[2025] JMSC Civ. 125

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2012HCV00800

BETWEEN **RICHARD BRYAN** **CLAIMANT**

AND **THE ATTORNEY GENERAL OF JAMAICA** **DEFENDANT**

OPEN COURT

Raymond Samuels, Attorney-at-Law, instructed by Samuels Samuels, Attorneys-at-Law for the Claimant

Duncan Roye and Shamona Smith-Johnson, Attorneys-at-Law, instructed by the Director of State Proceedings for the Defendant

Heard: June 30 & July 1 & 4, 2025

CIVIL PROCEDURE - Witness statements of the parties were filed and served out of time - Extension of time was granted after the sanction imposed by rule 29.11 of CPR had taken effect - Whether the claimant can testify - Claimant is his only witness - Whether the claimant's claim should be dismissed for want of prosecution - Whether and in what circumstances, a judge can set aside, vary or revoke the order of another judge of concurrent jurisdiction

ANDERSON K. J

BACKGROUND

Nature of the Claim

[1] This is a claim form proceeding, and in a claim of this nature, the burden of proof rests on the claimant throughout, and this requires him, if he can, to prove his claim, on a balance of probabilities.

[2] Trial was scheduled to take place over three days – June 30 - July 2, 2025, but at the onset of the trial, which was scheduled by the Registrar, to be presided over by me, lead counsel for the Crown, representing the defendant, submitted that the respective parties' witness statements had been filed and served out of time, and that, in the circumstances, the claimant has no evidence that can properly be allowed to be given in court, and therefore, the claimant's claim should be dismissed for want of prosecution. That is, in brief summary, the essence of the defendant's preliminary contention in objection to the trial even beginning.

[3] In fairness though and very importantly for present purposes, the defence counsel informed this court that on February 6, 2017, Dunbar-Green J. (as she then was), had made an order granting the respective parties, an extension of time within which to file and serve their respective witness statements. The respective parties complied with that order. It ought to be noted that there is absolutely no dispute between the parties that the parties' respective witness statements were initially filed and served out of time, in so far as the claimant's witness was filed in a sealed envelope, at the Registry, on September 22, 2016, and notice of that filing was served on the defendant on September 23, 2016. The defendant's witness statement was filed on February 6, 2017. Notably, on October 24, 2015, Batts J. had made, as a case management order, the order that witness statements were to have been filed and exchanged, by or before July 29, 2016.

[4] What has been heavily disputed between the parties though, is the defendant's ultimate contention that, given the prevailing context, the claimant's claim should be dismissed for want of prosecution. The defendant's counsel has relied heavily on ***rule 29.11 of the CPR***, which provides:

'(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 rule 26.8.'

They are also relying on one of the leading cases on the effect of failure to comply with ***rule 29.11 of the CPR - Oneil Carter et al v Trevor South et al [2020] JMCA Civ 54***. That case makes it clear that whenever there has been the failure of a party to comply with ***rule 29.11 of the CPR***, the sanction as prescribed in that rule of court, is automatic and that the said sanction is that the witness, whose witness statement was served late, *'may not be called unless the court permits.'* Further, according to the defendant's counsel, in order to meet the requirements of ***rule 29.11 (2) of the CPR***, affidavit evidence is required to be provided to the court, by the party who/which is seeking to invoke the court's discretion in his/her or its favour. No such affidavit evidence has been provided to this court, by either party herein. Quite frankly, the claimant's counsel cannot, I think, reasonably have been expected to have had such affidavit evidence made available to this court, bearing in mind that the defence counsel only made him aware of their intended preliminary objection to the trial proceeding as scheduled, after he had, as the claimant's counsel, arrived at court, anticipating the start of the trial.

[5] Furthermore, it was the defence counsel's submission that if seeking permission at trial, for a witness to be called to give evidence, notwithstanding that said witness' witness statement was served out of time, the party seeking that permission will still need to satisfy this court, that relief from sanction, ought to be granted.

[6] The claimant's counsel did not contest that last-mentioned aspect of the defendant's submissions. For my part, I think that he took the correct approach, to have not done so, as I am of the considered view that that aspect of the defendant's submissions, must, of necessity, be correct, since otherwise, it would be manifestly easier to enable a witness to be permitted to testify at trial, notwithstanding that his or her witness statement was, at least initially, as was the case here, served out of time, if such permission is sought at

trial, rather than that, prior to trial, an application for relief from sanction, has to be filed, pursued and successfully obtained. The latter-mentioned, is not at all, easy to achieve. In fact, the contrary is true. In that regard, see: ***H.B. Ramsay and Associates Ltd et al v Jamaica Redevelopment Foundation Inc et al [2013] JMCA Civ 1***.

