[2018] JMCC COMM 26

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2012 CD 00084

BETWEEN	**CONSTRUCTION DEVELOPERS ASSOCIATES LIMITED**	**CLAIMANT**
AND	**URBAN DEVELOPMENT CORPORATION**	**DEFENDANT**

IN CHAMBERS

Tavia Dunn and Javone Taylor for the Claimant instructed by Nunes, Scholefield, Deleon & Co.

Courtney Williams and Kristopher Brown for the Defendant instructed by DunnCox.

HEARD: 15th June 2018.

Civil Procedure – Default Costs Certificate - Rule 65.22 of the Civil Procedure Rules-Application to set aside - Whether paying party entitled to set aside Default Costs Certificate - Both parties in technical breach of the rules - Good Reason-Points of Dispute.

COR: BATTS, J

[1] On June 15, 2018 after hearing the parties I made the following orders: :

1. The Default Costs Certificate entered on the 19th day of January 2017 is set aside.

2. Claimant to file Points of Dispute on or before the 22nd day of June 2018.

3. Cost of today and Costs thrown away to the Defendant to be taxed if not agreed.

4. Court recommends that the Registrar tax the Bill of Costs filed on the 18 October 2016 as a matter of urgency.

5. Provisional Charging Order in respect of land registered at Vol. 1399, Folio 946 extended to the 26 October, 2018.

6. Inter partes hearing of the application to make provisional order final is fixed for the 26th October 2018 at 10 am for half an hour.

7. Claimant's attorneys at law to prepare file and serve formal order.

I promised then to put my reasons in writing and this Judgment is the fulfilment of that promise.

[2] In the year 2000, the Claimant initiated proceedings against the Defendant for breach of contract for construction and associated works. A defence was filed and the matter eventually tried by the Honourable Mrs Justice Sinclair Haynes (as she then was), The Defendant succeeded in the claim and, in the judgment dated the 5th December 2014, obtained an order for costs. The costs were to be agreed or taxed. At the time the attorney-at-Law on record for the Claimant was Ms. Carol Davis. Messrs Nunes, Scholefield, DeLeon & Co, took over conduct of the matter at the appellate level and filed a Notice of Appeal on the 15th July 2015.

[3] A Bill of Costs was filed on the 28th of October, 2016 and Ms Carol Davis was served with it on the 4th of November 2016. On the 11th November 2016, Messrs, Nunes, Scholefield Deleon & Co were served with the same Bill of Costs. It was however, not until the 18th April, 2018, that Nunes, Scholefield Deleon & Co filed and served a Notice of Change of Attorneys. As such, at the time of service of the Bill of Costs Nunes, Scholefield, DeLeon & Co were not on record as the attorneys-at-Law with conduct of the matter in the Supreme Court. A Default

Costs Certificate was served on both Ms Carol Davis and Nunes Scholefield Deleon & Co on the 20th February, 2018. It had been issued by the Registrar on the 19th January, 2017.

[4] The Claimant has come before this Court for an Order that the Default Costs Certificate issued on the 19th of January 2017, be set aside; and that the Claimant be permitted to file its Points of Dispute .The application is made pursuant to R**ule 65.22** of the **Civil Procedure Rules ('CPR')**, 2002. The rule states that a paying party may seek to set aside a Default Costs Certificate after failing to file its Point of Dispute within the required 28 days. Rule **65.22** of the **CPR**, (as amended in 2011) states:

> *"(1) The paying party may apply to set aside the default costs certificate.*
>
> *(2) The registrar must set aside a default costs certificate if the receiving party was not entitled to it.*
>
> *(3) The court may set aside a default costs certificate for good reason.*
>
> *(4) An application to the court to set aside a default costs certificate must be supported by affidavit and must exhibit the proposed Points of Dispute."*

[5] In the matter of **Rodney Ramazan and Another v Owners of Motor Vessel (CFS Pamplona)** [2012] JMCA App 37, Brooks JA, sitting in chambers, gave guidance as to the relevant considerations for setting aside a Default Costs Certificate:

