[2017]JMSC Civ 30

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2009HCV3759

BETWEEN	**COREY JACKSON**	**CLAIMANT**
AND	**ANNMARIE PHILLIPS (Executrix in the Estate of Barrington Gaynor, deceased, testate)**	**1st DEFENDANT**
AND	**PRISCILLA FISHER (Executrix in the Estate of Barrington Gaynor, deceased, testate)**	**2nd DEFENDANT**

IN CHAMBERS

Miss Renae Barker instructed by K Churchill Neita and company for the claimant

Mr. Leon Palmer instructed by Williams, McKoy and Palmer for the defendants

February 10 and 24, 2017

Application for Relief from Sanctions–Effect of unless order where non-compliance- Sufficiency of explanation

SIMMONS J

Background

[1] The claim in this matter is for damages for negligence arising from a motor vehicle accident that occurred on the 9th June 2009. The then defendant, who is now deceased, failed to file his defence within time. An order was made extending the time for doing so. His affidavit in support of that application

revealed that at the time when the claim was served he was suffering from Lou Gehrig's disease and was extremely ill.

[2] On the 23rd April 2012 when the matter was scheduled for a Case Management Conference (CMC), it is noted that the defendant was deceased. The matter was adjourned on three subsequent occasions for the defendant's Attorneys-at-Law to file proof his death.

[3] On the 7th January 2014 Annmarie Phillips and Priscilla Fisher were substituted as the defendant's representatives for the purpose of continuing the claim. That application was made by the claimant.

[4] On the 24th September 2014 a further CMC was adjourned as the claimant who had amended his Statement of Case had neglected to serve the defendants with the relevant documents.

[5] On the 11th March 2015 the claimant's application for an extension of time to serve the amended documents was granted. On the 28th September 2015 the Case Management Conference was finally held. On the 25th May 2016 a Further Amended Particulars of Claim was filed.

[6] At the Pre Trial Review that was held on the 31st January 2017 the defendants were given permission to file and serve a defence if necessary. The order also stated that unless the defendants complied with all the CMC orders on or before the 9th February 2017 their Statement of Case would stand as struck out. Neither the defendants nor their Attorneys-at-Law were present at the Pre Trial Review. A further Pre Trial Review was scheduled for the 10th February 2017.

[7] On that date the claimant was given permission to file and serve a Reply to the amended defence and supplemental witness statements if necessary by the 24th February 2017.

[8] Miss Barker pointed out that the defendants had not filed their List of Documents or Listing Questionnaire in the prescribed time and that consequently their

Statement of case had been automatically struck out. Mr. Palmer sought to explain the reason for the failure in an effort to save his clients' case. In short, he said that he had no documents to disclose and was of the view that in those circumstances the List of Documents was unnecessary. Having been reminded by the court, that a formal application was necessary, anapplication for Relief from Sanctions was made.

[9] That application was supported by the affidavit of Mr. Leon R. Palmer the Attorney-at-Law with conduct of the matter. Mr. Palmer stated that he did not file the Listing Questionnaire and the List of Documents as he was of the view that it was unnecessary since "there were no substantial matters arising from those documents". He indicated that the failure was entirely his fault and apologised for the omission. He said that *"the omission was as a result of the Defendants having no documents and my inadvertence and was not intentional"*. He also stated that he is *"now aware that whether there are no matters arising from the Questionnaire or there are no documents to file, the forms should be filed in accordance with the orders made".*

[10] Mr. Palmer submitted that the omission is not so serious so as to result in any prejudice to the claimant's case. He also stated that it will not affect the trial date as the only document that the defendants had in their possession was the Grant of Probate which had already been disclosed to the claimant. He submitted that costs would be an appropriate remedy for the infraction.

[11] Miss Barker opposed the application. She submitted that rule 28.8 (2) of the ***Civil Procedure Rules (CPR)*** imposes a duty on all parties to make disclosure. She also submitted that the defendants had failed to comply with rules 26.8 (1) and (2) as the application had not been made promptly and no good explanation has been made for the delay. She also submitted that although Counsel had indicated that the failure to comply was not intentional his statement that he thought that compliance with the particular orders was unnecessary does not support that position.