[7] What is though, most fervently being disputed between the disputing parties, is what impact, if any, the order of Dunbar-Green J. (as she then was), which granted each of the parties, an extension of time to file and serve their respective witness statements, should have now, on the defendant's contention that there is no witness in support of the claimant's statement of case, as the claimant should not be permitted to testify, since the sanction imposed by ***rule 29.11 of the CPR***, took effect, from as of the moment when there was no compliance with the earlier case management order of this court, that being the order of Batts, J. that the parties' witness statements were to have

[8] According to the claimant's counsel, the claimant's witness statement having been filed and served within the time as was contended by order of Dunbar-Green J. (as she then was), the claimant ought to be allowed to testify at trial, since otherwise, a judge of concurrent jurisdiction, that being myself, as the presiding trial judge, would be essentially, revoking that earlier order of my then sister judge (Dunbar-Green J.).

[9] The claimant's counsel has submitted, just as strongly as the lead defence counsel did before he began, that the order of Dunbar-Green J. (as she then was), remains a valid order and had to be obeyed by the parties, unless and/or until same is set aside by the Court of Appeal. He relies on the case of ***Isaacs v Robertson (1984) 3 All ER 140***, in that regard. That case does in fact, support that position of the claimant's counsel.

[10] Mr. Samuels, for the claimant, went on to emphasize that the order of Dunbar-Green J. (as she then was), was not an order, which was made ex parte and was not an order which permitted the parties to apply to vary same, which is often in orders, specified as, *'Liberty to apply'* and also since it is not an order that is now sought to be corrected under the *'slip rule'*, as per ***rule 42.10 of the CPR***. Accordingly, he said to this court, only the Court of Appeal could have made any order either revoking or varying

that particular order. Furthermore, he said that extension of time order was made over eight (8) years ago, in this court and even until now, has not yet been appealed, but yet, surprisingly, has been made by the defence counsel, in their application to have this claim struck out for want of prosecution, the subject of criticism.

[11] It is worthwhile noting, for present purposes, that even until now and as of now, there has never even been sought by either party, leave to appeal that order of Dunbar-Green, J. (as she then was), much less, has there been any actual appeal of same. This is so, even though that criticized order, which was, it should be noted, only criticized by the defence counsel, was made from as long as: February 20, 2017. Moreover, there is not before this court even as of now, any actual application to either vary or revoke that order.

[12] According to the defence counsel, the presently criticized order, when made, did not address the issue of the sanction which preceded it and therefore, cannot be relied on by the claimant at this time, to enable him to testify, since the sanction imposed by ***rule 29.11 of the CPR*** took effect from as of August 2, 2016, that is, the first work day after the last day for service of witness statements, as per order of Batts J.). Furthermore, according to them, as per ***rule 26.1 (7) of the CPR***. This court has the power to vary or revoke its own orders. That cited rule of court, reads as follows:

'A power of the court under these Rules to make an order includes a power to vary or revoke that order.'

[13] For his part though, the claimant's counsel contended that this court does have the power to vary or revoke its earlier orders, such can only be lawfully done, either if liberty to apply has been granted when making the order, which it is now being sought to have, either varied or revoked, or if that order was made ex parte, that is, without hearing the other side, in a context wherein, no notice of that hearing, had been given to the other side, by the party who/which eventually obtained that order. None of those two scenarios apply, in respect of the presently impugned order of Dunbar-Green J (as she then was).

The Analysis

[14] This court has the power to make orders of its own initiative. See ***rule 26.2(1) of the CPR***, in that regard. The claimant's counsel takes no issue with that. Instead, it is the claimant's counsel's position that this court should not do, what it has been urged by the defence counsel, which is, revoke or set aside the order of Dunbar-Green J. (as she then was), of its own motion, especially since it is not competent for this court to properly do so, even on application, much less, of its own motion. Just as a reminder, permit me to reiterate at this juncture, that it has throughout this court's hearing on the defendant's application, that this claim should now be struck out for want of prosecution, been the claimant's expressed position in response, in part, that the order of Dunbar-Green J. (as she then was), could only properly have been challenged, upon appeal to the Court of Appeal, and that, was never an option, which was pursued by either party. Moreover, he submitted that to be challenging that order now, over seven (7) years, after it was made, is not an effort to further the interests of justice, but rather, is essentially, inviting this court to now do a disservice to justice.

