[2020] JMSC Civ 55

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2009 HCV 02168

BETWEEN	**EVON BLAKE**	**CLAIMANT**
AND	**GLEANER COMPANY LTD**	**DEFENDANT**

Courtney Rowe instructed by Bignall Law for the Claimant

Garth McBean Instructed by Garth Mcbean and Co for the Defendant

Heard: March 9, 2020 and April 2nd, 2020

Application for relief from sanctions – consideration of rule 26.8 – effect of non-compliance with orders – unless order – good explanation - delay

T. HUTCHINSON, J (AG.)

INTRODUCTION

[1] This matter is an application for court orders which was filed on the 24th of April 2019. The Claimant seeks relief from sanction as his statement of case had been struck out on the 3rd of December 2018 pursuant to an unless order made by J. Pusey J on the 26th of November 2018. He also seeks an order that his statement of case be restored.

BACKGROUND

[2] The substantive claim in this matter was filed on the 27th of April 2009 in which the Claimant sought damages for libel. An acknowledgment of service was filed on the 5th of May 2009 and a Defence on the 10th of June 2009. The matter was referred

to mediation and mediation was eventually held on the 27th of August 2015. An amended Particulars of Claim was filed on the 23rd of September 2015.and an Amended Defence on the 1st of February 2016.

[3] On the 14th of December 2016, a Case Management Conference was held and the usual orders were made. The matter was also scheduled for trial on the 6th to 10th of May 2019 and the Pre-Trial Review was fixed for the 26th of November 2018. Pursuant to Item 1 of the orders made at the Case management conference an Amended Particulars of Claim was filed and served within time on the 20th of December 2016. No other items on that order were complied with by the Claimant/Applicant and on the 26th of November 2018 an extension was granted for the outstanding orders to be complied with by the 4th of December 2018 failing which his statement of case would stand struck out.

[4] Between the 27th of November and 3rd of December 2018 a number of documents were filed by the Claimant but a witness summary of the Claimant's account was not filed until the 4th of December 2019. On the 4th of April 2019, the date set for the re-scheduled Pre-Trial Review, it was noted that with the filing of the Witness Summary out of time the unless order had taken effect.

APPLICANT'S SUBMISSIONS

[5] In submissions made in support of this application the Court was urged by Mr Rowe not to punish the Applicant for the failure of Counsel and to grant the relief from sanction. In his submissions, he referred to and relied on the affidavit of Mr Paul Edwards who had appeared at the Pre-Trial Review for the Claimant having taken over conduct of the matter from Counsel who had left the firm.

[6] Mr Rowe submitted that the application had been made as soon as Counsel for the Claimant had become aware of the unless order, a mere 20 days after the 4th of April 2019, the date on which Mr Edwards indicated he became aware of the situation. The Court was asked to find that the failing was not intentional and that a good explanation had been offered as the situation was an unfortunate

administrative oversight, previous Counsel having failed to bring the unless order to the attention of the other attorneys in the Chambers.

[7] It was also submitted that the offending document was only one day late and this was as a result of the bearer overlooking same on the 3rd of December 2018 when other documents were taken to be filed. Mr Rowe also pointed out that this failure was promptly addressed the following morning.

[8] He also submitted that the parties had largely complied with the orders previously made and the Court would have a proper basis on which to grant relief. In support of his submissions, Mr Rowe has referred the Court to the dicta of Brooks JA in ***H.B. Ramsay and Associates Ltd v Jamaica Redevelopment Foundation Inc etal [2013] JMCA Civ 1*** with specific reference to the Learned Judge's remarks at paragraph 10 of the judgment where It was noted by His Lordship that a determination as to whether or not something was done promptly would depend on the circumstances of the case.

[9] Counsel also referred to the decision of ***Wayne Andrew Lattibeaudiere v Flames Production Inc and Patrick Anthony Barrett [2014] JMSC Civ 225*** and sought to distinguish same from the current matter. He argued that in that case the Application had been filed almost 8 years after the sanction had taken effect and this was a factor which in the Court's view was a sufficient basis on its own to deny the relief sought.

RESPONDENT'S SUBMISSIONS

[10] In advancing his submissions Mr McBean referred to Rules 42.2 and 29.6(5) which he submits would also have to be considered in addition to Rule 26.8(1) to (3). In addition to the relevant rules Counsel also made reference to a number of decided cases on the point namely, ***Corey Jackson v Annmarie Phillps etal 2009HCV3759, Joseph Nelson v David Roberts etal 2009HCV05253, Wayne Andrew Lattibeaudiere v Flames Production Inc etal [2014] JMSC Civ 225 and JPS v Charles Vernon Franklin etal*** S.C.C.A. 126/2015.

