[2023] JMCC COMM. 27

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISON

CLAIM NO. SU2020CD00414

BETWEEN	**KONKI OVERSEAS JAMAICA LIMITED**	**CLAIMANT**
AND	**M & M JAMAICA LIMITED**	**DEFENDANT**

Mr. Garth McBean KC instructed by Paris and Co. for the Claimant

Ms. Abigail Henry instructed by Naylor and Mullings for the Defendant

IN CHAMBERS

Heard: 26th April and 31th May, 2023

Application for Relief from Sanction- Part 26 of the Civil Procedure Rules (2002) -Test of promptness - good explanation - general compliance - interest of the administration of justice

STEPHANE JACKSON-HAISLEY J.

INTRODUCTION

[1] This is the Claimant's application for relief from sanction brought by way of an Amended Notice of Application for Court Orders filed on February 21, 2023 and supported by an Affidavit from counsel who had conduct of the matter. The original application was filed on September 23, 2022. The Claimant seeks the following order:

i. Pursuant to the provisions of Part 26.1(7) and 26.1(8) of the Civil Procedure Rules as amended the Applicant/Claimant hereby applies for relief from the sanction imposed by this Honourable

Court at the Pre-Trial Review held on the 21st September 2022 by varying or setting aside the Order made by the Court dismissing the Claim filed herein by the Claimant on the 21st September 2020 and extending the time for full compliance with the Orders made by this Honourable Court for the filing and service of the Particulars of Claim by the Claimant.

CLAIMANT'S CASE

[2] The grounds upon which the Claimant seeks this order can be summarized as follows: The failure to comply was not intentional as counsel for the Claimant was operating under a mistake as to when the Particulars of Claim was required to be filed. The earlier failure to comply which resulted in the Claimant being granted relief from sanction was due to inefficiency and not any disrespect for the Court and that the Applicant has generally complied with all other relevant rules, practice directions, orders and directions. Further, that it is in the interest of the administration of justice that the orders be granted as it will further the overriding objective and the Defendant will not be prejudiced by the grant of relief from sanction.

[3] There are two Affidavits in Support of the Application, one of which has attached to it a report from a Clinical Psychologist Dr. Charmaine Garwood who had been seeing Counsel representing the Claimant since April 2022 and wrote about her assessment of him and indicated her findings. Among the findings she made was the fact that although his long-term memory appeared intact he displayed minimal difficulty with short-term memory. She indicated that when she first saw him, he had recently lost his secretary and reported immense pressure at work and cited occasions when he had to do all-nighters in his office to catch up on work and she explained to him the likelihood of developing difficulty with short-term memory and focus. He started a course of treatment which rendered some improvements and resulted in the treatment being suspended. Sometime later he returned to treatment with concerns about his ability to follow through with simple tasks. Subsequent to that time he shared his MRI results him her which evidenced Microvascular Ischemic Disease and

she opined that this is sometimes a precursor to Alzheimer's. She recommended him to a neurologist.

[4] Kings Counsel Mr Garth McBean in his submissions pointed out that the law on how to treat with an application for relief from sanctions is fairly well established however the way in which the law is to be applied may pose an issue. It is well established that the threshold requirement of Rule 26.8 (1) and (2) must be satisfied for the court to exercise its discretion.

[5] On the issue of promptness, he cited the cases of **Corey Jackson v Annmarie Phillips and Priscilla Fisher** [2017] JMSC Civ 30 and **H.B. Ramsay & Associates Limited et al v Jamaica Redevelopment Foundation et al** SCCA No. 88 of 2012, both dealing with how the Court should approach the issue of promptness. In the **H.B. Ramsay** case Brooks JA (as he then was) indicated that the word "promptly" does have some measure of flexibility in its application. He asked this Court to exercise some measure of flexible especially given the circumstances of this case and the report from the clinical psychologist.

[6] Kings Counsel also cited the case of **Jamaica Public Service v Charles Vernon Francis and Columbus Communications Jamaica Limited (Trading as FLOW)** SCCA No. 126/2015 [2017] JMCA Civ 2 on the question of what is a good explanation and to make the point that a litigant is entitled to have his case heard on the merits and should not be lightly denied that right. He pointed out that the issues experienced by Counsel were largely medical and are being addressed as best as possible. Reliance was also placed on **Villa Mora Cottages Limited and Anor v Adele Shtern**, Supreme Court Civil Appeal No. 49 of 2006 where the Court indicated that even in cases where the fault can be laid at the feet of the defaulting party the court may lend its sympathy to the cause. Kings Counsel emphasised that the need to obey orders of the Court has to be balanced along with the principle that a litigant is entitled to have his case determined on the merits.