[15] In ***George Freckleton v Aston East [2013] JMCA Civ 39***, the Court of Appeal, per Morrison, JA (as he then was), concluded in the reasoning underlying that appellate court judgment, that once there has been a failure to comply with an unless order, the sanction is imposed as a consequence of that failure takes effect automatically, without the need for there to be a court order. See paras. 11 & 23 of the Court of Appeal's judgment in that case, as written by Morrison JA (as he then was) and wholly concurred with by the other two members of the judicial panel that presided over that appeal case.

[16] Furthermore, in that case, the Court of Appeal concluded an extension of time cannot properly be granted after a sanction has been imposed, unless relief from sanction has first been sought and granted, in this court (Supreme Court). See para. 23 of the court's judgement in that case, in that regard.

[17] In the case of ***Dale Austin v The Public Service Commission and The Attorney General of Jamaica [2016] JMCA Civ 46***, one of the issues addressed by the Court of

Appeal, was whether the Supreme Court could properly grant an extension of time, in a context wherein, by the time when that order was sought, the relevant sanction had already taken effect. Furthermore, that Court of Appeal case addressed whether, if an application for an extension of time is made after the time for compliance with an unless order has passed, and said application for extension of time is then granted, the same can be deemed to have been also an order granting relief from sanctions and that the relief granted, was the permitted, extension of time.

[18] The ***Dale Austin case (op. cit.)*** was not cited or relied on by either party's counsel, in their respective contentions as were made before me. Had it been cited, it would have no doubt, been readily recognized by whomever cited same, that said case, essentially provides the primary answer to the challenge to the order of Dunbar-Green J. (as she then was). That answer simply now must be that said challenge, cannot be successful at this time, in this court. See paras. 86 - 101 of the court's judgment in the ***Dale Austin case (op. cit.)***. In that case, the Court of Appeal treated an application for variation of a costs order, in the court below (this court), as having been entitled to have been treated with, by the judge, who presided over that application in this court, acting on her own motion, as both an application for relief from sanctions and also, an application for extension of time and concluded that, the judge of this court, who granted an extension of time, after a sanction had already been imposed on the litigant, who obtained that time extension, should be deemed to have also granted relief from sanctions, acting on her own and that she was entitled to do so. The Court of Appeal in the ***Dale Austin case (op. cit.)***, in particular, Morrison P. in his judgment, which was concurred with, by the other Justices of Appeal, stated as follows:

'For my part, I would agree with the appellant and litigants will do well to bear in mind, that where the time for compliance with an unless order has expired, it is necessary to apply for relief from sanctions. However, that does not mean that in this case, Lindo J, upon hearing from the parties, was wrong to have extended time for compliance. The power to extend time exercised by the learned judge after hearing the application, is the same whether she was hearing the application to extend time or an application for relief from sanctions. In that regard, in the circumstances of the case before her, in extending the time for compliance, Lindo J, in effect, granted relief from sanctions… Although the learned judge gave no reason for her decision, in light of rules 26.8(1)(2) and (3) and the unworkable nature of the order of G Fraser J, it is clear that the interest of the administration of justice was best served by Lindo J

exercising her discretion in the way she did. Furthermore, the application was made promptly, having been filed before the expiration of the time limit and made two days after the time for compliance had expired. It was supported by affidavit evidence and there is no contention before this court that the respondent could not have satisfied the other requirements in rule 26.8 for the grant of relief from sanctions.' (Paras. 100 & 102)