[12] Reference was made to ***H.B. Ramsay & Associates Limited and others v Jamaica Redevelopment Foundation Inc. & another*** [2012] JMSC Civ 64 in support of the above submissions. In that case Fraser J stated that the requirements of rule 28.8 (1) and (2) are mandatory and must be complied with before the court can determine whether its discretion ought to be exercised in favour of the applicant.

[13] Counsel also referred to ***The Attorney General v Universal Projects Limited*** [2011] UKPC 37, in which itwas stated that *"oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation".* Miss Barker stated that no good explanation was given for the failure to fully comply with the Case Management Conference orders and the defendants have not generally complied with the orders of the Court.

Discussion

[14] Rule 26.7(2)of the ***CPR*** prescribes the remedy where a party has failed to comply with an order of the Court. It 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".*

[15] Rule 26.8 of the ***CPR***which governs applications for relief from sanctions states:-

> *"(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.*

[16] In this matter the defendants have failed to comply with the "unless" order made by Pusey J on the 31st January 2017. That order stated that "*unless* the *defendants comply with all the Case Management Conference orders made on the 28th September 2015, on or before the 9th February 2017, then the defendants' Statement of Case do stand struck out"*. Among the CMC Orders was that which spoke to the disclosure of documents. Rule 28.8 (2), (3), (4) and (5) of the ***CPR***state:-

*"(2) Each party **must** make, and serve on every other party, a list of documents in form 12.*

(3) The list must identify the documents or categories of documents in convenient order and manner and as concisely as possible.

(4) The list must state-

(a) what documents are no longer in the party's control;

(b) what has happened to those documents; and

(c) where each such document then is to the best of the party's knowledge, information or belief.

(5) ***It must include documents already disclosed****."*

[My emphasis]

[17] It has been recognised that an "unless" orderimposes a special responsibility on the party to whom it applies. Such orders, according to Brooks J (as he then was) *"are to be given priority by those affected by them and should be complied with precisely".* The learned Judge also stated the Court should be careful not to send *"contrary signals to litigants and their attorneys-at-law"* when dealing with matters of this nature. The view has also been expressed that when such an order is made *"it indicates that time is running out for the erring litigant and he really needs to do what is required of him by the order".* [1]

[18] In ***R.C. Residuals Ltd. (formerly Regent Chemicals Ltd.) v Linton Fuel Oils Ltd.*** (2002) Times, 22 May Kay L.J described the seriousness of unless orders in the following terms:-

> *"The sooner parties and their advisers were disabused of the idea that an unless order meant doing something on the last day the better. It was the obligation of parties to comply with unless orders as soon as possible and no later than the deadline provided. In that way the administration of justice was best effected."*

[19] In ***Hytec Information Systems v Coventry City Council*** [1997] 1 W.L.R. 1666Ward L.J. in his definition of the nature of "unless' orders said:-

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[1] Per Sykes J in Elenard Reid and another v. Nancy Pinchas and others (unreported) Supreme Court, Jamaica claim no. C.L. 2002/R031 judgment delivered 27 February 2009 at paragraph 26

"In the light of my observations that each case really should be cited upon its own facts, it may be otiose to try and encapsulate what I understand to be the philosophy underlying this approach. It seems to me it is as follows.

(1) ***An unless order is an order of last resort. It is not made unless there is a history of failure to comply with other orders. It is the party's last chance to put his case in order.*** *(2) Because that was his last chance, a failure to comply will ordinarily result in the sanction being imposed. (3) This sanction is a necessary forensic weapon which the broader interests of the administration of justice require to be deployed unless the most compelling reason is advanced to exempt his failure. (4)* ***It seems axiomatic that if a party intentionally or deliberately (if the synonym is preferred) flouts the order then he can expect no mercy.*** *(5)* ***A sufficient exoneration will almost inevitably require that he satisfies the court that something beyond his control has caused his failure to comply with the order.*** *(6) The judge exercises his judicial discretion in deciding whether or not to excuse. A discretion judicially exercised on the facts and circumstances of each case on its own merits depends on the circumstances of that case; at the core is service to justice. (7) The interests of justice require that justice be shown to the injured party for the procedural inefficiencies caused by the twin scourges of delay and wasted costs. The public interest in the administration of justice to contain those two blights upon it alsoweighs very heavily. Any injustice to the defaulting party, though never to be ignored, comes a long way behind the other two".*[2]

