IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2017HCV02988

BETWEEN	**RUPERT BROWN**	**CLAIMANT**
AND	**D.R. FOOTE CONSTRUCTION COMPANY LIMITED**	**DEFENDANT**

IN CHAMBERS

Mrs. Symone Mayhew Q.C. instructed by K. Churchill Neita & Co. for the claimant

Mr. Aon Stewart instructed by Knight Junor Samuels & Co. for the defendant

Heard: June 15, July 28 and September 23, 2022

Civil Procedure- Application for Relief from Sanctions- Promptitude in making application

MASTER T. DICKENS (Ag.)

INTRODUCTION

[1] This is a claim rooted in the tort of negligence, in particular that of employer's liability. The claimant is a 70 year old man who was employed to the defendant as a driver. On September 18, 2017, the claimant brought the instant claim against the defendant, arising out of an incident wherein he was allegedly injured while conducting duties for the defendant on May 21, 2013.

BACKGROUND

[2] On October 3, 2018, a case management conference was held in the matter before Master P. Mason (as she then was), who ordered, among other things, that witness statements were to be filed and served on or before June 28, 2021. The claimant failed to meet that deadline and instead filed and served his witness statement on November 8, 2021.

[3] By application filed November 2, 2021, the claimant seeks, among other orders, relief from sanction for failure to comply with the order of Master Mason for the filing of witness statements made on October 3, 2018, and an extension of time within which to comply with the said order. The claimant also sought orders for his amended particulars of claim filed October 25, 2021, to be allowed to stand, for Dr. Grantel Dundas, MBBS (UWI) and FRCS (ED) to be appointed an expert witness and his medical report dated September 8, 2021, to be allowed to stand. Affidavits of the claimant, Rupert Brown, and counsel, Christine Mae Hudson, were filed on November 2, 2021, in support of the application. A further affidavit of Christine Mae Hudson was later filed in support of the application on April 21, 2022.

[4] On November 11, 2021, the defendant filed an application seeking an order that the claimant and counsel, Ms Hudson, attend at the hearing of the application for relief from sanction to be cross examined on the contents of their affidavits. I heard this application on April 25, 2022 and refused same. I reasoned that to embark upon cross examination on the interlocutory application for relief from sanction would not be in keeping with the overriding objective in circumstances where there is no conflict in evidence on the application and there were no good reasons to justify the additional delay and expense that would result from cross examination.

[5] The application for relief from sanction et al came on for hearing before me on June 15, 2022. At the outset, counsel for the defendant, Mr. Aon Stewart, indicated that he was not objecting to the claimant's application to amend particulars of claim. Having examined that aspect of the application and found it to be in order, I

granted the orders as sought. Mr. Stewart made similar concessions regarding the application to appoint expert witnesses and that application being in order, those orders were also granted.

[6] The only remaining issue of contention was whether the Claimant ought to be granted relief from sanction for failure to file his witness statement by June 28, 2021.

THE APPLICATION

[7] As outlined above, the claimant seeks relief from the sanction imposed pursuant to rule 29.11 of the Civil Procedure Rules (the CPR) for failure to file and serve his witness statement by June 28, 2021 as ordered by Master P. Mason (as she then was).

[8] The Claimant seeks this order on the following grounds:

i. This application is being made promptly;
ii. The failure to comply is not intentional;
iii. There is a good explanation for the failure to comply;
iv. The Claimant has generally complied with all other relevant orders;
v. The granting of the relief would be in the interest of the administration of justice;
vi. The failure can be remedied within a reasonable time;
vii. The trial date can still be met if relief from sanctions is granted;
viii. The granting of the relief would not prejudice the Defendant; and
ix. The interests of justice will not be adversely affected by the granting of the relief.

