IN THE SUPREME COURT OF JUDICATURE OF JAMAICA Judgment Book

CIVIL DIVISION

CLAIM NO. C.L. 1994/ D-130

BETWEEN	ALEXANDER DRYSDALE	1st CLAIMANT
AND	WINSTON CLARKE	2nd CLAIMANT
AND	HERMAN FARQUHARSON	1st DEFENDANT
AND	ENRICH GILMORE ALEXANDER GREEN (Executors of the estate of Phillip Powell, deceased)	2nd DEFENDANT

IN CHAMBERS

Mr. Garth Taylor, instructed by Lightbourne & Hamilton for the defendants/applicants.

Mr. Kevin Williams and Miss Yolande Christopher, instructed by Grant, Stewart, Phillips & Co., for the claimants/respondents.

Application for relief from sanctions – Circumstances in which such relief is to be granted –"Extraneous circumstances" for non-compliance with court order - Interpretation and Application of Rule 26.8 of the Civil Procedure Rules, 2002, as amended.

Heard: December 9 2008 & January 21, 2009

F. Williams, J (ag.)

Background

This matter has had a long and fairly-convoluted history.

It had its genesis in the signing of an Agreement for Sale of Land between the claimants/respondents and Mr. Phillip Powell on the 15th day of July, 1982. A breach of this agreement has been alleged by the claimants/respondents and suit filed in 1994 as a consequence. The claim is for specific performance of the said agreement; or, in the altemative, damages for breach.

The latest step in the litigation is an application by the defendants/applicants for relief from sanctions.

By Notice of Application dated (and filed) on the 7th November, 2008, the defendants/applicants seek relief from certain sanctions, which arise from an order of the Honourable Mr. Justice King made on the 2nd October, 2008.

The terms of the order were as follows: -

> "2. Unless the Defendants/applicants comply with all the case management orders by 10th November, 2008 their Statement of Case shall stand struck out."

The particular case-management order from which the defendants/applicants seek relief is that requiring the filing of witness statements by November 10, 2008. Relief is sought on this ground mainly on the ground of impossibility: that the defendants/applicants' witnesses are all deceased. As a corollary of this, the defendants/applicants have put forward another ground as a basis for applying for relief: - that is, that "The paper evidence before the Court is sufficient for the Court to render a Judgment in this matter".

This is ground iv of the defendants/applicants' Notice of Application for Court Orders filed on the 7th November, 2008.

Mr. Phillip Powell, the vendor and testator, died on or about the 12th May, 1984. Suit was filed against his executors, Mr. Herman Farquharson and Mr. Enrich Gilmore Alexander Green. These two defendants are now also deceased. It was hoped to lead evidence on behalf of the defendants from Ms. Sonia Jones, who acted as an attorney-at-law in the transaction, but Ms. Jones is also now deceased.

In these circumstances, the defendants (of course, through their attorneys-at-law) wish to rely on documentary evidence to resist the claimants/respondents' case and to prove the

counterclaim. To this end, some sixty-seven (67) documents have been exhibited to the affidavit of one of the vendor's sons and beneficiaries, Enrico Powell, sworn to on the 28th day of November, 2008. (Mr. Enrico Powell and his brother, Mr. Alistair Powell were, by order of Straw, J on the 4th February, 2008, also named personal representatives of the vendor's estate for the purposes of these proceedings). Additionally, another six (6) documents have been exhibited to the affidavit of Kevin A. Williams, sworn to on the 8th day of December, 2008. In the result, there are at lease seventy-two (72) documents that might have to be considered against the background of any *viva voce* evidence that will be given by the claimants/respondents and their witnesses, if any, at the trial of this matter.

An additional aspect to the background to this case is that this is by no means the first application for relief from sanctions by one or other of the parties. It is fair to say that the parties, at one time or another, have both found themselves in breach of various court orders made at various stages of the proceedings. For example, on the 5th June, 2002, Sykes, J. granted an extension of time to the claimants/respondents to file a list of documents, deliver further and better particulars and for documents disclosed to be inspected. He also made case-management orders on the 22nd February, 2005. Between 2005 and October, 2007, however, the only respect in which the parties complied with any case-management orders was in relation to disclosure of documents. Again, on the 7th November, 2007, Campbell, J made unless orders, extending the time for compliance with case-management orders by both the claimants/respondents and defendants (the case-management orders made by Sykes, J. on the 22nd February, 2005). Yet again, on the 24th January, 2008, King, J. confirmed the unless orders in respect of both parties' failure to comply with the case-management orders, with sanctions taking effect from the 15th January, 2008. This meant that the statements of case of both parties were struck out with effect from the said 15th January, 2008.