> *"[14] The above quotation identifies specific issues, which should be considered in deciding whether a good reason existed for setting aside a default costs certificate. Without attempting to stipulate mandatory requirements it would seem that those issues would include:*
>
> *(1) the circumstances leading to the default;*
>
> *(2) consideration of whether the application to set aside was made promptly;*
>
> *(3) consideration of whether there was a clearly articulated dispute about the costs sought;*

> *(4) consideration of whether there was a realistic prospect of successfully disputing the bill of costs;*
>
> *I find also that rule 2.20(4) of the CAR which requires a consideration of the principles of relief from sanctions applies in these circumstances. The rule states:*
>
> *"(4) CPR rule 26.8 (relief from sanctions) applies to any application for relief."*
>
> *It would seem that an application to set aside a default costs certificate easily qualifies as an application for relief. In assessing the instant case I shall use the benchmark set out in rule 26.8, albeit in a somewhat adjusted order."*

[6] Brooks JA reiterated his position on the law in the matter of **Harold Brady v The General Legal Council** [2012] JMCA App 40,. The question to be answered is whether the applicant has satisfied the requirements listed in the rules. In summary the application ought to be prompt, supported by affidavit, provide a good explanation for the failure to file the Points of Dispute and, demonstrate a real prospect of success that is, a bona fide dispute about the costs. The court is also to consider whether there has been general compliance with the orders of the court and the effect of the grant of the relief on the parties and the proceedings.

[7] The Claimant submits that the Defendant is in breach of **rule 65.18 (2).** That rule requires that the receiving party file and serve its Bill of Costs *'not more than three months after the date of the order or event entitling the receiving party to costs*." The Defendant's Bill of Costs ought to have been filed on the 5th of March, 2015.It was therefore one year and seven months late. The Defendant submitted that there is no automatic sanction for breach of this rule. A failure to comply with **Rule 65.18(2)** does not preclude the receiving party obtaining its costs. The breach may however result in the court disallowing all or part of the statutory interest on costs in respect of any period of delay; or disallowing all or part of the costs of taxation that might otherwise be awarded to the receiving party, see **Rule 65.19**.

[8] The power under **Rule 65.19** and its effect on **Rule 65.18** was discussed in **Auburn Court Limited and Delbert Perrier v National Commercial Bank Jamaica Ltd and RBTT Jamaica Limited SCCA No 27/2004**, judgment delivered on 18th March, 2009. Justice of Appeal Harris, stated at paragraph 15:

> *"It appears to me that, the drafters of the Rules, in conferring discretionary powers on the registrar and the court to make certain orders on a receiving party's failure to commence taxation within the prescribed time, must have intended that the word "must" is not mandatory. It would have been contemplated by them that the word ought to be construed as meaning "may". It follows that the word "must" within the context of Rule 65.18(2) is merely directory and therefore does not impose upon a receiving party any obligation to adhere strictly to the filing of a bill of costs within the requisite period."*

[9] In the matter of **Henlin Gibson Henlin (A Firm) v Calvin Green & Lilieth Turnquest [2015] JMCA App 2**, the court considered a situation in which both the Bill of Costs and the Points of Dispute were filed out of time. F Williams JA (AG) declared at paragraph 46 :

> *"[46] It seems to me that it would be somewhat unfair for the respondent, while herself being in breach of the rules (although the applicant did not seize on the respondent's default), to be allowed to successfully take a technical point against the applicant based on a technical breach of the rules (albeit one that it is properly entitled to take).*

[10] The Claimant has rightfully highlighted the breach by the Defendant of the stipulated time. I agree and adopt the approach of Frank Williams JA . Both parties are therefore precluded at this juncture from taking advantage of the technical points, namely; (a) the Defendant's breach of the stipulated time to file its Bill of Costs and (b) the Claimant's late filing of Points of Dispute. It appears to me that the substantive issue to be decided is, whether there is a bona fide dispute as to the amount of costs.

