[2015] JMSC Civ 206

IN THE SUPREME COURT OF JUDICATURE

THE CIVIL DIVISION

CLAIM NO: 2011 HCV 01287

BETWEEN	**NOEL GREEN**	**CLAIMANT**
AND	**GARBAGE DISPOSAL & SANITATION**	
	SYSTEMS LIMITED	**DEFENDANT**

CONSOLIDATED WITH CLAIM NO: 2011 HCV 01288

BETWEEN	**LAURESTON LOWE**	**CLAIMANT**
AND	**GARBAGE DISPOSAL & SANITATION**	
	SYSTEMS LIMITED	**DEFENDANT**

CONSOLIDATED WITH CLAIM NO: 2011 HCV 01289

BETWEEN	**DOCKERY FORBES**	**CLAIMANT**
AND	**GARBAGE DISPOSAL & SANITATION**	
	SYSTEMS LIMITED	**DEFENDANT**

IN CHAMBERS

Mrs. Marvalyn Taylor-Wright instructed by Taylor-Wright & Company, Attorneys-at-Law for the Claimants/Applicant.

Ms. Lauri Smikle instructed by Oswest Senior-Smith & Company for the Defendant.

Heard: 15th December 2014 and 30th October 2015.

Civil Procedure - Application to strike out Defendant's Statement of Case – Non-compliance with Case Management Conference Orders – Documents filed outside of the prescribed time – Defendant's Application for Relief from Sanctions - Application not made promptly – No Good Explanation for Delay after filing the Witness Statement and Summary – Delay Unintentional – Whether in the circumstances the Defendant's Statement of Case should be struck.

CAMPBELL J,

[1] On the 18th March 2011, the Claimants commenced proceedings against the Defendant, seeking damages for personal injuries, loss and expenses resulting from a motor vehicle accident which occurred on 20th October 2009 along Port Henderson Road, St. Catherine.

[2] The Claimants allege that Dockery Forbes, who was driving a motorcar in which they were travelling, had stopped to make a right turn, when the Defendant's truck collided in the rear of their vehicle.

[3] The Defendant, on the other hand contends that whilst negotiating a corner, he came upon the Claimant's motorcar that had stopped on the corner in the left lane. It displayed no brake lights or indicator. The said vehicle was on the road way around the corner which created a nuisance.

[4] On 16th May 2013, at a Case Management Conference, Mrs. Justice George made several Orders, including that, "*Parties to file and serve witness statement on or before the 24th day of January, 2014 and Parties to provide standard disclosure on or before 30th September 2013.*" The Defendant has failed to comply with these Orders.

[5] On 31st January 2014, the Claimant filed a Notice of Application for Court Orders, to strike-out the Defendant's case and for Summary judgment. The Defendant responded by filing, a witness summary and a witness statement, some seventeen (17) and eighteen (18) days respectively after the deadline set at Case Management Conference.

[6] On the 24th March 2014, Mr. Justice Sykes refused the Claimants' application to strike-out the Defendant's Statement of Case and for Summary Judgment. The essence of the application was the failure of the Defendant to comply with the Case Management Conference orders. The Defendant was penalized in costs. The court ordered that there be no further pre-trial review.

[7] On the 7th May 2014, the Defendant filed an Amended Notice of Application for Court Orders seeking the following Orders, inter alia;

1. That there be an abridgement of the time within which to serve this Notice of Application for Court Orders;

2. That the List of Documents filed on the 21st day of January, 2014, the Witness Summary and Statements filed on the 11th February 2014 and 12th February 2014 stand as being filed;

3. That there be further amendments to the Amended Defence which was filed on the 10th day of October 2012.

4. The Defendants be granted relief from sanctions pursuant to Rule 26.8 of the CPR.

[8] The grounds on which the Orders are sought are;

i. On the 31st day of May 2013, the above-captioned matter came up for Case Management Conference Hearing before the Honourable Mrs. Justice S. George, the Learned Master made orders that the parties were to provide standard disclosure on or before September 30, 2013 and the parties to file and serve Witness Statements on or before the 24th day January, 2014 among other things. Further, the Pre-trial Review was scheduled for the 12th day of February 2014 and the Trial dates scheduled for the 26th-28th day of May 2014.

ii. That Ms. Stacia Pinnock Wright, Attorney-at-Law for the Defendant, in attempting to comply with the said order took instructions and settled the

List of Documents on January 24, 2014 and the Witness Statement and Witness Summary of the Defendant and filed the same on February 11 and 12, 2014 respectively.

iii. The failure to file the abovementioned documents within the time as specified in the Order was due to the fact that it took some time to locate the driver of the Defendant's motor vehicle. The said driver is no longer employed to the Defendant. An Investigator was retained to locate him and was able to do so enabling the signing of the Witness Statement.

iv. The failure to file the said document within the time specified was not intentional or contumelious. Moreover, there is no prejudice to the Claimants.

v. The further amendments to the Amended Defence filed on the 10th day October, 2012 is necessary to determine the real controversies in dispute. The Claimant would not be prejudiced of the amendments as they had notice of the Defendant's position that it was the Defendant's authorized driver's evidence that the vehicle in which the Claimants were driving was in a stationary position and was a nuisance.

vi. The record indicates that the Defendant has to date complied with all the other orders of the Court in this matter.

