "the audit of processes, systems and facilities and the reorganization of same". This period of transition, she maintained, is still ongoing. It was during this time that her firm was unable to establish contact with the First Defendant to obtain instructions to comply with the Case Management Conference Orders. She said that several attempts were made to contact the First Defendant through their insurance company and insurance brokers.

[7] Ms. Williams was instructed by Mitzi Hyde, the Human Resource Manager of the First Defendant, that the Company experienced "internal difficulty in accessing employee files as well as other files" during the transition period. This resulted in a delay of the company instructing its attorneys. Since July, 2015 however, the First Defendant has located one of its potential witnesses and commenced the process of taking instructions from him regarding the incident.

[8] Mitzi Hyde, in her Affidavit sworn on the 29th July, 2015 and filed two days later, confirmed that the First Defendant experienced a transitional period for the control of FLOW to Cable and Wireless Communications Plc. She also confirmed that during this period the First Defendant was unable to instruct its attorneys in the matter. Its inability to instruct its attorneys was due to "internal difficulty in accessing employee files as well as other files related to the present claim".

[9] Ms. Hyde went on the state that, in late June 2015, she received an email from the company's attorneys advising them of the urgency of complying with the

Case Management Conference Orders. She said she was informed by her attorneys that attempts were made to contact the First Defendant's offices, but to no avail.

[10] At this time, she was outside the jurisdiction and was unable to convey the company's instructions to the attorney at law. It was upon her return to Jamaica that she was able to instruct them. Further, she said, the potential witnesses are no longer employed with the company and one is now deceased. However, Ms. Williams in her Supplemental Affidavit said that the First Defendant has "located the potential witness and is in the process of taking instructions from him regarding the incident".

[11] Both Ms. Williams and Ms. Hyde contended in their Affidavits that the late filing and exchange of the Witness Statements would not affect the trial date which is now set for 27th March, 2017 to 7th April, 2017. Ms. Williams, in her Affidavits, sought to justify the filing of the Further Amended Defence. In particular, she was of the view that the amendments do not materially vary the First Defendant's case, and the amendments provided greater clarity to the particulars of negligence pleaded against both the Claimant and the Second Defendant.

[12] In her written submissions, Counsel for the First Defendant, Ms. Arlene Williams referred to and relied on Rule 26.1(2)(c) of the Civil Procedure Rules (CPR) in support of the application, which reads as follows:

> *Except where these Rules provide otherwise, the court may –*
>
> *...*
>
> *(c) extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed;*

She relied on the decision of the Court of Appeal in ***Fiesta Jamaica Limited v National Water Commission*** [2010] JMCA Civ 4 for the factors to be considered by the Court in determining whether to extend time.

[13] In that case, the learned Judge of Appeal indicated some of the factors to be considered were: "the length of the delay, the prejudice to the other party, the explanation for the delay, the merits of the appeal, the effect of the delay on the public administration, the importance of compliance with time limits bearing in mind that they were there to be observed and the resources of the parties which might, in particular be relevant to the question of prejudice".

[14] Ms. Williams also advanced the argument, relying on ***Blackstone's Civil Practice 2006****,* that the court's discretion must be exercised in accordance with the overriding objective of dealing with matters justly, which is a principle enshrined in our Civil Procedure Rules.

[15] Ms. Williams contended that the overriding objective would not be furthered where an Order is made effectively depriving a party from being able to call any factual witness evidence. Counsel conceded however that this principle is not absolute, and that there are cases of repeated or deliberate defaults where an Order equivalent to striking out is appropriate. None of those instances however were applicable in this case.

[16] Counsel then argued in the alternative that the Court may treat the application for extension of time as an application for relief from sanction. This could be done, she submitted, where the Court is of the view that this application should be an application under Rule 26.8 of the CPR.

[17] Rule 26.8 of the CPR, so far as is relevant, reads as follows:

> *"26.8(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."

