[2022] **JMSC Civ. 85**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CONSOLIDATED CLAIMS NO. 2013HCV03257 and 2013HCV03258

BETWEEN	**DESMOND BLAIR**	**1ST CLAIMANT**
AND	**MICHAEL GRANDISON**	**2ND CLAIMANT**
AND	**DSP JOHN MORRIS**	**1ST DEFENDANT**
AND	**DET SGT RALPH GRANT**	**2ND DEFENDANT**
AND	**ATTORNEY GENERAL**	**3RD DEFENDANT**

IN CHAMBERS

Harrington McDermott instructed by Destiny Bennett and Matthew Phillips of Kazembe Law for Claimants

Mr Louis Jean Hacker instructed by the Director of State Proceedings for the Defendants

Heard: March 8th, 2022 and March 31, 2022

Application for relief from sanctions and application to strike out – primary considerations – good reason – consequences of failure to comply with 29.11(2), rule 16.2 (4) defendant's right to make submissions – rule 12.13

HUTCHINSON, J

INTRODUCTION

[1] There are two applications before me in this matter. The first in time was filed by the 3rd Defendant on the 29th of November 2021 and is an application 'to strike out claimant's statement of case.' It is supported by an affidavit sworn to by Faith Hall and outlines the failure of the Claimant to file their witness statement by the 8th of January 2021. It was also noted that this was not done until September 2021.

[2] While these failures were not disputed by the Claimant, the application was opposed and Counsel submitted as a preliminary point that it ought not to be heard, neither should the Defendant be heard from as by failing to file the Form 8A referred to at Rule 16.2(4), they had lost all opportunity to address the Court. Although this was raised as a point in limine, it is my intention to address the rule 16.2 (4) issue later.

[3] The 2nd application was filed by the Claimants on the 2nd of December 2021 and it was supported by an affidavit of Ruthann Campbell. The Claimants asked the Court to grant relief from sanctions and requested that the witness statements filed out of time be permitted to stand. It should be noted that other affidavits were filed by Ms. Campbell in respect of the matter, the final version had a number of exhibits attached and was filed on the 15th of December 2021. The Claimants have asked that this affidavit be considered as replacing those which had been filed before.

SUMMARY OF SUBMISSIONS

[4] In their submissions asking for the Claimant's statement of case to be struck out the Defendant's relied on the recent decision of ***Oneil Carter and An'or v Trevor South and An'or [2020] JMCA Civ 24*** in which the Court provided careful guidance on the application of Rule 29.11 of the CPR and the sanction to be applied where witness statements have not been filed in compliance with this rule. Specific reliance was placed on paragraphs 32 to 34 of that decision which Counsel argued was directly applicable to the instant case.

[5] The Defendant's also highlighted the dicta of F Williams JA in ***Garbage Disposal and Sanitation System Limited v Noel Green and others [2017] JMCA App 2*** where his Lordship affirmed that the sanction under rule 29.11(2) takes effect unless relief from sanctions is obtained from the Court. Mr Hacker argued that the Claimants had already been in default in the filing of their statements and had been granted a reprieve on the 10th of July 2020, when they were given until the 8th of January 2021 to file their witness statements but did not comply until the 17th of September 2021. The Court was asked to rule that the Claimants could not rely on these statements as their situation was no different from that of the Defendants who had been precluded from filing their defence as a result of their failure to comply with the timelines.

[6] In submissions made on behalf of the Claimant, Mr McDermott sought to persuade the Court that this is an appropriate case for the Court to grant relief. He made reference to the decision of ***Meeks v Meeks [2020] JMCA Civ 7*** in which the Court indicated that what amounts to promptness is significantly dependent upon the circumstances of the particular case. In that decision, the Court also reviewed ***Ray Dawkins v Damion Silvera [2018] JMCA Civ 25*** in which the application for relief was made approximately a year after the deadline for compliance. It was noted by that Court that the fact that there had been partial compliance and in effect no negative delays to the matter proceeding to trial were circumstances which ought to be taken into consideration.