[9] The Defendant's application was to be heard on 14th May 2014, twelve (12) days before the trial date of the 26th-28th May 2014. On the trial date Mr. Justice Batts, ordered pre-trial review for December 15th, 2014, after the learned judge heard the Defendant's application that his application be treated as a preliminary point at trial.

The relevant Rules concerning sanctions

[10] Rule 26.7(2) of the **Civil Procedure Rules** (CPR) provides that; *where a party has failed to comply with any of these Rules, a direction or any order, any*

sanction for non-compliance imposed by the rule, direction or the order has effect unless the party in default applies for and obtains relief from the sanction, and rule 26.9 shall not apply."

- Rule 27.11(3) of the **CPR**, provides that; "*a party seeking to vary any other date in the time-table without the agreement of the other parties must apply to the court, and the general rule is that the party must do so before that date."*

  Subsection (4) provides that; "*a party who applies after that date must apply -*

  (a) for relief from sanction from any sanction to which the party has become subject under these rules or any court order; and

  (b) for an extension of time."

- Rule 28.14(1) of the **CPR** provides; "*a party who fails to give disclosure by the date ordered or to permit inspection may not rely on or produce any document not so disclosed or made available at inspection at the trial*."

- Rule 29.11(1) of the **CPR** provides; "*where a witness statement or 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."*

  Subsection (2) provides that; "*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."*

[11] The **Civil Procedure Rules** provides guidance in this area of law. Part 26.8(1) of the **CPR** which speaks to Relief from Sanction states that 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.

Subsection (2) provides that 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.

Subsection (3) outlines several considerations that the court must have regard to in granting the relief. These are as follows –

(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 would or not have on each party.

Additionally, subsection (4) provides that 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.

[12] It had been ordered at Case Management Conference, that witness statements were to be filed on or before 24th January 2014. On the 11th February 2014 and 12th February 2014, a Witness Summary and a Witness Statement were filed; seventeen (17) and eighteen (18) days respectively out of time.

[13] This breach of the Case Management Conference order, would have triggered, Rule 29.11(1) of the **CPR**, which would disentitle the Defendant from calling the intended witnesses in respect of the impugned statements and summary, unless

the court permits. The court, pursuant to Rule 29.11(2) of the **CPR** would be debarred at trial from permitting those witnesses, whose statements were served in breach of the orders to be called; "*unless the party asking for permission has a good reason for not previously seeking relief."*

[14] On the trial date, May 26th 2014, before Mr. Justice Batts, the Defendant had only filed his Notice for Relief from Sanctions, twelve (12) days before trial. Mrs. Taylor-Wright argued that the period of delay incurred before the Defendant filed for relief in respect of the list of documents, which should have been filed on the 30th September 2013 is seven (7) months. In respect of the witness statement and summary, the delay incurred from the 24th January 2014, is four (4) months delay.

[15] In **National Irrigation Commission Ltd. v Conrad Gray and Marcia Gray** [2010] JMCA Civ 18, the issue was whether the claimants had acted promptly in compliance with Rule 26.8(1) of the **CPR**. At paragraph 13, Harrison JA, said;

> *"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 and quoted with approval Simon Brown L.J., and comments;*
>
> > *"I must 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".*

[16] In **National Irrigation Commission Ltd. v Conrad Gray and Marcia Gray**, the Court of Appeal also relied on **Harrison v Hockey** [2007] All E.R. (D) 336, where Mann J, opined that a period of four and a half (4 ½) months between judgment and an application under CPR 39.3 was likely to be too long in the vast majority

of cases where an application under that provision was made. This is not a setting aside judgment situation but we do believe that similar principles in terms of time would be applicable to an application for relief from sanction.

[17] In the Court of Appeal case of **H. B. Ramsay & Associates Ltd v Caledonia Hardware Ltd et al** [2013] JMCA Civ 1, the court noted that whether something has been promptly done or not, depends on the circumstances of the case. The Court of Appeal considered **Hyman v Matthews** SCCA Nos 64 and 73/2003 (delivered 8 November 2006), where an application, made three months after the entry of a judgment as a result of a failure to obey an "unless order", had not been made promptly. Despite its finding, the Court of Appeal in Hyman allowed the appeal against the judgment at first instance, which had refused the application. The Court found, that Hyman belonged to a period of transitional cases where particular care should have been taken to give ample time to the parties to adjust to the new requirements.

[18] At paragraph 13 of **Ramsay**, Justice Brooks JA, said; "*I find that that era has already passed. In its wake, the court may well take a more stringent approach to dilatory application*." The **CPR** came as a remedy to the malady that plagued the court and resulted in civil matters taking years to wind its way through the system. In the present regime judges are central in managing the civil procedure.

