In The Supreme Court of Judicature of Jamaica

Claim No 2003 HCV 2351

Between	**Hyacinth Matthews**	**Claimant**
And	**University Hospital Board Of Management**	**Defendant**

Interlocutory Application – Judgment in default – whether Judgment to be set aside – effect of Unless Order – Relief from Sanctions – whether pre-conditions cumulative –whether attorneys error an acceptable explanation.

F. Jobson, L. Phiilpot's-Brown, R. Bonner for Claimant instructed by Richard Bonner & Associates

A. Robinson for Defendant instructed by Myers Fletcher and Gordon

Heard: 27th January 2015

Coram: Batts J

REASONS FOR JUDGMENT

[1] On the 27th January 2015 having heard submissions I made the following Orders:

a) Relief from Sanctions granted
b) Trial date fixed for the 4th May 2016 for 3 days
c) Pre-trial Review fixed for the 16th November 2015 @ 10.00 a.m. for ½ hour.
d) The Claim will stand struck out unless the Claimant serves on the Defendant an expert report on or before the 20th day of March 2015
e) Costs of today to the Defendant to be taxed if not agreed
f) Defendant's attorney to prepare file and serve this Order

[2] Leave to appeal was granted to the Defendant. I promised then to put my Reasons in writing and this I now do.

[3] The Claimant applied to this Court seeking relief from sanctions. The sanctions were imposed on her in consequence of what can only be described as inept legal representation combined with misfortune. Her Claim was filed in 2003. I am told that her attorney-at-law at that time was Mrs. Antoinette Haughton Cardenas. The Claim is brought in negligence with respect to a total abdominal hysterectomy and complications which followed. The Defendant hospital denied negligence.

[4] At a Case Management conference on 23rd June 2005 witness statements and medical reports were ordered to be filed by the 29th September 2006 and a trial scheduled for the 19th May 2008. On the 23rd November 2006 an Order was made giving the Claimant permission to call Drs. Michael McFarlane and Derek Mitchell as expert witnesses. It was also ordered that medical reports dated 21st November 2002, 25th September 2002 and 27th October 2006 stand as expert reports on behalf of the Claimant.

[5] Dr. Michael McFarlane subsequently provided a witness statement in support of the Defendant and that was filed on the 16th October 2007.

[6] On the trial date of the 19th May 2008 the Claimant was reported to be ill and this was supported by a medical report from Dr. Lloyd Brooks. The trial was adjourned to the 14-16th January 2009. On that date also the Claimant was absent due to illness and the trial was further adjourned to the 8-11th February 2010. On this occasion neither the Claimant nor her attorney – at – Law was present. The matter was adjourned for a date to be fixed by the Registrar. The Court ordered that the Claimant ensure that a trial date be fixed within 12 months.

[7] It is common knowledge that Mrs. Antoinette Haughton Cardenas has been struck from the roll of attorneys – at- Law entitled to practice in Jamaica. It is also common knowledge that she has fled the jurisdiction whilst owing millions of dollars to her clients and others. This in no small measure explains the Claimant's predicament. She did consult another attorney-at-law, one Terrence Ballantyne.

[8] Mr. Ballantyne had difficulties accessing the Claimant's file no doubt due to Mrs. Haughton Cardenas' disappearance. As fate would have it, Mr. Ballantyne also departed the island.

[9] Mr. Richard Bonner does not in his affidavit dated 24th March 2014 state the date on which he commenced acting for the Claimant. He does say that he acted for her on the 6th March 2013 when, on an application being made to strike out the Claimant's Statement of Case, the following Orders were made among others:

a) Defendant's application to strike out the Claimant's claim is not granted.

b) Defendant's application for summary judgment against the Claimant is not granted.

c) Claimant is relieved from sanctions for failing to comply with the Order of the Hon. Mr. justice Anderson made on the 10th February 2010.

d) The trial of this matter is set for the 17th 18th and 19th March 2014.

e) Unless the Claimant attends the trial to give evidence her statement of case stands struck out

f) The Claimant is ordered to file and serve any expert medical opinion intended to be relied on at trial on or before 20th December 2013.

g) Costs is costs in the claim.