[My emphasis]

[20] The decision of the Court of Appeal in ***H.B Ramsey & Associates Ltd &another 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 position that all the requirements in rule 26.8 (2) of the CPRhave to be satisfied before the exercise of the court's discretion can be invoked. This was also

[2]Pages 1674 - 1675

recognised in ***The Attorney General v Universal Projects Limited*** (supra) where a similar provision in Civil Procedure Rules of Trinidad and Tobago were described by the Privy Council as pre-conditions. (see also ***Francis v Columbus Communications Jamaica Limited (trading as FLOW) and another***[2016] JMSC Civ 218 and ***Jamaica Public ServiceCompany Limited v Charles Vernon Francis and another*** [2017] JMCA Civ 2).

Was the application made promptly?

[21] The application which was made the day after the "unless" order came into effect was supported by the Affidavit of Leon R. Palmer Attorney-at-law which was sworn to on the 10th February 2017. The word "promptly" is not defined in the ***CPR***. In ***Kristin Sullivan v Rick's Café Holdings Inc T/A Rick's Café(No 2)*** (unreported) Supreme Court Jamaica claim no. 2007 HCV 03502 judgment delivered 15 April 2011, Sykes J stated:-

> *"Promptly is not defined in the rules, however, it is obvious that the context in which this adverb is used in the rules conveys the sense of 'without delay', 'quickly' or 'at once".*

It is however clear that in assessing whether a party has acted promptly, the court will have regard to the particular circumstances of each case. In ***H.B Ramsey & Associates Ltd &another v Jamaica Redevelopment Foundation Inc & the Workers Bank***[2013] JMCA Civ 1 Brooks JA stated:-

> *"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".*[3]

[22] In ***Paul White v Homel Grant and Carlos Daley***(unreported), Supreme Court, Jamaica Suit No. C.L. 1993/W127,judgment delivered 7April 2006 an application for relief from sanctions that was made two days after the "unless" order striking

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[3]Paragraph 10

out the defendants' statement of case came into effect was found to have been made promptly.

[23] In this matter I find that that the application was made promptly.

Was the failure to comply intentional?

[24] Having satisfied the first threshold test it must now be considered whether the defendants' failure to comply with the order of Pusey J was intentional.

[25] Counsel has pleaded ignorance of the rules pertaining to the filing of the List of Documents and Listing Questionnaire. He stated that the omission was unintentional. Counsel has found himself in an invidious position asit is obvious that he took a conscious decision, albeit not a sound one, not to file the documents in question. This decision in my view was clearly in breach of the Court's order. In the circumstances, Iagree with Miss Barker that counsel's statement that he did not think that the documents were necessary and his submission that the failure to comply with the Court's order was unintentional, cannot be reconciled.

[26] In addition, rule 28.8 (5) of the ***CPR*** clearly states that the List of Documents should include those already disclosed.

[27] In the circumstances, I find that the failure to comply was intentional.

Is there a good explanation for the failure?

[28] In this matter, Counsel has accepted responsibility for the defendants' failure to comply with all of the CMCorders. No evidence has been presented by the defendants themselves on this point. Where delay is caused by inadvertence or administrative difficulties the general rule is that that is not a sufficient explanation (see ***Elenard Reid and others v Nancy Pinchas and others*** (unreported)) Supreme Court, Jamaica claim no. C.L. 2002/R031 judgment delivered 27 February 2009.