[7] Counsel also made reference to the authority of ***Vicky Gough v Varrion Falconer and Natoya Peterkin [2021] JMSC Civ 25*** in which the Defendant's challenges in obtaining legal representation and complying with the Court's orders as a result of the pandemic were accepted as good reason and relief granted. He asked that a similar approach be adopted in the instant case. Reference was also made to the reliance which the Claimants attorneys had placed on the possibility of a settlement based on exchanges with Counsel from the 3rd Defendant's Chambers.

[8] Mr McDermott submitted that the delay was not intentional and asked the Court to accept the evidence of Ms. Campbell that the pandemic had resulted in the closure of airports locally as well as in Canada where the Claimants' principal attorney resided. He argued that the operational aspects of the firm locally had also been impacted by lockdowns, curfews and no movement days and the situation was further compounded by the departure from the firm of the local attorney who had been assisting in the matter. While it was conceded that the Claimant did not have a blemish free record in respect of compliance with orders, Mr McDermott submitted that there had been general compliance to a greater extent.

[9] In concluding his submissions, Counsel also asked the Court to find that the circumstances of this case satisfied the requirements of Rule 26.8(3). In support of this contention he asserted that a refusal of the grant would not be in the interest of the administration of the justice as the Claimants had committed a 'technical breach' which has since been remedied. Reference was also made to the fact that the evidence clearly showed that the failure was that of the attorneys and all effort had since been made to have the 'breach' remedied in a reasonable time to allow for the trial to proceed.

[10] In addressing the effect that a grant or refusal of leave would have on the parties, Mr McDermott submitted that the consequences for the Claimant would be far greater as they would be precluded from providing their evidence at trial a situation which would adversely impact their effort to 'reap the fruit' of their default judgment. He submitted that no prejudice would be occasioned to the defendants but if this were to occur, the Court could limit the period for which they would be liable to pay interest.

APPLICABLE LAW / ANALYSIS

[11] In my examination of both of these applications I carefully considered Rule 26.3(1) which provides that the Court, on its own motion, has the power to strike out a statement of case if there has been a failure to comply with a rule etc. In their

application the Defendant have asked that the powers under Rule 26.3(1)(a) be exercised. This provision states as follows;

> *In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –*
>
> *(a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;*

[12] The Court of Appeal decision of ***Oneil Carter*** which addresses the application of rule 29.11 where witness statements have not been filed by the stipulated deadline was also analysed and the relevant principles were extracted as follows;

> *[32] CPR rule 29.11, states as follows: "(1) Where a witness statement or a 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. (2) The court may not give permission at the trial unless the party asking for permission has a good reason for not previously seeking relief under the rule 26.8."*
>
> *[33] The appellants are correct in their submission that the sub-rules comprised in rule 29.11 should be read together as one rule. The phrases, "unless the court permits", in sub-rule 1, and "the court may not give permission", in sub-rule 2, relate to the seeking of relief under rule 26.8. Furthermore, the words, "at the trial", in rule 29.11(2) are contextual, since a court may grant permission in different contexts and at different stages.*
>
> *[34] The sanction for failing to file in the time allotted takes effect unless the court permits. The permission of the court can be achieved in an application for relief from sanctions under rule 26.8. So, rule 29.11 pre-supposes relief will be sought under rule 26.8 before trial. If it is not sought before trial, permission may be sought at trial but it will not be granted unless the additional hurdle is crossed, which is to show good reason why it was not sought before under rule 26.8. The import is that applications relating to pre-trial orders are to be dealt with, in the main, prior to trial. That, in my opinion, is the plausible meaning of rule 29.11.*

[13] At paragraph 33 of the judgment, the Court made it clear that the words 'at a trial' as used at 29.11(2) are contextual as a court may grant permission in different contexts or at different stages, in my opinion these words present a clear indication that 'a trial' would also include an assessment hearing which is a trial of quantum

and as such I am unable to agree with Mr McDermott's submission that the language here is specific to a trial as a whole and not an 'assessment hearing'.