[18] Ms. Williams submitted that her client was prompt in its application before the Court. She argued that the First Defendant applied as soon as it was able to state its ability to comply with the Case Management Orders. Further, that the delay was neither excessive nor inordinate. Counsel then made the submission that the First Defendant's inability to locate its intended witnesses was as a result of the internal difficulties it experienced due to the transfer of control of the business. This, she urged was a good explanation for the delay.

[19] She further argued that the First Defendant had been generally compliant with the Orders of the Court and has been diligent in its approach to defend the claim. She completed her submissions on the issue of Relief from Sanctions by highlighting the Court's discretion as to whether or not the application should be granted. She asserted that it was in the interest of the administration of justice to allow the First Defendant to call witnesses at trial and for the documents it had already filed to stand.

[20] Counsel for the claimant, Mr. Reitzin, in his response submitted that applications for extension of time where sanctions are imposed may be treated by the Court as applications for Relief from Sanctions. The First Defendant, he said, has not satisfied the criteria set out in Rule 26.8. Specifically, the First Defendant has not satisfied the preconditions under Rule 26.8(1) and (2). Therefore the Court cannot be called upon to exercise its discretion under Rule 26.8(3).

[21] He further submitted that the First Defendant's application was not made promptly within the meaning of Rule 26.8 (1)(a). Standard disclosure was to be made by 28th November, 2014 and Witness Statements were to be filed and exchanged by 9th May, 2015. This application was made on 15th July, 2015. He relied on the case of ***National Irrigation Commission Ltd. v Conrad Guy & Marcia Gray*** [2010] JMCA Civ 18, where it was held that "promptness" meant "alacrity" and "celerity in the circumstances". The First Defendant's application, Counsel argued, was therefore not promptly made.

[22] Mr. Reitzin further posited that Rule 26.1(2)(c), which permitted the court to extend or shorten the time for compliance with any Order of the Court, did not apply and the First Defendant cannot rely on it. The effect of the application he argued was that it was brought pursuant to Rule 27.11, that is, the variation of case management timetables. He concluded this point by submitting that the

First Defendant's application was bereft of a good explanation for the delay and that, by virtue of the delay, the Claimant has suffered irremediable prejudice.

[23] Counsel continued his submission that the evidence filed in the Affidavits in support of the application was vague. Specifically, he referred to Ms. Hyde's Affidavit and argued that she failed to exhibit the agreement for the transition of control. He further submitted that her Affidavit failed to show how this alleged period of transition created difficulty for the accessing of files. This failure he stated offended Rule 30.3 of the CPR which reads –

> *Rule 30.3 (1) The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge.*
>
> *(2) However an affidavit may contain statements of information and belief –*
>
> *(a) where any of these Rules so allows; and*
>
> *(b) where the affidavit is for use in an application for summary judgment under Part 15 or any procedural or interlocutory application, provided that the affidavit indicates –*
>
> *(i) which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief; and*
>
> *(ii) the source for any matters of information or belief.*

Mr. Reitzin urged the Court that the failure to give the source of the information made the evidence inadmissible.

[24] Counsel for the First Defendant submitted in reply that Ms. Hyde's Affidavit was admissible, notwithstanding that the transfer of control agreement between FLOW and Cable and Wireless Communications was not exhibited. Counsel

urged the Court to take judicial notice of the agreement, as it was a notorious fact which featured prominently in the media. Counsel further submitted that the Court was entitled to make reasonable inferences from the facts set out in the Affidavits to determine whether or not those circumstances existed.