[29] This issue was dealt with by Phillips JA in ***University Hospital Board of Management v Hyacinth Matthews*** [2015] JMCA Civ 49. The learned Judge of Appeal in her analysis of the circumstances began by making the point that*"counsel has a duty to act in the best interest of his client".*In that case the Court of Appeal upheld the decision of Batts J to grant relief from sanctions where the respondent failed to attend court on time. Briefly, the facts in that case were that the respondent having failed to attend court due to illness on a number of occasions was visited with an "unless" order which stated that if she did not attend on the new trial date she would not be allowed to give evidence. That order was made on the 24th March 2013 and the trial was adjourned to the 17th March 2014. Counsel neglected to inform her of the trial date until 10:30 a.m. on the day of trial. She arrived at court at approximately 11:30 a.m. the court having been adjourned at 11:00 a.m.

[30] The Court of Appeal agreed with Batts J that her failure to attend Court as ordered was unintentional. Phillips JA who delivered the judgment of the Court said that the finding of the learned Judge could not be faulted. She also went on to state that in circumstances where the respondent had not been present when the unless order was made and was only advised of the trial date at the eleventh hour *"there was no evidence to suggest tardiness or lack of due diligence on the part of the respondent herself..."*

[31] In the present case, it is my view that counsel has not acted in the best interest of the defendants. The question that arises is whether in these circumstances they should *"bear the draconian sanction"* of having their claim struck out due to their Attorney's misinterpretation of the rules?

[32] The court does not usually distinguish between an attorney and his client. This is encapsulated in the definition of a party in rule 2.4 of the ***CPR*** as including *"both the party to the claim and any attorney-at-law on record for that party unless any rule specifies or it is clear from the context that it relates to the client or to the attorney-at-law only".*

[33] The position of counsel vis- a- vis his client was addressed by the court in ***Hytec Information Systems v Coventry City Council***(supra)

> *"**Ordinarily this court should not distinguish between the litigant himself and his advisers**. There are good reasons why the court should not: first, if anyone is to suffer for the failure of the solicitor it is better that it be the client than another party to the litigation; secondly, the disgruntled client may in appropriate cases have his remedies in damages or in respect of the wasted costs; thirdly, **it seems to me that it would become a charter for the incompetent (as Mr. MacGregor eloquently put it) were this court to allow almost impossible investigations in apportioning blame between solicitor and counsel on the one hand, or between themselves and their client on the other. The basis of the rule is that orders of the court must be observed and the court is entitled to expect that its officers and counsel who appear before it are more observant of that duty even than the litigant himself.***
>
> *In my judgment, on the facts of this case, the defendant cannot escape the quite manifest failings of counsel who was instructed on its behalf. She displayed, as I have said, an arrogant disdain to the court's authority. Her sending her pupil was in my judgment contumaciously disrespectful. She had manifestly failed to fulfil her duty to her client and her duty to the court, to settle particulars which were intelligible and her client must pay the penalty for that failure."*[4]

[My emphasis]

[34] A similar issue was also addressed by Sykes J in ***Kristin Sullivan v Rick's Café Holdings Inc T/A Rick's Café(No 2)*** (supra) where the action was struck out as a result of counsel's failure to file the core bundle on time. The court found that counsel's explanation that his failure to comply with the "unless' order was due to

[4]Page 1675

his heavy workload was not a good one. The learned Judge made the following observations:-

> *"The explanation of counsel and the entreaty not to visit her counsel's omissions on her would make policing of the new rules impossible.* ***Taken to its ultimate conclusion, every litigant could simply blame his lawyer or the lawyer could easily say that he is to be blamed and the court would, as a matter of course, overlook the breach and grant relief.*** *Surely this is not the new culture being promoted by the CPR. If that were the case then [the] CPR would not be worth the paper that it is written on".*[5]

[My emphasis]

[35] It is clear from the authorities thatthe general rule is that, the actions or transgressions of counsel will be attributable to his client. In most instances, the client will be the one who pays the price.