THE SUBMISSIONS ON BEHALF OF THE CLAIMANT

[9] Queen's Counsel, Mrs. Symone Mayhew, argued on behalf of the claimant that he has met the criteria for relief from sanction as outlined in rule 26.8(1) and (2) of the CPR. She relied on the authority of **H.B. Ramsay and Associates Limited et al v Jamaica Redevelopment Foundation and Another** [2013] JMCA Civ 1 and argued that what is prompt in one situation may not necessarily be regarded as

prompt in another. She submitted therefore that the court's approach should be to consider the prevailing circumstances in each particular case.

[10] Queen's Counsel further submitted that the application was made by the claimant four (4) months after the imposition of the sanction, and in light of the circumstances at the relevant time, the application was made promptly. She also argued that the claimant's failure to file a witness statement in keeping with the order of the court was not intentional and there are good reasons for the non-compliance. She referred to the reasons given in the affidavit of Ms. Hudson, namely regarding the illness of counsel, as well as various challenges at the law firm. Mrs. Mayhew also referred to the reasons adumbrated in the affidavit of Mr. Rupert Brown, to include, challenges with his cellular phone, his ill health and Covid-19 restrictions which all made it difficult for him to make contact with his attorneys-at-law and attend their office in a timely manner.

[11] Mrs. Mayhew also noted that the breach has already been remedied by the claimant and the trial date will not be affected if relief is granted. Conversely, counsel argued, if there is no relief the claimant will be driven from the seat of judgment which will be counter to the interest of justice.

SUBMISSIONS OF THE DEFENDANT

[12] Counsel, Mr. Aon Stewart, made heavy weather about the claimant's delay of four (4) months in filing the application for relief from sanction and argued that the application was not made promptly in the circumstances. He relied on the authority of **Hyman v Matthews** [Consolidated appeals] (unreported), Court of Appeal, Jamaica, SCCAs 64/2003 & 73/2003, judgment delivered November 8, 2006, where a delay of three (3) months was not regarded as prompt by the Court of Appeal and urged the Court to rule likewise in this matter.

[13] Counsel for the defendant also submitted that there was no good explanation proffered by the claimant for failure to comply with the order for the filing of witness statements and consequently the relief should not be granted by the Court.

ISSUE

[14] Whether the Claimant is to be granted relief from sanction for failure to file witness statement by June 28, 2021.

THE LAW AND ANALYSIS

[15] Rule 26.8 of the Civil Procedure Rules ("the CPR") governs the application for relief from sanction and provides 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 remedies within a reasonable time;
>
> d) whether the trial date or any likely trial date can still be met if relief is granted;
>
> e) the effect which the granting of relief or not would have on each party.
>
> (4) …

WHETHER THE APPLICATION WAS MADE PROMPTLY

[16] This is a crucial issue to determine because where the Court finds that the application was not made promptly then the application must fail without need to consider the other criteria outlined in rule 26.8.

[17] In the case of **National Irrigation Commission Limited v Conrad Gray and Marcia Gray** [2010] JMCA Civ 18, Harrison JA at paragraph 14, stated the following in relation to this criterion of promptitude:

> "The first stage … is for the court to consider whether or not the appellant's application seeking relief from sanctions was made promptly. Promptly is an ordinary English word which we would have thought had a plain and obvious meaning, but if we need to be told a bit more about what it means, we do have the authority of Regency Rolls Limited v Carnall [2000] EWCA Civ. 379, where Arden, L.J. pointed out that the dictionary meaning of 'promptly' was 'with alacrity'. Simon Brown, L.J. said: "I would accordingly construe "promptly" here to require, not that an applicant has been guilty of no needless delay whatever, but rather that he has acted with all reasonable celerity in the circumstances."

[18] Harrison JA, at paragraph 16 further opined that:

> "Promptness, in our view, is the controlling factor under rule 26.8. It is plainly a very important factor, as is evident from the fact that it is singled out in the rule as a matter to which the court must have regard. In our judgment, it is a very important factor because there is a strong public interest in the finality of litigation. Put simply, people are entitled to know where they stand."