[10] The Claimant was only informed of the trial date one year later. She was informed by her attorneys on the 17th March 2014 at 10.30 a.m. that the trial was scheduled for the 17th March 2014 at 10.00 a.m. See paragraph 5 Claimant's Affidavit dated 24th March 2014 and Paragraph 18 of the Affidavit of Richard Bonner dated 24th March 2014. The Claimant, who I am told lives in Vineyard Town made it to court on the 17th March 2014 by 11.30 a.m. Mr. Bonner told me orally at the hearing that notwithstanding his pleas the court adjourned by 11.00 a.m. The result was that her claim was struck out consequent on the Unless Order taking effect.

[11] Mr. Bonner states in his Affidavit under reference that by letter dated 28th January 2014 he wrote to the Defendant's attorney complaining that there were pages missing from the Doctor's surgical notes obtained during discovery. He

states further that the medical expert on whom he wishes to rely complained about the missing pages and that he would be unable to complete his medical opinion by the 20th December 2014 as ordered by the court.

[12] Mrs. Robinson orally indicated, and Mr. Bonner admitted, that a letter had been written to him explaining that there were in fact no missing pages from the surgical notes. Be that as it may it seems to me that it would have been incumbent on Mr. Bonner to have had the medical expert prepare a partial report which explained the reason why it was incomplete and file it. This would then have prevented his client being in breach and also ground an application for specific disclosure. When I suggested that course to Claimant's counsel he appeared never to have considered such a course of action.

[13] The failure to file an expert report was not however the proximate cause of the Claimant's woe. It was, as earlier indicated, her late attendance on the morning of trial which led to the striking out of her case.

[14] The Defendant's Counsel quite predictably urged this court to refuse the application. She filed written submissions and relied on several authorities. Other than to say that any delay was inherently prejudicial, she could not point to any specific way in which the Defendant has been prejudiced by the delay in the prosecution of this claim.

[15] In summary the Defendant stated that all 3 requirements of Rule 26.8 (2) must be met before the court can go on to consider whether relief is to be granted. Reliance was placed on ***H.B. Ramsay & Associates Ltd. et al v Jamaica Redevelopment Foundation Inc. SCCA No. 88/2012*** an unreported Judgment of the Court of Appeal (2013) JMCA Civ 1; It was submitted that that case decided that administrative inefficiency or counsel's negligence, was not a good reason for delay. Defendant's counsel also submitted that the Claimant was not generally in compliance with the rules and for that reason also this application for

relief ought to be dismissed. She submitted that the integrity of the administration of Justice as a whole had to be considered.

[16] Surprisingly she answered in the affirmative when I enquired whether that public interest in the efficient administration of justice should be upheld even at the price of injustice to a litigant in an individual case.

[17] It is with not a little relief that I am able, notwithstanding some suggestive dicta in the case relied on by the Defendant, to say that the authorities do not compel the conclusions urged by Defendant's Counsel. In the first place the Court of Appeal in the H.B. Ramsay case was considering a matter in which there was no evidence to explain the breach. All that was before the court was an Affidavit which said that the applicant's attorneys had told him it was due to "inadvertence". This the court accepted was a conclusion from a set of facts and not the facts or circumstances to explain the breach.

[18] It is true that the court in H.B. Ramsay went on to say that assuming "oversight" by the attorney was the explanation it was not a good one. That court also expressed the view that all three elements at paragraph 26.8(2) must be satisfied as preconditions to consideration of relief. Interestingly the court relied on the decision of the Privy Council in ***Attorney General v Universal Projects Ltd. (2011) UK PC37*** at Paragraph 18. In that paragraph their Lordships clearly articulate that "oversight may be excusable in certain circumstances".

[19] The Court of Appeal in ***Villa Mora Cottages v Monica Cummings et al SCCA 49/2006*** unreported judgment dated 14th December 2007 adopted a more enlightened approach on this question of relief from Sanctions. In this regard the following quotation will suffice:

> ***"It cannot be disputed that Orders and Rules of the Court must be obeyed. A party's non-compliance with a Rule or an Order of the Court may preclude him from continuing litigation. This however, must be balanced against the principle that a litigant is***

> ***entitled to have his case heard on the merits. As a consequence, a litigant ought not to be deprived of the right to pursue his case.***
>
> ***The function of the Court is to do justice. " The law is not a game nor is the Court an arena. It is … the function and duty of a judge to see that justice is done as far as may be according to the merits." per Wooding CJ in Baptiste v Supersad (1967) 12WIR 140@144. In its dispensation of justice, the Court must engage in a balancing exercise and seek to do what is just and reasonable in the circumstances of each case, in accordance with Rule 1 of the CPR. A court in the performance of such exercise may rectify any mischief created by the non-compliance with any of its rules or order(s)."***

[20] In the matter before me the litigant having changed attorneys twice is left with a lawyer who fails to advise her of the trial date until very, very late in the day. This notwithstanding, she does attend court on the day. Her trial was adjourned minutes before. Can it be said that her explanation for absence at trial in these circumstances is not a good one? I find that her failure to attend was not intentional and her explanation a good one.