[36] In this matter counsel who was engaged by the defendants would obviously be charged with advising them on legal matters. It is reasonable to assume that they would be guided by the opinion of counsel who has the professional qualifications to deal with matters such as this. He would therefore be expected to know the rules and take the necessary steps to ensure that his client complies with them.

[37] The circumstances in this case are therefore in my view, different from that in ***University Hospital Board of Management v Hyacinth Matthews*** (supra).

[38] Having considered the circumstances, it is my view that the present case is not one in which the court should make a distinction between the defendants and their legal advisor. The issue of the duty to disclose and the way in which it is to be done is purely a matter of law which falls squarely within the ambit of

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[5]Paragraph 29

counsel's knowledge and expertise. There is also no evidence that the defendants had a different view on the matter. They would have, in my view, been entitled to depend on counsel's advice in such a matter. There is therefore no basis on which to make a distinction between counsel and the defendants.

[39] It must now be determined whetherCounsel's explanation is a good one? In ***The Attorney General v Universal Projects Limited [***2011] UKPC 37 Lord Dyson who delivered the judgment said:-

> *"if the explanation for the breach ...connotes real or substantial fault on the part of the defendant, then it does not have a "good" explanation for the breach. 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".*

[My emphasis]

[40] In this matter, counsel has in effect stated that he did not obey the court's order in its entirety as he was of the view that it was unnecessary to do so. The rules pertaining to disclosure are clearly set out in the***CPR.*** Those rules address situations in which there are no documents to disclose as well as those where all documents have already been disclosed. In those circumstances, I am unable to accept counsel's explanation as being a good one.

Have the defendants generally complied with all other rules, practice directions, orders and directions?

[41] The history of this matter hasrevealed that there was some delay on the part of the now deceased defendant which resulted in the defence being filed on the 10th May 2010. There is however a medical report which speaks to him being ill from 2009. On the 28th April 2012 when the matter was scheduled for a CMC the

Court was advised that Mr. Gaynor had died. There were three subsequent adjournments in order for counsel to obtain proof of his death.

[42] By Order made on the 7th January 2014 the defendants were substituted for the deceased. A CMC was held on the 28th September 2015 and several orders made. A further amended Claim Form and Particulars of Claim which took into account a more current assessment of the claimant's medical condition that was contained in a further report of Dr. Dundas were served on the defendants in June 2016.

[43] At the Pre trial Review it was revealed that the defendants had not complied with the CMC orders and they were given until the 9th February 2017 to do so failing which the "unless" order would take effect. The Amended Defence and the Witness Statement of the defendants' witness was filed on the 7th February in compliance with the order. On the 10th February 2017, the List of Documents which should have been filed on the 4th December 2015 and the Listing Questionnaire that should have been filed on the 4th November 2016 had still not been filed. I have also noted that the claimant's witness statement which ought to have been filed by the 29th April 2016 was filed on the 25th May 2016.

[44] In assessing whether there has been general compliance on the part of the defendant I have noted that Case Management Conferences were adjourned on three occasions in order for the court to be provided with evidence of Mr. Gaynor's death. I have also noted that although he died on the 19th March 2011 it was not until two years later that evidence of his death was provided to the claimant's Attorney-at-Law. The Death Certificate was issued on the 23rd March 2011. They were also advised in July 2013 that a Grant of Probate had been made in the deceased estate. The Grant is dated the 22nd November 2012.

[45] I am also mindful of the fact that an executor gets his or her authority from the Will and need not await the Grant of Probate to assume various responsibilities. Having considered the preceding sequence of events I am of the view that the

defendant, who was represented by counsel and indeed his estate which was represented by the same counsel have not been diligent in their defence of the matter.

[46] I have also noted that the Death Certificate had been issued approximately one year before the first CMC was adjourned. This was followed by three other adjournments. That scenario to my mind cannot be equated with general compliance. The failure to provide proof of the deceased's death delayed the progress of the claim for approximately two years.

[47] I therefore find that the defendants did not generally comply with all other rules, orders and directions of the Court.

[48] In the circumstances, the application for relief from sanctions is refused. Judgment is therefore entered for the claimant for damages to be assessed.