[11] It was pointed out by Mr. McBean that the period of delay for the purposes of this application is not one day but in fact more than 4 months as time would be calculated from the date on which the sanction took effect. He relied on the dicta of the Court in ***Joseph Nelson*** in which a 3-month delay in applying for relief was not viewed as acting promptly as support for his position.

[12] In relation to 26.8(2)(ii) and (iii) Mr McBean submitted that the Court ought to attribute little weight if any to the explanation that the failure had been brought about by the departure of Mr. Ricketts from the firm and his failure to advise others of this unless order. He submitted that the Court should be cautious in its approach to this explanation especially in circumstances where there was no affidavit from Mr. Ricketts to this effect. Counsel also submitted that in spite of the departure of Mr. Ricketts this was a firm which had a duty to ensure that the file was properly being managed and/or conducted on behalf of the Claimant.

[13] He submitted that this was certainly an example of inexcusable oversight or administrative inefficiency, circumstances which the case law has made clear does not qualify as a good explanation for the purpose of this application.

[14] It was also submitted that in relation to Rule 26.8(2)(iii) this was not a party who had generally complied with all other others and directions. In support of this Mr McBean made reference to the affidavit of Stacey Ann Steele where it was noted by her at paragraph 7 that there had been a history of delay by the Clamant in this matter. It was noted that having brought the Claim for 21/2 years the Claimant did nothing towards advancing same. On the 6th of May 2012 Counsel for the Defendant wrote to Counsel for the Claimant to indicate that the matter had been referred for mediation in September 2009 and to enquire as to the situation in that regard.

[15] It was also pointed out by Ms. Steele that the history of delay has caused prejudice to the Defendant given the likely difference in the award of damages, interests and

costs if the Claimant were successful added to which was the fact that the next trial date is now 4 to 5 years away.

[16] It was also pointed out that the witness statement is yet to be filed, demonstrating what Mr McBean describes as apathy and a general lack of interest on the part of the Claimant. It is in these circumstances Counsel submitted that the Application ought not to be granted as it has failed to meet the required hurdles at 26.8(1) and (2), he submitted that even if the Court were to find that 26.8(1) and (2) had been met on a close examination of 26.8(3) the Claimant still falls short of meeting the standard for success.

DISCUSSION/ANALYSIS

Effect of Unless Order

[17] ***In Elenard Reid etal v Nancy Pinard etal C.L. 2002/R032 delivered 27th February*** 2009 in speaking to the effect of an unless order Sykes J (as he then was) observed as follows:

> *'unless orders are treated quite differently from other orders. It indicates that time is running out for the erring litigant and he really needs to do what is required of him by this order.'*

[18] Similar sentiments were echoed in the dicta of Ward L.J. in the UK decision ***Hytec Information Systems v Coventry City Council*** [1997] 1 WLR 1666 *where he stated as follows:*

> *'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.'*

[19] In examining the consequences of the failure of the erring party to meet this order, his Lordship continued as follows:

> *'Because that was his last chance, a failure to comply will ordinarily result in the sanction being imposed. 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.'

[20] The framework against which the submissions of Counsel for the Claimant fall to be considered is outlined at Rule 26.8 of the CPR as well as in the principles referred to above. Rule 26.8 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]*

[21] The Court of Appeal decision of ***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 have been met by the Applicant herein.

Was the application made promptly – Rule 26.8 (1)

1. In considering this question, I have taken note of the submission of Mr. Rowe that this application was filed twenty days after newly assigned Counsel had become aware of the unless order. I have also noted that only one document was filed outside of the mandated period and that the date

stamp reveals it was filed early the following morning. Careful consideration was also given to the dicta of Brooks JA at paragraph 10 of ***H.B Ramsay,*** which has been referred to above, as well as the discourse on this issue in the authorities cited by Mr. McBean.

2. The current application for relief from sanctions was filed four months and twenty days after the unless order took effect and two days shy of five months after the order was made in the presence of the Claimant's Attorney. The order having been made in the presence of Counsel for the Claimant its effect was as noted by Brooks JA in ***H.B. Ramsay*** where he stated;

> '*the party affected is given notice of the requirement and the penalty for non-compliance. The deadline for compliance should therefore be uppermost in his mind.'*

3. In the instant case, the Claimant had already failed to comply with the case management orders made two years earlier. As such, the need to comply with the extended time should have been a priority for him and the failure to meet these dates should have been immediately obvious and resulted in a prompt application for relief to the Court.