[25] The First Defendant's application hinged on the admissibility of the Affidavit of Mitzi Hyde, the issue being, whether the Court may have judicial notice of the existence of the transition of control agreement. In ***Barrett v R*** [2015] JMCA Crim 29, F. Williams JA (Ag), as he then was, at paragraph 27 decided that the Court may take notice of matters which could fairly be said to be:

> *...so notorious or clearly established or susceptible of demonstration by reference to a readily obtainable and authoritative source that evidence of their existence is unnecessary...*

[26] I am of the view that the Court is entitled to take judicial notice of the fact of the agreement between FLOW and Cable and Wireless Communications Plc. The acquisition agreement, though not exhibited in these proceedings, was a notorious fact in Jamaica. The learned judge of appeal in ***Barrett v R*** *supra* provided a definition for "notorious fact" at paragraph 26 of the Judgment as follows: "a matter which men of ordinary intelligence are acquainted in their ordinary human affairs".

[27] I therefore do not agree with Mr. Reitzin that Rule 30.3 was infringed by the absence of the source of the agreement. Rule 30.3 provides that the general rule is that a deponent may only give Affidavit evidence as to such facts that he or she is able to prove from his or her knowledge (Rule 30.3(1)). However, as the transfer was a notorious fact in Jamaica, I find that Ms. Hyde's evidence of the transition was admissible and there was no need for her to include the agreement in her Affidavit.

[28] Ms. Hyde in her Affidavit indicated that "in or about November 2014 there was an agreement for the transfer of control". Coupled with the notorious fact of the agreement, I accept that the period of control transfer began in November 2014, two months after the Orders made at Case Management Conference. This finding takes me to the Application for Extension of Time and the Application for Relief from Sanctions.

[29] The First Defendant pitched its Application for Extension of Time under Rule 26.1(2)(c), that is, the Court's general powers of management. However, its failure to file and serve Witness Statements in accordance with the Court Order was a breach of Rule 29.11(1), which reads:

> *"29.11 (1) Where a witness statement or witness summary is not served in respect of an intended witness within the time specified by the court then the witness may not be called unless the court permits.*

[30] At this juncture, it is necessary to set out Rule 26.7(2) which reads as follows:

> *"where a party has failed to comply with any of these Rules, a direction or any order, any sanction for non-compliance imposed by the rule, direction or the order has effect unless the party in default applies for and obtains relief from the sanction, and rule 26.9 shall not apply".*

The sanction imposed in Rule 29.11(1) is that a witness, whose witness statement was not filed and served within the time specified by the Order, may not give evidence without the Court's permission. This sanction, according to Rule 26.7(2), takes effect unless the defaulting party applies for and obtains relief. This is an example of an automatic sanction that comes into effect without any further action by either the Court or any of the parties.

[31] In the unreported decision of ***George Bryan v Grossett Harris*** [2005] delivered on 21st October, 2005, Sykes, J said at paragraph 16: "a textual analysis of Rule 29.11 suggests that the door is not closed forever on a party who fails to comply

with a court order for witness statements". Accordingly, I am of the view that the application brought by the First Defendant, ought properly to have been an application for relief from sanctions, as implied by Rule 29.11.

[32] Counsel for the First Defendant, nevertheless, submitted in the alternative that the Court may treat the application as that of relief from sanctions. Rule 26.8 laid out the criteria and considerations of the Court for relief from sanction to be granted. Mr. Reitzin cited several authorities in his attempt to persuade the Court to refuse the First Defendant's application. One such authority was ***National Irrigation Commission Ltd. v Conrad Gray & Marcia Gray*** [2010] *supra,* where "promptly" was defined as "with alacrity". At paragraphs 14 to 15, Harrison, J.A explained that "promptly" requires an applicant to act "with all reasonable celerity in the circumstances".

[33] The question in the present case was whether the First Defendant complied with that essential requirement. Ms. Williams in her Supplemental Affidavit said that several attempts were made by the Firm to contact the First Defendant in order to obtain instructions to comply with the Case Management Orders. Also, she said, that it was only "recently" that they were able to obtain instructions. I construe "recently" to mean at or about the time of the swearing of the affidavit, that is, around July, 2015.