[19] To relate that dicta and the judgment overall, in the ***Dale Austin case (op. cit.)***, to the case at hand, it seems to me that the order of Dunbar-Green J. (as she then was), granting an extension of time to the parties for the filing and service of witness statements, ought implicitly to now be viewed by any court giving consideration to that particular order, contrary to the manner in which the defence counsel has urged this court to view same, as being one which also granted relief from sanctions, to both the claimant and the defendant. Whilst that is undoubtedly, an unusual approach and an extremely risky legal approach to take, particularly if it is taken as a matter of considered legal strategy, it is an approach which, in this jurisdiction, as also in England, a court is entitled to take. A case supporting that view, which was cited with approval, by Morrison P. in the ***Dale Austin case (op. cit.)***, at para. 95, is: ***Keen Phillips (a firm) v Field [2007] 1 WLR 686***. Furthermore, in the subsequent English Court of Appeal judgment in the case: ***Marcan Shipping (London) Ltd. v Kefales and another [2007] EWCA Civ 463***, the Court of Appeal referred to and approved the course taken in ***Keen Phillips (op. cit.)***. 'Of equal persuasion' (to borrow the words of Morrison, P. as used at para. 98 of the Court of Appeal's judgment in the ***Dale Austin case (op. cit.)***, *'is the case of* ***Samuels v Linzi Dresses Ltd. [1981] QB 115****, where an order was made that unless further and better particulars of the defence were served by a certain date, the defence and counterclaim should be struck out, and that, the claimant was at liberty to sign judgment for damages to be assessed. The particulars were served three days late, but the defendant applied for, and obtained from the judge, an extension of time, the effect of the order being to relieve it from sanction. It was held by the English Court of Appeal (per Roskill LJ) that the court does have the jurisdiction to extend time even after there has been a failure to comply with an "unless" order.'*

[20] I, therefore, disagree entirely with the defence counsel's submission that the order of Dunbar-Green J. (as she then was), is an irregular order. I also, have reached the

conclusion that same was not made, without jurisdiction, either. Accordingly, that conclusion is sufficient to dispose of the defence counsel's contention that the claimant cannot properly be permitted by this court, to testify at trial, since ***rule 29.11(1) of the CPR*** precludes him from now doing so. That contention of theirs would only and could only, properly, have found favour with this court, if the order of Dunbar-Green J., granting an extension of time, had not been made. When that order was made though, it was one which implicitly granted relief from sanctions and the relief granted, was an extension of time, which the parties thereafter, complied with. That order and compliance occurred over eight years ago.

[21] I am of the view though, that I need to go further, since an issue arose as to whether I have jurisdiction to set aside or revoke an order made by a judge of concurrent jurisdiction, in a context such as prevails in respect of this case. The defence counsel in that regard, have placed heavy reliance on two judgments of this court, namely: ***Sephlene Anne Johnson v Clarence George Johnson [2019] JMSC Civ 31*** and ***Fritz Pinnock and Ruel Reid v His Honour Chester Crooks (Chief Judge of Parish Courts) [2022] JMSC Civ 23***. In both of those cases, distinctions were drawn by the respective justices of this court, between the relevant underlying facts in each of those cases and the underlying facts, which are relevant in a Jamaican case, which addressed the issue of the circumstances in which a judge or a judicial officer of a court of concurrent jurisdiction, will have the lawful authority to either set aside or revoke one of the court's earlier orders. Counsel for the Crown (defence counsel), also referred this case to this court, but did not point out to this court, any distinction between the relevant factual scenario that obtains in the present case. I do not know whether they expect me to do their required work for them in that regard, but whether or not, I certainly will not be doing so and have not done so. That case, which constitutes binding authority for this court, in respect of this legal point, is: ***Strachan v The Gleaner Co. Ltd. and anor. [2005] 1 WLR 3204***.

[22] In the ***Strachan case (op. cit.)***, the plaintiff sued the defendants for libel and, in default of defence, obtained a judgment in the Supreme Court of Jamaica for damages to be assessed. Following a contested hearing before Bingham J. and jury, damages

were assessed and judgment entered for that sum. The defendants subsequently applied to the Supreme Court to set aside the default judgment, and to have leave to defend the action on the grounds that fresh evidence enabled them to plead justification. The application came before Walker J., who, having over-ruled the plaintiff's preliminary objection that he had no jurisdiction to do so, set aside the original default judgment and gave the defendants leave to file and serve a defence on terms as to costs. Following further interlocutory proceedings, the plaintiff applied to the Supreme Court to set aside Walker J.'s order. That application came before Smith, J., who upheld a preliminary objection by the defendants that he had no jurisdiction to set aside Walker J's order. The Court of Appeal dismissed the plaintiff's appeal from that decision and the plaintiff appealed to the Privy Council.