[14] I also noted that at paragraph 34 of the decision it was emphasised that the sanction for the failure to file in time takes effect unless the Court permits. The learned judge outlined that this permission can be achieved in an application for relief from sanction, she also stated that rule 29.11 (2) pre-supposes that the application for relief will be sought before the trial/assessment date. If the date arrives, permission will not be granted unless good reason is shown as to why relief was not sought prior to that date under Rule 26.8.

[15] I found that in these circumstances, the Claimants having filed their application at the eleventh hour placed themselves in a situation where they could not have had a hearing date before the assessment on the 7th of December 2021. As such on that date, good reason would have had to be given as to why there had been no application for relief prior to then. There was no evidence provided by the Claimant on the 7th of December 2021 in which a good reason was provided for relief not being sought previously and as such no permission was granted.

[16] The Claimant was then faced with two challenges as not only were they at risk of their case being struck out on the basis that they had failed to comply with the Court's orders; but they had also failed to seek relief prior to the hearing date and had also failed to provide a good excuse for this. In arriving at my decision, I considered it prudent to determine whether the Claimant's late application could still meet the threshold for relief to be granted.

[17] The framework against which the submissions of Counsel for the Claimant fall to be considered is outlined at Rule 26.8 of the CPR which provides as follows;

> *(1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be (a) made promptly; and (b) supported by evidence on affidavit.*
>
> *(2) The court may grant relief only if it is satisfied that (a) the failure to comply was not intentional; (b) there is a good explanation*

for the failure; and (c) the party in default has generally complied with all other relevant rules, practice directions orders and directions.

(3) In considering whether to grant relief, the court must have regard to (a) the interests of the administration of justice; (b) whether the failure to comply was due to the party or that party's attorney-at-law; (c) whether the failure to comply has been or can be remedied within a reasonable time; (d) whether the trial date or any likely trial date can still be met if relief is granted; and (e) the effect which the granting of relief or not would have on each party.

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

[emphasis supplied]

[18] The Court of Appeal decision ***HB Ramsay & Associates Ltd etal v Jamaica Redevelopment Foundation Inc etal [2013] JMCA Civ 1*** is authority for the position that all the requirements of Rule 26.8 (1) and (2) must be satisfied before the Court's discretion can be exercised on an Applicant's behalf. In order to arrive at a decision on this application the Court must consider whether these requirements are satisfied by the circumstances present herein.

Was the application made promptly – Rule 26.8 (1)

[19] Rule 26.8(1)(a) and (b) outline that the application must be made promptly and supported by evidence. It is not in dispute that the application was filed on the 2nd of December 2021 almost 12 months after the date by which the statement should have been filed and almost 3 months after the statements were filed. In these circumstances I fully understood the defendant's description that the application was filed in response to their application to strike out. I take note however that in considering this issue, various Courts have found that whether the application was prompt would also depend on the circumstances and applications filed after a similar or longer period of time have been favourably considered. In relation to 26.8(1)(b) the application is supported by evidence from a paralegal employed to the Claimant's attorneys who I am satisfied possessed sufficient familiarity with the file and the circumstances affecting same.

[20] In addition to the affidavit evidence, I carefully considered the guidance provided by the Courts in cases such as ***Ray Dawkins*** and ***Meeks v Meeks***, as well as the submissions made by respective Counsel. I formed the opinion that the delay in filing the application had to be viewed in circumstances where the witness statement had been filed and served almost 3 months before the date for assessment a situation in which it could be argued that it was still possible to meet the assessment date.