[11] In the event another court takes a different view I will briefly examine the Claimant's reasons for the late filing of its Points of Dispute. Counsel stated that from inception, the matter had been a contentious one, with both parties throughout the proceedings changing counsel. Thus, Counsel's firm was retained

in or around June of 2015 with a view to arguing the appeal. In November of 2016 they were served with a Bill of Costs from the Defendant. They then did not have conduct of the matter in the Supreme Court. Notwithstanding Counsel took full responsibility for failing to bring the Bill of Cost to the attention of the Claimant, see the affidavit of Patrick Foster Q.C. at paragraph 8. The Claimant's counsel further stated that they had the responsibility of filing an appeal with respect to the matter and the changeover of legal representation significantly contributed to the oversight. A copious amount of time had to be spent by the Claimant in instructing and properly briefing Counsel on the numerous legal issues ventilated in relation to the matter. Counsel went on to state that the Claimant should not be prejudiced by its attorney's inadvertence.

[12] I am satisfied that there was no intentional breach of the rules and find the Claimant's explanation satisfactory. It is not fatal to the application. An attorney's error has been accepted as good reason for delay, see **Henlin Gibson Henlin (A Firm)** v **Turnquest** (cited above) and, so too, a clerical error resulting in a misplaced Bill of Costs see **Rodney Ramazon v Owners of M/V (CFS Pampiona)** cited above**.** The question of what is a good reason is answered by the exercise of a judicial discretion .The authorities suggest that a bona fide explanation and circumstances that do not suggest a deliberate, intentional or culpable failure will generally suffice.

[13] I also consider whether the Claimant's application is prompt. In the **Harold Brady case** (cited above) the application was filed one month after the default costs certificate was issued. The court found that it was promptly filed. In the matter at bar, once served with the Default Costs Certificate on 20th February, 2018, the attorneys brought it to the attention of the Claimant, took instructions and filed this application on the 29th of March, 2018. It was made as soon as reasonably practicable and I find that it was prompt in all the circumstances.

[14] The question now arises whether there is a bona fide dispute as to costs or, as it is more conventionally put, does the Claimant have a realistic prospect of

challenging the amount of costs. F Williams JA, in **Lijyasu M Kandekore v COK Sodality Co-operative Credit Union Limited et al**, **[2018] JMCA App 2** ,when looking at whether or not there was a realistic prospect of successfully disputing the bill of costs stated :

> *"Whether there was a clearly-articulated dispute about the costs sought; and whether there was a realistic prospect of successfully disputing the bill of costs.*
>
> *These two factors might conveniently be considered together. They should be considered against the background of: (a) what is stated in the applicant's points of dispute; and (b) what the rules require points of dispute to state. The main statement relied on by the applicant in his points of dispute is this:*
>
> *The Appellant disputes each and every item in the Respondents' bill of costs and the Appellant says that the Respondents Bill of Costs does not comply with the relevant court orders and the amounts claimed have no legal basis."*

[15] The Claimant is disputing the costs claimed, see the Further Affidavit of Patrick Foster, Q.C and the proposed points of dispute exhibited .When one looks at the intended Points of Dispute, they raise important questions. They suggest that there exists a real prospect of successfully defending the Bill of Costs. It is, asserted that the time and amount claimed is unreasonable. It is alleged that several items should be disallowed because Senior Counsel does not normally take the instructions for preparing documents, a role usually undertaken by Junior Counsel. It is also indicated that it is unnecessary for Senior and Junior Counsel to peruse the same document at the same time. The Claimant makes the point that the time and amount claimed should not be allowed as no order for costs was ordered on the 1st November 2012.. Another point of dispute stated that an amount should not be allowed as Counsel had already claimed for both the summons and affidavit which had been filed together.. The Claimant should not be deprived of an opportunity to articulate these and the other challenges to the Bill of Costs.

[16] In the final analysis, both parties being in breach of the technical rules as to time, I consider that the only real issue for my consideration is whether there is a bona fide challenge to the Bill of Costs, that is, whether there is a realistic prospect of a successful challenge. There has, in any event, been provided a satisfactory

explanation for the failure to file the Points of Dispute. The application for relief was promptly made .Both parties have contributed to the general delay and no prejudice is alleged. There is no doubt that the points presented demonstrate a clearly articulated dispute, and a bona fide one, as to costs. Having regard to the discretion afforded to me and the overriding objective, I believe that the Claimant should not be deprived of an opportunity to challenge the Bill of Costs.

David Batts
Puisne Judge
26th July 2018