[7] He asked the Court to find that the Claimant has generally complied with previous orders made and has by now fully complied with all the case

management orders and is ready for trial and so it is in the interest of the administration of justice that the order sought be granted.

THE DEFENDANT'S CASE

[8] The affidavit in response to the application was made by Ms. Gillian Mullings, attorney-at-law. She pointed out that on October 2023, presumably she meant 2021 certain case management orders were made by the court. Among the orders made was that "Matter reconsidered by Palmer-Hamilton J, therefore matter to proceed as if begun by way of Claim Form" and "Trial is set for four days on September 26th, 27th, 28th and 29th 2022 to be heard in open court before a judge alone". Up to June 24, 2022 when the matter came up for hearing the Court observed that the Claimant had not complied with any of the orders made. There was also the Unless Order which stipulated that "Unless the Claimant fully complies with Case Management Orders made October 21, 2021 by June 24, 2022 then the Claimant's statement of case stands as struck out".

[9] Despite this the Claimant only complied with three of the five orders. The Claimant made an application for relief from sanction with respect to the documents filed out of time. The application was filed and served on June 29, 2022, less than the required time for service of applications on opposing parties. On June 30, 2022 the relief from sanction was granted with a further order that the Claimant is to file and serve a Particulars of Claim on or before July 15, 2022. There was also an order for the Defendant to file and serve a Defence by July 30, 2022 followed by an order that "Unless the parties comply with orders 2 and 3 their respective statements of case shall stand dismissed". Thereafter the Particulars of Claim was filed and served albeit out of time. On September 21, 2022 the Claimant having failed to comply with the order of Batts J the Court ordered his statement of case struck out with costs to the Defendant. On September 23, 2022 the Claimant filed another application for relief from sanction. Ms. Mullings emphasized that this application came approximately two months after the failure to comply and at that time no affidavit in support was filed. The Claimant failed to serve the Defendant within the time period

required by the rules for service of applications before a hearing date. Further the Claimant failed to file the affidavit in support along with the application as required but instead filed it some three months later.

[10] Mrs. Mullings further expressed that the Claimant has certainly shown a general history of being non-compliant with the deadlines set by the Court for the orderly administration of this matter. The facts and the records, as are before the court, show that, against Counsel for the Claimant's contention, the Claimant has not generally complied with other relevant rules and continued to disregard the orders set by the court by complying in a manner that only suits the Claimant without regard to the consequences.

[11] Counsel in her written submissions, provided an overview of the prevailing law starting with the decision of Brooks J (as he then was) in **White v Grant and Daley** Suit no C.C. 1993/W127 delivered April 7, 2006 which reaffirmed the court position that:

> *"The general principle is that 'unless' orders are to be given priority by those affected by them and should be complied with precisely. The court in considering applications for relief from sanctions should always be mindful that it does not send a contrary signal to the litigants and their attorneys-at-law."*

[12] She relied heavily on the judgment of Hutchinson J in **Blake v Gleaner Company Ltd** [2020] JMSC Civ 55 to make the point that where the applicant fails to comply with requirements of Rule 26.8(1) and (2), there is no requirement for the Court to go further to consider whether the provisions in 26.8(3) would apply. In coming to her decision Hutchinson J drew from cases such as **Elenard Reid et al v Nancy Pinard et al** C.L. 2002/R032 delivered 27th February 2009, **Hytec Information Systems v Coventry City Council** [1997] 1 WLR 1666, **H.B. Ramsay and Associates Limited et al v Jamaica Redevelopment Foundation Inc. and The Workers Bank** [2013] JMCA Civ 1.

[13] On the issue of promptness she cited the decision of Sykes J (as he then was) in **Sullivan v Rick's Café Holdings Inc. T/A Rick's Café (No. 2)** 2007 HCV 03502 Unreported delivered April 15, 2011 for the meaning to be afforded to the word "promptly". "Promptly is not defined in the rules, however, it is obvious

that the context in which this adverb is used in the rules conveys the sense of "without delay", "quickly" or "at once". She submitted that the Claimant failed to satisfy the legal requirement of a prompt application as despite the fact that the application was made two days after the striking out, this was approximately seventy days after the date he should have complied.