[34] Ms. Hyde's evidence was that contact between the First Defendant and the attorneys was established in June, 2015 after numerous failed attempts by the attorneys. The attorneys therefore were clearly not at fault in failing to comply with the Order within the time specified. I am of the view that steps were taken with all reasonable celerity, since June, 2015 and July, 2015, to apply for relief from sanctions as soon as the First Defendant was able to instruct its attorneys. I am therefore satisfied that the application was made promptly.

[35] Having found that the application was made promptly within the Rules, the next consideration is Rule 26.8(2). The evidence of Ms. Hyde does not support or suggest intentional default by the First Defendant. Her affidavit attributed the failure to comply with the Order to the "ongoing" ownership transitional period. During this time, she said, FLOW experienced "internal difficulties in accessing employee files as well as other files related to the present claim". This in my view amounted to a good explanation for the failure of the First Defendant to comply with the Court Order.

[36] I am also of the view that the First Defendant, although not having filed and exchanged Witness Statements, had generally complied with other rules, orders and directions. Rule 26.8(2)(b) provides that the explanation for the failure to comply with the Order must also be a "good explanation" within the meaning of the CPR. Counsel for the First Defendant relied on the unreported decision of the Court of Appeal in ***Villa Mora Cottages Ltd and Anor v Adele Shtern***, delivered December 14, 2007, where Harris J.A decided that both the transferring of the attorney's practice and the difficulty in locating witnesses were plausible explanations for the default in filing Witness Statements in that case.

[37] Counsel for the First Defendant submitted that, in like manner, the First Defendant experienced a period of transition. As a consequence of this transition, the First Defendant underwent "the audit of processes, systems and facilities and the reorganization of same". This further led to difficulties in locating the requisite information on the proposed witnesses.

[38] This, in my view, is a plausible reason for default in compliance with the Order. Clearly Witness Statements could not be prepared until all or some of the witnesses were found. These proposed witnesses, according to Ms. Hyde, were no longer employed to FLOW and one has since died. However, since July, 2015 the First Defendant's attorneys have established contact with the potential

witnesses and they were in the process of preparing Witness Statements. Contact with these potential witnesses was made after the First Defendant was able to contact its attorneys and after the time for compliance with the Order of the Court had passed.

[39] The decision of the Court of Appeal in ***H.B Ramsey & Associates Ltd & Anor v Jamaica Redevelopment Foundation Inc & the Workers Bank*** [2013] JMCA Civ 1 delivered on the 18th January 2013 by Brooks JA, is authority for the proposition that the Court may only grant relief from sanctions if all three requirements of Rule 26.8(2) have been satisfied. On the material before the Court, I am of the view that the First Defendant has cleared this evidential hurdle.

[40] I am also obliged to take Rule 26.8(3) into consideration before exercising any discretion to grant relief from sanction. This rule requires the Court to consider: "whether the failure to comply has been or can be remedied within a reasonable time". Since contact has been made with the potential witnesses, I am of the view that based on the evidence, compliance may be remedied within a reasonable time. I also have regard to Rule 26.8(3)(d) which highlights another consideration, that is: "whether the trial date or any likely trial date can still be met if relief is granted".

[41] The trial dates are 27th March, 2017 to 7th April, 2017, more than three months from the date of this Judgment. The trial dates, in my view, can still be met were the First Defendant's application to be granted. I am satisfied that no real prejudice will accrue to the Claimant by the grant of this Order. Accordingly, the First Defendant's applications for relief from sanctions and for its Further Amended Defence to stand are allowed.

[42] It is therefore ordered that:

a) The time within which the First Defendant is to comply with all the Case Management Conference Orders be varied and extended to 20th December, 2016

b) The First Defendant be permitted to make further amendments to its Amended Defence filed on 7th May, 2012 and the Further Amended Defence of the First Defendant filed and served on 15th July, 2015 be permitted to stand.

c) Costs of the application heard on the 22nd and 23rd September, 2015 to the Claimant to be paid by the First Defendant, such costs to be taxed if not agreed.