Not intentional

[21] While it should not be concluded that I endorse Counsel's non-compliance with orders of the Court, the evidence contained in the affidavit of Ms Campbell revealed that there had been discussions raised between the parties as to the possibility of settling the matter. I also noted that the record reveals that the Court was informed on three separate occasions being the 12th of June 2018, 28th of February 2019 and the 10th of July 2020 that the parties were so engaged.

[22] Although the 3rd Defendant has taken issue with this, I noted that the details of the minute of order for these dates reveal that with Counsel for both sides in attendance, this was the endorsement made by the Court, a situation which I believe could only have been informed by a mutual indication from Counsel. In relation to the letters exhibited, although the contents do not expressly make reference to any details of settlement, they provide tacit confirmation for the position that this had in fact been raised between the parties. In these circumstances, it is clear that there had been great emphasis placed on the possibility of bringing this matter to an end by settling same and I accept that this situation along with the impact of the pandemic resulted in the statement being filed outside the stipulated period. As such, I was satisfied that the Claimants had not intentionally failed to comply with the Court's order.

Good Explanation

[23] The explanation which has been advanced indicates that the failure to comply with the date for filing was not the fault of the Claimants themselves but as a result of challenges which were being experienced by their Attorney. The Court is aware that in March 2020, the island was impacted by the covid19 pandemic. This resulted in the airports being closed and similar restrictions were imposed in other nations, it is the evidence of the affiant that Canada where Counsel with conduct resides was one such jurisdiction where similar restrictions existed. The challenges to Counsel at the firm in terms of their numbers and ability to work during the lockdown, curfews and no movement days were also highlighted. I also noted that there were challenges in putting things in place to interact with the Claimants themselves in obtaining the instructions to place in the witness statements.

[24] In ordinary circumstances, while the period of time which elapsed between the order of the Court and the filing of the statement would have been far outside of a period which could be considered reasonable, these were no ordinary circumstances and I accept that they would have had an adverse effect on the Claimants ability to comply with these orders, particularly in circumstances where the principal attorney was outside of the jurisdiction and Counsel who had been assisting had moved on from the firm. While I have accepted the explanation as a good one in the circumstances, I also considered the dicta of Phillips JA in ***University Hospital Board v Hyacinth Matthews*** **[2015] JMCA Civ 49** to be useful as well as applicable, where she stated;

> *[49] Batts J referred to a powerful statement of Sykes J in Gloria Findlay v Gladstone Francis Suit No F 045/1994 delivered 28 January 2005, which I am of the view warrants repetition here, being apt to the circumstances of the case at bar. He said: "I recognize that the good administration of justice requires that cases be dealt with expeditiously but this has to be measured against the risk of injustice to a litigant because of his lawyer's default, particularly where the defendant did not personally contribute to the state of affairs that has come about. The administration of justice while receiving a blow in this case will not be undermined..."*

[25] As such, I am persuaded on the evidence presented that a good explanation has been provided for this failure.

Has the Applicant/Claimant generally complied with all other rules, practice directions, orders and directions?

[26] I then considered whether there had been a pattern/ history of failures on the part of the Claimant. My examination of this issue brought into focus two early situations, the first was on the 12th of March 2014 when the Claimants failed to attend for an application to enter default judgment. The second was on the 28th of April 2016 where there was a joint application for an adjournment of the hearing of the Claimant's application to enter default judgment.

[27] The case management orders which were made in July 2020 were then considered. In addition to the late filing of the witness statements, the lists of authorities were to be filed by both sides by the 30th of July 2021, neither party complied with this order but the Claimants filed written submissions in which their authorities were stated on the 16th of November 2021. A notice of intention with the documents on which they intended to rely was filed on the same date and the Defendants filed a notice of objection in response.