[14] She argued that the explanation provided in the affidavit evidence of the Claimant does not meet the criteria of good explanation. She argued that even though counsel was aware of his diagnosis he elected to suspend his treatment and so the Court should find that there is no good and reasonable explanation for the failure. A simple oversight or inadvertence without more is not a good explanation as since it was an unless order deadlines are to be treated as priority and be foremost in the mind of Counsel.

[15] She advanced that the Claimant has also failed to comply generally with all orders of the Court.

ISSUES

1. Whether the application was made promptly?
2. Whether the failure to comply was unintentional?
3. Whether there is a good explanation for the failure to comply?
4. Whether the Claimant has generally complied with all other relevant rules, practice directions, orders and directions?
5. Whether it is in the interest of the administration of justice to grant the relief?

DISCUSSION

[16] An application for relief from sanction is provided for in CPR 26.8 and stipulates as follows:

"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 direction, orders and directions.

3. In considering whether to grant relief, the court must have regard to-

   (a) The interest 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.

4. 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."

[17] To satisfy the Court that the relief from sanction should be granted the applicant must first satisfy the requirements of rule 26.8(1) and 26.8(2). Having satisfied those requirements that is not the end of the matter, the court still has to have regard to the factors set out in rule 26.8(3) in determining whether to grant the relief. However, before the court can move to consider these factors, the applicant must cross the threshold created by rules 26.8(1) and 26.8(2). These words are attributed to Brooks JA (as he then was) in the often-cited decision of the Court of Appeal of **H.B. Ramsey & Associates Ltd & another v Jamaican Redevelopment Foundation Inc & The Workers Bank** as follows:

> *"If he fails, for example, to make his application promptly the court need not consider the merits of the application."*

The first hurdle to be crossed is that of promptitude and that is where I will begin.

Whether the application was made promptly

[18] The application before me was made two days after the Order striking out the Claimant's case. Counsel for the Respondent has argued that the time to be considered would be the time the "Unless Order" would have taken effect which is on July 15, 2022. It is a fact that the Claimant did not need to await the striking out to make an application for relief from sanction as he could have applied once he realised that the date for compliance had passed. Based on the provisions of the rule 26.7 where a party fails to comply with an Order, any sanction for non-compliance has effect unless the party in default applies for and obtains relief from the sanction. Hence the Unless Order would have been in effect from July 15, 2022.

[19] However, based on how the Amended Notice of Application for Relief from Sanction is worded, what is being sought is relief from the order of the court to strike out the Claimant's case. The striking out took place at Pre-trial Review held on September 21, 2022. This was the said wording used in the original Notice of Application for Relief from Sanction which was filed on September 23, 2022, two days after the case was struck out. Therefore, a relevant time to be considered could have been when the case was in fact struck in which case this application was made two days thereafter. Based on the definition accorded to promptly which is "quickly", it is clear that two days would fit squarely within that meaning and satisfy the test of promptness.

[20] However, in the context of how rule 26.7 is worded, the relevant time would be July 15 to September 23. In the normal course of things this would be over two months within which the application could have been made. However, it is noted that as at July 15, there would have been approximately two weeks before the close of the court's term and as at September 23 there would be approximately one week after the beginning of the court's term. In light of that

and taking into account the medical issues alluded to in respect of counsel, I am prepared to exercise some flexibility on the question of promptness. In all the circumstances, I am prepared to say that the application was made promptly.

Whether the failure to comply was unintentional

[21] Counsel in his affidavit set out the circumstances in which he found himself which he described in this fashion: "the factual explanation for the difficulties being experienced by me are largely medical and are being addressed by me." He did not stop there but in a subsequent affidavit annexed the medical opinion of Dr. Charmaine Garwood Clinical Psychologist. I take into account all that Dr Garwood expressed in her report particularly the fact of his short-term memory lapse and difficulty to follow through on various tasks. There is no need to set out all the details of the report, suffice it to say there were several findings that weigh heavily on the court's mind and decision under this heading. It was argued that counsel should have taken better precautions regarding his health and his practice but the very nature of his diagnosis is what is said to have caused him to act in the way he did.

[22] Giving consideration to medical factors is not new to applications of this type. This court in a recent decision of **Rupert Brown v D.R. Foote Construction Company Limited** [2022] JMSC Civ 158 in considering the issues of promptitude and the reasons given for the failure to comply had regard to factors including counsel being diagnosed with a serious illness. In this instance although it was not said that there is any serious illness, the nature of counsel's condition has caused me to form the view that the failure to comply was unintentional.