This, of course, necessitated both parties' applying to have their statements of case restored and for time for compliance with the case-management orders extended yet again. On the 16th April, 2008, Straw, J. granted relief from the said sanctions to the claimants/respondents, restoring their statement of case. By that same order, Straw, J. also granted similar relief to the defendants/applicants, "in the interest of justice". The claimants/respondents were condemned with the costs of that application and time for compliance with the case-management orders was extended to the 16th June, 2008. A trial date of the 23rd of February, 2009 was also set.

At this stage of the historical excursion into this case, we come full circle back to the order of King, J. made on the 2nd October, 2008, ordering compliance with all case-management orders by the 10th November, 2008, failing which the defendants' statement of case should stand struck out.

Apart from the failure to file the witness statement, it seems that the defendants have also failed to comply with a notice to produce dated the 14th day of June, 2002. That notice relates to the production of (i) " letter dated the 13th day of March 1986 from Miss Dorothy C. Lightbourne, attorney-at-law to Miss Sonia Jones, attorney-at-law; and (ii) survey plan sent to Miss Dorothy C. Lightbourne by Miss Sonia Jones under cover of letter dated the 18th day of March, 1986".

It might be convenient at this stage to go a little more into the areas of contention in the substantive case that is before the court.

Shortly stated, the three main issues for determination are: - (i) whether the agreement for sale is vague and uncertain as to be unenforceable, thus denying the claimants/respondents their remedy in specific performance; (ii) whether the claimants/respondents were at all material times ready, willing and able to complete the agreement, or whether they failed to fulfill some of their obligations under the said agreement, thus again disentitling them to the remedy they seek; In particular, whose

responsibility was it to have the sub-division plans prepared? and (iii) whether their case is doomed to failure as a result of laches on their part.

This is the factual background against which the relevant part of the Civil Procedure Rules, 2002 (as amended) must be considered.

Rule 26.8 of the CPR

This application is governed by Rule 26.8. There are also at least two cases cited in the submissions in this case that deal with the interpretation of this Rule. These cases are: - (i) **Gallaher International v Tlais Enterprises Ltd**. [2007] EWHC 527; and the Jamaican case of **Gloria Findlay v Gladstone Francis** (unreported) C.L. 1994/f. 045 – delivered by Sykes, J. on January 28, 2005.

The principle to be extracted from the **Gallaher case** can be found in the dictum of Aikens, J at paragraph 45: -

> " Relief from that sanction will be granted only if the court, having considered all the circumstances, regards it as proper to do so. In considering whether it should grant relief from sanctions, the court is obliged to ensure that it considers each of the factors listed at (a) – (i) of the CPR 3.9 (1). The Court must also... stand back and form a judgment in the aggregate of the relevant circumstances that have been identified in going through the list to see whether it is in accordance with the overriding objective in the CPR to lift the sanction".

In his judgment in the **Gloria Findlay case**, Sykes, J examined the relevant Rule in detail, comparing it with its English equivalent. He opined that, with the inclusion of the phrase "only if", the wording of Rule 26.8 (2) "has the effect of raising the bar for applications under this provision" (compared to the English equivalent). He also

expressed the view that the list of matters in Rule 26.8 (3) for the court to consider in applications of this nature is not exhaustive.

In fine, both cases (and other relevant ones) seem to require a court very carefully to consider all the matters set out in the relevant rule and to do so against the background of the available evidence and the overriding objective.

We may now examine the Rule against the relevant evidence in this case and against the background of the overriding objective.

The Main Requirements of the Rule
Promptness and Evidence on Affidavit.

Among the first requirements of Rule 26.8 (1) (a) and (b) are that the application for relief must be made promptly and be supported by evidence by affidavit.

That these requirements have been met has not been challenged by the claimants/respondents. Even if there were such a challenge, it is the court's view that these two requirements have been met: there being affidavit evidence in support of the application and the application having been filed on the 7th November, 2008: - even before the sanctions took effect.

Rule 26.8 (2) Whether the failure to comply was intentional etc

Rule 26.8 (2) has some three requirements. These are for the court to consider (a) whether the failure to comply was intentional; (b) whether there is good explanation for the failure; and (c) whether the party in default has generally complied with all other relevant rules, practice directions orders and directions.