[21] It is not in doubt that the application for relief was prompt, however the Defendant submitted that the Claimant has not "generally complied" with all other relevant rules, orders and directions. In this regard she references the failure to serve a medical report as well as the previous absences at trial. The absences at trial were explained and accepted by the court and were the result of illness. It is a fair inference that her absence on the occasion when no explanation was proffered and her counsel was also absent, was due to the unsatisfactory personal circumstances of her then attorney. The absence on the day the Unless Order was made was the proximate act that led to the Unless Order and could not therefore be one of the "other relevant" orders or directions to which Section 20.8(2)(c) is referring. This leaves us with the outstanding expert report. Her present attorney explains that they have not received it because there was a reluctance of doctors to testify against the Defendant and the doctor who has agreed to give an opinion, does not wish to do so due to missing pages from the patient docket. It is not therefore that there is a report that has not been served; it is that no report has as yet been prepared.

[22] Be it noted that there is already in place an Order that 2 medical reports be admitted into evidence. So the matter is not without some expert evidence. I find that in all the circumstances the outstanding expert report and the failure to obtain and file it does not make the Claimant guilty of not generally being in compliance. Indeed, and perhaps surprisingly given the quality of legal service she has had to endure, it is fair to say that the Claimant has been in general compliance with the Rules and Orders of the Court. The requirements of rule 26.8(2)(a)(b)(c) are therefore satisfied.

[23] I should observe that an Unless Order, for striking out of a party's statement of case if that party does not attend trial, ought to be rarely made. In the first place there is authority that unless orders ought to be sparingly used ***Macon Shipping v Kefalas [2007]1 ALLER 365***. In the second place, a country like Jamaica has a notoriously unreliable system for public transportation also communication can at times be difficult and mail delivery to many addresses unknown. So there are a great many reasons why a party may be absent or late. In this case the travails of the absent attorney were well known in the year 2010. Furthermore the Claimant had a history of ill-health. Indeed that is the genesis of her claim. It is to be hoped that this Supreme Court of Justice will be less inclined to make Unless Orders in such circumstances.

[24] Finally I will end with a quotation from one of the authorities relied upon by the Defendant's Counsel.

> ***"I recognize that the good administration of justice requires that cases be dealt with expeditiously but this has to be measured against the risk of injustice to a litigant because of his lawyer's default, particularly where the Defendant did not personally contribute to the state of affairs that has come about. The administration of justice while receiving a blow in this case will not be undermined"*** per Sykes J***, Findlay v Francis FO45/1994, Unreported Judgment January 28th 2005***.

[25] When considering the matters listed in Rule 26.8(3) it is manifest on the evidence before me that:

> a) The administration of justice will be undermined if a litigant in the circumstances of the Claimant is precluded from having her day in court.

b) The failure was due to her attorney-at-law. This is an ameliorating circumstance as the subsection points to a difference in consequence where it is due to the litigant's personal conduct. Clearly the latter must have greater consequence per Sykes J in ***Findlay v Francis.***

c) The failure to attend court last year cannot in a narrow sense be corrected. However if given another trial date the Claimant will be able to attend. To that extent her failure can be corrected.

d) There is now no trial date and as such whether the trial date can be met does not arise. A trial date however can be set and I propose doing so.

e) The effect of the grant of relief will mean that the Defendant will after all have to face a trial. There is no suggestion that any intended witnesses have died or retired or become otherwise unavailable in the period. The problem with fading memories will afflict witnesses on each side. In a case such as this however one expects that medical practitioners may provide a lot of the evidence and one would expect that contemporaneous notes would be available and most helpful. If relief is not granted the Claimant will understandably feel that she has been hard done by in a system which would, through no fault of her own, permanently close the doors of justice in her face.

[26] For the reasons stated therefore on the 27th of January 2015 I made the Order outlined in Paragraph 1 of this judgment. The Defendant requested and was granted Permission to Appeal.

David Batts
Puisne Judge