[19] Smith JA, in the Court of Appeal case of **Mc Naughty v Wright** (2005) Court of Appeal, Jamaica Civ. App no 20/2005 (unreported) forcefully expressed the position of the court regarding non-compliance with the Rules and the orders of the courts. It was stated;

> *"I am constrained to repeat what the Court of Appeal has said ad nauseam, namely that orders or requirements as to time are made to be complied with and are not to be lightly ignored. No court should be astute to find excuses for such failure since obedience to the orders of the court and*

compliance with the rules of the court are the foundations for achieving the overriding objective of enabling the court to deal with cases justly."

[20] Further Brooks JA, at paragraph 31 of **Ramsay** said;

"*An applicant who seeks relief from a sanction, imposed by his failure to obey an order of the court, must comply with the provisions of rule 26.8(1) in order to have his application considered. If he fails, for example, to make his application promptly the court needs to consider the merits of the application. Promptitude does, however, allow some degree of flexibility and thus, if the court agrees to consider the application, the next hurdle that the applicant has to clear is that he must meet all requirements set out in Rule 26.8(2). Should he fail to meet those requirements then the court is precluded from granting him relief. There would, therefore, be no need for a court, which finds that the applicant has failed to cross the threshold created by rule 26.8(2), to consider the provisions of rule 26.8(3) in relation to that applicant."*

[21] Was the failure to comply intentional? Ms. Lauri Smikle, Attorney-at-Law, in her affidavit dated 27th March 2014, filed in support of the application, says that the failure to file within the time specified was not intentional There is no expression in respect of the delay in applying for relief from sanctions.

[22] The Defendant is not saying that there is evidence before the court that he acted promptly, or with alacrity. In my view he has failed to resist the Claimants' allegations that his conduct of the matter was dilatory, resulting in inordinate delay. I find that the application for relief from sanction was not made promptly.

[23] Was there a good explanation for the failure? The affidavit in support of the application for relief proffers an explanation, for the delay in the serving of the witness statements, which is that there was a difficulty in locating the Defendant's driver. There is however offered no explanation for the delay in applying for relief from sanctions. The reasons given for the delay is that there was difficulty finding the Defendant's driver as he was no longer employed to the Defendant. As such they had to seek the assistance of an Investigator. Additionally, the then Attorney-at-Law, Stacia Pinnock-Wright for the Defendant in attempting to comply with the said Order was taking instruction to settle the List of Documents on the 21st January 2014. There appears to be no explanation for the delay that followed the filing of the statements. The explanation given for the delay incurred prior to the filing of the Witness Statement and Summary is reasonable, but none was proffered for the delay incurred subsequently.

[24] The Privy Council in **The Attorney General v Universal Projects Limited** [2011] UKPC 37, held that the absence of a good explanation within the meaning of the rule, was fatal to the application. Where there is no good explanation for the default, the application for relief from sanctions must fail. The effect of Rule 26.8(2) of the **CPR** is that it is a precondition for granting relief; that the applicant must satisfy all three (3) elements of Subsection 2.

[25] There has been no general compliance with the other Rules, and there has been no application to extend time pursuant to Rule 27.11(4) of the **CPR**. The Listing Questionnaire was filed outside the time ordered at Case Management Conference. The affidavit in support does not conform with Rule 30.2(e)(i) of the **CPR**, in that it does contain the name of the person on whose behalf it is filed. Additionally, it does not contain the full name of the person before whom it was sworn contrary to Rule 30.4(1)(d) of the **CPR**.

[26] As such, I am precluded from granting the relief sought because the Defendant has not met the requirements of Rule 26.8(2) of the **CPR**. It is clear in Rule 26.3(1)(a) of the **CPR** that in addition to any other powers under these Rules, the

court may strike out a statement of case or part of a statement of case if it appears to the court that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in proceedings.

[27] Consideration was also given to the case of **Branch Development Limited T/A Iberostar Rose Hall Beach Hotel v The Bank of Nova Scotia Ltd**. [2014] JMSC Civ 003, where Mrs. Justice McDonald-Bishop noted that the ultimate question should, however be whether striking out will produce a just result having regard to all that the achievement of the overriding objective entails. Similarly in **Business Ventures & Solutions Inc. v Anthony Dennis Tharpe et al** [2012] JMCA Civ 49, Brooks JA, cited **Biguzzi v Rank Leisure plc** [1999] 4 All E.R. 934. In that case, Lord Woolf MR, in explaining the sanction of striking out of a statement of case in the regime of the **CPR**, said at page 940b:

> *"Under r 3.4(2)(c) [the English CPR equivalent of rule 26.3(1)(a)] a judge has an unqualified discretion to strike out a case such as this where there has been a failure to comply with a rule. The fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of case. The advantage of the CPR over the previous rules is that the court's powers are much broader than they were.* ***In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out." [Emphasis supplied].***

The court hereby grants the Claimants' application, save and except Order 2.
The court Orders;

1. The Defendant's Statements of case be struck out for failure to comply with Case Management Conference orders made on the 16th day of May 2013.

2. That judgment be entered for the Claimant and the matter proceed to Assessment of Damages

3. Costs to the Claimants to be taxed or agreed*.*