4. While it may be true that Counsel who had previously had conduct of the matter had departed from the firm in December 2018, upon his departure it ought to have been a priority for his files to immediately be re-assigned and internally reviewed. It is evident that this process did not take place until April 2019 or thereabouts as a result of a 'gap' as it has been described by Mr. Rowe. In light of the ongoing duty to monitor matters to ensure that timelines are being complied with it, is clear that Counsel for the Claimant was dilatory in making this application. The fact that the offending document was filed the day after the sanction took effect is a purely mitigating factor it does not correct the fact that the application for relief from sanctions was not made promptly.

Whether the failure to comply was intentional

5. It was submitted by Mr. Rowe that the failure to comply with the scheduled date was not intentional as the missteps had been due to the error of the bearer as well as the failing of previous Counsel.

6. In examining this submission, the Court would have been assisted by the presence of affidavits from both the bearer and Counsel who had previously had conduct. Neither however has been provided. In spite of the absence of same I am prepared to accept the indication by Mr. Edwards that the failure to comply was not intentional.

Is there a good explanation for the failure?

7. In respect of this requirement, as to what constitutes a good explanation, useful guidance is provided at paragraphs 22 and 23 of the dicta of Brooks JA in ***H.B. Ramsay*** where he stated as follows;

> *[22] Where there is no good explanation for the default, the application for relief from sanctions must fail. Rule 26.8(2) stipulates that it is a precondition for granting relief, that the applicant must satisfy all three elements of the paragraph. The Privy Council, in* ***The Attorney General v Universal Projects Ltd*** *[2011] UKPC 37, in considering a similarly worded rule, used in the Civil Procedure Rules of Trinidad and Tobago, held that the absence of a "good explanation" within the meaning of the rule, was fatal to the application. Their Lordships, in that context, said at paragraph 18 of their opinion:*
>
> *"The Board has reached the clear conclusion that there is no proper basis for challenging the decision of the courts below that there was no "good explanation" within the meaning of [the rule equivalent to rule 26.8(2)(b) of the CPR] for the failure to serve a defence by 13 March.* ***That is fatal to the Defendant's case in relation to*** *[the rule equivalent to rule 26.8 of the CPR]* ***and it is not necessary to consider the challenge to the other grounds on which the Defendant's appeal was dismissed by the Court of Appeal****." (Emphasis supplied)*
>
> *[23] At paragraph 23 of their opinion, their Lordships addressed the issue of oversight where it is used as an explanation. They said:*
>
> *"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." (Emphasis supplied)*

[22] The Court is also mindful of the dicta of Simmons J (as she then was) in ***Corey Jackson v Annmarie Phillips*** where she stated;

> *'where delay is caused by inadvertence or administrative difficulties the general rule is that that is not a sufficient explanation' (emphasis supplied). This position was also adopted in* ***Elenard Reid*** *supra as well as* ***The Attorney General v Universal Projects Ltd*** [2011] UKPC 37.

[23] In applying the relevant principles to the instant case the Court must take into account the fact that no affidavit has been provided by Mr. Ricketts in support of the position that he had failed to communicate the existence and effect of the unless order prior to his departure. On this point I note that it was argued by Mr Rowe that even in the absence of such an affidavit, the failing in this matter would be that of the firm and not the Claimant. In advancing this position, he has asked the Court not to punish the Claimant for the failings of his Counsel especially in circumstances where the claim would now be statute barred.

[24] It is the Respondent's position that this explanation ought not to move the Court to act in favour of the Applicant as an oversight and administrative error fall far short of what has been accepted as a good explanation.

[25] In addition to the principles outlined in the matters cited above, a review of the authority of ***Joseph Nanco v Anthony Lugg and B&J Equipment Rental Ltd [2012] JMSC Civ 81*** is useful, as although it dealt with an application to set aside a default judgment, it provides relevant guidance in respect of what can be accepted as a good explanation.

[26] At paragraph 84 of the decision, the Court addressed the question whether the failure of Counsel to act could be regarded as a good explanation and reference was made to the decision of ***Hoddinot v Persimmon Homes (Wessex) Ltd [2008] 1 WLR 806*** which reviewed the authorities of ***Leeson v Marsden and***

United Bristol Health NHS Trust and Glass v Surrendran [2006] EWCA Civ. It was held in those decisions that in spite of the fact that it was Counsel who made an error of judgment and not the Claimant the Claimant could not receive the relief which was sought.