In relation to the requirements at (a) and (b), it is to be remembered that it is the deaths of the vendor, the executors and the potential witness, Ms. Sonia Jones, attorney-at-law, that have brought the attorneys-at-law for the defendants to this pass. It is in respect of the

non-filing of the witness statement(s) that they seek relief; and, if there is no witness, then this must, in the court's humble view, qualify as a "good explanation" for the failure to comply with that requirement. In these circumstances, also, the failure to comply could never seriously be said to be intentional. In my view, the defendants/applicants have demonstrated that "there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances" thus passing the "test" laid down in **Caribbean General Insurance Limited v Frizzell Insurance Brokers Limited** [1942] 2 Lloyd's LR, 32, per Leggatt, L.J..

It is only the requirement at (c), therefore, that could seriously be challenged. This requirement must be considered in light of the history of the matter (outlined earlier). In this history, both parties have failed to comply with orders and directions for a considerable period of time. Against this background, therefore, the challenge is coming from parties who themselves have been in breach of orders and have recently benefited from relief from sanctions. It was these circumstances that led Straw, J to grant both parties relief "in the interest of justice" on the 16th September, 2008.

Rule 26.8 (3)

There are five matters to which the court must have regard under this part of the Rule. They are: -

(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.

I will deal with the requirement stated at (a) last as, in my view, it ties in directly with the overriding objective.

Whose fault, the failure?

In relation to (b), it is to be remembered that it is the deaths of all the potential witnesses that have led to the failure to comply, and so the failure could not be said to be the fault of either the vendor, executors or the defendants/applicants for the time being (the personal representatives ordered to be joined for the purposes of these proceedings).

How soon can the failure be remedied?

In relation to (c), all that the attorneys-at-law for the defendants/applicants will have to do if relief is granted, is to prepare for and proceed to trial: this is not one of those applications, which, if granted, would require the preparation, filing and serving of further documents or the taking of any other positive action, which might further delay the proceedings.

Can the trial date still be met?

This, (the answer to (b)), also leads to the answer to (d), because since no positive action is required on the part of the defendants/applicants/applicants (such as the filing of affidavits), with a corresponding need for time to be allowed for action to be taken in turn by the claimants/respondents/respondents, then it is clear that the trial date of February 23, 2009 can still be met.

Effect on the other party of granting relief

In these circumstances, it cannot be imagined what deleterious effect the granting of relief would have on the claimants/respondents (vide requirement (d)).

The interests of the administration of justice

I now consider requirement (a). I do so against the background of the overriding objective and the particular history of this matter. I also have had regard to the fact that, in the court's finding, the failure in this case was not intentional and that there are what might be regarded as unusual circumstances leading to the failure to comply, which is, in the court's view, a good explanation for the said failure.

It cannot be said that to grant relief would have a greater negative impact on the administration of justice than not to grant it. Whether or not relief is granted, the matter should be disposed of on the 23rd of February, 2009, all things being equal. In terms of the administration of justice, the scales are evenly balanced (in the court's view) where the question of the grant or non-grant of relief is concerned.

Conclusion

Having regard to all these considerations and looking at the matter "in the round", the court is of the view that it should grant the defendants/applicants' prayer for relief from sanctions that they seek.

It seems to me (looking at the requirements cumulatively), that the voluminous documentary evidence that exists will provide the proper context for the court to assess and interpret the viva voce evidence in this case and, with the help of cross-examination, to come to a conclusion either in favour of the claimants/respondents or the defendants/applicants. The matter should, therefore, proceed to trial.

In relation to the counterclaim, however, it should be remembered that this is regarded as a separate, independent action (see, e.g. **Attorney-General v Desnoes & Geddes Limited** (1970) 15 WIR 492, applying **Stumore v Campbell** [1892] 1 Q.B. 314). A counterclaim puts a defendant in the position of a claimant. Proving a counterclaim calls for the presentation of evidence. In this case the counterclaim is for damages.

With no surviving witness who can speak from his or her own knowledge of these alleged losses, the counterclaim, in the court's view, is doomed to failure. No relief from sanctions will therefore be applied to the counterclaim.

The court, therefore, orders that the defendants/applicants be granted relief from the sanction they pray on the claim. They are also being allowed fourteen (14) days from the date hereof to comply with the notice to produce dated the 14th day of June, 2002. For the avoidance of doubt, the same is not being extended to the counterclaim. The costs of the application are awarded to the claimants/respondents, to be taxed, it not agreed.