[23] It was held by the Privy Council, inter alia, *'that the Supreme Court of Jamaica, like the High Court in England, was a superior court and therefore had jurisdiction to determine the limits of its own jurisdiction; that where a judge of the Supreme Court made an order, he must be taken implicitly to have decided that he had jurisdiction to make it and, if wrong on that point, he made an error of law or fact, which could be corrected by the Court of Appeal; that a judge did not exceed his jurisdiction by making an error as to the extent of his jurisdiction, nor did a judge of co-ordinate jurisdiction have power to correct it; and that, accordingly, Walker J's decision that he had jurisdiction to set aside the default judgment could only be reversed by the Court of Appeal and Smith J. had been correct in holding that he had no power to set it aside…An order made by a judge without jurisdiction is obviously vulnerable, but it is not wholly without effect; it must be obeyed unless and until it is set aside and it provides a sufficient basis for the Court of Appeal to set it aside. On the other hand, since the defect goes to jurisdiction, it cannot be waived; the parties cannot by consent confer a jurisdiction on the court, which it does not possess.'* (Pp. 3204 & 3205 A & B & paras. 28, 32 & 33) Support for that, which was authoritatively laid down by the Privy Council in the ***Strachan case (op. cit.)***, can be found in the judgment of P. Williams, JA. In ***Ray Dawkins v Damion Silvera [2018] JMCA Civ 25***, albeit in that case, same is succinctly stated. See para. 58 of that judgment.

[24] With that carefully considered law now in mind, I am presently convinced beyond doubt, that even though I may disagree with the manner in which Dunbar-Green, J. (as

she then was) exercised her jurisdiction as a jurist of this court, when she granted the parties the relevant extension of time, and even though I may have exercised my discretion in respect of extension of time, differently than the way in which same was then exercised by Dunbar-Green J. (as she then was), I have in any event, no jurisdiction whatsoever to either vary, revoke or set aside the said order.

[25] Furthermore though, even if I did have such jurisdiction, surely, it could not be in the overall interest of justice, given the context that at all material times, the opposing parties to this claim had, at the very least acceded to the order of Dunbar-Green J. (as she then was), over eight years prior to this week, when on Monday, for the first time, the defence counsel announced that they were challenging same, albeit even at this stage, not as directly as they should have, or in other words, by means of a written application to this court, on notice to the claimant's counsel. That surely cannot have been a correct approach for Crown Counsel to have taken in a matter such as this, and in that regard, my excoriation would have been the same, whether arguments such as the ones advanced before me by Crown Counsel on Monday and Tuesday of this week, had instead, been advanced by counsel for the claimant in an effort to prevent the defence witness from testifying.

[26] Whilst technicalities will always be part and parcel of the law, generally, practitioners of law, and jurists, who are expected to apply the law, should not permit technicalities to prevail over the overall interests of justice. To my mind, that is what Crown Counsel sought, albeit likely unwittingly, to have this court do, in upholding their contention that with the claimant being his only witness and with his witness statement having initially, been filed and served out of time, the case for the claimant should now be dismissed by this court, for want of prosecution. Counsel must always know and bear in mind as important, their duty to assist the court to further the overriding objective, of enabling the court to deal with cases justly. See ***rule 1.3 of the CPR***. The

word *'parties'* in that rule, must of necessity, include within its ambit, counsel for those parties.

[27] For all the reasons given, I strongly disagree with Crown Counsel's conclusion in that regard, and I will order that new dates now be scheduled for trial over three (3) days, and will order that the costs for this court's hearings in respect of this claim, being two (2) hours on Monday, two (2) hours on Tuesday, and two (2) hours today, that being a total of six (6) hours, will be awarded to the claimant, in any event. We will obtain the earliest dates for trial that are agreed to by the parties' counsel and the court.

Orders

1. The defendant's preliminary submission that the claimant's claim should be dismissed for want of prosecution, is rejected by this court and costs for over six (6) hours for attendance at court and research related to that preliminary submission, are awarded to the claimant in any event and such costs shall be taxed, if not sooner agreed.

2. The trial of this claim is adjourned to be held in person, before a Judge alone, in open court, on September 20, 21 and 22, 2027 commencing at 10 a.m. on each day.

3. The defendant is granted an extension of time, so that the defendant's skeleton submissions filed on June 27, 2025, shall stand as if having been filed and served within time and the parties shall file and serve a bundle of the authorities referred to, in their respective skeleton submissions, by or before July 31, 2025.

4. The claimant and Sergeant Courtney Taylor are to be present to give evidence upon the trial of this claim.

5. Leave to appeal as sought by the Crown, is denied.

6. The claimant shall file and serve this order.

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Hon. K. Anderson, J.