Whether there is a good explanation for the failure?

[23] The reason given for the failure to comply is the same as what I have discussed in the preceding section which is due to counsel's prevailing condition which I

am of the view provides a good explanation for the failure to comply with the order of the Court.

Whether the applicant has generally complied with other relevant rules, practice directions and orders?

[24] Counsel for the Defendant argued that on the face of it the applicant has defaulted on more than one occasion, and this is in fact so, however, the nature of the default has to be considered. It is undisputed that this was not the first time he has had to seek relief from sanctions for failure to comply however it is part and part of the same issue which is the failure to comply with case management orders made. He failed to comply with the orders within the time stipulated, but he has now generally complied with the orders albeit late. The case **Paul White v Homel Grant and Carlos Daley** Suit No. C.L. 1993/W127 delivered April 7, 2006 unreported Brooks J (as he then was) cited by counsel for the Defendant features similar circumstances to the instant case and demonstrated how the court treated with the issue of general compliance. In that case Brooks J noted that when the case came on for Pre-Trial Review there was no compliance with any of the orders for the filing of documents made at the Case Management Conference. At the continuation of the Pre-Trial Review the court made an order for filing by specific dates and stipulated that the statement of case would stand struck out unless there was compliance. At a later Pre-Trial Review date only some orders were complied with and the case was struck out and judgment ordered. Two days later the application for relief was filed. Counsel candidly admitted that the latest default was not his client's but due to inadvertence in his own offices.

[25] Brooks J after considering all the circumstances including that the defaults were not a general disregard for the rules of court found that there was general compliance and made following statement:

> *"…I would not consider those defaults as a general disregard of the rules of court. It may be a bit of generosity to classify their performance as being 'general compliance' with the rules and directions but in light of the fact that they have cured all previous default, I am prepared to make that classification."*

Similarly, here and particularly in light of the medical report, I do not consider the defaults to be a general disregard for the rules of the court. The Claimant has now cured all previous defaults and has now fully complied with all the Case Management Orders and is ready for trial. It is in that context that I make the classification of "general compliance". I feel fortified in arriving at the conclusion that there has been general compliance and move on to consider the other factors set out in section 26.8(3).

[26] The interest of the administration of justice recognizes that a party is entitled to have his case determined on the merits and a party should not lightly be denied that right and so I have to balance that right against the need for timely compliance and the need to deal with cases expeditiously. If the application is not granted the applicant would lose the right to advance his case and although he may have a recourse against his lawyer, this would be in circumstances where his attorney is suspected of suffering from a debilitating condition due to aging and other factors. The Claimant's main representative is also a man of some advanced years and so the time he has to pursue other remedies may be restricted. As far as the evidence before the court has unearthed, he is not at fault and has contributed in no way to his case being dismissed. If the current situation were to remain, he would be forced to explore other means of accessing justice.

[27] Any prejudice that would be occasioned by the Defendant must also be taken into account. On September 22, 2022 the Defendant filed a Notice of Application for Court Orders seeking an order that Judgment be entered in his favour. He would be deprived of the benefit of advancing this application and he would already have incurred some cost in preparing for this application. The question of costs could easily be remedied by an order for his cost to be borne by the applicant. The fact that the Defendant has been delayed in the presentation of his Defence is also a matter to be considered. However, I take into account that any success the Defendant would reap on the application for judgment would be a victory on a technicality which would not in the

circumstances be in the interest of justice. When these factors are balanced the prejudice to the Claimant is greater than that to the Defendant. On my review of the Claimant's claim, it appears that the Claimant's case has a reasonable prospect of success. When all these factors are weighed, I find this to be an appropriate case to do as the Court did in the **Villa Mora Cottages Limited** case and lend sympathy to the Claimant's cause.

[28] The failure to comply has already been remedied and this Court is in a position to set trial dates within a reasonable time period. I am prepared under these circumstances to grant the relief from sanction. Consequently, the Defendant's application for judgment to be entered is refused.

[29] My orders are as follows:

1. The Claimant's Amended Application for Court Orders for Relief from Sanction filed February 21, 2023 is granted.
2. The Defendant's Request for Judgment filed September 22, 2022 is refused.
3. Costs are awarded to the Defendant to be taxed if not agreed.

Stephane Jackson Haisley
Pusine Judge