[28] Having considered these circumstances, I formed the view that while the Claimants had generally complied with the orders made prior to July 2020, the 'failures' after that date when viewed in the context of the challenges experienced by Counsel did not in my opinion outline a history of failing to comply with the Courts' orders. That having been said, I found that the threshold test has been crossed and it would then be necessary to consider the factors set out in rule 26.8(3) of the CPR per ***Kenneth Hyman v Audley Matthews and Derrick Matthews and The Administrator General for Jamaica v Audley Matthews and Derrick Matthews*** **SCCA Nos 64** and 73/2003 judgment delivered 8 November 2006.

The interests of the administration of justice

[29] The consolidated claims relate to the arrest of both Claimants between the 5th and 28th of June 2005 on suspicion of murder among other later charges. They were detained for a period of 3 weeks and 4 weeks respectively before being placed before the Court. Each individual remained in custody for months before eventually being granted bail. There were a number of Court hearings in the matter and they also had to report to the police station. The charges were eventually dismissed in the Circuit Court in 2012. The claims allege not only malicious prosecution and false imprisonment but also physical abuse and injuries/ailments as a result of the conduct of the police officers.

[30] On the filing and service of the claim, no defence was filed within the stipulated period and an application was made for an extension of time to do so. This application was denied on the 27th of July 2016 and the matter set down for assessment of damages. A review of the record after that date revealed that a number of adjournments were granted, several of which were on the basis that the parties were making efforts to have the matter settled. In light of my finding that the non-compliance which occurred was as a result of challenges being experienced by Counsel for the Claimant, I am persuaded that refusal of relief would not be in keeping with the interests of the administration of justice or the overriding objectives. This is especially the case given the ramifications for the Claimants as any award of damages which would be made would be adversely affected by the absence of evidence in that regard.

Whether the failure to comply was due to the party or that party's attorney-at-law

[31] Based on the foregoing discussion, I am satisfied that the 'failure' was entirely attributed to the Claimant's attorney.

Whether the failure to comply has been or can be remedied within a reasonable time

[32] The witness statements, notices of intention and submissions on quantum were filed between September and November 2021.

Whether the trial date or any likely trial date can still be met if relief is granted

[33] While the filing of the notices of intention and submissions occurred very close to the hearing date of December 7th, 2021, the witness statements were filed just under 3 months before the assessment date. It is arguable that the 7th of December could still have been effective but in any event, the matter would have been ready to proceed on any other date immediately following.

The effect which the granting of relief or not would have on each party

[34] In conducting this balancing exercise, I was satisfied that the refusal of relief would have had a more deleterious effect on the Claimant as if the statements are not permitted to stand, the Claimants would be deprived of the opportunity to make a full presentation of their loss to the Court on the issue of the quantum of damages to be awarded. I was also persuaded that while it meant that the defendants had to wait an additional period for the matter to be disposed of, they had also failed to fully comply with all the orders made and suffered no significant prejudice in this regard. Any issue of prejudice could however be addressed by the capping of the period for which interest would be awarded.

Conclusion

[35] In light of the foregoing factors, I was satisfied that there is an appropriate basis to grant the Claimants' application for relief from sanction and in the circumstances the defendant's application to strike out the claim is refused.

Preliminary point

[36] Having stated thus, this is not the end of the matter as I must now address the submission that the defendant should not have been heard and ought not to be heard at the assessment hearing. In support of this position, Mr McDermott made reference to the decision of ***YP Seaton and Associates Co Ltd v Dennis Lawson [2021] JMCC COMM 46*** as well as Rules 12.13 and 16.2 (4) the provisions of which states as follows;

> *12.13 Unless the defendant applies for and obtains an order for the judgment to be set aside, the only matters on which a defendant against whom a default judgment has been entered may be heard are –*
>
> *(a) the assessment of damages, provided that he has indicated that he wishes to be heard by filing a notice in form 8A pursuant to rule 16.2(4).*
>
> *(b) costs;*
>
> *(c) the time of payment of any judgment debt;*
>
> *(d) enforcement of the judgment; and (d) an application under rule 12.10(2)*
>
> *16.2(4) Where a defendant against whom a default judgment is entered under this rule wishes to be heard on the issue of quantum he must within 7 days of receipt of the notice under rule 16.2(2) or 16.2(3) file and serve a notice in form 8A.*