[19] Further, in the case of **H.B. Ramsay & Associates Ltd & Another v Jamaica Redevelopment Foundation Inc. & The Workers Bank** [2013] JMCA Civ 1, the Court of Appeal also had the occasion to examine the question of promptitude within the context of an application for relief from sanction. At paragraph 10, Brooks J.A. (as he then was), stated that:

> "In my view, if the application has not been made promptly the court may well, in the absence of an application for extension of time, decide that it will not hear the application for relief. I do accept, however, that 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."

[20] The evidence before the Court is that the claimant's application for relief from sanction was made four (4) months after the imposition of the sanction. The evidence also demonstrates that the reasons for the failure to comply with the court's order for the filing of the witness statement and the four (4) month delay in filing the instant application for relief from sanction were manifold and attributable to both the claimant and his attorneys-at-law.

[21] The reasons proffered as to why the order was not complied with and why the application was made four (4) months after non-compliance include, on the part of counsel; being diagnosed with a serious illness, significant reduction in the staff complement of the firm and limited access to the firm on account of Covid-19 restrictions, an outbreak of Covid-19 at the firm during the relevant period and backlog in the cases. On the part of the claimant, that as a 70-year-old man, he had experienced ill health during the relevant period and was exhibiting Covid-19 symptoms which caused him to go into isolation. It is also the evidence of the claimant that he had problems communicating with his counsel due to issues with his cellular phone and not having an alternate number.

[22] Within the context of a global pandemic with its attendant restrictions and other protocols, a serious diagnosis on the part of counsel and the claimant's own ill health, it can be said that the application for relief from sanction has met the threshold of being made promptly. The circumstances and facts of this case are peculiar and should in no way be regarded as setting a prescription that a four (4) month delay in filing an application for relief from sanction is sufficient promptitude. Having regard to all the prevailing facts and circumstances, I find that the application was made promptly.

[23] Having found that the application was made promptly and it being clear that there are affidavits in support of the application, the court can now go on to consider whether the criteria under rule 26.8(2) have been met.

[24] I find that the evidence outlined in the affidavits in support of the application for relief from sanction provides a good explanation for the failure to comply with the order of the court for the filing of witness statements and demonstrates that the non-compliance was not intentional. I also find that the claimant has generally complied with all other relevant rules, practice directions, orders and directions of the court. The manner in which the claim was brought was in keeping with the relevant provisions of the CPR, the claimant participated in mediation, attended the case management conference and largely complied with the case management orders save for the filing of his witness statement and the listing questionnaire. In relation to the latter order an extension of time was granted by the court at the hearing of the matter with the consent of the defendant's counsel and that order was complied with by the claimant.

OTHER FACTORS

[25] I have also considered all of the factors outlined under rule 26.8(3) of the CPR and have found that in relation to the interests of the administration of justice, this is properly served by allowing the claimant to have his day in court in circumstances where he has demonstrated a keen interest in pursuing his claim and was largely compliant with the orders of the court. Indeed, I have observed that the claimant filed his list of documents some five (5) months before it was due to be filed. I have noted that the failure to comply with the order for the filing of witness statements was due both to the claimant and his attorneys-at-law but that the fault laid mainly with the attorney-at-law and within such a context the interest of justice is best served if the claimant is granted the relief sought. I have also observed that the failure to comply has been remedied well in advance of the hearing of this application and was so done since November 8, 2021. Accordingly I also find that the trial date or any likely trial date can still be met if the relief is granted and in

relation to the effect which the granting of the relief or not would have on each party, I take the view that the prejudice to be suffered by the claimant if the relief is not granted would greatly outweigh any prejudice to the defendant if the relief is granted.

CONCLUSION

[26] In the upshot therefore the claimant is granted relief from sanction for failing to file and serve his witness statement by June 28, 2021 and the witness statement filed on his behalf on November 8, 2021 is allowed to stand as if filed and served within time. Costs to be costs in the claim.