[27] In examining the effect of those decisions on the application to set aside default judgment, at paragraph 86 the Court said as follows;

> *"These cases do demonstrate that even though the failure to comply with the rules was the fault of counsel in the matter and not the litigant himself, it made no difference. The court did not look at the fact that it was not the claimants' fault and excused the delay but instead looked at the reason advanced for the failure to comply with the rules".*

[28] This approach was consistent with that of Simmons J in ***Corey Jackson v Annmarie Phillips*** where she stated as follows;

> *"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".*

[29] Having stated this Simmons J continued: -

> '*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 is more observant of that duty even than the litigant himself.* *[emphasis supplied]*

[30] A similar approach was adopted by Sykes J (as he then was) in ***Kristin Sullivan v Rick's Café Holdings Inc. T/A Rick's Café 2007 HCV 03502 delivered 15th April 2011*** 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 his heavy workload was not a good one.

[31] Upon examination of the explanation advanced, I noted that while the matter had been within the conduct of previous Counsel every effort had been made to file the outstanding documents before the 3rd of December 2018 as the records show that a number of documents were filed and served between the 26th of November and 3rd of December 2018.

[32] The last document filed was the witness summary and this, as was stated earlier, was filed on the 4th of December 2018. It is clear from the filing dates that Counsel who previously appeared in the matter would have had the deadline at the forefront of his mind and had sought to have the documents filed as soon as possible.

[33] In respect of the sanction which would have taken effect, I note that the Formal Order which set out the date for compliance with the case management orders and the unless order was filed by the Chambers on the 14th of December 2018. It would follow that a copy of same would have been retained by the firm and placed on their file.

[34] As such, even in the absence of direct communication by departing Counsel, the contents of this formal order should have been sufficient to put the Chambers on notice as to the new date for the pre-trial hearing as well as the fact that a sanction for failure to comply with the case management orders had been imposed and that they were now in breach of same.

[35] As such, on a timely vetting of the file, the Attorneys for the Claimant would still have been in a position to be aware of this information just as they were aware of the date for the pre-trial review. In the circumstances I was not persuaded that the

explanation provided can be regarded as a good one. While I accept that these failings were not the fault of the Claimant the rules and authorities have made it clear that there is no distinction between the Claimant and his Counsel.

[36] I have considered whether the view of the Court in ***University Hospital Board of Management v Hyacinth Matthews [2015] JMCA Civ 49*** would be applicable to these circumstances in order to grant the Applicant's request, but it is my finding that the instant case is markedly different from the situation which obtained in that matter. As not only was the application made to set aside the sanction filed within a week of it taking effect, but the Claimant's situation had been compounded by the fact that her previous Counsel had been struck off and her new Attorney had neglected to inform her of the trial date.

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

[37] In respect of the question whether there has been general compliance on the part of the Claimant, I have noted that apart from the filing of the Amended Particulars of Claim on time, no other document was filed by the Claimant for almost 2 years after the Case Management Conference until the extension was granted and unless order made on the 26th of November 2018.

[38] A further review of the record revealed that an automatic referral of this matter to mediation was made in September 2009 after which the matter was dormant for almost 2 years. On the 16th of September 2011 a letter was sent to the Registrar by Counsel for the Claimant in which he requested that the matter be referred to mediation after which the matter was once again dormant until new life was apparently breathed into it by a letter sent by Counsel for the Defendant in May 2012 enquiring whether the Claimant intended to proceed.

[39] The matter appears to have gone dormant once more and it was not until the 27th of August and 30th of September 2015 that mediation finally took place. It has also been noted that although the Claimant had indicated that he would be calling three witnesses and an order was made for the filing of witness statements by a specific date, only a witness summary for the Claimant has been filed and the situation remained the same up to the date of this hearing.

[40] In view of the circumstances outlined above, I find that the failure of the Claimant to comply with the extended orders was simply a continuation of the dilatory approach which had been taken in complying with orders and timelines previously outlined and not an aberration. As such, the answer to the question whether he has generally complied would then be in the negative as the Claimant has consistently failed to act with a sense of urgency.

CONCLUSION

[41] On a review of the circumstances which exists in this matter, the submissions made by Counsel on both sides and the relevant case law, it is clear that the Claimant has failed to satisfy the requirements of Rule 26.8(1) and (2). On the authority of ***HB Ramsay etal*** there is no requirement to go further to consider whether the provisions in 26.8(3) would apply. The Claimant has failed to act promptly and this failure has not been ameliorated in any meaningful way by satisfying the other requirements outlined at 26.8(2).

[42] Accordingly, it is the ruling of this Court that the Claimant's application for relief from sanctions and the restoration of his statement of case is refused and Judgment is entered for the Defendant herein. Costs of the claim to the Defendant to be taxed if not agreed.