[37] Upon examining this issue, I note that Rule 16.2(4) outlines the approach to be taken by the defendant who wishes to be heard and the time frame within which he must act upon receipt of the notice under 16.2(2)(c) or 16.2(3). My analysis of the ***YP Seaton*** case revealed that while the circumstances were similar, as the applicant had sought to rely on evidence produced at the assessment hearing, in that case a notice had been served on the defendant but they had failed to file a form 8A, the relevant facts are outlined in the dicta of Palmer-Hamilton J where she stated;

> *[26] Counsel has not asserted that rule 16.2(2) or 16.2(3) of the CPR were not complied with. Moreover, the Claimant's Counsel filed a notice of adjourned hearing on September 22nd, 2021. It provides as follows;*
>
> *TAKE NOTICE that the Assessment of Damages Hearing which was fixed for hearing on April 15th, 2021 has been adjourned to October 14th, 2021 at 10 am at the Supreme Court, King Street, Kingston'*
>
> *[27] It is without doubt that the defendant's counsel received a copy of this document on September 22,2021. It bears a time stamp with his signature. On the day of the assessment of damages hearing it became evident that a notice in form8A had still not been filed.*
>
> *[28] An explanation was sought from counsel regarding the non-compliance and the court was not provided with a satisfactory answer. It was therefore determined that the defendant could only be heard on matters concerning costs, time to pay the judgment debt and enforcement of the judgment debt.*

[38] The sequence of events in respect of the hearing assessment in the instant case is outlined in the order of Henry-McKenzie J made on the 10th of July 2020 where she stated as follows;

> *Assessment of Damages is adjourned to December 7, 2021 at 10:00 a.m.*
>
> *Witness Statement to be filed on or before January 8, 2021*
>
> *Parties are to file list of Authorities on or before July 30, 2021*
>
> *Claimant is to file a Judge's Bundle on or before 17th September 2021*
>
> *Claimant's Attorney-at-Law is to prepare, file and serve Orders herein.*

[39] A careful review of the order reveals that it was made prior to the amendment of Rule 16.2. The assessment date was scheduled and a number of case management orders were made. Item 3 outlines that the Defendants were expressly permitted by the Court to participate in the hearing by filing their submissions. Of some significance also is the fact that no notice was issued by the Claimant pursuant to rule 16.2(2) or (3), all of these circumstances distinguished the instant case from the ***YP Seaton*** decision.

[40] It was also noted that both rule 16.2 and 12.13 were the subject of judicial findings in ***Natasha Richards v Errol Brown [2016] JMFC Full 05*** and ***Natasha Richards***

v Judan Brown [2019] JMCA Civ 27. Although both of these matters involved the consideration of the rules prior to the amendment, the principles enunciated are no less important and relevant in the instant case. It was the judgment of both Courts that it would be unconstitutional to close the defendant out of an assessment hearing, even where judgment had been obtained by default. The amendment of the rules to require a Form 8A ought not, in my opinion, to be viewed as sufficient without more, to oust these entrenched rights, particularly in circumstances such as existed in this case. Such a result would not only be a departure from the constitutionally recognised right but also contrary to the overriding objectives.

[41] As such, in light of the foregoing my ruling is as follows;

a. the application of the defendants to strike out the Claimants statement of case is refused.

b. The Claimants application for relief from sanctions is granted and the witness statement filed out of time is permitted to stand.

c. The Defendant is to file and serve their Form 8A within 7 days of today's date.

d. The assessment of damages hearing scheduled for 4th of April 2022 is vacated and the assessment will now be heard on the 20th of July 2022 at 10 am.

e. Each party is to bear their own cost.

f. Claimant's Attorney to prepare, file and serve Formal Order herein.

[42] Leave to appeal is granted to Defendant.